
# *SUPREME COURT OF THE STATE OF NEW YORK*

## *APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT*

DECISIONS FILED

FEBRUARY 8, 2013

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. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

**294/12**

**CA 11-02068**

PRESENT: CENTRA, J.P., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

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MICHEL D. TYSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LAWRENCE NAZARIAN, DEFENDANT-RESPONDENT.

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PARISI & BELLAVIA, ROCHESTER (TIMOTHY C. BELLAVIA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BURGIO, KITA & CURVIN, BUFFALO (HILARY C. BANKER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered August 15, 2011 in a personal injury action. The order and judgment granted the motion of defendant for summary judgment, dismissed the complaint and denied the motion and cross motion of plaintiff for summary judgment. The order and judgment was affirmed by order of this Court entered June 8, 2012 (96 AD3d 1349), and the Court of Appeals on December 18, 2012 modified the order by denying the motion of defendant for summary judgment and remitted the case to this Court for further proceedings in accordance with the memorandum (___ NY3d ___ [Dec. 18, 2012]).

Now, upon remittitur from the Court of Appeals,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the order and judgment so appealed from is unanimously modified on the law by granting that part of plaintiff's "motion and cross motion" for partial summary judgment on the issue of defendant's negligence and as modified the order and judgment is affirmed without costs.

Memorandum: On remittitur from the Court of Appeals, we are called upon to address plaintiff's contention that she is entitled to partial summary judgment on the issue of defendant's negligence. On this record, it is undisputed that defendant made a left-hand turn in his vehicle, in front of plaintiff's vehicle. The driver in the lane closest to defendant had stopped to give defendant the opportunity to turn, but defendant could not or did not see plaintiff's vehicle in the outer lane. When defendant executed the turn, he collided with plaintiff's vehicle, which was traveling straight through the intersection with the right-of-way. Plaintiff likewise did not see defendant's vehicle until it was too late to stop without a collision. Thus, the evidence establishes as a matter of law that defendant was

negligent and that his negligence was the sole proximate cause of the accident (*see Rogers v Edelman*, 79 AD3d 1803, 1804; *Guadagno v Norward*, 43 AD3d 1432, 1433). We therefore modify the order and judgment by granting that part of plaintiff's "motion and cross motion" for partial summary judgment on the issue of defendant's negligence.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**1304**

**KA 10-02450**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERRY JOSLYN, SR., DEFENDANT-APPELLANT.

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

JASON L. COOK, DISTRICT ATTORNEY, PENN YAN (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered November 9, 2010. The judgment convicted defendant, upon a jury verdict, of grand larceny in the fourth degree and falsely reporting an incident 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 a jury verdict of grand larceny in the fourth degree (Penal Law § 155.30 [7]), for trading a rifle that had been placed in his possession for safe keeping, and falsely reporting an incident in the third degree (§ 240.50 [3] [a]), for falsely reporting a burglary to cover up the larceny. Defendant contends that the evidence is legally insufficient to support his conviction inasmuch as his testimony that he was on pain medication that caused memory loss and confusion demonstrated that he lacked the requisite intent to commit the charged crimes. Defendant failed to preserve that contention for our review (*see People v Gray*, 86 NY2d 10, 19), and in any event his contention lacks merit. "[V]iewing the evidence in the light most favorable to the prosecution" (*People v Contes*, 60 NY2d 620, 621), we conclude that a rational jury could have found that, despite defendant's alleged intoxication, defendant intended to " 'deprive [the victim] of [his rifle] or to appropriate the same' " (*People v Jennings*, 69 NY2d 103, 118, quoting § 155.05 [1]; *see generally People v Bleakley*, 69 NY2d 490, 495) and knowingly made a false report (*see generally* § 240.50). Additionally, although a different result would not have been unreasonable (*see People v Danielson*, 9 NY3d 342, 348), we conclude that, viewing the evidence in light of the element of intent as charged to the jury (*see id.* at 349), the verdict with respect to that element is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that County Court erred in granting the prosecutor's motion in limine seeking to preclude defense counsel from impeaching the People's witnesses upon cross-examination with certain prior arrests and traffic infractions. Defense counsel, however, waived that contention when he confirmed that he had no objection to the court's ruling (*see generally People v Graham*, 292 AD2d 824, 824, *lv denied* 98 NY2d 697). With respect to defendant's contention that the prosecutor's cross-examination of him exceeded the scope of direct examination, we note that, "in a criminal case, a party may prove through cross-examination any relevant proposition, regardless of the scope of direct examination" (*People v Sanders*, 2 AD3d 1420, 1420-1421 [internal quotation marks omitted]).

Finally, we reject defendant's contention that he was denied effective assistance of counsel. Although defendant contends that defense counsel was ineffective because he did not oppose the prosecutor's in limine motion, " '[a] defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success' " (*People v Harris*, 97 AD3d 1111, 1111-1112, *lv denied* 19 NY3d 1026, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Additionally, " 'it 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), and here defendant failed to meet that burden (*see People v Rogers*, 70 AD3d 1340, 1340, *lv denied* 14 NY3d 892, *cert denied* ___ US___, 131 S Ct 475). Instead, "the evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of representation, reveal that [defense counsel] provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**1314**

**CA 11-01907**

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

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OLGA KNOPE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GERARD S. KNOPE, DEFENDANT-APPELLANT.

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THE ODORISI LAW FIRM, EAST ROCHESTER (TERRENCE C. BROWN-STEINER OF COUNSEL), FOR DEFENDANT-APPELLANT.

ALEXANDER KOROTKIN, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered March 17, 2011. The judgment, inter alia, awarded maintenance to plaintiff.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts and the law by providing that maintenance shall terminate six years from the date on which the action was commenced and as modified the judgment is affirmed without costs.

Memorandum: Defendant husband appeals from a judgment of divorce that, inter alia, incorporated the decision and order of the Matrimonial Referee (Referee) appointed to hear and determine the issues concerning the grounds for the divorce and spousal maintenance. Defendant contends that Supreme Court erred in awarding nondurational maintenance to plaintiff wife. We agree.

Although "[a]s a general rule, the amount and duration of maintenance are matters committed to the sound discretion of the trial court" (*Boughton v Boughton*, 239 AD2d 935, 935), "the authority of this Court in determining issues of maintenance is as broad as that of the trial court" (*Reed v Reed*, 55 AD3d 1249, 1251). Here, we conclude that the record does not support an award of nondurational maintenance to plaintiff. Specifically, the record does not support the Referee's finding that defendant signed an Immigration and Nationalization Form I-864 (I-864 affidavit) providing that "he would be completely liable for the plaintiff's support once she had obtained a visa which allowed her to enter the United States." Although at the hearing before the Referee defendant admitted signing an affidavit of support in connection with plaintiff's visa application, he explicitly denied that it was an I-864 affidavit, as suggested by plaintiff. Moreover, plaintiff never produced a signed affidavit setting forth the nature of defendant's obligation, and thus we conclude that the record does

not support the Referee's finding that defendant signed an I-864 affidavit.

Additionally, the record does not support the Referee's finding that plaintiff was "unable to work to support herself financially," now or at any point in the future. At the hearing, plaintiff testified that she suffered from certain medical conditions that prevented her from being able to work or to seek job training in the United States, including dizziness, depression, stress, constant tinnitus, and a complete loss of hearing in one ear. Although a person seeking maintenance may submit "general testimony" regarding a medical condition where the effect of that condition on the person's "ability to work is readily apparent without the necessity of expert testimony" (*Battinelli v Battinelli*, 174 AD2d 503, 504), that is not the case here. Thus, plaintiff was required to submit medical records or expert testimony, which she failed to do. Instead, plaintiff offered a letter from the Social Security Administration that referenced another letter allegedly declaring that plaintiff would have been eligible for disability benefits if she was a United States citizen. "[A] decision of the Social Security Administration [may serve] as some evidence" of a disability, but it is not prima facie evidence thereof (*Matter of Frenke v Frenke*, 267 AD2d 238, 238). Here, there is no decision in the record, and the letter submitted by plaintiff only references a decision. That letter did not indicate the nature, extent or permanence of plaintiff's disability, or the basis for the alleged determination by the Social Security Administration that plaintiff was disabled. Further, the Referee's finding that plaintiff's inability to speak English prevented her from seeking employment is belied by plaintiff's testimony, much of which was in English despite the instructions of the Referee that she testify in Russian and use an interpreter. Thus, based on the statutory factors, including the short duration of the marriage and plaintiff's age, education and job skills, we conclude that plaintiff is entitled to maintenance for a period of six years (*see* Domestic Relations Law § 236 [B] [6] [a]). We therefore modify the judgment accordingly.

We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**1331**

**KA 11-00278**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMARIO S. QUINN, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered October 6, 2010. The judgment convicted defendant, upon a nonjury verdict, of grand larceny in the third degree, falsifying business records in the first degree (two counts), grand larceny in the fourth degree and offering a false instrument for filing in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reversing that part convicting defendant of offering a false instrument for filing in the first degree under count eight of the indictment and dismissing that count of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of one count each of grand larceny in the third degree (Penal Law § 155.35 [1]) and grand larceny in the fourth degree (§ 155.30 [1]), and two counts each of falsifying business records in the first degree (§ 175.10) and offering a false instrument for filing in the first degree (§ 175.35). At the outset, we note that defendant failed to preserve for our review his contention that counts seven and eight of the indictment, charging him with offering a false instrument for filing, are multiplicitous (*see* CPL 470.05 [2]). We nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]) and, as the People correctly concede, we conclude that defendant's contention has merit. An indictment "is multiplicitous when a single offense is charged in more than one count" (*People v Alonzo*, 16 NY3d 267, 269) and, here, those counts are multiplicitous because they are based on the same instrument and that instrument was offered for filing only once. We therefore modify the judgment accordingly.

Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction of offering a false instrument for filing under count seven of the indictment because in his motion for a trial order of dismissal he asserted only that there was no showing that a false instrument was filed (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit because "there is [a] valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by [the factfinder] on the basis of the evidence at trial" (*People v Bleakley*, 69 NY2d 490, 495). Moreover, we reject defendant's further contentions that the verdict is against the weight of the evidence insofar as he was found guilty of offering a false instrument for filing in the first degree under count seven and grand larceny in the fourth degree under count six. Viewing the evidence in light of the elements of those crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). We have considered defendant's remaining contentions and conclude that none requires reversal or further modification of the judgment.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**1336**

**CA 12-00483**

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

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BAISCH, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE PIKE COMPANY, INC., DEFENDANT-APPELLANT.

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PHILLIPS LYTLE LLP, ROCHESTER (MARK J. MORETTI OF COUNSEL), FOR DEFENDANT-APPELLANT.

PIRRELLO, MISSAL, PERSONTE & FEDER, ROCHESTER (STEVEN E. FEDER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered June 8, 2011. The order denied the motion of defendant for partial summary judgment on its counterclaim.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, amounts allegedly owed under a construction contract, and defendant asserted a counterclaim for breach of contract based, inter alia, on plaintiff's alleged failure to perform in a timely manner and to provide adequate labor and materials. Supreme Court properly denied defendant's motion for partial summary judgment on liability on that counterclaim. With respect to plaintiff's alleged untimely performance, we note that, "[w]hen a contract does not specify time of performance, the law implies a reasonable time" (*Savasta v 470 Newport Assoc.*, 82 NY2d 763, 765, *rearg denied* 82 NY2d 889). "What constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case" (*id.*). Here, the contract states that "[t]ime is of the essence as to the prosecution of the [plaintiff's] Work," and thus the failure to perform in a timely manner would constitute a material breach (*see Wilkinson v Hoelscher*, 163 AD2d 819, 819). The contract does not, however, specify a time for performance. Although reference is made to a "Schedule of Work," the record does not contain any such schedule, nor is there other evidence of what would be a reasonable time. Thus, "th[e] issue cannot be determined as a matter of law on this record" (*O'Brien & Gere Ltd. v NextGen Chem. Processes, Inc.*, 87 AD3d 1277, 1278; *see Lake Steel Erection v Egan*, 61 AD2d 1125, 1126, *lv dismissed* 44 NY2d 848).

Similarly, there is an issue of fact whether plaintiff failed to

provide adequate labor and material precluding summary judgment (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). With respect to labor, the contract specifies that plaintiff shall "supply sufficient properly-skilled workmen," but defendant's repeated statements that the project was understaffed are insufficient to establish a breach of that contractual requirement as a matter of law. Indeed, there is no evidence of the number of workers present and the number necessary to complete the various tasks that plaintiff was required to perform. We reject defendant's further contention that it established as a matter of law that plaintiff failed to provide equipment in the quantity and quality required by the contract. Although plaintiff admitted that it did not have any pumps on site, there is no evidence in the record that defendant gave plaintiff notice that its equipment was not of adequate quantity or quality or that it gave plaintiff the opportunity to cure required by the contract (*see J.J. Juliano Constr. v Burgio & Campofelice*, 273 AD2d 921, 921).

Furthermore, defendant did not establish as a matter of law plaintiff's abandonment of the contract, i.e., an " 'unqualified and clear refusal to perform with respect to the entire contract' " so as to constitute an anticipatory repudiation of the contract (*O'Connor v Sleasman*, 37 AD3d 954, 956, *lv denied* 9 NY3d 806). Defendant sent an intent-to-terminate letter giving plaintiff 48 hours to cure alleged breaches on the day before plaintiff "walked off the job." Defendant has not demonstrated that it was possible for plaintiff to cure within that time period, and defendant's employee testified that the parties were in negotiations to resolve their disputes. In this context, plaintiff's actions did not rise to an unequivocal refusal to perform the whole of the contract at any time (*see id.*). Finally, to the extent that certain of defendant's arguments are raised for the first time on appeal, those contentions are not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**1342**

**CA 12-01021**

PRESENT: FAHEY, J.P., CARNI, LINDLEY, AND SCONIERS, JJ.

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RICHARD BIANCHI, ANGELO BIANCHI AND JOSEPH ERRIGO, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MIDTOWN REPORTING SERVICE, INC., DOING BUSINESS AS MIDTOWN REPORTING SERVICE, DEFENDANT-APPELLANT.

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ERNSTROM & DRESTE, LLP, ROCHESTER (TIMOTHY D. BOLDT OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCHIANO LAW OFFICE, P.C., ROCHESTER (CHARLES A. SCHIANO, SR., OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered March 12, 2012. The order denied the motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendant's motion in part and dismissing the first cause of action and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action alleging the breach of a partnership agreement and fraud, and seeking an accounting with respect to a court reporting business that operated as Midtown Reporting Service. We reject defendant's contention that Supreme Court erred in denying that part of its motion for summary judgment dismissing the causes of action alleging breach of a partnership agreement and seeking an accounting. Although defendant is correct in asserting that "a joint venture may not be carried on by individuals *through* a corporate form" (*Weisman v Awnair Corp. of Am.*, 3 NY2d 444, 449), that principle set forth in *Weisman* "has been qualified" (*Blank v Blank*, 222 AD2d 851, 852), and thus defendant is not entitled to judgment as a matter of law. Where, as here, "there is no written partnership agreement between the parties, the court must determine whether a partnership in fact existed from the conduct, intention, and relationship between the parties" (*Czernicki v Lawniczak*, 74 AD3d 1121, 1124). "In deciding whether a partnership exists, the factors to be considered are the intent of [those individuals] (express or implied), whether there was joint control and management of the business, whether there was a sharing of the profits as well as a sharing of the losses[ ] and whether there was a combination of

property, skill or knowledge . . . No one factor is determinative; it is necessary to examine the . . . relationship as a whole" (*Griffith Energy, Inc. v Evans*, 85 AD3d 1565, 1565 [internal quotation marks omitted]). Based on this record, we conclude that there are issues of fact whether a partnership existed and, if so, whether the partnership agreement was breached. Given those issues of fact, plaintiffs likewise have a viable cause of action for an accounting (*see generally Bouley v Bouley*, 19 AD3d 1049, 1051).

We agree with defendant, however, that the court erred in denying that part of its motion with respect to the first cause of action, for fraud. We therefore modify the order accordingly. To prevail on a cause of action for fraud, plaintiffs must prove "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff[s] and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559; *see Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421). Defendant met its initial burden of establishing its entitlement to judgment as a matter of law with respect to the cause of action for fraud, and plaintiffs failed to raise an issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**1362**

**CA 12-00458**

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

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JANNETTE MORALES, PLAINTIFF,

V MEMORANDUM AND ORDER

ASARESE MATTERS COMMUNITY CENTER, ET AL.,
DEFENDANTS,
CITY OF BUFFALO, DEFENDANT-RESPONDENT,
AND COUNTY OF ERIE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (BEVERLEY S. BRAUN OF COUNSEL), FOR DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (HUGH M. RUSS, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered July 11, 2011. The order, insofar as appealed from, denied that part of the motion of defendant County of Erie for summary judgment on its contractual indemnification cross claim against defendant City of Buffalo.

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

Same Memorandum as in *Morales v Asarese Matters Community Ctr.* ([appeal No. 2] ___ AD3d ___ [Feb. 8, 2013]).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**1363**

**CA 12-00459**

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

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JANNETTE MORALES, PLAINTIFF,

V MEMORANDUM AND ORDER

ASARESE MATTERS COMMUNITY CENTER, ET AL.,
DEFENDANTS,
CITY OF BUFFALO PARKS AND RECREATION
DEPARTMENT, CITY OF BUFFALO,
DEFENDANTS-RESPONDENTS,
AND COUNTY OF ERIE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (BEVERLEY S. BRAUN OF COUNSEL), FOR DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (HUGH M. RUSS, III, OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered January 9, 2012. The order, insofar as appealed from, granted that part of the motion of defendants City of Buffalo Parks and Recreation Department and City of Buffalo for summary judgment dismissing the cross claims of defendant County of Erie.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion of defendants City of Buffalo Parks and Recreation Department and City of Buffalo seeking summary judgment dismissing defendant County of Erie's cross claim for contractual indemnification and reinstating that cross claim, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained in a near-drowning incident at a pool owned by defendant City of Buffalo (City), which was located in one of the City's parks. At the time of the incident, the City and defendant County of Erie (County) were parties to an agreement pursuant to which the County agreed to operate and manage the City's parklands (contract). The County asserted two cross claims in its answer, including a cross claim for contractual indemnification against the City based on an indemnification provision contained in the contract. In appeal No. 1, the County appeals from an order insofar as it denied that part of the County's motion for summary judgment on the cross claim for contractual indemnification. In appeal No. 2, as limited by

its brief, the County appeals from an order insofar as it granted that part of the motion of the City and defendant City of Buffalo Parks and Recreation Department (City defendants) for summary judgment dismissing the County's cross claim for contractual indemnification.

The County contends that Supreme Court erred in denying its motion and granting the City defendants' motion with respect to the cross claim for contractual indemnification because the contract unambiguously provides that the City is required to indemnify it against any claims, including those based upon the County's negligence. In order to establish entitlement to summary judgment in a case involving the interpretation of a contract, a party "has the burden of establishing that the construction it favors is the only construction which can fairly be placed thereon" (*Arrow Communication Labs. v Pico Prods.*, 206 AD2d 922, 923 [internal quotation marks omitted]; *see Kibler v Gillard Constr. Inc.*, 53 AD3d 1040, 1042). We conclude that, in this case, both the County and the City failed to establish that their own construction is the only reasonable construction of the contract and that, instead, there is an ambiguity whether the indemnification provision requires the City to indemnify the County against claims based upon the County's alleged acts of negligence. Because the " 'determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence,' the issue is one of fact for the trier of fact and cannot be resolved as a matter of law" (*Brinson v Kulback's & Assoc.*, 296 AD2d 850, 852, quoting *Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 172). Thus, in appeal No. 1, we conclude that the court properly denied that part of the County's motion for summary judgment with respect to its cross claim for contractual indemnification. In appeal No. 2, however, we agree with the County that the court erred in granting that part of the City defendants' motion seeking summary judgment dismissing the County's cross claim for contractual indemnification, and we therefore modify the order accordingly.

The City defendants contend, as an alternative ground for affirmance (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546), that General Obligations Law § 5-322.1 (1) renders the indemnification provision unenforceable. We reject that contention. General Obligations Law § 5-322.1 (1) is inapplicable to this case inasmuch as the County's agreement to staff lifeguards at the pool is unrelated to "the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances" (*id.*; *see generally Pierre v Crown Fire Protection Corp.*, 240 AD2d 386, 387; *Pieri v Forest City Enters.*, 238 AD2d 911, 912-913). Moreover, "[i]n considering the legislative purpose behind General Obligations Law § 5-322.1, it is apparent that the Legislature did not intend to preclude agreements like the subject agreement made between sophisticated business entities free to agree to any terms they choose" (*Westport Ins. Co. v Altertec Energy Conservation, LLC*, 82 AD3d 1207, 1211; *see generally Fisher v Biderman*, 154 AD2d 155, 161-162, *lv denied* 76 NY2d 702).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**1372**

**KA 11-01297**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANE M. WOLFF, DEFENDANT-APPELLANT.

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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.

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Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered June 7, 2011. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the first degree and harassment 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 criminal contempt in the first degree (Penal Law § 215.51 [b] [v]) and harassment in the second degree (§ 240.26 [1]), defendant contends that County Court erred in refusing to charge criminal contempt in the second degree (§ 215.50 [3]) as a lesser included offense of criminal contempt in the first degree. We reject that contention. "There is no reasonable view of the evidence that would support a finding that defendant 'committed the lesser offense but not the greater' " (*People v Sullivan*, 284 AD2d 917, 918, *lv denied* 96 NY2d 942, *reconsideration denied* 97 NY2d 658, quoting *People v Glover*, 57 NY2d 61, 63; *see People v Wilson*, 55 AD3d 1273, 1274, *lv denied* 11 NY3d 931).

Defendant failed to preserve for our review his contention that he was deprived of a fair trial by the prosecutor's alleged misconduct during cross-examination and on summation. Defendant either failed to object to the allegedly improper conduct (*see People v Kidd*, 265 AD2d 859, 859, *lv denied* 94 NY2d 824) or he "failed to explain the basis for his general objection[s]" (*People v Bratcher*, 291 AD2d 878, 879, *lv denied* 98 NY2d 673; *see People v Tonge*, 93 NY2d 838, 839-840; *People v Antonio*, 255 AD2d 449, 450, *lv denied* 93 NY2d 850). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's further contention that the court erred in allowing the People to present evidence of two of his prior acts of domestic violence against the victim. The evidence was properly admitted because it was relevant to provide background information concerning the context and history of defendant's relationship with the victim (*see People v Perez*, 67 AD3d 1324, 1325-1326, *lv denied* 13 NY3d 941), and it was relevant to the issue whether defendant intended to harass and annoy her (*see People v Crump*, 77 AD3d 1335, 1336, *lv denied* 16 NY3d 857). Furthermore, its probative value exceeded its potential for prejudice (*see id.*; *People v Kelly*, 71 AD3d 1520, 1521, *lv denied* 15 NY3d 775; *see generally People v Molineux*, 168 NY 264, 293-294).

Defendant next contends that the court erred in failing to discharge a sworn juror. To the extent that defendant's contention is preserved for our review (*see* CPL 470.05 [2]), it is without merit. On the record before us, it cannot be said that the court should have been "convinced" (*People v Buford*, 69 NY2d 290, 299), based upon the responses of the juror upon questioning by the court and both the prosecutor and defense counsel, that the juror's family circumstances rendered him "unavailable for continued service" or that he was "grossly unqualified to serve in the case" because of his passing familiarity with defendant (CPL 270.35 [1]; *see People v Telehany*, 302 AD2d 927, 928).

We agree with defendant, however, that the court erred in refusing to give an intoxication charge. "An intoxication charge is warranted if, viewing the evidence in the light most favorable to the defendant, 'there is sufficient evidence of intoxication in the record for a reasonable person to entertain a doubt as to the element of intent on that basis' " (*People v Sirico*, 17 NY3d 744, 745, quoting *People v Perry*, 61 NY2d 849, 850; *see People v Gaines*, 83 NY2d 925, 927; *see also People v Tribunella*, 49 AD3d 1184, 1185). "A defendant may establish entitlement to such a charge 'if the record contains evidence of the recent use of intoxicants of such nature or quantity to support the inference that their ingestion was sufficient to affect defendant's ability to form the necessary criminal intent' " (*Sirico*, 17 NY3d at 745, quoting *People v Rodriguez*, 76 NY2d 918, 920). "Although a 'relatively low threshold' exists to demonstrate entitlement to an intoxication charge, bare assertions by a defendant concerning his intoxication, standing alone, are insufficient" (*id.* at 745).

Here, the victim testified that, several hours before defendant violated the order of protection by harassing her, she and defendant consumed heroin and marihuana and defendant consumed alcohol, and that she was still "high" when the incident occurred. Defendant testified that he and the victim had used heroin and marihuana on the night in question, and that he drank approximately four 12-ounce cans of beer. That evidence, viewed in the light most favorable to defendant, was sufficient to meet the relatively low threshold for entitlement to an intoxication charge (*see generally Sirico*, 17 NY3d at 745-746).

We also agree with defendant that the court erred in refusing to

give a voluntariness charge with respect to statements he made to the police. The court denied defendant's request on the sole ground that it had ruled at a pretrial *Huntley* hearing that the statements were admissible at trial. That was not a proper ground for denying defendant's request at trial for the voluntariness charge. Indeed, CPL 710.70 (3) expressly provides that, even where a court denies a defendant's pretrial motion to suppress statements, that does not preclude the defendant "from attempting to establish at a trial that evidence introduced by the people of a [pretrial] statement made by him [or her] should be disregarded by the jury . . . on the ground that such statement was involuntarily made within the meaning of [CPL] section 60.45." The statute further provides that, "[i]n the case of a jury trial, the court must submit [the issue of voluntariness] to the jury under instructions to disregard such evidence upon a finding that the statement was involuntarily made" (*see People v Graham*, 55 NY2d 144, 147). Although there may have been another ground upon which the court could have refused to give the voluntariness charge, our review is limited to the ground relied upon by the trial court (*see People v Concepcion*, 17 NY3d 192, 194-195; *People v LaFontaine*, 92 NY2d 470, 473-474, *rearg denied* 93 NY2d 849).

We further conclude, however, that the court's failure to charge the jury on intoxication and voluntariness is harmless error. The proof of defendant's guilt is overwhelming, "and there is no significant probability that defendant would have been acquitted but for the error" (*People v Thomas*, 96 AD3d 1670, 1672, *lv denied* 19 NY3d 1002; *see People v Greene*, 186 AD2d 147, *lv denied* 81 NY2d 840; *cf. People v Ressler*, 302 AD2d 921; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

Finally, given that defendant has a lengthy criminal record and engaged in prior instances of domestic violence, we perceive no basis to modify his sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**1380**

**CA 12-01109**

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

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IN THE MATTER OF HEATHER ALESSI,
PETITIONER-APPELLANT,

V OPINION AND ORDER

BOARD OF EDUCATION, WILSON CENTRAL SCHOOL
DISTRICT AND KARLENE CIESLIK,
RESPONDENTS-RESPONDENTS.

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WATSON BENNETT COLLIGAN & SCHECHTER, LLP, BUFFALO (CAROLYN NUGENT GORCZYNSKI OF COUNSEL), FOR PETITIONER-APPELLANT.

HODGSON RUSS LLP, BUFFALO (KARL W. KRISTOFF OF COUNSEL), FOR RESPONDENT-RESPONDENT BOARD OF EDUCATION, WILSON CENTRAL SCHOOL DISTRICT.

RICHARD E. CASAGRANDE, LATHAM (SUSAN W. FULLER OF COUNSEL), FOR RESPONDENT-RESPONDENT KARLENE CIESLIK.

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Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Catherine R. Nugent Panepinto, J.), entered December 13, 2011 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law without costs, the petition is granted in part, the determination is annulled, and respondent Board of Education, Wilson Central School District, is directed to award seniority credit to petitioner for the period between November 6, 2006 and February 10, 2010 and to reinstate petitioner to her position as a full-time probationary teacher in the foreign language tenure area with back pay and benefits.

Opinion by PERADOTTO, J.: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination of respondent Board of Education, Wilson Central School District (District), that she was the least senior teacher in the foreign language tenure area. According to petitioner, the determination was affected by an error of law and was arbitrary and capricious. Petitioner also seeks "seniority credit" for the services that she rendered to the District from November 6, 2006 through February 10, 2010, reinstatement to her former position, and "restitution" for damages that she allegedly sustained as a result of the District's determination, which, in effect, terminated her employment.

Petitioner appeals from a judgment denying the petition. We modify the judgment by granting the petition in part and annulling the District's determination.

I

Petitioner was first hired by the District in September 2006 as a part-time Spanish teacher in the foreign language tenure area. Petitioner was employed in that capacity until November 6, 2006, when she was hired as a full-time probationary Spanish teacher in the same tenure area. On June 9, 2009, the District granted petitioner tenure in the foreign language area commencing November 9, 2009.

At the time, petitioner had a provisional teaching certificate set to expire on September 1, 2009. By July 2009, petitioner had completed all of the necessary requirements to obtain her permanent teaching certificate, with the exception of passing the Spanish Content Speciality Test (CST). Petitioner took the CST in July 2009; she did not pass, and thus was not granted permanent certification to teach at that time. In August 2009, the District was notified that petitioner had failed the CST. Nonetheless, petitioner continued in her position as a full-time probationary Spanish teacher through the end of September 2009.

On October 1, 2009, the District's Superintendent demanded petitioner's immediate resignation because, having failed the CST, she was no longer certified to teach. The Superintendent assured petitioner, however, that she would be "rehired" immediately as a full-time substitute Spanish teacher until she obtained her permanent teaching certification, whereupon the District would, according to the Superintendent, rehire her as a full-time probationary Spanish teacher. Petitioner tendered her resignation and, the next day, resumed her regular teaching responsibilities, albeit now classified as a substitute teacher.

Petitioner retook the CST in December 2009, and she passed. In February 2010, petitioner received her permanent teaching certificate, and the District, as promised, thereupon rehired her as a full-time probationary Spanish teacher.

During the 2010-2011 school year, petitioner was informed that a teaching position in the foreign language tenure area would likely be abolished due to upcoming budgetary constraints. Pursuant to Education Law § 2510, a school district that abolishes a teaching position for economic reasons must discontinue "the services of the teacher having the least seniority in the system within the tenure of the position abolished" (§ 2510 [2]; *see Matter of Cole v Board of Educ., S. Huntington USFD*, 90 AD2d 419, 419-420, *affd* 60 NY2d 941; *Matter of Ward v Nyquist*, 43 NY2d 57, 62; *Matter of Kulick*, 34 Ed Dept Rep [Decision No. 13428], 1995 WL 17958467, *1; *Matter of Ducey*, 65 NY St Dept Rep 65, 65), and the District later determined that petitioner was that least senior teacher. Consequently, in June 2011, the District notified petitioner that, "[d]ue to unforseen State aid

reductions," her employment would be discontinued at the end of the school year. That determination is the subject of the instant proceeding.

II

Seniority is earned by both probationary and tenured teachers (*see Matter of Carey*, 31 Ed Dept Rep 394, 395; *see also Matter of Lezette v Board of Educ., Hudson City School Dist.*, 35 NY2d 272, 282; *Matter of Hofheins*, 18 Ed Dept Rep 503, 504), and, as a general rule, "is calculated on the basis of service within [a particular] tenure area" (*Cole*, 90 AD2d at 428; *see* 8 NYCRR 30-1.1 [f]). Thus, the first criterion for determining a teacher's seniority is the "actual full-time service rendered" thereby (*Matter of Schoenfeld v Board of Coop. Educ. Servs. of Nassau County*, 98 AD2d 723, 724; *see Kulick*, 1995 WL 17958467, at *1; *Matter of Crandall*, 20 Ed Dept Rep 16, 19; *Matter of Matera*, 17 Ed Dept Rep 459, 460), including full-time regular substitute service in a particular tenure area prior to his or her probationary appointment in that same area (*see Crandall*, 20 Ed Dept Rep at 18; *see also Matter of Kransdorf v Board of Educ. of Northport-E. Northport Union Free School Dist.*, 81 NY2d 871, 873; *Carey*, 31 Ed Dept Rep at 395; *Ducey*, 65 NY St Dept Rep at 67). The rationale for equating full-time substitute service with full-time probationary service for seniority purposes is that employment as a regular substitute "constitut[es] employment by the board of education on a permanent basis" (*Crandall*, 20 Ed Dept Rep at 18), and is "equivalent to service rendered pursuant to a probationary appointment" (*Matter of Silver*, 19 Ed Dept Rep 444, 448). By contrast, an "itinerant" or per diem substitute assigned on a temporary, as-needed basis does not accumulate seniority (*see Carey*, 31 Ed Dept Rep at 395; *Matera*, 17 Ed Dept Rep at 459-460; *Ducey*, 65 NY St Dept Rep at 67).

Here, it is undisputed that petitioner was first appointed to a full-time probationary position in the foreign language tenure area on November 6, 2006, approximately 10 months prior to respondent Karlene Cieslik's September 2007 appointment to the same position. Generally, "[a] teacher whose appointment occurs first has a longer affiliation with the school district and, therefore, greater seniority . . . than the teacher who was appointed on a later date" (*Kulick*, 1995 WL 17958467, at *2). It is likewise undisputed that petitioner taught Spanish in the foreign language tenure area on a continuous, full-time basis from November 2006 until her termination in June 2011, although her title changed several times during that period. Throughout the changes in petitioner's title, her teaching duties remained the same. Thus, petitioner's "length of service in [the foreign language] tenure area" (8 NYCRR 30-1.1 [f]) and "actual full-time service rendered" exceeded that of Cieslik (*Schoenfeld*, 98 AD2d at 724; *see Kulick*, 1995 WL 17958467, at *1; *Matter of Kiernan*, 32 Ed Dept Rep [Decision No. 12933], 1993 WL 13713072, *1; *Matera*, 17 Ed Dept Rep at 460).

III

Respondents contend, however, that petitioner's October 2009 resignation severed her employment relationship with the District and that she therefore lost all seniority accumulated prior to that time. Respondents thus contend that the District correctly computed petitioner's seniority from February 10, 2010, the date upon which her appointment as a new full-time probationary Spanish teacher became effective. We disagree.

The District is, of course, correct that a teacher who voluntarily severs all of his or her professional relationship with a school district through retirement or resignation forfeits his or her seniority rights under Education Law § 2510 (*see Matter of Girard v Board of Educ. of City School Dist. of City of Buffalo*, 168 AD2d 183, 185; *Matter of Hilow*, 31 Ed Dept Rep [Decision No. 12574], 1991 WL 11762530, *1-*2; *Carey*, 31 Ed Dept Rep at 396; *Ducey*, 65 NY St Dept Rep at 67-68). "Public policy[, however,] favors the protection of employees' seniority rights" (*Matter of Petkovsek*, 48 Ed Dept Rep 513, 517; *see generally Board of Educ., Lakeland Cent. School Dist. of Shrub Oak v Lakeland Fedn. of Teachers, Local 1760, Am. Fedn. of Teachers, AFL-CIO*, 51 AD2d 1033, 1034). Thus, while an employee may relinquish his or her seniority rights through, inter alia, resignation or retirement (*see Matter of Morehouse v Mills*, 268 AD2d 767, 768, *lv denied* 95 NY2d 751; *Girard*, 168 AD2d at 184), such a relinquishment must be knowing and voluntary, i.e., the employee must take "affirmative steps" to terminate all aspects of his or her employment by a school district (*Petkovsek*, 48 Ed Dept Rep at 516; *see Matter of Barry*, 43 NY St Dept Rep 313, 313-314; *cf. Matter of Gerson v Board of Educ. of Comsewogue Union Free School Dist.*, 214 AD2d 732, 732-733; *see generally Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 451-452). In other words, in the absence of a specific contrary intent, an employee who merely assents to being reassigned to a different title within the same tenure area – even under the guise of a resignation – is not deemed to have "resigned" for purposes of seniority credit so long as the title to which he or she is reassigned is otherwise eligible for such credit.

Notably, neither the District nor petitioner adhered to the requirements of Education Law § 3019-a (entitled "Notice of termination of service by teachers"), which governs the formal resignation and termination of probationary teachers. Moreover, the record is devoid of any intent or affirmative act by petitioner to sever all aspects of her employment relationship with the District and thereby relinquish her seniority rights (*cf. Morehouse*, 268 AD2d at 767-768; *Gerson*, 214 AD2d at 732-733; *Girard*, 168 AD2d at 185-186; *Matter of Middleton*, 16 Ed Dept Rep 50, 51). Indeed, petitioner averred that she tendered her resignation in October 2009 in order to *preserve* her continued employment with the District. According to petitioner, the Superintendent told her that if she did not resign immediately, she would be terminated and the District would withdraw its offer to employ her as a substitute teacher pending her receipt of

a permanent teaching certificate. The Superintendent's account of that discussion is largely consistent with petitioner's account. Petitioner thus agreed to "resign" in exchange for the District's promise to immediately rehire her as a substitute teacher and to reappoint her thereafter to a new full-time probationary position upon obtaining permanent certification to teach. Furthermore, unlike the severance cases relied upon by respondents, the circumstances in this case do not evince an intent by either petitioner or the District to sever their professional relationship; rather, the arrangement allowed petitioner to continue teaching in the District while her permanent certification was pending.

Although the Superintendent averred that petitioner was rehired as a "per diem" substitute teacher – a category of employee not entitled to seniority rights (*see Carey*, 31 Ed Dept Rep at 395; *Matera*, 17 Ed Dept Rep at 460; *Ducey*, 65 NY St Dept Rep at 67) – the record is clear that, in fact, petitioner was rehired as a regular, and not a per diem, substitute teacher for seniority accrual purposes. "A regular substitute is one who takes over the class of another teacher upon a permanent substitute basis; i.e., under circumstances where the regular teacher for maternity reasons, or for sabbatical or sick leave, or for some other reason, has been given a definite leave of absence. This contemplates a regular assignment for at least a term" (*Ducey*, 65 NY St Dept Rep at 67). Here, after her resignation, petitioner assumed the regular, full-time position from which she resigned, albeit at the lower pay rate. She was therefore a regular substitute teacher for purposes of accruing seniority (*see Matera*, 17 Ed Dept Rep at 460; *Ducey*, 65 NY St Dept Rep at 67).

Further, there was no actual break in petitioner's service to the District as a result of her "resignation" (*see Matter of Zurn*, 34 Ed Dept Rep 479, 483; *see also Matter of Lindsey v Board of Educ. of Mt. Morris Cent. School Dist.*, 72 AD2d 185, 186-189). Petitioner's resignation was effective at the end of the day on October 1, 2009. The next day, she returned to the same classroom to teach the same subject to the same students during the same hours. Thus, petitioner's "resignation" was essentially a legal fiction designed to allow petitioner to continue her duties as a full-time Spanish teacher while ensuring the District's compliance with the Education Law, which prohibits a school district from employing uncertified teachers (*see* §§ 3001 [2]; 3009 [1]; *Zurn*, 34 Ed Dept Rep at 483; *Matter of LeVay*, 21 Ed Dept Rep 426, 429; *Barry*, 43 NY St Dept Rep at 314).

Finally, although Supreme Court held that the District was "justified in giving more seniority credit to . . . Cieslik" as a "consequence[]" of petitioner's failure to obtain her permanent certification at an earlier date, "[s]eniority . . . relates only to length of service" and considerations such as prior experience, training, or educational qualifications are not properly included therein (*Ducey*, 65 NY St Dept Rep at 66; *see generally Schoenfeld*, 98 AD2d at 724; *Kulick*, 1995 WL 17958467, at *1; *Matera*, 17 Ed Dept Rep at 460). Only when two or more teachers have equal service time does a school district have discretion to determine whom to retain (*see*

*Schoenfeld*, 98 AD2d at 724). Here, petitioner was appointed before Cieslik and her actual, full-time service to the District also exceeded that of Cieslik. Thus, there is no basis to consider any other criteria in calculating their relative seniority.

IV

Accordingly, the judgment should be modified, on the law, by granting the petition in part, annulling the District's determination, awarding petitioner seniority credit for the period from November 6, 2006 through February 10, 2010, and reinstating her to her former position as a probationary teacher in the foreign language tenure area, with back pay and benefits (*see e.g. Petkovsek*, 48 Ed Dept Rep at 517; *Kulick*, 1995 WL 17958467, at *2; *Crandall*, 20 Ed Dept Rep at 19; *Silver*, 19 Ed Dept Rep at 448). In light of our conclusion, there is no need to address petitioner's alternative contention that issues of fact necessitate a trial pursuant to CPLR 7804 (h).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**1388**

**CA 11-02090**

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

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STEPHEN APPLEBEE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF CAYUGA, DEFENDANT-RESPONDENT.
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COUNTY OF CAYUGA, THIRD-PARTY PLAINTIFF,

V

VILLAGE OF PORT BYRON, THIRD-PARTY DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

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

LYNCH LAW OFFICE, SYRACUSE, CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (CHRISTINE GASSER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

DAVIDSON & O'MARA, P.C., ELMIRA (THOMAS F. O'MARA OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered February 9, 2011 in a personal injury action. The judgment dismissed plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action against defendant-third-party plaintiff, County of Cayuga (County), seeking damages for injuries that he sustained when the vehicle in which he was riding hit a bump in the road. According to plaintiff, the County had failed to maintain the road in an adequate condition. The County commenced a third-party action against the Village of Port Byron, and the case proceeded to trial. It is undisputed that the jury's answers to the interrogatories submitted under CPLR 4111 (c) were inconsistent both internally and with the general verdict in plaintiff's favor (*see e.g. Vera v Bielomatik Corp.*, 199 AD2d 132, 133). Specifically, while the jury found that plaintiff's conduct constituted a superseding cause of his own injuries, it also found that the County was 45% at fault for those injuries, which is legally impossible (*see Soto v New York City*

*Tr. Auth.*, 6 NY3d 487, 492). No party objected to the inconsistent verdict, however, and the jury was discharged.

One week later, the County obtained a ministerial judgment from the Cayuga County Clerk pursuant to CPLR 5016 (b) that dismissed the complaint, presumably upon the assumption that the jury's finding of superseding cause required a judgment in its favor. That is the judgment at issue in appeal No. 1. Plaintiff thereafter moved to vacate that judgment. By the order at issue in appeal No. 2, Supreme Court denied the motion and held that the jury's finding of superseding cause permitted a judgment in the County's favor. That order also provided that "the clerical entry of judgment herein by the Cayuga County Clerk is hereby approved, nunc pro tunc."

The procedure for addressing inconsistent interrogatory responses is spelled out in CPLR 4111 (c) (*see Marine Midland Bank v Russo Produce Co.*, 50 NY2d 31, 40; *Midler v Crane*, 67 AD3d 569, 579, *revd on other grounds* 14 NY3d 877, *rearg denied* 15 NY3d 821). When, as here, a jury's responses to interrogatories are inconsistent both with each other and with the general verdict, the court, under the plain terms of the statute, "only has the power to either ask the jury to further consider its answers and verdict[] or [to] order a new trial" (*Mars Assoc. v New York City Educ. Constr. Fund*, 126 AD2d 178, 190, *lv dismissed* 70 NY2d 747; *see Dubec v New York City Hous. Auth.*, 39 AD3d 410, 411; *Vathy v Rupp Rental Corp.*, 43 AD2d 892, 893). In other words, no judgment may be rendered in favor of either party under these circumstances. We therefore conclude that the Clerk lacked authority to enter the judgment at issue in appeal No. 1 as a ministerial act pursuant to CPLR 5016 (b) (*see Orix Credit Alliance v Grace Indus.*, 231 AD2d 502, 503 [*Orix I*]; 73 NY Jur 2d, Judgments § 73, n 3; *see also Matter of National Equip. Corp. v Ruiz*, 19 AD3d 5, 15-16). The Clerk's judgment was thus a nullity from which no appeal lies (*see Wood v Dolloff*, 52 AD3d 1190, 1190; *Pavone v Walters*, 214 AD2d 1052, 1052; *see generally Pauk v Pauk*, 234 AD2d 280, 281; *Orix Credit Alliance v Grace Indus.*, 231 AD2d 503, 504). We note that the court's later approval, in the order at issue in appeal No. 2, of the entry of the Clerk's judgment on a nunc pro tunc basis "was ineffective as it added nothing to correct [its] deficiencies" (*Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v City of New York*, 12 AD3d 247, 247; *see Matter of ZMK Realty Co. v Bokhari*, 267 AD2d 391, 392).

In appeal No. 2, we conclude that the court erred in denying plaintiff's motion to vacate the Clerk's judgment. Because, as noted, the Clerk lacked the authority to enter that judgment in the County's favor as a ministerial act pursuant to CPLR 5016 (b), it was void and should have been vacated by the court on plaintiff's motion (*see Orix I*, 231 AD2d at 503). Moreover, because CPLR 4111 (c) forbids the entry of any judgment under these circumstances, the court erred in attempting to cure the Clerk's defective ministerial judgment by itself "approv[ing]" of its entry (*see Mars Assoc.*, 126 AD2d at 187-190; *Vathy*, 43 AD2d at 892-893; *cf. Marine Midland Bank*, 50 NY2d at 40-41; *National Equip. Corp.*, 19 AD3d at 15-16), and we conclude

that the proper remedy is a new trial. We agree with the First Department that, "once a jury has been disbanded, it is too late to require that its [interrogatory] answers be reconsidered, and for that reason a new trial is generally in order" (*Vera*, 199 AD2d at 134). Moreover, "the disbanding of the jury without . . . objection . . . obliterate[s] neither [the] right to seek a new trial[] nor the court's capacity to grant it[] where[, as here,] the interest of justice manifestly requires it" (*id.*; *but see Preston v Young*, 239 AD2d 729, 732). In any event, "where, as is the case here, the record is confusing and incomplete . . . this [C]ourt can in the interest of justice [grant] a new trial" (*Weckstein v Breitbart*, 111 AD2d 6, 8; *see* CPLR 5522 [a]).

Finally, because we are granting a new trial, we note that the court erred in instructing the jury on the doctrine of superseding cause. Such an instruction is only warranted when, insofar as relevant here, the plaintiff's conduct was so extraordinary and unforeseeable that it "breaks the chain of causation" and thereby relieves the defendant of liability for any resulting injuries (*Lynch v Bay Ridge Obstetrical & Gynecological Assoc.*, 72 NY2d 632, 637; *see Fishman v Beach*, 237 AD2d 705, 706). Here, we conclude that plaintiff's allegedly negligent conduct was not so extraordinary and unforeseeable that it warrants a superseding cause instruction (*see Root v Feldman*, 185 AD2d 409, 410).

The parties' remaining contentions either lack merit or are rendered academic by our decision.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**1389**

**CA 11-02091**

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

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STEPHEN APPLEBEE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF CAYUGA, DEFENDANT-RESPONDENT.
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COUNTY OF CAYUGA, THIRD-PARTY PLAINTIFF,

V

VILLAGE OF PORT BYRON, THIRD-PARTY DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

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

LYNCH LAW OFFICE, SYRACUSE, CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (CHRISTINE GASSER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

DAVIDSON & O'MARA, P.C., ELMIRA (THOMAS F. O'MARA OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered September 6, 2011 in a personal injury action. The order, among other things, denied plaintiff's motion to vacate the judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, plaintiff's motion to vacate the judgment entered by the Cayuga County Clerk on February 9, 2011 is granted, and a new trial is granted.

Same Memorandum as in *Applebee v County of Cayuga* ([appeal No. 1] ___ AD3d ___ [Feb. 8, 2013]).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**1430**

**CAF 12-00080**

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

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IN THE MATTER OF ANDREA J. BALL,
PETITIONER-RESPONDENT,

V ORDER

SCOTT D. MARSHALL, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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DAVIS LAW OFFICE, OSWEGO (STEPHANIE N. DAVIS OF COUNSEL), FOR RESPONDENT-APPELLANT.

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Appeal from an order of the Family Court, Oswego County (Donald E. Todd, J.), entered December 29, 2011 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, confirmed the determination of the Support Magistrate that respondent had willfully violated an order of child support.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**1431**

**CAF 12-00771**

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

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IN THE MATTER OF ANDREA J. BALL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT D. MARSHALL, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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DAVIS LAW OFFICE, OSWEGO (STEPHANIE N. DAVIS OF COUNSEL), FOR RESPONDENT-APPELLANT.

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Appeal from an amended order of the Family Court, Oswego County (Donald E. Todd, J.), entered April 4, 2012 in a proceeding pursuant to Family Court Act article 4. The amended order, inter alia, confirmed the determination of the Support Magistrate that respondent had willfully violated an order of child support.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by vacating Special Conditions 17, 18 and 19 and as modified the amended order is affirmed without costs.

Memorandum: Respondent father appeals from an amended order of Family Court confirming the determination of the Support Magistrate that he willfully violated an order of child support. The Support Magistrate's amended order determining that there was a willful violation was issued after the father failed to appear for the hearing on the violation petition. The father's contention that he was denied his right to a hearing on the violation petition is not properly before us on this appeal from the amended order of Family Court. Rather, the proper procedure for challenging the Support Magistrate's amended order entered upon the father's default is by way of a motion to vacate that amended order pursuant to CPLR 5015 (a) (*see Matter of Chautauqua County Dept. of Social Servs. v Rita M.S.*, 94 AD3d 1509, 1510), and the father failed to make such a motion (*see Matter of Garland v Garland*, 28 AD3d 481, 481-482; *Matter of Wideman v Murley*, 155 AD2d 841, 842). We note in any event that, on the merits, the father is statutorily presumed to have sufficient means to support his child (*see* Family Ct Act § 437; *Matter of Christine L.M. v Wlodek K.*, 45 AD3d 1452, 1452), and evidence of the failure to pay support as ordered constitutes "prima facie evidence of a willful violation" (§ 454 [3] [a]; *see Matter of Powers v Powers*, 86 NY2d 63, 69; *Matter of Jelks v Wright*, 96 AD3d 1488, 1489). Once the mother made a prima facie showing of a willful violation, the burden shifted to the father to rebut that showing (*see Powers*, 86 NY2d at 69-70). Having failed

to appear at the hearing before the Support Magistrate, the father may not now argue that he was denied his right to rebut the mother's prima facie showing of a willful violation.

We reject the father's further contention that he was denied due process of law because the Support Magistrate failed to advise him of his rights in the violation proceeding prior to the hearing conducted in the father's absence. The father does not dispute that he was served with a summons and violation petition, nor does he contend that the petition was deficient in notice. In any event, the summons and petition are in conformance with the requisite provisions of Family Court Act § 453 (*cf. Matter of Stagnar v Stagnar*, 98 AD2d 983, 984; *see generally Matter of Santana v Gonzalez*, 90 AD3d 1198, 1199; *Matter of Child Support Enforcement Unit v John M.*, 283 AD2d 40, 43), and the record reflects that the father otherwise was afforded his due process rights in the proceeding.

Finally, we agree with the father that Special Conditions 17, 18 and 19, the only specific conditions challenged by the father in his brief, are not reasonably related to the underlying issue of child support arrears (*see generally People v Braun*, 177 AD2d 981, 981). We therefore modify the amended order in appeal No. 2 by vacating those conditions.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**1465**

**CA 12-00975**

PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND MARTOCHE, JJ.

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MICHAEL A. WOLFSON, M.D., INDIVIDUALLY AND DOING BUSINESS AS "SYRACUSE OCCUPATIONAL MEDICINE AND ENVIRONMENTAL MEDICINE CONSULTANTS," PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

FARACI LANGE, LLP, DEFENDANT-APPELLANT-RESPONDENT.

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FARACI LANGE, LLP, ROCHESTER (RAUL E. MARTINEZ OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

MELVIN & MELVIN, PLLC, SYRACUSE (LOUIS LEVINE OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

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Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered December 22, 2011. The order denied the motion of defendant for summary judgment and denied the cross motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff, a consultant in the field of occupational and environmental medicine, entered into a written agreement with defendant, a law firm, to provide medical consulting services at a rate of $325 per hour on two toxic tort cases. Over the course of their lengthy relationship, defendant paid plaintiff a total of $28,000 in three "retainer" installments. After one of those cases settled, plaintiff sent defendant itemized invoices for services rendered on both cases totaling an additional $48,727.50, which remain unpaid. Plaintiff thereafter commenced this action for breach of contract.

Both parties contend that the agreement is clear and unambiguous. Plaintiff contends that the "retainer" payments merely secured the full amount of his compensation for the services that he rendered in both cases, without regard to whether those services were rendered before or after the date of each payment. In contrast, defendant contends, inter alia, that each "retainer" payment constituted payment-in-full for all services provided by plaintiff up to the date thereof, and that it therefore does not owe plaintiff any further

sums. Defendant moved and plaintiff cross-moved for summary judgment based upon the foregoing contentions. Supreme Court, concluding that there were triable issues of fact with respect to whether the "retainers" paid by defendant were intended to constitute payment-in-full for plaintiff's services, denied the motion and the cross motion. Defendant appeals and plaintiff cross appeals.

We conclude that, notwithstanding the assertions of the parties to the contrary, the court properly determined that the agreement was ambiguous with respect to the intended purposes of the "retainer" payments (*see generally Sally v Sally*, 225 AD2d 816, 817-818). Plaintiff, however, presented extrinsic evidence in admissible form establishing that the parties intended to treat the "retainer" payments as security for defendant's entire obligation under the agreement, and not as payment-in-full for all services that plaintiff had provided up to the date of each respective payment, whether invoiced or not (*see generally Zoladz Constr. Co., Inc. v County of Erie*, 89 AD3d 1459, 1460-1461). We note in that regard that the course of the parties' performance with respect to the timing and frequency of the "retainer" payments and the issuance of invoices in connection therewith may constitute extrinsic evidence of their intent in relation to any ambiguity in the agreement on those issues. Contrary to defendant's contention, however, such a course of performance does not itself constitute probative extrinsic evidence of the parties' intentions in relation to the dispositive issue before the court, namely, the manner in which plaintiff would earn his fees and the method by which they would be calculated. Thus, we conclude that plaintiff established his entitlement to judgment as a matter of law and that defendant failed to raise a triable issue of fact sufficient to defeat his cross motion for summary judgment (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We therefore modify the order accordingly.

Finally, we conclude, as a matter of law, that any alleged failure by plaintiff to submit invoices within a reasonable period of time was not a material breach of the agreement that relieved defendant of its obligation to pay for plaintiff's services (*see generally Grace v Nappa*, 46 NY2d 560, 567, *rearg denied* 47 NY2d 952; *General Steel, Inc. v Delta Bldg. Syst., Inc.*, 297 Ga App 136, 141).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**1472**

**KA 12-00204**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID F. MCNAMARA, DEFENDANT-APPELLANT.

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DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered October 25, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree and criminal sale of a controlled substance 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 criminal possession of a forged instrument in the second degree (Penal Law § 170.25) and criminal sale of a controlled substance in the fourth degree (§ 220.34 [1]). Defendant concededly waived his right to appeal, which forecloses his present challenge to the severity of his sentence (*see People v Hubert*, 100 AD3d 1443, 1444).

Defendant further contends that his federal constitutional rights were violated when the Cayuga County Probation Department conducted his presentence interview in the absence of counsel and that his resulting statements should have therefore been suppressed and stricken from the presentence report. Even assuming, arguendo, that this contention survives defendant's waiver of his right to appeal, we nevertheless reject it; the federal constitution does not entitle a defendant to the presence of counsel at that stage of a criminal proceeding (*see United States v Tisdale*, 952 F2d 934, 939-940; *United States v Jackson*, 886 F2d 838, 844; *see also People v Cortijo*, 291 AD2d 352, 352, *lv denied* 98 NY2d 674). In any event, defendant was sentenced in accordance with a plea agreement and sentencing promise that preceded both the presentence interview and the preparation of the presentence report. Thus, any error in the court's refusal to suppress his statements therein is harmless (*see People v Williamson*, 72 AD3d 1339, 1339, *lv denied* 15 NY3d 779; *People v Vaughan*, 20 AD3d

940, 941-942, *lv denied* 5 NY3d 857; *People v Vasquez*, 256 AD2d 83, 83, *lv denied* 93 NY2d 880; *People v Tavarez*, 235 AD2d 278, 278).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**1478**

**KA 11-00844**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERICA L. MORELAND, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

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Appeal from a resentence of the Erie County Court (Michael L. D'Amico, J.), rendered June 6, 2011. Defendant was resentenced upon her conviction of assault in the second degree.

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

Same Memorandum as in *People v Moreland* ([appeal No. 2] ___ AD3d ___ [Feb. 8, 2013]).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**1479**

**KA 12-01220**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERICA L. MORELAND, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered February 25, 2011. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

It is hereby ORDERED that the appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Memorandum: In appeal No. 2, defendant appeals from a judgment convicting her following a jury trial of assault in the second degree (Penal Law § 120.05 [2]) for physically injuring the victim by kicking her with a stiletto boot and, in appeal No. 1, she appeals from the subsequent resentence.

Addressing appeal No. 2 first, we note that defendant failed to preserve for our review her contention that the prosecutor engaged in misconduct by failing to provide a sufficient notice of intent to introduce *Molineux* evidence (*see* CPL 470.05 [2]; *see also People v Nappi*, 83 AD3d 1592, 1594, *lv denied* 17 NY3d 820). In any event, that contention lacks merit inasmuch as the alleged misconduct "did not cause[] such substantial prejudice to the defendant that [she] has been denied due process of law" (*People v Scott*, 78 AD3d 1531, 1532, *lv denied* 17 NY3d 801 [internal quotation marks omitted]). Contrary to defendant's further contention, we conclude that she received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). "The alleged instances of ineffective assistance concerning defense counsel's failure to make various objections [or certain motions or requests] are based largely on [defendant's] hindsight disagreements with defense counsel's trial strategies, and defendant failed to meet [her] burden of establishing the absence of any legitimate explanations for those strategies" (*People v Douglas*, 60

AD3d 1377, 1377, *lv denied* 12 NY3d 914 [internal quotation marks omitted]).

Additionally, although defendant moved to dismiss the indictment at the close of the People's case based on the alleged legal insufficiency of the evidence, she failed to renew her motion after presenting evidence and thus failed to preserve for our review her present contention that the evidence is legally insufficient to establish her intent to cause physical injury (*see People v Diefenbacher*, 21 AD3d 1293, 1294, *lv denied* 6 NY3d 775). In any event, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that it is legally sufficient to establish that defendant possessed the requisite intent.

Moreover, viewing the evidence in light of the element of intent as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to that element is not against the weight of the evidence. "A defendant may be presumed to intend the natural and probable consequences of his [or her] actions . . . , and [i]ntent may be inferred from the totality of conduct of the accused" (*People v Mahoney*, 6 AD3d 1104, 1104, *lv denied* 3 NY3d 660 [internal quotation marks omitted]; *see generally People v Badger*, 90 AD3d 1531, 1532, *lv denied* 18 NY3d 991). The victim and defendant both testified that they were engaged in a physical altercation and were intentionally striking at each other with their fists. Defendant testified that, during the altercation, she kicked her stiletto boot in the direction of the victim. Although defendant testified that she did not intend to kick the victim, that testimony is belied by her actions. Thus, "it cannot be said that the jury failed to give the evidence the weight that it should be accorded" (*People v Mike*, 283 AD2d 989, 989, *lv denied* 96 NY2d 904).

With respect to appeal No. 1, we conclude that the sentence imposed at resentencing is not unduly harsh or severe.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**1486**

**CA 12-01148**

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

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GRIFFISS LOCAL DEVELOPMENT CORPORATION, CARDINAL GRIFFISS REALTY, LLC, AND CHARLES GAETANO CONSTRUCTION CORP., PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

COLLEEN C. GARDNER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF LABOR, AND NEW YORK STATE DEPARTMENT OF LABOR, BUREAU OF PUBLIC WORKS, DEFENDANTS-RESPONDENTS.

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SAUNDERS, KAHLER, L.L.P., UTICA (JAMES S. RIZZO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

J. WADE BELTRAMO, ALBANY, FOR NEW YORK STATE CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS, AMICUS CURIAE.

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Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered September 12, 2011. The order granted the motion of defendants to dismiss the complaint for failure to exhaust administrative remedies.

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

Memorandum: Plaintiffs commenced this action seeking a declaration that they were not subject to the prevailing wage provisions of Labor Law § 220 because, inter alia, their project was not a "public work" and thus any attempts by defendants to enforce such provisions against them were "invalid, null and void." We reject plaintiffs' contention that Supreme Court erred in granting defendants' motion to dismiss the complaint based on its determination that plaintiffs failed to exhaust their administrative remedies. It is well settled "that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57). As plaintiffs correctly note, "[t]he exhaustion rule . . . is subject to important qualifications[ and] need not be followed, for example, when an agency's action is challenged as either unconstitutional or wholly beyond its grant of

power" (*id*.). Nevertheless, " '[a] constitutional claim that may require the resolution of factual issues reviewable at the administrative level should initially be addressed to the administrative agency having responsibility so that the necessary factual record can be established. Moreover, merely asserting a constitutional violation will not excuse a litigant from first pursuing administrative remedies that can provide the requested relief' " (*Town of Oyster Bay v Kirkland*, 19 NY3d 1035, 1038, quoting *Matter of Schulz v State of New York*, 86 NY2d 225, 232, *cert denied* 516 US 944). We conclude that in this case there are "questions regarding the applicability of Labor Law § 220 [that] cannot be answered without the development of a factual record and an examination of all the circumstances of the project" (*Matter of Christa Constr., LLC v Smith*, 63 AD3d 1331, 1331 [internal quotation marks omitted]; *see Matter of Pyramid Co. of Onondaga v Hudacs*, 193 AD2d 924, 925). The court therefore properly granted defendants' motion to dismiss the complaint due to plaintiffs' failure to exhaust their administrative remedies.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**1492**

**CA 12-00424**

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

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WADE R. MEENAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPHINE M. MEENAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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KALIL & EISENHUT, LLC, UTICA (CLIFFORD C. EISENHUT OF COUNSEL), FOR DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR PLAINTIFF-RESPONDENT.

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Appeal from a decision of the Supreme Court, Oneida County (James R. Griffith, A.J.), dated December 22, 2011. The decision granted plaintiff's motion to amend the judgment of divorce.

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

Memorandum: In appeal No. 1, defendant wife appeals from a letter decision granting plaintiff husband's motion to amend the parties' judgment of divorce to correct an error in the calculation of child support and maintenance arrears due to the wife. That appeal must be dismissed inasmuch as "[n]o appeal lies from a mere decision" (*Kuhn v Kuhn*, 129 AD2d 967, 967; *see* CPLR 5512 [a]; *Matter of Reynoso v Dennison*, 10 NY3d 799, 799; *Plastic Surgery Group of Rochester, LLC v Evangelisti*, 39 AD3d 1265, 1266).

In appeal No. 2, the wife appeals from an amended judgment that incorporated by reference the terms of the letter decision and modified the judgment of divorce with respect to maintenance and child support arrears in accordance with that decision. We agree with the wife that Supreme Court erred in granting plaintiff's motion and applying CPLR 5019 (a) to amend the judgment by changing the amount of the husband's maintenance and child support arrears. CPLR 5019 (a) provides that "[a] judgment or order shall not be stayed, impaired or affected by any mistake, defect or irregularity in the papers or procedures in the action not affecting a substantial right of a party. A trial or an appellate court may require the mistake, defect or irregularity to be cured." The court's power to amend orders or judgments under that statute is limited, however, to correcting orders or judgments that contain "a mistake, defect, or irregularity not affecting a substantial right of a party, or [that are] inconsistent with the decision upon which [they are] based" (*Adams v Fellingham*, 52

AD3d 443, 444; *see Novak v Novak*, 299 AD2d 924, 925; *Gasteiger v Gasteiger*, 288 AD2d 881, 881; *Bolger v Davis*, 127 AD2d 979, 979; *Crain v Crain*, 109 AD2d 1094, 1094).

"The kinds of mistakes contemplated for correction [pursuant to CPLR 5019 (a)] are mere ministerial ones, not those involving new exercises of discretion or a further turn of the fact-finding wheel" (Siegel, NY Prac § 420 at 741 [5th ed 2011]; *see Kiker v Nassau County*, 85 NY2d 879, 881; *Herpe v Herpe*, 225 NY 323, 327). As the Court of Appeals explains, "[t]he rule has long been settled and inflexibly applied that the trial court has no revisory or appellate jurisdiction to correct by amendment error in substance affecting the judgment. It cannot, by amendment, change the judgment in matter of substance for error committed on the trial or in the decision, or *limit the legal effect of it to meet some supposed equity subsequently called to its attention or subsequently arising*. It cannot correct judicial errors either of commission or omission. Those errors are, under our system of procedure, to be corrected either by the vacating of the judgment or by an appeal" (*Herpe*, 225 NY at 327 [emphasis added]). Further, "[a] court has no power to reduce or increase the amount of [a] judgment when there is no clerical error" (*Matter of Schlossberg v Schlossberg*, 62 Misc 2d 699, 701; *see Bolger*, 127 AD2d at 979; *Fleming v Sarva*, 15 Misc 3d 892, 895; *see generally Herpe*, 225 NY at 327).

Unlike the cases relied upon by the husband, this case does not involve an inconsistency between the judgment and an underlying decision or stipulation of the parties (*see e.g. Berry v Williams*, 87 AD3d 958, 961; *Zebrowski v Zebrowski*, 28 AD3d 883, 885; *Crain*, 109 AD2d at 1094). Rather, the husband sought the correction of "[m]istakes of [f]act," i.e., the court's allegedly erroneous calculation of a credit for maintenance and support payments made by the husband during the pendency of the action in accordance with a temporary order, and the court's failure to credit him for the wife's equitable share of premiums he paid for the children's medical insurance. The court, however, was not empowered to amend the judgment substantively "to meet some supposed equity subsequently called to its attention" (*Herpe*, 225 NY at 327).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**1493**

**CA 12-01885**

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

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WADE R. MEENAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPHINE M. MEENAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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KALIL & EISENHUT, LLC, UTICA (CLIFFORD C. EISENHUT OF COUNSEL), FOR DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR PLAINTIFF-RESPONDENT.

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Appeal from an amended judgment of the Supreme Court, Oneida County (James R. Griffith, A.J.), entered June 18, 2012. The amended judgment, inter alia, ordered plaintiff to pay maintenance and child support.

It is hereby ORDERED that the amended judgment so appealed from is unanimously reversed on the law without costs, plaintiff's motion to amend the judgment entered January 4, 2011 is denied, and that judgment is reinstated.

Same Memorandum as in *Meenan v Meenan* ([appeal No. 1] ___ AD3d ___ [Feb. 8, 2013]).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**3**

**KA 08-02222**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TODD E. CARR, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ERIN TUBBS OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Stephen R. Sirkin, A.J.), rendered August 20, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the omnibus motion seeking to suppress evidence is granted, the indictment is dismissed, and the matter is remitted to Monroe County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), defendant contends that County Court erred in refusing to suppress the physical evidence obtained from his vehicle because it was seized as the result of an illegal search. We agree.

At the suppression hearing, the arresting police officer testified on direct examination that, on October 10, 2007 at approximately 4:00 a.m., he approached defendant's vehicle because the vehicle was illegally parked. The officer asked defendant, "what's going on?" and observed that defendant appeared to be very nervous. After the officer inquired as to why defendant was so nervous, defendant replied that he was seeking a prostitute. The officer described the area where the encounter occurred as an "open air drug market" characterized by a high incidence of prostitution and noted that, in his experience, persons seeking prostitutes were often found to possess illegal drugs. The officer thereafter sought and obtained defendant's permission to search the vehicle and, during the ensuing search, discovered a handgun underneath the passenger seat. On cross-examination, the officer acknowledged that, before he sought

defendant's permission to search the vehicle, he asked defendant if there was "anything in the car that [the officer] should be aware of." The officer could not recall whether he posed that question before or after defendant made the admission concerning the prostitute.

We analyze defendant's contentions pursuant to the four-tiered framework for citizen-police encounters set forth in *People v De Bour* (40 NY2d 210, 223; *see People v Garcia*, 20 NY3d 317, ___; *People v Hollman*, 79 NY2d 181, 184-185). At its inception, the encounter was a request for information, and defendant does not dispute that "[t]he police had an objective, credible reason for approaching [his] car . . . inasmuch as the car was illegally parked" (*People v Valerio*, 274 AD2d 950, 951, *affd* 95 NY2d 924, *cert denied* 532 US 981). Nevertheless, once the officer asked if there was anything in the vehicle he "should be aware of," the encounter became a common-law inquiry under *De Bour*, requiring a "founded suspicion that criminal activity is afoot" (*De Bour*, 40 NY2d at 223; *see generally Garcia*, 20 NY3d at ___ n 1; *People v Ponder*, 43 AD3d 1398, 1399, *lv denied* 10 NY3d 770). We conclude that the People failed to meet their burden of establishing the legality of the police conduct, i.e., that the officer possessed the requisite founded suspicion to make such an inquiry (*see generally People v Riddick*, 70 AD3d 1421, 1423, *lv denied* 14 NY3d 844). Although defendant ultimately admitted that he was seeking a prostitute, as noted the officer could not recall whether defendant made that admission before or after the officer inquired regarding the contents of the vehicle. Absent defendant's admission, the evidence demonstrated only that defendant appeared nervous and that the encounter took place in a "high-crime" area. Such factors alone are insufficient to elevate the encounter to a common-law inquiry (*see generally Garcia*, 20 NY3d at ___; *People v Banks*, 85 NY2d 558, 562, *cert denied* 516 US 868; *People v Boulware*, 130 AD2d 370, 374, *appeal dismissed* 70 NY2d 994).

Inasmuch as defendant's consent to the search was obtained immediately after the improper inquiry concerning the contents of the vehicle, we cannot conclude that defendant's consent was acquired by means "sufficiently distinguishable from the taint" of the illegal inquiry (*Banks*, 85 NY2d at 563; *see generally Hollman*, 79 NY2d at 194). As a result, the evidence seized during the search of the vehicle must be suppressed.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**4**

**KA 11-00932**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES M. WINTERS, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered March 31, 2011. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated as a class D felony.

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

Memorandum: On appeal from a judgment convicting him, upon his guilty plea, of driving while intoxicated as a class D felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]), defendant contends that his purported waiver of the right to appeal is unenforceable and that his sentence of nine months in jail and five years' probation is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is unenforceable, we perceive no basis upon which to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]; *People v Leggett*, 101 AD3d 1694, 1694). Defendant has now been convicted of felony driving while intoxicated four times, and prior sentences of probation have not been successful in deterring him from drinking and driving. In this case, defendant's vehicle almost struck a police car, forcing the officer to drive off the roadway. Under the circumstances, and considering that defendant could have been sentenced to an indeterminate term of imprisonment of two to six years, the agreed-upon sentence should not be disturbed.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**5**

**KA 11-01023**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC HINTZ, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered March 29, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted burglary 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 his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. We agree with defendant that the waiver of the right to appeal is invalid because the brief inquiry made by Supreme Court was "insufficient to establish that the 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' " (*People v Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767; *see People v Hamilton*, 49 AD3d 1163, 1164). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**6**

**KA 11-00450**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEXIS MADERA, DEFENDANT-APPELLANT.

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DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered January 10, 2011. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reducing the conviction of assault in the first degree under the first count of the indictment to attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]) and vacating the sentence imposed on that count and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Monroe County, for sentencing on that conviction.

Memorandum: On appeal from a judgment convicting him following a jury trial of assault in the first degree (Penal Law § 120.10 [1]) and assault in the second degree (§ 120.05 [2]), defendant contends that the evidence of serious physical injury is legally insufficient to support the conviction of assault in the first degree. Although defendant failed to preserve that contention for our review (*see People v Gray*, 86 NY2d 10, 19), we nevertheless exercise our power to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). A person is guilty of assault in the first degree when, inter alia, he or she, with intent to cause serious physical injury to another person, causes such injury to that person or to another person by means of a deadly weapon or a dangerous instrument (Penal Law § 120.10 [1]). We agree with defendant that the evidence is legally insufficient to establish the element of serious physical injury (*see generally People v Bleakley*, 69 NY2d 490, 495). Serious physical injury, as defined in the Penal Law, “means physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment

of health or protracted loss or impairment of the function of any bodily organ" (§ 10.00 [10]). The People correctly concede that there was no evidence that the victim sustained serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ. They contend, however, that the victim's injuries created a substantial risk of death (*see id.*). We reject that contention.

The evidence at trial concerning the victim's injury consisted of the victim's testimony and medical records. That evidence established that the bullet entered and exited the victim's body around his right nipple; it was not near any vital organs; and it grazed the victim's right arm either as it entered or exited his body. Although a tiny fragment of the bullet remained in the victim's chest, the People presented no medical testimony to explain what, if any, risk that fragment posed to the victim. No sutures were needed and the victim's self-reported pain level was low. The victim was kept in the hospital overnight for pain management and observation, but he remained in the hospital for another day due to his expressed intent to retaliate against defendant.

Viewing that evidence in the light most favorable to the People, we conclude that no " 'rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt' " (*People v Contes*, 60 NY2d 620, 621). The People presented no evidence establishing that the victim faced a substantial risk of death (*see e.g. People v Nimmons*, 95 AD3d 1360, 1360-1361, *lv denied* 19 NY3d 1028; *People v Tucker*, 91 AD3d 1030, 1031-1032, *lv denied* 19 NY3d 1002; *People v Ham*, 67 AD3d 1038, 1039-1040; *People v Gray*, 30 AD3d 771, 773, *lv denied* 7 NY3d 848). Nevertheless, we conclude that the evidence is legally sufficient to establish that defendant committed the lesser included offense of attempted assault in the first degree, "namely that defendant intended to cause serious physical injury to the victim by means of a deadly weapon and engaged in conduct that tended to effect the commission of the crime of assault in the first degree" (*Gray*, 30 AD3d at 773; *see* Penal Law §§ 110.00, 120.10 [1]; *People v Pross*, 302 AD2d 895, 897, *lv denied* 99 NY2d 657). We therefore modify the judgment by reducing the conviction of assault in the first degree to that lesser included offense, and we remit the matter to Supreme Court for sentencing on that conviction (*see* CPL 470.15 [2] [a]; 470.20 [4]; *Pross*, 302 AD2d at 897).

Although defendant further contends that the evidence before the grand jury was legally insufficient to support the indictment on the count of assault in the first degree, he failed to preserve that contention for our review inasmuch as his "omnibus motion . . . failed to set forth the specific grounds for dismissal now set forth on appeal, i.e., that the evidence was insufficient to establish . . . the element of [serious physical injury]" (*People v Agee*, 57 AD3d 1486, 1487, *lv denied* 12 NY3d 813; *see People v Becoats*, 71 AD3d 1578, 1579, *affd* 17 NY3d 643, *cert denied* ___ US ___, 132 S Ct 1970; *People v Cobb*, 72 AD3d 1565, 1565-1566, *lv denied* 15 NY3d 803). We decline to exercise our power to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Based

on our determination that the trial evidence is legally insufficient to support the charge of assault in the first degree, we do not address defendant's remaining contentions concerning the conviction of that count of the indictment.

Although defendant further contends that he was denied a fair trial based on prosecutorial misconduct during summation, that contention is not preserved for our review because defendant failed to object to the allegedly improper comments during summation (*see People v Balls*, 69 NY2d 641, 642; *People v Sulli*, 81 AD3d 1309, 1311, *lv denied* 17 NY3d 802). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant contends that the court erred at trial in allowing the People to present evidence concerning a confrontation between defendant and one victim that occurred the day before the instant shooting. In addition, defendant contends that the court erred in failing, sua sponte, to give the jury an appropriate limiting instruction. Defendant, however, failed to preserve either contention for our review (*see People v Hunt*, 74 AD3d 1741, 1742, *lv denied* 15 NY3d 806; *People v Francis*, 63 AD3d 1644, 1645, *lv denied* 13 NY3d 835; *see also People v Allen*, 93 AD3d 1144, 1146, *lv denied* 19 NY3d 956; *People v Moore* [appeal No. 2], 78 AD3d 1658, 1659). In any event, defendant's contentions lack merit. The challenged evidence "was probative of [defendant's] motive and intent to assault his victim; it provided necessary background information on the nature of the relationship and placed the charged conduct in context" (*People v Dorm*, 12 NY3d 16, 19; *see generally People v Alvino*, 71 NY2d 233, 241-242). "Although it would have been better practice to caution the jury on the limited purpose for which the evidence was admitted, both at the time it was introduced and again during the charge, the defendant did not request a limiting instruction when the testimony was admitted, and the court adequately instructed the jury as to its limited purpose in the charge" (*People v Kae Kim*, 218 AD2d 815, 815-816, *lv denied* 87 NY2d 847).

We reject the additional contention of defendant that he was denied effective assistance of counsel based on defense counsel's failure to preserve defendant's contentions for our review. Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Finally, the sentence imposed on the conviction of assault in the second degree with respect to a second victim is not unduly harsh or severe.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**7**

**KA 12-00530**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN P. MCGILLICUDDY, DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO, FOR RESPONDENT.

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Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered March 20, 2012. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, criminal mischief in the fourth degree and attempted assault in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]). Viewing the evidence in light of the elements of the crime of burglary in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict with respect to that crime is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We agree with defendant, however, that reversal is required because he was deprived of effective assistance of counsel based on a potential conflict of interest. "The New York State and Federal Constitutions guarantee the right to effective assistance of counsel, meaning representation that is reasonably competent, conflict-free and single-mindedly devoted to the client's best interests" (*People v Longtin*, 92 NY2d 640, 644, *cert denied* 526 US 1114; *see People v Harris*, 99 NY2d 202, 209). A few days before trial, defense counsel became aware of a recorded conversation between defendant and defense counsel's former client that the People sought to introduce in evidence to show defendant's motive and intent for the burglary. Defense counsel's former client was convicted of murder shortly before this trial began. Defense counsel was also aware that, when defendant was arrested for the instant crimes, he gave a statement to a police officer regarding defense counsel's former client that the People also intended to introduce in evidence.

When defense counsel raised the potential conflict of interest before County Court, the court erred in failing to ascertain whether defendant was aware of the potential risk and knowingly chose to continue with his retained counsel (*see People v McDonald*, 68 NY2d 1, 9, *rearg dismissed* 69 NY2d 724; *see also People v Carncross*, 14 NY3d 319, 327). That error requires reversal only if defendant first establishes that defense counsel had a potential conflict of interest (*see Harris*, 99 NY2d at 210; *Longtin*, 92 NY2d at 644; *McDonald*, 68 NY2d at 9). Defendant must then "demonstrate that 'the conduct of his defense was in fact affected by the operation of the conflict of interest,' or that the conflict 'operated on' counsel's representation" (*Longtin*, 92 NY2d at 644; *see McDonald*, 68 NY2d at 9). Stated differently, a defendant must establish that the potential conflict bore "such a 'substantial relation to the conduct of the defense' as to require reversal" (*People v Solomon*, 20 NY3d 91, 95). "Notably, the requirement that a potential conflict have affected, or operated on, or borne a substantial relation to the conduct of the defense--three formulations of the same principle--is not a requirement that defendant show specific prejudice" (*People v Ortiz*, 76 NY2d 652, 657).

Defendant established that defense counsel had a potential conflict of interest based on his representation of the former client (*see generally Longtin*, 92 NY2d at 644; *Ortiz*, 76 NY2d at 656), and we agree with defendant that the conflict bore a substantial relation to the conduct of the defense, requiring reversal (*see People v Krausz*, 84 NY2d 953, 955). Defense counsel indicated that he was unable to cross-examine the police officer with respect to defendant's statement concerning his former client; he stipulated that his former client's voice was on the recording and thus avoided having to confront his former client in that regard; and he did not call his former client to testify regarding the recorded conversations with defendant. Indeed, defendant's former client was mentioned several times during the prosecutor's examination of witnesses and in the prosecutor's closing argument, prompting the court to issue a curative instruction to the jury that it was not to infer that defendant was involved with the murder of which the former client was convicted. Under all the circumstances, we agree with defendant that the conduct of the defense was affected by the conflict of interest (*see generally Longtin*, 92 NY2d at 644; *McDonald*, 68 NY2d at 9).

In light of our determination, we do not address defendant's remaining contentions.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**8**

**KA 12-01414**

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

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

JESSE F. JOHNSTON, DEFENDANT-RESPONDENT.

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JASON L. COOK, DISTRICT ATTORNEY, PENN YAN, FOR APPELLANT.

MICHAEL A. JONES, JR., VICTOR, FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Yates County Court (W. Patrick Falvey, J.), dated June 4, 2012. The order granted the motion of defendant to suppress certain evidence.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Yates County Court for further proceedings.

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion to suppress evidence, i.e., a weapon and oral statements made by defendant to an investigator employed by the Sheriff's Department. County Court suppressed the weapon on the ground that, because the initial lawful encounter between defendant and the Sheriff's Deputy was improperly elevated to a level two encounter under *People v De Bour* (40 NY2d 210, 233), the ensuing search of defendant was not warranted, and the statements made by defendant were the fruit of an unlawful arrest. We agree with the People that the court erred in suppressing the weapon and statements on those grounds. The testimony at the suppression hearing established that a Sheriff's Deputy was on patrol in a marked vehicle at approximately 2:30 p.m. when he observed defendant and his codefendant walking from a residential driveway apron toward a vehicle in a nearby public parking lot used in conjunction with a State-owned recreation area. The officer explained that there had been an increased number of daytime residential burglaries and that the two men were walking from private property to a vehicle parked in a public parking area. The officer also explained that the men were dressed "pretty heavy" for the mid-70-degree day, that their dress was uncharacteristic of the hikers and mountain bicyclists who normally visited the area, and that marihuana was often harvested during that time of year. As the court properly determined, the People met their burden of establishing that the officer had an articulable reason for approaching defendant as he and the codefendant were about to enter their vehicle in the public parking lot and asking the basic,

nonthreatening question, "what's up guys?" (*see People v Hollman*, 79 NY2d 181, 185; *People v Rodriguez*, 82 AD3d 1614, 1615, *lv denied* 17 NY3d 800). Indeed, such "questions need be supported only by an objective credible reason not necessarily indicative of criminality" (*Hollman*, 79 NY2d at 185).

Upon the officer's approach, defendant began to slide down the side of the vehicle away from the officer and the codefendant placed his hands in the pocket of his hooded sweatshirt. The officer directed codefendant to remove his hands from his pocket and when codefendant raised his hands, the officer observed the outline of a handgun. Thus, the officer was thereafter justified in drawing his service weapon and ordering defendant and the codefendant to the ground inasmuch as he "had a reasonable basis for fearing for his safety and was not required to 'await the glint of steel' " (*People v Stokes*, 262 AD2d 975, 976, *lv denied* 93 NY2d 1028, quoting *People v Benjamin*, 51 NY2d 267, 271). Inasmuch as the officer had reason to believe that defendant was armed, he was justified in handcuffing him and frisking him for weapons to ensure his own safety (*see People v Fagan*, 98 AD3d 1270, 1271; *see also People v Allen*, 73 NY2d 378, 380). During the course of that frisk, the officer discovered a loaded revolver in defendant's waistband. Under the circumstances presented here, we conclude that the court erred in suppressing the weapon and thus also erred in suppressing defendant's subsequent statements to an investigator as the fruit of the allegedly illegal encounter with the Deputy. We note, however, that the court did not otherwise address any arguments advanced by defendant in support of the suppression of those statements. Because "the only issues that we may consider on this appeal are those that 'may have adversely affected the appellant' " (*People v Schrock*, 99 AD3d 1196, 1197, quoting CPL 470.15 [1]; *see People v Concepcion*, 17 NY3d 192, 194-195), we hold the case, reserve decision, and remit the matter to County Court to rule on any other arguments raised by defendant in support of suppression of the statements.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**9**

**KA 09-01287**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CORY D. DANIELS, ALSO KNOWN AS CORY DESMOND-LAMAR DANIELS, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ERIN TUBBS OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered April 14, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fifth 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 criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]), defendant contends that Supreme Court erred in refusing to suppress cocaine found on his person. Defendant correctly concedes that the police lawfully stopped the vehicle in which he was a passenger based on a traffic infraction committed by the driver, and defendant also acknowledges that the arresting officer lawfully ordered him to exit the vehicle after the stop. Defendant contends, however, that the cocaine should have been suppressed because the officer unlawfully conducted a pat frisk, which resulted in the seizure of the drugs from his pants pocket. We reject that contention.

It is well settled that "police officers may frisk passengers in a lawfully stopped vehicle to the extent necessary to guard their safety, provided that they act on reasonable suspicion that criminal activity is afoot and on an articulable basis to fear for [their] own safety" (*People v Goodson*, 85 AD3d 1569, 1570, *lv denied* 17 NY3d 953 [internal quotation marks omitted]). Here, the arresting officer observed defendant at a bus stop engage in a number of "handshakes" that, based on the officer's training and experience, were either

hand-to-hand drug transactions or gang signals. The officer was observing the bus stop area because armed robberies, drug transactions, and gang activity had been recently reported to have occurred in that vicinity. According to the officer, when defendant appeared to notice the officer, defendant attempted to hide himself from the officer's view. After about 40 minutes of such surveillance, the officer saw defendant enter a passenger seat of a black SUV-type vehicle, and the driver of the vehicle then made an illegal turn when leaving the scene. The officer thus stopped the vehicle for the traffic infraction and, while approaching the rear of the stopped vehicle, he noticed defendant moving in such a way that he appeared to be either removing something from or placing something into one of his pants pockets. That observation, together with the officer's earlier observations, reasonably caused him to fear for his safety (*see People v Grant*, 83 AD3d 862, 863-864, *lv denied* 17 NY3d 795; *see also People v Shackleford*, 57 AD3d 578, 578-579, *lv denied* 12 NY3d 762). The officer ordered defendant out of the vehicle and, during a pat frisk of defendant for weapons, the officer felt a hard object in defendant's pocket that he thought might be a firearm, but he could not be sure. We conclude under the circumstances of this case that the officer was authorized to "reach[ ] into defendant's pocket[ ] to make that determination" (*People v Wallace*, 41 AD3d 1223, 1224, *lv denied* 9 NY3d 883; *see People v Martinez*, 39 AD3d 1159, 1160, *lv denied* 9 NY3d 867; *People v Howard*, 2 AD3d 1323, 1324, *lv denied* 2 NY3d 800). Before reaching into the pocket, however, the officer asked defendant what the hard object was; defendant's answers were initially evasive, but ultimately he responded, "drugs." That response gave the officer reason to believe that defendant possessed contraband, authorizing a search of the pocket that resulted in the lawful seizure of the cocaine (*see People v Eure*, 46 AD3d 386, 387, *lv denied* 10 NY3d 810).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**13**

**CA 12-00866**

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

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FRED A. JACOBS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THE UNIVERSITY OF ROCHESTER, STRONG MEMORIAL HOSPITAL AND DONALD P.K. CHAN, M.D., DEFENDANTS-RESPONDENTS.

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WILLARD R. PRATT, III, SYLVAN BEACH, FOR PLAINTIFF-APPELLANT.

BROWN & TARANTINO, LLC, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Herkimer County (Norman I. Siegel, A.J.), entered January 19, 2012. The order granted the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this medical malpractice action in March 2008 seeking damages for injuries sustained as a result of spinal fusion surgery performed in August 1989. During the course of the surgery, a device known as a "Wisconsin wire" was implanted in plaintiff's body in order to enhance the fixation and stabilization of his thoracic spine. Thereafter, over the course of many years, plaintiff experienced pain and discomfort at the surgical site and inquired of a physician in February 2004 whether a wire was protruding from his spine. An X ray taken in March 2007 revealed that a Wisconsin wire was in fact protruding from plaintiff's spinal column into his muscle and soft tissue at the surgical site. The position of the wire was corrected in April 2007. Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint as time-barred.

Plaintiff contends that, because the wire was not properly bent, twisted or placed when it was implanted, it became a "foreign object" within the meaning of CPLR 214-a. He thus contends that this action was timely commenced within one year of the discovery of the wire or "of facts which would reasonably lead to such discovery, whichever is earlier," rather than within two years and six months from the date of the act (*id.*). Contrary to plaintiff's contention, however, it is well settled that an intentionally implanted device is not a "foreign object" within the meaning of CPLR 214-a (*see LaBarbera v New York Eye*

*& Ear Infirmary*, 91 NY2d 207, 212-213; *Rockefeller v Moront*, 81 NY2d 560, 564-565; *Provenzano v Becall*, 138 AD2d 585, 585).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**27**

**KA 08-02370**

PRESENT: SMITH, J.P., FAHEY, VALENTINO, WHALEN, AND MARTOCHE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN J. WITTMAN, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered October 9, 2008. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: Defendant was convicted following a jury trial of assault in the second degree (Penal Law § 120.05 [2]). Defendant's contention that he was deprived of effective assistance of counsel by defense counsel's failure to call certain persons as alibi witnesses is based on matters outside the record on appeal, and thus the proper procedural vehicle for raising that contention is by way of a motion pursuant to CPL 440.10 (*see People v King*, 90 AD3d 1533, 1534, *lv denied* 18 NY3d 959; *People v Watson*, 269 AD2d 755, 756, *lv denied* 95 NY2d 806). We reject defendant's further contention that defense counsel was ineffective in failing to conduct an adequate cross-examination of two of the People's witnesses. " 'Speculation that a more vigorous cross-examination might have [undermined the credibility of witnesses] does not establish ineffectiveness of counsel' " (*People v Bassett*, 55 AD3d 1434, 1438, *lv denied* 11 NY3d 922). Viewing the evidence, the law and the circumstances of this case, 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).

Defendant failed to preserve for our review his contention that he was deprived of a fair trial based on various instances of judicial misconduct (*see People v Yut Wai Tom*, 53 NY2d 44, 55-56), 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 [6] [a]; *People v Black*, 38 AD3d 1283, 1286, *lv denied* 8 NY3d 982). Defendant also

failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct (*see People v Figgins*, 72 AD3d 1599, 1600, *lv denied* 15 NY3d 893), and, in any event, that contention is without merit. The alleged misconduct was not so egregious as to deprive defendant of a fair trial (*see People v Pringle*, 71 AD3d 1450, 1451, *lv denied* 15 NY3d 777; *People v Scott*, 60 AD3d 1483, 1484, *lv denied* 12 NY3d 859).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**29**

**CAF 11-02089**

PRESENT: SMITH, J.P., FAHEY, VALENTINO, WHALEN, AND MARTOCHE, JJ.

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IN THE MATTER OF PAULA L. MASON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

AARON G. MASON, RESPONDENT-RESPONDENT.

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

RICHARD L. SOTIR, JR., JAMESTOWN, FOR RESPONDENT-RESPONDENT.

SANDRA FISHER SWANSON, ATTORNEY FOR THE CHILD, JAMESTOWN, FOR KALI A.M.

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Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered September 15, 2011 in a proceeding pursuant to Family Court Act article 6. The order awarded respondent sole custody of the subject child.

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

Memorandum: Petitioner mother appeals from an order that modified the parties' joint custody arrangement by granting sole custody of the parties' child to respondent father following a hearing. The mother contends that the Attorney for the Child (AFC) improperly advocated a position that was contrary to the child's express wishes because the AFC failed to state the basis for advocating that contrary position. The mother's contention is not preserved for our review because she made no motion to remove the AFC (*see Matter of Swinson v Dobson*, 101 AD3d 1686, 1687; *Matter of Juliet M.*, 16 AD3d 211, 212). In any event, we conclude that the mother's contention lacks merit. "There are only two circumstances in which an AFC is authorized to substitute his or her own judgment for that of the child: '[w]hen the [AFC] is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child' " (*Swinson*, 101 AD3d at 1687, quoting 22 NYCRR 7.2 [d] [3]). The obligation of the AFC, where the AFC is "convinced" that one of those two circumstances is implicated, is to inform the court of the child's wishes, if the child requests that the AFC do so (*see* 22 NYCRR 7.2 [d] [3]), which the AFC did here (*see Matter of Kashif II. v Lataya KK.*, 99 AD3d 1075, 1077).

Moreover, we note that the record supports a finding that the child lacked the capacity for "knowing, voluntary and considered judgment" (22 NYCRR 7.2 [d] [3]; *see generally Matter of Rosso v Gerouw-Rosso*, 79 AD3d 1726, 1728).

Contrary to the mother's further contention, we conclude that the court did not abuse its discretion in denying her request for an adjournment to enable her new attorney to prepare for the hearing (*see Matter of Anthony M.*, 63 NY2d 270, 283-284). We also reject the mother's contention that the denial of her request rendered her attorney's representation ineffective inasmuch as the mother has failed to establish that she received less than meaningful representation or that she suffered actual prejudice as a result of the denial of her request (*see Matter of Tommy R.*, 298 AD2d 967, 968, *lv denied* 99 NY2d 505).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**41**

**KAH 11-02187**

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, WHALEN, AND MARTOCHE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.
LAMONT REYNOLDS, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DALE ARTUS, SUPERINTENDENT, GOWANDA CORRECTIONAL FACILITY, AND BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS-RESPONDENTS.

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ROBERT M. GOLDSTEIN, BUFFALO, FOR PETITIONER-APPELLANT.

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

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Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Christopher J. Burns, J.), entered September 27, 2011 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner's appeal from the judgment dismissing his petition for a writ of habeas corpus has been rendered moot inasmuch as he reached the maximum expiration date of his sentence and was released from custody on May 18, 2012 (*see People ex rel. Kent v New York State Div. of Parole*, 87 AD3d 1205, 1206; *People ex rel. Brown v LaClair*, 74 AD3d 1642, 1643; *People ex rel. Dickerson v Unger*, 62 AD3d 1262, 1263, *lv denied* 12 NY3d 716), and none of the issues raised herein fall within the exception to the mootness doctrine (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715; *see generally Dickerson*, 62 AD3d at 1263; *People ex rel. Faison v Travis*, 277 AD2d 916, 916, *lv denied* 96 NY2d 705).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**58**

**CA 12-01466**

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, WHALEN, AND MARTOCHE, JJ.

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ADONIS CONSTRUCTION, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BATTLE CONSTRUCTION, INC., DEFENDANT-APPELLANT.

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GATES & ADAMS, P.C., ROCHESTER (RICHARD T. BELL, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (CHRISTIAN N. VALENTINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered April 25, 2012. The order, insofar as appealed from, denied defendant's motion for partial summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted and the second and third causes of action are dismissed.

Memorandum: Defendant appeals from that part of an order denying its motion seeking partial summary judgment dismissing the second and third causes of action, alleging unjust enrichment and quantum meruit, respectively. In those causes of action, plaintiff alleges that it is entitled to compensation for extra work performed outside of the scope of its subcontract with defendant, the prime contractor, for the performance of demolition work. The record supports plaintiff's contention that defendant's superintendent directed it to remove certain walls that were not included in the plans for removal. It is undisputed that the error was discovered at a site meeting several weeks after the walls were removed and that plaintiff was not aware at the time they were removed that the plans showed that those walls were to be left intact. Approximately six weeks after it learned that the walls were removed in error, and following defendant's notice to plaintiff that it would back-charge plaintiff for the cost of replacing the walls, as well as other items, plaintiff submitted a claim to defendant for payment for removing the walls. In that claim, plaintiff also sought payment for extra work related to a concrete floor and the removal of light fixtures.

With respect to the work related to the concrete floor and the light fixtures, we conclude that defendant established its entitlement to judgment dismissing the second and third causes of action insofar as they relate to those claims. The subcontract provided that

plaintiff was bound by the terms of the prime contract, which required approval of extra work before it was commenced "but in no event any later than three days from the event giving rise to the claim." Defendant met its initial burden with respect to those claims, and plaintiff failed to address those claims in opposition to the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We further conclude that defendant is entitled to judgment dismissing the claims in the second and third causes of action insofar as they relate to the removal of the walls. We therefore reverse the order insofar as appealed from and dismiss those causes of action in their entirety. The subcontract also provided that the "Subcontrator shall, within five days of receiving a direction or encountering a condition it regards as a change, alteration or extra work, submit to Contractor a written cost or credit proposal; otherwise Subcontractor shall be bound by such increase or credit as Contractor is able to obtain from Owner. Subcontractor waives any claim against Contractor for compensation or equitable adjustment for any claims, changes or extra work except to the extent the same is allowed and paid to Contractor by the Owner." Where, as here, the " 'parties set down their agreement in a clear, complete document, their writing . . . should be enforced according to its terms' " (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475). Inasmuch as the subcontract governs demolition work and requires strict compliance with the notice provision, compliance with that provision is a condition precedent to recovery in an action seeking compensation for extra work (*see A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 30-31, *rearg denied* 92 NY2d 920; *Rifenburg Constr., Inc. v State of New York*, 90 AD3d 1498, 1498-1499). We conclude that defendant established as a matter of law that plaintiff was obligated to seek compensation for the extra work pursuant to the terms of the contract when it learned that the removal of the walls constituted extra work and that plaintiff failed to do so in a timely manner (*see generally Zuckerman*, 49 NY2d at 561). We further conclude that plaintiff failed to raise an issue of fact whether the removal of the walls was outside the scope of the subcontract inasmuch as the terms of the subcontract "clearly cover[] the dispute between the parties" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389; *cf. Tom Greenauer Dev., Inc. v Burke Bros. Constr., Inc.*, 74 AD3d 1747, 1748), nor did plaintiff raise an issue of fact whether it performed the extra work with the implied or express promise that it would be paid for it over and above the subcontract amount (*cf. Pulver Roofing Co., Inc. v SBLM Architects, P.C.*, 65 AD3d 826, 827).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**64**

**KA 11-00486**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENT D. SPRATLEY, DEFENDANT-APPELLANT.

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CHRISTOPHER JUDE PELLI, UTICA, FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered November 17, 2010. The appeal was held by this Court by order entered June 8, 2012, decision was reserved and the matter was remitted to Oneida County Court for further proceedings (96 AD3d 1420). The proceedings were held and completed (Barry M. Donalty, J.).

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

Memorandum: We previously held this case, reserved decision and remitted the matter to County Court to rule on defendant's renewed pretrial motion to dismiss the indictment "based on allegedly prejudicial conduct during the grand jury proceeding," i.e., the presentation of testimony concerning handguns found in a bag in the trunk of defendant's vehicle (*People v Spratley*, 96 AD3d 1420, 1421). We determined in our prior decision that defendant's remaining contentions on the appeal from the judgment of conviction after a nonjury trial lacked merit (*id.* at 1420-1421). Upon remittal, the court denied the motion, and we now affirm.

Defendant contended in support of his renewed motion to dismiss the indictment that certain testimony of a police investigator regarding the handguns was not relevant and was prejudicial. A court may, upon the motion of a defendant, dismiss an indictment on the ground that the grand jury proceeding was "defective" (CPL 210.20 [1] [c]). A grand jury proceeding is defective when "the integrity thereof is impaired and prejudice to the defendant may result" (CPL 210.35 [5]; *see People v Huston*, 88 NY2d 400, 409). There "must be an articulable 'likelihood of' or at least 'potential for' prejudice" (*People v Adessa*, 89 NY2d 677, 686; *see Huston*, 88 NY2d at 409). Dismissal of an indictment is "limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially

prejudice the ultimate decision reached by the [g]rand [j]ury" (*Huston*, 88 NY2d at 409).

Here, contrary to defendant's contention, there was no error in the presentation of the testimony regarding the handguns during the grand jury proceeding. The victim testified before the grand jury that defendant pulled a handgun from his waistband, and the victim then heard a "bang" and realized he had been shot. The grand jury testimony that handguns were found in a bag in defendant's abandoned vehicle two hours later was thus relevant. In any event, even if the testimony was inadmissible, we agree with the court that there was no reason to dismiss the indictment. Indeed, " 'not every . . . elicitation of inadmissible testimony . . . renders an indictment defective. Typically, the submission of some inadmissible evidence will be deemed fatal only when the remaining evidence is insufficient to sustain the indictment' " (*People v Jeffery*, 70 AD3d 1512, 1513, quoting *Huston*, 88 NY2d at 409; *see People v Peck*, 96 AD3d 1468, 1469), which is not the case here.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**66**

**KA 11-01096**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STANLEY MCCARTY, SR., DEFENDANT-APPELLANT.

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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.

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Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered April 26, 2011. 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.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256). That valid waiver forecloses defendant's challenge to the severity of the sentence (*see id.* at 255-256; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**68**

**KAH 11-00998**

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

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.
THOMAS AIKENS, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DAWSON BROWN, SUPERINTENDENT, GROVELAND
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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GENESEE VALLEY LEGAL AID, INC., GENESEO (JEANNIE MICHALSKI OF COUNSEL), FOR PETITIONER-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered January 13, 2011 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition for a writ of habeas corpus. We note at the outset that the date on which judgment was entered is incorrect in petitioner's notice of appeal. The index number in the notice of appeal is correct, however, and we exercise our discretion to treat the notice of appeal as valid (*see* CPLR 5520 [c]; *People v Mitchell*, 93 AD3d 1173, 1173, *lv denied* 19 NY3d 999; *People ex rel. Cass v Khahaifa*, 89 AD3d 1517, 1517-1518).

Petitioner concedes that he was released to parole supervision before this appeal was perfected, and we thus conclude that the appeal has been rendered moot (*see People ex rel. Campolito v Hale*, 70 AD3d 1474, 1474). The exception to the mootness doctrine does not apply herein (*see id.*). In any event, petitioner was not deprived of due process because he personally did not receive the decision revoking his parole. Notice to petitioner's attorney served as notice to petitioner (*see People ex rel. Knowles v Smith*, 54 NY2d 259, 266). "[I]t is notification, not personal notification, that is a requirement of due process" (*id.*).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**69**

**KA 11-01222**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL WHITE, ALSO KNOWN AS MICHAEL BREWER,
DEFENDANT-APPELLANT.

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KATHLEEN P. REARDON, ROCHESTER, FOR DEFENDANT-APPELLANT.

MICHAEL WHITE, DEFENDANT-APPELLANT PRO SE.

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

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Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered April 11, 2011. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance 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 sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]), defendant contends that the conviction is unsupported by legally sufficient evidence. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). Moreover, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Defendant next contends that the court acted vindictively in sentencing him based on his exercise of his right to a jury trial. That contention is unpreserved for our review (*see People v Motzer*, 96 AD3d 1635, 1636, *lv denied* 19 NY3d 1104; *People v Stubinger*, 87 AD3d 1316, 1317, *lv denied* 18 NY3d 862). In any event, the record does not support defendant's contention (*see Stubinger*, 87 AD3d at 1317).

Defendant's challenge in his main and pro se supplemental briefs to the legal sufficiency of the evidence before the grand jury is

precluded by his conviction upon legally sufficient trial evidence (*see* CPL 210.30 [6]; *People v Smith*, 4 NY3d 806, 808). Furthermore, the record does not support defendant's contention that the grand jury was misled regarding a recorded telephone call, and the indictment therefore was not subject to dismissal on that ground (*see People v Bean*, 66 AD3d 1386, 1386, *lv denied* 14 NY3d 769). Defendant's claims of ineffective assistance of counsel in his main and pro se supplemental briefs fail "to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's alleged deficiencies (*People v Rivera*, 71 NY2d 705, 709; *see generally People v Baldi*, 54 NY2d 137, 151), and we thus reject them. Additionally, any isolated errors in defense counsel's representation were not so serious that defendant was thereby deprived of a fair trial (*see People v Henry*, 95 NY2d 563, 565–566).

We have reviewed defendant's remaining contentions in his pro se supplemental brief and conclude that none warrant reversal or modification of the judgment.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**70**

**KA 11-00856**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBBIE L. ALLEN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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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.

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Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered April 5, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (two counts).

It is hereby ORDERED that said appeal is unanimously dismissed.

Same Memorandum as in *People v Allen* ([appeal No. 2] ___ AD3d ___ [Feb. 8, 2013]).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**71**

**KA 11-00857**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBBIE L. ALLEN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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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.

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Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered April 5, 2011. The judgment convicted defendant, upon his plea of guilty, of bail jumping in the second degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of two counts 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 separate judgment convicting him, also upon his plea of guilty, of bail jumping in the second degree (§ 215.56). We note at the outset that defendant raises no challenge to the judgment in appeal No. 1, and we therefore dismiss the appeal from that judgment (*see* CPL 470.60 [1]; *People v Allen*, 93 AD3d 1340, 1340-1341, *lv denied* 19 NY3d 956). With respect to appeal No. 2, defendant challenges only the sentence, but concedes that he has been resentenced upon the judgment in that appeal. Consequently, inasmuch as "the initial sentence has been super[s]eded[,] any issue with respect to sentencing on th[at] appeal is now moot" (*People v Gannon*, 2 AD3d 1214, 1214; *see People v Haywood*, 203 AD2d 966, 966, *lv denied* 83 NY2d 967).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**73**

**KA 10-02428**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JETONE JONES, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered October 8, 2010. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree and robbery in the second 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: On appeal from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [3]) and robbery in the second degree (§ 160.10 [1]), defendant contends that reversal is required because the record fails to establish whether Supreme Court provided a meaningful response to the jury's request for exhibits. Defendant did not preserve that contention for our review and, in any event, there is no evidence in the record that the court did not comply fully with the jury's request (*see People v Snider*, 49 AD3d 459, 459, *lv denied* 11 NY3d 795, citing *People v Kisoon*, 8 NY3d 129, 135; *see generally People v O'Rama*, 78 NY2d 270, 276). Defendant's suggestion to the contrary is based solely on speculation.

Defendant further contends that the conviction is not supported by legally sufficient evidence. We reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). The evidence established that the victim, who had known defendant for several years, observed him seated with another man in a truck at a gas station, drinking from a Grey Goose vodka bottle that was partially wrapped in a paper bag. After a short conversation between defendant and the victim, defendant exited the truck and struck the victim in the head with a hard object. A struggle ensued and, while the victim was on the ground, defendant or his companion stole cash, a cell phone and a pack of Newport cigarettes from the victim's pockets. Although the victim did not see the object that defendant used to strike him,

defendant believed that it was the vodka bottle. After defendant drove away, the victim called 911 and reported the crime.

Within 20 minutes, the police observed defendant and his codefendant in a vehicle matching the description of the robbers' vehicle provided by the victim. The vehicle was parked on a street approximately a quarter of a mile from the crime scene. Upon investigation, the police learned that the victim's cell phone was in the vehicle, along with a pack of Newport cigarettes and a bottle of Grey Goose vodka. Another Grey Goose bottle was found on the grass next to the vehicle. The victim then identified defendant in a prompt showup procedure. While defendant was in a holding room at the police station following his arrest, a police investigator heard defendant saying to his codefendant, "Man, I should have thrown the phone out," or words to that effect.

The above evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction. Although the victim did not see defendant strike him with a Grey Goose bottle, which constitutes a dangerous instrument under these circumstances (*see People v Joseph*, 23 AD3d 174, 175, *lv denied* 6 NY3d 777; *People v Soumik*, 244 AD2d 584, 584, *lv denied* 91 NY2d 897), the evidence is legally sufficient to establish that defendant used the Grey Goose vodka bottle to attack defendant from behind in order to steal his property (*see People v Jacobs*, 188 AD2d 897, 898, *lv denied* 81 NY2d 887; *People v Carey*, 180 AD2d 431, 432, *lv denied* 79 NY2d 998; *cf. People v McBride*, 203 AD2d 85, 86, *lv denied* 83 NY2d 912). Further, viewing the evidence in light of the elements of the crimes 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 Bleakley*, 69 NY2d 495). Although a different verdict would not have been unreasonable, upon independently "weigh[ing] the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony," we conclude that the jury did not fail to give the evidence the weight it should be accorded (*People v Rayam*, 94 NY2d 557, 560 [internal quotation marks omitted]).

Defendant further contends that he was deprived of a fair trial by various erroneous evidentiary rulings made by the court, some of which were of constitutional dimension. Defendant failed to preserve for our review his contentions with respect to the alleged errors (*see* CPL 470.05 [2]). In any event, even assuming, arguendo, that the court erred in one or more of its evidentiary rulings, we conclude that "there is overwhelming proof of the defendant's guilt and no reasonable possibility that the error[s] might have contributed to the defendant's conviction" (*People v Khan*, 200 AD2d 129, 139-140, *lv denied* 84 NY2d 937; *see generally People v Crimmins*, 36 NY2d 230, 237). We reject defendant's further contention that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). We have reviewed defendant's contention concerning venue and conclude that it does not require reversal or modification of the judgment.

We agree with defendant, however, that the court erred in failing to rule on those parts of his pretrial motion seeking inspection of the grand jury minutes and seeking dismissal of the indictment on the ground that the integrity of the grand jury proceedings was impaired (*see People v Spratley*, 96 AD3d 1420, 1421). The record does not reflect that the court ever ruled on defendant's motion, and a failure to rule on a motion cannot be deemed a denial thereof (*see id.*; *see also People v Concepcion*, 17 NY3d 192, 197-198). We therefore hold the case, reserve decision and remit the matter to Supreme Court to decide those parts of defendant's motion.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**75**

**CAF 12-00440**

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

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IN THE MATTER OF BRITTANY W., STEPHAEN W.,
MICHAEL W., KARA W. AND JUSTIN W.
---------- MEMORANDUM AND ORDER
NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

PATRICK W., RESPONDENT-APPELLANT,
AND KAREN W., RESPONDENT.

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

LAURA WAGNER, LOCKPORT, FOR PETITIONER-RESPONDENT.

DEBORAH A. WALKER-DEWITT, ATTORNEY FOR THE CHILDREN, LOCKPORT, FOR BRITTANY W., STEPHAEN W., MICHAEL W., KARA W. AND JUSTIN W.

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Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered February 16, 2012 in a proceeding pursuant to Family Court Act article 10. The order, among other things, found that respondent Patrick W. neglected two of his children and derivatively neglected three others.

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

Memorandum: Respondent father appeals from an order finding that he neglected his two children and derivatively neglected three others. Contrary to the father's contention, the out-of-court statements of his two children were sufficiently corroborated by their "cross statements," the photographic evidence of their injuries, and the caseworker's testimony (*Matter of Frank Y.*, 11 AD3d 740, 742 [internal quotation marks omitted]; *see* Family Ct Act § 1046 [a] [vi]). "Moreover, [Family Court] properly drew 'the strongest possible negative inference' against the father after he failed to testify at the fact-finding hearing" (*Matter of Kennedie M. [Douglas M.]*, 89 AD3d 1544, 1545, *lv denied* 18 NY3d 808). We therefore conclude that the court's finding of neglect was justified on this record, as was its finding of derivative neglect with respect to the other three children (*see Matter of Steven L.*, 28 AD3d 1093, 1093, *lv denied* 7 NY3d 706). We reject the father's further contention that the court improperly admitted testimony and other evidence regarding an order of protection that he contends was not in effect, inasmuch as the record does not substantiate his claim that the order at issue was not actually in

effect. In any event, the evidence relating to that order of protection was not material to the court's ultimate finding of neglect, and any error in its admission is thus harmless (*see Matter of A.R.*, 309 AD2d 1153, 1153; *see also Matter of Shirley v Shirley*, 101 AD3d 1391, ___; *Matter of Anjoulic J.*, 18 AD3d 984, 986-987).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**76**

**CAF 11-01053**

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

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IN THE MATTER OF DEYA L. WILEY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SYLVIA GREER, RESPONDENT-RESPONDENT.

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DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR PETITIONER-APPELLANT.

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-RESPONDENT.

CHARLES A. MESSINA, ATTORNEY FOR THE CHILDREN, HAMBURG, FOR ALEYAH A. AND DAJAE A.

ELISABETH M. COLUCCI, ATTORNEY FOR THE CHILD, BUFFALO, FOR AMILEYAN A.

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Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered March 15, 2011 in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition without prejudice.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following Memorandum: Petitioner mother appeals from an order dismissing without prejudice a family offense petition she filed in February 2011 against respondent, her children's paternal grandmother, who has custody of the subject children. Petitioner had previously filed a family offense petition in October 2010, but she withdrew that petition and Family Court then dismissed it without prejudice. The court dismissed the February 2011 petition from the bench on March 15, 2011, immediately prior to a hearing on issues raised in a separate petition relating to custody and visitation of the subject children. Although the court initially stated in error that the February 2011 petition (hereafter, petition) was identical to the October 2010 petition, the court did not base its dismissal on that ground. Instead, the court explained that the factual allegations in the petition were "remote" and that, because the petition was filed on the eve of the trial scheduled for custody and visitation with respect to another petition, it was "nothing more than a delay tactic." After dismissing the petition, the court noted petitioner's objection and stated that she "can certainly appeal" from its order, which as noted above dismissed the petition without prejudice.

We agree with petitioner that the court erred in dismissing the petition (*see generally Matter of Prezioso v Prezioso*, 79 AD3d 1043, 1043-1044). There was no basis for the dismissal of the petition due to "remote" allegations inasmuch as some of respondent's offending conduct set forth in the petition occurred only 12 days before the petition was filed. Indeed, respondent on appeal does not contend that the petition was properly dismissed on remoteness grounds. There likewise was no basis for the dismissal of the petition as a "delay tactic" on the eve of trial because the court could have proceeded with the hearing scheduled for custody and visitation and considered the petition at a later date.

As an alternative ground for affirmance (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546), respondent contends that the petition was facially insufficient because it was based on hearsay allegations. That contention is raised for the first time on appeal and thus is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Finally, respondent contends that reversal is not warranted because the petition was dismissed without prejudice, and petitioner is therefore not barred from filing another petition based on the same allegations. We reject that contention. Inasmuch as there was no basis to dismiss the petition in the first instance, the fact that it was dismissed without prejudice is of no moment. To the extent that respondent is thereby challenging the appealability of an order dismissing a petition "without prejudice," that challenge is lacking in merit (*see e.g. Modica v Allstate Ins. Co.*, 294 AD2d 967).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**77**

**CA 12-01322**

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

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CLAUDETTE V. SAUTER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PETER A. CALABRETTA, DEFENDANT-APPELLANT.

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MACKENZIE HUGHES LLP, SYRACUSE (SAMANTHA MILLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

STANLEY LAW OFFICES, LLP, SYRACUSE (JOHN COOPER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered March 22, 2012 in a personal injury action. The order, inter alia, granted plaintiff's motion to set aside the jury verdict.

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

Memorandum: In this negligence action, plaintiff seeks damages for injuries that she sustained when she was struck by a vehicle operated by defendant while she was walking on the right side of a road. The jury returned a verdict in defendant's favor, but Supreme Court thereafter granted plaintiff's motion to set aside the verdict as against the weight of the evidence and directed that a new trial be conducted (*see* CPLR 4404 [a]). Defendant appeals. We reverse and reinstate the verdict.

"A verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence" (*Krieger v McDonald's Rest. of N.Y., Inc.*, 79 AD3d 1827, 1828, *lv dismissed* 17 NY3d 734 [internal quotation marks omitted]; *see Lolik v Big V Supermarkets*, 86 NY2d 744, 746; *Parr v Mongarella*, 77 AD3d 1429, 1429). Although "[t]hat determination is addressed to the sound discretion of the trial court, . . . if the verdict is one that reasonable persons could have rendered after receiving conflicting evidence, the court should not substitute its judgment for that of the jury" (*Ruddock v Happell*, 307 AD2d 719, 720; *see Harris v Armstrong*, 97 AD2d 947, 947, *affd* 64 NY2d 700; *Todd v PLSIII, LLC–We Care*, 87 AD3d 1376, 1377; *Parr*, 77 AD3d at 1429-1430). Further, it "is within

the province of the jury to determine issues of credibility, and great deference is accorded to the jury given its opportunity to see and hear the witnesses" (*Seong Yim Kim v New York City Tr. Auth.*, 87 AD3d 531, 532 [internal quotation marks omitted]).

It is undisputed that the accident at issue occurred at approximately 11:00 p.m. in a dark area with only minimal artificial lighting. Defendant testified that he was driving at the speed limit of 40 miles per hour in the right lane of the subject road when he saw "a big blur of . . . dark red or something" about 10 feet in front of him on the right. According to defendant, the blur was to the left of the fog line. The impact occurred one to two seconds after defendant perceived the blur in his peripheral vision, and he testified that he "had no time to react." Defendant's passenger-side mirror struck plaintiff in the back and threw her "to the right a little bit and a distance" from the point of impact. Plaintiff landed face-first in a puddle, slightly to the right of a drainage gutter that ran along the shoulder of the road. The "far right" portion of the vehicle's windshield and its passenger-side mirror were damaged by the impact.

It is further undisputed that conditions at the time of the accident would have substantially reduced defendant's ability to perceive and react to plaintiff and the friend with whom she was walking at that time. Plaintiff and her friend were walking shoulder-to-shoulder on the right side of the road with their backs to traffic; plaintiff, who was walking closest to the road, was wearing a dark red hooded sweatshirt and blue jeans, and she did not recall whether her hood was up or down; neither plaintiff nor her friend was wearing reflective clothing, and they were not carrying flashlights; the investigating officer testified that the north side of the subject road has a "very narrow" shoulder, and, according to plaintiff's friend, the fog line separating the shoulder from the roadway was so "faded" that she could "[b]arely" see it; the shoulder was also bisected by the drainage gutter that at the time of the accident contained an accumulation of water from an earlier rainfall, requiring plaintiff and her friend to walk around the resulting puddles; plaintiff's grandmother testified that "you can't see very well" at night on the subject road; and, although plaintiff's friend insisted that they "never" crossed the fog line, she also testified that she "wasn't paying attention to [the fog line]," that she did not see plaintiff's feet at the time of the accident, and that she never saw the wheels of defendant's vehicle cross the fog line.

Although by granting the posttrial motion the court agreed with plaintiff that defendant was negligent in failing to see what was there to be seen, we nevertheless agree with defendant that reasonable persons could have found that he was not negligent given the foregoing trial evidence (*see Todd*, 87 AD3d at 1376-1378; *Seong Yim Kim*, 87 AD3d at 532-533; *Parr*, 77 AD3d at 1430). The court therefore erred in setting aside the jury's verdict (*see generally Nicastro v Park*, 113 AD2d 129, 135).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**78**

**CA 12-00907**

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

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TIMOTHY FORD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CARDIOVASCULAR SPECIALISTS, P.C., DOING BUSINESS AS NEW YORK HEART CENTER, DEFENDANT-APPELLANT.

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LAW OFFICE OF STEWART L. WEISMAN, MANLIUS (STEWART L. WEISMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAPPAS, COX, KIMPEL, DODD & LEVINE, P.C., SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered December 12, 2011. The order denied plaintiff's motion for summary judgment to the extent that it sought declaratory relief and granted the motion to the extent that it sought dismissal of defendant's counterclaim for liquidated damages.

It is hereby ORDERED that said appeal from the order insofar as it denied that part of plaintiff's motion for declaratory relief is unanimously dismissed and the order is affirmed without costs.

Memorandum: Plaintiff physician commenced this action against defendant, his former employer, seeking judgment declaring that the noncompetition covenant in the parties' employment agreement is no longer in effect or is otherwise unenforceable against him. Defendant asserted a counterclaim alleging breach of the employment agreement and seeking liquidated damages. Plaintiff previously moved for a preliminary injunction enjoining defendant from enforcing the noncompetition covenant and, in a prior appeal, we concluded that Supreme Court erred in granting the ultimate relief requested in the complaint rather than ruling on that motion (*Ford v Cardiovascular Specialists, P.C.*, 71 AD3d 1429, 1430). Plaintiff thereafter moved for summary judgment granting the declaratory relief sought in the complaint and dismissing defendant's "claim" for liquidated damages. The court denied the motion to the extent that it sought declaratory relief and granted the motion to the extent that it sought dismissal of the counterclaim for liquidated damages.

At the outset, we note that defendant did not seek affirmative relief in Supreme Court but simply opposed plaintiff's motion. Thus, defendant is not aggrieved by that part of the order denying

plaintiff's motion to the extent that it sought a declaration (*see* CPLR 5511; *Savino v DeLeyer*, 160 AD2d 989, 990-991). We therefore dismiss the appeal to that extent (*see Savino*, 160 AD2d at 990-991). Moreover, plaintiff did not take a cross appeal from that part of the order denying his motion to the extent that it sought declaratory relief, and thus his contention that the court erred with respect to that denial is not properly before us (*see Harris v Eastman Kodak Co.*, 83 AD3d 1563, 1564; *Zeman v Falconer Elecs., Inc.*, 55 AD3d 1240, 1241; *see generally* CPLR 5515 [1]).

We further conclude that the court properly granted that part of plaintiff's motion with respect to defendant's counterclaim to the extent that it sought liquidated damages pursuant to the formula set forth in the noncompetition covenant, i.e., "150% of [plaintiff's] annual W-2 gross income and bonus at termination." "Whether [that formula] represents an enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the [employment agreement] and the circumstances" (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 379). Plaintiff met his initial burden of establishing that the liquidated damages sought by defendant are a penalty by submitting evidence that the amount of such damages, i.e., approximately $555,000, is "grossly disproportionate to" defendant's anticipated loss from plaintiff's alleged breach of the noncompetition covenant (*Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 424; *see JMD Holding Corp.*, 4 NY3d at 380; *Fingerlakes Chiropractic v Maggio*, 269 AD2d 790, 791; *Borek, Stockel & Co. v Slevira*, 203 AD2d 314, 314-315), and defendant failed to raise a triable issue of fact. We agree with defendant, however, that the counterclaim is intact to the extent that defendant is entitled to actual damages arising from plaintiff's alleged breach (*see Borek, Stockel & Co.*, 203 AD2d at 314-315; *Novendstern v Mt. Kisco Med. Group*, 177 AD2d 623, 625, *lv dismissed* 80 NY2d 826).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**87**

**KA 11-01948**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FREDRICK MILLS, DEFENDANT-APPELLANT.

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ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered September 7, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted 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 attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). 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 to the severity of the sentence (*see id.* at 255-256; *People v Scott*, 272 AD2d 783, 784; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737). In any event, the sentence is not unduly harsh or severe.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**88**

**KA 10-01389**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHANIEL SHEPARD, III, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered June 7, 2010. 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: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.), defendant contends that County Court violated his due process rights by ordering an upward departure from his presumptive risk level without informing him that it intended to consider such a departure, which the People had not requested. Defendant, however, failed to preserve that contention for our review (*see generally People v Wroten*, 286 AD2d 189, 195-196, *lv denied* 97 NY2d 610).

Defendant further contends that the court abused its discretion in finding that a departure from risk level two to risk level three was justified by the evidence adduced at the SORA hearing. "A court may make an upward departure from a presumptive risk level when, after consideration of the indicated factors . . . [,] 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 Grady*, 81 AD3d 1464, 1464; *see People v Howe*, 49 AD3d 1302, 1302). Here, the court properly based its upward departure on reliable hearsay from the presentence report and the case summary, which demonstrates that defendant forcibly raped a 10-year-old girl when he was 11 years old and participated in the gang rape of a 14-year-old girl when he was 15 years old. Contrary to defendant's assertion, his commission of those illegal sexual acts as a youth is an aggravating factor not adequately accounted for by the risk

assessment instrument. Although defendant had been assessed, inter alia, 30 points under risk factor 9 ("Number and nature of prior crimes"), that assessment was based solely on his prior attempted robbery convictions. As the People correctly note, defendant could not have been assessed points under risk factor 9 for raping the 10-year-old girl or for later gang-raping the 14-year-old girl because he was neither convicted of a crime for either act nor adjudicated a juvenile delinquent for a sex offense based on either act. Thus, the court properly relied on defendant's prior juvenile sex offenses in determining that he poses a level three risk of reoffending.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**91**

**KA 11-01597**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES FOX, DEFENDANT-APPELLANT.

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LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered July 22, 2011. The judgment convicted defendant, upon his plea of guilty, of failure to register as a sex offender.

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 as a sex offender (Correction Law §§ 168-f [4]; 168-t). By failing to move to withdraw his plea or to vacate the judgment of conviction, defendant failed to preserve for our review his contention that his statement during the allocution concerning a potential suppression issue rendered the plea involuntary (*see People v Lopez*, 71 NY2d 662, 667-668). In any event, defendant's contention lacks merit because the record establishes that, following an inquiry by County Court, he affirmatively waived his right to challenge the admissibility of his statement to the police (*see generally People v Mackie*, 54 AD3d 651, 652, *lv denied* 11 NY3d 898). Defendant's further contention that defense counsel's failure to move to suppress the statement at issue deprived him of meaningful representation does not survive his plea because there is no indication that the plea was infected by defense counsel's alleged ineffectiveness (*see People v La Bar*, 16 AD3d 1084, 1085, *lv denied* 5 NY3d 764). We note, in any event, that such a motion would have had little chance of success on these facts, and thus defense counsel was not ineffective for failing to make a motion on that basis (*see generally People v Caban*, 5 NY3d 143, 152).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**93**

**KA 08-01199**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN C. JOHNSON, ALSO KNOWN AS “STUNT,”
DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered May 16, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon 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 murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends that County Court improperly instructed the jury with respect to his justification defense. Defendant failed to object to the justification charge as given, however, and his contention is thus unpreserved for our review (*see People v Carr*, 59 AD3d 945, 946, *affd* 14 NY3d 808; *People v Folger*, 292 AD2d 841, 842, *lv denied* 98 NY2d 675). In any event, we conclude that “the jury, hearing the whole charge, would gather from its language the correct rules [that] should be applied in arriving at [a] decision” (*People v Jones*, 100 AD3d 1362, 1366 [internal quotation marks omitted]). Because the court did not erroneously instruct the jury regarding justification, defense counsel was not ineffective for failing to object to that charge (*see People v Fairley*, 63 AD3d 1288, 1290, *lv denied* 13 NY3d 743). Nor was defense counsel ineffective for failing to amend his pretrial motion papers; even had an amendment resulted in a reopened or enlarged suppression hearing, defendant cannot show that any evidence would have been consequently suppressed (*see People v Watson*, 90 AD3d 1666, 1667, *lv denied* 19 NY3d 868; *see also People v Caban*, 5 NY3d 143, 152).

Finally, there being no dispute that defendant shot the unarmed

victim multiple times at close range with an illegal handgun, we reject his contention that the verdict is against the weight of the evidence with respect to the murder conviction because the People failed to disprove his justification defense (*see generally People v Danielson*, 9 NY3d 342, 348-349). Defendant had sought out the victim, whose nickname was "Mooch," and he found him sitting on a stoop, smoking a cigarette with a female. Defendant then approached him, gun drawn, and said, "Hey, yo, Mooch, that's how you feel?" Almost immediately thereafter, defendant fired four or five shots at the victim. Three of the bullets struck the victim, one of which went through his heart and killed him almost instantaneously. Defendant then fled on foot. When arrested three days later, defendant admitted to the police that he shot the victim, explaining that he did so because he feared that, due to a dispute over drug money, the victim was going to kill him "sooner or later." Thus, although defendant testified at trial that he believed that the victim was reaching for a gun in his waistband moments before he shot him, we nevertheless conclude that the People disproved the justification defense beyond a reasonable doubt (*see People v McCallum*, 96 AD3d 1638, 1639, *lv denied* 19 NY3d 1103; *People v Rogers*, 94 AD3d 1152, 1152; *People v Fisher*, 89 AD3d 1135, 1137-1138, *lv denied* 18 NY3d 883).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**94**

**KA 12-01643**

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

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

FRANK VANALST, ALSO KNOWN AS SHAUN JOHNSON,
DEFENDANT-RESPONDENT.

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R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (BRIAN D. DENNIS OF COUNSEL), FOR APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Ontario County Court (Frederick G. Reed, A.J.), entered April 9, 2012. The order granted the motion of defendant to dismiss the indictment.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Ontario County Court for further proceedings in accordance with the following Memorandum: The People appeal from an order dismissing the sole count of the indictment, which charged defendant with criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), based on the alleged legal insufficiency of the evidence before the grand jury. The People contend that County Court applied an incorrect legal standard in reviewing that evidence. We agree.

"The grand jury 'must have before it evidence legally sufficient to establish a prima facie case, including all the elements of the crime, and reasonable cause to believe that the accused committed the offense to be charged' " (*People v Wyant*, 98 AD3d 1277, 1277, quoting *People v Jensen*, 86 NY2d 248, 251-252). Legally sufficient evidence is "competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof" (CPL 70.10 [1]; *see People v Swamp*, 84 NY2d 725, 730). On a motion to dismiss an indictment for legal insufficiency (*see* CPL 210.20 [1] [b]), the court "must consider whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted . . . would warrant conviction" (*Swamp*, 84 NY2d at 730; *see Jensen*, 86 NY2d at 251; *People v Jennings*, 69 NY2d 103, 114). Thus, the foregoing standard limits the reviewing court to determining whether the evidence before the grand jury, together with the inferences that logically flow therefrom, supplies proof of every element of the charged crimes "and whether 'the [g]rand [j]ury could rationally have

drawn the guilty inference' " (*People v Bello*, 92 NY2d 523, 526, quoting *People v Deegan*, 69 NY2d 976, 979).

Here, in dismissing the indictment, the court concluded that the police were not justified in pursuing defendant when he fled and thereafter allegedly dropped the narcotics that he was charged with possessing. That was error. The court did not decide the motion under the well-established standards set forth above; rather, the court decided the motion based on its improper determination of a suppression issue in the context of a motion to dismiss pursuant to CPL 210.20 (1) (b) (*see generally Jensen*, 86 NY2d at 251-252). In any event, it is further well established that, even "[i]f competent prima facie evidence underlying an indictment is subsequently rendered inadmissible [after a suppression hearing,] the legal sufficiency of the indictment is not undermined" (*People v Gordon*, 88 NY2d 92, 96; *cf.* CPL 210.20 [1] [h]).

We therefore hold the case, reserve decision, and remit the matter to County Court to determine whether the evidence before the grand jury is legally sufficient to support the indictment without regard to the alleged violations of defendant's rights under the Fourth Amendment or article I, § 12 of the New York Constitution, and to determine any remaining issues in connection with defendant's request for dismissal of the indictment.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**95**

**CAF 11-00069**

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

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IN THE MATTER OF JOSHUA R.S.,
RESPONDENT-APPELLANT.
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STEUBEN COUNTY LAW DEPARTMENT,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

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ROBERT A. DINIERI, ATTORNEY FOR THE CHILD, CLYDE, FOR RESPONDENT-APPELLANT.

ALAN P. REED, COUNTY ATTORNEY, BATH (RUTH A. CHAFFEE OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered November 30, 2010 in a proceeding pursuant to Family Court Act article 3. The order directed respondent to pay restitution.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reducing the amount of restitution to $730 and as modified the order is affirmed without costs.

Memorandum: On appeal from an order directing him to pay restitution in the amount of $740 for property damage and loss arising from his multiple burglaries of a single residence, respondent contends that the restitution award is not supported by the record. The restitution award is comprised of $580 for property damage and $160 for the theft of a handgun and a bottle of vodka. With one minor exception, we conclude that Family Court's restitution award is supported by a preponderance of the material and relevant evidence introduced at the dispositional hearing (*see* Family Ct Act § 350.3 [1], [2]; *Matter of Michael V.*, 92 AD3d 1115, 1116, *lv denied* 19 NY3d 804).

Here, the cost to repair the damaged property was established by the testimony of its landlord and an estimate for repairs written on construction company letterhead. Furthermore, the victim testified to the model and the condition of his stolen handgun and that he had inquired at three local stores to determine the value of comparable models. Based on the detailed testimony of the witnesses and in light of the great weight accorded to the court's award (*see Matter of Andrew D.*, 231 AD2d 953, 953; *Matter of James A.*, 205 AD2d 621, 622), we conclude that the evidence is sufficient to support the court's determination of the "fair and reasonable cost to replace the property [or] repair the damage caused by the respondent" with respect to those

portions of the restitution award (Family Ct Act § 353.6 [1] [a]; *see Matter of Dante P.*, 81 AD3d 1267, 1268; *Matter of Antonio M.*, 214 AD2d 571, 571).

We agree with respondent, however, that the court erred in granting restitution with respect to a $10 bottle of vodka allegedly stolen during a burglary. The theft of that bottle was not alleged in the petition and, as such, is not properly part of the restitution award (*see Matter of Jared G.*, 39 AD3d 1248, 1249). We therefore modify the order by reducing the amount of restitution accordingly.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**96**

**CAF 12-00768**

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

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IN THE MATTER OF PATRICK A. HOWELL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

FAATIMAH A. LOVELL, RESPONDENT-APPELLANT.

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LEGAL ASSISTANCE OF WESTERN N.Y. INC., OLEAN (STEVEN A. LANZA OF COUNSEL), FOR RESPONDENT-APPELLANT.

WAGNER & HART, LLP, OLEAN (JANINE FODOR OF COUNSEL), FOR PETITIONER-RESPONDENT.

SCHAVON R. MORGAN, ATTORNEY FOR THE CHILD, MACHIAS, FOR BIANCA J.H.

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Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered February 22, 2012 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, transferred primary physical placement of the parties' child to petitioner.

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

Memorandum: Respondent mother appeals from an order that, inter alia, transferred primary physical placement of the parties' child to petitioner father. Pursuant to an order entered on the consent of the parties in August 2011 (2011 order), the mother was awarded primary physical placement of the child. The father was awarded liberal visitation that included, in odd-numbered years, "Christmas/Winter Break that said child has from school, or if said child is not in school for a period of at least two weeks at Christmas time." The mother, who had relocated to Virginia, was responsible for all transportation to and from visitation with the father in New York. It is undisputed that the mother did not transport the child for the Christmas 2011 visitation on or before Christmas 2011. The father thus filed the instant petition alleging that the mother had violated the 2011 order. We conclude that Family Court properly granted the petition and transferred primary physical placement of the child to the father.

Contrary to the mother's contention, the father established by clear and convincing evidence that "a lawful court order clearly expressing an unequivocal mandate was in effect, that the [mother] had

actual knowledge of its terms, and that the violation . . . defeated, impaired, impeded, or prejudiced the rights of [the father]" (*Manning v Manning*, 82 AD3d 1057, 1058; *see Matter of Formosa v Litt*, 91 AD3d 644, 644-645; *Matter of Joseph YY. v Terri YY.*, 75 AD3d 863, 867; *Matter of Petkovsek v Snyder* [appeal No. 2], 251 AD2d 1085, 1085). Although the 2011 order did not specify the date upon which the father was to assume visitation, the mother conceded that she understood that the order mandated that his visitation occur on Christmas Day. Indeed, the record establishes that the mother had initially arranged to transfer the child to the paternal grandmother in New York on Christmas Eve. The mother testified, however, that the father had agreed, at the mother's request, to postpone visitation until the "beginning" of January because of medical issues involving the mother. The father denied that there was such an agreement and, notably, the paternal grandmother proceeded to the transfer location on Christmas Eve with the assumption that visitation was to occur. The court determined that the mother's testimony related to the purported agreement was not credible and, inasmuch as we defer to "the court's firsthand assessment of the character and credibility of the parties" (*Matter of Thayer v Thayer*, 67 AD3d 1358, 1359; *see Matter of Tarrant v Ostrowski*, 96 AD3d 1580, 1580-1581, *lv denied* ___ NY3d ___ [Jan. 8, 2013]; *Matter of Nicole J.R. v Jason M.R.*, 81 AD3d 1450, 1451, *lv denied* 17 NY3d 701), we will not disturb that determination.

The mother correctly contends that the court did not specifically address any other factors related to the child's best interests before transferring primary physical placement of the child to the father. That omission, however, does not warrant reversal. "Our authority in determinations of custody is as broad as that of Family Court . . . and where, as here, the record is sufficient for this Court to make a best interests determination . . . , we will do so in the interests of judicial economy and the well-being of the child" (*Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1450; *see e.g. Matter of Butler v Ewers*, 78 AD3d 1667, 1667; *Matter of Brian C.*, 32 AD3d 1224, 1225, *lv denied* 7 NY3d 717; *see generally Matter of Louise E. S. v W. Stephen S.*, 64 NY2d 946, 947).

We conclude that it is in the child's best interests for the father to have primary physical placement. It is undisputed that "defiance of a court order is but one factor to be considered when determining the relative fitness of the parties and what custody arrangement is in the child's best interest[s]" (*Wodka v Wodka*, 168 AD2d 1000, 1001; *see Tarrant*, 96 AD3d at 1582; *see generally Friederwitzer v Friederwitzer*, 55 NY2d 89, 94). "It is well settled, however, that [a] concerted effort by one parent to interfere with the other parent's contact with the child is so inimical to the best interests of the child . . . as to, per se, raise a strong probability that [the interfering parent] is unfit to act as custodial parent" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [internal quotation marks omitted]; *see Matter of Howden v Keeler*, 85 AD3d 1561, 1562; *Matter of Amanda B. v Anthony B.*, 13 AD3d 1126, 1127). Here, the father established that the mother had not only violated the visitation provisions of the 2011 order, but also had violated the

visitation provisions of an earlier order. At the time she refused to transport the child for the Christmas 2011 visitation, there was in effect an order adjourning the matter concerning the earlier violation in contemplation of dismissal. Furthermore, the father submitted evidence that the mother had indicated that she did not care what the court directed her to do. In our view, the mother's repeated violations of court orders and her interference with the father's visitation have rendered her unfit to act as a custodial parent.

Even assuming, arguendo, that the repeated interference with the father's visitation did not render the mother unfit to act as a custodial parent, we would nevertheless conclude that it is in the child's best interests to reside with the father. In both New York and Virginia, the child will be near extended family, although we note that in New York, the child will reside with her two half-siblings. The Court of Appeals has recognized that "it is often in the child's best interests to continue to live with his [or her] siblings. While this . . . is not an absolute, the stability and companionship to be gained from keeping the children together is an important factor for the court to consider" (*Eschbach v Eschbach*, 56 NY2d 167, 173; *see Fox v Fox*, 177 AD2d 209, 210). Both parents are employed and have suitable residences, and the father and his girlfriend have a long-term, stable relationship. Although the mother has been the primary caretaker for most of the child's life, the child is comfortable in both homes. Finally, the evidence at the hearing established that the father would be better able to foster the child's relationship with the noncustodial parent. We thus conclude that it is in the child's best interests for the father to have primary physical placement.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**97**

**CA 12-01357**

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

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PATRICE LEONARDI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF CAYUGA, CAYUGA COUNTY DIRECTOR OF MENTAL HEALTH KATHARINE O'CONNELL, CAYUGA COUNTY ASSISTANT DIRECTOR OF MENTAL HEALTH KAREN KILLIPS, CAYUGA COUNTY MENTAL HEALTH SUPERVISOR MITCHELL LURYE, CAYUGA COUNTY DIRECTORS OF HEALTH AND HUMAN SERVICES ELAINE DALY AND SANDRA GILLILAND, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES, DEFENDANTS-RESPONDENTS, AND CAYUGA COUNTY DIRECTOR OF ADMINISTRATIVE SERVICES THOMAS CROUNSE, DEFENDANT.

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CARL J. DEPALMA, AUBURN, FOR PLAINTIFF-APPELLANT.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (JOHN A. SICKINGER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered September 29, 2011. The order, among other things, granted defendants-respondents' motion to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by providing that the complaint is dismissed without prejudice to the rights of plaintiff to apply to Supreme Court for leave to serve an amended complaint with regard to the sixth cause of action, for fraudulent inducement, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action alleging, inter alia, that defendants fraudulently induced her to accept a promotion, which resulted in her loss of union protection and other benefits as well as the imposition of a one-year probationary period. Plaintiff was subsequently terminated from her new position during that period. Defendants-respondents (defendants) thereafter moved to dismiss the complaint for failure to state a cause of action, whereupon plaintiff withdrew certain causes of action and Supreme Court granted the motion with respect to the remaining causes of action. As limited by her brief, plaintiff contends that the court erred in dismissing the cause of action for fraudulent inducement on the ground that the notice of claim filed pursuant to General Municipal Law § 50-e was untimely. We

agree.

An action based upon fraud accrues for purposes of General Municipal Law § 50-e when the fraudulent act is committed or when "the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it" (CPLR 213 [8]), whichever occurs later (*see Vilsack v Myer*, 96 AD3d 827, 828; *see generally Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94). If the accrual rule were otherwise, municipalities would have an incentive to conceal the damages and/or injuries stemming from a fraudulent act until the 90-day period under section 50-e had passed, leaving potential plaintiffs with no recourse aside from an application for leave to serve a late notice of claim (*see* General Municipal Law § 50-e [5]). Here, plaintiff was unable to assert a cause of action for fraudulent inducement until she sustained damages resulting from the fraud, i.e., when she was terminated from her new position during its probationary period (*see Vilsack*, 96 AD3d at 828; *see generally Kronos*, 81 NY2d at 94). Plaintiff timely served her notice of claim within 90 days of her termination.

Nevertheless, we agree with defendants that there is an alternative ground for affirmance (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546), i.e., that the complaint should have been dismissed because plaintiff failed to plead with sufficient particularity the facts underlying her fraudulent inducement claim as required by CPLR 3016 (b). "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559; *see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486; *Merrill Lynch Credit Corp. v Smith*, 87 AD3d 1391, 1392-1393). In a pleading asserting a cause of action for fraud, "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]). "CPLR 3016 (b) is satisfied when the facts suffice to permit a 'reasonable inference' of the alleged misconduct" (*Eurycleia Partners*, 12 NY3d at 559). Inasmuch as plaintiff failed to satisfy the requirements of CPLR 3016 (b), the court properly dismissed the complaint to the extent that it was not withdrawn by plaintiff (*see Simmons v Washing Equip. Tech.*, 51 AD3d 1390, 1391-1392; *cf. Flandera v AFA Am., Inc.*, 78 AD3d 1639, 1640-1641). We note, however, that "[t]he dismissal . . . is without prejudice to an application by plaintiff[] to Supreme Court for leave to serve an amended complaint with regard to th[e] cause of action [for fraudulent inducement]" (*Credit Alliance Corp. v Arthur Anderson & Co.*, 66 NY2d 812, 812), and thus we modify the order to that extent.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**99**

**CA 12-00973**

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

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RICHARD F. CHRISTY, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS, DEFENDANT-APPELLANT.

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CRAIG H. JOHNSON, CORPORATION COUNSEL, NIAGARA FALLS (CHRISTOPHER M. MAZUR OF COUNSEL), FOR DEFENDANT-APPELLANT.

GIBSON MCASKILL & CROSBY, LLP, BUFFALO (KRISTIN A. TISCI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Niagara County (Catherine R. Nugent Panepinto, J.), entered February 16, 2012. The order, insofar as appealed from, denied the cross motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he was thrown from his motorcycle upon hitting a pothole. Supreme Court denied both plaintiff's motion for partial summary judgment on liability and defendant's cross motion for summary judgment dismissing the complaint. We agree with defendant that the court erred in denying its cross motion. Defendant municipality met its initial burden by establishing that it lacked prior written notice under the applicable pothole law, and plaintiff thus had the burden to demonstrate, as relevant here, that defendant "affirmatively created the defect through an act of negligence . . . 'that immediately result[ed] in the existence of a dangerous condition' " (*Yarborough v City of New York*, 10 NY3d 726, 728; *see Lastowski v V.S. Virkler & Son, Inc.*, 64 AD3d 1159, 1161). Even assuming, arguendo, that defendant "performed the negligent pothole repair" without a tack coat over brick and steel rails (*Yarborough*, 10 NY3d at 728), we note that the statements of plaintiff's experts concerning the defective nature of the repair were dependent upon the passage of time to allow for weather and traffic. We thus conclude that plaintiff failed to raise an issue of fact whether defendant thereby created a defective condition within the meaning of the affirmative act of negligence exception (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The additional requirement of weather or traffic conditions precludes application of that exception

because it cannot be said that the defective condition necessarily " 'immediately result[ed]' " from the repair (*Davison v City of Buffalo*, 96 AD3d 1516, 1518). Furthermore, defendant's purported negligent road construction, which occurred more than 20 years before plaintiff's accident, also did not immediately result in the existence of a defective condition (*see id.*).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**100**

**CA 12-01292**

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

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LORI DUFFEL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, DEFENDANT-APPELLANT.

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MARY ANNE DOHERTY, CORPORATION COUNSEL, SYRACUSE (AIMEE PAQUETTE OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREENE & REID, PLLC, SYRACUSE (JAMES T. SNYDER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered May 9, 2012. The order denied the motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries that she allegedly sustained when she tripped and fell on the edge of a tree grate that had sunk or collapsed below ½-inch from the surrounding sidewalk. Defendant moved for summary judgment dismissing the complaint on the ground that the tree grate was part of the sidewalk and the prior written notice of the defect required by Syracuse City Charter § 8-115 was not provided. We conclude that Supreme Court erred in denying the motion. Defendant met its initial burden by establishing that the tree grate was part of the sidewalk for purposes of the prior written notice requirement (*see Hall v City of Syracuse*, 275 AD2d 1022, 1023), and that it did not have prior written notice of the alleged defect. Plaintiff failed to raise an issue of fact whether either exception to the prior written notice rule applies (*see Yarborough v City of New York*, 10 NY3d 726, 728). Specifically, plaintiff failed to raise an issue of fact whether the special use exception to the prior written notice requirement applies (*see Poirier v City of Schenectady*, 85 NY2d 310, 315), or whether defendant affirmatively created the allegedly dangerous condition by an act of negligence (*see Yarborough*, 10 NY3d at 728). Plaintiff failed to present any evidence of negligent design or construction (*cf. Palmer v Rouse*, 198 AD2d 629, 631), and also presented no evidence that defendant repaired the tree grate at any time after its installation, or that the depression was present immediately after installation of the tree grate (*see Oboler v City of New York*, 8 NY3d

888, 889).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**102**

**CA 12-01341**

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

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JOSEPH MCNALLY, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

WORKERS' COMPENSATION BOARD, ET AL.,
RESPONDENTS,
UNINSURED EMPLOYERS FUND, MISHLANIE
CONSTRUCTION AND EXCAVATING, INC. AND
NOR'EASTER CUSTOM HOMES, INC.,
RESPONDENTS-RESPONDENTS.

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JOSEPH MCNALLY AND LAURA MCNALLY, PLAINTIFFS,

V

MISHLANIE CONSTRUCTION AND EXCAVATING, INC.
AND NOR'EASTER CUSTOM HOMES, INC., DEFENDANTS.

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PETER S. PALEWSKI, NEW YORK MILLS, FOR PETITIONER-APPELLANT.

VICTORIA A. PLOTSKY, ALBANY (KIM STUART SWIDLER OF COUNSEL), FOR RESPONDENT-RESPONDENT UNINSURED EMPLOYERS FUND.

GORIS & O'SULLIVAN, LLC, CAZENOVIA (MARK D. GORIS OF COUNSEL), FOR RESPONDENT-RESPONDENT NOR'EASTER CUSTOM HOMES, INC.

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Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered March 12, 2012. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated, leave to amend the petition to include a request to vacate the stipulation of discontinuance in the underlying action is granted, the request is granted and the stipulation of discontinuance is vacated, and the matter is remitted to Supreme Court, Oneida County, for further proceedings in accordance with the following Memorandum: Petitioner appeals from an order dismissing his petition seeking nunc pro tunc approval of the settlement of his underlying personal injury action. On this record, we cannot determine whether respondent Uninsured Employers Fund "was prejudiced by the settlement" of the underlying action and thus whether Supreme Court erred in dismissing the petition (*Buchanan v Scoville*, 241 AD2d 965, 966). "That issue turns largely on whether the settlement terms were reasonable" (*id.*),

and we are unable to determine whether the terms were reasonable because the record does not indicate whether respondent Nor'Easter Custom Homes, Inc., a defendant in the underlying action, had insurance coverage that would have covered the loss, or whether that defendant has assets sufficient to satisfy a judgment in the underlying action. We therefore reverse the order, reinstate the petition and remit the matter to Supreme Court to determine whether the settlement terms were reasonable, following a hearing if necessary (*see id.*). Under the circumstances of this case, we further conclude that the court should have granted petitioner leave to amend the petition to include a request to vacate the stipulation of discontinuance in the underlying action (*see* CPLR 3025 [b]), and that the court should have granted the request to vacate the stipulation (*see Matter of Frutiger*, 29 NY2d 143, 149-150; *see also Hallock v State of New York*, 64 NY2d 224, 230; *see generally Matter of New York City Hous. Auth. v Jackson*, 48 AD3d 818, 819; *Pasteur v Manhattan & Bronx Surface Tr. Operating Auth.*, 241 AD2d 305, 305-306). We therefore grant that relief as well.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**104**

**CA 12-01210**

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

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IN THE MATTER OF THE ARBITRATION BETWEEN NEW YORK FINGER LAKES REGION POLICE OFFICERS LOCAL 195 OF COUNCIL 82, AFSCME, AFL-CIO, PETITIONER-APPELLANT,

AND

CITY OF AUBURN, RESPONDENT-RESPONDENT.

MEMORANDUM AND ORDER

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ENNIO J. CORSI, NEW YORK STATE LAW ENFORCEMENT OFFICERS UNION, COUNCIL 82, AFSCME, AFL-CIO, ALBANY, FOR PETITIONER-APPELLANT.

JOHN C. ROSSI, CORPORATION COUNSEL, AUBURN (ANDREW S. FUSCO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from an order of the Supreme Court, Cayuga County (William P. Polito, J.), entered April 3, 2012 in a proceeding pursuant to CPLR article 75. The order denied the petition.

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

Memorandum: Petitioner appeals from an order that denied its petition to vacate an arbitration award determining that respondent did not violate the terms of the collective bargaining agreement (CBA) when it terminated the employment of one of petitioner's members. "An arbitration award may be vacated if it is irrational, violates a strong public policy, or 'clearly exceeds a specifically enumerated limitation on the arbitrator's power' " (*Matter of Buffalo Teachers Fedn., Inc. v Board of Educ. of City Sch. Dist. of City of Buffalo*, 50 AD3d 1503, 1505, *lv denied* 11 NY3d 708, quoting *Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City Sch. Dist. of City of N.Y.*, 1 NY3d 72, 79). Contrary to petitioner's contention, the arbitrator's interpretation of the CBA was not irrational, nor did the arbitrator alter the terms of the CBA based on his interpretation of its terms so as to exceed his authority. "An arbitrator is charged with the interpretation and application of the [CBA]" (*Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336). Here, " '[a]lthough a different construction could have been accorded to the subject provision of the [CBA], . . . it cannot be stated that the arbitrator gave a completely irrational construction to the provision in dispute and, in effect, exceeded [his] authority by making a new contract for the parties' " (*Matter of Communication Workers of Am., Local 1170 v Town of Greece*, 85 AD3d

1668, 1670, *lv denied* 18 NY3d 802).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**106**

**KA 11-01341**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, SCONIERS, AND WHALEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYLER J. MORFORD, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered April 28, 2011. 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]). 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: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**107**

**KA 11-01655**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, SCONIERS, AND WHALEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER SCOTT, DEFENDANT-APPELLANT.

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DANIEL M. GRIEBEL, BUFFALO, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered May 25, 2011. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree (two counts).

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 two counts of rape in the first degree (Penal Law § 130.35 [4]), defendant contends that the waiver of the right to appeal is not valid, and he challenges the severity of the sentence. Although the record establishes that defendant knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), we conclude that the valid waiver of the right to appeal does not encompass the challenge to the severity of the sentence because Supreme Court failed to advise defendant of the potential maximum term of incarceration (*see People v Newman*, 21 AD3d 1343, 1343; *see generally People v Lococo*, 92 NY2d 825, 827), and there was no specific sentence promise at the time of the waiver (*cf. People v Semple*, 23 AD3d 1058, 1059, *lv denied* 6 NY3d 852). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**111**

**KA 11-00447**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, SCONIERS, AND WHALEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILBERT T. MAXWELL, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered January 31, 2011. The judgment convicted defendant, upon a nonjury verdict, of robbery 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 a nonjury verdict, of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that the evidence is legally insufficient to support his conviction because the People failed to establish that the gun recovered by the police and allegedly used by defendant in the robbery was a "pistol, revolver, rifle, shotgun, machine gun, or other firearm" within the meaning of Penal Law § 160.15 (4). We reject that contention. A person is guilty of robbery in the first degree pursuant to Penal Law § 160.15 (4) "when he [or she] forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he [or she] . . . [d]isplays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm . . . ." Thus, in order to convict defendant of that crime, County Court "was not required to find that defendant displayed an actual firearm during the commission of the crime, but only that []he displayed what appeared to be a pistol, revolver, rifle, shotgun, machine gun, or other firearm" (*People v Jennings*, 279 AD2d 284, 285, *lv denied* 96 NY2d 830), and there is ample evidence of that element. Indeed, the victim described the weapon used in the robbery as a "big black gun," and she drew a picture of the gun, which was admitted in evidence. The investigating detective testified that, based upon that drawing, he believed that the weapon was a MAC-10, a machine-type pistol. The police subsequently recovered a loaded M-11 pistol in connection with another investigation, and the major DNA profile from that gun matched that of defendant. At trial, the victim identified

the M-11 as the gun defendant pointed at her during the robbery. Defendant also contends that the evidence is legally insufficient to support the conviction because the victim's testimony lacked credibility. We reject that contention. The victim's testimony was not incredible as a matter of law "inasmuch as it was not impossible of belief, i.e., it was not manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Gaston*, 100 AD3d 1463, 1464 [internal quotation marks omitted]; *see People v Walker*, 50 AD3d 1452, 1452-1453, *lv denied* 11 NY3d 795, *reconsideration denied* 11 NY3d 931; *People v Olivero*, 289 AD2d 1082, 1083, *lv denied* 98 NY2d 639). We thus conclude that, "viewing the facts in a light most favorable to the People, 'there is a valid line of reasoning and permissible inferences from which a rational [trier of fact] could have found the elements of the crime proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime in this nonjury trial (*see id.*), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495; *People v Campbell*, 98 AD3d 1310, 1311-1312). It is well settled that "[g]reat deference is to be accorded to the fact []finder's resolution of credibility issues based upon its superior vantage point and its opportunity to view witnesses, observe demeanor and hear the testimony" (*People v Aikey*, 94 AD3d 1485, 1486, *lv denied* 19 NY3d 956 [internal quotation marks omitted]; *see People v Curry*, 82 AD3d 1650, 1651, *lv denied* 17 NY3d 805). Here, the court specifically credited the victim's testimony, and we see no basis to disturb that determination (*see People v Newman*, 87 AD3d 1348, 1350, *lv denied* 18 NY3d 926). The evidence established that the victim called 911 within minutes after the robbery occurred and told the dispatcher that she knew the perpetrator. The victim sounded upset in the recording of the call, and her description of the robbery to the 911 dispatcher was consistent with her account at trial. Additionally, when the victim saw defendant two days after the robbery, she recorded his license plate number and promptly called the police. She then provided the police with a statement and a drawing of what the court described as "an unusual looking gun." A gun, which was similar in appearance to the gun described by the victim, was subsequently recovered by the police in connection with an unrelated investigation and was later linked to defendant through DNA evidence. With respect to the victim's criminal history, "[t]he fact that [she] had an unsavory background . . . [does] not render [her] testimony incredible" (*People v Bernard*, 100 AD3d 916, 916-917; *see People v Wellborn*, 82 AD3d 1657, 1658, *lv denied* 17 NY3d 803). Further, while the victim was the only eyewitness to the robbery, it is well established that "the testimony of one witness can be enough to support a conviction" (*People v Calabria*, 3 NY3d 80, 82; *see People v Jackson*, 8 NY3d 869, 870; *People v Arroyo*, 54 NY2d 567, 578, *cert denied* 456 US 979), and several aspects of the victim's account were corroborated by the testimony of other witnesses as well as the DNA evidence (*see People v Hurlbert*, 81 AD3d 1430, 1431-1432, *lv denied* 16 NY3d 896).

We also reject the contention of defendant that he was denied effective assistance of counsel. Although defense counsel's performance was not perfect, we conclude that, "[v]iewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, . . . defendant received meaningful representation" (*People v Hildreth*, 86 AD3d 917, 918; *see generally People v Baldi*, 54 NY2d 137, 147). Defense counsel, inter alia, opposed the People's application for a buccal swab, made a bail application, vigorously cross-examined the People's witnesses, gave cogent opening and closing statements, moved for a trial order of dismissal, and moved to set aside the verdict pursuant to CPL 330.30. Through his cross-examination of the People's witnesses and his opening and closing statements, defense counsel suggested that the victim fabricated the robbery either in an effort to retain the money for herself or in furtherance of a vendetta against defendant, which was "a reasonable trial strategy in the face of strong opposing evidence" (*People v Penwarden*, 258 AD2d 902, 902; *see People v Jordan*, 99 AD3d 1109, 1110). In furtherance of that strategy, he attacked the victim's veracity and the credibility of the People's other witnesses, challenged the significance of the DNA evidence, and questioned the adequacy of the police investigation into the robbery.

Finally, the sentence is not unduly harsh or severe, particularly given defendant's lengthy criminal history, the serious nature of the crime, and defendant's use of a semi-automatic assault weapon.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**118**

**CA 12-01245**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, SCONIERS, AND WHALEN, JJ.

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MICHAEL CONNELLY,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, SYRACUSE POLICE DEPARTMENT AND JOEL S. CORDONE,
DEFENDANTS-RESPONDENTS-APPELLANTS.

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MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (THOMAS J. FUCILLO OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

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

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Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered September 28, 2011 in a personal injury action. The order denied in part plaintiff's motion for partial summary judgment and denied defendants' cross motion 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 he sustained when the bicycle he was riding collided at an intersection with a police vehicle operated by defendant Joel S. Cordone, a sergeant in defendant Syracuse Police Department (hereafter, defendant officer). Plaintiff thereafter moved for partial summary judgment on liability, i.e., negligence and serious injury, and apportionment of fault, 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). Upon stipulation of defendants, Supreme Court granted that part of plaintiff's motion seeking summary judgment on the issue of serious injury, but otherwise denied the motion. The court also denied defendants' cross motion, concluding that, although the "reckless disregard" standard required for the imposition of liability under section 1104 (e) applied, there were issues of fact whether defendant officer acted with reckless disregard for the safety of others. Plaintiff appeals, and defendants cross-appeal. We affirm.

At the time of the collision, defendant officer was pursuing two motorcyclists who had committed traffic violations in his presence and

was therefore operating an authorized emergency vehicle while involved in an emergency operation (*see* Vehicle and Traffic Law §§ 101, 114-b; *Sierk v Frazon*, 32 AD3d 1153, 1155). Thus, we conclude that the standard of liability pursuant to Vehicle and Traffic Law § 1104 (e), i.e., reckless disregard for the safety of others, applies to his conduct rather than that of negligence (*see Sierk*, 32 AD3d at 1155; *see generally Criscione v City of New York*, 97 NY2d 152, 157-158; *Hughes v Chiera*, 4 AD3d 872, 873). We further conclude, however, that there is an issue of fact whether defendant officer acted with reckless disregard for the safety of others by entering a limited-visibility intersection controlled by a four-way stop sign shortly before midnight without slowing, stopping, or activating his emergency lights or sirens (*see Krulik v County of Suffolk*, 62 AD3d 669, 670; *Britt v Bustamante*, 55 AD3d 858, 859; *Ham v City of Syracuse*, 37 AD3d 1050, 1052, *lv dismissed* 8 NY3d 976).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**123**

**OP 12-01459**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, SCONIERS, AND WHALEN, JJ.

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IN THE MATTER OF DAVID DALE, PETITIONER,

V MEMORANDUM AND ORDER

HON. CHRISTOPHER J. BURNS, JUSTICE OF THE SUPREME COURT, AND HON. FRANK A. SEDITA, III, DISTRICT ATTORNEY, ERIE COUNTY, RESPONDENTS.

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DAVID DALE, PETITIONER PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), RESPONDENT PRO SE.

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Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to, inter alia, dismiss the indictment.

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

Memorandum: Petitioner pleaded guilty to one count each of scheme to defraud in the first degree (Penal Law § 190.65 [1] [b]) and practice of law by an attorney who has been disbarred (Judiciary Law § 486) in full satisfaction of the indictment at issue herein. Petitioner thereafter commenced this original CPLR article 78 proceeding in the nature of prohibition, seeking dismissal of the indictment on double jeopardy grounds; transfer of the proceeding to another tribunal or, in the alternative, the recusal of certain Justices of this Court; and a stay of "all pending orders and proceedings of the lower court." He was subsequently sentenced on the conviction and filed a timely notice of direct appeal.

We note as background that petitioner, a former attorney, was disbarred by this Court in November 2005 (*Matter of Dale*, 25 AD3d 181, 182-183, *appeal dismissed* 6 NY3d 806, *lv denied* 6 NY3d 714; *see Matter of Dale*, 59 AD3d 1105, 1106). He nonetheless persisted in holding himself out as an attorney, accepting retainer fees and legal fees, and engaging in the practice of law. In July 2011, this Court granted the motion of the Grievance Committee to confirm the report of a referee that was issued after a hearing, found petitioner guilty of criminal contempt of court pursuant to Judiciary Law § 750 (A) (3) and fined him in the amount of $1,000 (*Matter of Dale*, 87 AD3d 198, 199-200).

Thereafter, petitioner was charged in the indictment at issue herein with one count each of scheme to defraud in the first degree (Penal Law § 190.65 [1] [b]), grand larceny in the third degree (§ 155.35 [1]), and grand larceny in the fourth degree (§ 155.30 [1]), and six counts each of petit larceny (§ 155.25) and practice of law by an attorney who has been disbarred (Judiciary Law § 486). The indictment was based upon allegations that petitioner stole funds from six clients by accepting legal fees while disbarred. Several days before the scheduled trial, petitioner moved to dismiss the indictment on constitutional and statutory double jeopardy grounds, asserting that the July 2011 contempt adjudication barred prosecution on the indictment. The court denied the motion, and a Justice of this Court declined to issue a writ of prohibition or an order staying the proceedings. As noted above, petitioner pleaded guilty to two counts of the indictment in full satisfaction thereof, and thereafter commenced this proceeding.

At the outset, we reject petitioner's request that we transfer this matter to another tribunal or that individual Justices of this Court be recused from this case. It is well settled that where, as here, there is no "legal disqualification under Judiciary Law § 14, a . . . [j]udge is the sole arbiter of recusal . . . When the alleged impropriety arises from information derived during the performance of the court's adjudicatory function, then recusal could surely not be directed as a matter of law. A court's decision in this respect may not be overturned unless it was an abuse of discretion" (*People v Moreno*, 70 NY2d 403, 405-406), and here there was no abuse of discretion. "[T]he fact that a judge [or panel] issues a ruling that is not to a party's liking does not demonstrate either bias or misconduct" (*Gonzalez v L'Oreal USA, Inc.*, 92 AD3d 1158, 1160, *lv dismissed* 19 NY3d 874; *see Moreno*, 70 NY2d at 405-406; *People v Whitfield*, 275 AD2d 1034, 1034, *lv denied* 95 NY2d 971; *see also Irizarry v State of New York*, 56 AD3d 613, 614; *People v Doyle*, 15 AD3d 674, 675, *lv denied* 5 NY3d 761).

With respect to the merits, we conclude that the petition must be dismissed. Petitioner has already pleaded guilty on the indictment and has been sentenced. Thus, there is no criminal proceeding to stay and no action on the part of respondents to "prohibit". Further, petitioner's double jeopardy claims may be heard on his pending direct appeal (*see Matter of O'Neill v Beisheim*, 39 NY2d 924, 925; *Matter of Kinnaman v Doran*, 278 AD2d 923, 923-924; *see generally People ex rel. Pendleton v Smith*, 54 AD2d 195, 199 n 1, *lv denied* 40 NY2d 809). Although prohibition may lie to prevent the violation of a person's right against double jeopardy (*see Matter of Gorghan v DeAngelis*, 25 AD3d 872, 873, *affd* 7 NY3d 470; *Matter of Rush v Mordue*, 68 NY2d 348, 354), it will not lie where direct appeal provides an adequate remedy (*see Matter of Molea v Marasco*, 64 NY2d 718, 720; *Matter of Hirschfeld v Friedman*, 307 AD2d 856, 858-859; *Matter of Van Wie v Kirk*, 244 AD2d 13, 24).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**126**

**KA 10-02222**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEON BLOOM, JR., ALSO KNOWN AS LEON C. BLOOM, ALSO KNOWN AS LEON C. BLOOM, JR., DEFENDANT-APPELLANT.

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BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered June 3, 2010. The judgment convicted defendant, upon a jury verdict, of 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 a jury verdict, of grand larceny in the fourth degree (Penal Law § 155.30 [1]). As defendant correctly concedes, his contention that the evidence is legally insufficient to support the conviction is not preserved for our review because defendant failed to renew his motion for a trial order of dismissal after presenting proof (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, defendant's contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495) and, 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 reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "[T]he jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Orta*, 12 AD3d 1147, 1147, *lv denied* 4 NY3d 801).

Finally, the sentence is not unduly harsh or severe.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**131**

**KA 11-00929**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY T. JACKSON, DEFENDANT-APPELLANT.

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MULDOON & GETZ, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

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Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered April 20, 2011. The judgment convicted defendant, upon a jury verdict, 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: On appeal from a judgment convicting him upon a jury verdict of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant contends that he was denied effective assistance of counsel. We reject that contention. Defendant has failed to demonstrate "the absence of strategic or other legitimate explanations" for the various allegations of ineffectiveness (*People v Rivera*, 71 NY2d 705, 709). Further, viewing the evidence, the law and the circumstances of this case, 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).

Defendant failed to preserve for our review his further contention that County Court violated CPL 310.10 by questioning individual jurors concerning their contact with defendant without explicitly instructing the remaining jurors not to deliberate until all 12 jurors were present (*see People v Kelly*, 16 NY3d 803, 804), 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 [6] [a]). Contrary to defendant's contention, "there was no mode of proceedings error dispensing with the preservation requirement because the brief, momentary separation of the juror[s] from deliberations was not the type of violation contemplated by the 'continuously kept together'

language of CPL 310.10" (*Kelly*, 16 NY3d at 804).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**134**

**CAF 11-01607**

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

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IN THE MATTER OF ANGEL C., DORRANCE C., JR., LETA C. AND MICHAEL C.

---------- MEMORANDUM AND ORDER

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

LYNN H., RESPONDENT-APPELLANT, AND DORRANCE C., RESPONDENT.

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PATRICIA M. MCGRATH, LOCKPORT, FOR RESPONDENT-APPELLANT.

LAURA A. WAGNER, LOCKPORT, FOR PETITIONER-RESPONDENT.

STEPHEN C. KENNEDY, ATTORNEY FOR THE CHILDREN, LOCKPORT, FOR ANGEL C., DORRANCE C., JR., MICHAEL C. AND LETA C.

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Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered August 9, 2011 in a proceeding pursuant to Family Court Act article 10. The order denied the application of respondent Lynn H. for the return of the subject children who were temporarily removed from her custody.

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

Memorandum: Respondent mother appeals from an order that denied her application pursuant to Family Court Act § 1028 for the return of her children to her care and custody following their temporary removal pursuant to a prior order of Family Court. We dismiss the appeal because a final order of disposition was entered during the pendency of the appeal, finding that the children are neglected and placing them in petitioner's custody, and thus the appeal has been rendered moot (*see Matter of Melody B.*, 234 AD2d 1005, 1005, *lv dismissed* 90 NY2d 888; *see generally Matter of Kiearah P.*, 46 AD3d 958, 959; *Matter of Nicholas B.*, 26 AD3d 764, 764). We note in any event that the appeal is moot for the further reason that the order of disposition expired and the children were returned to the mother's custody during the pendency of this appeal (*see Kiearah P.*, 46 AD3d at 959; *Matter of Javier R. [Robert R.]*, 43 AD3d 1, 3). Contrary to the mother's contention, this case does not fall within the exception to the mootness doctrine (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715; *Matter of Gannett Co., Inc. v Doran*, 74 AD3d 1788, 1789). The mother contends on appeal that the court lacked an adequate basis for denying her Family Court Act § 1028 application. There is no

likelihood of repetition with respect to that issue because, although there may be additional Family Court Act § 1028 hearings with respect to this family (*see generally* § 1028 [a]), the circumstances to be addressed in each application are fact-specific; the issue raised does not typically evade review (*see generally* §§ 1028, 1112); and the issue raised is not substantial or novel (*see generally Matter of McGrath*, 245 AD2d 1081, 1082).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**143**

**CA 12-01440**

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

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LINDA L. ROBINSON, INDIVIDUALLY AND AS SPECIAL EDUCATION TEACHER, ORLEANS MEN'S CORRECTIONAL FACILITY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, ET AL., DEFENDANTS, AND PATRICIA TOWNSEND, INDIVIDUALLY AND AS ACADEMIC EDUCATION SUPERVISOR, ORLEANS MEN'S CORRECTIONAL FACILITY, DEFENDANT-RESPONDENT.

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EMMELYN LOGAN-BALDWIN, ROCHESTER, FOR PLAINTIFF-APPELLANT.

CHRISTINA A. AGOLA, PLLC, ROCHESTER (STEVEN E. LAPRADE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered October 28, 2011. The order denied the motion of plaintiff to compel the production of the medical records of defendant Patricia Townsend.

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

Memorandum: Plaintiff commenced this action alleging, inter alia, that, during the course of her employment as a teacher at defendant Orleans Men's Correctional Facility, she was subjected to unlawful discrimination based upon sex, age and disability, and to retaliation for complaining about such discrimination. Patricia Townsend (defendant) was plaintiff's supervisor at the correctional facility. We conclude that Supreme Court properly denied plaintiff's motion seeking, inter alia, to compel production of defendant's medical records. Even assuming, arguendo, that defendant waived the physician-patient privilege with respect to those records by disclosing them in an action commenced by defendant in federal court (*see Scinta v Van Coevering*, 284 AD2d 1000, 1001), we conclude that plaintiff failed to meet her initial burden of making an evidentiary showing that defendant's medical condition is "in controversy" in this action (CPLR 3121 [a]; *see Dillenbeck v Hess*, 73 NY2d 278, 287-288; *Scinta*, 284 AD2d at 1001). The fact that defendant affirmatively placed her medical condition in controversy in the related action she commenced in federal court does not relieve plaintiff of her initial

burden herein.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**144**

**KA 11-01198**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS A. BUSH, DEFENDANT-APPELLANT.

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JONES & MORRIS, VICTOR (MICHAEL A. JONES, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JEFFREY L. TAYLOR OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered April 13, 2011. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class D felony (two counts), and aggravated unlicensed operation of a motor vehicle in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the conditional discharge and ignition interlock device requirement and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, two counts of felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [2], [3]; 1193 [1] [c] [ii]). Defendant contends that the portion of his sentence imposing a three-year conditional discharge and an ignition interlock device requirement is illegal inasmuch as he committed the offense prior to the effective date of the statute imposing those requirements. We agree, and we therefore modify the judgment by vacating those provisions. Pursuant to the Laws of 2009 (ch 496, § 15), the amendments to, inter alia, Vehicle and Traffic Law § 1198 are not applicable to defendant because he committed his offense before November 18, 2009, the date of the enactment of those amendments. The People's reliance on *People v Farrelly* (92 AD3d 1290, *lv denied* 19 NY3d 996) is misplaced inasmuch as the record in that case reveals that the defendant committed his offense after the date on which the amendments were enacted.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**148**

**KA 10-00361**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RALPH T. GERALD, DEFENDANT-APPELLANT.

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KIMBERLY J. CZAPRANSKI, INTERIM CONFLICT DEFENDER, ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR DEFENDANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (HANNAH STITH LONG OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered February 2, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the determinate term of imprisonment to a term of four years and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]), defendant contends that his plea was not knowing, voluntary and intelligent because Supreme Court failed to advise him that, upon his guilty plea, he would be required to pay a mandatory surcharge and a DNA databank fee and that his driver's license would be suspended for six months. Defendant's contentions are not preserved for our review because he did not move to withdraw his plea or move to vacate the judgment of conviction on those grounds (*see People v Young*, 81 AD3d 995, 996, *lv denied* 16 NY3d 901; *People v Anderson*, 298 AD2d 869, 869, *lv denied* 99 NY2d 554). In any event, those contentions are without merit. Although "a trial court has no obligation to explain to defendants who plead guilty the possibility that collateral consequences may attach to their criminal convictions, the court must advise a defendant of the direct consequences of the plea" (*People v Catu*, 4 NY3d 242, 244). "The direct consequences of a plea—those whose omission from a plea colloquy makes the plea per se invalid—are essentially the core components of a defendant's sentence" (*People v Harnett*, 16 NY3d 200, 205). A mandatory surcharge and DNA databank fee are not components of defendant's sentence (*see People v Hoti*, 12 NY3d 742, 743). Thus, "the court's failure [here] to pronounce the surcharge and fee[] prior

to the entry of defendant's plea did not deprive . . . defendant of the opportunity to knowingly, voluntarily and intelligently choose among alternative courses of action" (*id.*). Contrary to defendant's further contention, his plea was not rendered involuntary because the court failed to advise him that his conviction would result in a six-month suspension of his driver's license. The loss of a driver's license is also a collateral consequence of a conviction and thus the court's failure to disclose that consequence during the plea colloquy does not warrant vacatur of the plea (*see People v Ford*, 86 NY2d 397, 403).

Defendant failed to preserve for our review his contention that the court erred in imposing an enhanced sentence without affording him an opportunity to withdraw his plea because defendant did not object to the enhanced sentence, nor did he move to withdraw the plea or to vacate the judgment on that ground (*see People v Sprague*, 82 AD3d 1649, 1649, *lv denied* 17 NY3d 801; *People v Vaillant*, 77 AD3d 1389, 1390). In any event, that contention lacks merit. The record establishes that, at the time of his guilty plea, defendant "was clearly informed of the consequences of his failure to appear at sentencing and the date on which sentencing was scheduled, and he nevertheless failed to appear on that date" (*Sprague*, 82 AD3d at 1649). Thus, upon defendant's violation of a condition of the plea agreement, the court was "no longer bound by the agreement and [was] free to impose a greater sentence without offering defendant an opportunity to withdraw his plea" (*People v Santiago*, 269 AD2d 770, 770; *see People v Figgins*, 87 NY2d 840, 841). Moreover, the court was not required to conduct further inquiry into the cause of defendant's absence from a scheduled sentencing hearing because, "had there been any plausible [medical] reason for defendant's failure to appear on the . . . prior scheduled sentencing date[], it is to be expected that defendant would have been prepared at sentencing with some supporting documentation, particularly after a warrant had been issued to secure his appearance" (*People v Goldstein*, 12 NY3d 295, 301; *see People v Winters*, 82 AD3d 1691, 1691, *lv denied* 17 NY3d 810).

Insofar as defendant contends that defense counsel was ineffective because he failed to produce documentary evidence that would have explained defendant's failure to appear at a scheduled sentencing hearing, that contention concerns matters outside the record on appeal and thus must be raised by way of a motion pursuant to CPL article 440 (*see generally People v Johnson*, 81 AD3d 1428, 1428, *lv denied* 16 NY3d 896). Insofar as defendant otherwise contends that he was denied his right to effective assistance of counsel, that contention does not survive the plea of guilty because "[t]here is no showing that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney[']s allegedly poor performance" (*People v Robinson*, 39 AD3d 1266, 1267, *lv denied* 9 NY3d 869 [internal quotation marks omitted]).

We agree with defendant, however, that the sentence is unduly harsh and severe with respect to the imposition of a determinate term of imprisonment of seven years. As a matter of discretion in the

interest of justice (*see* CPL 470.15 [6] [b]), we therefore modify the judgment by reducing the determinate term of imprisonment to a term of four years.

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**149**

**KA 11-00484**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BOBBY JOHNSON, JR., DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (COURTNEY E. PETTIT OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered August 21, 2008. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree (three counts), robbery in the first degree (nine counts), reckless endangerment in the second degree, endangering the welfare of a child and unlawful imprisonment in the second degree (two counts).

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, inter alia, three counts of burglary in the second degree (Penal Law § 140.25 [1] [a], [c], [d]), and nine counts of robbery in the first degree (§ 160.15 [2], [3], [4]). Contrary to defendant's contention, County Court properly exercised its discretion in denying his motion for new assigned counsel on the morning of the commencement of trial inasmuch as defendant failed to establish good cause for a substitution of counsel (*see People v Linares*, 2 NY3d 507, 511). The court conducted the requisite inquiry when defendant made his oral request for substitution of counsel and concluded that defendant's objections were without merit (*see People v Stilts*, 86 AD3d 927, 928, *lv denied* 18 NY3d 886; *see generally People v Sides*, 75 NY2d 822, 825). Good cause does not exist where, as here, "on the eve of trial, disagreements over trial strategy generate discord" (*Linares*, 2 NY3d at 511).

We reject defendant's further contention that he received ineffective assistance of counsel. Defendant failed to demonstrate that defense counsel's decision not to pursue the affirmative defense of mental disease or defect pursuant to Penal Law § 40.15 was not the result of a " 'well-advised defense strategy' " (*People v Skinner*, 224 AD2d 916, 916, quoting *People v Ford*, 46 NY2d 1021, 1023; *see generally People v Caban*, 5 NY3d 143, 152). Viewing the evidence, the

law and the circumstances of this case, 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).

Defendant's contention that the court erred in bifurcating the jury instructions over two days is not preserved for our review because he failed to make a timely objection thereto (*see People v Miller*, 59 AD3d 463, 464, *lv denied* 12 NY3d 856; *People v Graham*, 228 AD2d 299, 299, *lv denied* 88 NY2d 985; *People v Williams*, 206 AD2d 917, 917, *lv denied* 84 NY2d 911). We reject defendant's contention that the bifurcation of the jury instructions is a mode of proceedings error that does not require preservation. Defendant's reliance on *People v Fujah* (182 AD2d 774, 775) is misplaced because in that case there was a violation of CPL 260.30 when the jury instructions were provided before the parties' summations, whereas here there was no such violation. We decline to exercise our power to review defendant's contention concerning the bifurcated jury instructions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court

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

**150**

**KA 09-00168**

PRESENT: CENTRA, J.P., FAHEY, CARNI, AND SCONIERS, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CONRAD MARSHALL, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ERIN TUBBS OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Dennis M. Kehoe, A.J.), rendered September 11, 2008. The judgment convicted defendant, upon a jury verdict, of attempted aggravated assault upon a police officer or a peace officer 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 a jury verdict of attempted aggravated assault upon a police officer or a peace officer (Penal Law §§ 110.00, 120.11) and attempted assault in the second degree (§§ 110.00, 120.05 [2]). Defendant failed to preserve for our review his contention that the conviction of attempted aggravated assault is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's further contention, we conclude that he was not deprived of his right to effective assistance of counsel. Inasmuch as we have concluded that the evidence is legally sufficient to support the conviction of attempted aggravated assault, "there is no merit to [the] contention that [defendant] was denied effective assistance of counsel based on defense counsel's failure to make a specific motion for a trial order of dismissal with respect to that count" (*People v Ali*, 89 AD3d 1417, 1419, *lv denied* 18 NY3d 922).

Viewing the evidence in light of the elements of the crimes 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). Defendant failed to preserve for our review his contention that County Court erred in its instruction to the jury with respect to the count of attempted

aggravated assault (*see* CPL 470.05 [2]), and we decline to exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant also failed to preserve for our review his contention that the court improperly sentenced him as a persistent felony offender because it based the sentence on charges of which defendant was acquitted (*see* CPL 470.05 [2]), and in any event that contention lacks merit. At sentencing, the court noted that defendant had five prior felony convictions in this state, i.e., two convictions of grand larceny in the fourth degree, two convictions of criminal possession of stolen property in the third degree, and a conviction of grand larceny in the third degree. The court subsequently noted that defendant's conduct in this "criminal matter has escalated to the point that he not only presented a threat to the possession of property of innocent civilians, but [also] presented a significant and real threat to the lives of Police Officers who were charged with enforcing the law of our society." We conclude that the court's statement concerning defendant's escalated criminal conduct was proper in light of the court's position that probation and state incarceration had failed to deter defendant from the further criminal conduct at issue on this appeal, and does not reflect that the court based its sentence on charges of which defendant was acquitted (*see People v Storelli*, 216 AD2d 891, 891, *lv denied* 86 NY2d 803).

Entered: February 8, 2013

Frances E. Cafarell
Clerk of the Court