SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

AUGUST 20, 2010

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. SALVATORE R. MARTOCHE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. SAMUEL L. GREEN

HON. ELIZABETH W. PINE

HON. JEROME C. GORSKI, ASSOCIATE JUSTICES

PATRICIA L. MORGAN, CLERK

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

380

KA 09-00489

PRESENT: CENTRA, J.P., FAHEY, CARNI, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEREK MCIVER, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (NEAL J. MAHONEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

GERALD L. STOUT, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael F. Griffith, J.), rendered December 16, 2008. The judgment convicted defendant, upon a jury verdict, of promoting prison contraband in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of promoting prison contraband in the first degree (Penal Law § 205.25 [2]). Contrary to the contention of defendant, County Court did not err in refusing to suppress his statement to a police investigator. The testimony of defendant at the suppression hearing that the statement was coerced by correction officers and thus was not voluntary presented a credibility issue that the suppression court was entitled to resolve against defendant (*see People v Collins*, 302 AD2d 958, *lv denied* 99 NY2d 653). Here, "[t]he testimony of the [investigator] . . . supports the court's determination that defendant's statement[] [was] preceded by *Miranda* warnings and voluntarily made by defendant, without any promises, threats, or coercion on the part of [the correction officers]" (*People v Pennick*, 2 AD3d 1427, 1428, *lv denied* 1 NY3d 632).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see People v Livingston*, 262 AD2d 786, 787-788, *lv denied* 94 NY2d 881; *see generally People v Bleakley*, 69 NY2d 490, 495). Defendant preserved for our review his contention that he was denied a fair trial based on prosecutorial misconduct on summation only with respect to two of the prosecutor's comments (*see* CPL 470.05 [2]). In any event, that contention is

without merit inasmuch as all of the prosecutor's allegedly improper comments were either a fair response to defense counsel's summation or fair comment on the evidence (*see People v Anderson*, 52 AD3d 1320, 1321, *lv denied* 11 NY3d 733).

Entered: August 20, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

739

CA 10-00138

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

JULIE L. RUSHO AND WAYNE K. RUSHO,
CLAIMANTS-APPELLANTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 112572.)

ALEXANDER & CATALANO, SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A. CIRANDO OF COUNSEL), FOR CLAIMANTS-APPELLANTS.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Norman I. Siegel, J.), entered March 31, 2009 in a personal injury action. The order denied claimants' motion for partial summary judgment and granted defendant's cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the cross motion is denied, the claim is reinstated, and the motion is granted.

Memorandum: Claimants commenced this action seeking damages for injuries they sustained when a State-owned vehicle operated by a parole officer collided with a vehicle driven by claimant Wayne K. Rusho in which claimant Julie L. Rusho was a passenger. The Court of Claims denied claimants' motion for partial summary judgment on liability and granted defendant's cross motion for summary judgment dismissing the claim (*Rusho v State of New York*, 24 Misc 3d 752). That was error. In granting the cross motion, the court determined as a matter of law that defendant was protected from liability by the qualified privilege afforded by Vehicle and Traffic Law § 1104. According to the court, the parole officer was driving an authorized emergency vehicle and was engaged in an emergency operation with a fellow parole officer at the time of the collision. The record establishes, however, that the parole officers were not engaged in an emergency operation at the time of the collision. Rather, the parole officer who was driving the vehicle was attempting to turn the vehicle around to determine whether a person he observed operating a vehicle in the opposite lane of traffic was a parole absconder. In addition, the parole officers admitted that, if they determined upon further investigation that the person observed was in fact the absconder, they would not have attempted to arrest him but instead would have called

the police to assist in his apprehension. It thus follows that, at the time of the accident, the parole officers were still engaged in an investigatory role and were not in pursuit of an actual or suspected absconder. With respect to claimants' motion, we conclude that claimants established their entitlement to partial summary judgment on liability by submitting evidence that the parole officer who was driving the State-owned vehicle was negligent when he turned the vehicle into the opposing lane of traffic, and that such negligence was the sole proximate cause of the accident. In response, defendant failed to raise a triable issue of fact to defeat the motion (*see Pomietlasz v Smith*, 31 AD3d 1173; *Kelsey v Degan*, 266 AD2d 843).

All concur except CARNI, J., who dissents and votes to affirm in the following Memorandum: I respectfully disagree with the conclusion of my colleagues that the parole officers were not engaged in an emergency operation within the meaning of Vehicle and Traffic Law § 1104 at the time of the collision. Therefore, I dissent and would affirm the order that, inter alia, granted defendant's cross motion for summary judgment dismissing the claim (*Rusho v State of New York*, 24 Misc 3d 752).

The record establishes that the parole officers were engaged in an attempt to locate a specified parole absconder (absconder) who had violated the conditions of his parole, resulting in the issuance of a warrant for his arrest. If the absconder was located, the parole officers intended to call for police assistance in effectuating his arrest. Immediately prior to the collision with claimants' vehicle, the parole officers were proceeding to a hotel that had been identified as the absconder's possible location. The parole officers had also received information provided by an anonymous informant concerning the color, make and model of the vehicle allegedly being used by the absconder. While en route to the hotel and in the vicinity thereof, the parole officer operating what was an unmarked "police vehicle" within the meaning of Vehicle and Traffic Law § 132-a observed a vehicle traveling in the opposite direction that matched the description of the absconder's vehicle and that the parole officer thought - but not to a certainty - was being operated by the absconder. In an attempt to pursue that vehicle, the parole officer, without signaling, quickly attempted to reverse his direction of travel by turning left across two oncoming lanes of travel into a commercial parking lot. In the process, the police vehicle and claimants' vehicle collided.

The majority concludes that the police vehicle was not engaged in an emergency operation at the time of the collision because the parole officer operating the vehicle was "attempting to turn the vehicle around to determine" whether he had seen a parole absconder and was therefore "not in pursuit of an actual or suspected absconder." The majority's analysis would require that the parole officer definitively identify the absconder in order to qualify as being engaged in an emergency operation "pursuit." I disagree and do not believe that the Legislature intended such a narrow meaning of the word "pursuing" in promulgating Vehicle and Traffic Law § 114-b.

Vehicle and Traffic Law § 114-b includes "pursuing an actual or suspected violator of the law" in defining the term "emergency operation." Under the facts known to the parole officers, the absconder in question was no doubt a suspected violator of the law. Indeed, a warrant had been issued for his arrest. The fact that the parole officer operating the unmarked police vehicle may have been less than certain that he had observed the absconder driving the vehicle that matched the description provided by the anonymous informant is, in my view, not determinative of whether he was engaged in an "emergency operation."

The practical effect of the majority's analysis is to require certainty in the identification of the absconder or "violator of the law" in order to be engaged in an emergency operation within the meaning of Vehicle and Traffic Law § 114-b and, thus, Vehicle and Traffic Law § 1104. For example, under the majority's analysis, a police officer who receives a radio dispatch describing a vehicle used in an armed bank robbery in his or her vicinity will no longer be engaged in an "emergency operation" when he or she observes a vehicle in the opposite lane of travel on the New York State Thruway and exceeds the speed limit in an attempt to catch up to the vehicle that he or she *thinks* may fit the description in the radio dispatch. If the police officer is involved in an accident en route and testifies that he or she needed a closer look of the vehicle being pursued - which was never obtained because of the accident - in order to determine whether the vehicle fit the description in the radio dispatch and contained the bank robbers, the majority's ruling would deny the officer the protection of Vehicle and Traffic Law § 1104 because the officer was only "attempting to determine" if he or she had seen the bank robbery getaway vehicle. I do not think that this is a correct analysis, nor can I conclude that it is the Legislature's intended application of the statute.

Finally, I also agree with the conclusion of the Court of Claims that the "momentary judgment lapse" of the parole officer operating the unmarked police vehicle does not constitute "reckless disregard for the safety of others" (Vehicle and Traffic Law § 1104 [e]).

Entered: August 20, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

765

CA 09-02135

PRESENT: SMITH, J.P., FAHEY, CARNI, GREEN, AND GORSKI, JJ.

IN THE MATTER OF LEGACY AT FAIRWAYS, LLC, US HOMES CO., INC., MARK IV CONSTRUCTION CO., INC., AND CHRISTOPHER A. DIMARZO, PETITIONERS-PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SEAN MCADOO, ALLAN J. BENEDICT, ZONING BOARD OF APPEALS OF TOWN OF VICTOR, AND TOWN OF VICTOR, RESPONDENTS-DEFENDANTS-APPELLANTS. (APPEAL NO. 1.)

THE WOLFORD LAW FIRM LLP, ROCHESTER (MICHAEL R. WOLFORD OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

GATES & ADAMS, P.C., ROCHESTER (DOUGLAS S. GATES OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered July 17, 2009 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment, inter alia, granted the motion of petitioners-plaintiffs for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, the cross motion is granted, the second, fourth, fifth, and sixth causes of action are dismissed, and the matter is remitted to the Planning Board of respondent-defendant Town of Victor for further proceedings in accordance with the following Memorandum: Petitioners-plaintiffs (petitioners) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to annul the determination imposing a per unit recreation fee upon property owned and developed by petitioners as an assisted living facility. On a prior appeal, we determined that the proceeding/declaratory judgment action was properly only a CPLR article 78 proceeding, and we granted respondents-defendants (respondents) permission to appeal from the nonfinal order (*Matter of Legacy at Fairways, LLC v McAdoo*, 67 AD3d 1460, 1461). We affirmed that order denying "the pre-answer motion of respondents to the extent that it sought to dismiss the petition pursuant to CPLR 7804 (f) and instead permitted them to answer the petition" (*id.*). Respondents now appeal from a judgment that, inter alia, granted the motion of petitioners for summary judgment on the petition and denied

respondents' cross motion for summary judgment dismissing the petition or, alternatively, remitting the matter to the Planning Board of respondent Town of Victor (Town) for further findings. We conclude that respondents waived their contention that the proceeding is time-barred inasmuch as they failed to raise that defense either in their answer to the petition or in their cross motion (*see Matter of Hughes v Doherty*, 9 AD3d 327, *revd on other grounds* 5 NY3d 100).

We agree with respondents, however, that Supreme Court erred in granting petitioners' motion for summary judgment on the first and third causes of action that alleged, respectively, that the Planning Board failed to make the requisite findings in imposing a per unit recreation fee pursuant to Town Law § 277 and that, in any event, the assisted living facility was not a "proper case" for the imposition of such fees (§ 277 [4] [b]). As part of that project, petitioners applied to the Planning Board for approval of a minor subdivision plan in 2000. The Planning Board approved the application on the condition that petitioners comply with the Town's Design and Construction Standards for Land Development (Construction Standards), Section 5 of which expressly requires that a recreation fee be paid before issuance of a building permit. In 2006, the Planning Board also approved petitioners' site plan for the project, subject to the ongoing condition that petitioners comply with the Construction Standards. We conclude that, although the Planning Board imposed a recreation fee in 2000, the manner in which the Planning Board imposed the fee was improper inasmuch as it failed to make findings "that a proper case exist[ed] for requiring that" parkland be set aside or that a fee be imposed in lieu thereof (Town Law § 277 [4] [b]; *see* § 274-a [6] [b]). We further conclude, however, that the appropriate remedy for the imposition of a recreation fee in the absence of such findings was the alternative relief sought by respondents, i.e., remittal to the Planning Board, rather than summary judgment in favor of petitioners on the first and third causes of action. We therefore remit the matter "to the Planning Board for further consideration and, if appropriate, for required findings" (*Matter of Bayswater Realty & Capital Corp. v Planning Bd. of Town of Lewisboro*, 76 NY2d 460, 463; *see Long Clove v Town of Woodbury*, 292 AD2d 512; *Matter of Sepco Ventures v Planning Bd. of Town of Woodbury*, 230 AD2d 913, 914-915).

We agree with respondents that the court erred in granting petitioners' motion with respect to the second, fourth, and sixth causes of action and in denying those parts of respondents' cross motion for summary judgment dismissing those causes of action. In those causes of action, petitioners, inter alia, challenged respondents' imposition of a per unit recreation fee pursuant to chapter 27 of the Town Code. Sections 274-a (6) (c) and 277 (4) (c) of the Town Law authorize a town board to establish the amount of any recreation fee in lieu of parkland (*see Twin Lakes Dev. Corp. v Town of Monroe*, 1 NY3d 98, 103, *cert denied* 541 US 974). Here, pursuant to the provisions of the Town Code in effect at the time the Planning Board imposed the recreation fee, the rate of that fee was $600 per family unit (*see* § 27-8 [former (J)]). Thus, in the event that the Planning Board determines upon further consideration that a recreation

fee was properly imposed in 2000, we conclude that the recreation fee should be limited to the rate applicable at that time. Contrary to petitioners' contention, the Construction Standards do not set forth an amount for recreation fees, nor do they establish a "per lot," rather than a per unit, fee. Instead, the stated purposes of the Construction Standards are to conform with the Town Code and to provide guidelines for the development of land within the Town. Further, chapter 27 of the Town Code does not require that all fees imposed thereby serve to reimburse the Town for qualified administrative expenses. Although section 27-8 (A) of the Town Code discusses the imposition of fees in order to reimburse the Town, section 27-8 (J) does not do so. Rather, section 27-8 (J) sets forth various review and permit fees that "are based on the occupancy or use of the structure and type of work to be performed . . .[, as well as the] number of units or the gross square feet of floor area . . . ." Moreover, the Town Law specifically authorizes the imposition of fixed recreational fees, without consideration of whether the recreation fee would reimburse the Town for costs that it incurred in processing applications (*see* § 274-a [6]; § 277 [4]; *see generally Twin Lakes Dev. Corp*., 1 NY3d at 102-107; *Bayswater*, 76 NY2d at 467-470).

We further conclude that the court erred in granting petitioners' motion with respect to the fifth cause of action and in denying that part of respondents' cross motion for summary judgment dismissing that cause of action. Petitioners contended therein that the recreation fees had not been deposited into a trust fund to be used by the Town exclusively for park and recreational purposes as required by Town Law § 274-a (6) (c) and § 277 (4) (c); however, petitioners lack standing to assert that cause of action. To establish standing in a CPLR article 78 proceeding, a petitioner must demonstrate "that the administrative action will in fact have a harmful effect on the petitioner and that the interest asserted is arguably within the zone of interest to be protected by the statute" (*Matter of Dairylea Coop. v Walkley*, 38 NY2d 6, 9; *see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 771-774). Petitioners do not allege that they have suffered any injury in fact as a result of the Town's alleged failure to place recreation fees in the required trust (*see generally Matter of Benson v Roswell Park Cancer Inst. Corp. Merit Bd.*, 305 AD2d 1056, 1057-1058). In addition, petitioners do not fall within the zone of interest to be protected by the statutes, inasmuch as petitioners are not residents of the Town, the intended beneficiaries of the statutes.

Entered: August 20, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

766

CA 09-02582

PRESENT: SMITH, J.P., FAHEY, CARNI, GREEN, AND GORSKI, JJ.

IN THE MATTER OF LEGACY AT FAIRWAYS, LLC, US HOMES CO., INC., MARK IV CONSTRUCTION CO., INC., AND CHRISTOPHER A. DIMARZO, PETITIONERS-PLAINTIFFS-RESPONDENTS,

V ORDER

SEAN MCADOO, ALLAN J. BENEDICT, ZONING BOARD OF APPEALS OF TOWN OF VICTOR, AND TOWN OF VICTOR, RESPONDENTS-DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

THE WOLFORD LAW FIRM LLP, ROCHESTER (MICHAEL R. WOLFORD OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

GATES & ADAMS, P.C., ROCHESTER (DOUGLAS S. GATES OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered May 15, 2009 in a CPLR article 78 proceeding and a declaratory judgment action. The order, inter alia, granted the motion of petitioners-plaintiffs for summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Entered: August 20, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

841

KA 08-02645

PRESENT: MARTOCHE, J.P., FAHEY, CARNI, SCONIERS, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK K. MCDERMOTT, DEFENDANT-APPELLANT.

JOHN A. HERBOWY, ROME, FOR DEFENDANT-APPELLANT.

MARK K. MCDERMOTT, DEFENDANT-APPELLANT PRO SE.

JOHN H. CRANDALL, SR., DISTRICT ATTORNEY, HERKIMER (JACQUELYN M. ASNOE OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Herkimer County Court (Patrick L. Kirk, J.), rendered December 5, 2008. Defendant was resentenced to a determinate term of incarceration of 15 years without postrelease supervision.

It is hereby ORDERED that the resentence so appealed from is reversed on the law and the matter is remitted to Herkimer County Court for resentencing in accordance with the following Memorandum: Defendant appeals from a resentence pursuant to which County Court sentenced him to a 15-year term of incarceration without postrelease supervision (*see generally People v Lard*, 71 AD3d 1464, *lv denied* 14 NY3d 885, 889). We conclude that the court erred in failing to undertake any inquiry of defendant to determine whether his waiver of the right to counsel in connection with the resentence was knowingly, voluntarily and intelligently entered (*see People v Arroyo*, 98 NY2d 101, 103; *cf. People v Torpey*, 258 AD2d 972, *lv dismissed* 93 NY2d 903, *lv denied* 93 NY2d 1006; *People v Jewell*, 151 AD2d 607). We therefore reverse the resentence and remit the matter to County Court for resentencing, at which time defendant shall be advised of his right to counsel and, if defendant chooses to waive that right, the court must undertake a "searching inquiry" to determine whether defendant's waiver is knowing, voluntary and intelligent (*Arroyo*, 98 NY2d at 103 [internal quotation marks omitted]). The contention of defendant in his pro se supplemental brief that he was denied effective assistance of counsel because defense counsel signed the waivers of indictment and speedy trial is based on documents dehors the record on appeal and must therefore be raised by way of a motion pursuant to CPL article 440 (*see People v Dorn*, 71 AD3d 1523). Nevertheless, we note our concern with the fact that defense counsel, rather than defendant, signed those waivers. The remaining contentions of defendant are not properly before us inasmuch as they concern the proceedings underlying

the original judgment of conviction rather than the resentence (*see generally People v Lawlor*, 49 AD3d 1270, *lv denied* 10 NY3d 936).

All concur except MARTOCHE, J.P., and CARNI, J., who dissent and vote to dismiss the appeal in the following Memorandum: We respectfully dissent. Contrary to the majority's characterization of the document on appeal, we conclude that this is not an appeal from a resentence. Rather, in our view, defendant is appealing from an order that denied in part his motion made pursuant to CPL 440.20. Thus, defendant would be required to seek leave to appeal pursuant to CPL 450.15 (2), which defendant did not do here. We decline to treat this appeal as a request for leave to appeal and conclude that, for the reasons stated herein, we would dismiss the appeal.

A description of the background of this appeal is necessary to determine the proper characterization of the document on appeal. In 2003, defendant entered two guilty pleas for burglary in the second degree, in Herkimer County and Oneida County, respectively. The pleas were entered in satisfaction of unrelated charges in each county, but based on the negotiations between the prosecutors in both counties and defendant, and with the permission of the respective County Courts, the sentences imposed were directed to run concurrently with respect to each other. According to the terms of the plea agreement with respect to both pleas, Oneida County Court would sentence defendant to a determinate term of incarceration of 15 years and a period of five years of postrelease supervision (PRS), and Herkimer County Court would sentence defendant to a determinate term of incarceration of "[f]ifteen years flat." Indeed, Herkimer County Court informed defendant on several occasions during the plea proceeding that he would receive a determinate term of incarceration of 15 years "flat," and defendant agreed to waive his right to appeal. At sentencing in Herkimer County, defendant was sentenced to 15 years and was ordered to pay restitution in the amount of $1,144.32. Defendant acknowledged that restitution was being imposed as part of the sentence and that a judgment in that amount would be entered against him. Herkimer County Court did not mention a period of PRS.

Defendant did not perfect his appeal from the judgment of Herkimer County Court, and in 2005 we denied the motion of defendant to extend his time to perfect his appeal from that judgment. Defendant then made a CPL article 440 motion, contending that he was not notified of the period of PRS or that restitution was being imposed. The motion was denied, and in November 2005 defendant sought leave to appeal from the order denying that motion. We denied defendant's request for leave to appeal. Thus, defendant has had the opportunity on two occasions to raise the restitution issue before this Court, and on both occasions we have refused to consider that issue, by denying his motion to extend the time in which to perfect his appeal from the judgment of Herkimer County Court and by denying his request for leave to appeal from the order denying his CPL article 440 motion. Additionally, although the waiver by defendant of his right to appeal does not encompass his challenge to the restitution ordered because there is no indication in the record before us that restitution was included in the terms of the plea agreement,

defendant's challenge to the restitution ordered was not preserved for our review because at sentencing defendant did not request a hearing on restitution or object to the amount ordered (*see People v Jorge N.T.*, 70 AD3d 1456, *lv denied* 14 NY3d 889). This Court would have had the power to review such a challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), but such a challenge would not have come before this Court as a matter of law.

After we denied defendant's request for leave to appeal from the order denying the CPL article 440 motion, which challenged both the period of PRS and the imposition of restitution, defendant moved pro se in Herkimer County Court (hereafter, County Court) seeking to vacate his sentence under CPL 440.20. Included in his motion papers was a form entitled "Waiver of Counsel," which set forth that defendant waived and rejected any assigned counsel with respect to any proceedings or hearings to be conducted in connection with his CPL 440.20 motion and that he was "fully aware of his right to have an attorney present, on his behalf, during any proceedings related to this matter, and [did] knowingly, voluntarily, and intelligently, reject any assigned counsel." County Court indicated that it accepted the executed waiver of counsel and advised defendant that, "in the event you wish counsel, please advise the Court immediately." County Court, with the consent of the prosecutor, granted defendant's motion only in part, ordering that there would be no period of PRS to be served upon defendant's release from jail, based on the mandate of *People v Catu* (4 NY3d 242). Thus, because County Court granted that part of defendant's CPL 440.20 motion with respect to PRS and denied that part of the motion with respect to restitution, a new certificate of conviction was required to be entered, reflecting that defendant was now receiving a lesser sentence than the sentence originally imposed, namely, a sentence that did not include PRS.

We note that the document from which defendant appeals is entitled "record of conviction." It is signed by a senior court office assistant and sets forth that defendant was sentenced on February 10, 2003 to 15 years in state prison and was ordered to pay $1,144.32 in restitution. The majority views the appeal to be one from a resentencing. We note, however, that CPL 440.20 is available to set aside a sentence "upon the ground that it was unauthorized, illegally imposed, or otherwise invalid *as a matter of law*" (CPL 440.20 [1] [emphasis added]). The statute further provides that such a motion must be denied if "the ground or issue raised thereupon was previously determined on the merits upon an appeal from the judgment or sentence, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue" (CPL 440.20 [2]). With respect to the PRS component of defendant's sentence, that is precisely the scenario here. *Catu* was decided subsequent to the imposition of defendant's original sentence, and thus defendant was legally entitled to be resentenced without the PRS component of the original sentence. With respect to the restitution portion of the sentence, however, defendant had no legal right to relief from the imposition of that component of the sentence and, as previously noted, had an opportunity to convince this Court to consider the issue of restitution as a matter of discretion in the

interest of justice on two previous occasions. Thus, because this is not in our view an appeal from a resentence but, rather, this is an appeal from an order denying in part defendant's motion pursuant to CPL 440.20, we do not believe that an appeal lies as of right, and we would decline to grant defendant leave to appeal based on the papers before us and therefore would dismiss the appeal (*see* CPL 450.15 [2]).

We also note, without further comment, that the Herkimer County judgment originally entered, ordering defendant to pay restitution, has been fully satisfied, and that an order has been entered discharging the judgment.

Under the scenario presented here, we believe that the majority's decision extends the right to counsel well beyond previously enunciated legal parameters. While we have no dispute with the majority's discussion of the requirement that a court ascertain whether a defendant has made a knowing, voluntary and intelligent waiver of his right to counsel before allowing the defendant to proceed pro se, we note that the cases cited by the majority all involve a defendant's right to counsel up to the time of conviction. The United States Supreme Court has stated that there is "no constitutional right to counsel when mounting collateral attacks upon convictions" and that the right to appointed counsel extends only to the first appeal as of right (*Pennsylvania v Finley*, 481 US 551, 555). Thus, under CPL article 440, "there is no provision for an absolute right to counsel, absent a factual hearing, . . . [and a]ssignment of counsel other than for an evidentiary hearing is discretionary in . . . article 440 proceedings" (*People ex rel. Anderson v Warden, N.Y. City Correctional Inst. for Men*, 68 Misc 2d 463, 470; *see People v Lopez*, 14 Misc 3d 1223[A], 2006 NY Slip Op 52547[U], *10-11). Judiciary Law § 35 (1) (a) and (b) authorize appointment of counsel for writs of habeas corpus and appeals, not for CPL article 440 motions, and County Law § 722 (4) provides that counsel may be appointed on a CPL article 440 motion "when a hearing has been ordered." Given the clear mandate of *Catu*, there was of course no hearing here, and thus defendant had no right to counsel. Assuming that the majority is incorrect in characterizing this as an appeal from a resentence rather than as an appeal from an order denying a pro se CPL article 440 motion, we conclude that the ultimate result of the majority's decision is that counsel would be required to be appointed upon the filing of every such motion. We do not believe that this Court should so extend the law.

Entered: August 20, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

868

CAF 09-00796

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

IN THE MATTER OF DUSTIN K.R.

DAWN K., PETITIONER-APPELLANT,

MEMORANDUM AND ORDER

V

LISA R. AND THOMAS R.,
RESPONDENTS-RESPONDENTS.

LINDA M. JONES, BATAVIA, FOR PETITIONER-APPELLANT.

ASHCRAFT FRANKLIN YOUNG & PETERS, LLP, ROCHESTER (GREGORY A. FRANKLIN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered April 6, 2009 in a proceeding pursuant to Domestic Relations Law § 112-b. The order, inter alia, directed that petitioner would be permitted certain visitation.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied in its entirety, and the matter is remitted to Family Court, Genesee County, for further proceedings on the petition.

Memorandum: Petitioner, the birth mother of the infant who was adopted by respondents, commenced this proceeding seeking to enforce the terms of the visitation agreement (agreement) that she entered into with respondents at the time she surrendered her parental rights. According to petitioner, respondents were required pursuant to the terms of the agreement to pay for her travel and housing expenses because they had relocated over 250 miles from the location of petitioner's residence at the time of the adoption, and they were refusing to do so. The terms of the agreement allowed petitioner to visit the infant once a month for a six-hour period and it further provided that, in the event that respondents relocated, petitioner would have to pay for her own transportation costs if the relocation was less than 250 miles from the location of her residence at the time of the adoption. If the relocation was more than 250 miles, however, respondents would be financially responsible for petitioner's transportation and housing costs during visitation, and the visitation would occur "six times per year, with the visitation consisting of two six-hour visits over a two-day period."

Petitioner thereafter moved for summary judgment on the petition.

In support of her motion, she presented evidence that her trip would exceed 250 miles when traveling by bus, and she contended that when the parties entered into the agreement it was understood that she would be traveling by common carrier. In opposition, respondents asserted that the distance when traveling by car was less than 250 miles and that the 250-mile provision was included in the agreement because of the possibility that they would relocate to an area of New York State where one of the respondents had grown up and where several family members still resided. In deciding the motion, Family Court determined that there was a combined means of public transportation that was less than 250 miles, although the court noted that there would be practical difficulties in using those combined means of public transportation in one day. The court thus directed that petitioner would be permitted two six-hour visits over a two-day period six times a year rather than one six-hour visit per month, despite its determination that the combined means of transportation rendered the distance less than 250 miles. This appeal by petitioner ensued.

"It is well established that the function of the court on a motion for summary judgment is 'issue finding rather than issue determination' " (*Sirianno v New York RSA No. 3 Cellular Partnership*, 284 AD2d 913, 914; *see Patton v Matusick, Spadafora & Verrastro* [appeal No. 2], 16 AD3d 1072, 1074). In addition, it is equally well established that, "[i]n the event that a contract is ambiguous, its interpretation is . . . a matter for the court unless 'determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence' " (*Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 218, quoting *Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 172). Here, the court erred in its interpretation of the agreement, which is ambiguous to the extent that it does not provide for a method of computing the 250-mile provision. In computing the distance and concluding that there was a combined method of public transportation that would require petitioner to travel less than 250 miles, the court erred in relying on extrinsic evidence that was neither submitted by the parties nor included in the record on appeal. In addition, the court erred in altering the unambiguous visitation terms set forth in the agreement insofar as they concern the length and frequency of visitation. Although "[t]he interpretation of an unambiguous contractual provision is a function for the court" (*id.* [internal quotation marks omitted]), we conclude that the court erred in its interpretation by enforcing the visitation schedule that unambiguously applies only in the event that respondents' relocation exceeds a distance of 250 miles, despite its determination that the distance of respondents' relocation did not exceed 250 miles. We therefore reverse the order, deny petitioner's motion in its entirety, and remit the matter to Family Court for further proceedings on the petition.

Entered: August 20, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

891

KA 09-01383

PRESENT: MARTOCHE, J.P., FAHEY, LINDLEY, SCONIERS, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JASON C. NANNI, DEFENDANT-APPELLANT.

GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered April 9, 2009. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: August 20, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

909

CAE 10-01644

PRESENT: PERADOTTO, J.P., LINDLEY, PINE, AND GORSKI, JJ.

IN THE MATTER OF ANDREW W. GOODELL,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

WILLIAM L. PARMENT, ET AL., RESPONDENTS,
NANCY G. BARGAR AND CHAUTAUQUA COUNTY BOARD
OF ELECTIONS, BY NORMAN GREEN AND BRIAN ABRAM,
ELECTION COMMISSIONERS, RESPONDENTS-RESPONDENTS.

GOODELL & RANKIN, JAMESTOWN (R. THOMAS RANKIN OF COUNSEL), FOR PETITIONER-APPELLANT.

FREDERICK A. LARSON, JAMESTOWN, FOR RESPONDENT-RESPONDENT NANCY G. BARGAR.

LAW OFFICE OF MICHAEL R. CERRIE, DUNKIRK (MICHAEL R. CERRIE OF COUNSEL), FOR NORMAN GREEN, ELECTION COMMISSIONER OF RESPONDENT CHAUTAUQUA COUNTY BOARD OF ELECTIONS.

MICHAEL J. SULLIVAN, FREDONIA, FOR BRIAN ABRAM, ELECTION COMMISSIONER OF RESPONDENT CHAUTAUQUA COUNTY BOARD OF ELECTIONS.

Appeal from an order of the Supreme Court, Chautauqua County (John T. Ward, A.J.), entered August 6, 2010 in a proceeding pursuant to the Election Law. The order dismissed the petition.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Chautauqua County, for a hearing in accordance with the following Memorandum: Petitioner commenced this proceeding seeking, inter alia, to invalidate the certificate of declination filed by respondent William L. Parment with respect to Parment's designation as the Independence Party candidate for the office of Member of the State Assembly for the 150th District and to invalidate the certificate of substitution naming respondent Nancy G. Bargar as the Independence Party candidate for that office. Petitioner alleged that Parment never filed the certificate of declination pursuant to the Election Law but, rather, that it was mailed to Norman Green, the Democratic Election Commissioner of respondent Chautauqua County Board of Elections (Board), who filed the certificate of declination one week after the deadline. Petitioner thus further alleged that the Board improperly recorded the certificate of declination and accepted the certificate of substitution. Supreme Court dismissed the petition.

We conclude that the record before us is insufficient to determine whether the certificate of declination was properly filed pursuant to the Election Law. We therefore hold the case, reserve decision and remit the matter to Supreme Court for an expedited hearing at which Parment, the Election Commissioners and other relevant employees of the Board, as well as any other witness may testify concerning the delivery and handling of the certificate of declination to and by the Board.

Entered: August 20, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

910

CAE 10-01685

PRESENT: MARTOCHE, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

IN THE MATTER OF VINCENT D. IOCOVOZZI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

HERKIMER COUNTY BOARD OF ELECTIONS,
RESPONDENT-RESPONDENT,
ET AL., RESPONDENTS.

CAROL MALZ, ONEONTA, FOR PETITIONER-APPELLANT.

Appeal from an order of the Supreme Court, Herkimer County (Norman I. Siegel, A.J.), entered August 11, 2010 in a proceeding pursuant to the Election Law. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner appeals from an order dismissing his petition seeking, inter alia, to strike the specific objections to his designating petition for the office of Herkimer County Coroner District #4 on the ground that Herkimer County Board of Elections (respondent) lacked jurisdiction to address those objections (*see generally* Election Law § 6-154 [2]). We affirm. Contrary to the contention of petitioner, neither the objector nor respondent was required to give him notice of the specific objections before respondent made its determination and invalidated petitioner's candidacy, inasmuch as respondent never adopted such a rule (*see id.*; 9 NYCRR 6204.1; *Matter of Grancio v Coveney*, 60 NY2d 608, 610; *cf. Matter of Zogby v Longo*, 154 AD2d 889).

The further contention of petitioner that his constitutional right to due process was violated is not preserved for our review because the due process issue raised in the petition is based only on 9 NYCRR 6204.1 (*see generally Matter of Tower v McCall*, 257 AD2d 973, 974). In any event, that contention lacks merit. Petitioner was not entitled to any greater due process than that provided by the statutory process for judicial review of respondent's determination pursuant to Election Law § 16-102 (1) (*see Matter of Meader v Barasch*, 133 AD2d 925, 926-927, *lv denied* 70 NY2d 611; *see generally Snowden v Hughes*, 321 US 1, 3-7, *reh denied* 321 US 804; *Douglas v Niagara County Bd. of Elections*, US Dist Ct, WD NY, Arcara, C.J.), and petitioner took advantage of that process. Finally, petitioner waived his contention concerning the identity of the specific and general

objectors when he failed to pursue the offers of respondent and Supreme Court to conduct a factual hearing on that issue (*see generally Andrew v Hurh*, 34 AD3d 1331, *lv denied* 8 NY3d 808, *rearg denied* 8 NY3d 1017; *Matter of Shuford v Turner*, 8 AD3d 182).

Entered: August 20, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

911

CAE 10-01687

PRESENT: MARTOCHE, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

IN THE MATTER OF CRAIG M. SCHULTZ,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NIAGARA COUNTY BOARD OF ELECTIONS,
RESPONDENT-APPELLANT.

CLAUDE A. JOERG, COUNTY ATTORNEY, LOCKPORT (GARY LISOWSKI OF COUNSEL), FOR RESPONDENT-APPELLANT.

DAVID W. POLAK ATTORNEY AT LAW, P.C., WEST SENECA (DAVID W. POLAK OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered August 13, 2010 in a proceeding pursuant to the Election Law. The order, inter alia, granted the petition and validated the designating petition of petitioner for the office of Republican Committeeman for the First Election District in the Town of Wheatfield.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Supreme Court properly granted the petition seeking validation of petitioner's designating petition for the office of Republican Committeeman for the First Election District in the Town of Wheatfield. We reject respondent's contention that the validation proceeding was not timely commenced pursuant to Election Law § 16-102 (2). That statute provides that "[a] proceeding with respect to a [designating] petition shall be [commenced] within [14] days after the last day to file the petition[] or within [3] business days after the . . . board with . . . which such petition was filed[] makes a determination of invalidity with respect [thereto], whichever is later . . . ." Nevertheless, " 'an aggrieved party need not commence judicial proceedings prior to receiving written notice of the [b]oard's ruling' . . . Thus, the three-day time period [does] not begin to run until [the] petitioner receive[s] the notice of [the] determination by mail" (*Matter of Richardson v Britt*, 242 AD2d 857, 858, *lv denied* 90 NY2d 805). Here, petitioner received notice of respondent's determination invalidating the designating petition on

August 2, 2010, and the proceeding therefore was timely commenced on August 5, 2010.

Entered: August 20, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

912

CAE 10-01689

PRESENT: MARTOCHE, J.P., PERADOTTO, PINE, AND GORSKI, JJ.

IN THE MATTER OF ROBERT E. BROWN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

EMIN E. EGRIU, RESPONDENT-APPELLANT,
ET AL., RESPONDENTS.

JAMES OSTROWSKI, BUFFALO, FOR RESPONDENT-APPELLANT.

NIXON PEABODY LLP, ROCHESTER (CHRISTOPHER D. THOMAS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered August 11, 2010 in a proceeding pursuant to the Election Law. The order, inter alia, granted the petition and invalidated the designating petition of respondent Emin E. Egriu for the office of Representative in Congress for the 28th Congressional District.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Supreme Court properly granted the petition seeking, inter alia, to invalidate the designating petition of Emin E. Egriu (respondent) for the office of Representative in Congress for the 28th Congressional District. Respondent contends that the court lacked subject matter jurisdiction over the proceeding because it was commenced before the State Board of Elections (State Board) determined petitioner's objections to the designating petition. We reject that contention. Pursuant to Election Law § 16-102 (2), the proceeding must be commenced "within [14] days after the last day to file the [designating] petition[] *or* within [3] business days after the . . . board with . . . which such petition was filed[] makes a determination of invalidity with respect [thereto], whichever is later" (emphasis added). Here, the proceeding was timely commenced within 14 days of the deadline to file the designating petition, and the court therefore obtained subject matter jurisdiction over the proceeding. We also reject petitioner's contention that the court erred in relying upon the alleged number of signatures validated by the State Board inasmuch as the State Board had not yet issued its determination at the time of the hearing conducted by the court. The contents of the original file of the State Board, including its worksheets and the Hearing Officer's report, were admitted in evidence

at the hearing and constituted prima facie evidence of the number of signatures that the State Board determined to be valid (*see generally Matter of Segarra v Doe*, 9 AD2d 604; *Matter of Rauch v Cohen*, 268 App Div 879). We have reviewed respondent's remaining contentions and conclude that they are without merit.

Entered: August 20, 2010

Patricia L. Morgan
Clerk of the Court