SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 3, 2014

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

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. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

201

CA 13-01562

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND WHALEN, JJ.

GAETANO FARRUGGIA AND GABRIELLA FARRUGGIA,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF PENFIELD, DEFENDANT-APPELLANT-RESPONDENT,
KENNETH HERSHEY AND SUZANNE HERSHEY,
DEFENDANTS-RESPONDENTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

DOLCE & PANEPINTO, P.C., BUFFALO (STEPHEN C. HALPERN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

CHAMBERLAIN D'AMANDA OPPENHEIMER & GREENFIELD LLP, ROCHESTER (HENRY R. IPPOLITO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered April 3, 2013. The order, among other things, denied the motion of defendant Town of Penfield for summary judgment and granted the motion of defendants Kenneth Hershey and Suzanne Hershey for summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by granting the motion of defendant Town of Penfield and dismissing the complaint and cross claim against it, denying plaintiffs' motion in its entirety, and denying those parts of the motion of defendants Kenneth Hershey and Suzanne Hershey for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action against them and reinstating those causes of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by Gaetano Farruggia (plaintiff) when the backhoe that he was operating fell into a ravine. Defendant Town of Penfield (Town) hired plaintiff's employer to perform sidewalk and paving work on property owned by defendants Kenneth Hershey and Suzanne Hershey (Hershey defendants). Specifically, the Town hired plaintiff's employer to replace the sidewalk abutting the Hershey defendants' main driveway, which was located on the northern end of their property, and to perform some paving work on that driveway (hereafter, sidewalk project). The sidewalk project was located within the Town's right-of-way, which was

60 feet in width. There was also a second driveway on the southern portion of the Hershey property (hereafter, south driveway), which was located 700 to 800 feet from the main driveway. Plaintiff's accident occurred in what the parties refer to as a "landing area" adjacent to the south driveway. Plaintiff was parking the backhoe in the landing area at the end of his work day when it rolled or tipped into a ravine. The Hershey defendants and the Town moved for summary judgment dismissing the complaint and cross claims against them. Plaintiffs moved for partial summary judgment on liability under Labor Law § 240 (1) and for leave to amend their bill of particulars to assert a violation of 12 NYCRR 23-9.4 (c) as a basis for their Labor Law § 241 (6) cause of action against the Town. The Town appeals and plaintiffs cross-appeal from an order denying the Town's motion for summary judgment, granting the Hershey defendants' motion for summary judgment, denying that part of plaintiffs' motion for partial summary judgment, and granting that part of plaintiffs' motion for leave to amend their bill of particulars.

Addressing first the appeal, we agree with the Town that the court erred in denying the Town's motion for summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) causes of action against it, inasmuch as the Town is not an "owner" for purposes of those statutes (*see Sanzone v City of Rome*, 292 AD2d 777, 778). It is well settled that "the term 'owner' is not limited to the titleholder of the property where the accident occurred and encompasses a person 'who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit' " (*Scaparo v Village of Ilion*, 13 NY3d 864, 866, quoting *Copertino v Ward*, 100 AD2d 565, 566). Here, the accident occurred well outside of the Town's right-of-way, and the Town had no other interest in or legal authority over the landing area, which was located entirely on the Hersheys' private property (*see id.* at 866-867). The Town established that it was Kenneth Hershey, not the Town, who gave plaintiff permission to park in the landing area; that the Town had no authority to grant such permission to plaintiff; and that Kenneth Hershey directed plaintiff where to park. Further, the Town established that the landing area was not part of the construction site (*see Flores v ERC Holding LLC*, 87 AD3d 419, 421; *Sprague v Louis Picciano, Inc.*, 100 AD2d 247, 249-250, *lv denied* 62 NY2d 605). No work was being performed in the landing area, and the landing area was not contiguous or in proximity to the construction site (*see Sprague*, 100 AD2d at 250). Moreover, the Town established that it was not necessary for plaintiff to park the backhoe in the landing area. The Town provided plaintiff with parking in a municipal garage, which was located a few miles from the work site. Plaintiff, however, testified at his deposition that he chose to use the landing area because it was closer to the work site and more "convenient" to do so (*cf. Kane v Coundorous*, 293 AD2d 309, 311-312; *Zito v Occidental Chem. Corp.*, 259 AD2d 1015, 1015-1016, *lv dismissed* 93 NY2d 999).

We further agree with the Town that plaintiff's accident did not involve "an elevation-related risk of the kind that the safety devices listed in [Labor Law §] 240 (1) protect against" (*Broggy v Rockefeller*

Group, Inc., 8 NY3d 675, 681; *see Primavera v Benderson Family 1968 Trust*, 294 AD2d 923, 924; *Mazzu v Benderson Dev. Co.*, 224 AD2d 1009, 1010-1011). We thus conclude that plaintiff's accident was "not within the class of hazards against which Labor Law § 240 (1) was intended to guard" (*Ferreira v Village of Kings Point*, 68 AD3d 1048, 1050; *see Wynne v B. Anthony Constr. Corp.*, 53 AD3d 654, 655).

With respect to the Labor Law § 200 and common-law negligence causes of action against the Town, it is well settled that " '[l]iability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of [the] premises' " (*Clifford v Woodlawn Volunteer Fire Co., Inc.*, 31 AD3d 1102, 1103). " 'The existence of one or more of these elements is sufficient to give rise to a duty of care[, but w]here none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property' " (*id.*). Here, the Town met its initial burden on the motion "by establishing that [it] did not occupy, own, or control the [landing area] and did not employ it for a special use, and thus did not owe plaintiff a duty of care" (*Knight v Realty USA.COM, Inc.*, 96 AD3d 1443, 1444), and plaintiffs failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We therefore modify the order by granting the Town's motion for summary judgment and dismissing the complaint and cross claim against it. In view of that determination, we further modify the order by denying plaintiffs' motion in its entirety, inasmuch as there is no longer a basis for plaintiffs to seek leave to amend their bill of particulars in connection with a cause of action against the Town.

With respect to the cross appeal, we agree with plaintiffs that the court erred in dismissing the Labor Law § 200 and common-law negligence causes of action against the Hershey defendants. It is undisputed that the Hershey defendants owned and controlled the property where the accident occurred, and we conclude that they failed to establish as a matter of law that they lacked actual or constructive notice of the allegedly dangerous condition on their property (*see Mendez v Jackson Dev. Group, Ltd.*, 99 AD3d 677, 679-680; *Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1416-1417). We therefore further modify the order accordingly.

All concur except WHALEN, J., who dissents in part and votes to modify in accordance with the following Memorandum: I respectfully dissent in part, because I disagree with the majority's conclusion that defendant Town of Penfield (Town) is not an "owner" for the purposes of Labor Law §§ 240 (1) and 241 (6). I therefore would affirm the order insofar as it denied that part of the Town's motion for summary judgment dismissing those causes of action against it. As the majority rightly notes, "the term 'owner' is not limited to the titleholder of the property where the accident occurred and encompasses a person 'who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit' " (*Scaparo v Village of Ilion*, 13 NY3d 864, 866, quoting *Copertino v Ward*, 100 AD2d 565, 566). Here, the Town satisfied the definition of "owner" inasmuch as it had an undisputed

property interest, i.e., the right-of-way, and it fulfilled the role of owner by contracting for the sidewalk replacement work (*see Larosae v American Pumping, Inc.*, 73 AD3d 1270, 1272; *Reisch v Amadori Constr. Co.*, 273 AD2d 855, 856; *see also Walp v ACTS Testing Labs, Inc./Div. of Bur. Veritas*, 28 AD3d 1104, 1104-1105). It is undisputed that the backhoe was regularly parked at the "landing area" overnight, to be used in the construction project the following day. The "landing area," moreover, was part of the property subject to the Town's right-of-way on which the reconstruction project was taking place. Thus, the facts here are distinguishable from those in *Sanzone v City of Rome* (292 AD2d 777), inasmuch as in *Sanzone* the accident occurred, not on property that was part of the construction project, but at a parking lot leased for the sole purpose of storing equipment and materials.

I also respectfully disagree with the majority's conclusion that the accident was not the result of the type of hazard that the use or placement of the safety devices enumerated in Labor Law § 240 (1) was designed to protect against. In my view, issues of fact remain whether the accident resulted from an elevation-related risk. The Town did not meet its initial burden of establishing that parking the backhoe at the edge of a steep ravine did not involve an elevation-related risk that called for placement of a safety device to shield Gaetano Farruggia (plaintiff) from the danger arising from the significant elevation differential (*see DeLong v State St. Assoc.*, 211 AD2d 891, 892; *see generally* Labor Law § 240 [1]; *Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 139). Thus, "[w]hether plaintiff's injuries were proximately caused by the lack of a safety device of the kind required by the statute is an issue for the trier of fact to determine" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 11).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-01437

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND WHALEN, JJ.

JAMES FOOTS, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

CONSOLIDATED BUILDING CONTRACTORS, INC.,
DEFENDANT-RESPONDENT,
60 GRIDER STREET LLC,
DEFENDANT-APPELLANT-RESPONDENT,
AND ROLLINS CONSTRUCTION MANAGEMENT, INC.,
DEFENDANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (VICTOR ALAN OLIVERI OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

LOSI & GANGI, BUFFALO (HARRY G. MODEAS, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (ALBERT J. D'AQUINO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered November 15, 2012 in a personal injury action. The order, among other things, denied the motions of defendant 60 Grider Street LLC for summary judgment and denied the motion of plaintiff for partial summary judgment.

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

Memorandum: Defendant 60 Grider Street LLC (60 Grider) appeals from an order denying its motion for summary judgment seeking to dismiss plaintiff's common-law negligence cause of action and Labor Law §§ 200, 240 (1), and 241 (6) claims, and denying its motion for summary judgment on its cross claims against defendant Consolidated Building Contractors, Inc. (Consolidated) seeking a conditional order of contractual and common-law indemnification. Plaintiff cross-appeals from the same order, which denied his motion for partial summary judgment on the issue of liability against 60 Grider with respect to his Labor Law § 240 (1) claim, and granted Consolidated's motion for summary judgment with respect to his Labor Law §§ 200, 240 (1), and 241 (6) claims.

This case arose out of injuries plaintiff sustained when he drove a forklift over a plywood-covered pit, constructed by Consolidated, in

the floor of a building owned by 60 Grider during the course of his employment with the lessee, Sodexho, a commercial laundry business. Pursuant to the lease agreement, 60 Grider was responsible for making structural improvements and repairs to the long-vacant and dilapidated building, and Sodexho was responsible for installing the equipment it needed to operate an industrial laundering facility. 60 Grider hired defendant Rollins Construction Management, Inc. (RCM) to manage the renovation project, and subcontracted with Consolidated to construct four large pits, approximately 10 feet deep, 6 feet wide, and 10 feet long, in the floor of the facility at Sodexho's direction, to serve as repositories for linens. Sodexho began its laundering operations during the renovation project, and the absence of a suspended "monorail system" required Sodexho employees to manually push large laundry carts across the facility. It was therefore necessary to cover the pits until the monorail system was installed. Following consultation with Sodexho representatives, Consolidated constructed wooden frames that it placed in the pits and then covered with three-quarter-inch plywood, which was flush with the floor.

We reject 60 Grider's contention that Supreme Court erred in denying its motion for summary judgment with respect to the Labor Law § 200 claim. Labor Law § 200 "is not limited to construction work," and we conclude that the statute encompasses plaintiff's normal duties as part of Sodexho's maintenance staff (*Jock v Fien*, 80 NY2d 965, 967). Inasmuch as plaintiff's section 200 claims relate to an allegedly defective or dangerous condition of the work site, 60 Grider was required to establish that it did not control the work site and that it lacked actual or constructive notice of the condition (*see Miller v Savarino Constr. Corp.*, 103 AD3d 1137, 1138; *Ferguson v Hanson Aggregates N.Y., Inc.*, 103 AD3d 1174, 1175; *Piazza v Frank L. Ciminelli Constr. Co., Inc.*, 2 AD3d 1345, 1349). 60 Grider failed to meet its burden with respect to either issue in its submissions. Indeed, our review of the record establishes that there is "a question of fact . . . whether [60 Grider], through its agent, [RCM], exercised control over the work site and had notice of the allegedly dangerous condition, thereby precluding summary judgment" to 60 Grider (*Samiani v New York State Elec. & Gas Corp.*, 199 AD2d 796, 797; *cf. Miller*, 103 AD3d at 1138-1139; *see generally Simms v Elm Ridge Assoc.*, 259 AD2d 538, 539). Because there is an issue of fact whether 60 Grider had actual or constructive notice of the dangerous condition, the court also properly denied its motion with respect to plaintiff's common-law negligence cause of action (*see Verel v Ferguson Elec. Constr. Co., Inc.*, 41 AD3d 1154, 1156).

Contrary to the contentions of both plaintiff and 60 Grider, the court properly denied their respective motions for summary judgment with respect to the Labor Law § 240 (1) claim because there are issues of fact whether plaintiff was engaged in an activity covered by that section. To fall under the protection of Labor Law § 240 (1), "the task in which an injured employee was engaged must have been performed *during* 'the erection, demolition, repairing, [or] altering . . . of a building or structure' " or must have "involve[d] . . . such activities" (*McMahon v HSM Packaging Corp.*, 302 AD2d 1012, 1013,

quoting *Martinez v City of New York*, 93 NY2d 322, 326). Here, the parties' submissions raise an issue of fact whether plaintiff himself was "altering" or making a "*significant* physical change to the configuration or composition of the building or structure" at the time of his injury (*Joblon v Solow*, 91 NY2d 457, 465). Specifically, the record is unclear whether plaintiff was in the process of simply moving a "towel folder," which would not afford him the protection of section 240 (1) (*see generally Bodtman v Living Manor Love, Inc.*, 105 AD3d 434, 434; *Zolfaghari v Hughes Network Sys., LLC*, 99 AD3d 1234, 1235, *lv denied* 20 NY3d 861; *Maes v 408 W. 39 LLC*, 24 AD3d 298, 300, *lv denied* 7 NY3d 716), unless that activity "was . . . ancillary" to the ongoing renovation work (*Gallagher v Resnick*, 107 AD3d 942, 944; *see Scally v Regional Indus. Partnership*, 9 AD3d 865, 867, citing *Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881; *see also Simms*, 259 AD2d at 538-539); or, whether he was removing an old machine weighing approximately 1,000 pounds and then installing and securing to the cement floor a new machine as a replacement, which would afford him the protection of section 240 (1) (*see Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 337; *Panek v County of Albany*, 99 NY2d 452, 458; *Joblon*, 91 NY2d at 465; *Lucas v Fulton Realty Partners, LLC*, 60 AD3d 1004, 1005-1006).

We likewise conclude that the court properly denied 60 Grider's motion for summary judgment with respect to plaintiff's Labor Law § 241 (6) claims. Even assuming, arguendo, that 60 Grider met its initial burden on its motion, we conclude that plaintiff raised an issue of fact by submitting evidence that, at the time of the accident, the renovation was ongoing and that he was engaged in a covered activity, i.e., the installation of industrial laundry equipment, which was part of the larger renovation project (*see* 12 NYCRR 23-1.4 [b] [13]; *see also Nagel v D & R Realty Corp.*, 99 NY2d 98, 103; *Piazza v Shaw Contract Flooring Servs., Inc.*, 39 AD3d 1218, 1219).

We reject plaintiff's contention that the court erred in granting Consolidated's motion seeking summary judgment dismissing the Labor Law §§ 200, 240 (1) and 241 (6) claims. Consolidated established its entitlement to summary judgment on those claims by submitting evidence that it had completed its work and was not at the work site at the time of plaintiff's injury; and, that as a subcontractor, it did not have the "authority to supervise or control the work that caused the plaintiff's injury" and thus cannot be held liable under Labor Law §§ 200, 240 (1), or 241 (6) (*Tomyuk v Junefield Assoc.*, 57 AD3d 518, 521; *see Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 554). Plaintiff failed to raise an issue of fact by submitting invoices that Consolidated submitted to Sodexho in May 2007 (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The invoices merely demonstrate that Consolidated was present at the work site sometime after the accident, but they do not raise an issue of fact whether Consolidated had the requisite authority to supervise or control the work site or the work that resulted in plaintiff's injuries (*see generally Brownell v Blue Seal Feeds, Inc.*, 89 AD3d 1425, 1427-1428).

60 Grider contends that it is entitled to a conditional order of contractual and common-law indemnification from Consolidated because 60 Grider's liability, if any, would be solely statutory or vicarious, and that the court erred in failing to grant it such an order. We reject that contention. 60 Grider is not entitled to a conditional order of contractual indemnification because it failed to meet its burden of establishing as a matter of law that Consolidated was negligent, as required by the parties' contract (*see Walter v United Parcel Serv., Inc*., 56 AD3d 1187, 1188). 60 Grider also is not entitled to a conditional order of common-law indemnification because it failed to establish as a matter of law either that Consolidated was negligent or that Consolidated exercised actual supervision or control over the injury-producing work (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378; *Naughton v City of New York*, 94 AD3d 1, 10; *Osgood v KDM Dev. Corp*., 92 AD3d 1222, 1223).

We have reviewed the remaining contentions of the parties and conclude that they are without merit.

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-00949

PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND WHALEN, JJ.

VAL TECH HOLDINGS, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WILSON MANIFOLDS, INC., DEFENDANT-RESPONDENT.

HARRIS BEACH PLLC, PITTSFORD (PHILIP G. SPELLANE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (JEREMY M. SHER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered March 13, 2013. The order, among other things, denied the motion of plaintiff for summary judgment dismissing defendant's counterclaims and granted the cross motion of defendant for leave to serve a second amended answer and counterclaims.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of plaintiff's motion to strike defendant's demand for punitive damages and denying that part of defendant's cross motion for leave to serve a second amended answer to add a counterclaim for breach of the implied covenant of good faith and fair dealing, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, breach of a written contract. Pursuant to the contract, in return for the payment of $275,000, plaintiff was to fabricate plastic injection molds for the production of specialty intake manifold parts for high performance automobile engines and resale by defendant to retail consumers. In its amended answer, defendant asserted counterclaims for, inter alia, breach of contract, seeking consequential damages in the form of lost profits. Plaintiff moved for summary judgment dismissing defendant's counterclaims, which sought $16 million in consequential damages, plus punitive damages, and defendant cross-moved for leave to serve a second amended answer with, inter alia, counterclaims for breach of the implied covenant of good faith and fair dealing and fraud. Supreme Court denied plaintiff's motion and granted defendant's cross motion. We note at the outset that we agree with plaintiff that this agreement for the sale of "specialty manufactured goods" is governed by New York's version of the Uniform Commercial Code (*see* UCC 2-105 [1]).

As relevant on appeal, we conclude that Supreme Court properly denied plaintiff's motion to the extent that it sought summary judgment dismissing the counterclaim for breach of contract, which seeks consequential damages. Under the circumstances presented here, lost profits are a form of consequential damages recoverable if "the seller at the time of contracting had reason to know of them and which could not reasonably be prevented by cover or otherwise" (UCC 2-715 [2] [a]). "The rule that damages must be within the contemplation of the parties is a rule of foreseeability. The party breaching the contract is liable for those risks foreseen or which should have been foreseen at the time the contract was made. The breaching party need not have foreseen the breach itself, however, or the particular way the loss came about. It is only necessary that loss from a breach is foreseeable and probable" (*Ashland Mgt. v Janien*, 82 NY2d 395, 403).

Although the written contract is silent with respect to damages, we apply a "commonsense rule" to determine "what the parties would have concluded had they considered the subject" (*Kenford Co. v County of Erie*, 67 NY2d 257, 262). Knowledge of resale is one of the factors of which the "seller at the time of contracting had reason to know" within the meaning of UCC 2-715 (2) (a). Applying these rules, we conclude that plaintiff failed to meet its initial burden of establishing as a matter of law that lost profits were not within the contemplation of the parties at the time the contract was made (*see Kenford Co.*, 67 NY2d at 262). Here, there is no dispute that plaintiff knew at the time the contract was made that defendant needed the molds for production and immediate resale of the specialty parts (*see Fruition, Inc. v Rhoda Lee, Inc.*, 1 AD3d 124, 125). Although plaintiff contends that defendant failed to state that an agreement for lost profits was in fact reached or identify when the purported agreement was consummated, the test that the parties must have reached some sort of "tacit agreement" with respect to the recovery of lost profits has been specifically rejected by the drafters of the Uniform Commercial Code (*see* UCC 2-715, Official Comment 2; *see also Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799, ___). Moreover, "[i]t is well established . . . that '[a] moving party must affirmatively [demonstrate] the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof' " (*Dodge v City of Hornell Indus. Dev. Agency*, 286 AD2d 902, 903).

In any event, we agree with defendant that it alleged facts in opposition to the motion from which it could be determined that lost profits were within the contemplation of the parties and thus defendant raised a triable issue of fact sufficient to defeat that part of the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We reject plaintiff's further contention that defendant's lost profit claim must fail because defendant did not have executed contracts in place for the sale of units at the time of the breach (*see Kenford Co.*, 67 NY2d at 261-262*; see also Jewell-Rung Agency, Inc. v Haddad Org., Ltd.*, 814 F Supp 337, 341-342). Moreover, regardless whether the claim involves a new or an established

business, the test remains the same, i.e., whether future profits can be calculated with reasonable certainty (*see Ashland Mgt.*, 82 NY2d at 404), and plaintiff does not challenge that element in this appeal.

We reject plaintiff's further contention that defendant's claim for consequential damages is barred by the statute of frauds because it cannot be performed within one year (*see* General Obligations Law § 5-701 [a] [1]). The written agreement states on its face that it is to be performed within "six weeks." The expressions of the contemplation of mutually beneficial future association between the parties by defendant's president in his deposition testimony obviously referred to the "possibility of future business dealings and not to the performance of the contract already made" (*Gruber v S-M News Co.*, 208 F2d 401, 403).

We further conclude that defendant's claim for the loss of prospective profits caused by plaintiff's alleged breach of the written contract is not subject to the one-year statute of frauds, but instead is subject to the well established "reasonable certainty" test used in predicting the probable results of contemplated business ventures (*Kenford Co.*, 67 NY2d at 261). Plaintiff's further contention that defendant's damages should be limited to the first 1,000 units produced is raised for the first time on appeal and therefore is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

We also reject plaintiff's contention that defendant's lost profit claim fails because "cover" was available (*see* UCC 2-715 [2] [a]). Where the buyer is prevented from covering because of its financial condition, which in turn is attributable in part to the seller's breach, it is not reasonable to require him to cover (*see Nyquist v Randall*, 819 F2d 1014, 1018-1019; *Hall v Miller*, 143 Vt 135, 145-146, 465 A2d 222, 228; *Gerwin v Southeastern California Assn. of Seventh Day Adventists*, 14 Cal App 3d 209, 218). Even assuming, arguendo, that plaintiff met its initial burden on the motion, we conclude that defendant submitted evidence in opposition to the motion from which it could be determined that, under the circumstances, cover was not reasonably available (*see Jewell-Rung Agency, Inc.*, 814 F Supp at 341-342).

We agree with plaintiff, however, that defendant's demand for punitive damages is not supported by allegations of a pattern of egregious conduct directed at the public in general and the court therefore erred in denying that part of plaintiff's motion to strike that demand from defendant's pleading (*see Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613; *Wright v Selle*, 27 AD3d 1065, 1067). We thus modify the order accordingly.

We also agree with plaintiff that the court abused its discretion in granting that part of defendant's cross motion for leave to amend its pleadings by adding a counterclaim for breach of the implied covenant of good faith and fair dealing, and we therefore further modify the order accordingly. "Allegations that defendant violated

'the implicit contractual duties of good faith and fair dealing' are not sufficient to state a 'violation of a duty independent of the contract' " (*Makuch v New York Cent. Mut. Fire Ins. Co.*, 12 AD3d 1110, 1111). Defendant's proposed counterclaim for breach of the implied covenant of good faith and fair dealing was duplicative of its breach of contract counterclaim and leave to add that counterclaim should have been denied on the ground that the counterclaim was palpably insufficient on its face (*see generally Matter of Clairol Dev., LLC v Village of Spencerport*, 100 AD3d 1546, 1546).

We agree with defendant, however, that the proposed second amended answer sets forth a viable counterclaim for fraud. Defendant does not allege merely that plaintiff entered into the contract while misrepresenting its intent to perform as agreed (*see Citibank v Plapinger*, 66 NY2d 90, 93-94, *rearg denied* 67 NY2d 647). Rather, defendant, alleges that, after the contract was made, plaintiff repeatedly misrepresented or concealed existing facts concerning plaintiff's performance thereunder. The fraud counterclaim thus alleges wrongful conduct and injurious consequences independent of those underlying the breach of contract counterclaim (*see Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956; *Eagle Comtronics v Pico Prods.*, 256 AD2d 1202, 1203).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

510

CA 13-01817

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, SCONIERS, AND VALENTINO, JJ.

FREDERICK DIMOND, ROBERT DIMOND AND MOST HOLY FAMILY MONASTERY, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TIME WARNER, INC., TURNER BROADCASTING SYSTEM, INC., CNN AMERICA, INC., JANE VELEZ-MITCHELL, INDIVIDUALLY AND AS EMPLOYEE/AGENT OF CNN AMERICA, INC., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (CHARLES C. RITTER, JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

DAVIS WRIGHT TREMAINE LLP, NEW YORK CITY (ELIZABETH A. MCNAMARA OF COUNSEL), COLUCCI & GALLAHER, P.C., BUFFALO, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered December 20, 2012. The order granted the motion of defendants-respondents for summary judgment and dismissed the complaint against them.

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

Memorandum: Plaintiffs commenced this libel action seeking damages for three statements that were made by defendant Jane Velez-Mitchell during a broadcast aired by defendant CNN America, Inc. (CNN). During the broadcast, Velez-Mitchell interviewed a transgender woman who had received a letter from an employee of the California Department of Motor Vehicles (DMV), stating, inter alia, his objection to gender changes on the basis of his religious beliefs. The woman had also received a package from plaintiff Most Holy Family Monastery (MHFM) containing a pamphlet discussing scriptural references concerning homosexuality and a DVD entitled “Death and the Journey into Hell.” Supreme Court granted the motion of defendants-respondents (defendants) for summary judgment dismissing the complaint against them on the ground that none of the three alleged defamatory statements was “of and concerning” plaintiffs. We affirm, although our reasoning differs from that of the court’s with respect to the first alleged defamatory statement.

The first alleged defamatory statement is the following remark by Velez-Mitchell: "Sounds like – it's very threatening. And it gets worse. That same day a DVD arrived from a fundamentalist church warning that homosexuals must be put to death. Here is a clip from the DVD, entitled 'Death and the Journey to Hell.' " Plaintiffs alleged that they were defamed by the false assertion that they advocated that homosexuals should be put to death. The broadcast contained the partial pseudonym of one of the plaintiffs and the title of the video, and thus there was sufficient information to identify plaintiffs (*cf. Haefner v New York Media, LLC*, 82 AD3d 481, 482). We therefore agree with plaintiffs that defendants failed to establish as a matter of law that the first statement was not " 'of and concerning' " plaintiffs (*Bee Publs., Inc. v Cheektowaga Times, Inc.*, 107 AD2d 382, 385).

We nevertheless conclude with respect to the first statement that defendants are entitled to the absolute privilege set forth in Civil Rights Law § 74 (*see Alf v The Buffalo News*, 100 AD3d 1487, 1488, *affd* 21 NY3d 988; *Saleh v New York Post*, 78 AD3d 1149, 1151-1152, *lv denied* 16 NY3d 714). The first statement was made in the context of the interview conducted by Velez-Mitchell, which concerned, inter alia, pending judicial proceedings commenced by the woman in California after her personal information had allegedly been misused by the DMV employee. During the interview, the woman and her attorney explained that the woman had obtained a temporary restraining order against the DMV employee based upon that employee's misuse of her personal information, and that she had thereafter received the package from MHFM. The broadcast of the interview was twice promoted as a transgender woman "suing," and a caption beneath the woman's image stated, inter alia, "Transgender Woman Suing DMV." Velez-Mitchell questioned a former prosecutor regarding the viability of an anticipated lawsuit against the DMV, and the woman's attorney stated that "[t]he Human Rights Commission filed a complaint" concerning the incident and the "big picture is about privacy and the legal right to have [one's] privacy protected."

"When examining a claim of libel, we do not view statements in isolation. Instead, '[t]he publication must be considered in its entirety when evaluating the defamatory effect of the words' " (*Alf*, 21 NY3d at 990). Here, "[r]ealistically considered," the first statement provided background facts for the woman's claims in pending and anticipated judicial proceedings, and the broadcast as a whole was a " 'substantially accurate' " report of the judicial proceedings (*Ford v Levinson*, 90 AD2d 464, 465; *see Alf*, 21 NY3d at 990). Consequently, the first statement is entitled to the absolute privilege set forth in Civil Rights Law § 74.

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

547

CA 13-00383

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, VALENTINO, AND WHALEN, JJ.

CHALINA RUIZ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BRENDAN L. COPE AND CITY OF SYRACUSE,
DEFENDANTS-APPELLANTS.

ROBERT P. STAMEY, CORPORATION COUNSEL, SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GREENE & REID, PLLC, SYRACUSE (EUGENE W. LANE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered November 29, 2012. The order and judgment awarded plaintiff money damages upon a nonjury verdict.

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

Memorandum: Defendants appeal from an order and judgment awarding plaintiff damages following a nonjury trial. Plaintiff commenced this action seeking to recover damages for injuries she allegedly sustained when the vehicle she was driving collided with a Syracuse Police Department (SPD) vehicle being driven by Brendan L. Cope (defendant), a police officer who was in the process of "field training" under the supervision of a sergeant. Shortly before the collision at a blind intersection, defendant received a "priority one," "shots-fired" radio call, and the sergeant activated the vehicle's siren and lights. As defendant's vehicle approached the intersection, his direction of travel had a red light, and the cross street on which plaintiff was driving had a green light. Defendant failed to come to a complete stop prior to entering the intersection, in violation of SPD rules and regulations. Witness testimony and the physical evidence, including a 45-foot skid mark, presented conflicting accounts whether defendant slowed down or came to a near stop prior to entering the intersection and whether he failed to look left, i.e., in plaintiff's direction.

Defendants contend, inter alia, that Supreme Court erred in denying that part of their pretrial motion for summary judgment dismissing the complaint on the ground that defendant's actions do not rise to the level of recklessness required under Vehicle and Traffic

Law § 1104. We reject that contention. Although defendants met their initial burden on the motion, we conclude that plaintiff raised a triable issue of fact whether defendant acted with "reckless disregard for the safety of others" in his operation of the police vehicle (§ 1104 [e]; *see generally Saarinen v Kerr*, 84 NY2d 494, 501). Specifically, plaintiff submitted evidence that defendant was traveling at an excessive rate of speed; that defendant did not slow down or look left as he approached the intersection; that defendant's direction of travel was controlled by a red light; that a building obstructed defendant's and plaintiff's views of each other; that there was other vehicular traffic in the vicinity; that the roads were wet; and that defendant had violated the rules and regulations of the SPD (*see Ham v City of Syracuse*, 37 AD3d 1050, 1052, *lv dismissed* 8 NY3d 976; *Allen v Town of Amherst*, 294 AD2d 828, 829, *lv denied* 3 NY3d 609; *see generally Elnakib v County of Suffolk*, 90 AD3d 596, 597).

Contrary to defendants' further contention, we conclude that the court's finding following the trial that defendant had "intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and ha[d] done so with conscious indifference to the outcome" was based on a fair interpretation of the evidence (*Ham*, 37 AD3d at 1052 [internal quotation marks omitted]; *see Campbell v City of Elmira*, 84 NY2d 505, 508, 510-511; *see generally Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170). Furthermore, the court's apportionment of liability is amply supported by the record (*cf. Don Vito v State of New York*, 182 AD2d 1070, 1071).

Likewise, we reject defendants' contention that the court's determination that plaintiff sustained a "serious injury" under the 90/180-day and significant limitation of use categories of Insurance Law § 5102 (d) is not supported by objective medical evidence. Plaintiff provided objective evidence of her injuries in the form of her chiropractor's quantification of her loss of range of motion and observations of muscle spasms, MRI reports, and an EMG study (*see generally Limardi v McLeod*, 100 AD3d 1375, 1376-1377; *Frizzell v Giannetti*, 34 AD3d 1202, 1203).

Lastly, defendants failed to preserve for our review their contention that plaintiff's vicarious liability claim against defendant City of Syracuse (City) should have precluded her negligent training and supervision claim against the City (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). In any event, although we agree with defendants that the undisputed fact that defendant was acting within the scope of his employment should have precluded plaintiff as a matter of law from bringing a claim that the City was liable for the negligent training and supervision of defendant (*see Leftenant v City of New York*, 70 AD3d 596, 597; *Matter of Trader v State of New York*, 277 AD2d 978, 978), we conclude that the court's determination that the City negligently trained and supervised defendant is harmless (*see* CPLR 2002), inasmuch as the City is nonetheless vicariously liable under the doctrine of respondeat superior (*see* General Municipal Law §

50-c; *see generally Pacelli v City of Syracuse*, 305 AD2d 1062, 1063).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

557

KA 12-01763

PRESENT: SMITH, J.P., PERADOTTO, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARREN SULLIVAN, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered March 29, 2012. The judgment convicted defendant, upon a jury verdict, of robbery in the third degree and petit larceny.

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 robbery in the third degree (Penal Law § 160.05) and petit larceny (§ 155.25). Defendant contends that the evidence established that he used force to escape from store security personnel rather than for the purpose of retaining stolen property, and thus the evidence is legally insufficient to support his robbery conviction. We reject that contention. The People presented evidence establishing that defendant took items into a fitting room and left the store without paying for any merchandise, holding a bag that appeared larger than it appeared when he had entered the store. When confronted by store security personnel, defendant threatened the use of force and escaped from the mall. Viewing the evidence in the light most favorable to the People, we conclude that "permissible inferences could lead a rational person to the conclusion reached by the jury that defendant used force or at least the threat of force in order to retain control of the [property,] thus satisfying the proof and burden requirements for robbery in the third degree" (*People v Bynum*, 68 AD3d 1348, 1349, *lv denied* 14 NY3d 798; *see People v Gordon*, ___ NY3d ___, ___ [June 12, 2014]).

We further reject defendant's contention that the verdict is against the weight of the evidence. "Given that defendant was in possession of the stolen property while he was engaged in such use of force, the jury was entitled to infer that his purpose in using force

was to retain control of the stolen property, not merely to escape" (*People v Stone*, 45 AD3d 1270, 1271, *lv denied* 9 NY3d 1039 [internal quotation marks omitted]). Thus, 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 generally People v Bleakley*, 69 NY2d 490, 495).

Contrary to defendant's contention, " '[t]he evidence presented at trial . . . consisted of both circumstantial and direct evidence, and thus a circumstantial evidence charge was not required' " (*People v Smith*, 90 AD3d 1565, 1566, *lv denied* 18 NY3d 998; *see People v Daddona*, 81 NY2d 990, 992; *People v Stanford*, 87 AD3d 1367, 1369, *lv denied* 18 NY3d 886).

Contrary to defendant's further contention, the prosecutor did not suggest on summation that defendant had the burden of proof but, even assuming, arguendo, that the prosecutor did so, we conclude that the comment at issue "w[as] not so . . . egregious as to deny defendant a fair trial" (*People v Rogers*, 103 AD3d 1150, 1153-1154, *lv denied* 21 NY3d 946). Indeed, we note in particular that "the court clearly and unequivocally instructed the jury that the burden of proof on all issues remained with the prosecution" (*People v Pepe*, 259 AD2d 949, 950, *lv denied* 93 NY2d 1024; *see People v Page*, 105 AD3d 1380, 1382). Defendant failed to preserve for our review the remainder of his contention concerning alleged prosecutorial misconduct inasmuch as he failed to object to the alleged additional instances of misconduct (*see* CPL 470.05 [2]; *People v Lane*, 106 AD3d 1478, 1480, *lv denied* 21 NY3d 1043) and, in any event, we conclude that "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Jackson*, 108 AD3d 1079, 1080, *lv denied* 22 NY3d 997 [internal quotation marks omitted]).

Finally, defendant's sentence is not unduly harsh or severe.

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

568

CA 13-01811

PRESENT: SMITH, J.P., PERADOTTO, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

ROBERT BISH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ODELL FARMS PARTNERSHIP, DEFENDANT-APPELLANT.

BRIAN P. FITZGERALD, P.C., BUFFALO (DEREK J. ROLLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

LEWIS & LEWIS, P.C., BUFFALO (EMILY F. JANICZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered July 10, 2013. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs, the motion is granted in its entirety, and the complaint is dismissed.

Memorandum: Plaintiff, a cement truck driver, commenced this Labor Law action seeking damages for injuries he sustained while he was cleaning the truck on property owned by defendant, a dairy farm operator. Defendant contracted with plaintiff's employer, a cement supplier, to deliver cement to the farm property for the construction of a bunk silo. On the date of the accident, plaintiff delivered a load of cement to the farm property in a truck owned by his employer. After the truck was unloaded, plaintiff drove the cement truck to an area of the farm property adjoining a ditch in order to wash out the truck. Plaintiff climbed a ladder permanently affixed to the truck and washed out the truck using an attached hose and water tank. As plaintiff was descending the ladder, he slipped on a wet rung and fell backwards into the ditch. As relevant on appeal, defendant moved for summary judgment dismissing the complaint, and Supreme Court granted the motion only in part, denying the motion with respect to the Labor Law § 240 (1) cause of action and the Labor Law § 241 (6) cause of action insofar as it was premised on the violation of 12 NYCRR 23-1.7 (d) (8). We conclude that the court should have granted the motion in its entirety.

It is well settled that Labor Law § 240 (1) "provides rights to certain workers going well beyond the common law . . . [I]t imposes liability even on contractors and owners who had nothing to do with

the plaintiff's accident; and where a violation of the statute has caused injury, any fault by the plaintiff contributing to that injury is irrelevant" (*Dahar v Holland Ladder & Mfg. Co.*, 18 NY3d 521, 524). "The Legislature, however, afforded this protection only to workers 'employed' in the 'erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure' " (*id.* at 524-525; *see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 880). Although "Labor Law § 240 (1) is to be construed as liberally as necessary to accomplish the purpose of protecting workers" (*Wicks v Trigen-Syracuse Energy Corp.*, 64 AD3d 75, 78; *see Martinez v City of New York*, 93 NY2d 322, 325-326), "the language of Labor Law § 240 (1) 'must not be strained' to accomplish what the Legislature did not intend" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 292, quoting *Martinez*, 93 NY2d at 326; *see Wicks*, 64 AD3d at 79).

Here, we agree with defendant that the activity in which plaintiff was engaged at the time of his injury, i.e., the routine cleaning of his employer's cement truck after making a delivery, "was 'not the kind of undertaking for which the Legislature sought to impose liability under Labor Law § 240' " (*Wicks*, 64 AD3d at 79, quoting *Brown v Christopher St. Owners Corp.*, 87 NY2d 938, 939, *rearg denied* 88 NY2d 875; *see Wittmeyer v Holland Cent. Sch. Dist.*, 255 AD2d 921, 921-922, *lv denied* 93 NY2d 801; *Koch v E.C.H. Holding Corp.*, 248 AD2d 510, 511-512, *lv denied* 92 NY2d 811). Specifically, plaintiff "was not engaged 'in the erection, demolition, repairing, altering, painting, cleaning or pointing' of a 'building or structure' within the intended meaning of Labor Law § 240 (1)" (*Gentile v New York City Hous. Auth.*, 228 AD2d 296, 296, *lv dismissed* 89 NY2d 981). Rather, he was "engaged in routine maintenance" of the cement truck, "which is not a protected activity under Labor Law § 240 (1)" (*Pasquale v City of Buffalo*, 255 AD2d 874, 875; *see Selak v Clover Mgt., Inc.*, 83 AD3d 1585, 1586; *Koch*, 248 AD2d at 511-512).

We reject the dissent's view that this case is distinguishable from *Koch* because the plaintiff in that case was "merely a delivery driver" while "there is evidence here that plaintiff operated the machinery of the cement truck to assist in the pouring of the concrete as part of the construction of the silo." Any such distinction, even if supported by the record, is irrelevant to the applicability of Labor Law § 240 (1).

Contrary to the further assertion of the dissent, plaintiff's statement that he would have returned to the farm property with additional cement but for his accident does not raise an issue of fact. Plaintiff admitted that, per "standard procedure," "a cement truck must be washed down after each use to remain functional." Thus, plaintiff's actions in washing out the truck were unrelated to the erection of the silo.

We further agree with defendant that Labor Law § 241 (6) does not apply here because plaintiff "was not engaged in 'construction work' within the meaning of the statute when he fell" (*Koch*, 248 AD2d at 512).

All concur except WHALEN, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent because I disagree with the majority's conclusion that the activity in which plaintiff was engaged, i.e., cleaning his employer's cement truck after making a delivery, was not covered by Labor Law §§ 240 (1) and 241 (6). I therefore would affirm the order denying those parts of defendant's motion with respect to the Labor Law § 240 (1) cause of action and the Labor Law § 241 (6) cause of action insofar as it was premised on the violation of 12 NYCRR 23-1.7 (d) (8).

Specifically, if we view the evidence presented on the motion in the light most favorable to the nonmoving party, as we must (*see Krampen v Foster*, 242 AD2d 913, 914-915), and we construe Labor Law § 240 (1) liberally to accomplish its purpose of protecting workers (*see Panek v County of Albany*, 99 NY2d 452, 456-457), it is clear that there are issues of fact regarding whether plaintiff was engaged in the erection of a building or structure within the meaning of Labor Law § 240 (1). In this case, there is evidence that plaintiff not only drove the truck but also operated its equipment and poured the concrete. Plaintiff testified at his deposition that had he not been injured, he would have delivered additional loads of concrete to the farm for the silo construction project. He also testified that, in order to put a second load of cement in the truck, it had to be washed out after the first load was delivered. This is evidence that plaintiff was on a continuous loop where he would bring a load to defendant's farm, unload it from the truck and then plaintiff would wash out his truck so that he could travel to get another load and return to the farm and repeat the process. There is also evidence that cleaning the truck was an essential part of the erection of the silo because it was required so that plaintiff could continue to bring loads of concrete in order to allow the erection of the silo to continue.

I note that plaintiff's activities in relationship to the project here are different from those of the plaintiff in *Koch v E.C.H. Holding Corp.* (248 AD2d 510, 511, *lv denied* 92 NY2d 811) because the plaintiff there was merely a delivery driver, whereas there is evidence here that plaintiff operated the machinery of the cement truck to assist in the pouring of the concrete as part of the construction of the silo. I note that I do not agree with the trial court's finding that plaintiff was an integral and necessary part of the construction work being performed and therefore was protected under the Labor Law, but I believe there are questions of fact on this issue that require denial of defendant's motion with respect to Labor Law § 240 (1) (*see Zuckerman v City of New York*, 49 NY2d 557, 562).

For the foregoing reasons, I also disagree with the majority's conclusion that Labor Law § 241 (6) does not apply because issues of fact exist regarding whether plaintiff was engaged in " 'construction work' within the meaning of the statute when he fell" (*Koch*, 248 AD2d

at 512).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

569

CA 13-01812

PRESENT: SMITH, J.P., PERADOTTO, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF ROGER D. HENSON, DOING BUSINESS AS TNT TOWING SERVICE, WAYMON HENSON, DOING BUSINESS AS METRO COLLISION, AND WAYMON D. HENSON, INC., DOING BUSINESS AS HENSON'S TOWING SERVICE, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, RESPONDENT-APPELLANT, ET AL., RESPONDENT.

MARY ANNE DOHERTY, CORPORATION COUNSEL, SYRACUSE (ANN MAGNARELLI ALEXANDER OF COUNSEL), FOR RESPONDENT-APPELLANT.

TISDELL, MOORE & WALTER, SYRACUSE (ROBERT L. TISDELL OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered May 1, 2013 in a CPLR article 78 proceeding. The judgment granted the petition and permanently reinstated petitioners to the City of Syracuse's rotational towing list, pending proper notice and a hearing.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul the determination removing them from the rotational towing list of respondent City of Syracuse (City) and to reinstate them to the list until they received proper notice and a hearing. Supreme Court granted the petition, holding that *Henson v City of Syracuse* (147 Misc 2d 1064), which involved the same parties as here, established that petitioners had a property interest in the towing list and could not be removed from it without due process. That was error. Supreme Court erred in determining that collateral estoppel applies and that a property interest existed between petitioners and the City based on *Henson*.

Collateral estoppel "applies only 'if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action' " (*City of New York v Welsbach Elec. Corp.*, 9 NY3d 124, 128; *see Plumley v*

Erie Blvd. Hydropower, L.P., 114 AD3d 1249, 1249).

We conclude that there is no identity of issue here inasmuch as the instant case involves different facts from those in *Henson* (*see Reiss v Maynard*, 129 AD2d 999, 1000, *appeal dismissed* 70 NY2d 748; *cf. Academic Health Professionals Ins. Assn. v Kaleida Health* [appeal No. 2], 305 AD2d 1055, 1056, *appeal dismissed* 100 NY2d 614, *lv dismissed* 100 NY2d 614). In *Henson* (147 Misc 2d at 1065), the City removed petitioners from the rotational towing list because they gave "an unlawful gratuity" to an employee of the Department of Motor Vehicles. In the instant case, the City removed petitioners from the rotational towing list because they charged "extra fees" and because of their attitude toward City police officers. The doctrine of collateral estoppel therefore does not apply (*see Plumley*, 114 AD3d at 1249; *Reiss*, 129 AD2d at 1000). Even assuming, arguendo, that collateral estoppel applies, we note that *Henson* is not controlling because subsequent cases have held that a towing company does not have a "property . . . interest in its inclusion on a municipal rotational tow list that would entitle it to . . . a hearing" (*Matter of Alltow, Inc. v Village of Wappingers Falls*, 94 AD3d 879, 881; *see Matter of Prestige Towing & Recovery, Inc. v State of New York*, 74 AD3d 1606, 1608; *see also Matter of Loyal Tire & Auto Ctr. v New York State Thruway Auth.*, 227 AD2d 82, 85-86, *lv denied* 90 NY2d 804).

We agree with the City that petitioners are not entitled to mandamus relief inasmuch as inclusion or removal from the rotational towing list is discretionary and the City's determination was not irrational, arbitrary, or capricious. "[M]andamus does not lie to enforce the performance of a duty that is discretionary, as opposed to ministerial" (*New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184, *rearg denied* 4 NY3d 882; *see Alltow, Inc.*, 94 AD3d at 880; *Matter of Eck v Mayor of Vil. of Attica*, 28 AD3d 1195, 1196). "[W]hen the issue concerns the exercise of discretion . . . , [t]he courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [internal quotation marks omitted]; *see Prestige Towing & Recovery, Inc.*, 74 AD3d at 1607; *Matter of City of Buffalo [Buffalo Police Benevolent Assn.]*, 13 AD3d 1202, 1203). We conclude upon our review of the record that there was a rational basis for the City's determination, and that the City did not act in an arbitrary or capricious manner in removing petitioners from the towing list (*see Alltow, Inc.*, 94 AD3d at 881; *Prestige Towing & Recovery, Inc.*, 74 AD3d at 1607-1608).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

593

TP 13-02121

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND DEJOSEPH, JJ.

IN THE MATTER OF STEVEN MARCHIONDA AND INTERNATIONAL GROUP, LLC, PETITIONERS,

V MEMORANDUM AND ORDER

INDUSTRIAL BOARD OF APPEALS OF STATE OF NEW YORK, DEPARTMENT OF LABOR, RESPONDENT.

HANDELMAN, WITKOWICZ & LEVITSKY, LLP, ROCHESTER (STEVEN M. WITKOWICZ OF COUNSEL), FOR PETITIONERS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KEVIN M. LYNCH OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [William P. Polito, J.], dated November 27, 2013) to review a determination of respondent. The determination, among other things, imposed a civil penalty against petitioners.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioners commenced this CPLR article 78 proceeding challenging respondent's determination that their former employee was entitled to payment for vacation time that was accrued but unused at the time of the employee's termination. Contrary to petitioners' contention, the payroll records they submitted in response to a request from the Department of Labor did not comply with the statutory requirement that "[e]very employer shall . . . establish, maintain and preserve for not less than three years payroll records showing the hours worked, gross wages, deductions and net wages for each employee" (Labor Law § 195 [former (4)]; *see also* former § 661). At the administrative hearing, petitioners contended that their former employee was not entitled to vacation pay because she had no unused vacation time, but the Department of Labor presented evidence that the former employee had not used all of her vacation time because she had worked extra hours to make up the time for her absences. The payroll records provided by petitioners did not include any information concerning the wages paid to their former employee, and such information was material to the issue under consideration at the administrative hearing. "In view of the petitioners' failure to produce complete and accurate records, [respondent] was entitled to

make just and reasonable inferences and use other evidence to establish" whether petitioners' employees were permitted to work extra hours in order to make up time for any absences that were not attributed to accrued vacation time (*Matter of D & D Mason Contrs., Inc. v Smith*, 81 AD3d 943, 944, *lv denied* 17 NY3d 714; *see generally Matter of Ramirez v Commissioner of Labor of State of N.Y.*, 110 AD3d 901, 901-902; *Matter of Angello v National Fin. Corp.*, 1 AD3d 850, 854).

We further conclude that respondent's determination that the former employee was entitled to payment for her unused vacation time is supported by substantial evidence, i.e. "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180).

Contrary to petitioners' further contentions, respondent "is obligated to impose interest at the statutory rate" (*Matter of Garcia v Heady*, 46 AD3d 1088, 1090, *lv denied* 10 NY3d 705; *see* Labor Law § 219 [1]; Banking Law § 14-a [1]), and "the civil penalty imposed . . . was within the limits set by Labor Law § 218 (1), and . . . was not 'so disproportionate to the underlying offense as to be shocking to one's sense of fairness' " (*Ramirez*, 110 AD3d at 902; *see Garcia*, 46 AD3d at 1090).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

609

KA 12-01628

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL CARL SIMMONS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID R. PANEPINTO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered July 6, 2011. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, criminal sexual act in the first degree (two counts) and sexual abuse 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 two counts of criminal sexual act in the first degree (Penal Law § 130.50 [1]), and one count each of rape in the first degree (§ 130.35 [1]) and sexual abuse in the first degree (§ 130.65 [1]). Defendant failed to preserve for our review his contention that the prosecutor's reason for striking a prospective juror was pretextual, "having failed to raise before [Supreme Court] the specific claim he now raises on appeal" (*People v Ali*, 89 AD3d 1412, 1414, *lv denied* 18 NY3d 881; *see People v Jones*, 284 AD2d 46, 48, *affd* 99 NY2d 264; *People v Holloway*, 71 AD3d 1486, 1486-1487, *lv denied* 15 NY3d 774). In any event, defendant failed to meet his burden of establishing, with respect to the third step of the *Batson* analysis, that the People engaged in the discriminatory use of peremptory challenges (*see Batson v Kentucky*, 476 US 79, 94-98; *People v Hecker*, 15 NY3d 625, 634-635, *cert denied* ___ US ___, 131 S Ct 2117). "Specifically, defense counsel did not compare the challenged juror[] to similarly-situated unchallenged prospective jurors, point to factors in the challenged juror['s] background that made [her] likely to be pro-prosecution, or enunciate any factor that suggested that the prosecutor exercised the challenge[] due to the prospective juror['s]" race (*People v MacShane*, 11 NY3d 841, 842; *see People v Donahue*, 81 AD3d 1348, 1350, *lv denied* 16 NY3d 894).

Defendant further contends that the court was required to excuse, sua sponte, a prospective juror who did not unequivocally state that he could be impartial. "By failing to raise that challenge in the trial court, however, defendant failed to preserve it for our review" (*People v Stepney*, 93 AD3d 1297, 1297-1298, *lv denied* 19 NY3d 968). In any event, "[e]ven assuming, arguendo, that the court erred in [refusing to excuse, sua sponte, the prospective juror] for cause, we conclude that the error does not require reversal because defendant had not exhausted his peremptory challenges and did not peremptorily challenge that prospective juror" (*People v Arguinzoni*, 48 AD3d 1239, 1241, *lv denied* 10 NY3d 859; *see* CPL 270.20 [2]; *People v Irvin*, 111 AD3d 1294, 1295; *People v Brown*, 101 AD3d 1627, 1628). Defendant also contends that he was denied effective assistance of counsel because his attorney failed to exercise a for-cause or peremptory challenge with respect to that prospective juror. Defendant, however, has not met "his burden of showing the absence of a legitimate explanation for th[at] perceived error" (*People v Barboni*, 21 NY3d 393, 407; *see People v Reed*, 115 AD3d 1334, 1336-1337; *Irvin*, 111 AD3d at 1296; *Stepney*, 93 AD3d at 1298).

Finally, the sentence is not unduly harsh or severe.

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

625

CA 13-01671

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

CASSONDRA WILLIAMS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, DEFENDANT,
AND ERIE COUNTY MEDICAL CENTER CORPORATION,
DEFENDANT-RESPONDENT.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (SARAH P. RERA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RICOTTA & VISCO, ATTORNEYS & COUNSELORS AT LAW, BUFFALO (JOHN VISCO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 25, 2013. The order granted the motion of defendant Erie County Medical Center Corporation for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped and fell on water in the dietary corridor of a hospital owned and operated by Erie County Medical Center Corporation (defendant). Defendant entered into a contract with plaintiff's employer to provide food service to the hospital. Plaintiff, as limited by her brief, contends that Supreme Court erred in granting defendant's motion seeking summary judgment dismissing the complaint against it insofar as plaintiff alleges that defendant created the allegedly dangerous condition or had constructive notice of it. We affirm.

Contrary to plaintiff's contention, we conclude that defendant met its initial burden of establishing that it neither created the condition nor had constructive notice thereof, and plaintiff failed to raise a triable issue of fact (*see Costanzo v Woman's Christian Assn. of Jamestown*, 92 AD3d 1256, 1257; *Steele v Lafferty*, 79 AD3d 1802, 1803; *see Wilkowski v Big Lots Stores, Inc.*, 67 AD3d 1414, 1415). With respect to defendant's alleged creation of the condition, defendant submitted evidence that it cleaned the floors of the dietary corridor using an autoscrub machine during the overnight shift preceding plaintiff's accident. When plaintiff arrived at work around 6:30 a.m., she did not notice anything on the floor of the corridor. Defendant also submitted evidence that the dietary corridor is

primarily used by food service workers employed by plaintiff's employer and that, pursuant to the contract between defendant and plaintiff's employer, the latter was solely responsible for cleaning and maintaining the area during the day shift. Plaintiff did not see any water on the floor before she fell at around 9:00 a.m. and, in response to a question at her General Municipal Law § 50-h hearing whether she knew "where the water came from," she testified that she had "no idea". Plaintiff's speculation that an employee of the hospital, as opposed to plaintiff or one of her coworkers, spilled the water at issue is insufficient to raise an issue of fact as to defendant's creation of the condition (*see Costanzo*, 92 AD3d at 1257; *King v Sam's East, Inc.*, 81 AD3d 1414, 1415).

With respect to defendant's alleged constructive notice of the condition, it is well established that "a defect [or dangerous condition] must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant[ ] . . . to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837). Here, defendant met its initial burden of establishing that it did not have constructive notice of the condition by submitting, inter alia, plaintiff's testimony from her section 50-h hearing that she did not see any water on the floor when she walked through the dietary corridor a few minutes prior to her fall (*see Costanzo*, 92 AD3d at 1257). Defendant thus established that the condition "did not exist for a long enough period of time to permit [its] employees . . . to discover and remedy it" (*Gilbert v Evangelical Lutheran Church in Am.*, 43 AD3d 1287, 1288, *lv denied* 9 NY3d 815; *see Costanzo*, 92 AD3d at 1257-1258), and plaintiff failed to raise a triable issue of fact (*see Costanzo*, 92 AD3d at 1258; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

627

KA 11-01145

PRESENT: SCUDDER, P.J., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TOMMY R. JACKSON, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (William D. Walsh, J.), entered March 24, 2011. The order denied the motion of defendant to vacate his sentence pursuant to CPL 440.20.

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

Memorandum: Defendant appeals from an order that denied his motion pursuant to CPL 440.20 seeking to vacate the sentence imposed upon his conviction of, inter alia, burglary in the third degree (Penal Law § 140.20). We previously affirmed the judgment of conviction upon defendant's appeal therefrom (*People v Jackson*, 71 AD3d 1457, *lv denied* 17 NY3d 774). Contrary to defendant's contention, County Court properly adjudicated him a persistent felony offender and, therefore, the sentence is not "unauthorized, illegally imposed or otherwise invalid as a matter of law" (CPL 440.20 [1]). Defendant correctly contends that the persistent felony offender (PFO) statement filed by the court pursuant to CPL 400.20 (3) listed a 1995 conviction, which had been reversed on appeal by this Court (*People v Jackson*, 226 AD2d 1090, *lv denied* 88 NY2d 1021), instead of the 1996 conviction following the retrial (*People v Jackson*, 262 AD2d 1031, *lv denied* 94 NY2d 881). That mistake, however, was corrected in a statement filed by the prosecutor and was addressed at the PFO hearing (*see People v Oliver*, 96 AD2d 1104, 1105-1106, *affd* 63 NY2d 973). We thus conclude that any alleged defect in the notice was harmless "inasmuch as defendant received reasonable notice of the accusations against him and was provided an opportunity to be heard with respect to those accusations during the persistent felony offender proceeding" (*People v Gonzalez*, 61 AD3d 1428, 1429, *lv denied* 12 NY3d 925; *see People v Bouyea*, 64 NY2d 1140, 1142; *see e.g. People v Judd*, 111 AD3d

1421, 1423; *People v Feliciano*, 108 AD3d 880, 882, *lv denied* 22 NY3d 1040; *People v Dawson*, 269 AD2d 867, 868; *People v Rose*, 203 AD2d 115, 115-116, *lv denied* 83 NY2d 971).

Defendant further contends that he was improperly sentenced as a PFO because he did not have a violent criminal history and he has meritorious constitutional challenges to the two predicate convictions. With respect to the constitutionality of the 1988 predicate conviction and defendant's alleged lack of a violent criminal history, defendant failed to raise those contentions in his CPL 440.20 motion and, therefore, they are not properly before us (*see People v Pennington*, 107 AD3d 1602, 1604, *lv denied* 22 NY3d 958).

We have reviewed defendant's remaining contentions and conclude that they lack merit.

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

640

CA 13-01718

PRESENT: SCUDDER, P.J., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF DENNIS H. KINDRED, CHRISTINE C. DELIBERT, ELIZABETH M. ALISANKUS, JANET R. CONNOR, J. GRANT ESLER, MICHAEL J. CAREY AND KARIN STROH, PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MONROE COUNTY AND MONROE COUNTY FAIR AND RECREATION ASSOCIATION, INC., RESPONDENTS-DEFENDANTS-RESPONDENTS.

BANSBACH ZOGHLIN P.C., ROCHESTER (MINDY L. ZOGHLIN OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

MERIDETH H. SMITH, COUNTY ATTORNEY, ROCHESTER (MALLORIE C. RULISON OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT MONROE COUNTY.

HARTER SECREST & EMERY LLP, ROCHESTER (MEGAN K. DORRITIE OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT MONROE COUNTY FAIR AND RECREATION ASSOCIATION, INC.

Appeal from a judgment (denominated judgment/order) of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered July 10, 2013 in a CPLR article 78 proceeding and declaratory judgment action. The judgment dismissed the petition/complaint.

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

Memorandum: Petitioners-plaintiffs (petitioners) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to annul the determination of respondent-defendant Monroe County to permit respondent-defendant Monroe County Fair and Recreation Association, Inc. to operate a four-day agricultural festival in a County-owned park and to vacate the County's negative declaration issued with respect thereto under the State Environmental Quality Review Act ([SEQRA] ECL art 8). Petitioners moved for a temporary restraining order and preliminary injunction enjoining the festival from taking place during the pendency of the litigation. Respondents-defendants (respondents) filed objections in point of law seeking dismissal of the petition/complaint on the ground, inter alia, that petitioners lacked standing. Supreme Court determined that petitioners lacked standing and dismissed the petition/complaint. We affirm.

Where, as here, the proceeding does not involve a "zoning-related issue . . . , there is no presumption of standing to raise a SEQRA challenge" based solely on a party's proximity (*Matter of Save Our Main St. Bldgs. v Greene County Legislature*, 293 AD2d 907, 908, *lv denied* 98 NY2d 609; *see Matter of Sierra Club v Village of Painted Post*, 115 AD3d 1310, 1311; *Matter of Rent Stabilization Assn. of N.Y.C., Inc. v Miller*, 15 AD3d 194, 194-195, *lv denied* 4 NY3d 709). In such a situation, parties seeking to establish standing must establish that the injury of which they complain "falls within the 'zone of interests,' or concerns, sought to be promoted or protected" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773), and that they "would suffer direct harm, injury that is in some way different from that of the public at large" (*id.* at 774; *see Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency*, 76 NY2d 428, 433). Contrary to petitioners' contention, we conclude that the court properly determined that the environmental effects relied on by each petitioner to establish his or her standing are no different in either kind or degree from that suffered by the general public (*see Matter of Powers v De Groodt*, 43 AD3d 509, 513; *Matter of Many v Village of Sharon Springs Bd. of Trustees*, 218 AD2d 845, 845). We further conclude that the alleged environmentally related injuries are too speculative and conjectural to demonstrate an actual and specific injury-in-fact (*see Matter of New York Propane Gas Assn. v New York State Dept. of State*, 17 AD3d 915, 916). Thus, the court did not err in concluding that none of the petitioners has standing (*see Sierra Club*, 115 AD3d at 1312-1313; *Save Our Main St. Bldgs.*, 293 AD2d at 908-909).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

651

KA 11-01221

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, SCONIERS, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES M. BONACCI, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY A. GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered May 13, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the third degree and driving while ability impaired by drugs.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of stolen property in the third degree (Penal Law § 165.50) and driving while ability impaired by drugs ([DWAI] Vehicle and Traffic Law § 1192 [4]). Although defendant "initially made remarks [during the plea allocution] that 'cast significant doubt' on his guilt" on the DWAI charge, "thereby triggering the trial court's duty to conduct a further inquiry to ensure that defendant's plea was knowingly and voluntarily made" (*People v McNair*, 13 NY3d 821, 822-823), we conclude that Supreme Court properly conducted such an inquiry and that "defendant's responses to the court's subsequent questions removed [any] doubt about [his] guilt" (*People v Ocasio*, 265 AD2d 675, 677-678; *see McNair*, 13 NY3d at 823; *People v Stepney*, 273 AD2d 841, 841, *lv denied* 95 NY2d 939). In view of our determination with respect to the DWAI conviction, we reject defendant's further contention that his conviction of criminal possession of stolen property must be reversed because his guilty plea was induced by a sentence promise for both crimes (*see generally People v Pichardo*, 1 NY3d 126, 129).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

657

KA 09-00861

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, SCONIERS, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON S. HALL, DEFENDANT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered April 22, 2009. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him, upon his guilty plea, of burglary in the first degree (Penal Law § 140.30 [2]). By failing to move to withdraw his plea of guilty or to vacate the judgment of conviction, defendant failed to preserve for our review his challenge to the factual sufficiency of the plea allocution (*see People v Lopez*, 71 NY2d 662, 665; *People v Hawkins*, 94 AD3d 1439, 1440, *lv denied* 19 NY3d 974). Contrary to defendant's contention, this case does not fall within the narrow exception to the preservation requirement because nothing in the plea allocution "clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea" (*Lopez*, 71 NY2d at 666; *see People v Moorer*, 63 AD3d 1590, 1590-1591, *lv denied* 13 NY3d 837).

As defendant further contends and the People correctly concede, however, the court erred in failing to determine whether defendant should be afforded youthful offender status. Defendant, an eligible youth, pleaded guilty pursuant to a plea bargain that included a promised sentence. There was no mention during the plea proceedings whether defendant would be adjudicated a youthful offender. "Upon conviction of an eligible youth, the court must order a [presentence] investigation of the defendant. After receipt of a written report of the investigation and at the time of pronouncing sentence the court must determine whether or not the eligible youth is a youthful offender" (CPL 720.20 [1]). The sentencing court must make "a youthful offender determination in every case where the defendant is

eligible, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain" (*People v Rudolph*, 21 NY3d 497, 501; *see People v Scott*, 115 AD3d 1342, 1343; *People v Smith*, 112 AD3d 1334, 1334). We therefore hold the case, reserve decision on any issues not addressed herein, and remit the matter to County Court to make and state for the record "a determination of whether defendant is a youthful offender" (*Rudolph*, 21 NY3d at 503).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

681

KA 13-02182

PRESENT: CENTRA, J.P., LINDLEY, SCONIERS, VALENTINO, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. GUARIGLIA, DEFENDANT-APPELLANT.

NORMAN P. DEEP, ROME, FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (MATTHEW P. WORTH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered March 8, 2012. The judgment convicted defendant, upon a jury verdict, of grand larceny in the fourth degree and burglary in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of grand larceny in the fourth degree (Penal Law § 155.30 [1]) and burglary in the third degree (§ 140.20). The evidence at trial established that defendant, an employee of a pizzeria, gave his keys to the pizzeria and the safe inside to a codefendant who, during the early morning hours, entered the building and stole approximately $3,000 in cash. The evidence further established that defendant drove the codefendant to the pizzeria but stayed in the vehicle while the codefendant went inside, and that the two men then split the proceeds.

We reject defendant's contention that County Court erred in allowing the codefendant to testify at trial that, when defendant suggested that they commit the crime, defendant stated that he and his brother had previously stolen money from another employer in a similar manner. As the court properly determined, evidence of defendant's statement to the codefendant was part of the res gestae, inasmuch as it showed how defendant planned the crime and persuaded the codefendant to assist him (*see generally People v Owens*, 51 AD3d 1369, 1371, *lv denied* 11 NY3d 740; *People v Chavys*, 263 AD2d 964, 965, *lv denied* 94 NY2d 821). In any event, any error with respect to the admission of the codefendant's testimony is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

Defendant further contends that he was deprived of a fair trial

because the People failed to disclose fully the benefits that a prosecution witness received in return for her testimony. The witness in question is defendant's former girlfriend, who at the time of trial had two outstanding warrants from Rome City Court, one for a traffic ticket and the other for a petit larceny charge. The People disclosed prior to trial that in return for her testimony the witness was promised that she would not be taken into custody when she appeared in court to testify and that she would be allowed to turn herself in on the warrants. The day after she testified, the witness appeared in Rome City Court and was released on her own recognizance on both warrants. Defense counsel later learned that the prosecutor had called the Judge in City Court and asked that the witness be released on the warrants. In a subsequent CPL 330.30 motion, defendant contended that he was entitled to a new trial because, among other reasons, the prosecutor did not disclose that the witness had been promised that she would be released on the warrants. In their papers opposing defendant's postverdict motion, the People did not controvert defendant's assertion that the prosecutor contacted the City Court Judge to recommend the witness's release.

Even assuming, arguendo, that the court should have conducted a hearing on defendant's motion to determine whether the prosecutor made undisclosed promises to the witness before she testified (*see* CPL 330.40 [2] [f]; *see generally People v Nicholson*, 222 AD2d 1055, 1056-1057; *People v Tokarski*, 178 AD2d 961, 961), we conclude that the error is harmless beyond a reasonable doubt (*see generally Crimmins*, 36 NY2d at 237). We note that the witness's trial testimony was consistent with a statement she gave to the police and her grand jury testimony, both of which occurred before the People made any promises to her. Moreover, the jurors knew that the witness had been promised that she would not be taken into custody at trial on the warrants, and it is doubtful that their assessment of her credibility would have changed if they had been informed that the prosecutor would recommend that she be released on the warrants once she turned herself in to City Court.

Finally, we reject defendant's remaining contention that he was impermissibly denied his right to confront the same prosecution witness, i.e., his former girlfriend, about her theft of an electronics device from the home of her son's father during a birthday party to which she had been invited (*see generally People v Rivera*, 98 AD3d 529, *lv denied* 20 NY3d 935; *cf. People v Young*, 235 AD2d 441, 445-446, *lv denied* 81 NY2d 895). The court did not allow defense counsel to cross-examine the witness about the underlying facts of the crime because the witness, and apparently the court, were under the misapprehension that the charge was still pending, and thus the court was concerned that defense counsel's questions would implicate the witness's Fifth Amendment rights. As defense counsel determined after the witness testified but before the People rested, however, the witness had pleaded guilty to a lesser offense with respect to the theft and had already been sentenced by the time she testified at defendant's trial. When defense counsel informed the court that the theft charge was no longer pending, the court ruled that defendant could serve the witness with a subpoena and then question her in

detail about the theft. It appears from the motion papers that the prosecutor knew that the petit larceny charge was no longer pending and yet was silent when the court precluded defense counsel from cross-examining the witness due to concerns about her non-existent Fifth Amendment rights, and the People do not explain the prosecutor's conduct in this regard. Nevertheless, because defendant was given the opportunity to have the witness brought back to the stand for further examination but declined to do so, it cannot be said that he was deprived of his right to confront the witness about the petit larceny charge.

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

696

KA 10-01760

PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRONE L. MALONE, DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (JEFFREY WICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered July 19, 2010. The judgment convicted defendant, upon a jury verdict, of attempted criminal sexual act in the first degree and sexual abuse in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, attempted criminal sexual act in the first degree (Penal Law §§ 110.00, 130.50 [4]), defendant contends that he did not knowingly, voluntarily and intelligently waive his right to counsel before proceeding pro se at trial. We reject that contention. It is well settled that, before proceeding pro se, " 'a defendant must make a knowing, voluntary and intelligent waiver of the right to counsel' " (*People v Crampe*, 17 NY3d 469, 481, *cert denied* ___ US ___, 132 S Ct 1746), and we must determine whether he did so by reviewing "the whole record, not simply . . . the waiver colloquy" (*People v Providence*, 2 NY3d 579, 583). When defendant sought to proceed pro se, Supreme Court was required to conduct a " 'searching inquiry' . . . aimed at insuring that the defendant 'was aware of the dangers and disadvantages of proceeding without counsel' " (*id.* 582, quoting *People v Slaughter*, 78 NY2d 485, 492). Based on our review of the court's inquiry, as well as the earlier proceedings in the case, we conclude that defendant knowingly, intelligently and voluntarily waived his right to counsel.

Defendant further contends that his request to proceed pro se was not unequivocal due to his repeated statements that he did not wish to represent himself and that he wanted a new attorney. We reject that contention. Defendant's first attorney was relieved shortly after arraignment due to a conflict of interest arising from defendant's

wish to file a motion pursuant to CPL sections 190.50 (5) and 210.20, and the attorney's stated inability to support that motion. A second attorney was assigned to defendant and, after the second attorney filed and argued, inter alia, the above-referenced motion, defendant indicated that he wanted to proceed pro se with standby counsel, or to have new counsel assigned, on the ground that he was not satisfied with his second attorney's representation. In response, the court assigned a third attorney to represent defendant. Several weeks before the scheduled trial date, defendant again sought permission either to proceed pro se with standby counsel or to have new counsel assigned. The court, indicating its concerns that defendant again would be unable to work with a new assigned attorney and that the trial would be unnecessarily delayed, denied the request. The court, however, ordered an examination of defendant pursuant to CPL article 730, the results of which confirmed that defendant was not an incapacitated person (*see generally* CPL 730.30 [2]). Finally, several days before trial, defendant again sought new counsel, or permission to proceed pro se at trial. At that point, the court questioned defendant regarding his education and experience with trials, explained the procedures that would govern the trial, noted the frequent lack of success experienced by pro se defendants, and denied defendant's request for another new attorney. When the court then asked defendant if he wanted to proceed pro se, defendant initially equivocated and then indicated that he wanted to have new counsel assigned, but when the court subsequently asked him if he wanted to proceed pro se with standby counsel, defendant replied, "[y]eah. I can do that. Yeah." When the court again asked if that was how defendant wanted to proceed, defendant consulted with the third assigned attorney and unequivocally replied "[y]es."

It is well-settled that a "defendant's conditioning of his request for new counsel with a request for self-representation [does] not necessarily render the latter request equivocal" (*People v Gillian*, 8 NY3d 85, 88). Here, based on our review of the record, we conclude that "[t]he fact that defendant's request to proceed pro se had been preceded by an unsuccessful request for new counsel did not render the request equivocal . . . Defendant was not hesitant to represent himself, nor were his requests 'overshadowed' by numerous requests for new counsel, obstreperous demands or severely disruptive behavior" (*People v Lewis*, 114 AD3d 402, 404; *see People v DePonceau*, 96 AD3d 1345, 1346-1347, *lv denied* 19 NY3d 1025; *cf. People v Jackson*, 97 AD3d 693, 694, *lv denied* 20 NY3d 1100).

We also reject defendant's further contention that he was unable to waive his right to counsel by reason of his alleged mental health difficulties. It is well settled that a defendant's mental capacity is just one of many issues that the court must consider in determining whether defendant has intelligently and voluntarily waived his right to counsel (*see People v Stone*, 22 NY3d 520, 527). Here, the court directed that defendant be evaluated pursuant to CPL article 730 before deciding whether to grant his request to proceed pro se, and the results of that evaluation demonstrate that defendant was mentally competent, a factor that weighs in favor of our conclusion that defendant knowingly, voluntarily and intelligently waived his right to

counsel (*see People v Pelto*, 172 AD2d 1027, 1027, *lv denied* 78 NY2d 972; *cf. People v Tafari*, 68 AD3d 1540, 1541-1542; *see generally Stone*, 22 NY3d at 525-527).

Finally, we reject defendant's contention that his poor performance at trial demonstrates that the court erred in granting his request to represent himself. "Regardless of his lack of expertise and the rashness of his choice, defendant could choose to waive counsel [where, as here, the record reflects that] he did so knowingly and voluntarily" (*People v Vivenzio*, 62 NY2d 775, 776). It is well settled that, "even in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice with eyes open" (*People v McIntyre*, 36 NY2d 10, 14 [internal quotation marks omitted]; *see United States ex rel. Maldonado v Denno*, 348 F2d 12, 15 [2d Cir 1965]; *see also Vivenzio*, 62 NY2d at 776).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

704

CAF 13-00133

PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND WHALEN, JJ.

IN THE MATTER OF ANDREA J. MORGIA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

THOMAS E. HORNING, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

LINDA M. CAMPBELL, SYRACUSE, FOR PETITIONER-APPELLANT.

KRYSTAL M. HARRINGTON, ATTORNEY FOR THE CHILD, LOWVILLE.

SCOTT A. OTIS, ATTORNEY FOR THE CHILD, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered December 17, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Memorandum: In these proceedings pursuant to Family Court Act article 6, the parties sought, inter alia, modification of a prior order of custody and visitation. While the appeals herein were pending, Thomas E. Horning, the petitioner in appeal No. 2 and the respondent in appeal Nos. 1, 3 and 4, filed another petition seeking modification of the same order. An order was thereafter entered upon stipulation of the parties, thereby rendering moot the appeals herein (*see Matter of Walker v Adams*, 31 AD3d 1018, 1018; *Matter of Rebecca O. v Todd P.*, 309 AD2d 982, 983).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

705

CAF 13-00134

PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND WHALEN, JJ.

IN THE MATTER OF THOMAS E. HORNING,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ANDREA J. MORGIA, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

LINDA M. CAMPBELL, SYRACUSE, FOR RESPONDENT-APPELLANT.

KRYSTAL M. HARRINGTON, ATTORNEY FOR THE CHILD, LOWVILLE.

SCOTT A. OTIS, ATTORNEY FOR THE CHILD, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered December 17, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Same Memorandum as in *Matter of Morgia v Horning* ([appeal No. 1] ___ AD3d ___ [July 3, 2014]).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

706

CAF 13-00135

PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND WHALEN, JJ.

IN THE MATTER OF ANDREA J. MORGIA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

THOMAS E. HORNING, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

LINDA M. CAMPBELL, SYRACUSE, FOR PETITIONER-APPELLANT.

KRYSTAL M. HARRINGTON, ATTORNEY FOR THE CHILD, LOWVILLE.

SCOTT A. OTIS, ATTORNEY FOR THE CHILD, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered December 17, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Same Memorandum as in *Matter of Morgia v Horning* ([appeal No. 1] ___ AD3d ___ [July 3, 2014]).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

707

CAF 13-00136

PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND WHALEN, JJ.

IN THE MATTER OF ANDREA J. MORGIA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

THOMAS E. HORNING, RESPONDENT-RESPONDENT.
(APPEAL NO. 4.)

LINDA M. CAMPBELL, SYRACUSE, FOR PETITIONER-APPELLANT.

KRYSTAL M. HARRINGTON, ATTORNEY FOR THE CHILD, LOWVILLE.

SCOTT A. OTIS, ATTORNEY FOR THE CHILD, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered December 17, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Same Memorandum as in *Matter of Morgia v Horning* ([appeal No. 1] ___ AD3d ___ [July 3, 2014]).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

740

CA 13-00211

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, VALENTINO, AND DEJOSEPH, JJ.

IN THE MATTER OF STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL C. BASS, A PATIENT IN THE CUSTODY
OF THE OFFICE OF MENTAL HEALTH,
RESPONDENT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an amended order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered December 7, 2012 in a proceeding pursuant to Mental Hygiene Law article 10. The amended order, among other things, adjudged that respondent is a dangerous sex offender requiring confinement.

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

Memorandum: Respondent appeals from an amended order pursuant to Mental Hygiene Law article 10 determining, following a nonjury trial, that he is a dangerous sex offender (*see* § 10.03 [e]) and directing that he be committed to a secure treatment facility. We affirm.

We reject respondent's contention that the use of hearsay by petitioner's experts denied him due process. Supreme Court properly permitted petitioner's experts, two psychologists, to testify about the conduct to which respondent pleaded guilty, his total number of victims, his offense pattern, particular incidents of uncharged child sexual abuse, and his sexual activity while incarcerated inasmuch as the records of such matters were shown to be reliable based on respondent's convictions or his admissions during the interviews with the experts (*see Matter of State of New York v Floyd Y.*, 22 NY3d 95, 109; *see also Matter of State of New York v Anonymous*, 82 AD3d 1250, 1251, *lv denied* 17 NY3d 702; *see generally Matter of State of New York v Wilkes* [appeal No. 2], 77 AD3d 1451, 1452-1453). We note in any event that, in this nonjury trial, the court is " 'presumed to be able to distinguish between admissible evidence and inadmissible evidence [and to abide by the limited purpose of hearsay evidence when

admitted] and to render a determination based on the former' " (*Matter of State of New York v Mark S.*, 87 AD3d 73, 80, *lv denied* 17 NY3d 714).

Respondent further contends that the evidence is not legally sufficient to establish that he requires confinement. We reject that contention. Petitioner's proof consisted of the testimony of its two experts that respondent suffers from pedophilia. Extensive documentary evidence was admitted consisting of, inter alia, respondent's records from the New York State Department of Correctional Services, New York State Office of Mental Health, presentence investigation of probation, and the United States Air Force. Upon our review of the record, we conclude that the experts' testimony and the documentary evidence established by the requisite clear and convincing evidence that respondent "has a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that [he] is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (Mental Hygiene Law § 10.07 [f]; *see Matter of State of New York v Stein*, 85 AD3d 1646, 1648, *affd* 20 NY3d 99, *cert denied* ___ US ___, 133 S Ct 1500). Respondent acknowledged in his brief that this Court in *Stein* previously rejected the contentions, raised by respondent herein, that due process requires proof beyond a reasonable doubt and that the clear and convincing evidence standard of proof is unconstitutional. We perceive no reason to depart from our decision in *Stein*. We also reject respondent's contention that remittal is required for the court to consider the possibility of a "least restrictive alternative" in rendering its disposition inasmuch as there is no such requirement (*see Matter of State of New York v Gooding*, 104 AD3d 1282, 1282, *lv denied* 21 NY3d 862). Finally, respondent's contention that the court's delay in rendering its final determination denied him due process is unpreserved for our review (*see Matter of State of New York v Trombley*, 98 AD3d 1300, 1302, *lv denied* 20 NY3d 856), and we decline to review it in the interest of justice (*see generally Matter of State of New York v Campany*, 77 AD3d 92, 101, *lv denied* 15 NY3d 713).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

743

KA 09-02091

PRESENT: SMITH, J.P., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TEMPLE J. BOGGS, ALSO KNOWN AS TEMPLE MCCOLLOUGH-BOGGS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered August 27, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03) and criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends that the prosecutor's reason for excluding a prospective juror in response to his *Batson* challenge, i.e., that the juror did not seem to understand the point the prosecutor was trying to make or what the prosecutor was "getting at" with a question about irrelevant factual discrepancies in the evidence, was pretextual. According to defendant, the prospective juror was asked a more arduous question in comparison to other prospective jurors. Defendant failed to preserve his contention for our review inasmuch as he failed to articulate to County Court any reason why he believed that the prosecutor's explanation was pretextual (*see People v Cooley*, 48 AD3d 1091, 1092, *lv denied* 10 NY3d 861; *People v Dandridge*, 26 AD3d 779, 779-780, *lv denied* 9 NY3d 1032). In any event, we conclude that defendant's contention is without merit. The court properly determined that the prosecutor provided a race-neutral explanation for excluding the prospective juror (*see People v Tucker*, 22 AD3d 353, 353-354, *lv denied* 6 NY3d 760).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

746

KA 12-01694

PRESENT: SMITH, J.P., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER H. ERON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CAITLIN M. CONNELLY OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered September 7, 2012. The judgment convicted defendant, upon a jury verdict, of aggravated unlicensed operation of a motor vehicle in the first degree and failure to stay within a single lane.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a] [i]), defendant initially contends that County Court erred in denying his motion to suppress his statements and other evidence seized as the result of the allegedly unlawful stop of his vehicle. Contrary to defendant's contention, the court properly denied that motion. Affording great deference to the court's resolution of credibility issues at the suppression hearing (*see generally People v Prochilo*, 41 NY2d 759, 761), we conclude that the record supports the court's finding that the police officer lawfully stopped defendant's car for crossing the white fog line in violation of section 1128 (a) (*see People v Tandle*, 71 AD3d 1176, 1177-1178, *lv denied* 15 NY3d 757; *People v Wohlers*, 138 AD2d 957, 957; *see generally Whren v United States*, 517 US 806, 810; *People v Robinson*, 97 NY2d 341, 348-349).

Defendant failed to preserve for our review his contention that the verdict was inconsistent inasmuch as he failed to object to the alleged inconsistency before the jury was discharged (*see People v Alfaro*, 66 NY2d 985, 987). In any event, we conclude that defendant's contention is without merit (*see generally People v Tucker*, 55 NY2d 1, 6-8, *rearg denied* 55 NY2d 1039).

Defendant also failed to preserve for our review his challenge to the legal sufficiency of the evidence inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that challenge lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crime and traffic infraction as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]) and, here, we see no reason here to disturb the jury's resolution of those issues.

Defendant failed to object when a prosecution witness was permitted to testify while wearing his National Guard uniform, and thus failed to preserve for our review his contention that he was thereby denied due process (*see generally People v Smikle*, 112 AD3d 1357, 1358, *lv denied* 22 NY3d 1141; *People v Caldwell*, 98 AD3d 1272, 1272, *lv denied* 20 NY3d 985). In addition, defendant did not ask that the jury be instructed that the witness was not more credible merely because he was wearing a uniform, and thus he also failed to preserve for our review his contention that the court should have issued such an instruction (*see generally People v Montero*, 100 AD3d 1555, 1556, *lv denied* 21 NY3d 945; *People v Perez*, 89 AD3d 1393, 1394, *lv denied* 18 NY3d 961). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

748

CA 13-02097

PRESENT: SMITH, J.P., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ.

LIMARIE DOMINICCI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS FORD, ET AL., DEFENDANTS.

STATE FARM AUTOMOBILE INSURANCE COMPANY,
APPELLANT.

HISCOCK & BARCLAY, LLP, ROCHESTER (TARA J. SCIORTINO OF COUNSEL), FOR APPELLANT.

PARISI & BELLAVIA, LLP, ROCHESTER (ALBERT PARISI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered June 12, 2013. The order denied the motion of State Farm Automobile Insurance Company to quash a subpoena.

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

Memorandum: This personal injury action arises out of a motor vehicle accident in which a vehicle operated by plaintiff was rear-ended by a vehicle operated by Thomas Ford (defendant). During the course of the litigation, defendant's insurance company, nonparty State Farm Automobile Insurance Company (State Farm), the appellant herein, retained a physician to conduct an independent medical examination of plaintiff on behalf of defendant. Thereafter, plaintiff's counsel served a judicial subpoena duces tecum on State Farm. The subpoena sought, inter alia, production of 1099 forms or other wage statements reflecting payments made by State Farm to the examining physician for the period from 2009 through 2011, as well as bills and invoices related to the litigation received from the examining physician, his staff or business, or from the independent examination processing company.

State Farm moved to quash the subpoena pursuant to CPLR 2304 on the ground that it was plaintiff's intent to use the subpoenaed materials to impeach the examining physician's general credibility. Plaintiff opposed the motion on the ground that she intended to use the subpoenaed documents to cross-examine the examining physician at trial with respect to his bias or interest. Supreme Court denied the motion, and we affirm.

"It is . . . well settled that a motion to quash a subpoena duces tecum should be granted only where the materials sought are utterly irrelevant to any proper inquiry" (*Velez v Hunts Point Multi-Serv. Ctr., Inc*., 29 AD3d 104, 112; *see New Hampshire Ins. Co. v Varda, Inc*., 261 AD2d 135, 135). "Moreover, the burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed" (*Gertz v Richards*, 233 AD2d 366, 366). It is "proper to allow cross-examination of a physician regarding the fact that the defendant's insurance company retained him to examine the plaintiff in order to show bias or interest on the part of the witness" (*Salm v Moses*, 13 NY3d 816, 818, citing *Di Tommaso v Syracuse Univ*., 172 App Div 34, 37, *affd* 218 NY 640). Questions concerning the bias, motive or interest of a witness are relevant and should be "freely permitted and answered" (*see Burke v County of Erie*, 110 AD3d 1461, 1462 [internal quotation marks omitted]; *see Roggow v Walker*, 303 AD2d 1003, 1004) and, thus, plaintiff is entitled to discovery materials that will assist her in preparing such questions. In light of the foregoing, we conclude that the court did not abuse its discretion in denying the motion.

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

762

KA 12-01703

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEJUAN D. JACKSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered September 4, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). Inasmuch as County Court made a determination at the time of sentencing whether defendant should be afforded youthful offender treatment (*cf. People v Rudolph*, 21 NY3d 497, 503), defendant's valid waiver of the right to appeal encompasses his contention that the court erred in denying his request for youthful offender status (*see People v Jones*, 108 AD3d 1213, 1214, *lv denied* 22 NY3d 997; *People v Jones*, 96 AD3d 1637, 1637, *lv denied* 19 NY3d 1103).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

767

KA 12-02311

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD DALLAS, DEFENDANT-APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (SHIRLEY A. GORMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (MELVIN BRESSLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered July 17, 2012. The judgment convicted defendant, upon a nonjury verdict, of predatory sexual assault against a child, assault in the first degree (two counts), assault in the first degree as a sexually motivated felony (two counts) and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of assault in the first degree under counts four and six of the indictment and dismissing those counts, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him of, inter alia, predatory sexual assault against a child (Penal Law § 130.96), two counts of assault in the first degree (§ 120.10 [3], [4]), and two counts of assault in the first degree as a sexually motivated felony (§§ 120.10 [3], [4]; 130.91), all arising from a sexual assault upon a nine-month-old infant girl. Defendant contends that his repeated statements to the police that he wished to leave the police station where he was being interrogated should be viewed as the functional equivalent of a request for an attorney, and that County Court therefore erred in refusing to suppress all of his statements thereafter made to the police. In addition, he contends that the statements were not voluntary based upon alleged deception and coercion by the police officers who questioned him, especially in light of his limited intellect. We reject those contentions.

It is well settled that the right to counsel indelibly attaches when a defendant unequivocally requests an attorney, and he or she may not be questioned further in the absence of an attorney (*see People v Esposito*, 68 NY2d 961, 962). Conversely, where a defendant's request

for an attorney is not unequivocal, the right to counsel does not attach and therefore does not affect the admissibility of the defendant's subsequent statements (*see People v Hicks*, 69 NY2d 969, 970, *rearg denied* 70 NY2d 796). "Whether a particular request is or is not unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding the request[,] including the defendant's demeanor [and] manner of expression[,] and the particular words found to have been used by the defendant" (*People v Glover*, 87 NY2d 838, 839).

Applying that case law to the facts before us, we reject defendant's contention that his statements that he wanted to leave the police station should be deemed a request for an attorney. Most significantly, the police ended their questioning after defendant did in fact indicate that he wished to speak with an attorney. Thus, his contentions on appeal that his mental limitations prevented him from specifically asking for an attorney are belied by his specific request for counsel. Similarly, we reject defendant's contention that, taking into account his mental limitations, deception and coercion by the police were such that his statements were not a "free and unconstrained choice by [their] maker" (*Culombe v Connecticut*, 367 US 568, 602). Inasmuch as defendant never admitted committing any sexual act with the child and eventually exercised his rights and asked for an attorney, we cannot conclude that the "interrogation . . . completely undermined[] defendant's right not to incriminate himself" (*People v Thomas*, 22 NY3d 629, 642). We have considered defendant's remaining contentions with respect to the court's denial of his request to suppress his statements to the police, and we conclude that they are without merit.

Contrary to defendant's further contention, the People established at the suppression hearing that he voluntarily permitted the police to swab his cheek for the purpose of obtaining his DNA for testing purposes, and thus the court properly admitted the DNA test results based thereon in evidence. "[T]he fact that the police officers did not advise the defendant . . . of [his] right to refuse consent does not, by itself, negate the consent otherwise freely given" (*People v Auxilly*, 173 AD2d 627, 628, *lv denied* 78 NY2d 1125; *see People v Osborne*, 88 AD3d 1284, 1285, *lv denied* 19 NY3d 999, *reconsideration denied* 19 NY3d 1104).

Also without merit is defendant's contention that he was denied effective assistance of counsel by several actions or omissions by his attorneys, including their failure to attend his competency evaluation and their failure to object to the introduction of certain evidence. We conclude that "defendant failed to demonstrate that defense counsel lacked a strategic or legitimate explanation for" the actions and omissions that he now contends were required (*People v Williams*, 55 AD3d 1449, 1451, *lv denied* 12 NY3d 789; *see People v Gonzalez*, 62 AD3d 1263, 1265, *lv denied* 12 NY3d 925; *see generally People v Benevento*, 91 NY2d 708, 712). Viewing defense counsels' representation in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v*

Baldi, 54 NY2d 137, 147). We likewise reject defendant's contention that the People failed to establish a proper chain of custody with respect to the items in the rape kit that were admitted in evidence. To the contrary, "[t]he police provided sufficient assurances of the identity and unchanged condition of th[at] evidence . . . , and thus any alleged gaps in the chain of custody went to [its] weight . . . , not its admissibility" (*People v Kennedy*, 78 AD3d 1477, 1478, *lv denied* 16 NY3d 798; *see People v Hawkins*, 11 NY3d 484, 494; *People v Shinebarger*, 110 AD3d 1478, 1479).

Defendant failed to preserve for our review his further contention that he did not knowingly, intelligently and voluntarily waive his right to a jury trial (*see People v Reed*, 15 AD3d 911, 911, *lv denied* 4 NY3d 890; *People v Williams*, 5 AD3d 1043, 1044, *lv denied* 2 NY3d 809). In any event, that contention is without merit inasmuch as "[d]efendant waived his right to a jury trial in open court and in writing in accordance with the requirements of NY Constitution, art I, § 2 and CPL 320.10 (2) . . . , and the record establishes that defendant's waiver was knowing, voluntary and intelligent" (*People v Wegman*, 2 AD3d 1333, 1334, *lv denied* 2 NY3d 747; *see generally People v Smith*, 6 NY3d 827, 828, *cert denied* 548 US 905). Defendant's contentions attributing the underlying reason for the waiver to the convenience or other purposes of his attorneys are outside the record and are properly raised by way of a motion pursuant to CPL article 440 (*see People v Magnano*, 158 AD2d 979, 979, *affd* 77 NY2d 941, *cert denied* 502 US 864).

We agree with defendant, however, that the fourth and sixth counts of the indictment, each charging him with assault in the first degree, must be reversed and dismissed pursuant to CPL 300.30 (4) as inclusory concurrent counts of counts five and seven, each charging him with assault in the first degree as a sexually motivated felony. We therefore modify the judgment accordingly. CPL 300.30 (4) provides in pertinent part that "[c]oncurrent counts are 'inclusory' when the offense charged in one is greater than any of those charged in the others and when the latter are all lesser offenses included within the greater." A crime is a lesser included offense of another where "it is theoretically impossible to commit the greater crime without at the same time committing the lesser . . . [, as] determined by a comparative examination of the statutes defining the two crimes, in the abstract" (*People v Glover*, 57 NY2d 61, 64; *see People v Davis*, 14 NY3d 20, 22-23; *People v Miller*, 6 NY3d 295, 302-303). Here, "defendant could only commit the sexually motivated felon[ies] if it was proven that he had committed the underlying [assaults] and that the [assaults were] committed for his own sexual gratification" (*People v Judware*, 75 AD3d 841, 846, *lv denied* 15 NY3d 853; *see People v Rodriguez*, 97 AD3d 246, 253, *lv denied* 19 NY3d 1028). Thus, the underlying assault counts charging assault in the first degree should have been dismissed as inclusory concurrent counts of the counts charging assault in the first degree as a sexually motivated felony upon defendant's conviction of the latter crime (*see* CPL 300.40 [3] [b]).

Defendant further contends that the conviction of one of the two

counts of assault in the first degree as a sexually motivated felony, i.e., the count pursuant to Penal Law §§ 130.91 and 120.10 (3), is not supported by legally sufficient evidence that he acted under circumstances evincing a depraved indifference to human life, or that he was aware of and disregarded a grave risk of death to the victim. We reject that contention. Here, the court "heard testimony—including medical and forensic proof—that defendant inflicted injuries on a [nine]-month-old child by [forcibly anally sodomizing] the child so brutally as to cause" a series of tears in the exterior of her anus and rectum, and a two-inch tear in her sigmoid colon (*People v Barboni*, 21 NY3d 393, 401). In addition, after defendant told a witness that the infant was "bleeding from the butt" shortly after the incident and the witness advised him to obtain medical care for the child, defendant instead placed sanitary napkins on the infant's posterior and attempted to persuade the infant's mother that nothing was wrong with the infant. It is well settled that, "[i]n light of the child's vulnerability and utter dependence on a caregiver, defendant's post-assault failure to treat the child or report [her] obvious injuries must be considered in assessing whether depraved indifference was shown" (*id.* at 402). The evidence further established the presence of sperm in the infant's peritoneal cavity, in her diaper and on her vagina, with DNA that was consistent with that of defendant. The People also presented expert medical testimony establishing that the sperm could only have entered the infant's peritoneal cavity through the tear in her colon, and that, to a reasonable degree of medical certainty, the tear was caused by the insertion of an adult male penis. "Knowing the brutal origin of the injuries and the force with which they were inflicted makes it much less likely that defendant was holding out hope . . . that the child's symptoms were merely signs of a trivial injury or illness. Thus, contrary to defendant's contention, it is significant that defendant was the actor who had inflicted the injuries in the first place" (*id.*). We therefore conclude that, "[g]iven defendant's knowledge of how the injuries were inflicted and his failure to seek immediate medical attention, either directly or via consultation with his girlfriend . . . , there was sufficient evidence for [the court] to conclude that defendant evinced a wanton and uncaring state of mind" (*id.*).

Furthermore, with respect to the requirement that the People establish recklessness, i.e., that defendant was aware of and consciously disregarded a grave risk of death to the infant (*see* Penal Law §§ 15.05 [3]; 120.10 [3]), we conclude that, "[g]iven the level of force required to inflict these . . . injuries and defendant's attempt to cover up his conduct, the [court] reasonably could have concluded that defendant was aware of an obvious risk of death to the infant" (*People v Maddox*, 31 AD3d 970, 972, *lv denied* 7 NY3d 868), and that he disregarded that risk.

Finally, the sentence is not unduly harsh or severe.

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

777

CA 13-01005

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

DAVID GREEN AND CHRISTINE GREEN,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

WALTER HALL, M.D., ET AL., DEFENDANTS,
AND DONALD J. BLASKIEWICZ, M.D.,
DEFENDANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOTTAR LEONE, PLLC, SYRACUSE (AARON J. RYDER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered April 10, 2013. The order denied the motion of defendant Donald J. Blaskiewicz, M.D. for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion of defendant Donald J. Blaskiewicz, M.D. is granted and the complaint against him is dismissed.

Memorandum: In this action seeking damages for injuries allegedly arising from medical malpractice and lack of informed consent, Donald J. Blaskiewicz, M.D. (defendant) appeals from an order that, inter alia, denied his motion for summary judgment dismissing the complaint against him. We agree with defendant that Supreme Court erred in denying the motion.

It is well settled that a "resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene" (*Soto v Andaz*, 8 AD3d 470, 471; *see Wulbrecht v Jehle*, 92 AD3d 1213, 1214). Here, in support of his motion, defendant submitted evidence establishing that defendant Walter Hall, M.D., the supervising physician, conducted the initial meeting with plaintiff David Green, the patient. Defendant also submitted evidence establishing that Dr. Hall supervised defendant throughout all of the surgeries involved, reviewed all notes that defendant wrote, determined which surgical method would be used, decided to discontinue the first operation to

obtain further information about the cyst or tumor that was to be excised, and decided to perform the subsequent operations. Furthermore, "[a]lthough the evidence demonstrated that [defendant] played an active role in [Dr. Hall's] procedure, it did not demonstrate the exercise of independent medical judgment" by defendant (*Soto*, 8 AD3d at 471; *see Muniz v Katlowitz*, 49 AD3d 511, 514). We conclude that defendant met his initial burden by establishing that he implemented a course of treatment created by Dr. Hall that was not " 'so clearly contraindicated by normal practice that ordinary prudence require[d] inquiry into the correctness' " of that treatment (*Cook v Reisner*, 295 AD2d 466, 467; *see Costello v Kirmani*, 54 AD3d 656, 657), and plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Contrary to plaintiffs' contention, the fact that defendant could not independently recall the details of the operations or his part in them does not require a different result. On a motion for summary judgment, a defendant may meet his or her burden "by submitting a defendant physician's affidavit or affirmation describing the facts in specific detail and opining that the care provided did not deviate from the applicable standard of care" (*Cole v Champlain Val. Physicians' Hosp. Med. Ctr.*, 116 AD3d 1283, 1285). Here, defendant's affidavit and deposition testimony, along with the deposition testimony of the attending physician establishing the details of the operations at issue, were sufficient "to rebut the claim of malpractice by establishing that [defendants] complied with the accepted standard of care" (*id.*).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

779

CA 13-01790

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

APRIL M. WILLIAMS,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

CHARLES A. FASSINGER AND CITY OF SYRACUSE,
DEFENDANTS-APPELLANTS-RESPONDENTS.
(APPEAL NO. 1.)

MARY ANNE DOHERTY, CORPORATION COUNSEL, SYRACUSE (ANN M. ALEXANDER OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

GREENE & REID, PLLC, SYRACUSE (EUGENE W. LANE OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered May 3, 2013. The order denied the motion of plaintiff and cross motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendants' cross motion and dismissing the complaint and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when her vehicle collided at an intersection with a police vehicle owned by defendant City of Syracuse (City) and operated by defendant Charles A. Fassinger, a police officer employed by the City (hereafter, defendant officer). Plaintiff thereafter moved for partial summary judgment on liability, i.e., negligence and serious injury, and defendants cross-moved for summary judgment dismissing the complaint on the ground that they are afforded qualified immunity by Vehicle and Traffic Law § 1104 (e). By the order in appeal No. 1, Supreme Court denied the motion and the cross motion. Plaintiff moved, and the City cross-moved, for leave to reargue. By the order in appeal No. 2, the court granted that part of plaintiff's motion seeking summary judgment on the issue of serious injury, apparently on stipulation of the parties, but otherwise denied the motion and further denied the City's cross motion for leave to reargue. We note at the outset that we dismiss the City's appeal from the order in appeal No. 2 inasmuch as the order denying the cross motion for leave to reargue is not appealable (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984).

With respect to appeal No. 1, we agree with defendants that the applicable standard of liability is reckless disregard for the safety of others as set forth in Vehicle and Traffic Law § 1104 (e) (*see generally Criscione v City of New York*, 97 NY2d 152, 157-158). At the time of the collision, defendant officer was responding to a police call and was therefore operating an authorized emergency vehicle while involved in an emergency operation (*see* §§ 101, 114-b; *Criscione*, 97 NY2d at 157-158; *Hughes v Chiera*, 4 AD3d 872, 873). We further conclude that, by failing to yield the right of way while attempting to execute a left turn at a green light, defendant officer was "engage[d] in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b)" (*Kabir v County of Monroe*, 16 NY3d 217, 220), i.e., he was "exercis[ing one of] the privileges set forth in" the statute at the time of the accident (§ 1104 [a]; *see Kabir*, 16 NY3d at 223; *Dodds v Town of Hamburg*, 117 AD3d 1428, ____).

We further conclude that defendants established as a matter of law that defendant officer's conduct did not rise to the level of reckless disregard for the safety of others (*see Szczerbiak v Pilat*, 90 NY2d 553, 556-557), and that plaintiff failed to raise a triable issue of fact in opposition to the cross motion (*see Herod v Mele*, 62 AD3d 1269, 1270, *lv denied* 13 NY3d 717; *Hughes*, 4 AD3d at 873; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Defendant officer testified that, as he was approaching the intersection in a southbound direction, the only traffic he observed was a line of northbound vehicles waiting to turn left. When he reached the intersection, he stopped for a "few seconds" to ensure that the intersection was clear. Defendant officer testified that he could see a distance of approximately three car lengths in the right northbound lane and that he did not see any traffic in that lane when he started his turn. He then "cre[pt] into the intersection, making sure . . . nobody was passing on the right of the vehicles stopped to make a left." Plaintiff similarly testified that there was a line of cars in the northbound lane preparing to turn left, that she "veered to the right" around the line of cars in order to proceed straight through the intersection, and that the accident occurred in the intersection. We thus conclude that, "[g]iven the evidence of precautions taken by [defendant officer] before he attempted his [left] turn, . . . he did not act with 'conscious indifference' to the consequences of his actions" (*Green v State of New York*, 71 AD3d 1310, 1312, quoting *Saarinen v Kerr*, 84 NY2d 494, 501; *see Dodds*, 117 AD3d at ____). We therefore modify the order in appeal No. 1 by granting defendants' cross motion for summary judgment dismissing the complaint.

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

780

CA 13-01791

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

APRIL M. WILLIAMS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES A. FASSINGER, DEFENDANT,
AND CITY OF SYRACUSE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MARY ANNE DOHERTY, CORPORATION COUNSEL, SYRACUSE (ANN M. ALEXANDER OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREENE & REID, PLLC, SYRACUSE (EUGENE W. LANE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), dated July 15, 2013. The order, among other things, denied the cross motion of defendant City of Syracuse for leave to reargue.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Same Memorandum as in *Williams v Fassinger* ([appeal No. 1] ___ AD3d ___ [July 3, 2014]).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

784

TP 14-00101

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

IN THE MATTER OF WILLIAM MCKETHAN, PETITIONER,

V ORDER

DAVID STALLONE, SUPERINTENDENT, CAYUGA CORRECTIONAL FACILITY, RESPONDENT.

WILLIAM MCKETHAN, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered January 14, 2014) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

785

KA 13-01142

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN C. JOHNSON, ALSO KNOWN AS KEVIN JOHNSON,
DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO 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 May 21, 2013. The judgment convicted defendant, upon his plea of guilty, of failure to register a change of internet accounts.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of failure to register a change of internet accounts (Correction Law § 168-f [4]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

787

KA 13-01844

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD EAST, JR., DEFENDANT-APPELLANT.

LOTEMPIO & BROWN, P.C., BUFFALO (MICHAEL H. KOOSHOIAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered June 28, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed and the matter is remitted to Supreme Court, Erie County, for proceedings pursuant to CPL 460.50 (5).

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We reject defendant's contention that the police lacked probable cause to stop his vehicle. It is well settled that a traffic stop is lawful where "a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation" (*People v Robinson*, 97 NY2d 341, 349; *see People v Binion*, 100 AD3d 1514, 1515, *lv denied* 21 NY3d 911). Here, the police had probable cause to stop defendant's vehicle because one of the officers observed him driving a motor vehicle and holding a cell phone to his ear while the vehicle was in motion (*see* Vehicle and Traffic Law § 1225-c [2] [a], [b]; *People v Nunez*, 82 AD3d 1128, 1129, *lv denied* 16 NY3d 898). Shortly after defendant exited the vehicle, one of the officers observed a handgun in plain view by the driver's seat of the vehicle, providing probable cause to arrest defendant (*see People v Johnson*, 114 AD3d 1132, 1132).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

788

KA 13-00201

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD KESICK, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered December 12, 2012. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of grand larceny in the third degree (Penal Law § 155.35 [1]), defendant contends that his waiver of the right to appeal is invalid. We reject that contention. County Court "engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice . . . , and the record establishes that defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Blurts*, 114 AD3d 1272, 1273, *lv denied* 22 NY3d 1197 [internal quotation marks omitted]; *see People v Lopez*, 6 NY3d 248, 256; *People v Hicks*, 89 AD3d 1480, 1480-1481, *lv denied* 18 NY3d 924). We thus conclude that "[the plea colloquy and the written waiver of the right to appeal signed [and acknowledged in court] by defendant demonstrate that [he] knowingly, intelligently and voluntarily waived the right to appeal" (*People v Caleche*, 94 AD3d 1418, 1419, *lv denied* 19 NY3d 959; *see People v Pulley*, 107 AD3d 1560, 1561, *lv denied* 21 NY3d 1076; *People v Ramsey*, 105 AD3d 1448, 1449, *lv denied* 21 NY3d 1019).

Contrary to defendant's further contention, the valid waiver of the right to appeal encompasses his challenge to the severity of the sentence, including the imposition and amount of restitution, the terms of which were made a part of the plea agreement (*see Lopez*, 6 NY3d at 255; *People v Graves*, 96 AD3d 1466, 1466, *lv denied* 19 NY3d

1026; *People v Butler*, 81 AD3d 1465, 1465, *lv denied* 17 NY3d 805).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

790

CA 13-00936

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

IN THE MATTER OF GABRIEL PENABLE,
PETITIONER-APPELLANT,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered April 22, 2013 in a CPLR article 78 proceeding. The judgment dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Robles v Evans*, 100 AD3d 1455, 1455).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

792

CA 13-00905

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

IN THE MATTER OF RAVI KUMAR,
PETITIONER-APPELLANT,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered April 22, 2013 in a CPLR article 78 proceeding. The judgment dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Robles v Evans*, 100 AD3d 1455, 1455).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

793

CA 13-00403

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND DEJOSEPH, JJ.

IN THE MATTER OF GERALD BROCKINGTON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered January 23, 2013 in a CPLR article 78 proceeding. The judgment denied the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding challenging the denial of his application for release to parole supervision in June 2011. The Attorney General has advised this Court that, subsequent to that denial and during the pendency of this appeal, petitioner reappeared before the Board of Parole in June 2013 and was again denied release. Consequently, this appeal must be dismissed as moot (*see Matter of Sanchez v Evans*, 111 AD3d 1315, 1315; *Matter of Robles v Evans*, 100 AD3d 1455, 1455). Contrary to petitioner's contention, the exception to the mootness doctrine does not apply (*see Sanchez*, 111 AD3d at 1315; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

795

TP 14-00004

PRESENT: SMITH, J.P., CENTRA, CARNI, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF GEORGE BROWN, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered December 26, 2013) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the amended petition is dismissed.

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

797

KA 13-01684

PRESENT: SMITH, J.P., CENTRA, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BARRY BOEKHOUT, JR., DEFENDANT-APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (RICHARD W. YOUNGMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered May 30, 2013. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

799

KA 13-01194

PRESENT: SMITH, J.P., CENTRA, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MELISA NUNEZ, ALSO KNOWN AS MELISSA NUNEZ,
DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered May 20, 2013. The judgment convicted defendant, upon her plea of guilty, of driving while intoxicated, a class E felony, and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of, inter alia, felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [2]; 1193 [1] [c] [i]). Contrary to defendant's contention, County Court did not abuse its discretion in sentencing her to, among other things, a three-year conditional discharge that required her to install and maintain an ignition interlock device. "Penal Law § 65.05 (3) (a) requires that the period of the conditional discharge in the case of a felony shall be three years, while Vehicle and Traffic Law § 1193 (1) (c) (iii) requires that the ignition interlock device condition shall be for a period not less than six months but not exceeding the duration of the conditional discharge, and the court complied with those statutes" (*People v Marvin*, 108 AD3d 1109, 1109; *see People v Beyrau* [appeal No. 1], 115 AD3d 1240, 1240).

We also reject defendant's contention that the court erred in concluding that she is able to pay the costs associated with installing and maintaining the ignition interlock device. A defendant "who claims financial inability to pay for the device shall submit in advance of sentencing three copies of his or her financial disclosure report" (9 NYCRR 358.8 [b]). Here, defendant failed to submit the requisite financial disclosure report, and the record otherwise fails

to support her contention that she is unable to pay the cost of installing and maintaining the device. In addition, her contention is speculative at this time inasmuch as she has not yet been released from prison and thus has not yet had to bear those costs. Furthermore, if defendant is unable to pay those costs after her release from prison, pursuant to Vehicle and Traffic Law § 1198 (5), she may seek relief from them pursuant to CPL 420.10 (5).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

800

KA 12-02113

PRESENT: SMITH, J.P., CENTRA, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAKOTA W. BARNES, ALSO KNOWN AS "KNEES,"
DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered July 13, 2010. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). As the People correctly concede, Supreme Court erred in failing to determine whether defendant, an apparently eligible youth, was eligible for youthful offender status. Indeed, there was no mention at the plea proceeding whether he would be afforded youthful offender treatment. "Upon conviction of an eligible youth, the court must order a [presentence] investigation of the defendant. After receipt of a written report of the investigation and at the time of pronouncing sentence the court must determine whether or not the eligible youth is a youthful offender" (CPL 720.20 [1]). A sentencing court must determine whether to grant youthful offender status to every defendant who is eligible for it because, inter alia, "[t]he judgment of a court as to which young people have a real likelihood of turning their lives around is just too valuable, both to the offender and to the community, to be sacrificed in plea bargaining" (*People v Rudolph*, 21 NY3d 497, 501).

We therefore hold the case, reserve decision and remit the matter to Supreme Court to make and state for the record a determination

whether defendant should be afforded youthful offender status.

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

801

CA 13-01081

PRESENT: SMITH, J.P., CENTRA, CARNI, VALENTINO, AND WHALEN, JJ.

BERTRAM PAYNE, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 115204.)

BERTRAM PAYNE, CLAIMANT-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered April 2, 2013. The order denied the motion of claimant for a default judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at the Court of Claims.

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

802

CA 13-00915

PRESENT: SMITH, J.P., CENTRA, CARNI, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF STEVON MCFADDEN,
PETITIONER-APPELLANT,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JEFFREY W. LANG OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered April 24, 2013 in a CPLR article 78 proceeding. The judgment dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Ansari v Travis*, 9 AD3d 901, *lv denied* 3 NY3d 610).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

804

KA 13-01549

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEONTE J. BRINSON, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered January 3, 2013. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree (two counts), robbery in the first degree (two counts), criminal mischief in the third degree and grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, two counts of burglary in the first degree (Penal Law § 140.30 [3], [4]) and two counts of robbery in the first degree (§ 160.15 [3], [4]) in connection with a home invasion robbery. Contrary to the contention of defendant, the record establishes that his waiver of the right to appeal was knowing, intelligent and voluntary (*see People v Lopez*, 6 NY3d 248, 256), and that valid waiver encompasses his contention concerning the severity of the sentence (*see id.*).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

809

KA 13-01147

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL J. KOLATA, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (KELLY M. BALCOM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered April 8, 2013. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and remitting the matter to Cattaraugus County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of driving while intoxicated ([DWI] Vehicle and Traffic Law § 1192 [2]). We agree with defendant that he was denied due process at sentencing when County Court imposed a sentence based on defendant's postplea arrest without determining that "the information upon which it [was basing] the sentence [was] reliable and accurate" (*People v Outley*, 80 NY2d 702, 712; *see generally People v Fiammegta*, 14 NY3d 90, 97-98). As a preliminary matter, we note that defendant's due process challenge is not encompassed by the waiver of the right to appeal (*see generally People v Peck*, 90 AD3d 1500, 1501).

The record establishes that, during the plea colloquy, the court informed defendant that the maximum sentence for DWI is a fine of $5,000 and an indeterminate term of imprisonment of 1⅓ to 4 years, but that the court would also consider the lesser alternatives of a sentence of probation or a referral to "drug court." The court further informed defendant that, "as long as you show up for [ ]sentencing and don't get into trouble again, I won't go over [1 to 3] years if I were to incarcerate you." On the day of sentencing, the court noted that, two weeks after defendant's plea of guilty, defendant was arrested in the Town of Allegany and charged with a violation and a class A misdemeanor. The court thereafter imposed on defendant a term of imprisonment, rather than one of the lesser

alternatives it had previously mentioned, based upon defendant's postplea arrest. The record is clear that the court based its determination to impose a term of imprisonment solely on the information contained in the presentence report that defendant had been arrested and charged with the violation and misdemeanor. Notably, in response to the court's inquiry concerning "what was happening" with that matter, defense counsel responded that he did not represent defendant on the matter and that it was still pending in local court. Thus, we conclude that, in imposing a term of imprisonment, the court erred in relying on the " 'mere fact' " that defendant had been arrested (*Fiammegta*, 14 NY3d at 97), and that it failed to "carry out an inquiry of sufficient depth to satisfy itself that there was a legitimate basis" for defendant's arrest (*id.* at 98; *cf. People v Semple*, 23 AD3d 1058, 1059-1060, *lv denied* 6 NY3d 852; *People v Lighthall*, 6 AD3d 1170, 1171, *lv denied* 3 NY3d 643). We therefore vacate the sentence and remit the matter to County Court for a determination whether there was a legitimate basis for the postplea arrest and for such further proceedings as may be necessary thereafter.

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

810

KA 12-01867

PRESENT: SCUDDER, P.J., PERADOTTO, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUAN CASTRO, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 14, 2011. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree, attempted murder in the second degree and assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), defendant contends that Supreme Court erred in failing to follow the requirements of CPL article 730 to determine whether he was competent to stand trial at the time his case was presented to the grand jury (*see* CPL 730.30 [1]). We reject that contention. The record establishes that the court granted defense counsel's request for a "forensic examination" of defendant by ordering only an informal psychological examination and not by issuing an order of examination pursuant to CPL article 730. We conclude that "[t]he decision of the court to order an informal psychological examination was within its discretion . . . and 'did not automatically require the court to issue an order of examination or otherwise comply with CPL article 730' " (*People v Brown*, 277 AD2d 972, 972, *lv denied* 96 NY2d 732; *see People v Johnson*, 252 AD2d 967, 968, *affd* 92 NY2d 976; *People v Ortiz*, 46 AD3d 1409, 1409, *lv denied* 10 NY3d 769). We further conclude that the sentence is not unduly harsh or severe.

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

812

KA 13-01143

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES R. POLEUN, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Niagara County Court (Matthew J. Murphy, III, J.), dated May 23, 2013. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Defendant failed to preserve for our review his contention that County Court's acceptance of his waiver of appearance constituted a violation of due process (*see People v Wall*, 112 AD3d 900, 901; *see also People v Warrington*, 19 AD3d 881, 882; *see generally People v Charache*, 9 NY3d 829, 830). In any event, we conclude that defendant's right to due process was not violated. Defendant waived his right to be present at the SORA hearing when he informed the court in writing that he did not wish to appear. Defendant also signed a written waiver of that right, in which he " 'was advised of the hearing date, of the right to be present at the hearing, and that the hearing would be conducted in his . . . absence' " (*People v Ensell*, 49 AD3d 1301, 1301, *lv denied* 10 NY3d 715; *see People v Brooks*, 308 AD2d 99, 104, *lv denied* 1 NY3d 502).

Contrary to defendant's further contention, we conclude that the court properly granted the People's request for an upward departure from the presumptive level two risk, which was based on defendant's score on the risk assessment instrument, and assessed him as a level three risk. An upward departure is warranted where, as here, "there exists an aggravating . . . factor of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines" (*People v Zimmerman*, 101 AD3d 1677, 1678 [internal

quotation marks omitted]; *see People v Abraham*, 39 AD3d 1208, 1209). The record establishes that defendant was convicted of two misdemeanors involving inappropriate conduct towards children previously unknown to him prior to his conviction of possessing a sexual performance by a child (Penal Law § 263.16). In addition, defendant admitted that he took into his home two "runaways" who later accused him of rape, and that his prior places of employment included places frequented by children, such as roller skating rinks, video game arcades, and child-themed restaurants. We therefore conclude that "the risk of repeat offense is high and there exists a threat to the public safety" (Correction Law § 168-*l* [6] [c]), thereby warranting the upward departure to a level three risk (*see People v Ryan*, 96 AD3d 1692, 1693, *lv dismissed* 20 NY3d 929; *People v DeBiaso*, 49 AD3d 1280, 1281, *lv denied* 10 NY3d 711).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

813

CAF 13-01036

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, SCONIERS, AND WHALEN, JJ.

IN THE MATTER OF MELISSA A. FERRUSI,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SHARIFF K. JAMES, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

EMILY A. VELLA, SPRINGVILLE, FOR RESPONDENT-APPELLANT.

SOUTHERN TIER LEGAL SERVICES, A DIVISION OF LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., OLEAN (JESSICA L. ANDERSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

WENDY A. TUTTLE, ATTORNEY FOR THE CHILD, ALLEGANY.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered May 24, 2013 in a proceeding pursuant to Family Court Act article 8. The order determined that respondent violated the terms of an order of protection.

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

Memorandum: Petitioner mother commenced this proceeding pursuant to Family Court Act article 8 alleging that respondent father willfully violated an order of protection directing him to stay away from the mother and the parties' child except during scheduled visitation. In appeal No. 1, the father appeals from an order finding, inter alia, that the mother met her burden of establishing the allegations in the petition and, in appeal No. 2, the father appeals from an order committing him to a jail term of six months, to be served consecutively to a jail term imposed upon his violation of a prior order of protection. Contrary to respondent's contention in appeal No. 1, the mother established by clear and convincing evidence that the father willfully violated the terms of the order of protection (*see Matter of Ferrusi v James*, 108 AD3d 1083, 1083; *Matter of Mary Ann YY. v Edward YY.*, 100 AD3d 1253, 1254). With respect to the order in appeal No. 2, the father's challenge to the commitment is moot inasmuch as it has expired by its own terms (*see Ferrusi*, 108 AD3d at 1083), and we therefore dismiss the appeal from that order.

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

814

CAF 13-01037

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, SCONIERS, AND WHALEN, JJ.

IN THE MATTER OF MELISSA A. FERRUSI,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SHARIFF K. JAMES, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

EMILY A. VELLA, SPRINGVILLE, FOR RESPONDENT-APPELLANT.

SOUTHERN TIER LEGAL SERVICES, A DIVISION OF LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., OLEAN (JESSICA L. ANDERSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

WENDY A. TUTTLE, ATTORNEY FOR THE CHILD, ALLEGANY.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered May 24, 2013 in a proceeding pursuant to Family Court Act article 8. The order committed respondent to jail for two consecutive six month terms.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Same Memorandum as in *Matter of Ferrusi v James* ([appeal No. 1] ___ AD3d ___ [July 3, 2014]).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

815

TP 14-00108

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND VALENTINO, JJ.

IN THE MATTER OF JERRY GARRETT, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered January 15, 2014) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

816

TP 14-00287

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND VALENTINO, JJ.

IN THE MATTER OF WILLIAM STEELE, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered January 30, 2014) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

817

KA 13-01181

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER E. ROBINSON, DEFENDANT-APPELLANT.

WILLIAM G. PIXLEY, ROCHESTER, FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered June 7, 2013. The judgment convicted defendant, upon his plea of guilty, of rape 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 his plea of guilty of rape in the first degree (Penal Law § 130.35 [3]). Although defendant did not waive the right to appeal and thus his challenge to the severity of the sentence is properly before us (*see generally People v Lopez*, 6 NY3d 248, 255; *People v Hidalgo*, 91 NY2d 733, 737), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

819

KA 13-00251

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARGARET D. MARRERO, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (ROBERT TUCKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JASON A. MACBRIDE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered January 2, 2013. The judgment convicted defendant, upon her plea of guilty, of criminal possession of stolen property in the fourth degree, grand larceny in the fourth degree, and possession of burglar's tools.

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

Memorandum: Defendant appeals from a judgment convicting her upon a plea of guilty of, inter alia, grand larceny in the fourth degree (Penal Law §§ 20.00, 155.30 [1]). Defendant's challenge to the factual sufficiency of the plea with respect to that count is unpreserved for our review inasmuch as she did not move to withdraw her plea or to vacate the judgment of conviction on that ground (*see* CPL 470.05 [2]; *People v Williams*, 91 AD3d 1299, 1299; *see generally People v Lopez*, 71 NY2d 662, 665). This case does not fall within the narrow exception to the preservation requirement because the plea colloquy did not "clearly cast[] significant doubt upon the defendant's guilt or otherwise call[] into question the voluntariness of the plea" (*Lopez*, 71 NY2d at 666). We decline to exercise our power to review defendant's challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

820

KA 12-01918

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM P. OLIVER, DEFENDANT-APPELLANT.

WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (MARIO J. GUTIERREZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM P. OLIVER, DEFENDANT-APPELLANT PRO SE.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (NATHAN J. GARLAND OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered August 16, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). We reject defendant's contention in his main brief that the sentence is unduly harsh and severe. By pleading guilty, defendant waived the contention in his pro se supplemental brief that count three of the indictment is barred by the statute of limitations (*see People v Parilla*, 8 NY3d 654, 659; *see generally* CPL 210.20 [1] [f]). Defendant's further contention in his pro se supplemental brief that he was improperly denied the opportunity to participate in the judicial diversion program set forth in CPL 216.05 is not preserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

824

TP 14-00134

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND VALENTINO, JJ.

IN THE MATTER OF CONSTANTINE JACKSON, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered December 26, 2013) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

826

KA 13-00651

PRESENT: SMITH, J.P., CARNI, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LATEEK DAVIS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (RYAN JAMES MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

LATEEK DAVIS, DEFENDANT-APPELLANT PRO SE.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (NATHAN J. GARLAND OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered February 28, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and, in appeal No. 2, he appeals from a judgment that also convicted him upon his plea of guilty of that crime. In both appeals, defendant contends in a pro se supplemental brief that he was denied effective assistance of counsel based on his attorney's failure to file motions or investigate the crime. Defendant's contention that he was denied effective assistance of counsel survives his guilty pleas only to the extent that "he contends that his plea[s were] infected by the allegedly ineffective assistance and that he entered the plea[s] because of his attorney's allegedly poor performance" (*People v Bethune*, 21 AD3d 1316, 1316, *lv denied* 6 NY3d 752; *see People v Jacques*, 79 AD3d 1812, 1812, *lv denied* 16 NY3d 896). With respect to defendant's contention that he was forced to plead guilty because defense counsel failed to file motions, the record reflects that defense counsel, with defendant's consent, repeatedly requested adjournments of the date for filing motions in order to pursue plea negotiations. " '[I]t is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712,

quoting *People v Rivera*, 71 NY2d 705, 709). Here, particularly in light of the evidence in the record establishing that defense counsel delayed in filing motions in order to arrange a plea agreement in accordance with defendant's wishes, we conclude that defendant failed to meet that burden (*see People v Elamin*, 82 AD3d 1664, 1665, *lv denied* 17 NY3d 794; *People v Jacobs*, 52 AD3d 1182, 1184, *lv denied* 11 NY3d 926). Further, to the extent that defendant contends that defense counsel was ineffective in failing to investigate the crimes, we note that such contention is based on matters outside the record and thus is not reviewable on direct appeal (*see People v Cobb*, 72 AD3d 1565, 1567, *lv denied* 15 NY3d 803; *People v Washington*, 39 AD3d 1228, 1230, *lv denied* 9 NY3d 870).

Contrary to defendant's contention in his main brief, his sentence is not unduly harsh or severe.

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

827

KA 13-00653

PRESENT: SMITH, J.P., CARNI, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LATEEK DAVIS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (RYAN JAMES MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

LATEEK DAVIS, DEFENDANT-APPELLANT PRO SE.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (NATHAN J. GARLAND OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered February 28, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Same Memorandum as *People v Davis* ([appeal No. 1] ___ AD3d ___ [July 3, 2014]).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

828

KA 13-00829

PRESENT: SMITH, J.P., CARNI, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH W. HOUGHTON, JR., DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered April 24, 2013. The judgment convicted defendant, upon his plea of guilty, of reckless endangerment in the first degree and attempted assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of reckless endangerment in the first degree (Penal Law § 120.25) and attempted assault in the second degree (§§ 110.00, 120.05 [3]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

829

KA 11-00853

PRESENT: SMITH, J.P., CARNI, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

STANLEY WRIGHT, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN MCDERMOTT OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered March 7, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

830

KA 13-00801

PRESENT: SMITH, J.P., CARNI, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JON C. MARTIN, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Niagara County Court (Sara S. Farkas, J.), dated March 21, 2013. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, the nearly six-year delay in rendering a risk classification determination did not deny him due process and was not " 'so outrageously arbitrary as to constitute gross abuse of governmental authority' " (*People v Wilkes*, 53 AD3d 1073, 1074, *lv denied* 11 NY3d 710). Contrary to defendant's related contentions, County Court did not misapply the relevant case law, and vacatur of his risk classification is not warranted under the facts and circumstances of this case (*cf. People v Gregory*, 71 AD3d 1559, 1560).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

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

831

KA 13-01178

PRESENT: SMITH, J.P., CARNI, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT D. SCOTT, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), dated May 28, 2013. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). Contrary to defendant's contention, County Court properly agreed with the recommendation of the Board of Examiners of Sex Offenders that an upward departure from the presumptive risk level was warranted based upon aggravating factors not taken into account by the risk assessment guidelines, i.e., those relating to his risk of re-offense. Contrary to defendant's contention, the court properly concluded that the guidelines did not adequately take into account his lack of insight into the inappropriateness of his conduct (*see People v Cruz*, 111 AD3d 685, 685-686, *lv denied* 22 NY3d 860), and that defendant's California felony conviction, while not a "sex offense" under SORA (*see* § 168-a [2] [d] [i], [ii]), nevertheless had a sexual component (*see People v Faver*, 113 AD3d 662, 663, *lv denied* 22 NY3d 865; *People v Galindo*, 107 AD3d 603, 604). In addition, the evidence supports the court's conclusion that those factors are causally related to defendant's risk of re-offense (*see People v Abraham*, 39 AD3d 1208, 1209). Finally, we conclude that defendant received effective assistance of counsel at the SORA hearing (*see People v Russell*, 115 AD3d 1236, 1236).

Entered: July 3, 2014

Frances E. Cafarell
Clerk of the Court

MOTION NOS. (153-154/96) KA 05-01122. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER YOUNG, DEFENDANT-APPELLANT. (APPEAL NO. 1.) KA 05-01123. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER YOUNG, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for summary reversal denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND LINDLEY, JJ. (Filed July 3, 2014.)

MOTION NO. (1648/06) KA 04-02967. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CLEOTIS MERCER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY AND WHALEN, JJ. (Filed July 3, 2014.)

MOTION NO. (176/10) KA 08-01386. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TOMMY ESQUERDO, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, WHALEN, AND DEJOSEPH, JJ. (Filed July 3, 2014.)

MOTION NO. (199/10) KA 06-03648. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DEGLOYDE POLES, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, WHALEN, AND DEJOSEPH, JJ. (Filed July 3, 2014.)

MOTION NO. (247/11) KA 99-02223. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTHONY SHERROD, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed July 3, 2014.)

MOTION NO. (1173/13) TP 13-00534. -- IN THE MATTER OF EDDIE ORTIZ, PETITIONER, V CHARLES KELLY, JR., SUPERINTENDENT, MARCY CORRECTIONAL FACILITY AND BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS. -- Motion for reargument of the appeal is granted to the extent that, upon reargument, the memorandum and order entered November 15, 2013 (111 AD3d 1411) is amended by deleting the ordering paragraph and substituting the following ordering paragraph: "It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed." The memorandum and order is further amended by deleting the second paragraph of the memorandum and substituting the following paragraph: "We note at the outset that petitioner's contentions concerning the court's dismissal of his declaratory judgment causes of action are not properly before this Court in the context of this transferred proceeding pursuant to CPLR 7804 (g), and petitioner has not perfected an appeal from the order and judgment to bring those contentions properly before us (*see* CPLR 5525 *et seq*.). We note in addition that, although an appeal from an order and judgment is 'deemed abandoned and dismissed . . . when an appellant has failed to perfect [the] appeal within nine months of service of the notice of appeal' (22 NYCRR 1000.12 [b]), 'a motion to vacate the dismissal may be made within one year of the date of the dismissal' (22 NYCRR 1000.13 [g])." PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND WHALEN, JJ. (Filed July 3, 2014.)

MOTION NO. (36/14) CA 13-00808. -- ACEA MOSEY, AS ADMINISTRATOR OF THE

ESTATE OF LAURA CUMMINGS, DECEASED, PLAINTIFF-APPELLANT, V COUNTY OF ERIE, DEFENDANT-RESPONDENT. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ. (Filed July 3, 2014.)

MOTION NO. (42/14) CA 13-00809. -- ACEA MOSEY, AS ADMINISTRATOR OF THE ESTATE OF LAURA CUMMINGS, DECEASED, PLAINTIFF-APPELLANT, V TIMOTHY B. HOWARD, ERIE COUNTY SHERIFF, DEFENDANT-RESPONDENT. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ. (Filed July 3, 2014.)

MOTION NO. (199/14) CA 13-01511. -- DANIELLE DOWNIE, PLAINTIFF-RESPONDENT, V SHAWN T. MCDONOUGH, DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND WHALEN, JJ. (Filed July 3, 2014.)

MOTION NO. (262/14) CA 13-01366. -- BRIAN HYATT, PLAINTIFF-APPELLANT, V DANIEL YOUNG, DOING BUSINESS AS CY CONSTRUCTION, DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ. (Filed July 3, 2014.)

MOTION NO. (305/14) CA 13-00761. -- IN THE MATTER OF RICCELLI ENTERPRISES,

INC., ET AL., PETITIONERS-PLAINTIFFS-RESPONDENTS, V STATE OF NEW YORK WORKERS' COMPENSATION BOARD AND ROBERT E. BELOTEN, AS CHAIRMAN OF THE WORKERS' COMPENSATION BOARD, RESPONDENTS-DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND WHALEN, JJ. (Filed July 3, 2014.)

MOTION NO. (372/14) CA 13-01632. -- DAVID SMALLEY AND JUDITH SMALLEY, PLAINTIFFS-APPELLANTS, V HARLEY-DAVIDSON MOTOR COMPANY, INC., AND STAN'S HARLEY-DAVIDSON, INC., DEFENDANTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed July 3, 2014.)

MOTION NO. (405/14) KA 12-00445. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD F. MILLS, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., FAHEY, PERADOTTO, SCONIERS, AND VALENTINO, JJ. (Filed July 3, 2014.)

MOTION NO. (480/14) CA 13-01415. -- IN RE: EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION. LARRY P. LANG AND BARBARA LANG, PLAINTIFFS-RESPONDENTS, V CRANE CO., ROPER PUMP COMPANY, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. -- Motions for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, SCONIERS, AND VALENTINO, JJ. (Filed July 3, 2014.)

MOTION NO. (510.1/14) KA 13-00253. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DANIEL JONES, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, SCONIERS, AND VALENTINO, JJ. (Filed July 3, 2014.)

KA 11-02526. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL CRUZ, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon a jury verdict of grand larceny in the third degree (Penal Law § 155.35 [1]). Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38), alleging that no issues are presented that would merit relief on appeal. Upon our review of the record, we find that nonfrivolous issues exist as to the sufficiency of the evidence at trial and as to whether defendant was deprived of the opportunity to testify before the grand jury. We therefore relieve counsel of his assignment and assign new counsel to brief these issues, as well as any other issues that counsel's review of the record may disclose. (Appeal from Judgment of Cattaraugus County Court, Terrence M. Parker, J. - Grand Larceny, 3rd Degree). PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed July 3, 2014.)

KA 13-01065. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FRANKLIN LEONARD, ALSO KNOWN AS FRANK BROWN, DEFENDANT-APPELLANT. -- Resentence unanimously affirmed. Counsel's motion to be relieved of assignment

granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Resentence of Supreme Court, Monroe County, Joseph D. Valentino, J. - Robbery, 2nd Degree). PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed July 3, 2014.)

KA 11-00096. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOHN ROCKWELL, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon his guilty plea of aggravated driving while intoxicated as a felony (Vehicle and Traffic Law §§ 1192 [2-a]; 1193 [1] [c] [i]), and was sentenced to an indeterminate term of imprisonment of one to three years and a $1000 fine, and a consecutive term of five years probation. Defendant's assigned appellate counsel has moved to be relieved of the assignment on the ground that there are no nonfrivolous issues for appeal (*see People v Crawford*, 71 AD2d 38). Upon our review of the record, we conclude that a nonfrivolous issue exists as to whether the court erroneously imposed a more severe sentence than that bargained for without affording defendant the opportunity to withdraw his plea (*see People v Lafferty*, 60 AD3d 1318). We therefore relieve counsel of her assignment and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from Judgment of Livingston County Court, Dennis S. Cohen, J. - Felony Driving While Intoxicated). PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed July 3, 2014.)

KA 13-01478. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V AMEER WALKER, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Supreme Court, Erie County, Penny M. Wolfgang, J. - Robbery, 1st Degree). PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed July 3, 2014.)