SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 24, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Catterson, Richter, Abdus-Salaam, JJ.

534 The People of the State of New York, Respondent, Ind. 3418/04

-against-

Omar Montes,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Allen Fallek of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Matthew C. Williams of counsel), for respondent.

Judgment, Supreme Court, New York County (Edwin Torres, J.), rendered May 10, 2006, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him to a term of 7 years, affirmed.

On June 3, 2004, in response to a 4:00 a.m. radio communication of "shots fired," police found Robinson "Tito" Lopez dead behind a building at 1952 Second Avenue. The medical examiner found that Lopez had died from multiple gunshot wounds that had perforated his vital organs.

Eyewitness testimony established that, immediately before the shooting, Lopez was involved in an argument with two women,

his ex-girlfriend Loraine Ceballo and her friend Tamika Taylor. During the argument, Lopez made insulting remarks about Charles Gonzalez, Ceballo's current boyfriend. In response to a telephone call from Ceballo, Gonzales arrived on the scene about 10 minutes later accompanied by defendant. After the two men located Lopez in the parking lot in the back of the building, a confrontation erupted. Shortly thereafter, Lopez was shot and killed.

Investigation of the scene revealed one deformed bullet and nine .380 caliber shell casings. Ballistics testing established that, of the nine shell casings, six had been fired by one gun and the remaining three by another gun. All four recovered bullets - the deformed bullet recovered at the scene and the three bullets recovered during the autopsy - were found to have been fired by the same gun. However, officers were unable to link the bullets to the shell casings.

At trial, Ceballo testified that she followed Gonzalez and defendant to the back of the building. Although her view of Lopez was blocked, she watched Gonzalez and defendant approach Lopez's car. There, according to Ceballo, she saw both Gonzalez and defendant raise their hands "in a fist form," and saw that they were holding something in their hands. Although Ceballo said at trial that she could not identify the objects in the men's hands, she had told detectives who interviewed her that she

saw them holding guns, and had testified similarly in her grand jury testimony.

Ceballo further testified that after she heard three gunshots, she immediately ran back towards the building, and that Gonzalez and defendant ran right past her, through the lobby. Notably, Ceballo testified that she did not see anything in either Gonzalez's or defendant's hands as they ran.

According to evidence read into the record by the People, during the trial, after Ceballo testified, she and Taylor were brought back to the prosecutor's office and reinterviewed. Taylor, who had not yet testified, denied being present during the shooting. However, after Ceballo left the room, Taylor admitted to the prosecutor that she had been present during the shooting. Taylor added that Gonzalez put a gun or guns in Ceballo's purse after the shooting.

After Ceballo returned to the room, Taylor confronted her about whether Gonzalez had put a gun in her purse. At that point, Ceballo acknowledged that Gonzalez had in fact placed a gun or guns in her purse. Ceballo went "back and forth" on whether she received one or two guns, and said that she did not know.

The next day, Taylor testified that, immediately after the shooting, Gonzalez and defendant ran to the back entrance of the building, and she and Ceballo ran into the building with the two

men. According to Taylor, Gonzalez put at least one gun in Ceballo's purse. As Gonzalez and defendant fled through an exit door, Ceballo boarded the elevator with Taylor and asked, "What am I going to do with the guns? . . . I don't want this in my house."

Following Taylor's testimony, defense counsel asked to recall Ceballo but was told that she was no longer available because she had suffered a breakdown and had attempted suicide. Defendant moved for a mistrial or, alternatively, to strike Ceballo's testimony, on the grounds that he was denied his right to confront Ceballo regarding the gun or guns.

The trial court denied defendant's motion, finding that the issue of whether Ceballo was given one or more guns was a minor portion of her testimony. The next day, the court made the following record explaining its decision:

> "[T]wo days ago, the witness Loraine Ceballo was subjected to a consummately skillful and exhaustive cross examination. All encompassing, grueling, scathing, and repeatedly reduced her to tears and the breaking point. Add to this the palpable abject terror she communicated, the lethal factions this most reluctant, this fine young woman finds her in the middle of. The culmination? Loraine Ceballo had a psychotic breakdown that night, attempting suicide twice. Through nobody's fault, she is unavailable for further examination by either side. The end result is that Tamika Taylor's testimony will remain uncontroverted, and this, it appears, in no way indisposes the defense, either tactically or strategically.

> "To vitiate all her testimony as proposed by defense counsel is too drastic a measure . . . akin to throwing out the baby with the bath water."

Later in the trial, defendant made a request for a missing witness charge for Ceballo, asserting that he was being denied his confrontation rights, especially with respect to the issue of whether one gun or two were dropped into Ceballo's purse. After the court denied the missing witness charge, defendant and the People entered a stipulation with respect to Ceballo. The stipulation stated in relevant part:

> "Loraine Ceballo was not honest when she testified in that she failed to state that . . . Gonzalez . . . gave her the gun or guns when he ran past her after the shooting occurred. When first confronted at the District Attorney's office that Carlos Gonzalez placed weapons in her purse, Loraine Ceballo had denied that this had occurred. When confronted by Tamika Taylor about this matter, Loraine Ceballo immediately stated that . . . Gonzalez shoved a weapon or weapons into her purse and that she took the purse containing the weapon or weapons up to her apartment. Loraine Ceballo is unavailable to be recalled by either side."

The jury acquitted defendant of murder in the second degree and criminal possession of a weapon in the second degree, but convicted him of criminal possession of a weapon in the third degree. Former Penal Law § 265.02(4). After the jury left, defendant moved to set aside the verdict as repugnant, which motion was denied.

At the sentencing proceeding, counsel presented letters from

about 30 individuals from the community attesting to defendant's good character. Defendant maintained his innocence and asked for leniency. The court expressed the view that defendant was a joint actor with Gonzalez in bringing about Lopez's death. Defendant was sentenced, as a second felony offender, to the statutory maximum of seven years in prison, with five years of post-release supervision.

On appeal, defendant claims that he was denied his constitutional right to confront Ceballo pursuant to US Const. Amends. VI, XIV; N.Y. Const. art I, § 6. Specifically, he argues that he was deprived of the opportunity to recall Ceballo in order to bring her credibility into question and draw attention to her apparent role in the shooting. Additionally, defendant argues that Ceballo may have testified that she received only one gun, thereby providing evidence supporting his innocence. Defendant also claims that his sentence was excessive and should be reduced. For the reasons set forth below, we find these arguments unavailing and affirm the ruling of the trial court.

It is well established that the Confrontation Clause of the Sixth Amendment protects a criminal defendant's right to question the witnesses against him. However, trial judges retain wide latitude to impose reasonable limits on such interactions (*Delaware v Van Arsdall*, 475 US 673, 678-79 [1986]). "'[T]he Confrontation Clause guarantees an *opportunity* for effective

cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish'" (*id.* at 679, quoting *Delaware v Fensterer*, 474 US 15, 20 [1985]).

Here, the trial court did not abuse its discretion in denying defendant's request to recall Ceballo, or in the alternative to strike the testimony. Defendant had already had a full opportunity to cross examine Ceballo. As the trial court stated in its decision on defendant's motion, "Ceballo was subjected to a consummately skillful and exhaustive cross-examination." In particular, defendant had the opportunity to cross-examine Ceballo about Gonzalez's and defendant's actions after the shooting including what they did as they were fleeing the scene. Thus, defendant's right to confront Ceballo was protected, since he was afforded the "opportunity to probe and expose [...] infirmities" in Ceballo's testimony (*Delaware v Fensterer*, 474 US at 22; *see People v Mercado*, 237 AD2d 200 [1997], *lv denied* 90 NY2d 895 [1997]). Ultimately, it was not Ceballo's testimony, but her friend Taylor's, that raised the question of how many guns were dropped into Ceballo's purse. Further, another witness also testified as to conversations about two guns. In this respect, defense counsel had ample opportunity to engage in cross-examination of two witnesses on the issue. Moreover, by drawing attention to the ambiguities in the two

witnesses' testimony, as well as focusing on Ceballo's dishonesty, the defendant, in his summation, "was afforded ample scope to present the theory of defense to which the proffered evidence purportedly related" (*People v Isaacs*, 272 AD2d 159, 159 [2000], *lv denied* 95 NY2d 854 [2000]).

Furthermore, defendant was able to bring his arguments before the jury by means of a stipulation providing that Ceballo was dishonest and that she was unclear as to whether one or two guns were placed into her purse. Indeed, by this stipulation, the issue of Ceballo's credibility was resolved entirely against the People, and this, in itself, weighs heavily against a finding of a constitutional violation (*see People v Alicea*, 33 AD3d 326, 328 [2006], *lv denied* 7 NY3d 923 [2006]).

In any event, even if the trial court erred by failing to declare a mistrial or striking Ceballo's testimony, we find that the error was harmless as the evidence amply established defendant's guilt of criminal possession of weapon in the third degree. The forensics evidence demonstrated that at the crime scene, there were nine discharged shell casings, all of which were fresh. Further, the evidence showed that six of the shell casings had been fired from one gun and the other three had been fired from another gun, thus indicating that there were two guns, not one, at the scene.

As for defendant's challenge to his sentence, it is not

disputed that defendant had a prior felony conviction on his record, nor does defendant dispute that the crime for which he was convicted arose out of the shooting death of Tito Lopez. Thus, we do not find it necessary to substitute our discretion for that of the trial court to reduce the sentence.

All concur except Abdus-Salaam, J. who dissents in a memorandum as follows:

ABDUS-SALAAM, J. (dissenting)

I must respectfully dissent and would reverse the conviction on the ground that the trial court abused its discretion in failing to strike Ceballo's testimony. This error was a violation of defendant's constitutional rights under the Confrontation Clause and under the circumstances was not harmless beyond a reasonable doubt (*see People v Goldstein*, 6 NY3d 119, 129 [2005], *cert denied* 547 US 1159 [2006]).

Contrary to the majority's conclusion that if the trial court erred, the error was harmless because the evidence, even without Ceballo's testimony, amply established defendant's guilt of criminal possession of a weapon in the third degree, Ceballo was the sole individual who offered eyewitness testimony indicating that defendant might have had a gun. She testified that although her view of the victim Lopez was blocked, she saw both Gonzalez and defendant raise their hands "in a fist form," and saw that they were holding something in their hands, although she could not identify the objects.

The only other person who offered an eyewitness account was Dominick Castro, who described himself as a close friend of Lopez's and who was there in the parking lot when the shooting occurred. He testified that defendant did not have a gun in his hand and that only Gonzalez had a gun. Castro testified that during the incident, defendant was standing in the parking lot

with his hands crossed in front of him. According to Castro, Gonzalez confronted Lopez face to face, abruptly shot him and then ran after him and continued to shoot him, while defendant stood at a distance and watched. Thus, without Ceballo's testimony, there was no eyewitness testimony as to defendant's guilt, only eyewitness testimony to the contrary.

As noted by the majority, Ceballo testified that after the shooting, Gonzalez and defendant ran right past her through the lobby. She made no mention before the jury of Gonzalez placing a gun or guns into her purse. This stunning and significant revelation was made at the prosecutor's office after Ceballo had concluded her testimony, and only because Ceballo's friend Tamika Taylor first admitted to prosecutors at that time that she, together with Ceballo, had been present during the shooting. Defendant was not able to recall Ceballo because he was told that she was unavailable due to suffering a breakdown.

The question of whether Ceballo received one or two guns had evidentiary significance with respect to whether defendant was armed. Ceballo and Castro gave sharply contradictory accounts of whether defendant was holding a gun or any object at all, and the jury had to determine whether defendant was armed with a gun. In that regard, whether Gonzalez had given Ceballo one or two guns was important. Of course, had Gonzalez only given Ceballo one gun, that would not have negated the possibility that defendant

had also been armed with a gun. But it made sense in terms of the testimony that if Gonzalez and defendant had both come running into the building after the shooting, and they both had guns, that both guns would have been handed to Ceballo. She was the only witness who could answer that question based on personal knowledge, and defendant had a basic constitutional right to confront her about this matter through cross-examination (*People v Chin*, 67 NY2d 22, 27 [1986]).

Defendant's inability to cross-examine Ceballo regarding this revelation about the gun or guns prevented defendant from questioning her about facts closely related to the crime (*see generally United States v Cardillo*, 316 F2d 606, 611 [2d Cir 1963], *cert denied* 375 US 857 [1963]; *People v Vargas*, 88 NY2d 363, 380 [1996]). The fact that Gonzalez had given Ceballo a gun or guns right after the shooting was not a collateral matter that had nothing to do with the incident (*compare People v Rodriguez*, 24 AD3d 394 [2005], *lv denied* 6 NY3d 837 [2006] [the trial court properly exercised its discretion in refusing to strike the victim's testimony after he asserted a Fifth Amendment privilege in response to a single question on cross-examination that related to a collateral matter pertaining only to credibility]).

The "'ultimate question must be whether the defendant's inability to test the accuracy of the witness' direct examination has been such as to create a substantial risk of prejudice'

(McCormick, Evidence § 140, at 347 [3d ed]; *see generally*, Ann., 55 ALR Fed 742)" (*People v Chin*, 67 NY2d at 28). The trial court's reasoning that whether or not Ceballo took a gun or guns from Gonzalez was only "a minor portion of the totality of her testimony" and that accordingly the motion to strike Ceballo's testimony should be denied, is puzzling. The issue of the number of guns was obviously significant because both Gonzalez and defendant had been with the victim in the parking lot and there was a jury question as to whether they had both possessed guns.

The majority's conclusion that defendant had already been afforded a full opportunity to cross-examine Ceballo misses the point that defendant had no opportunity to cross-examine her regarding the bombshell revelation about having been given the gun or guns. Furthermore, while the majority observes that defense counsel had ample opportunity to cross-examine Ceballo's friend Tamika Taylor, as well as another witness, regarding conversations about two guns, this was no substitute for cross-examination of Ceballo, who was the only one with personal knowledge as to whether she had been given one or two guns. Taylor's testimony was confused and inherently inconsistent with respect to whether there was one gun or there were two guns.[1]

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[1] She testified that she saw Gonzalez put something in Ceballo's purse and that when she and Ceballo were in the elevator, Ceballo remarked, "What am I going to do with the guns?" When asked by the court whether she saw what was in the purse, Taylor responded, "No. She told me he put the gun in my

The other witness to whom the majority refers was Carlos Pino, who was incarcerated for a drug conviction and who was brought downstate from prison to testify for the prosecution only after Ceballo made her surprise revelation about having been given the weapon(s).

Pino testified that he knew Taylor, who is his son's godmother, Ceballo, Gonzalez and defendant. He testified that on the night of the shooting, he called Taylor, who told him that Gonzalez had shot Lopez. That same night, he received a phone call from defendant asking him to call Taylor to find out what "that girl did with them things," which Pino understood to mean Ceballo and the guns. According to Pino, Taylor also told him that after the shooting, Gonzalez had stuck the guns in Ceballo's bag. He was certain that Taylor had said "two" guns. On cross-examination, defense counsel elicited from this prosecution witness that he had about five months remaining on his prison term and that the detectives who had retrieved him from prison and escorted him to the courthouse to testify had told him that he was a witness to a murder case and that if he lied on the stand he could be penalized and "catch another case," that is be charged with another crime.

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purse," but she also said, "I saw the gun." When the court asked how many guns she had seen, Taylor said, "I don't remember" and that "I did see one." She repeated that she saw one gun and did not know if there was a second gun.

Defendant's opportunity to cross-examine these two witnesses, neither of whom had personal knowledge of whether Ceballo had been given one or two guns, was insufficient to cure the considerable prejudice created by defendant's inability to cross-examine Ceballo on this issue.

The stipulation that was read to the jury stating that Ceballo was not honest when she testified in that she failed to state that Gonzalez had given her the gun or guns when he ran past her after the shooting occurred, was no substitute for the right to confront Ceballo. As stated by the Court of Appeals in *People v Chin:*

> "[S]tipulations cannot substitute for confrontation, because confrontation envisions 'a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief' (*Mattox v United States*, 156 US 237, 242-243 [1895])" (67 NY2d at 30, n3 [1986]).

The majority's reliance on *People v Alicea* (33 AD3d 326 [2006], *lv denied* 7 NY3d 923 [2006]), for the proposition that through this stipulation, the issue of Ceballo's credibility was resolved entirely against the People, and that this factor weighs heavily against finding a constitutional violation, is misplaced. In *Alicea*, this Court found that the trial court had properly

exercised its discretion in denying defendant permission to recall one of the People's witnesses for further cross-examination on newly acquired information. However, significantly, in *Alicea*, unlike here, the information had little impact on the witness's credibility, and defendant had the opportunity to acquire the information earlier in the proceeding (*see also People v Crawford*, 39 AD3d 426 [2007], *lv denied* 9 NY3d 864 [2007] [the court properly exercised its discretion in denying the defendant's request to recall the victim in order to lay a foundation to introduce a prior inconsistent statement which had minimal impeachment value and which had been previously disclosed to the defense]).

In contrast, Ceballo's admission that she had hidden the weapon or weapons used to kill the victim went to the heart of her credibility and was a surprise to both the prosecution and the defense. While this Court concluded in *Alicea* that the defendant had been afforded a full opportunity to impeach the witness and that there was no impairment of defendant's right of confrontation, the circumstances here are starkly different.

Because the failure to strike Ceballo's testimony was an error that violated defendant's constitutional rights, the test for harmless error applies: that is, "[t]he People must show that any error was harmless beyond a reasonable doubt" (*People v Goldstein*, 6 NY3d at 129 [2005]). In so deciding, this Court

must "consider both the overall strength of the case against defendant and the importance to that case of the improperly admitted evidence." (*id.*)

As noted, Ceballo was the only eyewitness who indicated that she saw defendant holding something in his hand before the victim was shot. If her entire testimony is struck, what remains is the testimony of Castro, who testified that Gonzalez alone was the shooter, that defendant was not holding a gun and that defendant just stood there during the shooting; the testimony of Taylor, who stated that she did not see the shooting and did not know whether Gonzalez had given Ceballo one or two guns; and the testimony of Pino, the convicted felon, who related what had been said to him about two guns by Taylor (who had lied to the prosecutor until the eleventh hour about not having been present during the shooting) and by defendant.

There was also evidence that one bullet and nine .380 caliber shell casings had been recovered and that six casings had been fired from one gun and the remaining three from another gun. All of the shell casings were "fresh," meaning that they did not appear to have been there for any length of time because they were not crushed or disturbed, but the People's witnesses could not tell how long the casings had been in the parking lot. There was testimony from a firearms analyst that the bullets found in the victim's body and the deformed bullet found at the scene had

all come from the same gun, but that witness could not determine whether the bullets had been fired from the same gun as the shell casings.

I disagree with the majority's conclusion that even without Ceballo's testimony, the forensic evidence amply established defendant's guilt of criminal possession of a weapon in the third degree. The majority states that because the casings were fired from two guns, this indicates that there were two guns, not one at the scene. But while we know that there was at least one gun at the scene at the time of the incident because the victim was shot and killed, *the forensic evidence does not show that there were two guns at the scene at the time of the shooting*, only that at some point, there was a gun fired in the parking lot that was different from the gun that was used to shoot the victim.

The overall strength of the People's evidence against defendant was "far from overwhelming" (*Brinson v Walker*, 547 F3d 387, 396 [2d Cir 2008]; *compare People v Johnson*, 60 AD3d 425 [2009] [although it was error to admit the nontestifying codefendant's plea allocution in that this violated the Confrontation Clause, the error was harmless because there was overwhelming evidence of defendant's guilt]). The case against defendant is greatly diminished in the absence of Ceballo's testimony that she saw defendant in the parking lot with Gonzalez and that both defendant and Gonzalez raised their hands "in a

fist form" and were holding objects in their hands just before the victim was shot. Here, as in *People v Goldstein* (6 NY3d at 130), "[t]he People's case drew some significant support from the improperly admitted [evidence]." The People have failed to show beyond a reasonable doubt that the failure to strike Ceballo's testimony was harmless error.

As was emphasized by the Court of Appeals in *Goldstein* (6 NY3d at 132), while noting the "unwelcome consequences"[2] of ordering a new trial, "the constitutional rules that guarantee defendants a fair trial must be enforced, and few such rules are more important than the one that guarantees defendants the right to confront the witnesses against them." The Supreme Court has "repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt" (*Delaware v Van Arsdall*, 475 US 673, 681 [1986]). I do not believe that this

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[2] This is the infamous Kendra Webdale case. Defendant had pushed Ms. Webdale into the path of an approaching subway train. He was charged with murder in the second degree and his principal defense was insanity. The first trial ended in a hung jury. The second jury convicted him of second degree murder. Although the Court of Appeals was troubled by "the tangible cost of a third trial, and by the intangible cost of the long delay in resolving the case" (6 NY3d at 132) as well as the knowledge that another trial would bring pain to the victim's family, it reversed the conviction and ordered a new trial because defendant's constitutional right under the Confrontation Clause was violated when a psychiatrist who testified recounted statements made by people who were not available for cross-examination.

Court can confidently say that the constitutional error committed in this case was harmless beyond a reasonable doubt.

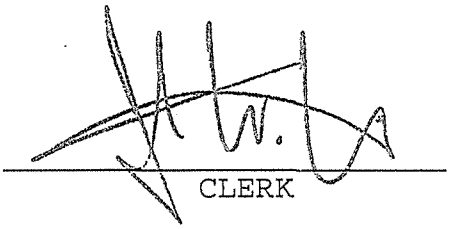
Accordingly, the conviction should be reversed and the case remitted for a new trial.

M-1053 *People v Omar Montes*

Motion seeking leave to file pro se supplemental brief and related relief denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 24, 2009



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Sweeny, J.P., Buckley, Catterson, Acosta, Freedman, JJ.

1376 The People of the State of New York, Ind. 674/99
Respondent,

-against-

Julio Rodriguez,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Michael C. Taglieri of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Matthew C. Williams of counsel), for respondent.

Appeal from order, Supreme Court, New York County (Eduardo Padro, J.), entered on or about October 9, 2007, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously dismissed, without costs.

Since defendant, having absconded from parole supervision, is not presently available to obey the mandate of the court, he has forfeited his right to appeal (*see e.g. People v Law*, 12 AD3d 192 [2004]). Although a SORA appeal is a civil appeal, this principle is similarly applicable (*see e.g. Wechsler v Wechsler*, 45 AD3d 470, 472 [2007]).

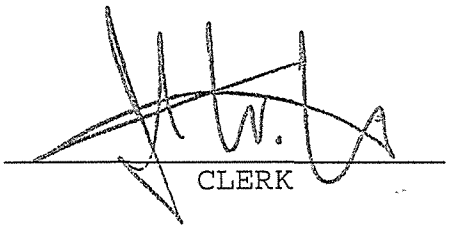
This appeal is without merit in any event. Defendant advances the argument that his underlying guilty plea to two counts of rape in the first degree should be viewed as "incest rather than a conventional sex crime against a child." This view

of the underlying crimes, defendant urges, would demonstrate that defendant is far less likely to "recidivate" (*sic*) because defendant has "run out of family victims."

This argument is wholly bereft of evidentiary support in the record, relies on purported evidence submitted for the first time on appeal, and is repugnant to common decency, the plain language of the statute, and precedent in this Department. Even if we were to accept defendant's contention that the recidivist rate for incest child molesters is somewhat lower than that for other presumably more common child molesters, we would nonetheless decline to consider a discretionary downward departure.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 24, 2009



Friedman, J.P., McGuire, Renwick, Richter, Manzanet-Daniels, JJ.

1541 The People of the State of New York, Ind. 1748/99
Respondent,

-against-

Marcus Johnson,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Charlotte E. Fishman of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County (Marcy L. Kahn, J.), rendered on or about December 12, 2008, resentencing defendant, as a second felony offender, to a term of 5½ to 11 years, and specifying that the sentence be served consecutively to an undischarged sentence for a previous conviction, unanimously affirmed.

Defendant was sentenced in 1999 as a second felony offender, and was therefore subject to the consecutive sentencing provisions of Penal Law § 70.25(2-a). Where a sentencing court is required by statute to impose a consecutive sentence, it is deemed to have imposed the consecutive sentence the law requires, even in the absence of an express judicial directive to that effect (*People ex rel. Gill v Greene*, 12 NY3d 1 [2009], *cert denied* __ US __, 2009 WL 1370237, 2009 US LEXIS 5715 [2009]). Accordingly, defendant's 1999 sentence had always been

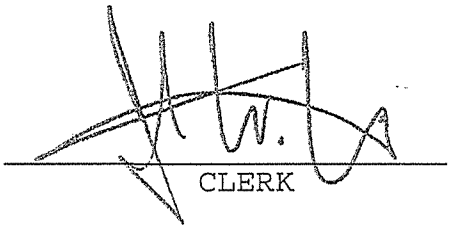
consecutive to his undischarged prior sentence, upon which he had been paroled, and the Department of Correctional Services correctly calculated defendant's conditional release date to reflect the consecutive sentence. At the 1999 sentencing, the court said nothing that could lead defendant to believe he had received concurrent sentences, and we reject his arguments in this regard. Since the sentences were already consecutive, the 2008 resentencing that is the subject of this appeal was unnecessary, but not improper. Defendant's due process and double jeopardy claims are without merit.

M-4948 ***People v Marcus Johnson***

Motion seeking leave to file pro se supplemental brief denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 24, 2009



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Friedman, J.P., McGuire, Renwick, Richter, Manzanet-Daniels, JJ.

1543 In re Shawn R.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for presentment agency.

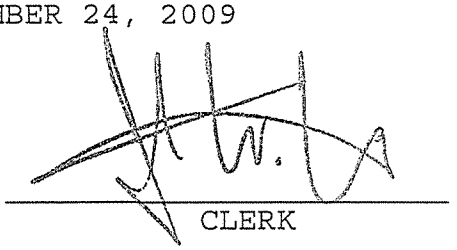
Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about September 10, 2008, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he had committed acts which, if committed by an adult, would constitute the crime of robbery in the second degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's fact-finding determination was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility and identification. The victim's testimony clearly established that appellant was not merely present at the scene of the robbery, but that he participated by

pulling the victim to the ground, taking his property, and passing it to an accomplice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 24, 2009



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Friedman, J.P., McGuire, Renwick, Richter, Manzanet-Daniels, JJ.

1544 Elizabeth Morazzani, Index 406617/07
Plaintiff-Appellant,

-against-

MTA New York City Transit,
Defendant-Respondent.

Milos Law Office, New York (Irena Milos of counsel), for appellant.

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for respondent.

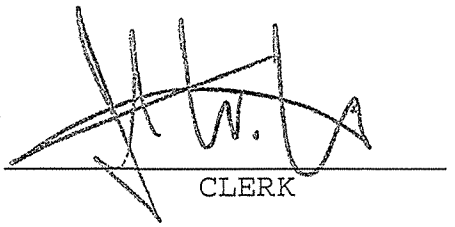
Order, Supreme Court, New York County (Donna M. Mills, J.), entered October 15, 2008, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The record demonstrates that it was raining when plaintiff boarded the bus and still raining when she slipped while attempting to exit the bus. Plaintiff claims she slipped on a puddle of water on the floor of the bus. Defendant is not obligated to provide a constant remedy for the tracking of water onto a bus during an ongoing storm (*Duncan v New York City Tr. Auth.*, 260 AD2d 213 [1999]).

We have considered plaintiff's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 24, 2009



CLERK

Friedman, J.P., McGuire, Renwick, Richter, Manzanet-Daniels, JJ.

1548 Cain Lopez, Index 6620/07
Plaintiff-Appellant,

-against-

Abdul Abdul-Wahab, et al.,
Defendants-Respondents.

Dominick W. Lavelle, Mineola, for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for respondents.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, J.), entered October 8, 2008, which granted defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of the Insurance Law, unanimously affirmed, without costs.

Plaintiff was 28 years old at the time of the motor vehicle accident, in December 2004, in which he allegedly sustained injuries to his cervical and lumbar spine and left shoulder. Defendants established their prima facie entitlement to judgment that plaintiff had not sustained a "serious injury" within the meaning of Insurance Law § 5102(d) by submitting medical affirmations stating that no evidence of recent trauma was found on plaintiff's diagnostic films, and reporting normal ranges of motion in all tested body areas by specifying the objective tests they used to arrive at the measurements (such as palpation, impingement sign and straight leg raising), concluding that

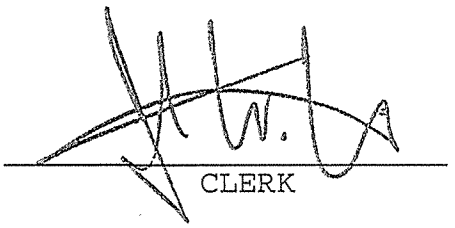
plaintiff's injuries were resolved without permanency (*see DeJesus v Paulino*, 61 AD3d 605 [2009]). Reference to plaintiff's own proof and deposition testimony sufficiently refuted the "permanence" and "significant" categories of serious injury under § 5102(d) (*see Colon v Tavares*, 60 AD3d 419 [2009]). The affirmation submitted by defendants' expert radiologist was not equivocal. From her review of the MRIs, she observed preexisting disc dessication at all of the cervical and lumbar disc levels at which injuries were alleged, explaining that desiccation is a drying out of disc material that develops over time and could not have occurred so quickly after the accident (*see e.g. Depena v Sylla*, 63 AD3d 504, 505 [2009], *lv denied* 13 NY3d 706 [2009]; *Jean v Kabaya*, 63 AD3d 509, 510 [2009]). Any injury in the nature of an annular lumbar tear was not identified in the bill of particulars and need not be addressed by this Court (*see Sharma v Diaz*, 48 AD3d 442, 443 [2008]), and in any event, defendants' expert radiologist found "clear evidence of pre-existing degenerative disease in the lower lumbar spine."

In opposition to defendants' motion, plaintiff improperly relied on the unaffirmed medical reports of his treating physicians (*see Grasso v Angerami*, 79 NY2d 813 [1991]). The report of plaintiff's expert was, in the absence of objective, contemporaneous evidence of the extent and duration of the alleged physical limitations resulting from the injury,

insufficient (*cf. Ayala v Douglas*, 57 AD3d 266, 267 [2008]). Even considering the unaffirmed reports, plaintiff's experts failed to address the findings of defendants' expert radiologist, who opined that plaintiff had preexisting degenerative disease in his cervical and lower spine (*see Valentin v Pomilla*, 59 AD3d 184 [2009]). Plaintiff's deposition testimony that he was never confined to his home following the accident and missed no time from work negated his chance of establishing a 90/180-day serious-injury claim under § 5102(d) (*see Nguyen v Abdel-Hamed*, 61 AD3d 429, 430 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 24, 2009



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Friedman, J.P., McGuire, Renwick, Richter, Manzanet-Daniels, JJ.

1549 The People of the State of New York, Ind. 2835/07
Respondent,

-against-

Lonnie Pearson,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Andrew C. Fine of counsel), and Morrison & Foerster LLP, New York (Michael Gerard of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered January 9, 2008, convicting defendant, after a jury trial, of robbery in the first degree (two counts), robbery in the second degree, criminal possession of a weapon in the third degree (two counts), and menacing in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 25 years to life, unanimously affirmed.

Defendant did not preserve his claim that the court failed to poll the jury after it rendered its verdict (*see People v Bembry*, 209 AD2d 270 [1994] *affd* 85 NY2d 932 [1995]), and we decline to review the claim in the interest of justice. The better practice would have been to address the spectator's outburst and then poll the jury. Nonetheless, defendant did not request that the jury be polled before it was discharged, during the process of discharging it, or at any other time (*see* CPL

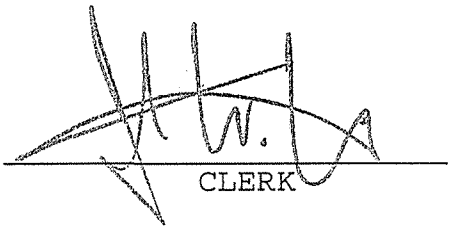
310.80). The record fails to support defendant's assertion that the court discharged the jury in such haste that defendant had no opportunity to request polling. To the extent that defendant is arguing that once the court said the word "discharged," it would have lacked authority to retract that statement and poll the still-present and intact jury had defendant made a prompt request for polling, we reject that argument. Furthermore, the court did not "in re[s]ponse to a protest by a party, . . . expressly decide[]" (CPL 470.05[2]) that defendant was not entitled to poll the jury (*see People v Colon*, 46 AD3d 260, 263 [2007]).

The trial court properly denied defendant's request to submit third-degree robbery as a lesser included offense, since there was no reasonable view of the evidence that defendant used physical force other than the threatened use of a knife to retain the property he had shoplifted (*see People v James*, 11 NY3d 886 [2008]). The witnesses at trial consistently maintained that defendant used a knife. Although the surveillance videotape of the robbery did not present a clear view of the knife in defendant's hand, the videotape supported the security guards' testimony that they retreated when they saw the knife. There is no reasonable view that defendant was able to force the two

guards to retreat merely by physical menace. In addition, a knife was recovered under circumstances indicating that defendant had discarded it.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 24, 2009



Friedman, J.P., McGuire, Renwick, Richter, Manzanet-Daniels, JJ.

1553 Chelsea 19 Associates, Index 570746/07
Petitioner-Respondent,

-against-

Warren James,
Respondent-Appellant.

Fishman & Neil, LLP, New York (Karen Takach of counsel), for appellant.

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for respondent.

Order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered October 9, 2008, which, in a nonpayment summary proceeding, reversed an order of Civil Court, New York County (Peter M. Wendt, J.), entered on or about July 27, 2007, granting respondent tenant's motion to vacate a default judgment and warrant of eviction, denied the motion and reinstated the default judgment and warrant of eviction, unanimously affirmed, without costs.

The parties' so-ordered stipulation of settlement of October 31, 2006 provided that upon tenant's failure to pay certain monies by December 31, 2006, landlord, upon notice, could restore the case to the calendar for entry of a "possessory/money judgment" and issuance of a warrant of eviction. Tenant does not dispute that he failed to make timely payment of the monies due under the stipulation, and, in April 2007, Civil Court, upon

tenant's failure to appear in opposition to landlord's motion, awarded landlord a possessory/money judgment and issued a warrant of eviction. In July 2007, tenant returned to Civil Court tendering all moneys due under the stipulation as well as rent arrears that had subsequently accrued, and seeking vacatur of the judgment and warrant. Civil Court granted tenant's motion, finding that his "delay in payment" had not been "willful or deliberate but a result of difficulty in obtaining the funds," and concluding that "[u]nder these circumstances, a forfeiture is not favored, and tenant should be given an opportunity to cure his default." Appellate Term reversed, finding that tenant offered neither an excuse for the default in opposing landlord's motion to enforce the stipulation nor a meritorious defense to the stipulation.

Enforcement of stipulations of settlement, including those in housing court cases, is highly favored by the courts (*see Hotel Cameron, Inc. v Purcell*, 35 AD3d 153, 155 [2006], citing, inter alia, *Hallock v State of New York*, 64 NY2d 224, 230 [1984]). While the court has discretion not to enforce a stipulation of settlement "where there is evidence of fraud, overreaching, unconscionablilty, or illegality" (*see id.* at 156), tenant's claimed difficulty in obtaining funds does not fall under that rubric. Accordingly, tenant does not show a meritorious defense to the stipulation, his loss of possession is

not a forfeiture but "merely the contracted-for consequence" of his noncompliance with the stipulation (*id.* at 155-156 [internal quotation marks omitted]), and Civil Court lacked the discretion not to enforce the stipulation (*see City of New York v 130/40 Essex St. Dev. Corp.*, 302 AD2d 292, 294 [2003]; *see also* RPAPL 749[3] ["good cause" required to vacate warrant of eviction]).

We also reject tenant's argument that landlord's renewal of tenant's rent-stabilized lease, during the pendency of the appeal before Appellate Term, "vitiated" the warrant of eviction. Landlord was legally obligated under the Rent Stabilization Code to tender the lease renewal (*see* 9 NYCRR 2523.5), "and, as such, cannot be deemed to have waived the right to seek judicial rescission of the lease based on [the tenant's] alleged material breach thereof" (*Waterside Plaza, LLC v Smith*, 12 AD3d 231, 236 [2004]; *see AA Spirer & Co. v Adams*, NYLJ, June 3, 1991, at 27, col 4 [App Term 1st Dept]).

M-4856 ***Chelsea 19 Associates v Warren James***
M-4984

Motion to modify stay and cross motion for fees and costs denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 24, 2009

CLERK

Friedman, J.P., McGuire, Renwick, Richter, Manzanet-Daniels, JJ.

1556 The People of the State of New York, Ind. 7034/04
Respondent,

-against-

Joselin Perez,
Defendant-Appellant.

Goldstein & Weinstein, Bronx (David J. Goldstein of counsel), for appellant.

Joselin Perez, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Alice Wiseman of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered December 14, 2005, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the first and third degrees, and sentencing him to an aggregate term of 25 years to life, unanimously reversed, on the law, and the matter remanded for a new trial.

As the People concede, defendant is entitled to a new trial because, as the Court of Appeals stated in reversing the conviction of a jointly tried and similarly situated codefendant, the trial court failed "to issue an appropriate and balanced deadlock instruction" (*People v Aleman*, 12 NY3d 806, 807 [2009]),

Defendant's legal sufficiency argument is unpreserved and we decline to review it in the interest of justice. As an

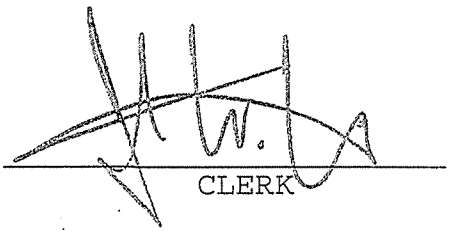
alternative holding, we find that the verdict was based on legally sufficient evidence. Furthermore, the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence connected defendant to very large amounts of drugs and money, and it supports the conclusion that defendant was a knowing participant in a large-scale drug enterprise.

The court properly denied defendant's motion to suppress evidence recovered as the result of a search of a garage and vehicles parked therein pursuant to a search warrant. The court correctly concluded that defendant failed to demonstrate a legitimate expectation of privacy with respect to the garage or any of the vehicles, including the one he had been seen driving earlier in the day (*see People v Wesley*, 73 NY2d 351 [1989]; *People v Di Lucchio*, 115 AD2d 555 [1985], *lv denied* 67 NY2d 942 [1986]; *compare People v Gonzalez*, 68 NY2d 950 [1986]). We have considered and rejected defendant's remaining suppression claims, including those contained in his pro se supplemental brief.

Since a new trial is required, we find it unnecessary to reach any other issues.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 24, 2009



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Friedman, J.P., McGuire, Renwick, Richter, Manzanet-Daniels, JJ.

1557-
1557A The People of the State of New York, Respondent, Ind. 1174/00 5667/01

-against-

Benjamin Carter,
Defendant-Appellant.

Law Office of Raymond L. Colón, New York (Raymond L. Colón of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Lindsey M. Kneipper of counsel), for respondent.

Judgments, Supreme Court, New York County (Michael A. Corriero, J.), rendered February 6, 2003, convicting defendant, upon his pleas of guilty, of rape in the first degree and two counts of robbery in the first degree, and sentencing him to an aggregate term of 24 years, unanimously affirmed.

Defendant did not move to withdraw his guilty pleas. Accordingly, and because none of his challenges to the validity of the guilty pleas fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662 [1995]), all of his contentions (other than his claim relating to postrelease supervision) are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The record establishes the voluntariness of the plea. Furthermore, defendant's ineffective assistance of counsel claims are primarily based on factual

assertions outside the record and are therefore unreviewable on direct appeal (*see People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Counsel negotiated a disposition that was favorable under the circumstances (*see People v Ford*, 86 NY2d 397, 404 [1995]), in that it covered additional serious charges and protected defendant from exposure to lengthy consecutive sentences.

Defendant's claim that the court failed to advise him about the postrelease supervision component of his sentence is without merit. The court misspoke at the plea proceedings by informing defendant that he would be subject to a 10-year period of "parole" upon his release from prison; at sentencing, the court correctly imposed five years' postrelease supervision. Neither warning defendant of a *greater* term of postrelease supervision than he actually faced nor using the wrong nomenclature deprived defendant of the information he needed to "knowingly, voluntarily

and intelligently choose among alternative courses of action"

(*People v Catu*, 4 NY3d 242, 245 [2005]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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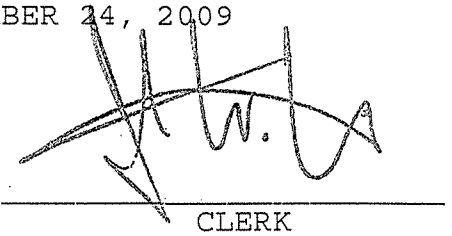


CLERK

Friedman, J.P., McGuire, Renwick, Richter, Manzanet-Daniels, JJ.

1559 In re Wesley Lakins, Index 401204/08
Petitioner,

Diana Lakins,
Petitioner-Appellant,

-against-

The New York City Housing Authority,
Respondent-Respondent.

Diana Lakins, appellant pro se.

Sonya M. Kaloyanides, New York (Byron S. Menegakis of counsel), for respondent.

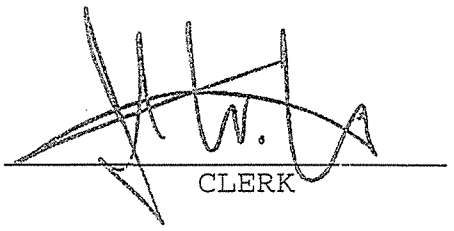
Appeal from order, Supreme Court, New York County (Walter B. Tolub, J.), entered December 15, 2008, which denied the petition and dismissed this proceeding brought pursuant to CPLR article 78 seeking to review respondent's determination to terminate the tenancy of petitioner Wesley Lakins, unanimously dismissed, without costs.

Although petitioner-appellant Diana Lakins was the wife of the tenant of record Wesley Lakins and was an occupant of the subject apartment, she does not have standing to pursue this appeal since she was not a co-lessee of the apartment. Indeed, respondent was not even required to serve Diana with a notice and specification of charges (*see McLaughlin v Hernandez*, 16 AD3d 344, 344 [2005] [respondent "is not obligated to serve . . . notice on household members other than the tenant of record"]).

We have considered appellant's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 24, 2009



Mazzarelli, J.P., Nardelli, Catterson, DeGrasse, Roman, JJ.

1562 The People of the State of New York, Ind. 3356/06
Respondent,

-against-

Charles Stevenson,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Anastasia Heeger of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Andrew S. Holland of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered July 11, 2007, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a second felony offender, to a term of 12½ years, unanimously affirmed.

Brief testimony that the police had been called to defendant's home on an unrelated "crime" and a description of the location as a "crime scene" were not uncharged crimes evidence (*see People v Flores*, 210 AD2d 1 [1994], *lv denied* 84 NY2d 1031 [1995]; *People v Perez*, 191 AD2d 285 [1993], *mod on other grounds* 83 NY2d 269 [1994]). Evidence that a crime may have been committed in defendant's apartment did not necessarily imply that he committed it, or that he was even present at the time of the crime. In any event, this limited testimony was admissible as necessary background to complete the narrative of how the police

first encountered defendant, realized he met the description of a robbery suspect, and recovered property taken in the robbery (*see People v Tosca*, 98 NY2d 660 [2002]). The testimony at issue was necessary to explain why the police were at defendant's home, while at the same time preventing the jury from drawing unfair inferences that additional evidence was being withheld from it, or that the police were improperly present. We note that defendant's summation contained assertions of a police frameup. Furthermore, the court's limiting instructions were sufficient to prevent any prejudice.

Defendant's arguments regarding the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). While some of the prosecutor's comments were improper, they did not deprive defendant of a fair trial, particularly in light of the court's instructions to the jury.

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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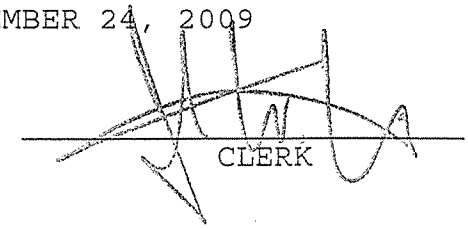

Mazzarelli, J.P., Nardelli, Catterson, Roman, JJ.

1563 Basu Sarkar, et al., Index 109880/07
Plaintiffs-Respondents,

-against-

Mridul Kumar Pathak,
Defendant-Appellant.

Stillman, Friedman & Shechtman, P.C., New York (Charles A. Stillman of counsel), for appellant.

Manual Moses, New York, for respondents.

Order, Supreme Court, New York County (Marilyn Shafer, J.), entered April 22, 2009, which, insofar as appealed from, granted plaintiffs' cross motion for 22 NYCRR part 130 sanctions in the form of a costs award to be paid by defendant's attorneys, unanimously reversed, on the law and the facts, with costs, and the cross motion denied.

Less than two months after issue was joined and before disclosure had commenced, defendant moved, inter alia, for summary judgment dismissing the complaint; plaintiffs cross-moved for sanctions against defendant and his attorney for making a frivolous motion. Both motions were denied, although the motion court, after finding that plaintiffs failed to show that defendant's motion was frivolous, did award plaintiffs $100 costs, presumably motion costs pursuant to CPLR 8106 and 8202. Subsequently, defendant moved for leave to renew the prior motion for summary judgment and to compel an answer to a deposition

question concerning statements made to one of the plaintiffs by plaintiffs' former attorney assertedly to the effect that the action lacked merit; plaintiffs cross-moved for a protective order and sanctions for the making of a frivolous motion; and defendant's reply, in effect, withdrew so much of his motion as sought summary judgment. The motion court denied the motion and granted the cross motion to the extent of granting a protective order and awarding plaintiffs their costs and expenses in opposing the motion and prosecuting the cross motion.

We reverse because it is not clear from the court's decision whether the sanctioned conduct consisted of defendant's counsel's making of a motion to compel attorney-client communications, or his making of successive motions for summary judgment, or some combination of both (*see* 22 NYCRR 130-1.2).

In any event, with respect to successive motion practice, defendant made only two motions for summary judgment; a prior motion court had determined that the first motion was not frivolous; the second motion did not repeat the arguments made in the first; and defendant's reply made clear that the only relief being requested was to compel one of the plaintiffs to respond to the deposition question. Generally, the imposition of sanctions involves a more persistent pattern of repetitive or meritless motions (*cf. Matter of Minister, Elders & Deacons of Refm. Prot. Dutch Church of City of N.Y. v 198 Broadway*, 76 NY2d 411 [1990];

William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22, 32 [1992], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992]). We would also note that while the court found "little justification for the parties' failure to complete the limited discovery required by this relatively simple case," the court did not put the blame for this delay exclusively on defendant.

We would add that at least to the extent that the motion to compel disclosure was based on the crime-fraud exception to the attorney-client privilege, it was not frivolous. Defendant's attorney asserted that plaintiffs' former attorney withdrew before commencing an action and after defendant's attorney presented certain evidence to him belying plaintiffs' version of the facts; that plaintiffs' former attorney must have advised plaintiffs that their claims were without merit before withdrawing, yet plaintiffs and their present attorneys went ahead and commenced the action anyway; and that since an intentionally false statement in a sworn document filed with the court constitutes the crime of perjury, the crime-fraud exception to the attorney-client privilege applies (citing *Superintendent of Ins. of State of N.Y. v Chase Manhattan Bank*, 43 AD3d 514 [2007]). While it may be, as the motion court held, that plaintiffs' former attorney's opinion concerning the truth of plaintiffs' allegations is irrelevant on the issue of whether the

complaint is perjurious, it was not frivolous for defendant to argue the contrary, and to seek disclosure of that opinion based on the crime-fraud exception.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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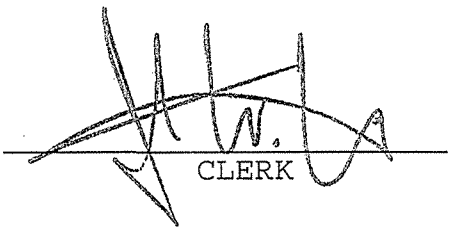


Mazzarelli, J.P., Nardelli, Catterson, DeGrasse, Roman, JJ.

1564 Michael Hines, Index 117923/05
Plaintiff-Appellant,

-against-

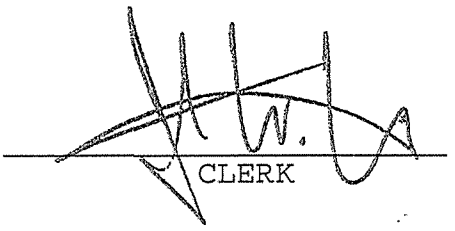
Jakobson Properties, LLC, et al.,
Defendants-Respondents.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Martin Shulman, J.), entered on or about January 23, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated November 5, 2009,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: NOVEMBER 24, 2009



Mazzarelli, J.P., Nardelli, Catterson, DeGrasse, Roman, JJ.

1565-
1565A In re Albert G., Jr., and Others,

Dependent Children Under the
Age of Eighteen Years, etc.,

Albert G., Sr.,
Respondent-Appellant,

Deanna G.,
Respondent,

The Administration for
Children's Services,
Petitioner-Respondent.

Dora M. Lassinger, East Rockaway, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for ACS, respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Margaret Tarvin of counsel), Law Guardian.

Orders of disposition, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about July 16, 2008, which, inter alia, placed the subject children in the custody of petitioner until the completion of the next permanency hearing, upon a fact-finding determination that respondent father had neglected the children, unanimously affirmed insofar as it brings up for review the fact-finding determination, and the appeal otherwise dismissed, without costs.

Because the father failed to appear at the dispositional hearing, the dispositional determinations were entered on default

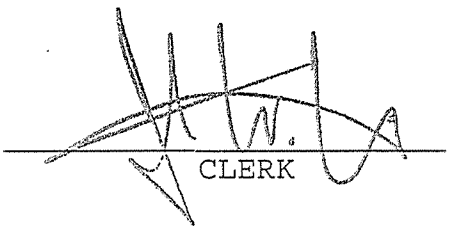
and are not appealable by him (*see Matter of Rosa S.*, 38 AD3d 216, 217 [2007]). Moreover, inasmuch as the date scheduled for the next permanency hearing has since passed, the appeal from the orders is moot (*see Matter of Stephon Elijah G.*, 63 AD3d 640 [2009]).

The finding of neglect against the father was established by a preponderance of the evidence that he should have known of the mother's substance abuse, but failed to take steps to protect the children (*see Matter of R.W. Children*, 240 AD2d 207 [1997], *lv denied* 90 NY2d 807 [1997]; *see also Matter of Pearl M.*, 44 AD3d 348 [2007]; Family Ct Act § 1012[f][i][B]). There exists no basis to disturb the court's credibility determinations (*see Matter of Irene O.*, 38 NY2d 776 [1975]).

We have considered the father's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 24, 2009



Mazzarelli, J.P., Nardelli, Catterson, DeGrasse, Roman, JJ.

1566 William E. Fontaine, Index 21742/05
Plaintiff-Respondent,

-against-

Juniper Associates, et al.,
Defendants-Appellants,

Hall-Wollford Tank Co.,
Defendant.

Carol R. Finocchio, New York, for appellants.

DeAngelis & Hafiz, Mount Vernon (Talay Hafiz of counsel), for respondent.

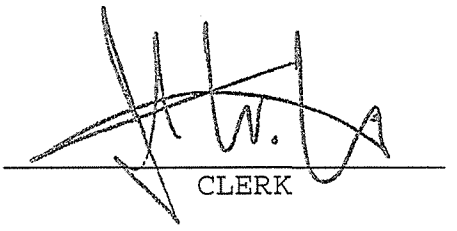
Order, Supreme Court, Bronx County (Lucy Billings, J.), entered on or about July 24, 2009, which, to the extent appealed from, denied the motion by defendants Juniper, Durst and M&T for summary judgment dismissing claims under Labor Law §§ 240(1) and 241(6) and granted plaintiff's cross motion for summary judgment on his Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff was injured when struck by several pieces of lumber that fell from a flatbed truck at ground level while he and coworkers were unloading the lumber by hand. The lumber, stacked at heights above plaintiff's head, had been piled inches from the edge of the flatbed. The court correctly granted plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1), since the accident involved an

elevation-related risk within the meaning of the statute, and his injuries were attributable, at least in part, to defendants' failure to provide proper protection as mandated by the statute (*see e.g. Cammon v City of New York*, 21 AD3d 196, 200-201 [2005]). The court also properly found that issues of fact precluded summary dismissal of the § 241(6) claim to the extent it was based on a violation of Industrial Code (12 NYCRR) § 23-2.1(a)(2). The evidence raised issues of fact as to whether the lumber had been placed so close to the edge of the platform as to endanger plaintiff.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 24, 2009



Mazzarelli, J.P., Nardelli, Catterson, DeGrasse, Roman, JJ.

1569-
1570 The People of the State of New York, Ind. 444/07
Respondent,

-against-

Johnny Tanner,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Risa Gerson of counsel), and Linklaters LLP, New York (Joshua D. Burns of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (John B.F. Martin of counsel), for respondent.

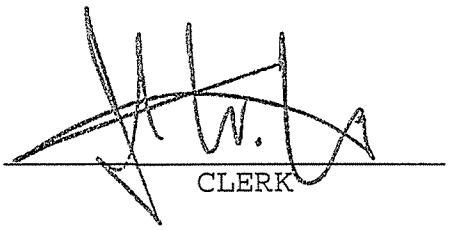
Judgment, Supreme Court, New York County (Charles J. Tejada, J.), rendered December 4, 2007, as amended January 14, 2008, convicting defendant, after a jury trial, of seven counts each of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree and sentencing him, as a second felony offender, to an aggregate term of 1½ to 3 years, unanimously affirmed.

The court properly granted defendant's application to represent himself. The record, taken as a whole (*see People v Providence*, 2 NY3d 579, 583 [2004]), establishes that defendant made a knowing and intelligent waiver of his right to counsel. The record does not support defendant's assertions that his request to proceed pro se may have been equivocal or the product of mental infirmity.

Defendant's claim that testimony concerning the contents of an erased videotape violated the best evidence rule is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 643-644 [1994]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 24, 2009



Mazzarelli, J.P., Nardelli, Catterson, DeGrasse, Roman, JJ.

1571 In re Shelia B.,
Petitioner-Appellant,

-against-

Shirelle Jasmine B.,
Respondent,

Administration for Children's Services,
Respondent-Respondent.

John J. Marafino, Mount Vernon, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for ACS, respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), Law Guardian.

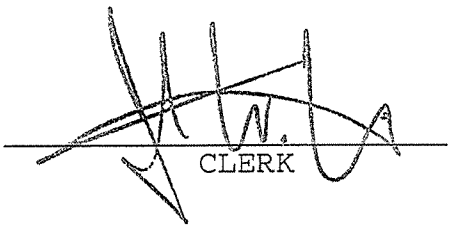
Order, Family Court, Bronx County (Jennifer Burtt, Referee), entered on or about March 19, 2008, which dismissed the petition of appellant grandmother for custody of the subject child, unanimously affirmed, without costs.

In light of the mother's surrender of parental rights and the child's adoption, the court properly dismissed the custody petition (*see Matter of Linda S. v Krishnia S.*, 50 AD3d 805, 806 [2008]; *Matter of Moorhead v Coss*, 17 AD3d 725 [2005]). Although petitioner, the child's maternal grandmother, asserts that the court should have converted the custody petition to one for visitation, her counsel never expressly requested that the custody petition be treated as an application for visitation, nor did the petition request visitation. Indeed, the petition

provided virtually no information about petitioner's relationship with her grandson, other than that she is his grandmother and that he resided with her for three months in 2005 (*see Matter of Emanuel S. v Joseph E.*, 78 NY2d 178, 182 [1991]). Under the circumstances, the court was not required to treat petitioner's counsel's oral inquiry about visitation as a formal application (*see Moorehead*, 17 AD3d at 726). We take note however that petitioner is free to file a petition for visitation at any time.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 24, 2009



Mazzarelli, J.P., Nardelli, Catterson, DeGrasse, Roman, JJ.

1572 The People of the State of New York, Ind. 635/07
Respondent,

-against-

German Figueroa,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Alexandra Keeling of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Maureen A. Lee of counsel), for respondent.

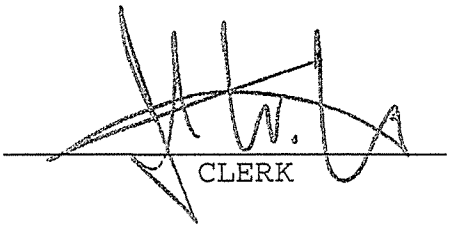
Judgment, Supreme Court, Bronx County (Caesar Cirigliano, J.), rendered May 29, 2008, as amended July 8, 2008, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of 7 years, unanimously affirmed.

At sentencing, the court was under no obligation to conduct a sua sponte inquiry into whether there was a conflict between defendant and his counsel. Defendant never made an explicit or implicit request for new counsel at any stage of the proceedings, or a motion to withdraw his plea; on the contrary, during the plea allocution he said he was "very" satisfied with his legal representation. Accordingly, there was nothing before the court to warrant an inquiry. In any event, defendant received a full opportunity to be heard before the court imposed sentence.

Nothing in the comments made by defendant or his counsel at sentencing suggested a conflict of interest (*see People v Nelson*, 7 NY3d 883 [2006]). At most, the purported conflict amounted to a possible disagreement over investigatory strategy. There is no indication that the attorney provided ineffective assistance in connection with the guilty plea (*see People v Ford*, 86 NY2d 397, 404 [1995]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 24, 2009



Mazzarelli, J.P., Nardelli, Catterson, DeGrasse, Roman, JJ.

1573 Filip Grozea, Index 350223/05
Plaintiff-Appellant,

-against-

Maria Lagoutova,
Defendant-Respondent.

Filip Grozea, Brooklyn, appellant pro se.

Order, Supreme Court, New York County (Rosalyn Richter, J.), entered September 23, 2008, which denied plaintiff's motion to impose monetary sanctions on defendant based on a purported delay in transferring title to an automobile that was acquired in the course of their marriage, unanimously affirmed, without costs.

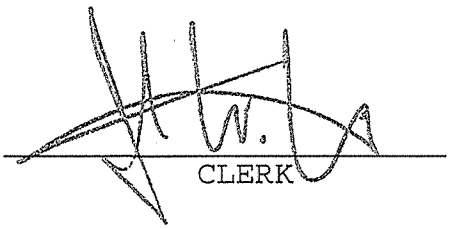
Under the terms of the underlying divorce judgment, plaintiff was entitled to take possession of a Mercedes Benz automobile titled in defendant wife's name. When the transfer of title did not occur, plaintiff filed a pro se motion seeking, among other things, monetary sanctions against defendant's guardian and attorney to cover the garage fees and costs of renting a substitute car.

The Rules of the Chief Administrator of the Courts grant the court discretion to impose financial sanctions and/or costs on a party or the party's attorney for engaging in frivolous conduct (22 NYCRR 130.1.1[a], [c][2]). Unless there is a clear abuse of discretion, we will defer to a trial court regarding a

determination on imposing such sanctions (*see Pickens v Castro*, 55 AD3d 443 [2008]). On this record we find no such clear abuse of discretion.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 24, 2009



Mazzarelli, J.P., Nardelli, Catterson, DeGrasse, Roman, JJ.

1576 The People of the State of New York, Ind. 2031/08
Respondent,

-against-

Robert Edwards,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

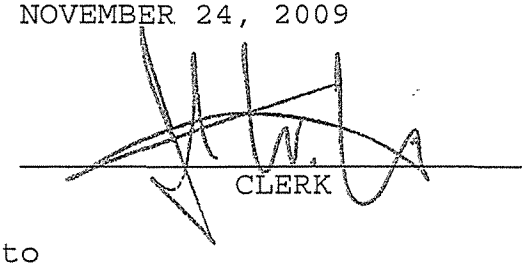
Robert T. Johnson, District Attorney, Bronx (Alan S. Alvarez of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of resentence of the Supreme Court, Bronx County (Robert Holdman, J.), rendered on or about April 13, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: NOVEMBER 24, 2009



Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Mazzarelli, J.P., Nardelli, Catterson, DeGrasse, Roman, JJ.

1578 The People of the State of New York, Ind. 4783/06
Respondent,

-against-

Edward Harris,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Carl S. Kaplan of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered November 28, 2007, as amended December 3, 2007, convicting defendant, after a jury trial, of grand larceny in the fourth degree, and sentencing him, as a persistent felony offender, to a term of 15 years to life, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the persistent felony offender adjudication and replacing it with a second felony offender adjudication and reducing the sentence to 2 to 4 years, and otherwise affirmed.

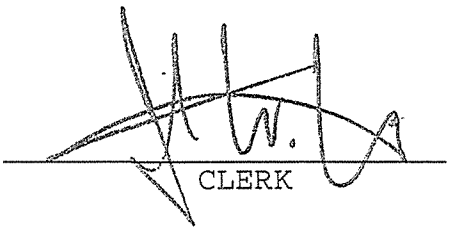
The court properly declined to submit petit larceny as a lesser included offense. There was no reasonable view of the evidence, viewed most favorably to defendant (*see generally People v Scarborough*, 49 NY2d 364 [1980]), that defendant did not steal a wallet from the victim's person (Penal Law § 155.30[5]),

but instead only committed petit larceny by acquiring lost property (Penal Law § 155.05[2][b]). Defendant posits a theory, unsupported by any evidence, that he picked up the wallet and fled with it after an unidentified person stole the wallet and dropped or discarded it. However, the fast-paced chain of events, with particular reference to the fact that immediately after the theft a witness saw defendant fleeing from the pursuing victim and holding the wallet, placed defendant's alternative theory outside the realm of reasonable possibility. The victim's inability to identify the thief, or to accurately describe him at trial, does not warrant a different conclusion.

We find the sentence excessive to the extent indicated.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 24, 2009



Mazzarelli, J.P., Nardelli, Catterson, DeGrasse, Roman, JJ.

1579 O'Porto Holding Company, Ltd., Index 117056/06
Plaintiff-Respondent,

-against-

Estate of Angela Boone, et al.,
Defendants-Appellants.

Kellner Herlihy Getty & Friedman, LLP, New York (Carol Anne Herlihy of counsel), for appellant.

Perry Ian Tischler, Bayside, for respondent.

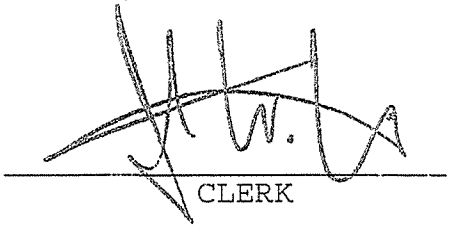
Order, Supreme Court, New York County (Edward H. Lehner, J.), entered on or about March 5, 2009, which, after a nonjury trial, found that plaintiff was entitled to a judgment of possession, unanimously affirmed, with costs.

There is no basis for disturbing the trial court's finding, based on its credibility determinations and the sparse documentary evidence (*see 300 E. 34th St. Co. v Habeeb*, 248 AD2d 50, 54-55 [1997]), that defendants failed to meet their burden of proving that Angela Boone's apartment was her grandson Taylor's primary residence for the two years preceding her death (*see Gottlieb v Licursi*, 191 AD2d 256 [1993]).

We have considered defendants' remaining arguments and find them without merit.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 24, 2009



CLERK

Mazzarelli, J.P., Nardelli, Catterson, DeGrasse, Roman, JJ.

1582N Diamond State Insurance Company, as Subrogee of Gentry Apartments, Inc., Plaintiff-Respondent, Index 104910/05

-against-

Utica First Insurance Company, Defendant-Appellant.

Farber Brocks & Zane L.L.P., Mineola (Audra S. Zane of counsel), for appellant.

Steven G. Fauth, New York, for respondent.

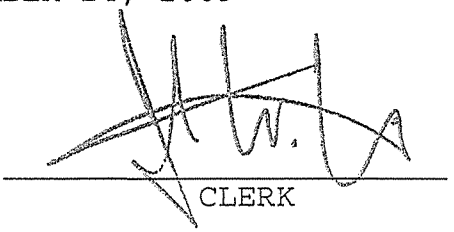
Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 13, 2009, which, to the extent appealed from as limited by the briefs, granted plaintiff's cross motion to strike the answer for failure to comply with disclosure obligations, unanimously affirmed, with costs.

This is a subrogation action involving a roof fire. Plaintiff sought to obtain other roofing exclusion claim files in defendant's possession. Defendant insurer has exhibited a pattern of repeated noncompliance with orders in this case and by this Court in a prior appeal (*see* 37 AD3d 160), giving rise to an inference that its conduct has been willful and contumacious (*see Olmstead v Pizza Hut of Am., Inc.*, 61 AD3d 1238, 1240-1241 [2009]). Defendant's behavior was particularly reprehensible because defendant not only violated the motion court's conference orders, but also endeavored to undermine an appellate order by

limiting its search to only a small percentage of its potentially relevant files. Defendant contends that the striking of its pleadings was unwarranted because plaintiff had not submitted proof of any good faith effort to resolve its disagreement with defendant (*see* 22 NYCRR 202.7[a][2]). But in light of defendant's multiple delays and violations of repeated court orders, its numerous improper objections to practically every demand for disclosure made by plaintiff, its unjustifiable limitation of the search of its files, its continued refusal to produce responsive documents and its utter failure to account for its behavior, the motion court, under the unique facts of this case, appropriately found it would have been futile to compel plaintiff to confer once more with defendant as a condition for moving to strike its pleadings (*see Carrasquillo v Netsloh Realty Corp.*, 279 AD2d 334 [2001]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 24, 2009



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Eugene Nardelli
James M. Catterson
Leland G. DeGrasse, JJ.

81
Ind. 355/05

x

The People of the State of New York,
Respondent,

-against

Joseph Fisher,
Defendant-Appellant.

x

Defendant appeals from a judgment of the Supreme Court, New York County (Budd G. Goodman, J.), rendered November 23, 2005, convicting him, upon his plea of guilty, of burglary in the first degree and attempted rape in the first degree, and sentencing him, as a second felony offender.

Noah A. Kinigstein, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Sheila O'Shea of counsel), for respondent.

CATTERSON, J.

This appeal arises out of a judgment of conviction upon the defendant's plea of guilty to certain felony charges related to an incident on January 15, 2005. On appeal, the defendant claims that he should be permitted to withdraw his guilty plea and that his conviction should be vacated on the grounds, inter alia, that it was the product of undue coercion by the court.

Although the defendant neither sought to withdraw the plea nor moved to vacate the judgment, as a matter of discretion in the interest of justice, for the reasons set forth below, we review the claim and allow the defendant's withdrawal of his guilty plea and hereby vacate his conviction and remand to the Supreme Court for further proceedings.

The defendant was charged with burglary in the first degree, attempted rape in the first degree, four counts of sexual abuse in the first degree, and assault in the second degree. He was arraigned on the indictment on February 24, 2005, and pleaded not guilty. At that time, the People offered a plea involving a sentence of 20 years. The defendant filed an omnibus motion which was considered by the court on July 19, 2005. The court granted a Huntley hearing and adjourned the case until September 14, 2005 for hearing and trial.

On September 14, 2005, the People answered not ready, and

requested an adjournment until September 26, 2005 to secure the testimony of an eyewitness. The People also indicated that they would accept a plea of 15 years if defendant was willing to plead guilty on that day.

The judge responded by advising the defendant that after that day, "there would be no further discussions ever [...] I will never repeat it again nor will the District Attorney nor will anybody else. He is looking at obviously a lot more time." The defendant indicated that he did not understand the plea offer and wanted time to consider it. The judge adjourned the case to shortly before the hearing and trial scheduled for September 26 in order to give the defendant time to decide whether or not to accept the plea offer. The judge further warned the defendant that he would not entertain any pleas on September 26 and stated that if the defendant wanted a plea on that day, he was not going to get it.

On September 26, 2005, the People again answered not ready since their witness was out of the country and would not be available to testify until October 27th. When the prosecutor requested that the time be excluded, the judge did not rule on the request but instead told defense counsel that if counsel tried to file a speedy trial motion on October 27, he would be "very upset." On October 27, defense counsel filed an order to

show cause seeking the defendant's release. The judge responded that the case was going to be marked ready for trial the following day. Defense counsel also advised the court that the defendant was filing a CPL 30.30 speedy trial motion pro se and that defense counsel was filing a motion in support. The judge denied all motions and adjourned the case for trial.

On Friday, October 28, during the defendant's Sandoval hearing, the court stated:

> "[L]et me start off by saying on the record that it is my hope that Mr. Fisher gets a fair trial because frankly I believe in giving everybody a fair trial and *I also believe that when somebody commits a crime of this nature that if they are convicted that they should get the maximum sentence allowable by law* and so the last thing in the world I want to create is reversible error and I'm very careful about that and I have a record of getting reversed very few times so we're going to give him a fair trial. If he's acquitted, he is acquitted but *if he's convicted he will be a very old man when he gets out of jail because whatever is the maximum sentence allowable by law he will get it*" (emphasis added).

The judge observed that the sentence for a predicate felony offender was 8 to 25 years, but that the defendant was "guarantee[d]" to get 20 to 25 years. The judge announced that the trial would proceed, and he would not entertain any further plea bargains, and that if convicted, the court would "deal with it" by giving defendant "what sentence [he felt] was

appropriate." Despite these declarations, on Monday, October 31, 2005, the judge agreed to accept a guilty plea to first degree burglary and first degree attempted rape in return for a prison sentence of 17 years followed by 5 years of post-release supervision. When the defendant returned to court on November 23, 2005, he was sentenced according to the terms of the plea agreement.

Upon conviction, the defendant executed a waiver of his right to appeal which specifically did not apply to 1) a constitutional speedy trial claim, 2) a challenge to the legality of the sentence promised by the judge, 3) a challenge to defendant's competency to stand trial, and 4) the voluntariness of his waiver of his right to appeal. Unquestionably, the defendant should have preserved a claim of coercion by the court by requesting to withdraw his guilty plea pursuant to CPL 220.60(3), or by filing a motion to vacate judgment pursuant to CPL 440.10. However, we review his claim in the interest of justice.

It is well settled that a threat to impose a maximum sentence if the defendant is convicted goes beyond a description of the possible sentencing exposure and has consistently been

held impermissibly coercive. People v. Richards, 17 A.D.3d 136, 792 N.Y.S.2d 79 (1st Dept. 2005); People v. Stevens, 298 A.D.2d 267, 748 N.Y.S.2d 589 (1st Dept. 2002), lv. dismissed, 99N.Y.2d 585, 755 N.Y.S.2d 721, 785 N.E.2d 743 (2003); People v. Sung Min, 249 A.D.2d 130, 131-32, 671 N.Y.S.2d 480, 481 (1998). A defendant's exercise of his right to trial is wrongly burdened when a court expresses its intent to impose the maximum sentence after trial, but a significantly shorter sentence if he accepts a plea. Sung Min, 249 A.D.2d at 132, 671 N.Y.S.2d at 481. Further, though allegations of coercion made off the record normally warrant an evidentiary hearing, where the coercive threat is in the record the defendant is entitled to withdraw his guilty plea. See, e.g., Sung Min, 249 A.D.2d at 131, 671 N.Y.S.2d at 481.

While the People concede that the court's remarks made in defendant's presence could be considered coercive, this Court goes further and views the remarks as definitely so, since they were made before plea negotiations were concluded. In this case, the record shows that the judge made the following remarks during the defendant's October 28, 2005 Sandoval hearing:

1. "I [...] believe that when someone commits a crime of this nature that if they are convicted, that they should get the maximum sentence allowable by law."

2. "[I]f he's convicted, he will be a very old man when he gets out of jail because whatever is the maximum sentence allowable by law he will get it."

3. "So it's very very possible that he would be looking at, if he gets convicted, anywhere between twenty and twenty-five years. I guarantee you it will not be less than that."

As the People correctly concede, these remarks are improperly coercive when made in the course of plea negotiations.

A plea is voluntary if it represents a choice freely made by the defendant among legitimate alternatives. People v. Grant, 61 A.D.3d 177, 182, 873 N.Y.S.2d 355, 359 (2nd Dept. 2009). The court considers several factors to determine the voluntariness of a plea: "1) the knowledge, intellect and criminal experience of the defendant; 2) the seriousness of the crime and the 'nature of the crime as clearly understood by laymen'; 3) the competency, experience and level of participation of counsel; 4) the rationality of the plea bargain; and 5) the speed or slowness of procedure in the particular court." People v. Montford, 134 A.D.2d 207, 208, 521 N.Y.S.2d 7, 9 (1987), lv. denied, 70 N.Y.2d 1009, 526 N.Y.S.2d 944, 521 N.E.2d 1087 (1988) quoting People v. Nixon, 21 N.Y.2d 338, 353, 287 N.Y.S.2d 659, 671, 234 N.E.2d 687, 696 (1967), cert. denied, 393 U.S. 1067 (1969).

The People argue that three factors, the defendant's experience with the justice system, the favorable terms of the plea, and the totality of circumstances, support that it was

voluntarily entered. Although it appears that the defendant has experience with the legal system as evidenced by his record and the rationality of the terms of his plea could favor a view that the plea was voluntary, we disagree that the totality of circumstances relied upon by the People supports such a conclusion.

The People claim that the context, nature, and timing of the judge's comments indicate that they were not coercive. The People contend that these remarks were made in the context of emphasizing the importance of a fair trial on the eve of trial rather than during plea negotiations. We disagree.

The judge may have stated several times that the defendant would be tried fairly, but he made these assurances while underscoring the fact that he was rarely reversed and that he had no intention of creating a reversible error in this case. Taken in context, such assurances together with the promise to impose the maximum sentence upon conviction sound like coercion rather than assurances of the court's fairness.

The People further argue that the judge's reluctance to entertain a plea is evidence that, in fact, he was not in favor of a plea agreement, and was not pressuring the defendant to plead guilty. However, again, viewed in context, the statements sound more like warnings to the defendant that he should take the

plea, and take it sooner rather than later.

Ultimately, the People contend that by the time the remarks were made immediately prior to the Sandoval hearing, no plea offer was under consideration, so that the judge's remarks were made outside of the plea proceedings and could not have been coercive. This argument is entirely unpersuasive since the defendant's plea was accepted by the court just three days later on October 31, 2005. Hence, de facto, plea negotiations had not concluded at the time the subject remarks were made by the court. Indeed, the fact that the defendant was permitted to take the plea, and did so only three days after the remarks were made not only strongly belies that argument but places the judge's remarks squarely in the impermissible area of coercion.

Accordingly, the judgment of the Supreme Court, New York County (Budd G. Goodman, J.), rendered November 23, 2005, convicting defendant, upon his plea of guilty, of burglary in the first degree and attempted rape in the first degree and sentencing him, as a second felony offender, to an aggregate term of 17 years, should be reversed, as a matter of discretion in the interest of justice, the plea vacated, and the matter remanded for further proceedings.

All concur except Nardelli, J. who dissents in an Opinion.

NARDELLI, J. (dissenting)

Inasmuch as I do not believe the circumstances presented warrant review in the interest of justice (*see* CPL 470.15(3)(c)) I dissent, and would affirm.

On January 15, 2005, defendant forced his way into a woman's apartment, forced the victim to take off her clothes and get onto her bed, pinned her down, and attempted to rape her. During the course of the attack, he struck the victim several times, causing injury, including a broken finger, as well as bruises to her arm and back, and scratches to her face. Neither during the negotiations leading up to his eventual plea, nor, on this appeal, has defendant controverted any of the facts concerning this vicious crime. He only claims that his plea was coerced.

Initially, defendant's claim that his plea was coerced is, as the majority acknowledges, unpreserved, because he did not move to withdraw the plea on that ground (*see People v Lopez*, 71 NY2d 662 [1988]). Additionally, the claim lacks merit.

On September 14, 2005, the People advised the court that an eyewitness who was needed for trial was still in Israel, although the witness had been expected to be back at that time. The prosecutor requested an adjournment until September 26 to allow the witness to appear.

The prosecutor then stated that the "recommendation for

today only" was "fifteen years." The prosecutor added that, while she understood that defendant was seeking a much lesser sentence, the People were not inclined to offer less time. The prosecutor noted that defendant was facing up to 25 years on the charge of burglary in the first degree, and that there were other counts, including attempted rape, for which defendant could receive consecutive time.

The judge noted that nobody was pressuring defendant, and stated that he assumed defendant wanted to go to trial. When defendant indicated that he did not understand the terms of the offer, the court explained, "You are not entitled to a plea bargain. So that means the People can say, or the court can say, 'try the case.'" The court adjourned the case to September 26, and warned defendant that it was not going to entertain any pleas on September 26, and if defendant wanted a plea on that day, he was not going to get it. On September 26, the People answered not ready on the basis that the "necessary" witness was still in Israel because of a family emergency. Eventually, the case was adjourned to October 27, 2005.

On October 28, 2005, the court conducted a *Sandoval* hearing. After reviewing defendant's NYSID sheet, the court addressed the prosecutor as follows:

"Ms. Gallo, let me start off by saying on the

record that it is my hope that [defendant] gets a fair trial because frankly I believe in giving everybody a fair trial and I also believe that when somebody commits a crime of this nature that if they are convicted that they should get the maximum sentence allowable by law and so the last thing in the world I want to create is reversible error and I'm very careful about that and I have a record of getting reversed very few times so we're going to give him a fair trial. If he's acquitted, he is acquitted but if he's convicted he will be a very old man when he gets out of jail because whatever is the maximum sentence allowable by law he will get it."

After confirming that defendant was a predicate felony offender, the court noted that for the class B violent felony of first-degree burglary, the minimum mandatory sentence was 8 years and the maximum sentence was 25 years. The court then stated:

"So, it's very possible that he would be looking at, if he gets convicted, anywhere between twenty and twenty-five years. I

> guarantee you it will not be less than that. So it is, therefore, my desire in every case not only this case but every case to give a defendant a fair trial. To go back in the 1980's and allow in evidence his conviction in that case, I think would be not only inappropriate but I think that could create reversible error. So I will state for the record so that the appellate court will be aware of it the following so they will be aware of what my compromise is."

After recounting defendant's criminal history, which dated back to 1974 and included two felony convictions (third-degree burglary and attempted third-degree burglary) and 27 misdemeanor convictions, the court issued its *Sandoval* ruling.

Despite the court's prior indications that it would not accept a guilty plea after September 14, defendant was permitted, on October 31, 2005, to withdraw his plea of not guilty, and to enter a plea of guilty to burglary in the first degree and attempted rape in the first degree. In exchange for his guilty plea, the court promised to sentence defendant to a total prison term of 17 years, to be followed by 5 years of post-release supervision.

On November 23, 2005, defendant appeared with counsel for sentencing. Defense counsel and the prosecutor relied on the promised sentence of concurrent terms of 17 years on the first-degree burglary and 15 years on the attempted first-degree rape, to be followed by 5 years of post-release supervision. Defendant

was reminded that he would be required to register as a sex offender, and when given the opportunity, defendant declined to address the court.

Certainly, where a court, during plea negotiations, states that upon conviction after trial, the maximum sentence would be imposed, such comments have been found to be impermissibly coercive, with the result that the plea should be vacated (*see e.g. People v Stevens*, 298 AD2d 267 [2002], *lv dismissed* 99 NY2d 585 [2003]; *People v Sung Min*, 249 AD2d 130 [1998]).

In the case at bar, however, the two statements made by the court did not occur during plea negotiations, but during a *Sandoval* hearing, and must be viewed within the context of the entire proceedings. Throughout the pretrial proceedings, the court had expressed its reluctance at allowing defendant to enter into any plea bargain in view of the serious crimes with which he had been charged. On September 14, 2005, when the prosecutor suggested a plea in exchange for a sentence of 15 years, prior to the two statements being made by the court which defendant is now challenging, the court gave defendant until a day or two before September 26 (the date the trial was scheduled to go forward), to decide whether he wanted to take the deal. When the parties returned to court on September 26 for trial, no mention was made by defendant of a plea agreement. In fact, the parties were in

court on September 28 and October 27, and again no mention was made of a plea agreement, and the court proceeded as if the case was going to trial. On October 28, the judge made the two statements during the *Sandoval* hearing, when discussing its intention of giving defendant a fair trial, especially in view of the significant sentence that he faced.

At the time the statements were made, the record indicates that there was no extant plea offer. Thus, any comments by the court were not made as leverage to force defendant to accept a plea bargain to which he was opposed, but were being made to explain the court's benevolent *Sandoval* ruling. This contrasts with the situation in, for instance, *People v Wilson* (245 AD2d 161 [1997], *lv denied* 91 NY2d 946 [1998]), where the record made clear that the defendant believed himself coerced into taking the plea as a result of the threats by the court to impose the maximum.

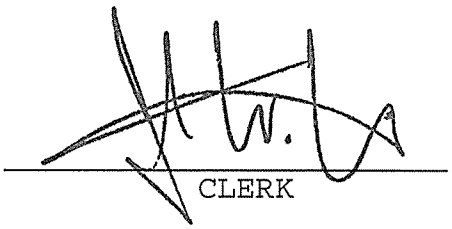
The majority surmises that the period of time between the court's comments and the actual plea was too brief to conclude anything other than that the comments had a coercive effect. This conjecture, however, ignores the reality that the trial was about to commence, and that the witness who was out of the country had returned to testify against defendant. At that juncture, the motivation for defendant to take the plea was not

the threat by the court to impose a severe sentence, but the recognition that he would be convicted.

Thus, I see no reason to disturb the plea, which was clearly freely made, and which, under the circumstances, was hardly Draconian.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 24, 2009



CLERK