SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MAY 9, 2014

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

94

KA 11-02170

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

OLGA CASIANO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered July 12, 2010. The judgment convicted defendant, upon a jury verdict, of grand larceny in the third degree, falsifying business records in the first degree (7 counts) and offering a false instrument for filing in the first degree (7 counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law, the indictment is dismissed and the matter is remitted to Supreme Court, Erie County, for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting her, upon a jury verdict, of grand larceny in the third degree (Penal Law § 155.35 [1]) and seven 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). We agree with defendant that the judgment must be reversed and the indictment dismissed (*see People v McNab*, 167 AD2d 858).

This matter stems from allegations of public assistance fraud relating to defendant's operation of a daycare. In October 2007, the New York State Office of Children and Family Services (OCFS) issued defendant a license to run a group family day care home (*see* 18 NYCRR part 416). Pursuant to OCFS regulations, a group family day care home "must be operated by a provider and have at least one assistant present during the hours that care is provided" (18 NYCRR 413.2 [1] [j]), and the provider and assistant must be the "primary caregivers" of the children (18 NYCRR 416.8 [1] [c]). Any "caregivers who are not providers or assistants must meet the qualifications of an assistant" (18 NYCRR 413.2 [1] [j] [2] [ii]). Defendant thereafter contracted with the Erie County Department of Social Services (DSS) to provide

daycare services to low income families. Parents applied to DSS for childcare subsidies and received preapproval letters indicating the days of the week and the number of hours per day they were approved for daycare. On a monthly basis, defendant submitted vouchers to DSS listing the children in her care and the hours that she provided daycare during that month, and DSS paid defendant in accordance with the vouchers.

OCFS received a complaint against defendant in 2008, and an OCFS licensor was assigned to investigate the complaint. From February to June 2008, the licensor visited the daycare on several occasions and, during many of those visits, no one answered the door and there were no signs of activity inside. During another visit, an unlicensed assistant was supervising the children, in violation of OCFS regulations. As a result of the investigation, OCFS referred the case to DSS for suspected public assistance fraud. DSS investigators conducted periodic surveillance of the daycare between April and July 2008 and many times did not see any children at the daycare.

Defendant was charged by indictment with one count of grand larceny in the third degree (Penal Law § 155.35 [1]) and 10 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). Count one of the indictment alleged that, between October 1, 2007 and July 30, 2008, defendant "stole property having a value in excess of [$3,000], to wit: a sum of money, belonging to [DSS]." Counts 2 through 11 charged defendant with making false entries in the business records of DSS between various dates by submitting vouchers identified only as having either Vendor No. 42835XH (counts 2, 5, 6, 8, 11) or Vendor No. 923351HR (counts 3, 4, 7, 9, 10). Counts 12 through 21 charged defendant with presenting written instruments that contained false information to DSS by submitting vouchers again identified only as having Vendor No. 42835XH (counts 12, 15, 16, 18, 21) or Vendor No. 923351HR (counts 13, 14, 17, 19, 20). Defendant requested a bill of particulars identifying the facts underlying each of the charges in the indictment, which the People refused to provide.

At trial, the crux of the People's case was the testimony of a DSS special investigator, who testified over defendant's repeated objections. The investigator reviewed the school and bus schedules of the children who attended the daycare, their parents' work schedules, the parents' applications for daycare subsidies and preapproval letters, and the work schedules of defendant and her assistant, and prepared charts listing each day that the daycare was open and defendant's billings for those dates. Based upon that information, the investigator created charts purporting to illustrate the amounts that defendant allegedly "overbilled" DSS, which were admitted in evidence over defendant's objection. According to the investigator, defendant submitted vouchers for monies to which she was not entitled because (1) she billed for hours when neither she nor her certified assistant were at the daycare, and (2) she billed for hours when the children were not at the daycare

By its verdict, the jury found defendant guilty of grand larceny

as charged in count one of the indictment, falsifying business records as charged in counts 5 through 11 of the indictment, and offering a false instrument for filing as charged in counts 15 through 21 of the indictment. The jury acquitted defendant of the remaining counts of falsifying business records (counts 2 through 4) and offering a false instrument for filing (counts 12 through 14).

On appeal, defendant contends that the judgment must be reversed and the indictment dismissed because, inter alia, the indictment was rendered duplicitous and/or multiplicitous by the evidence adduced at trial. We agree. "Prosecutors and grand juries must steer between the evils known as 'duplicity' and 'multiplicity.' An indictment is duplicitous when a single count charges more than one offense . . . It is multiplicitous when a single offense is charged in more than one count . . . A duplicitous indictment may fail to give a defendant adequate notice and opportunity to defend; it may impair his [or her] ability to assert the protection against double jeopardy in a future case; and it may undermine the requirement of jury unanimity, for if jurors are considering separate crimes in a single count, some may find the defendant guilty of one, and some of the other. If an indictment is multiplicitous it creates the risk that a defendant will be punished for, or stigmatized with a conviction of, more crimes than he [or she] actually committed" (*People v Alonzo*, 16 NY3d 267, 269). An indictment that is not duplicitous on its face may be rendered so based upon the trial evidence (*see People v Bennett*, 52 AD3d 1185, 1186, *lv denied* 11 NY3d 734; *People v Bracewell*, 34 AD3d 1197, 1198).

Here, the People correctly concede that counts 5 through 7, 9, 15 through 17, and 19 of the indictment are duplicitous and multiplicitous inasmuch as they are based on "distinct but not identifiable vouchers." Those counts are all based on the same time period and the same vendor number and, according to the People, there is no way to identify which voucher refers to which count (*see generally People v Burnett*, 306 AD2d 947, 947-948). In addition, the People correctly concede that the conviction of counts 11 and 21 should be reversed and those counts dismissed because there is no proof in the record to support the conviction of those counts. Those counts are based on the so-called "10th voucher," which was not submitted in evidence and about which there was no testimony. Although defendant's contention with respect to counts 11 and 21 is unpreserved for our review because her motion for a trial order of dismissal was not specifically directed at that deficiency (*see People v Gray*, 86 NY2d 10, 19), we nonetheless reach that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

With respect to the remaining counts of the indictment, we agree with defendant that counts 8, 10, 18, and 20 of the indictment were rendered duplicitous by the trial evidence (*see Bennett*, 52 AD3d at 1186; *Bracewell*, 34 AD3d at 1198). As noted above, the People alleged that defendant submitted vouchers for monies to which she was not entitled because, at various dates and times, she (1) billed for hours when neither she nor her certified assistant were at the daycare, and (2) she billed for hours when the children were not at the daycare.

There is no basis in the record to determine, with respect to each of those counts, whether the jury convicted defendant based upon the first act (billing for hours when the children were watched by uncertified assistants) or the second act (billing for hours when the children were not at daycare), or whether certain jurors convicted defendant upon the former and others upon the latter. Thus, "it is impossible to verify that each member of the jury convicted defendant for the same criminal act" (*People v Dalton*, 27 AD3d 779, 781, *lv denied* 7 NY3d 754, *reconsideration denied* 7 NY3d 811).

Finally, we agree with defendant that her conviction of grand larceny must also be reversed. Count one of the indictment alleges that, between October 1, 2007 and July 30, 2008, defendant "stole property having a value in excess of [$3,000], to wit: a sum of money, belonging to [DSS]." Under Penal Law § 155.05 (1), "[a] person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself [or herself] or to a third person, he [or she] wrongfully takes, obtains or withholds such property from an owner thereof." Larceny includes "obtaining property by false pretenses" (§ 155.05 [2] [a]). A defendant commits larceny by false pretenses when he or she "obtain[s] possession of money of another by means of an intentional false material statement about a past or presently existing fact upon which the victim relied in parting with the money" (*People v Starks*, 238 AD2d 621, 622, *lv denied* 91 NY2d 836; *see People v Churchill*, 47 NY2d 151, 157-158).

Here, the People alleged that defendant committed larceny by false pretenses by charging for times when unlicensed assistants were watching the children in violation of OCFS regulations, and by billing for times when the children were not receiving daycare services. We question whether submitting vouchers for daycare services rendered by an uncertified assistant falls within the definition of larceny. OCFS's regional manager testified that, although it is a "regulatory violation" for an uncertified assistant to watch children at a group day care, the regulations do not state that daycare providers are not permitted to bill for services rendered by an uncertified assistant. Indeed, the DSS special investigator referred to those hours as "billable" on his charts, although unauthorized by the regulations.

Even assuming, arguendo, that billing for services provided by an uncertified assistant constitutes a "wrongful[ ] tak[ing]" within the meaning of Penal Law § 155.05 (1), we note that "[c]onduct which is wrongful in the civil context is not necessarily 'wrongful' within the meaning of the larceny statutes" (*People v Foster*, 73 NY2d 596, 603-604; *see Churchill*, 47 NY2d at 158). As the Court of Appeals explained in *Foster*, "[t]he courts and the Legislature have been reluctant to elevate civil wrongs to the level of criminal larceny . . . , *particularly when the conduct arises out of legitimate business activities where there are often close questions as to whether the defendant acted intentionally or was merely incompetent* . . . In such cases, whenever the Legislature has found that certain acts performed in these contexts warrant criminal punishment, it has generally identified the prohibited conduct quite specifically . . . in order to

protect the truly inept or victims of spite from being branded as criminals" (73 NY2d at 604 [emphasis added]).

Here, we agree with defendant that her alleged regulatory violation cannot form the basis for criminal liability under the larceny statute. Article 6 of the Social Services Law, which governs child care facilities and the regulations promulgated thereunder (18 NYCRR part 413 *et seq.*) set forth civil penalties for statutory or regulatory violations (*see e.g.* Social Services Law § 390 [10]; 18 NYCRR 413.3 [1] [a] [1], [4], [5]). Although 18 NYCRR 413.3 (1) (a) (9) provides that OCFS may request that the Attorney General "take such action as is necessary to collect civil penalties, *seek criminal prosecution*, or to bring about compliance with any outstanding hearing decision or order" (emphasis added), we conclude that the reference to criminal prosecution merely reserves OCFS's right to seek prosecution for otherwise criminal conduct. It does not criminalize the violation of regulations relating to the proper supervision of children in group daycare (*see generally People v Caswell-Massey Co.*, 6 NY2d 497, 501). Thus, defendant's violation of 18 NYCRR part 416 cannot supply the basis for a larceny prosecution (*cf. People v Kyu H. Shin*, 181 Misc 2d 751, 754-755; *see generally Foster*, 73 NY2d at 604).

There is no question that the People's other theory of the case, that defendant billed for services not actually rendered, would fall within the definition of larceny by false pretenses (*see e.g. People v McDonald*, 215 AD2d 504, 504, *affd* 88 NY2d 281; *see generally Churchill*, 47 NY2d at 157-158; *Starks*, 238 AD2d at 622). The People, however, argued and produced evidence supporting both theories of larceny at trial, and there is no way to determine whether the jury convicted defendant on the ground that she billed DSS for services she did not in fact provide or on the ground that she billed DSS for services provided by unlicensed caregivers. Because we cannot be certain whether the jury convicted defendant on the basis of non-criminal acts, i.e., submitting vouchers to DSS for daycare provided by uncertified assistants, or whether the jurors lacked unanimity with respect to the acts for which she was convicted, we conclude that her conviction of grand larceny must be reversed and count one of the indictment dismissed (*see generally Alonzo*, 16 NY3d at 269).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

122

CA 13-00513

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

DRYDEN MUTUAL INSURANCE COMPANY,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STANLEY GOESSL, ET AL., DEFENDANTS,
AP DAINO & PLUMBING, INC. AND THE MAIN STREET
AMERICA GROUP, DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JESSE J. COOKE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KNYCH & WHRITENOUR, LLC, SYRACUSE (PETER W. KNYCH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oswego County (James W. McCarthy, J.), entered October 29, 2012 in a declaratory judgment action. The judgment, among other things, declared that plaintiff has no duty to defend or indemnify defendant Stanley Goessl.

It is hereby ORDERED that the judgment so appealed from is reversed on the law without costs and judgment is granted as follows:

> It is ADJUDGED AND DECLARED that plaintiff is obligated to defend and indemnify defendant Stanley Goessl in the underlying action, and that plaintiff is obligated to reimburse defendant Stanley Goessl for the reasonable attorneys' fees and expenses he incurred in defending the underlying action, and
>
> It is further ADJUDGED AND DECLARED that defendant The Main Street America Group is not obligated to defend or indemnify defendant Stanley Goessl in the underlying action.

Memorandum: Plaintiff, Dryden Mutual Insurance Company, commenced this action seeking a declaration that it is not obligated to defend or indemnify defendant Stanley Goessl in the underlying tort action pursuant to a business general liability insurance policy (hereafter, Dryden policy) that it issued to Goessl, who was doing business as S&K Plumbing. The underlying action arose from a fire at a residence that occurred while Goessl was engaged in plumbing work there. Plaintiff disclaimed coverage on the grounds that, inter alia, Goessl was an employee of defendant AP Daino & Plumbing, Inc. (AP

Daino) and was acting within the scope of his employment at the time of the fire. AP Daino was insured by defendant The Main Street America Group (MSA) under a "contractors policy" (MSA policy). MSA disclaimed coverage on the ground that Goessl was not an employee of AP Daino at the time of the fire and therefore was not an "insured" within the meaning of the MSA policy. After a bench trial, Supreme Court issued a judgment declaring that plaintiff had no duty to defend or indemnify Goessl in the underlying action and that MSA had a duty to "defend and potentially indemnify" Goessl in that action. In addition, the court ordered MSA to reimburse plaintiff and Goessl for costs they had incurred relative to Goessl's defense in the underlying action. We conclude that the court erred, and instead conclude, inter alia, that plaintiff must indemnify Goessl in the underlying action while MSA has no such duty.

It is well settled that, "[o]n appeal from a judgment following a bench trial, this Court may independently consider the probative weight of the evidence and the inferences that may be drawn therefrom, and grant the judgment that we deem the facts warrant" (*Blakesley v State of New York*, 289 AD2d 979, 979, *lv denied* 98 NY2d 605; *see Crane-Hogan Structural Sys., Inc. v State of New York*, 88 AD3d 1258, 1260). "In determining a dispute over insurance coverage, we first look to the language of the policy" (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221; *see Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 264). "As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning . . . , and the interpretation of such provisions is a question of law for the court" (*White v Continental Cas. Co.*, 9 NY3d 264, 267). "If the plain language of the policy is determinative, we cannot rewrite the agreement by disregarding that language" (*Fieldston Prop. Owners Assn., Inc.*, 16 NY3d at 264; *see White*, 9 NY3d at 267). "Unless otherwise defined by the policy, words and phrases are to be understood in their plain, ordinary, and popularly understood sense, rather than in a forced or technical sense" (*Hartford Ins. Co. of Midwest v Halt*, 223 AD2d 204, 212, *lv denied* 89 NY2d 813; *see Rocon Mfg. v Ferraro*, 199 AD2d 999, 999). Thus, "[t]he meaning of the language used in the policy must be found in the common sense and common speech of the average person" (*Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 32-33, *affd* 49 NY2d 924; *see Canfield v Peerless Ins. Co.*, 262 AD2d 934, 934, *lv denied* 94 NY2d 757).

Here, we conclude that the Dryden policy unambiguously provides coverage for Goessl in the underlying action. The Dryden policy states that, "if the ***named insured*** is an individual, both the individual and his/her spouse are ***insureds*** but only with respect to the conduct of a ***business*** of which he/she is the sole proprietor." "Business" is broadly defined in the Dryden policy as "a trade, profession, or other occupation, including farming, all whether full or part time." The record in this case establishes that Goessl was the sole proprietor of S&K Plumbing and that, at the time of the fire, he was engaged in the conduct of his "trade, profession, or other occupation" as a plumbing subcontractor for AP Daino. Because the

injury in the underlying action allegedly arose out of the conduct of Goessl's plumbing business, plaintiff is obligated to defend and indemnify him in the underlying action (*see Cataract Sports & Entertainment Group, LLC v Essex Ins. Co.*, 59 AD3d 1083, 1084).

We reach the contrary conclusion with respect to the MSA policy. That policy provides that AP Daino's "employees" are insureds for acts committed "within the scope of their employment by [AP Daino] or while performing duties related to the conduct of [its] business." The term "employee" is not defined in the MSA policy, and should therefore be given its plain or ordinary meaning (*see Curry v Atlantic Mut. Ins. Co.*, 283 AD2d 937, 938, *lv denied* 96 NY2d 721). Where, as here, the dispute involves a business insurance policy, "[a]n important guidepost when interpreting [such] a . . . policy is to examine the reasonable expectation and purpose of the ordinary business [person] when making an ordinary business contract" (*Baughman v Merchants Mut. Ins. Co.*, 87 NY2d 589, 593 [internal quotation marks omitted]; *see Moshiko, Inc. v Sieger & Smith*, 137 AD2d 170, 176, *affd* 72 NY2d 945). Here, the record establishes that AP Daino and Goessl intentionally structured their business relationship as a long-term subcontracting arrangement rather than an employment relationship. AP Daino did not provide Goessl with health insurance or other employee benefits, and did not withhold taxes or pay social security or unemployment taxes on his behalf. Goessl determined his own hourly rate, submitted invoices to AP Daino on behalf of S&K Plumbing, and received a Form 1099-MISC, for miscellaneous income, as opposed to a W-2 wage statement. At AP Daino's request, Goessl obtained his own liability coverage, which is further evidence that neither party considered Goessl to be an "employee" under the MSA policy.

Although it is undisputed that Goessl was an insured under AP Daino's workers' compensation policy, the record indicates that the workers' compensation carrier required AP Daino to include uninsured subcontractors on its policy, and Goessl was listed as an uninsured subcontractor, not as an employee, on the policy. AP Daino initially asked Goessl to obtain his own workers' compensation policy, but Goessl was advised by his insurance carrier that he did not need such coverage because he was an independent contractor. Further, we conclude that the fact that AP Daino's owner, a master plumber, signed Goessl's journeyman's card as his "employer" and paid the required fee is insufficient to render Goessl an "employee" under the MSA policy. Goessl testified without contradiction that a master plumber is permitted to sign for a subcontractor or independent contractor.

Inasmuch as the record establishes that AP Daino and Goessl intentionally entered into a business arrangement whereby Goessl was an independent contractor rather than an employee, we conclude, upon our independent review of the record (*see generally Blakesley*, 289 AD2d at 979), that neither AP Daino nor Goessl expected that Goessl would be considered an "employee" under the MSA policy (*see generally Baughman*, 87 NY2d at 594). We thus conclude that Goessl is not insured under the MSA policy and, therefore, that MSA has no duty to defend or indemnify him in the underlying action (*see generally Farm Family Cas. Ins. Co. v Nason*, 89 AD3d 1401, 1402).

All concur except SCONIERS, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent because I conclude that Supreme Court properly determined, after conducting a nonjury trial, that defendant Stanley Goessl was an employee of defendant AP Daino & Plumbing, Inc. (AP Daino) and that defendant The Main Street America Group, which insured AP Daino, is obligated to "defend and potentially indemnify" Goessl in the underlying tort action arising from a fire at the residence of a customer of AP Daino. While it is a closer question, I also conclude that the court properly declared that plaintiff is not obligated to defend and indemnify Goessl, whom plaintiff insured as the sole proprietor of S&K Plumbing, in the underlying action.

It is well settled that, "[o]n an appeal from a judgment rendered after a nonjury trial, our scope of review is as broad as that of the trial court (*see Matter of Capizola v Vantage Intl.*, 2 AD3d 843, 844 [2003]). Upon such a review, the record should be 'viewed in the light most favorable to sustain the judgment' (*Farace v State of New York*, 266 AD2d 870, 871 [1999]; *see Parone v Rivers*, 84 AD2d 686 [1981]), and this Court should evaluate 'the weight of the evidence presented and grant judgment warranted by the record, giving due deference to the trial court's determinations regarding witness credibility, so long as those findings could have been reached upon a fair interpretation of the evidence' (*New York Tel. Co. v Harrison & Burrowes Bridge Contrs.*, 3 AD3d 606, 608 [2004] [internal quotation marks and citations omitted]). '[T]he decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses' (*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992] [internal quotation marks omitted], *rearg denied* 81 NY2d 835 [1993])" (*Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170).

In my view, the court properly considered and gave appropriate weight to the evidence in determining that Goessl was an employee of AP Daino. Specifically, on the day of the fire, Goessl went to AP Daino's Central Square office, picked up a van, and drove his crew of AP Daino employees to the designated work site; Goessl previously was employed by AP Daino before being approached about working for AP Daino as an "independent contractor"; Goessl was paid on an hourly basis; Goessl performed the same type of work as other AP Daino employees; Goessl introduced himself to customers as "Stan from AP Daino"; and, in all respects, AP Daino directed the work, told Goessl where to go, and told him what to do. Also, Goessl worked 40 hours per week as a plumber for AP Daino and used AP Daino tools for that work. Notably, the underlying loss occurred in 2009 and, in 2010, Labor Law § 861-c was enacted and Workers' Compensation Law § 2 was amended precisely because "unscrupulous employers [were] intentionally reporting employees as independent contractors to state and federal authorities or workers' compensation carriers in record numbers" (NY Bill Jacket, 2010 S.B. 5847, ch 418). Moreover, Goessl's designation as an independent contractor by AP Daino for income tax reporting

purposes was improper (*see* Betty Wang, *IRS Cracking Down on 'Independent Contractors'*, http://blogs.findlaw.com/free_enterprise/2013/07/irs-cracking-down-on-independent-contractors.html, July 31, 2013 [accessed Apr. 23, 2014]; *see also* Robert W. Wood, *IRS Inspector Urges Crackdown On Mislabeling 'Independent Contractors'*, http://www.forbes.com/sites/robertwood/2013/07/30/irs-inspector-urges-crackdown-on-mislabeling-independent-contractors/, July 30, 2013 [accessed Apr. 23, 2014]). As a result, I respectfully submit that the majority's rejection of the court's factual finding that Goessl was an employee of AP Daino is not only contrary to the well-settled standard that we apply when reviewing nonjury verdicts, but it is also contrary to the overwhelming evidence presented at trial and the strong public policy that militates against the improper and unscrupulous classification of employees as independent contractors.

With respect to the insurance policy that plaintiff issued to Goessl, I conclude that the language of that policy is not ambiguous and that Goessl was not "conduct[ing] . . . a *business* of which he[ ] is the sole proprietor" when he was working as an employee of AP Daino (emphasis added). Notably, plaintiff insured Goessl as the sole proprietor of a plumbing business with no employees, and Goessl undoubtedly reported his business revenue, which would be used for underwriting purposes, only insofar as such revenue included payments for work performed for AP Daino, as well as the payments for the small amount of work he performed for his own customers. At trial, Goessl described working on crews with one, two or possibly more AP Daino employees under circumstances where he sometimes supervised an apprentice plumber and where he, based on his experience, was the de facto foreman when working with other AP Daino employees. If the majority's analysis is correct, Goessl would be potentially liable not only for his own negligence, but also for the negligence of AP Daino employees working on the same crew, thereby creating greater liability exposure for plaintiff than plaintiff knowingly contracted for. While I see no merit to plaintiff's position that it had a right to disclaim coverage based on Goessl's willful misrepresentation, I conclude that plaintiff had a right to disclaim coverage because it expressly insured a one-person plumbing business, not a plumber who was employed by a much larger plumbing business.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

158

CA 13-01324

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

NORTH COUNTRY INSURANCE COMPANY,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FRANK RASPANTE, DEFENDANT,
VICTOR JONES, ARDINE JONES AND ADAM JONES,
DEFENDANTS-APPELLANTS.

ATHARI & ASSOCIATES, LLC, UTICA (MO ATHARI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered March 18, 2013. The judgment, among other things, granted that part of the motion of plaintiff seeking a declaration that it has no obligation to defend and indemnify defendant Frank Raspante in an action commenced by defendants Victor Jones, Ardine Jones and Adam Jones, and denied the cross motion of defendants-appellants seeking, inter alia, summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion in its entirety and vacating the declarations, and by vacating that part denying the cross motion insofar as it sought to compel discovery, and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Oneida County, for further proceedings on that part of the cross motion in accordance with the following Memorandum: Plaintiff commenced this action seeking, inter alia, a declaration that it is not obligated to defend and indemnify Frank Raspante (defendant) in the underlying lead paint action commenced against him by the remaining defendants (hereafter, Jones defendants), who allegedly were injured based on their exposure to lead paint at a property owned by defendant. Plaintiff thereafter moved for summary judgment with respect to that requested relief, contending in support thereof that there is a lead exclusion in defendant's insurance policy. The Jones defendants cross-moved for, inter alia, summary judgment declaring that plaintiff is obligated to defend and indemnify defendant in the underlying action, and an order compelling plaintiff to respond to certain discovery demands, and defendant submitted an affidavit in support of the cross motion. Supreme Court granted

plaintiff's motion in part, declaring that "plaintiff excluded from [defendant's] coverage claims for exposure to lead" and that, with respect to the underlying action, plaintiff "is under no obligation to indemnify" defendant and "is under no obligation to continue to provide [defendant] with a defense." The court denied the cross motion.

Contrary to the contention of the Jones defendants, plaintiff did not violate any legal obligation by destroying its policy records. The evidence submitted in support of plaintiff's motion establishes that plaintiff complied with 11 NYCRR 243.2 (b) (1), which requires that insurers maintain policy records for "six calendar years after the date the policy is no longer in force."

We agree with the Jones defendants, however, that the court erred in granting plaintiff's motion in part, issuing the above declarations in plaintiff's favor, and we therefore modify the judgment accordingly. Even assuming, arguendo, that defendant's policy included the lead exclusion, we conclude that plaintiff failed to meet its burden of establishing that defendant had notice of it (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The evidence submitted by plaintiff in support of its motion does not establish that the exclusion was actually mailed, and the affidavit of plaintiff's employee, who averred that the exclusion was sent to defendant pursuant to plaintiff's custom and practice, is "conclusory and otherwise insufficient to establish 'office practice . . . geared so as to ensure the likelihood that [the documents were] always properly addressed and mailed' " (*Matter of Frankel v Citicorp Ins. Servs., Inc.*, 80 AD3d 280, 284, quoting *Nassau Ins. Co. v Murray*, 46 NY2d 828, 830; *cf. Preferred Mut. Ins. Co. v Donnelly*, 111 AD3d 1242, 1243, *lv denied* ___ NY3d ___ [Apr. 3, 2014]). Furthermore, even assuming, arguendo, that plaintiff met its initial burden on its motion, we conclude that the Jones defendants raised an issue of fact whether defendant's policy included the lead exclusion by submitting evidence that at least some policies at the time did not contain the exclusion.

The Jones defendants further contend that they were entitled to the declarations sought in their cross motion because the lead exclusion is void as against public policy and the language of the exclusion is ambiguous. We reject those contentions (*see Preferred Mut. Ins. Co.*, 111 AD3d at 1245; *3405 Putnam Realty Corp. v Chubb Custom Ins. Co.*, 14 AD3d 310, 311; *see generally Greenfield v Philles Records*, 98 NY2d 562, 569-570).

Finally, the Jones defendants contend that the court erred in denying their cross motion insofar as they sought to compel plaintiff to produce certain documents. In light of our determination herein, we further modify the judgment by vacating that part denying the cross motion to that extent, and we remit the matter to Supreme Court to rule on that part of the cross motion.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

238

CA 13-01639

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

MIDFIRST BANK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ANDREW J. BELLINGER, CARRIE L. BELLINGER,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

FRENKEL LAMBERT WEISS, WEISMAN & GORDON, LLP, BAY SHORE (MICHELLE MACCAGNANO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered May 30, 2013. The order and judgment denied the motion of plaintiff to vacate an order and judgment of dismissal dated December 19, 2012.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the motion to vacate the order and judgment dated December 19, 2012 is granted, that order and judgment is vacated, the complaint is reinstated and plaintiff is granted 30 days from service of the order of this Court with notice of entry to file and serve either a motion or an ex parte application, as appropriate, for a judgment of foreclosure and sale.

Memorandum: Plaintiff commenced this action in February 2012 to foreclose on a mortgage that was secured by property owned by Andrew J. and Carrie L. Bellinger (defendants). Defendants failed to answer or appear, and in July 2012 plaintiff moved for an order of reference pursuant to RPAPL 1321. Supreme Court granted plaintiff's motion and issued an order of reference, entered August 31, 2012, directing the Referee to file his report on or before November 1, 2012. The order of reference further directed plaintiff to "submit either a Motion or [an] Ex Parte Application, as appropriate, for a Judgment of Foreclosure and Sale" on or before December 15, 2012. The order of reference provided that plaintiff's failure to submit a motion or an ex parte application by that date would be "deemed an abandonment of the action pursuant to 22 NYCRR [] 202.48 and shall result in the Court's dismissal of the complaint." Plaintiff failed to submit a motion or an ex parte application by December 15, 2012. By order and judgment dated December 19, 2012 (dismissal order), the court dismissed plaintiff's complaint sua sponte. The Referee did not issue his report until February 1, 2013. Plaintiff moved to vacate the dismissal order, arguing, inter alia, that 22 NYCRR 202.48 was inapplicable and that the order of reference provided plaintiff with

no recourse to avoid dismissal of the complaint if the Referee had not yet submitted his report as of December 15, 2012. By the order and judgment on appeal, the court denied plaintiff's motion to vacate the dismissal order. We reverse.

We note at the outset that we agree with plaintiff that its time to take an appeal from the dismissal order has not yet expired because the court, rather than a party, served the dismissal order on plaintiff (*see* CPLR 5513 [a]; Siegel, NY Prac § 533 at 948 [5th ed 2011]). That is of no practical consequence, however, because plaintiff did not attempt to appeal directly from the dismissal order nor, in any event, could plaintiff do so inasmuch as the dismissal order is an ex parte order from which no appeal lies as of right (*see* CPLR 5701 [a] [2]; *Sholes v Meagher*, 100 NY2d 333, 335; *People ex rel. De Capua v Lape*, 17 AD3d 1041, 1042). Rather, plaintiff used the appropriate procedural mechanism to seek review of the dismissal order by moving, upon notice, to vacate the dismissal order and appealing as of right to this Court from the order and judgment denying that motion (*see* CPLR 5701 [a] [3]; *Sholes*, 100 NY2d at 335). We agree with plaintiff that this appeal brings up for review the order of reference as a non-final order that necessarily affected the final order and judgment on appeal (*see* CPLR 5501 [a] [1]).

Contrary to plaintiff's contention, the court was not required to comply with CPLR 3216 before dismissing the complaint inasmuch as, by its terms, CPLR 3216 applies only when issue has been joined in the action (*see* CPLR 3216 [b] [1]; *Attarian v Cutting Edge Marble & Granite*, 285 AD2d 432, 433). Nevertheless, we agree with plaintiff that the court erred in dismissing the complaint sua sponte pursuant to 22 NYCRR 202.48. That rule provides that "[p]roposed orders or judgments . . . must be submitted for signature, unless otherwise directed by the court, within 60 days after the signing and filing of the decision directing that the order be settled or submitted . . . Failure to submit the order or judgment timely shall be deemed an abandonment of the motion or action, unless for good cause shown" (22 NYCRR 202.48 [a], [b]). As the Court of Appeals wrote, "[b]y its plain terms, section 202.48 (a) speaks to the circumstances where the court's decision expressly directs a party to submit or settle an order or judgment" (*Funk v Barry*, 89 NY2d 364, 367). Thus, the Court held that "the 60-day period applies only where the court explicitly directs that the proposed judgment or order be settled or submitted for signature" (*id.* at 365). Here, the order of reference did not explicitly direct plaintiff to settle or submit an order or judgment for signature. Rather, it directed plaintiff to submit a "Motion or [an] Ex Parte Application" seeking a judgment of foreclosure and sale. We therefore conclude that the court erred in dismissing the complaint in reliance on 22 NYCRR 202.48 (*see Funk*, 89 NY2d at 365; *Shamshovich v Shvartsman*, 110 AD3d 975, 976-977; *Chang v Botsacos*, 92 AD3d 610, 610). We note in any event that " '[u]se of the [sua sponte] power of dismissal must be restricted to the most extraordinary circumstances,' and no such extraordinary circumstances are present in this case" (*Hurd v Hurd*, 66 AD3d 1492, 1493).

We do not address plaintiff's further contention that the court

erred in relying on CPLR 3215 in dismissing the complaint inasmuch as the court did not in fact rely upon that statute. Consequently, we conclude that the court erred in denying plaintiff's motion to vacate the dismissal order, and we therefore reverse the order and judgment, grant the motion, vacate the dismissal order, and reinstate the complaint. We further direct plaintiff to "submit [to Supreme Court] either a Motion or [an] Ex Parte Application, as appropriate, for a Judgment of Foreclosure and Sale" within 30 days of service of the order of this Court with notice of entry.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

253

KA 13-00197

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS J. DEMARCO, DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (William H. Mountain, III, A.J.), rendered November 26, 2012. The judgment convicted defendant, upon his plea of guilty, of assault in the third degree and endangering the welfare of a child.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, assault in the third degree (Penal Law § 120.00 [2]), defendant contends that his plea was not knowingly, voluntarily or intelligently entered because the factual allocution negated the mental state of recklessness, which is an essential element of the crime of assault in the third degree. Although that contention survives defendant's valid waiver of the right to appeal (*see People v Theall*, 109 AD3d 1107, 1107-1108), defendant failed to preserve it for our review inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction (*see id.* at 1108; *People v Rossborough*, 101 AD3d 1775, 1776; *People v Russell*, 55 AD3d 1314, 1314-1315, *lv denied* 11 NY3d 930). In any event, even assuming, arguendo, that defendant's initial statements during the plea colloquy negated the requisite mens rea and that defendant's contention is properly before us (*see People v Lopez*, 71 NY2d 662, 666), we conclude that his subsequent statements removed any doubt with respect thereto, and defendant did not make any further protestations of innocence (*see Theall*, 109 AD3d at 1108; *People v Gardner*, 101 AD3d 1634, 1634-1635; *People v Trinidad*, 23 AD3d 1060, 1061, *lv denied* 6 NY3d 760).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

254

KA 12-00121

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PERRY C. GRIGGS, DEFENDANT-APPELLANT.

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

PERRY C. GRIGGS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered November 15, 2011. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]). Although we agree with defendant that he should not have been shackled when he testified before the grand jury, we conclude that reversal on that basis is not warranted. As the People correctly contend, the prosecutor's cautionary instructions to the grand jury were sufficient to dispel any potential prejudice to defendant (*see People v Burroughs*, 108 AD3d 1103, 1106, *lv denied* 22 NY3d 995). Defendant contends that the prosecutor engaged in misconduct during the grand jury proceedings by failing to inform the members of the grand jury that defendant had requested that a certain witness be called. That contention is not preserved for our review inasmuch as defendant failed to move to dismiss the indictment on that ground (*see People v Gordon*, 277 AD2d 1053, 1053, *lv denied* 96 NY2d 759). In any event, the record establishes that, under the circumstances presented here, there was no "likelihood [or] possibility of prejudice" inasmuch as the witness did not observe the criminal transaction at issue (*People v Adessa*, 89 NY2d 677, 686). Defendant likewise failed to preserve for our review his further contention that the prosecutor engaged in misconduct by improperly cross-examining him before the grand jury (*see Gordon*, 277 AD2d at 1053).

We reject defendant's contention that he was denied effective

assistance of counsel because counsel failed to make a motion to dismiss the indictment based upon the alleged defects in the grand jury proceedings (*see generally People v Baldi*, 54 NY2d 137, 147).

Contrary to defendant's further contention, the evidence at trial is legally sufficient to establish that he forcibly stole property from the victim while using a gun (*see People v Gerena*, 49 AD3d 1204, 1205-1206, *lv denied* 10 NY3d 958; *see generally People v Bleakley*, 69 NY2d 490, 495). Defendant asserts that he had a claim of right defense based on good faith, and he contends that the evidence of intent is legally insufficient when viewed in light of that defense. Defendant's contention is without merit, however, inasmuch as he failed to present any evidence that the particular bills making up the $30 he forcibly took from the victim "had any significance" to defendant (*see People v Pagan*, 19 NY3d 91, 97-99). In any event, fungible cash is not a chattel within the scope of a claim of right defense based on good faith (*see People v Reid*, 69 NY2d 469, 476). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). The sentence is not unduly harsh or severe.

We have considered the remaining contentions of defendant in his main and pro se supplemental briefs and conclude that none warrant reversal or modification of the judgment.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

264

CA 13-01385

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

IN THE MATTER OF SHERIDAN PARK, INC. AND AMIGONE FUNERAL HOME, INC., PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF CEMETERIES, NEW YORK STATE DEPARTMENT OF STATE DIVISION OF CEMETERIES, NEW YORK STATE CEMETERY BOARD, NEW YORK STATE DEPARTMENT OF STATE, RICHARD D. FISHMAN, DIRECTOR OF NEW YORK STATE DIVISION OF CEMETERIES, NEW YORK STATE DEPARTMENT OF STATE DIVISION OF CEMETERIES, CESAR A. PERALES, NEW YORK STATE SECRETARY OF STATE AND MEMBER OF NEW YORK STATE CEMETERY BOARD, NEW YORK STATE DEPARTMENT OF STATE, ERIC T. SCHNEIDERMAN, AS NEW YORK STATE ATTORNEY GENERAL AND A MEMBER OF NEW YORK STATE CEMETERY BOARD, AND NIRAV R. SHAH, M.D., M.P.H., AS NEW YORK STATE COMMISSIONER OF HEALTH AND A MEMBER OF NEW YORK STATE CEMETERY BOARD, RESPONDENTS-RESPONDENTS.

THE KNOER GROUP, PLLC, BUFFALO (ROBERT E. KNOER OF COUNSEL), FOR PETITIONERS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (John A. Michalek, J.), entered April 23, 2013 in a CPLR article 78 proceeding. The judgment denied the petition.

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

Memorandum: In this CPLR article 78 proceeding, petitioners appeal from a judgment denying their petition challenging the determination of respondent New York State Cemetery Board (Cemetery Board) that their exemption under a "grandfather clause" of the Anti-Combination Law (L 1998, ch 560, § 14), which permitted them to jointly operate an existing crematory, did not include the right to relocate and construct a new crematory at a different location. In 1998, the legislature enacted the Anti-Combination Law, which, among

other things, prohibited funeral entities and cemetery corporations from sharing real property interests, marketing, management, operation or control, or other business operations (*see e.g.* N-PCL 1506-a, Cemetery corporations; restrictions). The act was in response to concerns about consumer pricing and unfair competition as a result of for-profit funeral entities operating in concert with not-for-profit cemetery corporations, including the operation of crematory facilities. However, recognizing the substantial investment that had already been made in crematory facilities by these joint operations, the legislature included a "grandfather clause," which provides that the act "shall not apply to the operation of any crematory or crematorium, or act of cremation performed by a funeral entity after the effective date of this act, if the funeral entity: a. operated such crematory or crematorium, or performed cremations prior to January 1, 1998; or b. filed an application with the cemetery board for the operation of a crematory or crematorium prior to January 1, 1998" (L 1998, ch 560, § 14). Petitioners operated a crematory and performed cremations prior to January 1, 1998. Upon application by petitioner Sheridan Park, Inc., the Cemetery Board determined that petitioners' exemption under the "grandfather clause" applies only to the crematory that was being operated by petitioners at the time the Anti-Combination Law took effect and does not extend to a crematory at any new location. Supreme Court concluded that the language of the exemption supports the Cemetery Board's determination, and further concluded that the determination was not affected by an error of law and was not arbitrary and capricious (*see* CPLR 7803 [3]). We affirm.

Initially, we note that the facts of this case are undisputed. Inasmuch as this appeal involves only "a question of statutory interpretation, we turn first to the plain language of the statutes as the best evidence of legislative intent" (*Matter of Malta Town Ctr. I, Ltd. v Town of Malta Bd. of Assessment Review*, 3 NY3d 563, 568; *see Feher Rubbish Removal, Inc. v New York State Dept. of Labor, Bur. of Pub. Works*, 28 AD3d 1, 3-4, *lv denied* 6 NY3d 711). Given the nature of the issue before us, we agree with petitioners that there is no basis for us to rely on any special competence or expertise of the Cemetery Board, and that we need not accord any deference to its determination (*see Matter of Belmonte v Snashall*, 2 NY3d 560, 565-566).

We conclude that the Cemetery Board's interpretation of the statute, which comports with the statute's plain language, purpose and legislative history, and gives meaning to every phrase, is sound. We further conclude that the legislature's intent in including the "grandfather clause" was to prevent the forfeiture of existing crematory structures and facilities, the construction of which had involved substantial capital investment and development costs by funeral entities and cemetery corporations prior to the effective date of the Anti-Combination Law. We reject petitioners' contention that the legislature intended to exempt all existing "business arrangements" between funeral entities and cemetery corporations. The plain language of the exemption specifically applies only to the operation of a crematory or crematorium (*see* L 1998, ch 560, § 14 [a], [b]), and no other form of now-prohibited business relationship

existing between funeral entities and cemetery corporations was embraced by the exemption.

We have considered petitioners' remaining contentions and conclude that they are without merit.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

276

CAF 12-01926

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

IN THE MATTER OF DASHAUN G. AND DESHAUN G.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DIANA B., RESPONDENT.

JONATHAN G., INTERVENOR-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR INTERVENOR-APPELLANT.

MERIDETH SMITH, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILDREN, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered September 12, 2012 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed Dashaun G. in the custody of petitioner.

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

Memorandum: Intervenor father appeals from an order that placed the older child (hereafter, child) with petitioner following a period of trial placement with the father. We note at the outset that this appeal is moot because a subsequent permanency order continuing placement of the child in the custody of petitioner has been issued (*see Matter of Cleophus B. [Torrence B.]*, 93 AD3d 1241, 1242, *lv denied* 19 NY3d 807). We conclude, however, that the exception to the mootness doctrine applies (*see id*.).

Shortly after his birth, the child was placed with petitioner pursuant to a neglect proceeding against only respondent mother. Family Court adjudicated the child to be neglected by the mother and subsequently issued an order placing the child with the father under petitioner's supervision (*see* Family Ct Act § 1054 [a]). When the placement with the father deteriorated due to, among other things, the father's refusal to afford petitioner access to the child's home and misinformation given by the father concerning caregivers for the child when the father was at work, petitioner and the father reached an agreement on the record at a permanency hearing to impose additional

conditions with which he agreed and was required to comply. The record specifically reflects that the father agreed, inter alia, to provide proof of income sufficient to prove that he has the means to care for the child; to obtain his own residence; to prohibit the child from being left in the care of a certain woman with a criminal history; to place the child in daycare when he worked; to allow petitioner access to his home; and to terminate any relationship with a person involved in the "prostitution industry." The court adjourned the permanency hearing for two weeks to monitor the father's compliance with those additional conditions. Before those conditions were reduced to a written order, petitioner alleged in an order to show cause that the father violated them and that the child was in imminent risk in his care. Pending a hearing on the order to show cause, the court issued an order returning the child to placement with petitioner. Following a hearing, the court issued the permanency order on appeal, finding that the child would be in imminent risk of harm if returned to the father and that the father violated the above conditions, and continuing the child's placement with petitioner.

At the outset, we note that, although no written order was issued setting forth the additional conditions, the transcript of the proceeding reflects that the father was present with counsel and stipulated to the imposition of those additional conditions in open court, and those conditions therefore are binding upon him regardless of whether they were reduced to a written order (*see generally Matter of Lagano v Soule*, 86 AD3d 665, 667; *Matter of W. Children*, 226 AD2d 385, 386-387, *lv denied* 88 NY2d 811).

The father contends that the court abridged his fundamental parental rights and violated his right to equal protection by removing the child from placement with him without requiring petitioner to commence a neglect proceeding pursuant to Family Court Act article 10. We reject that contention. By its order to show cause, petitioner sought modification of the placement based upon the father's violation of the additional conditions to which he was bound. The father was subject to the supervision of petitioner and, when he violated the supervision order as modified by the additional conditions, petitioner was entitled to seek removal of the child by way of revocation of the order of supervision (*see* §§ 1054, 1072, 1089 [d] [2] [viii] [C]). We conclude that petitioner established by a preponderance of the evidence that the father violated those additional conditions to which he stipulated to be bound and that his violation was willful (*see Matter of Aimee J.*, 34 AD3d 1350, 1350-1351; *Matter of Linda FF.*, 301 AD2d 887, 888-890; *cf. Matter of Brittany T.*, 48 AD3d 995, 997). Although the court erred in stating that it was proceeding pursuant to Family Court Act §§ 1061 and 1089 and not Family Court Act § 1072, in the absence of any showing of prejudice, we consider that technical defect to be harmless error (*see* CPLR 2001; *Matter of Rachel G.*, 185 AD2d 382, 383-384). The father's similar contentions with regard to another child are unpreserved for our review (*see generally Matter of Longo v Wright*, 19 AD3d 1078, 1079) and, in any event, are likewise without merit.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

288

KA 12-00567

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD M. JENKINS, DEFENDANT-APPELLANT.

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

EDWARD M. JENKINS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered February 21, 2012. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree and robbery in the third degree (two counts).

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

Memorandum: On appeal from a judgment convicting him following a plea of guilty of one count of robbery in the first degree (Penal Law § 160.15 [4]) and two counts of robbery in the third degree (§ 160.05), defendant contends that County Court erred in denying his motion to withdraw his guilty plea. Defendant's contention "that his plea was involuntary because he was coerced by defense counsel is belied by [defendant's] responses to the court's questions during the plea colloquy, indicating that he was pleading guilty voluntarily and that no threats or promises had induced the plea" (*People v Toliver*, 82 AD3d 1581, 1582, *lv denied* 17 NY3d 802, *reconsideration denied* 17 NY3d 862; *see People v Ivey*, 98 AD3d 1230, 1231, *lv denied* 20 NY3d 1012; *People v Irvine*, 42 AD3d 949, 949, *lv denied* 9 NY3d 962). "Furthermore, the fact that defendant was required 'to accept or reject the plea offer within a short time period does not amount to coercion' " (*Irvine*, 42 AD3d at 949; *see People v Mason*, 56 AD3d 1201, 1202, *lv denied* 11 NY3d 927; *People v Thomas*, 39 AD3d 1197, 1198-1199, *lv denied* 9 NY3d 869). Although defendant also contended in support of his motion that he was innocent of the crimes, he "failed to submit any new evidence to substantiate his conclusory assertions of innocence" (*People v Morris*, 78 AD3d 1613, 1614, *lv denied* 17 NY3d 798; *see People v Diaz*, 286 AD2d 980, 980, *lv denied* 97 NY2d 681), and he admitted all of the essential elements of the crimes during the

plea allocution (*see People v Hobby*, 83 AD3d 1536, 1536, *lv denied* 17 NY3d 859; *People v Sparcino*, 78 AD3d 1508, 1509, *lv denied* 16 NY3d 746). Therefore, based on the record before us, we see no reason to disturb the court's denial of defendant's motion (*see People v Stephens*, 6 AD3d 1123, 1124-1125, *lv denied* 3 NY3d 663, *reconsideration denied* 3 NY3d 682).

Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived his right to appeal (*see People v Bradshaw*, 18 NY3d 257, 264-265; *People v Lopez*, 6 NY3d 248, 256), and that valid waiver encompasses his contentions, raised in his main and pro se supplemental briefs, that the court erred in refusing to suppress identification testimony and in refusing to hold a *Wade* hearing on the superseded indictment (*see People v Kemp*, 94 NY2d 831, 833; *People v Caraballo*, 59 AD3d 971, 971, *lv denied* 12 NY3d 852; *People v McMillon*, 31 AD3d 1197, 1197), as well as the final contention in his pro se supplemental brief that he was denied his statutory right to a speedy trial (*see People v Badding*, 107 AD3d 1453, 1454; *People v Paduano*, 84 AD3d 1730, 1730; *People v Barnes*, 41 AD3d 1309, 1309-1310, *lv denied* 9 NY3d 920).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

303

OP 12-02204

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

IN THE MATTER OF CITY OF FULTON, PETITIONER,

V MEMORANDUM AND ORDER

TOWN OF GRANBY, RESPONDENT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (JOHN D. ALLEN OF COUNSEL), FOR PETITIONER.

SCOTT F. CHATFIELD, MARIETTA, FOR RESPONDENT.

Proceeding pursuant to General Municipal Law article 17 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to General Municipal Law § 712) for a determination that a proposed annexation is in the public interest.

It is hereby ORDERED that the petition is unanimously granted without costs and judgment is granted in favor of petitioner as follows:

> It is ADJUDGED that the proposed annexation is in the overall public interest.

Memorandum: Petitioner, City of Fulton (City), commenced this original proceeding pursuant to General Municipal Law article 17 seeking to annex approximately 69.5 acres of industrial and vacant land from respondent, Town of Granby (Town). Pursuant to General Municipal Law § 712, this Court designated three Referees to hear and report on the issue whether the proposed annexation is in the overall public interest. The Referees unanimously concluded that the proposed annexation is in the overall public interest and recommended that we grant the City's petition in its entirety, and we agree with that recommendation. We therefore confirm the report of the Referees, grant the petition and grant judgment in favor of petitioner adjudging that the proposed annexation is in the overall public interest.

"The municipality seeking an article 17 annexation has the burden of proving that the annexation is in the overall public interest" (*Matter of City of Utica v Town of Frankfort*, 10 NY3d 128, 132; *see* General Municipal Law § 712; *Matter of Mayor of Vil. of Akron v Town Bd. of Town of Newstead*, 238 AD2d 902, 903). "A reviewing court must weigh[ ] the benefit or detriment to the annexing municipality, the territory proposed to be annexed, and the remaining governmental unit

from which the territory would be taken" (*City of Utica*, 10 NY3d at 132 [internal quotation marks omitted]; *see Matter of Town of Niagara v City of Niagara Falls*, 19 AD3d 1076, 1076-1077, *lv denied* 5 NY3d 713). "Benefit and detriment are customarily defined in terms of municipal services such as police and fire protection, health regulations, sewer and water service, public utilities and public education" (*Matter of Town of Lansing v Village of Lansing*, 80 AD2d 942, 942; *see Matter of Incorporated Vil. of Ilion v Town Bd. of Frankfort*, 261 AD2d 952, 952). "Another factor to consider is whether the municipality seeking the annexation and the territory proposed to be annexed have 'the requisite unity of purpose and facilities to constitute a community' " (*Town of Niagara*, 19 AD3d at 1077, quoting *Matter of Common Council of City of Gloversville v Town Bd. of Town of Johnstown*, 32 NY2d 1, 6; *see City of Utica*, 10 NY3d at 133).

Here, we conclude that the City met its burden of establishing that the proposed annexation is in the overall public interest (*see Matter of City of Watertown v Town Bd. of Town of Pamelia*, 251 AD2d 1073, 1074; *Matter of Common Council of City of Fulton v Town Bd. of Town of Volney* , 238 AD2d 903, 904; *City of Batavia v Town of Batavia*, 45 AD2d 203, 206, *lv denied* 35 NY2d 644). There is no question that the annexation would significantly benefit the City. As the Referees found, the territory sought to be annexed houses the City's multimillion dollar Wastewater Treatment Facility (hereafter, Facility), which is the "nerve center" of the City's sewage treatment system and a "vital component of the City's municipal utility infrastructure." Thus, "by incorporating the system within its territorial boundaries, the City . . . will be better able to manage, preserve and protect the system" (*City of Watertown*, 251 AD2d at 1075). It is further undisputed that the annexation would significantly reduce the City's tax liability and, therefore, the Facility's operating expenses. Specifically, the annexation would relieve the City of Town, Town Highway, fire district, school district, and county real property taxes, which totaled $116,183.46 in 2012.

The annexation would also benefit the territory itself. The parties stipulated that the City, not the Town, currently provides municipal services to the territory, including police and fire protection, water and sewer service, and maintenance of the access road leading to the Facility (*see Incorporated Vil. of Ilion*, 261 AD2d at 953). The parties further stipulated that the City is "better equipped than the Town to provide all municipal services to the [t]erritory," a factor that "weighs strongly" in favor of the annexation (*see Common Council of City of Fulton*, 238 AD2d at 904; *City of Jamestown v Town of Ellicott*, 185 AD2d 627, 627, *abrogated on other grounds by City of Utica*, 10 NY3d at 134-135, n 1). Among other things, the record establishes that the City is better able to respond to a fire, chemical spill, or other emergency at the Facility. The City has a full-time, paid fire department with two fire stations, one of which is located within 1.5 miles of the Facility. By contrast, the Town has an all-volunteer fire department, and its single fire house is located three miles from the Facility. As for police

protection, the City maintains a full-time police department while the Town has no police force (*see Matter of City of Amsterdam v Town Bd. of Town of Amsterdam*, 100 AD2d 661, 661, *lv denied* 62 NY2d 604). City police officers presently provide police protection to the territory as special deputy sheriffs. Thus, the record establishes that the City's police and fire protection services are superior to those provided by the Town (*see City of Utica*, 10 NY3d at 132-133; *see also Incorporated Vil. of Ilion*, 261 AD2d at 953; *Common Council of City of Fulton*, 238 AD2d at 904; *cf. Town of Niagara*, 19 AD3d at 1077).

With respect to the effect of the annexation on the Town and the region, the parties stipulated that improvement and protection of the Facility would benefit not only the City, but also much of the Town and the neighboring Town of Volney. The annexation and the resultant tax reduction would enable the City to stabilize its Sewer Fund and the rates it charges to residents and businesses throughout the area, including within the Town. The parties stipulated that, because wastewater disposal rates are a key cost that businesses consider in deciding to locate or expand in the area, the annexation "is substantially likely to spawn industrial growth and development in the City and the surrounding area," thereby providing economic benefits to the Town and the City.

Although there is no question that the annexation would result in a loss of tax revenue to the Town and, consequently, the possibility of increased taxes for its residents, we have previously concluded that "such is the inevitable result of any annexation and does not constitute, in and of itself, sufficient detriment to defeat the application" (*City of Batavia*, 45 AD2d at 206; *see Matter of Town of Plattsburgh v Town of Saranac*, 274 AD2d 852, 854, *lv denied* 95 NY2d 768). In any event, the Town agreed that the increased tax burden on its residents would be "minimal," with a projected increase of only about 7.5 cents per $1,000 of assessed valuation. The Town further agreed that "[t]he City's tax savings of approximately $116,183.46 per year far outweigh the minimal loss in tax revenue to the Town, Town Highway Department, and Granby Center Fire District, combined, of approximately $12,983.41 per year" (*see Incorporated Vil. of Ilion*, 261 AD2d at 953; *City of Watertown*, 251 AD2d at 1074; *Common Council of City of Fulton*, 238 AD2d at 904; *City of Amsterdam*, 100 AD2d at 661-662).

Finally, we agree with the Referees that the territory and the City have the requisite unity of purpose and facilities to constitute a community (*see City of Utica*, 10 NY3d at 133; *Incorporated Vil. of Ilion*, 261 AD2d at 953; *City of Jamestown*, 185 AD2d at 627-628). As noted by the Referees, the City already provides all municipal services to the territory, the Facility located within the territory is "a vital component" of the City's municipal sewage treatment system, and the character and use of the territory is consistent with the character and use of the adjacent parts of the City. The remainder of the property to be annexed consists of vacant land that could be developed for recreational purposes, which is harmonious and consistent with the use of the City's land directly across the river

from the territory, including Indian Point and Pathfinder Trail.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

308

CA 13-00042

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

KATHLEEN A. SARGENT, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF ERIC J. ENGASSER, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DONALD MAMMOSER, DEFENDANT-RESPONDENT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WALSH ROBERTS & GRACE, BUFFALO (JOSEPH H. EMMINGER, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered August 30, 2012. The order granted the motion of defendant for summary judgment dismissing the complaint and denied the cross motion of plaintiff to amend the complaint and for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendant's motion and reinstating the complaint, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this wrongful death action individually and as administratrix of the estate of Eric J. Engasser (decedent), seeking damages for fatal injuries sustained by decedent in a motorcycle accident. The accident occurred when the motorcycle operated by decedent collided with a cow on East Eden Road in the Town of Eden. The cow had wandered onto East Eden Road from a farm that was owned by defendant and located along the roadway. Plaintiff alleged that defendant was negligent in failing to control, care for, and supervise his cow. Defendant moved for summary judgment dismissing the complaint, and plaintiff cross-moved to amend the complaint to add a claim for strict liability based on vicious propensities and for partial summary judgment on the issue of liability. Supreme Court granted defendant's motion and denied plaintiff's cross motion.

We note at the outset that plaintiff does not contend on appeal that the court erred in denying her cross motion, and thus she is deemed to have abandoned any contention with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). We agree with

plaintiff, however, that the court erred in granting defendant's motion for summary judgment dismissing the complaint. We conclude that the decision of the Court of Appeals in *Hastings v Sauve* (21 NY3d 122) compels the denial of defendant's motion, and we therefore modify the order accordingly.

In *Hastings* (21 NY3d at 124), the plaintiff was injured when the van she was driving hit a cow on a public road. The cow had been kept on the property of one of the defendants, and there was evidence that the fence separating that defendant's property from the road was overgrown and in bad repair (*id.*). The plaintiff and her husband commenced a personal injury action against the property owner and the owners of the animal (*id.* at 125). In reversing the order of the Third Department, which had ruled that injuries inflicted by domestic animals may proceed only under a strict liability theory based on the owner's knowledge of the animal's vicious propensities, the Court of Appeals held that the rule articulated in cases such as *Petrone v Fernandez* (12 NY3d 546, 550), *Bard v Jahnke* (6 NY3d 592, 596-597), and *Collier v Zambito* (1 NY3d 444, 446) "does not bar a suit for negligence when a farm animal has been allowed to stray from the property where it is kept" (*Hastings*, 21 NY3d at 124). The Court reasoned that the claim in *Hastings* was "fundamentally distinct from the claim made in *Bard* and similar cases: It is that a farm animal was permitted to wander off the property where it was kept through the negligence of the owner of the property and the owner of the animal" (*id.* at 125). The Court further reasoned that to apply the rule in *Bard*, i.e., that the owner's liability is determined solely by the vicious propensity rule, "would be to immunize defendants who take little or no care to keep their livestock out of the roadway or off of other people's property" (*id.*). The Court therefore held that "a landowner or the owner of an animal may be liable under ordinary tort-law principles when a farm animal—i.e., a domestic animal as that term is defined in Agriculture and Markets Law § 108 (7)—is negligently allowed to stray from the property on which the animal is kept" (*id.* at 125-126). That holding is applicable here to the instant case.

Defendant's contention that he is entitled to summary judgment dismissing plaintiff's common-law negligence claim on the ground that he lacked notice of the defect in the fence surrounding the paddock where the cow was kept is not properly before us inasmuch as it is raised for the first time on appeal (*see Ciesinski*, 202 AD2d at 985). In any event, we conclude that there are triable issues of fact with respect to defendant's negligence based upon, inter alia, defendant's own testimony that there was a break in the fence on the night of the accident and his acknowledgment that there had been previous breaks in the fence that had to be repaired; the affidavits of defendant's neighbors, who averred that the escape of defendant's cows was a recurring problem; and the affidavit of plaintiff's expert, who opined that defendant's fence was inadequate (*see Hastings*, 21 NY3d at 126).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

310

KA 12-00467

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LARRY COLLINS, JR., DEFENDANT-APPELLANT.

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

LARRY COLLINS, JR., DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered November 18, 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 order of protection issued in conjunction with sentencing is invalid because it exceeds the maximum permissible duration of such an order under the version of CPL 530.13 in effect when he was sentenced. Although that contention survives defendant's valid waiver of the right to appeal (*see People v Ouchie*, 59 AD3d 926, 926; *People v Holmes*, 294 AD2d 871, 872, *lv denied* 98 NY2d 730), defendant did not object to the duration of the order of protection at sentencing and therefore failed to preserve his contention for our review (*see People v Nieves*, 2 NY3d 310, 316-317; *People v Tidd* [appeal No. 2], 81 AD3d 1405, 1406). In any event, defendant's contention is without merit inasmuch as, when defendant was sentenced on November 18, 2011, CPL 530.13 former (4) provided in relevant part that the maximum duration of an order of protection was eight years from the end of any determinate term of incarceration actually imposed.

Defendant further contends that the order of protection should be vacated because Supreme Court failed to articulate its reasons for issuing it. "Even assuming, arguendo, that defendant's contention survives the plea and the valid waiver of the right to appeal . . . ,

we conclude that it is not preserved for our review inasmuch as defendant failed to object to the order of protection at sentencing" (*People v Kulyeshie*, 71 AD3d 1478, 1479, *lv denied* 14 NY3d 889; *see Nieves*, 2 NY3d at 316-317). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Contrary to the contention of defendant in his pro se supplemental brief, the court did not err in resentencing him, inasmuch as the court thereby acted within its inherent power to correct an illegal sentence (*see People v McCoy*, 98 AD3d 1135, 1136, *lv denied* 20 NY3d 933; *see generally People v DeValle*, 94 NY2d 870, 871-872). Here, the record establishes that the court initially directed that defendant's sentence be served concurrently with his unexpired parole time. After realizing that concurrent sentences were illegal in that situation (*see* Penal Law § 70.25 [2-a]), the court resentenced defendant on the same day, directing that the sentence be served consecutively to the unexpired part of his prior sentence. We have considered the remaining contentions in defendant's pro se supplemental brief and conclude that they are without merit.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

337

KA 07-01017

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERMAINE BROWN, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO (JEREMY D. SCHWARTZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Peter L. Broderick, Sr., J.), rendered March 2, 2007. 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 reversed on the law and a new trial is granted on count two of the indictment.

Memorandum: Following a jury trial in 2007, defendant was convicted of assault in the second degree (Penal Law § 120.05 [2]). On appeal, we reduced the period of postrelease supervision to a period of three years, and otherwise affirmed the judgment (*People v Brown*, 52 AD3d 1237, *lv denied* 10 NY3d 956). In 2013, defendant moved for a writ of error coram nobis in this Court, asserting that he was denied effective assistance of appellate counsel because counsel had failed to raise an issue on direct appeal that would have resulted in reversal, i.e., that County Court's deference to the decision of defendant to forego a jury charge for a lesser included offense denied him the expert judgment of counsel, to which the Sixth Amendment entitles him. We granted the writ, vacated our prior order, and decided to consider the appeal de novo (*People v Brown*, 105 AD3d 1466). We now reverse the judgment and grant a new trial on count two of the indictment (*see People v Colville*, 20 NY3d 20, 33).

In *Colville* (20 NY3d at 23), the Court of Appeals held that "the decision whether to seek a jury charge on lesser-included offenses is a matter of strategy and tactics which ultimately rests with defense counsel." In that case, the trial court agreed with defense counsel that a reasonable view of the evidence supported his request to submit two lesser included offenses to the jury (*id.*). Nevertheless, "contrary to defense counsel's request and repeated statements that, in his professional judgment, the lesser-included offenses should be

given to the jury, the judge did not do so because defendant objected" (*id.*). The jury convicted the defendant of murder, and the Court of Appeals reversed and ordered a new trial, concluding that, "[b]y deferring to defendant, the judge denied him the expert judgment of counsel to which the Sixth Amendment entitles him" (*id.* at 32).

Here, defense counsel requested that the court charge the jury with respect to the lesser included offense of assault in the third degree (Penal Law § 120.00 [1]), and the court agreed. The court then advised defendant that his conviction of a lesser included offense would "automatically" result in a probation violation with respect to unrelated charges then pending, whereupon defendant told the court that he did not want the lesser included offense to be submitted to the jury. Defense counsel requested an opportunity to confer further with defendant and, after a recess, defendant reiterated his position to the court. Defense counsel told the court that defendant's position was "against [the] strong . . . advice" of counsel, and that he and his co-counsel "strongly resisted [defendant's] decision," which defendant was "making on his own, certainly against our advice." Upon questioning by the court, defendant confirmed that the decision to forego a charge for a lesser included offense was his own and against the advice of his attorneys, and the court indicated that it would submit only the offenses charged in the indictment. Defense counsel reiterated his opinion that defendant's decision was "the wrong decision." The court did not submit the lesser included offense to the jury in accordance with defendant's decision, and defendant was convicted of assault in the second degree (§ 120.05 [2]).

We conclude that the court erred in deferring to defendant in determining whether to submit the lesser included offense to the jury inasmuch as that decision "was for the attorney, not the accused, to make" (*Colville*, 20 NY3d at 32; *see People v Taylor*, 2 AD3d 1306, 1308, *lv denied* 2 NY3d 746). We agree with defendant that, contrary to the People's contention, defense counsel "never 'acceded' or 'acquiesc[ed]' to defendant's decision . . . except to the extent the judge impermissibly left [them] no alternative" (*Colville*, 20 NY3d at 32). Moreover, we agree with defendant that the court's error in deferring to his decision relative to the charge for a lesser included offense cannot be deemed harmless beyond a reasonable doubt (*see id.* at 32-33). As did the court when it initially granted defense counsel's request for the charge for a lesser included offense, we conclude that there is a reasonable view of the evidence to support a finding that defendant committed the crime of assault in the third degree (Penal Law § 120.00 [1]), but not assault in the second degree (§ 120.05 [2]; *see* CPL 300.50 [2]; *Colville*, 20 NY3d at 32-33). Specifically, a jury reasonably could find that defendant intended to cause physical injury to the victim and that he caused physical injury to the victim, but that he did not do so "by means of . . . a dangerous instrument" (§ 120.05 [2]). Although the indictment alleged that defendant attacked the victim with a "box cutter," the victim never observed a box cutter or any other dangerous instrument in defendant's hands, and he did not know what caused the lacerations on his neck and chest. An employee who witnessed the altercation testified that he never saw a razor, a box cutter, or any other weapon

during the fight, and no such weapon was recovered from the crime scene. Further, defendant was apprehended while fleeing from the scene, and no weapons were found on defendant, in or near defendant's vehicle, or in the possession of the other occupants of his vehicle. In view of those facts, the court should have given a charge for the lesser included offense of assault in the third degree, as requested by defense counsel.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

338

KA 11-02439

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MIGUEL CRESPO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered October 3, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession 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 a jury verdict of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]). We reject defendant's contention that County Court erred in denying his motion to dismiss the indictment pursuant to CPL 30.30 (1) (a). Defendant was arrested on December 13, 2008, and the People announced their readiness for trial on May 28, 2009, i.e., within the requisite six-month period (*see People v Goss*, 87 NY2d 792, 797; *see also* CPL 30.30 [1] [a]). The period of postreadiness delay between October 1, 2009 and November 24, 2009 is not chargeable to the People because it was the result of the unavailability of the court due to court congestion (*see People v Tirado*, 109 AD3d 688, 690, *lv denied* 22 NY3d 959, *reconsideration denied* 22 NY3d 1091). Defendant's contention with respect to the prereadiness period of delay between May 21, 2009 and May 28, 2009 is raised for the first time on appeal and is thus not preserved for our review (*see* CPL 470.05 [2]; *see also People v Luperon*, 85 NY2d 71, 77-78). In any event, defendant requested an adjournment from May 27, 2009 to May 28, 2009 and the period of time between the indictment and arraignment at issue here is chargeable to the court—not the People—as a matter of law (*see Goss*, 87 NY2d at 798).

We reject the further contention of defendant that the court should have reopened the suppression hearing, as well as his alternative contention that defense counsel was ineffective for

failing to move to do so. Defendant did not ask to reopen the suppression hearing, and the court was under no obligation to reopen the hearing sua sponte (*see People v Lewis*, 302 AD2d 322, 323, *lv denied* 100 NY2d 540). In any event, defendant's contention is based upon evidence that was available and could have been discovered with reasonable diligence prior to the hearing (*see* CPL 710.40 [4]; *People v Wynn*, 55 AD3d 1378, 1379, *lv denied* 11 NY3d 901), or evidence that would not have changed the outcome of the hearing (*see People v Lucie*, 49 AD3d 1253, 1254, *lv denied* 10 NY3d 936). Inasmuch as a motion to reopen the suppression hearing would not have been successful, defendant was not denied effective assistance of counsel when his first attorney did not make such a motion (*see People v Nuffer*, 70 AD3d 1299, 1300). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Finally, the sentence is not unduly harsh or severe.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

346

CA 13-01011

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

FIBERGLASS FABRICATORS, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

C.O. FALTER CONSTRUCTION CORP.,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

BYRNE, COSTELLO & PICKARD, P.C., SYRACUSE (ZEA M. WRIGHT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an amended order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered August 23, 2012. The amended order, inter alia, dismissed the complaint of plaintiff and granted money damages to defendant C.O. Falter Construction Corp. after a nonjury trial.

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

Same Memorandum as in *Fiberglass Fabricators, Inc. v C.O. Falter Constr. Corp.* ([appeal No. 2] ___ AD3d ___ [May 9, 2014]).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

347

CA 13-01012

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

FIBERGLASS FABRICATORS, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

C.O. FALTER CONSTRUCTION CORP.,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

BYRNE, COSTELLO & PICKARD, P.C., SYRACUSE (ZEA M. WRIGHT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered August 23, 2012. The judgment awarded money damages to defendant C.O. Falter Construction Corp. after a nonjury trial.

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

Memorandum: C.O. Falter Construction Corp. (defendant), the general contractor on a public improvement project, hired plaintiff to supply fiberglass reinforced plastic (FRP) products for the project. Defendant refused to pay plaintiff's final invoice on the ground that a number of products that plaintiff was required to provide under the parties' agreement were missing, defective, or otherwise failed to conform to the project's plans and specifications. Pursuant to the terms of the agreement, defendant thereafter demanded adequate assurance of performance from plaintiff in the form of a surety bond, and plaintiff was unable or unwilling to deliver such bond. Defendant then terminated the agreement and obtained from other suppliers the FRP products necessary to complete the project.

Following the termination of the agreement, plaintiff filed a mechanic's lien in the amount of its final invoice, and defendant secured a bond to discharge the lien. Plaintiff thereafter commenced this action alleging, inter alia, breach of contract, and seeking foreclosure of its lien. Defendant asserted counterclaims seeking, inter alia, a declaration that the lien is void based upon plaintiff's willful exaggeration of the amount for which it claimed a lien.

In appeal No. 1, plaintiff appeals from an amended order entered following a bench trial that dismissed its complaint, discharged and declared null and void the mechanic's lien, awarded damages to defendant pursuant to Lien Law § 39-a, discharged the discharge bond and awarded judgment to defendant on its counterclaim for the cost of obtaining such bond, and directed an inquest to determine the amount of attorney's fees defendant was entitled to recover from plaintiff pursuant to section 39-a. In appeal No. 2, plaintiff appeals from a judgment awarding defendant damages as provided in the amended order and, in appeal No. 3, plaintiff appeals from a judgment awarding defendant attorney's fees. We note at the outset that, inasmuch as the amended order in appeal No. 1 is subsumed in the judgment in appeal No. 2, we dismiss plaintiff's appeal from the amended order in appeal No. 1 (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Contrary to plaintiff's contention in appeal No. 2, we conclude that Supreme Court applied the proper standard in finding that plaintiff had willfully exaggerated the amount of the mechanic's lien, i.e., whether plaintiff intentionally and deliberately exaggerated the amount of the lien (*see Pelc v Berg*, 68 AD3d 1672, 1673; *J. Sackaris & Sons, Inc. v Terra Firma Constr. & Gen. Contr., LLC*, 14 AD3d 538, 541, *lv denied* 4 NY3d 878). The court did not base its finding of willful exaggeration solely upon the discrepancy between the amount of the lien and the amount actually due to plaintiff (*see generally Capogna v Guella*, 41 AD3d 522, 523). Contrary to plaintiff's further contention in appeal No. 2, we conclude that defendant met its burden of demonstrating that such discrepancy was the result of plaintiff's intentional and deliberate exaggeration rather than honest mistakes or disagreements concerning the terms of the agreement (*see Pelc*, 68 AD3d at 1673; *Fidelity N.Y. v Kensington-Johnson Corp.*, 234 AD2d 263, 263).

We reject plaintiff's contention in appeal No. 3 that the amount of attorney's fees awarded to defendant is excessive. The court considered the appropriate factors and properly concluded that the fees sought by defendant were "for services in securing the discharge of the lien" (Lien Law § 39-a; *see generally Diaz v Audi of Am., Inc.*, 57 AD3d 828, 830). The court was in the best position to determine the amount of reasonable attorney's fees for such services "and, absent an abuse of discretion, the trial court's determination will not be disturbed" (*Pelc*, 68 AD3d at 1673 [internal quotation marks omitted]). We perceive no abuse of discretion in this case.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

348

CA 13-01013

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

FIBERGLASS FABRICATORS, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

C.O. FALTER CONSTRUCTION CORP.,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 3.)

BYRNE, COSTELLO & PICKARD, P.C., SYRACUSE (ZEA M. WRIGHT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered April 5, 2013. The judgment awarded attorney's fees to defendant C.O. Falter Construction Corp. after a nonjury trial.

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

Same Memorandum as in *Fiberglass Fabricators, Inc. v C.O. Falter Constr. Corp.* ([appeal No. 2] ___ AD3d ___ [May 9, 2014]).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

363

CAF 13-01058

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND WHALEN, JJ.

IN THE MATTER OF KARLA BOW, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOSEPH BOW, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

KARLA BOW, PETITIONER-APPELLANT PRO SE.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered August 20, 2012 in a proceeding pursuant to Family Court Act article 4. The order denied petitioner's written objections to an order of the Support Magistrate on her petition to modify a prior child support order.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the amount of respondent's annual income and the amount of child support awarded, and as modified the order is affirmed without costs and the matter is remitted to Family Court, Niagara County, for further proceedings in accordance with the following Memorandum: In appeal No. 1, petitioner mother appeals pro se from an order denying her written objections to the order of the Support Magistrate on her petition to modify a prior child support order. In appeal No. 2, the mother appeals pro se from a corrected order that denied in part her written objections to the Support Magistrate's order on her petition alleging that respondent father willfully violated a prior order of support.

With respect to appeal No. 1, we reject the mother's contention that Family Court erred in awarding arrears from October 29, 2010, the date on which she petitioned for arrears and recalculation of child support, rather than from several specified earlier dates (*see* Family Ct Act § 449 [2]; *Matter of Aiken v Aiken*, 115 AD2d 919, 920; *see also Matter of Johna M.S. v Russell E.S.*, 10 NY3d 364, 366). Insofar as the mother's contention invokes equitable principles, we note that Family Court lacks equity jurisdiction (*see Matter of Brescia v Fitts*, 56 NY2d 132, 139).

Next, the mother contends that the court erred in automatically applying the biannual child support recalculation clause in the parties' divorce settlement, which was incorporated but not merged in the judgment of divorce, based on 2011 income. Contrary to the mother's contention, the court did not automatically apply the biannual child support recalculation clause. Rather, the record

establishes that the mother requested a prospective recalculation in her October 29, 2010 modification petition; the mother's petition stated that neither party was opposed to the implementation of the biannual recalculation clause; the mother acknowledged that a recalculation would be needed in order to calculate the parties' current pro rata share of uninsured, unreimbursed medical expenses; and, indeed, the father requested a prospective child support recalculation based on 2011 income. The record thus establishes that the court's decision to recalculate child support based on 2011 income was based on factors advanced by the parties, and we further conclude that the court's decision did not unfairly prejudice the mother because she had adequate notice thereof and the opportunity to present evidence (*cf. Matter of Revet v Revet*, 90 AD3d 1175, 1176-1177; *see generally Matter of Heintz v Heintz*, 28 AD3d 1154, 1155). The mother failed to preserve for our review her further contention that the court had previously applied the recalculation clause in an inconsistent manner that favored the father inasmuch as she failed to raise that contention concerning the prior support recalculations in her written objections to the Support Magistrate's order (*see* Family Ct Act § 439 [e]; *Matter of White v Knapp*, 66 AD3d 1358, 1359).

The mother also contends that the court erred in determining the parties' 2011 income by using the proof of income provided by the parties in an inconsistent manner. We reject that contention. "A court need not rely upon a party's own account of his or her finances" (*Matter of Rohme v Burns*, 92 AD3d 946, 947), and the court's determination whether to impute income to the obligor spouse "is given great deference on appeal" (*Khaimova v Mosheyev*, 57 AD3d 737, 738). We further reject the mother's contention that her income determination is inaccurate due to lack of notice and her related inability to present evidence because, as we previously concluded herein, the mother had sufficient notice. Moreover, the mother had the opportunity to list unreimbursed business expenses in her 2011 financial affidavit, and the court's alleged failure to consider those expenses is attributable to the mother's failure to provide that information to the court.

We agree with the mother, however, that the court erred in determining the father's 2011 income. It does not appear that the father's 2011 rental income was included in his gross income, and we are unable on the record before us to determine the amount of the father's 2011 rental income (*see McAuliffe v McAuliffe*, 70 AD3d 1129, 1133). We therefore modify the order in appeal No. 1 by vacating the amount of the father's income as well as the amount of child support awarded, and we remit the matter to Family Court to determine the proper amount of the father's income upon taking into account the amount of his 2011 rental income, and to recalculate the father's resulting child support obligation. Contrary to the mother's contention, however, both rental income and rental losses are to be considered by the court (*see Matter of Petkovsek v Snyder*, 255 AD2d 960, 960; *see also Matter of Pringle v Pringle*, 283 AD2d 966, 967). We have examined the mother's remaining contentions in appeal No. 1 and conclude that they are without merit.

With respect to appeal No. 2, we reject the mother's contention that the court erred in finding that the father did not willfully violate a prior support order. The mother did not meet her burden of proving that the father "failed to pay support as ordered" (*Matter of Powers v Powers*, 86 NY2d 63, 69; *see* Family Ct Act § 454 [3]). The receipts presented by the mother to the court relating to alleged uninsured, unreimbursed medical expenses and expenses related to medical appointments were both disorganized and confusing. According to the father, the mother claimed reimbursement for medical expenses paid in cash, but she had also withdrawn large amounts of cash from the father's health savings account. In addition, the mother failed to record whether the expenses related to medical appointments were incurred on a day when either of the children had a medical appointment. Even assuming, arguendo, that the parties' stipulation was intended to cover expenses incurred in the children's hometown of Lockport, a point disputed by the parties, we conclude in any event that the meal receipts claimed as expenses related to medical appointments fall short of the totals sought by the mother in her monthly summaries submitted to the court. Because the father did not willfully violate the order, the decision not to award reasonable counsel fees was properly within the court's discretion (*see* § 438 [a], [b]; *Matter of Nieves-Ford v Gordon*, 47 AD3d 936, 937; *Sampson v Glazer*, 109 AD2d 831, 832), and we note in any event that the mother failed to present evidence of her attorney's limited services sufficient to provide an adequate basis for an award of reasonable attorney's fees. The court did not abuse its discretion in denying the mother's informal request, by way of a facsimile letter, for a further extension in which to submit additional documents to perfect her written objections. "It is well recognized that the [court's] power to control its calendar is a vital consideration in the administration of the courts" (*Headley v Noto*, 22 NY2d 1, 4, *rearg denied* 22 NY2d 973; *see Matter of Bales*, 93 AD2d 861, 862, *lv dismissed* 60 NY2d 554, 60 NY2d 701).

Lastly, we reject the mother's request for reassignment to a different court upon remittal, inasmuch as there was no showing of bias or an abuse of discretion on the part of the court (*see generally* CPLR 5522; *William Kaufman Org. v Graham & James*, 269 AD2d 171, 174).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

364

CAF 13-01203

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND WHALEN, JJ.

IN THE MATTER OF KARLA BOW, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOSEPH BOW, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

KARLA BOW, PETITIONER-APPELLANT PRO SE.

Appeal from a corrected order of the Family Court, Niagara County (John F. Batt, J.), entered September 21, 2012 in a proceeding pursuant to Family Court Act article 4. The corrected order denied in part petitioner's written objections to an order of the Support Magistrate on her petition alleging that respondent willfully violated a prior order of support.

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

Same Memorandum as in *Matter of Bow v Bow* ([appeal No. 1] ___ AD3d ___ [May 9, 2014]).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

368

CA 13-01136

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND WHALEN, JJ.

RYAN NICASTRO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY, DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (MARCO CERCONE OF COUNSEL), FOR DEFENDANT-APPELLANT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (ELIZABETH A. KRAENGEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 3, 2013 in a breach of contract action. The order, insofar as appealed from, granted in part the motion of plaintiff and thereby compelled production of approximately 200 pages of previously withheld or partially redacted documents.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the motion is denied in its entirety.

Memorandum: On appeal from an order that granted in part plaintiff's motion and thereby compelled production of approximately 200 pages of previously withheld or partially redacted documents, defendant contends that the documents are protected by the attorney-client and attorney work product privileges. We agree. We note at the outset that, with respect to other documents, e.g., documents relating to insurance reserve information, claims expenses, subrogation interests, expenses incurred by attorneys, and documents created after commencement of the action, the order issued by Supreme Court requiring disclosure of those documents conflicts with the court's decision denying such disclosure. It is well settled that, "[w]here, as here, there is a conflict between an order and a decision, the decision controls" (*Wilson v Colosimo*, 101 AD3d 1765, 1766 [internal quotation marks omitted]).

A party seeking to invoke the attorney-client privilege must show that "the information sought to be protected from disclosure was a 'confidential communication' made to the attorney for the purpose of obtaining legal advice or services . . . [, and] the burden of proving each element of the privilege rests upon the party asserting it" (*Matter of Priest v Hennessy*, 51 NY2d 62, 69; *see generally PCB*

Piezotronics v Change, 179 AD2d 1089, 1089; *Central Buffalo Project Corp. v Rainbow Salads*, 140 AD2d 943, 944). "For the privilege to apply when communications are made from client to attorney, they 'must be made for the purpose of obtaining legal advice and directed to an attorney who has been consulted for that purpose.' . . . [F]or the privilege to apply when communications are made from attorney to client—whether or not in response to a particular request—they must be made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship" (*Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588, 593).

It is well settled that "[t]he payment or rejection of claims is a part of the regular business of an insurance company. Consequently, reports which aid it in the process of deciding which of the two indicated actions to pursue are made in the regular course of its business" (*Bertalo's Rest. v Exchange Ins. Co.*, 240 AD2d 452, 454-455, *lv dismissed* 91 NY2d 848 [internal quotation marks omitted]; *see Landmark Ins. Co. v Beau Rivage Rest.*, 121 AD2d 98, 101). Notably, "while information received from third persons may not itself be privileged . . . , a lawyer's communication to a client that includes such information in its legal analysis and advice may stand on different footing. The critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client" (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 379).

Here, defendant did not retain counsel to perform the work of an adjuster or otherwise to handle claims. Defendant itself evaluated plaintiff's claim and determined that it was obligated to pay and did pay him in excess of $100,000 as a result of a fire that damaged two insured properties. When it became clear that plaintiff believed that the value of his claim was far in excess of what defendant was willing to pay him, defendant retained counsel to protect its rights. Defendant's attorney expressly stated that he was retained to provide legal services to defendant, to advise defendant of its legal responsibilities, and to conduct the examination under oath of plaintiff. We thus conclude that counsel was retained to provide legal advice and services to defendant with respect to plaintiff's claim and, as a result, the court erred when it ordered disclosure of documents of or relating to communications between defendant and its attorney and documents that constitute attorney work product.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

371

CA 13-01245

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND WHALEN, JJ.

WILLIAM J. GILBERTI, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF SPAFFORD, DEFENDANT-APPELLANT.

TOWN OF SPAFFORD, THIRD-PARTY PLAINTIFF-APPELLANT,

V

CLIFFORD R. WHITE, DOING BUSINESS AS GROUND EFFECTS, ET AL., THIRD-PARTY DEFENDANTS, SPECTRA ENVIRONMENTAL GROUP, INC., THIRD-PARTY DEFENDANT-RESPONDENT.

LYNCH LAW OFFICE, SYRACUSE, CONGDON FLAHERTY O'CALLAGHAN REID DONLON TRAVIS & FISHLINGER, UNIONDALE (GREGORY A. CASCINO OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-APPELLANT.

GILBERTI STINZIANO HEINTZ & SMITH, P.C., SYRACUSE (GARY T. KELDER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (DANIEL R. RYAN OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), dated December 21, 2012. The order, among other things, denied in part the motion of defendant-third-party plaintiff for summary judgment dismissing the complaint and granted the motion of third-party defendant Spectra Environmental Group, Inc., for summary judgment dismissing the third-party complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of third-party defendant Spectra Environmental Group, Inc. and reinstating the third-party complaint against it and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action alleging, inter alia, that defendant-third-party plaintiff (hereafter, Town) was negligent in the design, installation, construction and maintenance of the storm water system in the vicinity of plaintiff's house. The Town subsequently commenced a third-party action against, inter alia, third-party defendant Spectra Environmental Group, Inc. (Spectra),

alleging that Spectra and the other third-party defendants were retained by plaintiff to perform work at plaintiff's house, including work with respect to the design, construction or maintenance of plaintiff's private drainage system. The Town subsequently moved for, inter alia, summary judgment dismissing the complaint, and Spectra moved for summary judgment dismissing the third-party complaint against it. Supreme Court granted the Town's motion in part and, as relevant on appeal, denied the Town's motion with respect to the trespass and nuisance causes of action, as well as the negligence causes of action to the extent that they asserted that the Town negligently maintained its storm water system. The court also granted Spectra's motion.

Addressing first the third-party action, we agree with the Town that the court erred in granting Spectra's motion, and we therefore modify the order accordingly. In support of its motion, Spectra contended that it had no role in designing the water drainage system for plaintiff's house and thus bears no responsibility for the flood. The record, however, establishes that Spectra participated in the road design process, that Spectra's plans were at least partially incorporated into the road's final design, and that the flood occurred shortly after the completion of the subject project. Consequently, the court erred in granting Spectra's motion for summary judgment dismissing the third-party complaint against it (*see generally Syracuse Univ. v Games 2002, LLC*, 71 AD3d 1531, 1531; *Matter of Kreinheder v Withiam-Leitch*, 66 AD3d 1485, 1485).

Contrary to the Town's contention in the main action, the court properly refused to dismiss plaintiff's negligent maintenance causes of action in their entirety on the ground that the Town's alleged negligence arises from a governmental function. The law relevant to municipal immunity from negligence causes of action is set forth in, inter alia, *Applewhite v Accuhealth, Inc.* (21 NY3d 420), *Valdez v City of New York* (18 NY3d 69) and *McLean v City of New York* (12 NY3d 194). If the municipality acted in a proprietary role, i.e., "when its activities essentially substitute for or supplement traditionally private enterprises" (*Applewhite*, 21 NY3d at 425 [internal quotation marks omitted]), ordinary rules of negligence apply. If, however, the municipality acted in a governmental capacity, i.e., "when its acts are undertaken for the protection and safety of the public pursuant to general police powers" (*id.* at 425 [internal quotation marks omitted]), the court must undertake a separate inquiry to determine whether the municipality owes a special duty to the injured party (*see McClean*, 12 NY3d at 199). In the event that the plaintiff fails to prove such a duty, the municipality is insulated from liability. Even in the event that the plaintiff proves such a duty, however, the municipality will not be liable if it proves that the alleged negligent act or omission involved the exercise of discretionary authority (*see Valdez*, 18 NY3d at 75-76).

With respect to municipal sewer malfunctions, it is well settled that a municipality's design of a sewer system constitutes a governmental function (*see Urquhart v City of Ogdensburg*, 91 NY 67, 71; *Azizi v Village of Croton-on-Hudson*, 79 AD3d 953, 954; *Biernacki v*

Village of Ravena, 245 AD2d 656, 657; *Vanguard Tours v Town of Yorktown*, 83 AD2d 866, 866), while a municipality's "operation, maintenance and repair of th[at] sewer system is a proprietary function, and thus the Town's liability in that respect is not contingent upon the existence of a special relationship" (*Johnston v Town of Jerusalem*, 2 AD3d 1403, 1403; *see Pet Prods. v City of Yonkers*, 290 AD2d 546, 547; *Zeltmann v Town of Islip*, 265 AD2d 407, 408; *see generally Clinger v New York City Tr. Auth.*, 85 NY2d 957, 959; *Searles v Town of Horicon*, 116 AD2d 93, 95). The issue before us is whether the Town's alleged negligence stems from a proprietary function, i.e., the maintenance of its storm water drainage systems, or a governmental function, i.e., the design of that system, and "[t]he relevant inquiry in determining whether a governmental agency is acting within a governmental or proprietary capacity is to examine the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred" (*Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d 428, 447, *rearg denied* 18 NY3d 898, *cert denied sub nom. Ruiz v Port Auth. of N.Y. and N.J.*, ___ US ___, 133 S Ct 133 [internal quotation marks omitted]).

In support of his negligence causes of action, plaintiff asserts five allegedly negligent acts or omissions: (1) the Town's allegedly excessive deepening of the drainage ditches during cleanings in the summer and fall of 2007; (2) the Town's failure to install check dams to mitigate the excessively deep ditches; (3) the Town's alleged failure to cover one of the pipes in its storm water system (Pipe A) with sufficient amounts of "fill" during its construction and installation; (4) the Town's alleged failure to remove clogged debris from two other pipes in its storm water system (Pipes B and C) prior to the storm at issue; and (5) the Town's alleged failure to repair the crushed ends of Pipes B and C prior to that storm. We conclude that plaintiff alleges design negligence in items (2) and (3) (*see e.g. Carbonaro v Town of N. Hempstead*, 97 AD3d 624, 625), and that, because plaintiff does not even assert the existence of a special duty, the Town cannot be liable for any failure to install check dams or to provide a sufficient cover for Pipe A (*see Middleton v Town of Salina*, 108 AD3d 1052, 1053-1054; *Carbonaro*, 97 AD3d at 625). We conclude that plaintiff alleges negligent maintenance in items (1), (4) and (5) (*see e.g. McCarthy v City of Syracuse*, 46 NY 194, 196-197; *Tappan Wire & Cable, Inc. v County of Rockland*, 7 AD3d 781, 782-783, *lv dismissed* 3 NY3d 738; *Pet Prods.*, 290 AD2d at 547), and that such allegations are actionable inasmuch as they relate to the performance of a proprietary function (*see generally Applewhite*, 21 NY3d at 425-426).

The Town's further contention that it is entitled to summary judgment dismissing the negligent maintenance claims because the Town was not in fact negligent is not properly before us inasmuch as the Town did not seek summary judgment on that ground before the motion court. "A motion for summary judgment 'on one claim or defense does not provide a basis for searching the record and granting summary judgment on an unrelated claim or defense' " (*Baseball Off. of Commr.*

v Marsh & McLennan, 295 AD2d 73, 82, quoting *Sadkin v Raskin & Rappoport*, 271 AD2d 272, 273; *see Dischiavi v Calli*, 68 AD3d 1691, 1693). "Thus, the court's consideration of those [claims] was improper" (*Sunrise Nursing Home, Inc. v Ferris*, 111 AD3d 1441, 1441; *see Baseball Off. of Commr.*, 295 AD2d at 82), and we may not consider those claims here (*see Conti v Town of Constantia*, 96 AD3d 1461, 1462).

We also reject the Town's contention that the court erred in denying that part of its motion seeking summary judgment dismissing the claim that the Town negligently maintained its storm water system because the Town lacked prior written or constructive notice of problems with its storm water system. As the movant, the Town had the burden of establishing that it lacked constructive notice of the allegedly dangerous condition (*see id.* at 1461-1462), and it failed to meet that burden here. The deposition testimony of the Town's maintenance workers submitted in support of the Town's motion does not address the frequency of the inspection of the subject pipes or the method of inspection. Moreover, those workers did not deny that the pipes were clogged before the flood, that the ditches were unnecessarily deep, or that the pipes were not properly aligned with those ditches. Indeed, the maintenance records offered in support of the motion do not establish when the pipes were last inspected. We thus conclude that the Town "failed to make a prima facie showing that [it] lacked constructive notice of the allegedly dangerous condition described by the plaintiff" (*Griffith v JK Chopra Holding, LLC*, 111 AD3d 666, 666; *see Adam v Town of Oneonta*, 217 AD2d 894, 895).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

374

CA 13-00603

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND WHALEN, JJ.

IN THE MATTER OF VILLAGE OF SCOTTSVILLE,
PLAINTIFF-RESPONDENT,

V ORDER

JAMIE SWANN, DEFENDANT-APPELLANT.

REEVE BROWN PLLC, ROCHESTER (STEVEN E. LAPRADE OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF PETER K. SKIVINGTON, PLLC, GENESEO (PETER K. SKIVINGTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), entered December 31, 2012. The judgment, inter alia, denied the motion of defendant to vacate an order entered June 14, 2012 and granted plaintiff the right to demolish a certain structure at the expense of defendant.

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

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

378

KA 10-02190

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND BRYANT, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered June 4, 2010. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed and the matter is remitted to Monroe County Court for further proceedings in accordance with the following Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of rape in the first degree (Penal Law § 130.35 [4]), as a lesser included offense of the second count of the indictment and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of burglary in the first degree (§ 140.30 [3]). He pleaded guilty pursuant to a plea agreement providing that he would be sentenced as a second felony offender to a determinate term of nine years' incarceration with seven years' postrelease supervision on the rape conviction, and lesser concurrent terms of incarceration and postrelease supervision on the burglary conviction. County Court imposed the promised sentence, and defendant appeals.

Contrary to defendant's contention, the sentence is not unduly harsh or severe. The term of postrelease supervision imposed on the rape charge in appeal No. 1 is illegal, however, because the minimum period of postrelease supervision on that charge is 10 years where, as here, defendant has a prior nonviolent felony conviction (*see* Penal Law §§ 70.45 [2-a] [i]; 70.80 [9]). "It is well established that an invalid sentence cannot be allowed to stand" (*People v Swan*, 158 AD2d 158, 163, *lv denied* 76 NY2d 991; *see People v Barber*, 31 AD3d 1145, 1145-1146). Thus, "[b]ecause neither the sentence pursuant to the plea agreement nor the sentence actually imposed was authorized by law

for the crime of which defendant was convicted," we modify the judgment in appeal No. 1 by vacating the sentence and we remit the matter to County Court "for resentencing with the opportunity for both parties to withdraw from the plea agreement" (*People v Cameron*, 83 NY2d 838, 840; *see People v Ignatowski*, 70 AD3d 1472, 1473; *People v Martin*, 278 AD2d 743, 744). Because defendant must be given the opportunity to withdraw his plea to the rape conviction, the judgment in appeal No. 2 is modified by vacating the sentence imposed on the burglary conviction, and the matter is remitted to County Court for resentencing, and to afford defendant the opportunity to withdraw his plea to that charge if he withdraws his plea to the rape conviction (*see generally People v Hendrix*, 2 AD3d 1479, 1479-1480).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

379

KA 10-02191

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND BRYANT, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered June 4, 2010. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed and the matter is remitted to Monroe County Court for further proceedings in accordance with the same Memorandum as in *People v Bryant* ([appeal No. 1] ___ AD3d ___ [May 9, 2014]).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

393

CA 12-01383

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

DAVID W. CASTOR, JR., PLAINTIFF-RESPONDENT,
AND JANICE POISSANT, PLAINTIFF,

V MEMORANDUM AND ORDER

LYNN J. PULASKI, PAUL W. PULASKI,
DEFENDANTS-APPELLANTS,
STACEY R. CASTOR, ET AL., DEFENDANTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DANIEL ROSE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MEGGESTO, CROSSETT & VALERINO, LLP, SYRACUSE (JAMES A. MEGGESTO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered December 14, 2011. The order and judgment, among other things, awarded plaintiff David W. Castor, Jr., compensatory damages, punitive damages and attorneys' fees against defendants Lynn J. Pulaski and Paul W. Pulaski.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by granting in its entirety the motion to dismiss the complaint for lack of standing, the first and third through sixth ordering paragraphs are vacated, and the complaint is dismissed against defendants Lynn J. Pulaski and Paul W. Pulaski without prejudice in accordance with the following Memorandum: David W. Castor, Jr. (plaintiff) commenced this fraud action seeking damages from, inter alia, Lynn J. Pulaski (Lynn) and Paul W. Pulaski (Paul) (collectively, defendants) in connection with the probate of a fraudulent will, purported to be the will of plaintiff's father, David Castor, Sr. (decedent), which was offered for probate by defendant Stacey R. Castor (Castor), decedent's wife. Castor was convicted of, inter alia, the murder of decedent in connection with decedent's death in August 2005 of antifreeze poisoning, and offering a false instrument for filing in connection with the purported will (*People v Castor*, 99 AD3d 1177, *lv denied* 20 NY3d 1010). Decedent's death was treated as a suicide until Castor's arrest approximately two years later. Plaintiff is decedent's sole heir. It is undisputed that defendants agreed to Castor's request that they witness decedent's signature on the will six weeks after his death and that they thereafter each signed an attestation affidavit, falsely swearing that he/she was present when decedent executed the will, that decedent

declared the document to be his will and that he/she witnessed decedent's signature. Castor was issued letters of administration c.t.a. in June 2006 and filed an accounting in April 2007, valuing the estate at $159,048.50. Castor was the sole beneficiary under the purported will. Although plaintiff filed objections to the probate of the will because he suspected Castor may have been responsible for his father's death, he testified that he withdrew those objections because he relied on defendants' attestation affidavits. At the inquest on damages against Castor and the nonjury fraud trial against defendants, the Public Administrator testified that the value of the estate was approximately $45,000. Supreme Court awarded damages to plaintiff in the amount of $127,118.65 and punitive damages in the amount of $250,000 with joint and several liability between defendants and Castor.

We agree with defendants that the estate representative is charged with the duty of recovering property of the estate, and that plaintiff, as decedent's sole heir, has no independent cause of action, either in his own right or the right of the estate, to maintain an action for recovery of the property of the estate, absent extraordinary circumstances (*see McQuaide v Perot*, 223 NY 75, 79-80*; Gaentner v Benkovich*, 18 AD3d 424, 426). Extraordinary circumstances include collusion of the personal representative with others or an "unreasonable refusal" of the personal representative of the estate to commence an action (*McQuaide*, 223 NY at 80). Inasmuch as the extraordinary circumstances must relate directly to the actions of the personal representative of the estate, we conclude that the court erred in determining that the "unique and novel circumstances" of this case, i.e., "homicide, possible forgery, perjury, false statements, and possible conflicts of interest," constitute the requisite extraordinary circumstances. Indeed, we note that the Public Administrator testified that he was not asked to commence the fraud action (*cf. id.* at 80-81), and there is no allegation that he was involved in the alleged fraud (*cf. Inman v Inman*, 97 AD2d 864, 865). We therefore conclude that the court erred in denying defendants' motion to dismiss the complaint against them on the ground that plaintiff lacked standing to commence the action. We therefore grant defendants' motion and dismiss the complaint against them without prejudice to the commencement of a new action by an appropriate party within six months, in accordance with CPLR 205 (a).

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

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

402

KA 12-02201

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACOB E. WARE, III, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered July 12, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). 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 his challenge to the severity of the sentence because "no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal" with respect to his conviction that he was also waiving his right to appeal any issue concerning the severity of the sentence (*People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076; *see People v Maracle*, 19 NY3d 925, 928). Nevertheless, on the merits, we conclude that the sentence is not unduly harsh or severe.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

405

KA 12-00445

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD F. MILLS, DEFENDANT-APPELLANT.

KATHLEEN E. CASEY, BARKER, FOR DEFENDANT-APPELLANT.

RICHARD F. MILLS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a resentence of the Genesee County Court (Robert C. Noonan, J.), rendered January 31, 2011. Defendant was resentenced upon his conviction of attempted assault in the first degree.

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

Memorandum: Defendant was convicted upon a jury verdict of, inter alia, attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [i]) and attempted assault in the first degree (§§ 110.00, 120.10). He appeals from a resentence with respect to the attempted assault conviction. During the resentencing proceeding, County Court, with the consent of the People (*see* § 70.85), imposed the same sentence that was originally imposed, i.e., without a period of postrelease supervision ([PRS] *see* Correction Law § 601-d [4], [5]).

Initially, we note that defendant raises contentions in his pro se supplemental brief related to the underlying conviction. "Where, as here, the resentence is conducted for the purpose of rectifying a *Sparber* error—that is, an error in failing to impose a required period of PRS (*see People v Sparber*, 10 NY3d 457, 464-465 [2008])—'[t]he defendant's right to appeal is limited to the correction of errors or the abuse of discretion at the resentencing proceeding' " (*People v Howard*, 96 AD3d 1701, 1702, *lv denied* 19 NY3d 1103, quoting *People v Lingle*, 16 NY3d 621, 635; *see People v Campbell*, 111 AD3d 1253, 1254). Consequently, defendant's contentions in his pro se supplemental brief with respect to the original judgment of conviction are not properly before us (*see generally People v Alvarado*, 109 AD3d 1185, 1185, *lv denied* 22 NY3d 1086; *People v Coble*, 17 AD3d 1165, 1165, *lv denied* 5 NY3d 787).

Defendant further contends that the court erred in conducting the resentence in his absence and without assigning counsel (*see* Correction Law § 601-d [4] [a]; CPL 380.40 [1]; *see also People v Robinson*, 111 AD3d 963, 963-964). That contention is not properly before us because we may only "consider and determine any question of law or issue of fact involving error or defect . . . which may have adversely affected the appellant" (CPL 470.15 [1]). Here, the only issue presented at resentencing was whether the court would impose a period of PRS, and the District Attorney had already informed the court and defendant in writing that the People would consent to the reimposition of the original sentence, i.e., without a period of PRS. Inasmuch as the court reimposed that original sentence, "defendant was not adversely affected by any error, because the result, i.e., freedom from having to serve a term of PRS [with respect to this count of the indictment], was in his favor" (*People v Covington*, 88 AD3d 486, 486, *lv denied* 18 NY3d 858).

Finally, defendant's contention that Penal Law § 70.85 is an unconstitutional ex post facto law is not properly before us inasmuch as he failed to notify the Attorney General that he would be raising that contention (*see People v Williams*, 82 AD3d 1576, 1578, *lv denied* 17 NY3d 810; *People v Whitehead*, 46 AD3d 715, 716, *lv denied* 10 NY3d 772; *see generally Koziol v Koziol*, 60 AD3d 1433, 1434-1435, *appeal dismissed* 13 NY3d 763). In any event, we note that defendant, in the context of a prior habeas corpus proceeding challenging his resentencing, previously raised his contention that the statute is unconstitutional, and we rejected it on the ground that it is without merit (*see People ex rel. Mills v Lempke*, 112 AD3d 1365, 1366, *lv denied* 22 NY3d 864; *see also People v Pignataro*, 22 NY3d 381, 387, *rearg denied* 22 NY3d 1135; *People v Hibbert*, 114 AD3d 1134, 1134).

All concur except FAHEY, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent and would remit the matter for a further resentencing of defendant. My analysis begins with CPL 380.40 (1), which plainly provides that, "[i]n general . . . [,] the defendant must be personally present at the time sentence is pronounced." CPL 380.50 (1), in turn, considers statements at the time of sentencing, and it provides, inter alia, these mandates: "At the time of pronouncing sentence, the court must accord the prosecutor an opportunity to make a statement with respect to any matter relevant to the question of sentence. The court must then accord counsel for the defendant an opportunity to speak on behalf of the defendant. The defendant also has the right to make a statement personally in his or her own behalf, and before pronouncing sentence the court must ask the defendant whether he or she wishes to make such a statement."

Both CPL 380.40 (1) and CPL 380.50 (1) apply to resentences (*see People v Green*, 54 NY2d 878, 880; *People v Aloi*, 78 AD3d 1546, 1547; *People v Dennis* [appeal No. 2], 6 AD3d 1211, 1212). Moreover, the legislature built no exception for futility or arrogance—which is a fair characterization of defendant's behavior—into CPL 380.40 or CPL 380.50, and I do not believe that we should find one here. To the extent that the First Department overlooked those statutes in the

Sparber case of *People Covington* (88 AD3d 486, 486-487, *lv denied* 18 NY3d 858; *see People v Sparber*, 10 NY3d 457), I conclude that we should not rely on that precedent, but instead should honor and adhere to the sentencing procedures mandated by the legislature. There is no statutory basis for the exception proposed by the majority. The right to speak at one's resentencing should be deemed fundamental.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

407

KA 13-00967

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES R. WILSON, DEFENDANT-APPELLANT.

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

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (AMANDA M. CHAFEE OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Steuben County Court (Joseph W. Latham, J.), entered June 7, 2013. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, County Court did not err in assessing 10 points under risk factor 12 in the risk assessment instrument, for defendant's failure to accept responsibility for his crime. Defendant entered an *Alford* plea, which was not an admission of guilt (*see People v Hazen*, 47 AD3d 1091, 1092; *People v Donhauser* [appeal No. 1], 37 AD3d 1053, 1053, *lv denied* 8 NY3d 815), and he thereafter "minimized the underlying sexual offense and . . . denied that he performed the criminal sexual act which formed the basis for the conviction" during an interview with the Probation Department (*People v Farrice*, 100 AD3d 976, 977, *lv denied* 20 NY3d 859). Although defendant participated in a sex offender treatment program while incarcerated, he denied the acts underlying his conviction at the subsequent SORA hearing (*see People v Johnson*, 85 AD3d 889, 889, *lv denied* 17 NY3d 718; *cf. People v Ireland*, 50 AD3d 1592, 1593). We thus conclude that the People established by clear and convincing evidence that defendant "fail[ed] to genuinely accept responsibility for his conduct 'as required by the risk assessment guidelines' " (*Johnson*, 85 AD3d at 889).

Contrary to the further contention of defendant, the court properly assessed 20 points against him under risk factor 4, for "duration of offense conduct with victim." The People met their burden of proving that "defendant engaged in two acts of sexual

intercourse with the victim and that such 'acts [were] separated in time by at least 24 hours' " (*People v Wood*, 60 AD3d 1350, 1351, quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 10; *see generally* Correction Law § 168-n [3]). Defendant failed to preserve for our review his contention that he should not have been assessed 25 points under risk factor 2, for sexual contact with the victim (*see generally People v Smith*, 17 AD3d 1045, 1045, *lv denied* 5 NY3d 705). In any event, that contention lacks merit inasmuch as the People presented reliable hearsay evidence, in the form of the victim's statement (*see* § 168-n [3]), that defendant had engaged in sexual intercourse with the victim (*see People v Law*, 94 AD3d 1561, 1562, *lv denied* 19 NY3d 809). To the extent that defendant contends that the court improperly assessed 10 points pursuant to risk factor 1, for the use of violence, because forcible compulsion was not an element of the crime of which he was convicted, it is well settled that "the court was not limited to considering only the crime of which . . . defendant was convicted in making its determination" (*People v Feeney*, 58 AD3d 614, 615; *see People v Stewart*, 63 AD3d 1588, 1588, *lv denied* 13 NY3d 704). Finally, we conclude that the presentence report and the victim's statement provided the requisite clear and convincing evidence of forcible compulsion (*see Stewart*, 63 AD3d at 1588).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

414

CA 13-01119

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

IN THE MATTER OF RICHARD ROBLES,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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

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

Memorandum: Petitioner appeals from a judgment dismissing his petition pursuant to CPLR article 78 seeking to annul the determination of the New York State Division of Parole (Parole Board) in May 2012, denying him parole release. We agree with petitioner that his appeal is not moot inasmuch as the determination has not expired during the pendency of this appeal, and he has not reappeared before the Parole Board (*cf. Matter of Robles v Evans*, 100 AD3d 1455, 1455). We nevertheless reject the contention of petitioner that Supreme Court erred in determining that the Parole Board properly denied parole release. "Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined" (Executive Law § 259-i [2] [c] [A]; *see Matter of Silmon v Travis*, 95 NY2d 470, 476). We conclude that the record establishes that the Parole Board considered the relevant factors in determining that petitioner's release would be incompatible with the welfare of society and would so deprecate the serious nature of his crimes as to undermine respect for the law (*see* § 259-i [c] [A]), and petitioner has made no " 'showing of irrationality bordering on impropriety' " to warrant judicial intervention (*Silmon*, 95 NY2d at 476; *see Matter of Russo v New York State Bd. of Parole*, 50 NY2d 69, 77; *Matter of Montane v Evans*, ___AD3d ___, ___ [Mar. 13, 2014]). We further conclude that the Parole Board properly considered the COMPAS

instrument, which was "intended to bring the [Parole] Board into compliance with recent amendments" to section 259-c (4) of the Executive Law (*see Matter of Malerba v Evans*, 109 AD3d 1067, 1067, *lv denied* 22 NY3d 858). We reject petitioner's further contention that the court erred in determining that, under the circumstances presented here, the Parole Board was not required to consider his sentencing minutes. The record establishes that petitioner's sentencing minutes—from 1966—are unavailable (*see Matter of Freeman v Alexander*, 65 AD3d 1429, 1430).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

423

TP 13-01867

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

IN THE MATTER OF DEBRA A. GACEK, PETITIONER,

V ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND
ERIE COUNTY SHERIFF'S OFFICE, RESPONDENTS.

LINDY KORN, BUFFALO, FOR PETITIONER.

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX (MARILYN BALCACER OF COUNSEL), FOR RESPONDENT NEW YORK STATE DIVISION OF HUMAN RIGHTS.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (MICHELLE PARKER OF COUNSEL), FOR RESPONDENT ERIE COUNTY SHERIFF'S OFFICE.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Erie County [Christopher J. Burns, J.], entered October 17, 2013) to review a determination of respondent New York State Division of Human Rights. The determination adjudged that respondent Erie County Sheriff's Office did not engage in unlawful discriminatory practice against petitioner.

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

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

430

KA 12-02278

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIFFANY L. SCHULTZ, DEFENDANT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered June 13, 2012. The judgment convicted defendant, upon her plea of guilty, of attempted burglary 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 surcharge to 5% of the amount of restitution and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that her waiver of the right to appeal is invalid, that her sentence is unduly harsh and severe, and that County Court erred in imposing a 10% surcharge of the total amount of restitution. The record establishes that defendant 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).

The valid waiver of the right to appeal, however, does not encompass defendant's challenge to the restitution surcharge because the court failed to advise defendant before she waived her right to appeal of the potential range of the surcharge that could be imposed as part of the requirement to pay restitution (*see generally People v Newman*, 21 AD3d 1343, 1343; *People v McLean*, 302 AD2d 934, 934). Although defendant failed to preserve for our review her contention that the court erred in imposing the maximum restitution surcharge of 10% rather than the minimum 5% surcharge (*see People v Kirkland*, 105 AD3d 1337, 1338-1339, *lv denied* 21 NY3d 1043), we nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). We conclude that

the court erred in imposing the 10% surcharge because, as the People correctly concede, there was no "filing of an affidavit of the official or organization designated pursuant to [CPL 420.10 (8)] demonstrating that the actual cost of the collection and administration of restitution . . . in a particular case exceeds five percent of the entire amount of the payment or the amount actually collected" (Penal Law § 60.27 [8]).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

431

KA 09-00732

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRYSON DAVIS-JOHNSON, DEFENDANT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AMANDA L. DREHER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered March 20, 2008. The judgment convicted defendant, upon a jury verdict, of manslaughter 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 manslaughter in the second degree (Penal Law § 125.15 [1]) after his first trial ended in a hung jury. Contrary to defendant's contention, the conviction is supported by legally sufficient evidence (*see generally People v Delamota*, 18 NY3d 107, 113; *People v Danielson*, 9 NY3d 342, 349). Although defendant's further challenge to the legal sufficiency of the evidence at the first trial is properly before us because "[t]he Double Jeopardy Clause precludes a second trial if the evidence from the first trial is determined by the reviewing court to be legally insufficient" (*People v Scerbo*, 74 AD3d 1730, 1731, *lv denied* 15 NY3d 757; *see People v Scott*, 107 AD3d 1635, 1636-1637, *lv denied* 21 NY3d 1077), we reject that challenge. The evidence at both trials, which included the testimony of four eyewitnesses, was substantially similar, and demonstrated that defendant was "aware of and consciously disregard[ed] a substantial and unjustifiable risk" of death when defendant and at least one other individual gained entry to a known drug house operated by the victim, and the victim was fatally shot through his apartment door when he returned (§ 15.05 [3]; *see* §§ 20.00, 125.15 [1]; *see also People v Flayhart*, 72 NY2d 737, 742; *People v Davis*, 278 AD2d 886, 886-887, *lv denied* 96 NY2d 757). Even if defendant's "assistance was not initially planned, the totality of the evidence permits only the conclusion that he knowingly participated and continued to participate even after his companion's intentions became clear" (*People v Allah*, 71 NY2d 830, 832; *see People*

v Scott, 107 AD3d 1592, 1593, *lv denied* 22 NY3d 958).

"Defendant was convicted 'upon legally sufficient trial evidence,' and thus his contention with respect to the competency of the evidence before the grand jury 'is not reviewable upon an appeal from the ensuing judgment of conviction' " (*People v Haberer*, 24 AD3d 1283, 1284, *lv denied* 7 NY3d 756, *reconsideration denied* 7 NY3d 848, quoting CPL 210.30 [6]). Defendant's sentence is not unduly harsh or severe, and his remaining contention does not require modification or reversal of the judgment.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

434

CAF 13-00006

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

IN THE MATTER OF EDEN S., ELYSIUM S., AND ARKADIAN S.

CAYUGA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JOSHUA S., RESPONDENT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR RESPONDENT-APPELLANT.

SAMUEL P. GIACONA, AUBURN, FOR PETITIONER-RESPONDENT.

JAMES A. LEONE, ATTORNEY FOR THE CHILDREN, AUBURN.

Appeal from an order of the Family Court, Cayuga County (Mark H. Fandrich, A.J.), entered November 20, 2012 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that Eden S. is an abused child and Elysium S. and Arkadian S. are derivatively neglected children.

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

Memorandum: In this proceeding pursuant to article 10 of the Family Court Act, respondent father appeals from an order determining that he abused one child and derivatively neglected his two other children. We reject the father's contention that Family Court abused its discretion in denying his motion to dismiss the petition based upon petitioner's delay in proceeding with this matter (*see* § 1049). "[D]ismissal is a harsh remedy which ought not to be imposed without the utmost caution. This is particularly true in abuse and neglect proceedings where the consequences of improvident dismissal may be deleterious to the welfare of the children in whose behalf the proceedings are brought" (*Matter of Shevon C.*, 163 AD2d 14, 15; *see Matter of Ismael M., Jr. [Ismael M.]*, 2 AD3d 312, 313-314). Contrary to the father's further contention, the finding of abuse is supported by the requisite preponderance of the evidence (*see* § 1046 [b] [i]; *Matter of Tammie Z.*, 66 NY2d 1, 3). Although the father is correct that the court failed to comply with Family Court Act § 1051 (e) by specifying the particular sex offense perpetrated upon the child as defined in Penal Law article 130, we conclude that the error is "technical in nature and harmless" (*Matter of Shannon K.*, 222 AD2d 905, 906). In light of the fact that the child was five years old at

the time of the contact, the specific offense could only be sexual abuse in the first degree (*see* Penal Law § 130.65 [3]; *Shannon K.*, 222 AD2d at 906). Contrary to the father's further contention, where, as here, the underlying crime is sexual abuse, the court is permitted to infer the sexual gratification element from the conduct itself if that conduct involved the deviate touching of the child's genitalia, which is the case here (*see Matter of Olivia YY.*, 209 AD2d 892, 893). We reject the father's contention that the out-of-court statements of the child found to be abused were not sufficiently corroborated (*see Matter of Nicole V.*, 71 NY2d 112, 118-119). We further conclude that the finding of derivative neglect with respect to the two other children is supported by a preponderance of the evidence (*see Matter of Sheena D.*, 27 AD3d 1128, 1128-1129, *mod on other grounds* 8 NY3d 136).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

443.1

KA 12-01432

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LASHORN SPARROW, DEFENDANT-APPELLANT.

KINDLON SHANKS AND ASSOCIATES, ALBANY (TERENCE KINDLON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered August 2, 2011. 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 appeals from a judgment convicting him, upon a jury verdict, of assault in the second degree (Penal Law § 120.05 [former (3)]). By failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that contention is without merit (*see generally People v Danielson*, 9 NY3d 342, 349). The People presented legally sufficient evidence from which the jury could find that defendant knew that his vehicle had been pulled over by the police, that the persons outside his vehicle were police officers, that the officers were "performing a lawful duty," and that defendant "cause[d] physical injury to [a] police officer" when he backed his vehicle up and drove away (§ 120.05 [former (3)]). In addition, viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant failed to preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct (*see* CPL 470.05 [2]; *People v Montero*, 100 AD3d 1555, 1555, *lv denied* 21 NY3d 945), 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]). We reject defendant's further contention that he received ineffective assistance of counsel. Viewing the evidence, the law and

the circumstances of the 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, we have considered defendant's remaining contentions and conclude that none requires reversal or modification of the judgment.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

471

KA 12-01616

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERRARD BLACKNELL, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MARIA MALDONADO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered December 18, 2006. The judgment convicted defendant, upon his plea of guilty, of attempted aggravated assault upon a police officer or a peace officer.

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 aggravated assault upon a police officer or a peace officer (Penal Law §§ 110.00, 120.11), defendant contends that his waiver of the right to appeal is not valid. We agree. "[T]he minimal inquiry made by County 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 Box*, 96 AD3d 1570, 1571, *lv denied* 19 NY3d 1024 [internal quotation marks omitted]; *see People v Jones*, 107 AD3d 1589, 1589-1590, *lv denied* 21 NY3d 1075), and the court "conflated the waiver of the right to appeal with the rights forfeited by defendant based on his guilty plea" (*People v Tate*, 83 AD3d 1467, 1467; *cf. People v Boatman*, 110 AD3d 1463, 1463, *lv denied* 22 NY3d 1039). Nevertheless, we affirm.

Defendant failed to move to withdraw his plea or to vacate the judgment of conviction, and thus he failed to preserve for our review his contention that the plea allocution was factually insufficient (*see People v Lopez*, 71 NY2d 662, 665). In any event, that contention is without merit because "there is no requirement that defendant recite the underlying facts of the crime to which he is pleading guilty" (*People v Bailey*, 49 AD3d 1258, 1259, *lv denied* 10 NY3d 932). Furthermore, the court recited the facts underlying the crime, and " '[t]he record establishes that defendant confirmed the accuracy of

[the court's] recitation' " (*People v Bullock*, 78 AD3d 1697, 1698, *lv denied* 16 NY3d 742; *see People v Gordon*, 98 AD3d 1230, 1230, *lv denied* 20 NY3d 932).

Contrary to defendant's further contention, the court did not err in refusing to suppress his statements to the police. "The People met 'their initial burden of establishing the legality of the police conduct and defendant's waiver of rights,' and defendant failed to establish that he did not waive those rights, or that the waiver was not knowing, voluntary and intelligent" (*People v Grady*, 6 AD3d 1149, 1150, *lv denied* 3 NY3d 641; *see People v Andrus*, 77 AD3d 1283, 1283, *lv denied* 16 NY3d 827; *see also People v Pratchett*, 90 AD3d 1678, 1679, *lv denied* 18 NY3d 997).

Finally, defendant failed to preserve for our review his contention that the court erred in sentencing him as a persistent violent felony offender (*see People v Proctor*, 79 NY2d 992, 994). In any event, we reject that contention. The statute provides that the People must file a statement prior to sentencing indicating that defendant may have previously been convicted of a violent felony offense (*see* CPL 400.15 [2]). "A defendant who wishes to controvert the allegations 'must specify the particular allegation or allegations he wishes to controvert' or they are deemed admitted . . . Where the 'uncontroverted allegations [in the predicate violent felony statement] . . . are sufficient to support a finding that the defendant has been subjected to a predicate violent felony conviction the court must enter such finding' and sentence defendant accordingly" (*People v Konstantinides*, 14 NY3d 1, 14, quoting CPL 400.15 [3], [4]). Here, the record reflects that, prior to sentencing, defense counsel was provided with a statement alleging that defendant had previously been convicted of three felonies, including the violent felonies of assault in the second degree and robbery in the second degree. The record further reflects that, "defendant, in the presence of counsel, declined to challenge any part of the People's persistent violent felony offender statement" (*People v Buel*, 53 AD3d 930, 932). Consequently, the allegations in the statement were properly deemed admitted, and the court properly sentenced defendant as a persistent violent felony offender.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

475

CAF 13-00241

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

IN THE MATTER OF ANDREW M. DELONG,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

FRANCES A. BRISTOL, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Oswego County (Donald E. Todd, A.J.), entered January 29, 2013 in a proceeding pursuant to Family Court Act article 4. The order committed respondent to six months in jail for her willful violation of a court order.

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

Memorandum: In appeal No. 1, respondent appeals from an order committing her to jail for a term of six months for her willful violation of an order of child support. Respondent has served her sentence and thus her appeal from that order is moot (*see Matter of Johnson v Boone*, 289 AD2d 938, 938).

In appeal No. 2, respondent challenges the finding of willful violation made by the Support Magistrate and confirmed by Family Court. Respondent's appeal from that order must likewise be dismissed inasmuch as the Support Magistrate's finding was made upon respondent's default, and respondent did not move before the Support Magistrate to vacate the default (*see Matter of Reaves v Jones*, 110 AD3d 1276, 1277).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

476

CAF 14-00029

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

IN THE MATTER OF ANDREW M. DELONG,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

FRANCES A. BRISTOL, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Oswego County (Donald E. Todd, A.J.), entered March 6, 2013 in a proceeding pursuant to Family Court Act article 4. The order determined that respondent willfully violated a court order.

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

Same Memorandum as in *Matter of Delong v Bristol* ([appeal No. 1] ___ AD3d ___ [May 9, 2014]).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

477

CAF 13-00249

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

IN THE MATTER OF XAVIER O.V.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SABINO V., RESPONDENT-APPELLANT.

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

MERIDETH H. SMITH, COUNTY ATTORNEY, ROCHESTER (ROBIN UNWIN OF COUNSEL), FOR PETITIONER-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered January 10, 2013 in a proceeding pursuant to Family Court Act article 10. The order terminated the parental rights of respondent.

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

Memorandum: Respondent father agreed to an adjournment in contemplation of dismissal with respect to the allegations in a neglect petition. Later, he consented to a finding that he had permanently neglected the subject child and to the entry of a suspended judgment based on that finding. He now appeals from an order that, inter alia, revoked the suspended judgment, terminated his parental rights with respect to the child, and freed the child for adoption.

We have frequently concluded that Family Court's "prior order finding permanent neglect and suspending judgment was entered on consent of [the father] and thus is beyond appellate review" (*Matter of Bryan W.*, 299 AD2d 929, 930, *lv denied* 99 NY2d 506; *see Matter of Ronald O.*, 43 AD3d 1351, 1351-1352; *Matter of Amanda T. [John T.]*, 4 AD3d 846, 846; *Matter of Cherilyn P.*, 192 AD2d 1084, 1084, *lv denied* 82 NY2d 652). Here, however, the father contends that his consent to the entry of the finding of permanent neglect was not given knowingly, voluntarily and intelligently. The father "has raised that contention for the first time on appeal . . . , and thus has failed to preserve it for our review" (*Matter of Atreyu G. [Jana M.]*, 91 AD3d 1342, 1342, *lv denied* 19 NY3d 801; *see Matter of Derrick T.M.*, 286 AD2d 938, 938-

939; *see also Matter of Megan L.G.H. [Theresa G.H.]*, 102 AD3d 869, 869) and, in any event, that contention is without merit. Although the record reflects that the father initially hesitated and indicated that he did not wish to admit any wrongdoing, he relented and agreed to permit the court to make a finding of permanent neglect and to enter a suspended judgment based on that finding. Contrary to the father's contention, "the proof does not show that 'the consent was [given] under compulsion or threat, or against [the father]'s free will, or based upon fraudulent statements' " (*Matter of Jarrett*, 224 AD2d 1029, 1030, *lv dismissed* 88 NY2d 960; *see generally Matter of Seasia D.*, 10 NY3d 879, 880, *rearg denied* 11 NY3d 752, *cert denied sub nom. Kareem W. [Anonymous]*, 555 US 1046). Indeed, the record establishes that the father was represented by counsel at the time of his admission, and the father stated that he understood all the proceedings because they were translated into Spanish, his native language. Thus, we conclude that he knowingly, voluntarily and intelligently agreed to the entry of a finding of permanent neglect (*see generally Matter of Aparicio Rodrigo B.*, 29 AD3d 351, 351).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

478

CAF 12-01943

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

IN THE MATTER OF BURKE H.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

RICHARD H., RESPONDENT,
AND TIFFANY H., RESPONDENT-APPELLANT.

EVELYNE O'SULLIVAN, EAST AMHERST, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL).

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered August 24, 2012 in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, determined Burke H. to be a neglected child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order that, insofar as appealed from, adjudged that she neglected the subject child. Contrary to the mother's contention, Family Court's finding of derivative neglect is supported by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]; *Matter of Brandon T. [Guillaume T.]*, 114 AD3d 950, 950-951). Petitioner established that "the neglect . . . of the child's older siblings was so proximate in time to the derivative proceeding that it can reasonably be concluded that the condition still existed" (*Brandon T.*, 114 AD3d at 950; *see Matter of Jamarra S. [Jessica S.]*, 85 AD3d 803, 804), and that the mother failed to address the problems that led to the neglect findings with respect to her other children (*see Matter of Krystal J.*, 267 AD2d 1097, 1098). To the extent that the mother challenges the testimony of petitioner's psychologist, it is well settled that the court's "determination regarding the credibility of witnesses is entitled to great weight on appeal, and will not be disturbed if supported by the record" (*Matter of Kanterakis v Kanterakis*, 102 AD3d 784, 785, *lv denied* 21 NY3d 864; *see Matter of Merrick T.*, 55 AD3d 1318, 1319). We conclude that the court properly credited the psychologist's report and opinion, which were based upon numerous visits with the mother and an extensive

review of documentation.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

481

CA 13-01840

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

JEFFREY T. HARRIS AND SHERYL HARRIS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ASHLEY E. SCHMIDT AND KATHRYN J. GILL,
DEFENDANTS-APPELLANTS.

BURGIO, KITA, CURVIN & BANKER, BUFFALO (HILARY BANKER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICES OF RICHARD S. BINKO, CHEEKTOWAGA (RICHARD S. BINKO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered June 4, 2013. The order, among other things, denied in part defendants' motion for, inter alia, discovery of certain documents.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the fourth and fifth ordering paragraphs and granting the motion to the extent that plaintiffs are directed to submit to Supreme Court the documents sought under paragraphs 1, 2, 4 and 5 of the notice for discovery and inspection, and to provide to defendants a copy of the application for no-fault benefits filed by plaintiff Jeffrey T. Harris under Claim No. 01678398692, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Jeffrey T. Harris (plaintiff) when the vehicle he was driving collided with defendants' vehicle. After plaintiffs failed to respond to defendants' notice for discovery and inspection, defendants moved, inter alia, for discovery of the documents that are the subject of the outstanding discovery demands.

Supreme Court properly exercised its discretion in directing plaintiffs to submit for in camera review income tax and other records relating to the post-accident employment of plaintiff, who is self-employed, but erred in declining to direct plaintiffs to submit for in camera review such records relating to his pre-accident employment. We therefore modify the order accordingly. Those records, whether pre- or post-accident, may contain information that is "material and necessary" to the defense of the action (CPLR 3101 [a]; *see Carter v*

Fantauzzo, 256 AD2d 1189, 1190; *Myrie v Shelley*, 237 AD2d 337, 338-339), and the court may minimize any intrusion into plaintiffs' privacy by "redact[ing] any portions of the records . . . that are irrelevant or unduly prejudicial" (*Carter*, 256 AD2d at 1190). The court properly exercised its discretion in directing plaintiffs to submit for in camera review records of a prior workers' compensation claim unrelated to the subject accident, thus permitting the court to determine whether those records are material and relevant to the medical conditions placed in controversy by plaintiffs (*see Tirado v Koritz*, 77 AD3d 1368, 1370; *Myrie*, 237 AD2d at 339).

We agree with defendants that this Court's decision in *Harris v Processed Wood* (89 AD2d 220) does not render plaintiff's application for no-fault benefits immune from disclosure. Unlike the statement at issue in that case, the information in plaintiff's application was not communicated to the insurer in anticipation of litigation and, moreover, such information may be "material and necessary" to the defense of the action (CPLR 3101 [a]; *see Donald v Ahern*, 96 AD3d 1608, 1610). We therefore further modify the order by vacating the fifth ordering paragraph, and we direct plaintiffs to produce the application for no-fault benefits filed by plaintiff Jeffrey T. Harris under Claim No. 01678398692.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

504

CAF 12-02316

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

IN THE MATTER OF BEVERLY GRIFFIN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JESSICA GRIFFIN, RESPONDENT-APPELLANT.

MINDY L. MARRANCA, BUFFALO, FOR RESPONDENT-APPELLANT.

TERRANCE C. BRENNAN, BUFFALO, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered September 7, 2012 in a proceeding pursuant to Family Court Act article 6. The order granted sole custody of respondent's children to petitioner.

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

Memorandum: On appeal from an order granting sole custody of the subject children to petitioner, a nonparent, respondent mother contends that Family Court erred in failing to conduct an evidentiary hearing to determine whether extraordinary circumstances exist and, if so, to determine the best interests of the children. We agree, and we therefore reverse the order and remit the matter to Family Court for the requisite evidentiary hearing. It is well settled that, "as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of 'surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' " (*Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981, quoting *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544). " '[T]he nonparent has the burden of proving that extraordinary circumstances exist, and until such circumstances are shown, the court does not reach the issue of the best interests of the child[ren]' " (*Matter of Ruggieri v Bryan*, 23 AD3d 991, 992). Here, the court "deprived a biological parent of custody of [her] child[ren] without the . . . [requisite evidentiary] hearing" on the issues of extraordinary circumstances and best interests (*Matter of Stiles v Orshal*, 290 AD2d 824, 825). Instead of conducting the hearing on the date it was to

begin, the court asked the parents what witnesses would be called on their behalf. When the parents responded that they would be testifying but had no other witnesses, the court stated that it found no triable issues of fact and granted the nonparent's petition for custody. Thus, the court failed to place the burden of proof on the nonparent to prove that extraordinary circumstances exist. Finally, we note that the home study on which the court relied was potentially out of date when the court granted the petition.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

505

CA 13-00916

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

IN THE MATTER OF PETER KING,
PETITIONER-APPELLANT,

V ORDER

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

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

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

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

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

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

512

KA 12-01075

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARLOS A. TORRES, JR., ALSO KNOWN AS CARLOS A. TORRES, ALSO KNOWN AS CARLOS TORRES, ALSO KNOWN AS CARLOS TORRES, JR., DEFENDANT-APPELLANT.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered April 5, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession 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 controlled substance in the fourth degree (Penal Law § 220.09 [1]). Contrary to defendant's contention, we conclude that the record supports County Court's determination that the police had probable cause to arrest him (*see People v Shapiro*, 141 AD2d 577, 577-578, *lv denied* 72 NY2d 1049; *see generally People v Gibeau*, 55 AD3d 1303, 1303-1304, *lv denied* 12 NY3d 758). The arresting officer testified that, after he executed a traffic stop based upon defendant's failure to signal a left turn, he observed that defendant "had slurred slow speech [and] bloodshot glassy eyes," and that "there was also an odor of mari[h]uana coming from the vehicle." Defendant admitted that he had ingested hydrocodone and had smoked marihuana two or three hours prior to the traffic stop. The officer further testified that defendant failed a number of field sobriety tests and that he determined, based on his training and experience, that defendant was impaired by the use of drugs. The suppression court credited the officer's testimony, and we see no basis to disturb that credibility determination (*see People v Bush*, 107 AD3d 1581, 1582, *lv denied* 22 NY3d 954).

Defendant further contends that the People's refusal to disclose the search warrant application constituted a denial of his statutory

and constitutional rights, and that the court should have ordered disclosure of a redacted copy of the application. Those contentions, however, are forfeited by defendant's guilty plea (*see People v Ippolito*, 114 AD3d 703, 703; *People v Oliveri*, 49 AD3d 1208, 1209; *see generally People v Hansen*, 95 NY2d 227, 230-231).

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

513

KA 07-02359

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAPADRE A. HAMPTON, JR., DEFENDANT-APPELLANT.

BROWN & HUTCHINSON, ROCHESTER (KAREN BAILEY TURNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered March 29, 2007. The judgment convicted defendant, upon a jury verdict, of rape in the first degree.

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

Memorandum: Defendant appeals from a judgment that convicted him upon a jury verdict of rape in the first degree (Penal Law § 130.35 [1]). Contrary to defendant's contention, County Court properly admitted a knife in evidence "as a model of the knife" used by defendant during the commission of the crime (*People v Del Vermo*, 192 NY 470, 482; *see People v Felder*, 182 AD2d 495, 496, *lv denied* 80 NY2d 830). We reject defendant's further contention that he was denied effective assistance of counsel. Viewing defense counsel's representation in totality and as of the time of the representation, and in light of defendant's claim that he had consensual sex with the victim (*see People v Ross*, 43 AD3d 567, 570, *lv denied* 9 NY3d 964), we conclude that defendant received meaningful representation (*see People v Marra*, 96 AD3d 1623, 1626-1627, *affd* 21 NY3d 979; *see generally People v Baldi*, 54 NY2d 137, 147). We further conclude that the sentence is not unduly harsh or severe.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

514

KA 13-01953

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

DOMINIC A. DANIELS, DEFENDANT-RESPONDENT.

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

JEREMY D. SCHWARTZ, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), dated August 14, 2013. The order, among other things, granted the motion of defendant to suppress his statement and certain physical evidence.

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

Memorandum: The People appeal from an order granting defendant's motion to suppress the statement made by defendant to the police and the cocaine seized by them following an automobile stop. Many of the relevant facts are not in dispute. The arresting officer and his partner heard a broadcast over police radio stating that a vehicle with a particular description was involved in an armed robbery of a gas station in Buffalo. Approximately six minutes later, the officers observed a vehicle matching the description of the vehicle in the broadcast at an intersection less than a mile from the gas station in question. Observing that the windows of the vehicle were excessively tinted, in violation of the Vehicle and Traffic Law, the officers stopped the vehicle and ordered defendant to exit. Defendant was alone in the vehicle. After defendant stepped out of the vehicle, the arresting officer conducted a pat frisk but found no weapons. When defendant did not respond to the officer's inquiry whether he had "anything on" him, the officer used his forearm to pin defendant against the vehicle. When the officer again asked defendant whether he had anything on him, defendant either said "nothing" or did not answer, and the officer asked for a third time whether defendant had anything on him. Defendant finally stated that he had drugs in the pocket of his pants. The officer's partner recovered the drugs, which were later determined to be cocaine, and placed defendant under arrest. The police subsequently learned that neither defendant nor his vehicle was involved in the gas station robbery.

After being indicted on one count of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]), defendant moved to suppress the statement and the cocaine, contending, inter alia, that his statement to the police that he had drugs was involuntary and that the cocaine thus constituted the fruit of the poisonous tree. Following a suppression hearing, Supreme Court granted defendant's motion, and we now affirm. As a preliminary matter, we agree with the People that the stop of defendant's vehicle was lawful based on the arresting officer's observation of its excessively tinted windows, notwithstanding the officer's admission that he intended to stop the vehicle in any event because it matched the description of a vehicle allegedly involved in the robbery (*see generally People v Pealer*, 89 AD3d 1504, 1506, *affd* 20 NY3d 447, *cert denied* ___ US ___, 134 S Ct 105; *People v Robinson*, 97 NY2d 341, 346). The officer also acted lawfully in ordering defendant to exit the vehicle based on the traffic violation, even in the absence of evidence that he possessed a weapon or had committed a crime (*see People v Robinson*, 74 NY3d 773, 775, *cert denied* 493 US 966; *People v Binion*, 100 AD3d 1514, 1515, *lv denied* 21 NY3d 911).

Nevertheless, even assuming, arguendo, that the officers had "reasonable suspicion that criminal activity [was] afoot" so as to justify the pat frisk of defendant (*People v Goodson*, 85 AD3d 1569, 1570, *lv denied* 17 NY3d 953 [internal quotation marks omitted]; *see People v Daniels*, 103 AD3d 1204, 1205, *lv denied* 22 NY3d 1137), we conclude that defendant's statement in which he admitted to possessing drugs was involuntary because it was "obtained from him . . . by the use or threatened use of physical force" by the arresting officer (CPL 60.45 [2] [a]). "It is the People's burden to prove beyond a reasonable doubt that statements of a defendant they intend to rely upon at trial are voluntary . . . To do that, they must show that the statements were not products of coercion, either physical or psychological . . . , or, in other words, that they were given as a result of a 'free and unconstrained choice by [their] maker' . . . The choice to speak where speech may incriminate is constitutionally that of the individual, not the government, and the government may not effectively eliminate it by any coercive device" (*People v Thomas*, 22 NY3d 629, 641-642).

Here, the People failed to prove beyond a reasonable doubt that defendant's admission that he possessed drugs was the "result of a 'free and unconstrained choice' " by defendant (*id.* at 641). Before repeatedly asking defendant whether he had "anything" on him, the arresting officer conducted a pat frisk and found no weapons. There was thus no need for the officer to be concerned about his safety. Moreover, although defendant did not respond when he was initially asked whether he had anything on him, that did not justify the use of physical force by the officer. It is clear that, as the court determined, defendant's eventual incriminating response was prompted by the officer's continuing use of force while repeating the same question that defendant refused to answer or answered in a manner that did not satisfy the officer. Although the People assert that the officer was unable to complete his pat frisk because defendant was attempting to flee, the court stated in its findings that defendant

"did not flee or resist," and the court's determination in that regard is supported by the record and will not be disturbed (*see generally People v Prochilo*, 41 NY2d 759, 761).

We thus conclude that the court properly granted defendant's suppression motion.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

519

CAF 13-00074

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

IN THE MATTER OF JESSICA LYNN KIRKPATRICK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD C. KIRKPATRICK, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

DAVID J. PAJAK, ALDEN, FOR PETITIONER-APPELLANT.

TIMOTHY R. LOVALLO, BUFFALO, FOR RESPONDENT-RESPONDENT.

MICHELE A. BROWN, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered December 13, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: In these consolidated appeals, petitioner mother appeals from three orders resolving three petitions that she filed against respondent father, her ex-husband, with respect to the mother's visitation with the parties' daughter. We note at the outset that, although the mother filed a notice of appeal with respect to all three orders, the only issues raised in her brief concern the visitation order in appeal No. 2. The mother is therefore deemed to have abandoned any issues concerning the orders in appeal Nos. 1 and 3 (*see Matter of Danner v NePage* [appeal No. 3], 100 AD3d 1405, 1405, *lv denied* 20 NY3d 859; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984). We further note that any contentions concerning the propriety of the order dismissing the mother's custody petitions are not properly before us because the mother did not appeal from that order (*see Matter of Groesbeck v Groesbeck*, 52 AD3d 903, 903).

With respect to appeal No. 2, we note that the Attorney for the Child has submitted new information, obtained during the pendency of this appeal, indicating that the order of visitation has been superseded by a subsequent order. Therefore, the mother's challenge to the order in appeal No. 2 has been rendered moot (*see Matter of Dupuis v Costello*, 80 AD3d 806, 807), and we conclude that the exception to the mootness doctrine does not apply (*see generally*

Matter of Hearst Corp. v Clyne, 50 NY2d 707, 714-715).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

520

CAF 13-00075

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

IN THE MATTER OF JESSICA LYNN KIRKPATRICK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD C. KIRKPATRICK, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

DAVID J. PAJAK, ALDEN, FOR PETITIONER-APPELLANT.

TIMOTHY R. LOVALLO, BUFFALO, FOR RESPONDENT-RESPONDENT.

MICHELE A. BROWN, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered December 13, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted in part the petition for modification of a prior visitation and custody order.

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

Same Memorandum as in *Matter of Kirkpatrick v Kirkpatrick* ([appeal No. 1] ___ AD3d ___ [May 9, 2014]).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

521

CAF 13-00076

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

IN THE MATTER OF JESSICA LYNN KIRKPATRICK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD C. KIRKPATRICK, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

DAVID J. PAJAK, ALDEN, FOR PETITIONER-APPELLANT.

TIMOTHY R. LOVALLO, BUFFALO, FOR RESPONDENT-RESPONDENT.

MICHELE A. BROWN, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered December 13, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Same Memorandum as in *Matter of Kirkpatrick v Kirkpatrick* ([appeal No. 1] ___ AD3d ___ [May 9, 2014]).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

522

CAF 12-01899

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

IN THE MATTER OF CARL A. SHAW,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOANNE M. BICE, RESPONDENT-APPELLANT.

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

MUEHE AND NEWTON, LLP, CANANDAIGUA (GEORGE F. NEWTON OF COUNSEL), FOR PETITIONER-RESPONDENT.

VICTORIA L. KING, ATTORNEY FOR THE CHILDREN, CANANDAIGUA.

Appeal from an order of the Family Court, Ontario County (Stephen D. Aronson, A.J.), entered July 9, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject children.

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

Memorandum: In this custody proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order modifying a prior order and awarding sole custody of the parties' two children to petitioner father, with liberal visitation to the mother. We reject the mother's contention that Family Court erred in failing to appoint separate attorneys for the children when, during the trial, the parties' son expressed a desire to reside with the mother, which was not consistent with the daughter's expressed wishes. Both children had previously informed the Attorney for the Children (AFC) that they wanted to continue residing with the father, who had been granted temporary custody. During the trial, however, the AFC advised the court that the son, age nine, wanted to live with his mother because at her house "he can stay up late and he doesn't get in trouble." The AFC further stated that, in her view, the son's position was "immature and thus not controlling" upon the AFC. Following a *Lincoln* hearing, the court denied the mother's request to appoint a new attorney for the child for the son. At the conclusion of the trial, the court awarded custody of both children to the father, as advocated by the AFC. We now affirm.

The Rules of the Chief Judge provide that an attorney for the

child "must zealously advocate the child's position" and that, "[i]f the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests" (22 NYCRR 7.2 [d] [2]; *see Matter of Swinson v Dobson*, 101 AD3d 1686, 1687, *lv denied* 20 NY3d 862). Nevertheless, "[w]hen the attorney for the child 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, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position" (22 NYCRR 7.2 [d] [3]).

Here, based on our review of the transcript of the *Lincoln* hearing, during which the court interviewed the son at length, we conclude that the court properly denied the mother's request to appoint separate counsel for the son. Although the reasons for our determination cannot be stated in this decision given the confidential nature of the *Lincoln* hearing, we note that the AFC on appeal asks us to affirm, thereby indicating that the son does not object to the court's failure to appoint separate counsel on his behalf.

Finally, we conclude that, contrary to the mother's remaining contention, there is a sound and substantial basis in the record to support the court's determination that it was in the children's best interests to award sole custody to the father, and we thus will not disturb that determination (*see Matter of Tisdale v Anderson*, 100 AD3d 1517, 1517-1518).

Frances E. Cafarell

Entered: May 9, 2014

Clerk of the Court

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

532

KA 12-01672

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FREDERICK E. WALKER, DEFENDANT-APPELLANT.

JAMES S. HINMAN, P.C., ROCHESTER (JAMES S. HINMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FREDERICK E. WALKER, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Francis A. Affronti, J.), dated July 10, 2012. The order determined that defendant had been present for his *Sandoval* hearing.

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

Memorandum: Following the reconstruction hearing ordered by the Court of Appeals in *People v Walker* (18 NY3d 839, 840), Supreme Court concluded that defendant "failed to satisfy his burden of coming forward with substantial evidence establishing his absence" at the *Sandoval* hearing. We agree with defendant that the court erred in imposing the burden of proof on him at the reconstruction hearing.

Inasmuch as " '[a] presumption of regularity attaches to judicial proceedings' " (*People v Cruz*, 14 NY3d 814, 816), a defendant challenging the proceedings has the initial "burden of rebutting the presumption of regularity by substantial evidence" (*id.*). In ordering the reconstruction hearing, the Court of Appeals held that defendant had rebutted the presumption of regularity and "satisfied his burden of showing that a reconstruction hearing is necessary to determine whether he was present during the *Sandoval* hearing" (*Walker*, 18 NY3d at 840; *see Cruz*, 14 NY3d at 816).

At the reconstruction hearing, "the People ha[d] the burden of establishing the facts by a preponderance of the evidence" (*People v Terry*, 225 AD2d 1058, 1058, *lv denied* 88 NY2d 886; *see People v Pitsley*, 300 AD2d 1010, 1011; *People v Goodman*, 284 AD2d 928, 928; *see also People v Durda*, 265 AD2d 824, 824, *lv denied* 94 NY2d 862; *People*

v Nelson, 234 AD2d 977, 977, *lv denied* 89 NY2d 1039). We conclude that the People failed to meet their burden. We therefore reverse the order, vacate the judgment of conviction and grant a new trial.

The transcript of the trial establishes that defendant was not in the courtroom when the proceedings began. According to the transcript, defense counsel informed the court that she "just went back to see [defendant]," who was not dressed for court because the jail had lost his trial clothes. After being informed that the jail had also misplaced the trial clothes for the codefendant, the court stated, "I didn't come here today to spend my day waiting for clothes. Trust me. Any Sandoval?" The *Sandoval* hearing for both defendant and his codefendant was held, and the first indication in the record of defendant's presence is after the conclusion of that hearing. At the reconstruction hearing, the only witnesses to testify were defendant and his former attorney. Defendant denied that he was present during any discussion of his prior crimes, stating that it was during that time that he was returned to the jail, where he successfully located his missing clothes. Defendant's former attorney had no independent recollection of the events surrounding the *Sandoval* hearing. We thus conclude that the People failed to establish by a preponderance of the evidence that defendant was present at the *Sandoval* hearing (*see People v Pitsley*, 4 AD3d 841, 842, *lv denied* 2 NY3d 804).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

533

KA 12-01538

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

IFEOMA A. OKAFOR, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered June 6, 2012. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We reject defendant's contention that County Court erred in relying upon facts set forth in the case summary prepared by the Board of Examiners of Sex Offenders in determining his risk level. " 'The case summary may constitute clear and convincing evidence of the facts alleged therein and, where, as here, the defendant does not dispute the facts contained in the case summary, the case summary alone is sufficient to support the court's determination' " (*People v Vaillancourt*, 112 AD3d 1375, 1375-1376, *lv denied* ___ NY3d ___ [Apr. 1, 2014]; *see People v Bethune*, 108 AD3d 1231, 1231-1232, *lv denied* 22 NY3d 853). "[D]efense counsel's statement at the hearing that the court should not rely solely upon the case summary was not the equivalent of disputing the facts contained therein. Furthermore, defendant's contention that the court violated his due process rights by relying solely upon the case summary is without merit" (*Vaillancourt*, 112 AD3d at 1376; *see People v Latimore*, 50 AD3d 1604, 1605, *lv denied* 10 NY3d 717; *cf. People v David W.*, 95 NY2d 130, 138-140; *see generally People v Montanez*, 88 AD3d 1278, 1279).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

535

KA 13-00449

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN MORRIS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TYSON BLUE, MACEDON, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered November 20, 2012. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his guilty plea of rape in the third degree (Penal Law § 130.25 [2]) and, in appeal No. 2, defendant appeals from a judgment convicting him upon his guilty plea of, inter alia, attempted burglary in the second degree (§§ 110.00, 140.25 [2]) as a lesser included offense of burglary in the second degree, charged in count one of the indictment.

Defendant contends in appeal No. 1 that he was deprived of the right to effective assistance of counsel based upon defense counsel's abandonment of a suppression motion that defense counsel had previously filed. To the extent that defendant's contention survives his guilty plea, i.e., to the extent that defendant contends that "his plea was infected by the alleged ineffective assistance" (*People v Culver*, 94 AD3d 1427, 1427, *lv denied* 19 NY3d 1025 [internal quotation marks omitted]), we conclude that it is without merit. Defendant has failed to demonstrate the absence of strategic or other legitimate explanations for defense counsel's decision not to pursue the suppression motion (*see People v Webb*, 92 AD3d 1268, 1269). We conclude that defense counsel provided meaningful representation (*see generally People v Ford*, 86 NY2d 397, 404).

In appeal No. 2, defendant contends that County Court erred in denying his motion to dismiss count one of the indictment, charging burglary in the second degree, because the People failed to allege an

essential element of the crime, namely, that he had entered the dwelling "unlawfully" (Penal Law § 140.25 [2]). We reject that contention. That count of the indictment specifically referred to Penal Law § 140.25 (2) and, thus, the People's failure to allege that defendant entered the dwelling "unlawfully" does not constitute a jurisdictional defect requiring dismissal of that count (*see People v Wright*, 67 NY2d 749, 750; *People v Shanley*, 15 AD3d 921, 922, *lv denied* 4 NY3d 856).

Finally, the sentence in each appeal is not unduly harsh or severe.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

536

KA 13-00450

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN MORRIS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TYSON BLUE, MACEDON, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered November 20, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree and grand larceny in the fourth degree.

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

Same Memorandum as in *People v Morris* ([appeal No. 1] ___ AD3d ___ [May 9, 2014]).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

537

KA 11-00291

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES TUCKER, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MARIA MALDONADO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered October 29, 2010. The judgment convicted defendant, upon a jury verdict, 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 case is held, the decision is reserved and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict 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]). We note that the certificate of conviction incorrectly reflects that defendant was convicted of criminal possession of a controlled substance in the fifth degree under Penal Law § 220.06 (1), and it must therefore be amended to reflect that he was convicted under Penal Law § 220.06 (5) (*see generally People v Anderson*, 79 AD3d 1738, 1739, *lv denied* 16 NY3d 856). 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 People v Bleakley*, 69 NY2d 490, 495).

We agree with defendant, however, that Supreme Court erred in summarily denying his motion to set aside the verdict pursuant to CPL 330.30 (2). The sworn allegations in defendant's moving papers, i.e., that he learned after the verdict was rendered that a juror who had allegedly been "holding out" contacted defendant's aunt between the first and second days of deliberation and discussed the likelihood of a guilty verdict when the jury reconvened the following morning, "required a hearing on the issue whether the juror's alleged misconduct prejudiced a substantial right of defendant" (*People v*

Saxton, 32 AD3d 1286, 1287; *see People v Paulick*, 206 AD2d 895, 896; *see generally People v Clark*, 81 NY2d 913, 914). We therefore hold the case, reserve decision and remit the matter to Supreme Court to conduct a hearing on defendant's CPL 330.30 motion.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

538

KA 12-01908

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NEWNON FLAX, DEFENDANT-APPELLANT.

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

NEWNON FLAX, DEFENDANT-APPELLANT PRO SE.

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

Appeal from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered May 3, 2012. The order, insofar as appealed from, denied that part of the motion of defendant pursuant to CPL 440.30 (1-a) for DNA testing.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law, and the matter is remitted to Supreme Court, Erie County, for a hearing in accordance with the following Memorandum: Defendant appeals from that part of an order denying his postjudgment motion pursuant to CPL 440.30 (1-a) for DNA testing of a certain item of evidence secured in connection with his conviction of, inter alia, rape in the first degree (Penal Law § 130.35 [1]). This Court previously modified the judgment of conviction by vacating the sentence (*People v Flax*, 155 AD2d 894, *lv denied* 76 NY2d 734) and, on the appeal from the judgment after resentencing, we affirmed (*People v Flax*, 178 AD2d 1026). Preliminarily, we note that the notice of appeal herein incorrectly states that defendant is appealing from the judgment, rather than the order denying the postjudgment motion. As a matter of discretion in the interest of justice, however, we treat the notice of appeal as valid (*see* CPL 460.10 [6]; *People v Jones*, 114 AD3d 1272, 1272). Inasmuch as defendant's previous CPL 440.30 (1-a) motion was denied, CPL 440.10 (3) (b), made applicable to this motion pursuant to 440.30 (2), permits but does not require denial of the motion. Under the circumstances of this case, we conclude that Supreme Court erred in denying the instant CPL 440.30 (1-a) motion (*see People v Tankleff*, 46 AD3d 846, 847; *see also People v Hayes*, 284 AD2d 1008, 1009, *lv denied* 97 NY2d 641).

The identification evidence at trial consisted of testimony from the complainant that, although she could not see her attacker, she

recognized the voice as defendant's from the three words the attacker spoke when he grabbed her. The complainant also stated that she observed the profile of her attacker in the dark of night from three houses away as he was running from the scene. At trial, the complainant testified that, during a subsequent encounter, defendant made a statement indicating that the complainant "gave it to him." The complainant also testified, however, that defendant, during that same subsequent encounter, denied ever touching her. In a posttrial statement to a probation officer, the complainant stated that, during that subsequent encounter, defendant had told the complainant that "he had a girlfriend at home and that she[, i.e., the girlfriend,] would give it to him." Thus, what had initially been characterized by the prosecution as an admission by defendant actually may not have been one. In other words, the complainant's equivocal accounts of defendant's statements render it possible that defendant never admitted to engaging in any sexual encounter with the complainant, consensual or otherwise.

Following the attack, a semen stain was found on the crotch of the jumpsuit that the complainant had been wearing. There was no indication that the source of the semen could have been anyone but the attacker (*see e.g. Tankleff*, 46 AD3d at 847; *People v Keene*, 4 AD3d 536, 536-537; *cf. People v Swift*, 108 AD3d 1060, 1061, *lv denied* 21 NY3d 1077; *People v Workman*, 72 AD3d 1640, 1640, *lv denied* 15 NY3d 925, *reconsideration denied* 16 NY3d 838), but no DNA testing was performed on the jumpsuit. Based on the record before us, we conclude that "the evidence of defendant's guilt was not so overwhelming that a different verdict would not have resulted if . . . DNA testing excluded him" as the source of the semen on the jumpsuit (*People v West*, 41 AD3d 884, 885; *see People v Bush*, 90 AD3d 945, 946; *Keene*, 4 AD3d at 537). We therefore remit the matter to Supreme Court for a hearing to determine whether the jumpsuit is still in existence and, if so, whether there is sufficient DNA material for testing (*see Keene*, 4 AD3d at 537).

With respect to the contentions raised by defendant in his pro se supplemental brief, we conclude that they are not properly before us (*see People v Johnson*, 112 AD3d 969, 970).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

541

KA 10-00057

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ORADO N. GRAHAM, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AMANDA L. DREHER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frederick G. Reed, A.J.), rendered November 6, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the second degree, criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia 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, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Contrary to defendant's contention, County Court properly admitted uncharged crimes as *Molineux* evidence on the People's direct case because that evidence was relevant with respect to defendant's intent to sell the controlled substance in his possession (*see* § 220.16 [1]), and we conclude that its probative value outweighed any prejudice (*see People v Ray*, 63 AD3d 1705, 1706, *lv denied* 13 NY3d 838; *People v Carson*, 4 AD3d 805, 806, *lv denied* 2 NY3d 797). Furthermore, the court gave a limiting instruction that minimized any prejudicial effect (*see People v Rogers*, 103 AD3d 1150, 1153, *lv denied* 21 NY3d 946). Even assuming, arguendo, that the court erred in admitting such evidence, we conclude that the error is harmless. The evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the error (*see People v Laws*, 27 AD3d 1116, 1117, *lv denied* 7 NY3d 758; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

542

KA 10-01640

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD M. MUNOZ, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered May 27, 2010. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). Defendant contends that County Court erred in failing to determine whether he should be afforded youthful offender status. We agree.

"Upon conviction of an eligible youth, the court must order a [presentence] investigation of the defendant. After receipt of a written report of the investigation and at the time of pronouncing sentence the court must determine whether or not the eligible youth is a youthful offender" (CPL 720.20 [1]). A sentencing court must determine whether to afford youthful offender status to every defendant who is eligible for it because, inter alia, "[t]he judgment of a court as to which young people have a real likelihood of turning their lives around is just too valuable, both to the offender and to the community, to be sacrificed in plea bargaining" (*People v Rudolph*, 21 NY3d 497, 501). The record here indicates that, although the court told defendant during the plea proceeding, "I will not be adjudicating you a youthful offender"—thus referring to some future, unspecified time—the court thereafter failed to make a formal adjudication on the record. We therefore hold the case, reserve decision and remit the matter to County Court to make and state for the record a determination whether defendant should be afforded youthful offender status (*see id.* at 503).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

543

KA 12-01433

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MALCOLM BRYANT, DEFENDANT-APPELLANT.

EDELSTEIN & GROSSMAN, NEW YORK CITY (JONATHAN I. EDELSTEIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), dated June 26, 2012. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is reversed on the law, the motion is granted, the judgment is vacated and a new trial is granted in accordance with the following Memorandum: On appeal from an order denying his CPL 440.10 motion following a hearing, defendant contends that Supreme Court erred in denying that motion. We agree. Defendant was convicted following a jury trial of assault in the first degree (Penal Law § 120.10 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]) related to the shooting of the victim. Defendant thereafter moved to vacate the judgment on the grounds of, inter alia, newly discovered evidence, ineffective assistance of counsel and actual innocence, seeking either a new trial or dismissal of the indictment. We conclude that defendant is entitled to a new trial on the ground of newly discovered evidence, and we therefore reverse the order and grant the motion to the extent that it is based on newly discovered evidence.

At trial, the only witness to identify defendant as the shooter was the victim. Immediately after the shooting, however, the victim informed the police officers investigating the shooting that, because he wore glasses, he was unable to identify the shooter. Defendant, who lived in the area of the shooting, presented a neighbor as an alibi witness. That neighbor testified that he had seen defendant inside a bar immediately before the neighbor left the bar. Upon his arrival at his residence, the neighbor observed the victim and drove him to the hospital. Because the neighbor was admittedly intoxicated

on the night of the shooting, there was some question whether he was mistaken about the timing of events. Following 13 hours of deliberation and an *Allen* charge, the jury convicted defendant.

In support of his CPL 440.10 motion, defendant submitted the affidavit of a neighbor who observed the shooting (hereafter, first witness). She averred that she observed a person, whom she identified, shoot the victim, and that person was not defendant. She further averred that defendant, whom she knew from the neighborhood, was not present at the scene of the crime. Defendant also submitted an affidavit from another neighbor who arrived home shortly before the shooting and observed several men on the street arguing (hereafter, second witness). The second witness also knew defendant from the neighborhood, and she averred that he was not among the men arguing on the street. Although the second witness did not actually observe the shooting, she went to her window immediately after hearing the gunshots and observed two men, neither of whom was defendant, leaving the scene. The first witness identified the shooter by a street name, and the second witness identified that same person as being one of the men arguing with the victim and then leaving the scene immediately after the shooting. Both the first witness and second witness testified at the hearing on the motion, and their testimony reiterated the information contained in their sworn affidavits.

It is well settled that, in order to establish entitlement to a new trial on the ground of newly discovered evidence, "a defendant must prove that 'there is newly discovered evidence: (1) which will probably change the result if a new trial is granted; (2) which was discovered since the trial; (3) which could not have been discovered prior to trial; (4) which is material; (5) which is not cumulative; and[] (6) which does not merely impeach or contradict the record evidence' " (*People v Madison*, 106 AD3d 1490, 1492; *see People v Smith*, 108 AD3d 1075, 1076, *lv denied* 21 NY3d 1077; *see generally People v Salemi*, 309 NY 208, 215-216, *cert denied* 350 US 950).

We conclude that defendant met his burden of establishing all six factors by a preponderance of the evidence (*see* CPL 440.30 [6]; *People v Tankleff*, 49 AD3d 160, 179-180). Although the second witness gave the police a statement on the night of the incident, there is no dispute that the information obtained from the first witness was in fact discovered after trial, that it was material to the case and that it was not cumulative of other evidence (*see e.g. People v Singh*, 111 AD3d 767, 768-769; *People v Bellamy*, 84 AD3d 1260, 1261-1262, *lv denied* 17 NY3d 813). Contrary to the People's contention, the information from the first witness was not merely impeaching evidence; it addressed directly the issue of defendant's guilt or innocence (*see e.g. Madison*, 106 AD3d at 1493; *People v Lackey*, 48 AD3d 982, 984, *lv denied* 10 NY3d 936; *cf. People v Welch*, 281 AD2d 906, 906, *lv denied* 97 NY2d 734). We further conclude that, when the testimony from the first witness is considered in light of the hearing testimony from the second witness and all of the evidence admitted at trial, "there is a reasonable probability that had such evidence been received at trial, the verdict would have been more favorable to the

defendant" (*People v Malik*, 81 AD3d 981, 982; *see Tankleff*, 49 AD3d at 182). The jury deliberated for over 13 hours and, at one point, was deadlocked. The hearing testimony of the two witnesses corroborates each other as well as the trial testimony of defendant's alibi witness, i.e., that defendant was not present at the scene immediately before or immediately after the shooting. Had evidence from the first witness and the second witness been introduced at trial, the prosecution may not have been able to discredit the trial testimony of the alibi witness as being mistaken relative to the timing of events.

In our view, the one factor that warrants a more extended analysis is whether defendant established that the information obtained from the two witnesses could not have been discovered with due diligence before trial. " '[T]he due diligence requirement is measured against the defendant's available resources and the practicalities of the particular situation' " (*Tankleff*, 49 AD3d at 180). Here, the police reports submitted by defendant in support of his motion established that police officers canvassed the neighborhood shortly after the shooting. They went to 14 nearby residences and were not able to find anyone with any relevant information. While the second witness gave a statement to the police on the night of the incident, none of the police reports mentioned the name of the first witness. Inasmuch as "[t]he primary burden of investigating a crime is on the People through their agency, the police department" (*People v Hildenbrandt*, 125 AD2d 819, 821, *lv denied* 69 NY2d 881), we conclude that it was not unreasonable for defense counsel, in light of "the limited resources generally available to the defense" (*id.*), to conclude that a further canvass of the neighborhood would not yield any new and relevant information. Here, as in *Hildenbrandt*, "[t]he existence of the [first] witness was not uncovered by the police[,] and there is nothing in the record to indicate that the failure to discover the witness was unreasonable. Thus, it can hardly be said that defendant should be charged with a lack of due diligence in finding the witness" (*id.* at 821-822). Although the information obtained from the second witness was available before trial and thus does not constitute newly discovered evidence, the information obtained from the first witness was not. That evidence thus meets all of the requisite factors.

While we agree with our dissenting colleague that there are issues concerning the credibility of the first witness and that issues of credibility are best determined by the hearing court (*see People v Britton*, 49 AD3d 893, 894, *lv denied* 10 NY3d 956), we conclude that the testimony of the first witness, when combined with the information obtained from the second witness and the trial testimony of defendant's alibi witness, would probably change the result if a new trial were granted. As noted above, the identification evidence against defendant was weak, and even the victim initially told the police that he was unable to identify his attacker. Moreover, during the lengthy deliberations, the jury required an *Allen* charge, which is given only when a jury is deadlocked (*see People v Abston*, 229 AD2d 970, 971, *lv denied* 88 NY2d 1066; *see generally Allen v United States*, 164 US 492, 501-502). Under the unique circumstances of this case, and given the fact that the first witness, although seemingly

reluctant, in fact agreed to testify against the person she identified as the shooter, we conclude that the court erred in denying defendant's motion.

We reject defendant's contention, however, that he is entitled to dismissal of the indictment on the ground of actual innocence, and we instead conclude that he is entitled to a new trial. Even assuming, arguendo, that a claim of actual innocence is a viable ground for a CPL 440.10 motion, we conclude that defendant failed to establish by clear and convincing evidence that he is actually innocent of the crimes (*see generally People v Hamilton*, 115 AD3d 12, 26).

In light of our determination, we see no need to address defendant's remaining contentions.

All concur except LINDLEY, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent. Although I agree with the majority that Supreme Court properly rejected defendant's claims of actual innocence and ineffective assistance of counsel, I do not agree that defendant is entitled to a new trial based on newly discovered evidence (*see* CPL 440.10 [1] [g]). According to defendant, the newly discovered evidence is information that he obtained from a witness who submitted an affidavit in which she averred that she saw someone other than defendant commit the shooting (hereafter, first witness). Based on that affidavit, among other evidence, the court granted defendant a hearing, at which the first witness testified consistently with her affidavit.

If the first witness's testimony is accepted as true, then I would agree that defendant would be entitled to a new trial, inasmuch as defendant established that he could not have discovered that witness with due diligence before trial, and the proffered testimony, if believed by the jury, would likely have changed the outcome at the trial (*see generally People v Salemi*, 309 NY 208, 215-216, *cert denied* 350 US 950; *People v Madison*, 106 AD3d 1490, 1492). The hearing court specifically found, however, that the first witness's testimony was not credible. In the context of a CPL 440.10 motion, the credibility determinations of the hearing court, "with its particular advantages of having seen and heard the witnesses," are entitled to "great deference on appeal" (*People v Britton*, 49 AD3d 893, 894, *lv denied* 10 NY3d 956; *see People v Jacobs*, 65 AD3d 594, 595, *lv denied* 13 NY3d 836), and they should not be disturbed "unless clearly erroneous" (*People v Jamison*, 188 AD2d 551, 551, *lv denied* 81 NY2d 841; *see People v Prochilo*, 41 NY2d 759, 761). Based on my review of the record, I see no basis for us to disturb the hearing court's credibility determinations (*see People v Betsch*, 4 AD3d 818, 819, *lv denied* 2 NY3d 796, *reconsideration denied* 3 NY3d 657; *People v Wallace*, 270 AD2d 823, 824, *lv denied* 95 NY2d 806).

In my view, the court had ample reasons for not believing the first witness, who, despite her purported knowledge of the identity of the shooter, did not come forward until more than a year after defendant had been convicted. I note that, when initially asked at the hearing whether she knows another female neighbor who observed the

scene after the shooting and who also submitted an affidavit in support of defendant's motion (hereafter, second witness), the first witness answered, "No, I do not." Upon further questioning, the first witness acknowledged that she knows the second witness but only by her street name. The second witness testified, however, that she spoke to the first witness "[a]lmost every day" when they lived on the same street and, since moving to another apartment, she spoke to the first witness on the telephone "once every other week." In fact, shortly before the hearing, the second witness telephoned the first witness and, during that conversation, the second witness asked the first witness about her children and invited them to a birthday party. It thus strains credulity to believe that the first witness does not know the name of the second witness. In addition, the first witness refused to discuss the matter with an investigator from the District Attorney's office prior to the hearing, and she appeared reluctant to testify before the grand jury against the person she claimed to have seen commit the shooting. She did not even want to disclose who had brought her to the courthouse to testify at the hearing.

Where, as here, a defendant seeks a new trial based on newly discovered evidence in the form of testimony from an eyewitness, the defendant is not entitled to relief unless the hearing court believes that testimony (*see People v Watson*, 152 AD2d 954, 955, *lv denied* 74 NY2d 900). The hearing court, in denying defendant's motion, gave specific and legitimate reasons for not believing the first witness's testimony, and it cannot be said that the court was "clearly erroneous" in that regard (*People v Wilson*, 38 AD3d 1326, *lv denied* 9 NY3d 853). I would thus affirm the court's denial of defendant's CPL 440.10 motion.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

558

KA 11-00804

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS BRYANT, DEFENDANT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered January 12, 2011. The judgment convicted defendant, upon a jury verdict, of aggravated harassment of an employee by an inmate.

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 aggravated harassment of an employee by an inmate (Penal Law § 240.32), defendant contends that County Court erred in failing sua sponte to order a competency examination pursuant to CPL 730.30 (1). "It is well settled that the decision to order a competency examination under CPL 730.30 (1) lies within the sound discretion of the trial court" (*People v Williams*, 35 AD3d 1273, 1274, *lv denied* 8 NY3d 928; *see People v Morgan*, 87 NY2d 878, 879-880). "A defendant is presumed competent . . . , and the court is under no obligation to issue an order of examination . . . unless it has 'reasonable ground . . . to believe that the defendant was an incapacitated person' " (*Morgan*, 87 NY2d at 880). Based on the record before us, we conclude that the court did not abuse its discretion in failing sua sponte to order a competency examination (*see id.* at 879-880).

Defendant further contends that he was deprived of a fair trial based on prosecutorial misconduct. He failed to preserve his contention for our review with respect to the majority of the alleged instances of prosecutorial misconduct (*see* CPL 470.05 [2]), and we decline to exercise our power to review his contention concerning those alleged instances as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Insofar as defendant's contention is preserved for our review, we conclude that it lacks merit. We note in particular that the prosecutor's cross-examination of defendant did not amount to prosecutorial misconduct; rather, "it appears that the

cross-examination was intended to place defendant in his proper setting and put the weight of his testimony and his credibility to a test," thus enabling the jury to appraise the facts (*People v Brent-Pridgen*, 48 AD3d 1054, 1055, *lv denied* 10 NY3d 860 [internal quotation marks omitted]). We have considered defendant's remaining contentions and conclude that they lack merit.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

567

CAF 13-01253

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

IN THE MATTER OF HOLLY B. AND SPENCER B.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

AMANDA A., RESPONDENT,
AND SCOTT B., RESPONDENT-APPELLANT.

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

ABRAHAM J. PLATT, LOCKPORT, FOR PETITIONER-RESPONDENT.

TIMOTHY D. HASELEY, ATTORNEY FOR THE CHILDREN, LOCKPORT.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered June 25, 2013 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Scott B. neglected the subject children.

It is hereby ORDERED that said appeal is unanimously dismissed insofar as it concerns custody and the order is otherwise affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order finding that he neglected the subject children. Initially, we dismiss the appeal insofar as it concerns the placement of the children in the custody of their maternal grandmother, upon the father's consent thereto. "No appeal lies from [that part of] an order entered upon the parties' consent" (*Matter of Cherilyn P.*, 192 AD2d 1084, 1084, *lv denied* 82 NY2d 652).

Contrary to the father's contention, Family Court's determination that he neglected his children is supported by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]). "Where, as here, issues of credibility are presented, the hearing court's findings must be accorded great deference" (*Matter of Todd D.*, 9 AD3d 462, 463). Petitioner presented evidence establishing, inter alia, that the family's apartment was unsafe and unsanitary, due to the neglect of the parents, and thus the court properly determined that the children's health was in imminent danger of impairment due to the father's actions and inaction (*see Matter of Raven B. [Melissa K.N.]*, 115 AD3d 1276, 1280; *Matter of Alexis AA. [John AA.]*, 91 AD3d 1073,

1074, *lv denied* 18 NY3d 809; *Matter of Alyssa L.D.*, 56 AD3d 1184, 1185, *lv denied* 12 NY3d 703).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

571

CA 13-01917

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

IN THE MATTER OF JACK BAILEY, ET AL.,
PETITIONERS-PLAINTIFFS,
AND ANDREW DEWOLF,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF LYONS BOARD OF TRUSTEES,
RESPONDENT-DEFENDANT-RESPONDENT.

ANDREW DEWOLF, PETITIONER-PLAINTIFF-APPELLANT PRO SE.

NESBITT & WILLIAMS, NEWARK (ARTHUR B. WILLIAMS OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated decision) of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered August 27, 2013 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, among other things, granted the petition-complaint in part by enjoining respondent-defendant to have a Board of Trustee's approved dissolution plan in place by October 20, 2013, failing which the court would appoint a hearing officer to undertake that responsibility.

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

Memorandum: We dismiss the appeal as moot because, once the dissolution plan at issue was adopted on September 30, 2013, no justiciable controversy remained upon which a declaratory judgment could be made or injunctive relief could be granted. "It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713). This case does not fall within the exception to the mootness doctrine (*see id.* at 714-715).

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court

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

1354/13

CA 13-00790

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

IN THE MATTER OF THE ESTATE OF GINO ROLANDO MONACO, DECEASED.

EUGENE ALLEN MONACO, PETITIONER-RESPONDENT;

THE ESTATE OF GINO ROLANDO MONACO, RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

ANTHONY D. PARONE, NIAGARA FALLS, FOR RESPONDENT-APPELLANT.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (JON F. MINEAR OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered December 6, 2012. The order denied the motion of the Estate of Gino Rolando Monaco to compel Eugene Allen Monaco to supply his earnings records.

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

Memorandum: Respondent appeals from an order denying its motion to compel production of petitioner's income tax records from the years 1980 to 1995, or for authorization to obtain such records from the New York State Department of Taxation and Finance (hereafter, State). It is undisputed that petitioner has voluntarily produced State records of his earnings from 1996 to 2009.

Pursuant to decedent's will, his daughter was devised all of his real property while petitioner, decedent's son, was devised a cemetery plot, a compressor, and a roll of electrical wire. At issue is petitioner's claim that a single-family residence in which he has resided since decedent purchased the property in 1996, and the deed for which is in decedent's name, was the subject of a verbal agreement whereby decedent promised to transfer title of the property to petitioner when the mortgage was paid off, upon petitioner's demand or upon decedent's death. Petitioner alleges that, in reliance on that agreement, he gave decedent $20,000 for the down payment, and he has paid all expenses on the property, including the mortgage, taxes, the cost of improvements, and the insurance premium. Respondent seeks an order requiring petitioner, or the State, to supply petitioner's income tax records from 1980 through 1995 because that information is relevant to the issue of whether petitioner had sufficient savings in 1996 to make the $20,000 down payment to decedent, as alleged.

We conclude that Surrogate's Court properly denied respondent's motion, inasmuch as respondent has not made a sufficiently strong showing that the information contained in petitioner's income tax records "were indispensable to this litigation and unavailable from other sources" (*Supama Coal Sales Co. v Jackson*, 186 AD2d 1052, 1052), such as "other financial or business records" (*Consentino v Schwartz*, 155 AD2d 640, 641; *see Grossman v Lacoff*, 168 AD2d 484, 485-486; *Niagara Falls Urban Renewal Agency v Friedman*, 55 AD2d 830, 830). Indeed, respondent "failed to make any factual showing in this regard, since the hearsay affirmation[s] of [respondent's] attorney [are] wholly conclusory" (*Consentino*, 155 AD2d at 641), petitioner's deposition testimony, the only exhibit submitted in support of the motion, accounted for petitioner's employment history during the times in question, although in a vague manner (*see generally Grossman*, 168 AD2d at 486), and respondent did not establish that it sought the requested information from any alternate source (*see Mayo, Lynch & Assoc. v Fine*, 123 AD2d 607, 608).

All concur except LINDLEY and SCONIERS, JJ., who dissent and vote to reverse in the following Memorandum: We respectfully dissent. At issue in this proceeding is a single-family residence (hereafter, property) purchased by petitioner's father (decedent) in 1996 for $98,500. Although the deed to the property was in decedent's name alone, there is no dispute that petitioner resided there continuously since the property was purchased. Decedent and his wife lived elsewhere. Decedent paid $20,000 in cash at closing for the property and financed the rest of the purchase price with a mortgage. Petitioner alleges that he gave decedent the money for the down payment and then each month gave decedent $700 in cash for the mortgage and $300 in cash for the property taxes. Petitioner does not have any documentary evidence showing that he made any of those payments.

Decedent died in 2010, and his will devised all of his "real property," without specification, to his daughter, petitioner's sister. The will left a china cabinet and the china therein to petitioner's brother and sister-in-law, along with two cemetery plots. As for petitioner, the will left him "the red compressor, the roll of electrical wire and one cemetery plot." After decedent's daughter filed papers in Surrogate's Court seeking probate of the will, petitioner filed a petition against respondent, decedent's estate, asserting causes of action for breach of an oral promise, breach of an oral trust, and unjust enrichment. More specifically, petitioner alleged that he and decedent entered into a verbal agreement in the spring of 1996, whereby decedent promised that he would transfer the property to petitioner when the mortgage was paid off, upon petitioner's demand or upon decedent's death. Petitioner further alleged that, in reliance on that agreement, he paid all expenses on the property, including the down payment, mortgage and taxes. As a remedy, petitioner asked that a constructive trust be imposed on the property for his benefit.

Respondent answered the petition and discovery commenced. During his two depositions, petitioner testified that he made the $20,000

down payment with money he had saved. Petitioner explained that the house was not put in his name because he could not get a loan, and that he had savings of between $30,000 and $40,000, which he gave to his father for the down payment and other expenses. When asked where he worked at the time, petitioner testified that he had numerous jobs over the years, and that he continuously operated a landscaping and snow plowing business. Petitioner did not, however, have any specific recollection as to how much money he earned on any of those jobs, and he testified that he has never used a bank account for anything other than cashing checks.

At respondent's request, petitioner obtained a letter from the New York State Department of Taxation and Finance (hereafter, State) that set forth his reported earnings from 1996 through 2009, and then provided that letter to respondent's attorney. Petitioner refused, however, to obtain and provide a similar letter with respect to his reported earnings from 1980 through 1995. Respondent then moved for an order compelling petitioner to provide such information, and the Surrogate denied the motion without prejudice. Following petitioner's second deposition, during which he professed not to know how much he earned from his various employers, including his own business, respondent again moved for an order compelling petitioner to obtain a letter from the State setting forth his reported earnings from 1980 through 1995. The Surrogate denied the motion without explanation, and respondent appeals from the order denying that motion.

In our view, the Surrogate improvidently exercised her discretion in denying respondent's motion. CPLR 3101 (a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." As we recently explained, the phrase "material and necessary should be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Rawlins v St. Joseph's Hosp. Health Ctr.*, 108 AD3d 1191, 1192 [internal quotation marks omitted]; *see Matter of Wendy's Rests., LLC v Assessor, Town of Henrietta*, 74 AD3d 1916, 1917). The party opposing a motion to compel discovery must "establish that the requests for information are unduly burdensome, or that they may cause unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (*Kimball v Normandeau*, 83 AD3d 1522, 1523 [internal quotation marks omitted]; *see generally* CPLR 3103 [a]).

We note at the outset that there is no dispute that information regarding petitioner's reported income during the years preceding decedent's purchase of the property is "material and necessary" to this proceeding (CPLR 3101 [a]). Nor is there any dispute that petitioner can easily and without cost obtain the requested information from the State. Instead, petitioner contends that the order should be affirmed because disclosure of tax records is disfavored based on their confidential and private nature (*see e.g. Manzella v Provident Life & Cas. Co.*, 273 AD2d 923, 924), and respondent failed to meet its burden of establishing that the tax

records are "indispensable" to the proceeding and are "unavailable from other sources" (*Supama Coal Sales Co. v Jackson*, 186 AD2d 1052, 1052).

Petitioner did not contend before the Surrogate that respondent failed to establish that the tax records are indispensable and thus failed to preserve that contention for our review (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). In any event, petitioner's contention lacks merit because, among other reasons, respondent is not in fact seeking disclosure of petitioner's tax records; rather, respondent is seeking a single-page letter from the State setting forth petitioner's reported incomes for the years in question. Such a letter, like the one previously provided by the State regarding petitioner's reported incomes from 1996 to 2009, would not disclose any private or confidential information. Moreover, as noted, petitioner testified at his deposition that he operated a landscaping and snow plowing business during the years preceding decedent's purchase of the subject property, and he has no recollection of how much money he earned from that business. Under the circumstances, we cannot conceive of any other source of the relevant information requested by respondent other than the State.

Entered: May 9, 2014

Frances E. Cafarell
Clerk of the Court