



SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 29, 2012

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. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

426

CA 11-01854

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

U.S. BANK NATIONAL ASSOCIATION,
SUCCESSOR-IN-INTEREST TO WACHOVIA BANK, NATIONAL
ASSOCIATION, AS INDENTURE TRUSTEE FOR THE
REGISTERED HOLDERS OF AEGIS ASSET BACKED
SECURITIES TRUST 2004-6, MORTGAGE BACKED NOTES,
PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

FRANK D. DENISCO, ET AL., DEFENDANTS,
WILLIAM E. STRUBLE,
DEFENDANT-RESPONDENT-APPELLANT,
AND CITY OF BUFFALO, DEFENDANT-RESPONDENT.

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

MICHAEL J. HUGHES, AMHERST, FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie
County (Michael L. D'Amico, A.J.), entered November 19, 2010. The
order, inter alia, denied the cross motion of plaintiff and the motion
of defendant William E. Struble for summary judgment.

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

Memorandum: Defendants Frank D. Denisco and Cheryl A. Denisco
obtained a loan from Aegis Lending Corporation (Aegis), which was
secured by a mortgage against their property at 108 Duerstein Street
in defendant City of Buffalo (City). Mortgage Electronic Registration
Systems, Inc. (MERS), acting as a nominee for Aegis, was the mortgagee
of record. On February 19, 2008, the City filed a list of delinquent
taxes, including taxes owed on the Deniscos' property, with the Erie
County Clerk's Office.

Thereafter, MERS assigned the mortgage to Wachovia Bank, N.A.
(Wachovia), and plaintiff is the successor in interest to Wachovia.
When the Deniscos subsequently defaulted on their loan, plaintiff
commenced foreclosure proceedings. Shortly thereafter, the City filed
a petition and notice of foreclosure with respect to the property and,
although the City mailed a copy thereof to the Deniscos, it is
undisputed that no notice was mailed to Aegis, MERS, Wachovia or
plaintiff.

Upon obtaining a tax foreclosure judgment, the City sold the property to defendant William E. Struble at a public auction. Plaintiff thereafter commenced this action seeking to set aside the tax foreclosure judgment and tax sale and to provide plaintiff with a reasonable opportunity to redeem the property. Plaintiff alleged, inter alia, that the City had a constitutional and statutory obligation to provide plaintiff with notice of the tax foreclosure proceedings (see *Mennonite Bd. of Missions v Adams*, 462 US 791, 798-800; see also RPTL 1125 [1] [a]). The City moved to dismiss the complaint against it pursuant to CPLR 3211 (a) (7), and Struble moved for summary judgment dismissing the complaint against him. Both the City and Struble contended that, because plaintiff was not a record lien holder "as of the date the list of delinquent taxes was filed," plaintiff was not entitled to notice of the tax foreclosure proceedings (RPTL 1125 [1] [a] [i]). Plaintiff opposed the motions and submitted an amended complaint that it anticipated would be served prior to the return date of the motions adding an allegation that, because Aegis, by virtue of its recorded mortgage, held a protected interest in the property at the time of the filing of the list of delinquent taxes, Aegis was entitled to notice pursuant to RPTL 1125 (1) (a) (i). Inasmuch as the City failed to provide Aegis with the requisite notice, plaintiff contended that the tax foreclosure judgment should be vacated. Plaintiff subsequently cross-moved for summary judgment on the amended complaint on that ground. Supreme Court denied the motions and cross motion. Plaintiff appeals, and Struble cross-appeals. We now affirm.

We reject plaintiff's contention that it was entitled to personal notice of the tax foreclosure proceedings. It is undisputed that plaintiff did not have a protected interest in the property "as of the date the list of delinquent taxes was filed" (RPTL 1125 [1] [a] [i]; see e.g. *Solomon v City of New York*, 171 AD2d 739, 740; *Matter of Tref Realty Corp. v City of New York*, 135 AD2d 862, 863, appeal dismissed 72 NY2d 833). We agree with plaintiff, however, that Aegis was entitled to such notice inasmuch as Aegis, through MERS, had a protected interest in the property. It is undisputed that Aegis did not receive such notice and we therefore conclude that, were Aegis a party to this action, it would have grounds to set aside the tax foreclosure judgment and tax sale (see e.g. *Love v County of Orange*, 90 AD3d 619, 620-621; *Meadow Farm Realty Corp. v Pekich*, 251 AD2d 634, 635-636, appeal dismissed 92 NY2d 946, lv denied 93 NY2d 802; *Matter of County of Erie [Virella-Castro]*, 225 AD2d 1089, 1090, appeal dismissed 88 NY2d 932, lv dismissed 88 NY2d 1062, rearg denied 89 NY2d 917).

We further agree with plaintiff that, as an assignee of Aegis, plaintiff may assert the lack of notice to Aegis as a ground for setting aside the tax foreclosure judgment and tax sale. It is well settled that "an assignee steps into the shoes of its assignor" (*Federal Fin. Co. v Levine*, 248 AD2d 25, 28; see *New York & Presbyt. Hosp. v Country-Wide Ins. Co.*, 17 NY3d 586, 592) and "may pursue the same remedies as would have been available to the assignor" (*Beltway Capital, LLC v Soleil*, 25 Misc 3d 1233[A], 2009 NY Slip Op 52403[U], *3; see generally *New York & Presbyt. Hosp.*, 17 NY3d at 592-593).

Thus, where as here, the assignor was not provided the requisite notice and thus "was not aware of and could not" pursue its legal remedies (*Beltway Capital, LLC*, 2009 NY Slip Op 52403[U], *3), the assignee may assert the lack of notice to the assignor as a ground to vacate the tax foreclosure judgment and to set aside the subsequent tax sale.

The dissent relies on *Solomon* (171 AD2d at 740-741) and *Tref Realty Corp.* (135 AD2d at 863) for the proposition that assignees and transferees are bound by the outcome of previously-instituted tax foreclosure proceedings. We note, however, that in both *Solomon* and *Tref Realty Corp.* the original notices complied with RPTL 1125 (1) (a). Thus, the assignor in those cases did not have any grounds to vacate the tax foreclosure judgment and to set aside the subsequent tax sale. Here, the underlying proceeding was flawed and plaintiff, as the assignee, may assert any grounds that could have been asserted by Aegis.

We conclude, however, that plaintiff is not entitled to summary judgment on the amended complaint because Struble raised triable issues of fact concerning plaintiff's succession to title to the mortgage, various equitable defenses and whether plaintiff acquired actual notice of the tax foreclosure proceeding in sufficient time to redeem the property (*see e.g. Matter of ISCA Enters. v City of New York*, 77 NY2d 688, 697, *rearg denied* 78 NY2d 952, *cert denied* 503 US 906; *Sendel v Diskin*, 277 AD2d 757, 759, *lv denied* 96 NY2d 707).

All concur except FAHEY and PERADOTTO, JJ., who dissent in part and vote to modify in accordance with the following Memorandum: We respectfully dissent in part because, contrary to the conclusion of the majority, we conclude that Supreme Court erred in denying the motion of defendant William E. Struble, an innocent purchaser, for summary judgment dismissing the amended complaint against him.

As noted by the majority, defendants Frank D. Denisco and Cheryl A. Denisco obtained a loan from Aegis Lending Corporation (Aegis), which was secured by their property at 108 Duerstein Street (hereafter, property). On February 19, 2008, defendant City of Buffalo (City) filed a list of delinquent taxes with the Erie County Clerk's Office, which included the property. Thereafter, Mortgage Electronic Registration Systems, Inc., acting as a nominee for Aegis, assigned the mortgage to Wachovia Bank, N.A. (Wachovia). The Deniscos defaulted on the mortgage and plaintiff, as the alleged successor in interest to Wachovia, commenced foreclosure proceedings by notice of pendency filed April 4, 2008.

Approximately one month later, the City filed a petition and notice of foreclosure with respect to the property. On May 20, 2008, the City mailed a copy of the petition and notice of foreclosure to affected property owners and any other persons "whose right, title or interest was a matter of public record as of **February 19, 2008,**" the date of the list of delinquent taxes. The City did not provide notice of the foreclosure proceeding to Aegis, the mortgagee of record with respect to the property on that date. In September 2008, the City

obtained a tax foreclosure judgment and, in October 2008, it sold the property at public auction to Struble.

Approximately one year after the deed from the City to Struble was recorded, plaintiff commenced this action seeking to set aside the tax foreclosure judgment and tax sale, and to provide plaintiff with the opportunity to redeem the property. Plaintiff alleged, *inter alia*, that the City had a constitutional and statutory obligation to provide it with notice of the foreclosure proceeding. The City moved to dismiss the complaint against it, and Struble moved for summary judgment dismissing the complaint against him. Both the City and Struble contended that plaintiff was not entitled to notice of the tax foreclosure proceeding because it was not a record lien holder "as of the date the list of delinquent taxes was filed" (RPTL 1125 [1] [a]). Plaintiff thereafter filed an amended complaint and cross-moved for summary judgment on the amended complaint. Supreme Court denied the motions and cross motion. Plaintiff appeals, and Struble cross-appeals.

We agree with the majority that plaintiff was not entitled to personal notice of the tax foreclosure proceeding because plaintiff did not have a protected interest in the property "as of the date the list of delinquent taxes was filed" (*id.*; see *Maple Tree Homes, Inc. v County of Sullivan*, 17 AD3d 965, 966, *appeal dismissed* 5 NY3d 782). At the time the City filed the list of delinquent taxes in February 2008, Aegis was the mortgagee of record. It is undisputed that the mortgage was not assigned to Wachovia, plaintiff's asserted predecessor in interest, until March 24, 2008, and that the mortgage assignment was not recorded until July 2008, some four months after the filing of the list of delinquent taxes. Thus, at the time the list of delinquent taxes was filed, plaintiff had no legal interest in the property and no right to notice of the commencement of foreclosure proceedings pursuant to RPTL 1125 (1) (a) (see *Solomon v City of New York*, 171 AD2d 739, 740; *Matter of Tref Realty Corp. v City of New York*, 135 AD2d 862, 863, *appeal dismissed* 72 NY2d 833).

We cannot agree with the majority, however, that plaintiff is entitled to assert the rights of Aegis as an alleged successor in interest to Wachovia, the assignee of Aegis, as a ground for setting aside the tax foreclosure judgment and tax sale. While plaintiff correctly recites the "common-law principle that an assignee steps into the shoes of its assignor" (*Federal Fin. Co. v Levine*, 248 AD2d 25, 28; see *Matter of Stralem*, 303 AD2d 120, 123), it is equally well settled that an assignee of an interest is bound by the outcome of a previously-instituted tax foreclosure proceeding (see *Solomon*, 171 AD2d at 741; *Tref Realty Corp.*, 135 AD2d at 863).

RPTL 1122 (7) provides that the filing of the list of delinquent taxes "shall constitute and have the same force and effect as the filing and recording . . . of an individual and separate notice of pendency pursuant to [CPLR article 65] with respect to each parcel involved in such list . . ." CPLR 6501, in turn, provides that a notice of pendency constitutes "constructive notice, from the time of filing of the notice only, to a purchaser from, or incumbrancer

against, any defendant named in a notice of pendency . . . A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as a party" (emphasis added). Here, the notice of pendency was filed before Aegis assigned its interest in the mortgage to Wachovia, and thus both Wachovia and, by extension, plaintiff are bound by the foreclosure proceeding (see generally Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 6501, at 462 ["(T)he filing of a notice of pendency prevents a potential transferee or mortgagee of the property from acquiring the status of innocent purchaser for value while the action is pending"]).

We further note that plaintiff had several remedies available to it prior to entry of the judgment of foreclosure and the ensuing tax sale. First, upon obtaining an interest in the property, Wachovia and/or plaintiff could have filed a declaration of interest pursuant to RPTL 1126 (1), which provides that "[a]ny mortgagee, lienor, lessee or other person having a legally protected interest in real property who wishes to receive copies of the notices required by this article may file with the enforcing officer a declaration of interest on a form prescribed by the commissioner." Second, plaintiff filed its own notice of pendency to foreclose the mortgage in April 2008. In connection therewith, plaintiff in all likelihood performed a title search, which would have revealed the earlier-filed notice of pendency by the City. Plaintiff then could have redeemed the property several months prior to the entry of the tax foreclosure judgment and the tax sale (see RPTL 1122 [9]).

Because plaintiff was not entitled to notice of the tax foreclosure proceedings, the court properly denied plaintiff's cross motion for summary judgment seeking to vacate the tax foreclosure judgment and to set aside the tax sale based upon lack of notice (see generally *Tref Realty Corp.*, 135 AD2d at 863). For the same reason, however, we conclude that Struble is entitled to summary judgment dismissing the amended complaint against him inasmuch as there is no basis to set aside the City's deed to Struble (see generally *Solomon*, 171 AD2d at 741). We would therefore modify the order accordingly.

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

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KA 07-01694

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ONACIMO BENITEZ-FERNANDEZ, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered June 12, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence to an indeterminate term of incarceration of 5 to 15 years.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). In appeal No. 2, defendant appeals from an order denying his application for resentencing pursuant to CPL 440.46, the 2009 Drug Law Reform Act (DLRA-3).

Addressing first the order in appeal No. 2, we note that, "[w]hen a defendant moves for resentencing under [DLRA-3], the defendant is entitled to be brought before the court and given an opportunity to be heard" (*People v Jenkins*, 86 AD3d 522, 522; see CPL 440.46 [3]; L 2004, ch 738, § 23; *People v Rampino*, 55 AD3d 348, 349). Defendant contends that County Court failed to comply with the statutory mandate that "[t]he court shall . . . bring the applicant before it" (L 2004, ch 738, § 23; see *People v Scarborough*, 88 AD3d 585, 585-586; *Jenkins*, 86 AD3d at 522-523; *People v Moreno*, 58 AD3d 643, 644). It is undisputed that defendant was never before the court on his resentencing motion. The People respond that defendant waived his right to be brought before the court when defense counsel submitted the motion for resentencing on the papers. "There is nothing in the record, however, to support any inference that the defendant was ever

advised of his statutory right to be brought before the court, or that he knowingly, intentionally, and voluntarily chose to relinquish that right" (*Moreno*, 58 AD3d at 644). We nevertheless conclude that defendant failed to preserve his contention for our review (see *People v Murray*, 89 AD3d 567, 568; see generally *People v Williams*, 90 AD3d 1547, 1547-1548). Defense counsel did not object to defendant's absence at oral argument on the motion for resentencing, nor did he object when the court decided the motion in the absence of defendant from the courtroom (see *Murray*, 89 AD3d at 568; cf. *People v Garcia*, 74 AD3d 477, 478). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Although defendant is eligible to apply for resentencing under DLRA-3 (see CPL 440.46 [1]), we conclude that the court "did not abuse its discretion in determining that substantial justice required denial of his application" (*People v Gatewood*, 87 AD3d 825, 826, lv denied 17 NY3d 903; see CPL 440.46 [3]; L 2004, ch 738, § 23; see e.g. *People v Hickman*, 85 AD3d 1057, 1057-1058, lv denied 18 NY3d 859; *People v Wilson*, 85 AD3d 1069, 1069-1070, lv denied 17 NY3d 863). We note in particular that defendant absconded prior to sentencing on the conviction in appeal No. 1, and he remained at liberty for approximately 14 years until he was involuntarily returned on a warrant.

With respect to the judgment in appeal No. 1, we agree with defendant that the sentence is unduly harsh and severe. Thus, as a matter of discretion in the interest of justice (see CPL 470.15 [6] [b]), we modify the judgment by reducing the sentence to an indeterminate term of incarceration of 5 to 15 years.

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

577

KA 10-01856

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ONACIMO BENITEZ-FERNANDEZ, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered July 6, 2010 pursuant to the 2009 Drug Law Reform Act. The order denied defendant's application to be resentenced upon his conviction of criminal sale of a controlled substance in the third degree.

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

Same Memorandum as in *People v Benitez-Fernandez* ([appeal No. 1] ___ AD3d ___ [June 29, 2012]).

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

603

KA 11-00375

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SHAWN G. GRANGER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (KRISTYNA S. MILLS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered May 26, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (two counts), criminal use of drug paraphernalia in the second degree (two counts), driving while ability impaired by drugs, suspended registration, operating a motor vehicle without insurance, speeding (two counts), criminal possession of marihuana in the second degree, reckless driving, leaving the scene of a property damage accident, failure to keep right, criminal possession of a controlled substance in the seventh degree (two counts), and unlawful possession of marihuana (two counts).

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 two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]) and various other drug-related offenses. In appeal No. 2, he appeals from a judgment convicting him upon his guilty plea of, inter alia, criminal possession of a controlled substance in the third degree (§ 220.16 [1]), assault in the second degree (§ 120.05 [3]), and harassment in the second degree (§ 240.26 [1]).

Addressing first appeal No. 2, we note that defendant challenges the sufficiency of the plea allocution with respect to assault in the second degree on the ground that he denied having struck the arresting police officer with his fist, which thereby negated an element of the crime. Because defendant did not move to withdraw his plea or to vacate the judgment of conviction, defendant's contention is unpreserved for our review (see *People v Lopez*, 71 NY2d 662, 665; *People v Jackson*, 90 AD3d 1692, 1693, lv denied 18 NY3d 958). In any

event, although defendant stated during the plea colloquy that he "never struck" the arresting officer, we conclude that County Court made the proper further inquiry in accordance with *Lopez* (71 NY2d at 666) and elicited from defendant an admission that, after intentionally resisting arrest, his body came into contact with the officer's body. Defendant further admitted that, as a result of his struggle with the officer, the officer sustained an injury to his knee that caused him substantial pain or impaired his physical condition. The mere fact that defendant denied having struck the officer is immaterial because intent to cause injury is not an element of assault in the second degree under section 120.05 (3). In addition, we note that the People did not allege that the physical injury sustained by the officer resulted from the punch allegedly thrown by defendant. Although defendant's denial that he punched the officer may have negated an element of harassment in the second degree, defendant does not challenge the sufficiency of his plea to that noncriminal offense.

Defendant contends in both appeals that he was deprived of his right to effective assistance of counsel based upon his attorney's failure to pursue his motions to suppress evidence obtained from his person and his vehicle. To the extent that defendant's contention survives his guilty pleas, i.e., to the extent defendant contends that "his plea[s] were] infected by the alleged ineffective assistance" (*People v Culver*, 94 AD3d 1427, 1427 [internal quotation marks omitted]), we conclude that defendant received meaningful representation. Defense counsel negotiated advantageous plea agreements, and defendant made a strategic decision to accept the plea offers before the court ruled on his suppression motions (see generally *People v Ford*, 86 NY2d 397, 404). Finally, we reject defendant's challenge to the severity of the sentence, particularly in view of the fact that he was eligible to be sentenced as a persistent felony offender and faced consecutive sentences on five separate felony charges.

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

604

KA 11-01566

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SHAWN G. GRANGER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (KRISTYNA S. MILLS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered May 26, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fourth degree, assault in the second degree, resisting arrest, harassment in the second degree, unlawfully fleeing an officer in the third degree, reckless endangerment in the second degree, reckless driving and various other traffic infractions.

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

Same Memorandum as in *People v Granger* ([appeal No. 1] ___ AD3d ___ [June 29, 2012]).

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

609

KA 11-00321

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SHAWN G. GRANGER, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

SHAWN G. GRANGER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered May 26, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance 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 upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1], [12]), defendant contends that his plea was involuntary based on allegedly coercive statements made by County Court during a pretrial conference with respect to defendant's sentencing exposure. Because he did not move to withdraw his plea or to vacate the judgment of conviction on that ground, defendant failed to preserve that contention for our review (*see People v Jackson*, 64 AD3d 1248, 1249, *lv denied* 13 NY3d 745; *People v Lando*, 61 AD3d 1389, *lv denied* 13 NY3d 746), 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]*).

Defendant further contends that the court erred in conducting the *Darden* hearing in camera rather than in open court, and that the police did not timely file the search warrant return with the court, as required by CPL 690.50 (5). By pleading guilty, however, defendant forfeited those contentions. It is well settled that "[a] guilty plea generally results in a forfeiture of the right to appellate review of any nonjurisdictional defects in the proceedings" (*People v Fernandez*,

67 NY2d 686, 688), and defendant's contentions regarding the *Darden* hearing and the search warrant return do not fall within the exception to the general rule set forth in CPL 710.70 (2) for an order "finally denying a motion to suppress evidence" (see generally *People v Petgen*, 55 NY2d 529, 534, rearg denied 57 NY2d 674).

Although defendant's constitutional speedy trial challenge survives his guilty plea (see *People v Blakley*, 34 NY2d 311, 314; *People v Faro*, 83 AD3d 1569, 1569, lv denied 17 NY3d 858), we conclude that it lacks merit. In view of the complex undercover investigation that led to defendant's arrest, the serious nature of the charges and the lack of prejudice to defendant, we conclude that the seven-month delay between defendant's commission of the first crime charged and his arrest and arraignment did not violate his constitutional right to a speedy trial (see *People v Jenkins*, 2 AD3d 1390, 1390-1391; *People v Morobel*, 273 AD2d 871, lv denied 95 NY2d 906; see generally *People v Taranovich*, 37 NY2d 442, 445).

Defendant's contention that he received ineffective assistance of counsel does not survive his guilty plea because "[t]here is no showing that the plea bargaining process was infected by any allegedly ineffective assistance or that defendant entered the plea because of his attorney[']s allegedly poor performance" (*People v Burke*, 256 AD2d 1244, lv denied 93 NY2d 851). In any event, we reject defendant's contention that his attorney was ineffective based solely on his failure to file a demand for a bill of particulars (see generally *People v Ford*, 86 NY2d 397, 404). Indeed, although defendant was eligible for sentencing as a persistent felony offender and faced consecutive sentences on multiple criminal transactions, defense counsel negotiated a favorable plea agreement pursuant to which defendant received concurrent sentences aggregating eight years in prison with three years of postrelease supervision.

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

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

632

KA 10-01368

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BERNARD THOMAS, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Shirley Troutman, J.), rendered May 21, 2010. The judgment convicted defendant, upon a jury verdict, of murder 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 murder in the second degree (Penal Law § 125.25 [1]). We conclude at the outset that Supreme Court properly refused to suppress DNA evidence obtained from defendant and certain statements that defendant made to the police. Contrary to defendant's contention, the DNA evidence was not obtained in violation of his right to counsel. The court properly determined that defendant was not in custody until well after that evidence was obtained (*see generally People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851), and we thus conclude that defendant's waiver of the right to counsel during the interview in which that evidence was obtained was valid (*see People v Davis*, 75 NY2d 517, 522-523; *People v Casey*, 37 AD3d 1113, 1115-1116, *lv denied* 8 NY3d 983). Defendant's further contention that his constitutional rights were violated by the use of the recorded jailhouse telephone conversations between defendant and his mother is not preserved for our review (*see CPL 470.05 [2]*), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*). We conclude, however, that the court erred in refusing to suppress defendant's statements to his wife on the ground that they were subject to the marital privilege (*cf. People v Felton*, 145 AD2d 969, 970, *lv denied* 73 NY2d 1014). The record of the suppression hearing established that those statements were obtained surreptitiously by the police, inasmuch as defendant and his wife were unaware that the police were monitoring their conversation from an adjacent room.

Indeed, the statements were described at trial by the police rather than by defendant's wife. Nevertheless, we conclude that the error is harmless (see generally *People v Crimmins*, 36 NY2d 230).

Defendant further contends that he was denied a fair trial based on various erroneous rulings of the court at trial. Defendant failed to preserve for our review his contention that his constitutional right of confrontation was violated inasmuch as he failed to object to the questioning implicating that right during the prosecutor's cross-examination of him (see generally *People v Dombroff*, 44 AD3d 785, 787, lv denied 9 NY3d 1005), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). Contrary to defendant's further contention, the court's " 'Sandoval compromise . . . reflects a proper exercise of the court's discretion' " (*People v Kelly*, 79 AD3d 1642, 1642, lv denied 16 NY3d 832). Defendant contends that the court erred in denying his request to redact the recording of the jailhouse telephone call between defendant and his mother that was published by the People on rebuttal, in which defendant indicated that he would be willing to serve 10 to 15 years in prison. That contention lacks merit inasmuch as the court subsequently instructed the jury that it could not consider or speculate concerning matters related to sentencing or punishment, and the jury is presumed to have followed the court's instruction (see *People v Davis*, 58 NY2d 1102, 1103-1104; *People v McCullough*, 8 AD3d 1122, 1122-1123, lv denied 3 NY3d 709). Defendant did not preserve for our review his further contention that the court's limiting instruction should have been given when the subject recording was played for the jury (see CPL 470.05 [2]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). We note that the loss of the subject recording does not preclude our review of defendant's present contention because we may glean from the record the relevant information from the recording (see *People v Jackson*, 11 AD3d 928, 930, lv denied 3 NY3d 757; see generally *People v Yavru-Sakuk*, 98 NY2d 56, 60).

Even assuming, arguendo, that the court erred in denying defendant's request for a missing witness charge with respect to two witnesses (see generally *People v Savinon*, 100 NY2d 192, 196-197), we conclude that such error is harmless inasmuch as 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 generally *Crimmins*, 36 NY2d at 241-242). Contrary to defendant's contention, the court properly refused to charge manslaughter in the second degree (Penal Law § 125.15 [1]) as an additional lesser included offense of murder in the second degree (§ 125.25 [1] [intentional murder]) as charged in the indictment. "Although we agree with defendant that manslaughter in the second degree may be a lesser included offense of intentional murder . . ., we conclude that there was no reasonable view of the evidence that would permit the jury to find that defendant committed manslaughter in the second degree but did not commit . . . intentional murder" (*People v Stanford*, 87 AD3d 1367, 1368, lv denied 18 NY3d 886; see also *People v*

Gonzalez, 302 AD2d 870, 871, *affd* 1 NY3d 464).

We also conclude that the court properly denied defendant's motions for a mistrial based on the admission in evidence of defendant's October 28, 1975 statement to the police and the *Miranda* warnings card that defendant initialed in 1975 with respect to that statement. Those exhibits were properly admitted in evidence subsequent to the testimony of a police detective who authenticated the documents (see *Prince, Richardson on Evidence* § 9-103 [b] [Farrell 11th ed]). In addition, the court properly refused to grant defendant's motion for a mistrial based on one of the prosecutor's comments during summation (see *People v Stanton*, 43 AD3d 1299, 1299-1300, *lv denied* 9 NY3d 993). Defendant failed to preserve for our review his further contention that he was deprived of a fair trial based on several other alleged instances of prosecutorial misconduct (see CPL 470.05 [2]; *People v Rumph*, 93 AD3d 1346, 1347; *People v Valez*, 256 AD2d 135, *lv denied* 93 NY2d 879). In any event, " 'any alleged [prosecutorial] misconduct was not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Szyzskowski*, 89 AD3d 1501, 1503). The contention of defendant that he was denied a fair trial by the court's failure to submit to the jury the issue of the voluntariness of his statements to the police is also not preserved for our review inasmuch as defendant did not request that relief at trial, and we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (see *People v Torres*, 205 AD2d 350, 350-351, *lv denied* 84 NY2d 873). There is no merit to defendant's further contention that the court erred in denying his motion for a trial order of dismissal with respect to the felony murder counts, of which he was acquitted. Defendant speculates that the alleged error "may well have led to a compromise verdict," but "[a] compromise verdict is not a ground for reversal provided the verdict is not repugnant" (*People v Fontanez*, 254 AD2d 762, 765, *lv denied* 93 NY2d 852 [internal quotation marks omitted]), and defendant does not contend that the verdict is repugnant.

Defendant waived his contention that the court erred in discharging a sworn juror at trial by consenting to such discharge (see *People v Barner*, 30 AD3d 1091, 1092, *lv denied* 7 NY3d 809; *cf. People v Noguel*, 93 AD3d 1319, 1320; see also *People v Davis*, 83 AD3d 860, 861; see generally *People v Colon*, 90 NY2d 824, 826). Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we reject defendant's contention that he was denied effective assistance of counsel (see generally *People v Baldi*, 54 NY2d 137, 147). Defendant's challenge to the legal sufficiency of the evidence is not preserved for our review because he failed to renew his motion for a trial order of dismissal after presenting evidence (see *People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that challenge lacks merit. Viewing the evidence in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621), "we conclude that defendant's intent to kill the victim was inferable from his conduct" (*People v Lewis*, 93 AD3d 1264, 1267; see *People v Geddes*, 49 AD3d 1255, 1255-

1256, *lv denied* 10 NY3d 863; *cf. Gonzalez*, 302 AD2d at 871). In addition, 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 further 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: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

653

KA 10-00800

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ISAIAH MCCOY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered March 17, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by vacating the forfeiture of \$5,000 and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon his guilty plea of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]), defendant contends that County Court erred in allowing the People to condition their plea offer upon his ability to provide \$5,000 in forfeiture funds for the City of Geneva Police Department. We agree, and we therefore modify the judgment accordingly.

Defendant was arrested after he sold cocaine to a police informant for \$80. The sale was observed by an undercover officer who provided the informant with the buy money, and the police pulled over defendant's vehicle as he was driving away from the apartment where the sale occurred. Before pulling over his vehicle, defendant threw cocaine out the window. The police recovered that cocaine and charged defendant with both the sale and possession of a controlled substance.

Prior to defendant's entry of a plea to counts one and two of the indictment in satisfaction of the remaining counts, the prosecutor stated the terms of the plea offer on the record. With respect to sentencing, the prosecutor stated that, if defendant "could come up

with \$5,000 in cash that he would forfeit," he would be sentenced as a second felony offender to concurrent terms of five years in prison and three years of postrelease supervision. The prosecutor further stated, "If he does not come up with the \$5,000 cash," or if he failed to appear for sentencing or was re-arrested, "then all bets would be off and [the court] might be inclined to give him 10 years in prison." Defendant was also asked to forfeit the vehicle he was driving when he was arrested. The court then asked defendant whether he wished to accept the plea offer, and defendant responded in the affirmative. Before accepting the plea, the court noted that defendant's aunt had posted \$5,000 in cash for defendant's bail, and inquired whether that "might be the source of the funds" to be forfeited. "That's possible," defense counsel answered, "and if it is, I'll prepare the necessary paperwork to have that happen." Defendant proceeded to plead guilty.

At sentencing, the bailor signed over the bail money to the Geneva Police Department, and defendant executed a "Waiver and Assignment" form (waiver form). In the waiver form, defendant acknowledged that he may become liable for the forfeiture of \$5,000 and his vehicle due to his "action," and stated that, to avoid a lawsuit filed against him pursuant to CPLR article 13, he agreed to forfeit \$5,000 and his vehicle to the Geneva Police Department. Defendant also agreed in the waiver form to waive his right to challenge the forfeiture on appeal or in a collateral proceeding.

Before imposing the agreed-upon sentence, the court expressed its appreciation to defendant for making amends for his crime "by making restitution, the waivers, so forth." The court was apparently referring to the forfeiture, inasmuch as the People did not request restitution and defendant did not agree to pay it. According to the presentence report, the only request for restitution came from the arresting officer, who sought the return of the \$80 obtained by defendant from the informant in the controlled drug transaction. Nevertheless, the certificate of conviction states that defendant was ordered to pay restitution of \$5,000. On appeal, defendant asks us to vacate the forfeiture of funds. He does not challenge the forfeiture of his vehicle.

As a preliminary matter, we note that no order or judgment of forfeiture was issued by the court. In addition, there is no indication in the record that the People filed the waiver form with the clerk of the court along with "an affidavit from the claiming authority that written notice of the stipulation or settlement agreement, including the terms of such," was given to the office of victim services, the state division of criminal justice services and the state division of substance abuse services, as required by CPLR 1311 (11) (a). It thus does not appear that the People complied with the civil forfeiture procedures set forth in CPLR article 13-A, nor did the People comply with the criminal forfeiture procedures set forth in Penal Law article 480.

Apart from the procedural irregularities, however, is the absence of any apparent nexus between defendant's crimes and the forfeited

funds. Pursuant to CPLR article 13-A, a district attorney or attorney general, as "the appropriate claiming authorit[ies]," may recover from a criminal defendant money or property that constitutes the proceeds, substituted proceeds, or an instrumentality of a crime or the real property instrumentality of a crime (CPLR 1311 [1]; see *Kuriansky v Bed-Stuy Health Care Corp.*, 135 AD2d 160, 164, *affd* 73 NY2d 875; *Hynes v Iadarola*, 221 AD2d 131, 133-134; see also Penal Law § 480.05 [1]). Under CPLR 1311 (1) (a), the proceeds of "criminal activity arising from a common scheme or plan of which [the defendant's criminal] conviction is a part" are also subject to forfeiture (CPLR 1311 [1] [a]). "CPLR article 13-A is based on the 'fundamental equitable principle' . . . that '[n]o one shall be permitted to profit by [that person's] own fraud, or to take advantage of [that person's] own wrong, or to found any claim upon [that person's] own iniquity, or to acquire property by [that person's] own crime' " (*Hynes*, 221 AD2d at 133-134).

Here, the forfeited funds were not the proceeds of the crimes with which defendant was charged, nor is there any indication that the funds were derived from uncharged criminal activity in which defendant engaged. Defendant did not possess the funds when he was arrested and, in fact, it appears from the record that the forfeited funds did not belong to him but to the person who posted bail on his behalf. Notably, the People do not contend otherwise. Rather, they rely solely on the waiver form, contending that defendant thereby waived his right to appeal with respect to the forfeiture. We reject that contention. In our view, it cannot be said that defendant voluntarily signed the waiver form given that the People, with the court's imprimatur, essentially threatened to double his sentence if he failed to do so. We thus conclude that the waiver of the right to challenge the forfeiture on appeal is invalid (see generally *People v Lopez*, 6 NY3d 248, 256).

With respect to the merits, we conclude under the circumstances of this case that the forfeiture should be vacated and the funds returned to the bailor. The conditioning of defendant's sentence upon his ability to procure funds for forfeiture creates an unacceptable appearance of impropriety, i.e., that funds were extorted from defendant or the person who posted his bail by threatening defendant with a more severe sentence. It may also appear that defendant was allowed to "buy" a more lenient sentence by donating money to the local police department.

We recognize that forfeiture may be a lawful component of a negotiated plea agreement under certain circumstances not present here (see *People v Abruzzese*, 30 AD3d 219, *lv denied* 7 NY3d 784; *People v Szczepankowski*, 293 AD2d 212, *lv denied* 99 NY2d 564). In *Abruzzese* and *Szczepankowski*, however, the money forfeited was seized from the defendants when they were arrested. Here, as noted, the forfeited funds have no apparent relation to defendant's crimes, which in turn gives rise to the aforementioned appearance of impropriety. We therefore vacate the forfeiture, without prejudice to the People's commencement of an action for forfeiture pursuant to CPLR article 13-A within the applicable statute of limitations (see CPLR 1311 [1]).

Finally, we reject defendant's remaining contention that the sentence is unduly harsh or severe.

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

660

CAF 12-00090

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

IN THE MATTER OF CHARLENE H. FULLER,
PETITIONER-RESPONDENT,

V

ORDER

WILLIAM H. WALKER, RESPONDENT-RESPONDENT.

MICHELE E. DETRAGLIA, ESQ., ATTORNEY FOR
THE CHILD, APPELLANT.

MICHELE E. DETRAGLIA, ATTORNEY FOR THE CHILD, UTICA, APPELLANT PRO SE.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered August 9, 2011 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that the parties have split custody of the subject child.

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

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

751

KA 11-01209

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES A. MASKAL, JR., 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 (Matthew J. Murphy, III, J.), rendered May 27, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted disseminating indecent material to minors in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted disseminating indecent material to minors in the first degree (Penal Law §§ 110.00, 235.22). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (see generally *People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (see *id.* at 255; see generally *People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

782

CA 11-02291

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

WINIFRED K. DAY, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ONE BEACON INSURANCE, DEFENDANT-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (DAN D. KOHANE OF COUNSEL), FOR
DEFENDANT-APPELLANT.

BRIAN P. FITZGERALD, P.C., BUFFALO (BRIAN P. FITZGERALD OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered July 29, 2011 in a breach of contract action. The order, insofar as appealed from, granted plaintiff's motion to dismiss defendant's first through fifth affirmative defenses and denied defendant's cross motion for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiff commenced this breach of contract action seeking supplementary underinsured motorist (SUM) coverage under an automobile insurance policy issued by defendant. Plaintiff was a passenger in a Ford Windstar van driven by her husband that collided with a pickup truck that had failed to yield the right-of-way at an intersection. Upon impact, plaintiff's car seat detached from the floor of the minivan and plaintiff became airborne as the vehicle spun out of control. She allegedly sustained severe and permanent injuries as a result of the accident. The driver of the pickup truck (motorist tortfeasor) had liability coverage of \$100,000. The minivan in which plaintiff was riding was insured by defendant pursuant to a policy with plaintiff and her husband, with SUM coverage of \$500,000. Plaintiff timely placed defendant on notice of her potential SUM claim, and commenced the underlying personal injury action against, inter alia, the motorist tortfeasor, sounding in negligence, and against Ford Motor Company (Ford), sounding in strict products liability. Following mediation, the motorist tortfeasor's insurer offered to settle for the policy limits of \$100,000, and Ford, which was self-insured, offered to settle for \$475,000.

In the meantime, plaintiff commenced the instant action, which the parties had agreed to hold in abeyance pending settlement discussions in the underlying action. Upon learning of plaintiff's potential settlement with the motorist tortfeasor and Ford, defendant wrote to plaintiff and her attorney "to remind" plaintiff that, pursuant to the release or advance and subrogation protection conditions of the SUM endorsement, settlement of plaintiff's claims against the motorist tortfeasor and Ford without defendant's consent would vitiate plaintiff's right to SUM coverage. Shortly thereafter, plaintiff formally notified defendant of the settlement offers and stated that she intended to accept the offers unless defendant advanced the full amount of the settlement offers, i.e., \$575,000, within 30 days. Defendant responded that, pursuant to the release or advance condition of the SUM endorsement, it was obligated to advance only the \$100,000 limit of the motorist tortfeasor's policy and that, pursuant to the release or advance and subrogation conditions of that endorsement, plaintiff could not thereafter settle her action against the motorist tortfeasor. Defendant further responded that those conditions further prohibited plaintiff from settling her action against Ford without defendant's consent, which it refused to provide. After its initial response to plaintiff, defendant repeatedly offered to advance the \$100,000 limit of the motorist tortfeasor's policy, but plaintiff rejected those offers and proceeded to settle her underlying action against the motorist tortfeasor and Ford for \$100,000 and \$475,000, respectively, issuing general releases to both parties.

Plaintiff then pursued this action seeking, inter alia, \$400,000 in SUM coverage from defendant, and she thereafter moved to dismiss defendant's affirmative defenses of failure to satisfy the release or advance and subrogation provisions of the SUM endorsement. Defendant cross-moved for summary judgment dismissing the amended complaint. We agree with defendant that Supreme Court erred in denying its cross motion.

Exclusion 1 of the SUM endorsement provides that, except as provided by Condition 10, "if [an] insured . . . without [defendant's] written consent, settles any lawsuit against any person or organization that may be legally liable for such injury," coverage is excluded. Condition 10, the standard "release or advance" condition, provides that "[i]n accidents involving the insured and one or more negligent parties, if such insured settles with any such party for the available limit of the motor vehicle bodily injury liability coverage of such party, release may be executed with such party after thirty calendar days actual written notice to [defendant], unless within this time period [defendant] agree[s] to advance such settlement amounts to the insured in return for the cooperation of the insured in [defendant's] lawsuit on behalf of the insured . . . An insured shall not otherwise settle with any negligent party, without [defendant's] written consent, such that [defendant's] rights would be impaired."

Finally, Condition 13, the standard subrogation provision of the policy, provides that, where defendant makes a payment under the SUM endorsement, it has "the right to recover the amount of this payment from any person legally responsible for the bodily injury or loss of

the person to whom, or for whose benefit, such payment was made to the extent of the payment." It further provides that "[t]he insured . . . must do whatever is necessary to transfer this right of recovery to [defendant]. Except as permitted by Condition 10, such person shall do nothing to prejudice this right."

Here, we conclude that plaintiff violated Conditions 10 and 13 by settling with the motorist tortfeasor without defendant's consent. Pursuant to Condition 10, defendant was obligated either to consent to the settlement with the motorist tortfeasor or to advance the \$100,000 settlement funds offered by that tortfeasor's insurer. That release or advance condition, however, applies only to settlements "for the available limit of the motor vehicle bodily injury liability coverage of such party," and therefore does not apply to the settlement offer by Ford, which was not based upon a motor vehicle bodily injury policy. Thus, defendant satisfied its obligation to plaintiff under Condition 10 by offering to advance the \$100,000 offered by the motorist tortfeasor (*see generally Matter of Central Mut. Ins. Co. [Bemiss]*, 12 NY3d 648, 654-655) and was not obligated to advance the \$475,000 offered by Ford, as plaintiff had demanded.

We further conclude that plaintiff violated Conditions 10 and 13 by settling with Ford without defendant's written consent. Condition 10 provides that plaintiff "shall not otherwise settle with *any negligent party*, without [defendant's] written consent" (emphasis added). Similarly, Condition 13 gives the SUM carrier the subrogation right to recover a SUM payment from "*any person legally responsible for the bodily injury or loss*" (emphasis added). Thus, although defendant was not obligated to advance the settlement offer made by Ford, Ford was nevertheless "legally responsible" for plaintiff's injuries, and defendant therefore had subrogation rights against Ford to the extent that its SUM payments represented payment for injuries for which Ford was legally responsible.

We reject plaintiff's contention that the last sentence of Condition 10, which provides that the insured "shall not otherwise settle with any negligent party, without [defendant's] written consent," applies only to motorist tortfeasors, not to settlement with non-motorists such as Ford. The provision on its face plainly refers to settlements with "any negligent party," and does not refer merely to motorist tortfeasors. We thus reject plaintiff's "strained, unnatural and unreasonable" interpretation of that policy condition (*Progressive Northeastern Ins. Co. v State Farm Ins. Cos.*, 81 AD3d 1376, 1378, *appeal dismissed* 16 NY3d 891, *lv dismissed* 17 NY3d 849; *see Central Mut. Ins. Co.*, 12 NY3d at 658-659). Plaintiff's interpretation would require the replacement of the word "motorist" for "party" in the last sentence of Condition 10, such that the phrase would read "negligent motorist" rather than "negligent party." Had the sentence been intended to read in the manner suggested by plaintiff, it would have been easy enough to phrase it that way.

We thus conclude that, by settling with Ford and the motorist tortfeasor in violation of Conditions 10 and 13, plaintiff prejudiced defendant's subrogation rights and thereby vitiated her right to SUM

coverage (*see Weinberg v Transamerica Ins. Co.*, 62 NY2d 379, 381-382).
In view of our determination, we need not address the parties'
remaining contentions.

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

801

CAF 11-01701

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

IN THE MATTER OF MELISSA A. FLINT,
PETITIONER-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

ANDREW L. ELY, RESPONDENT-PETITIONER-RESPONDENT.

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

DAVID C. BRAUTIGAM, ATTORNEY FOR THE CHILD, HOUGHTON, FOR DYLAN E.

Appeal from an order of the Family Court, Allegany County (Terrence M. Parker, J.), entered July 29, 2011 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded respondent-petitioner primary physical custody of the subject child.

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

Memorandum: Petitioner-respondent mother appeals from an order that, following a hearing, modified the prior custody order pursuant to which the parties had shared physical custody of their child and awarded primary physical custody of the child to respondent-petitioner father and visitation to the mother. The parties agreed that a change in circumstances was created by virtue of the fact that the child had reached the age where he was attending school, rendering the existing shared physical custody arrangement impractical, and thus we need only address whether it was in the child's best interests to award primary physical custody to the father (*see Matter of Dubuque v Bremiller*, 79 AD3d 1743, 1744). Contrary to the mother's contention, Family Court properly determined that awarding primary physical custody of the child to the father was in the child's best interests. " 'Generally, a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record' " (*id.*). Here, the court's determination that both parties are fit and loving parents but that the father is better able to provide for the child's needs is supported by the requisite " 'sound and substantial basis in

the record' " and thus will not be disturbed (*id.*).

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

803

CAF 11-01577

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

IN THE MATTER OF LINDA M. ALLEN,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

SUSAN FIEDLER, RESPONDENT-APPELLANT.

LOTEMPPIO & BROWN, P.C., BUFFALO (TERRI L. LOTEMPPIO OF COUNSEL), FOR
RESPONDENT-APPELLANT.

MICHAEL J. SULLIVAN, FREDONIA, FOR PETITIONER-RESPONDENT.

RICHARD L. SOTIR, JR., ATTORNEY FOR THE CHILD, JAMESTOWN, FOR OLIVIA
M.A.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered August 9, 2011 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, denied the motion of respondent to vacate a stipulation dated June 2, 2011 and a related order entered June 24, 2011.

It is hereby ORDERED that said proceeding is unanimously dismissed on the law without costs, and all orders entered therein are vacated in accordance with the following Memorandum: Petitioner, the subject child's maternal aunt, commenced this proceeding seeking to "modify" a prior order of custody and visitation by awarding her sole custody of the subject child. On the scheduled trial date, respondent, a non-relative and the legal guardian of the child, and petitioner entered into a stipulation transferring custody of the child to petitioner. Family Court approved that stipulation and entered an order granting petitioner sole custody and physical placement of the child (modification order). Thereafter, respondent moved to vacate the stipulation and modification order and to transfer this proceeding to Surrogate's Court. Respondent appeals from the order that, among other things, denied respondent's motion. On appeal, respondent contends, inter alia, that Family Court lacked jurisdiction to entertain the petition. We agree. We conclude that the proceeding must be dismissed because Family Court lacked jurisdiction ab initio and all orders entered therein must be vacated.

As background, we note that the child's parents are both deceased. From the child's birth until her mother's death in August 2008, the child resided with the mother. After the mother's death, petitioner and the father filed petitions seeking custody of the

child. Family Court issued an order (prior custody order) awarding custody to the father and visitation to petitioner subject to various conditions. Thereafter, the father's health began to deteriorate. In October 2009, the father designated respondent, a family friend, as standby guardian of the child in the event of the father's physical or mental incapacitation or death and, in January 2010, the father executed a last will and testament naming respondent as the child's guardian.

In March 2010, the child began residing with respondent as a result of the father's declining health. By decree issued in May 2010, Surrogate's Court granted letters of guardianship to respondent, appointing her guardian of the child. The letters of guardianship "authorize and empower [respondent] . . . to perform all acts requisite to the proper administration and disposition of the person . . . of the [child] in accordance with the decree and the laws of New York State." The father passed away in August 2010.

Petitioner thereafter commenced this proceeding in Family Court seeking to "modify" the prior custody order on the ground that the father's death constituted a change of circumstances. The parties entered into a stipulation transferring custody of the child to petitioner, and entitling respondent to one week of visitation with the child each year and telephone contact twice per month. After Family Court entered the modification order based upon that stipulation, respondent moved to vacate the stipulation and modification order on the grounds of duress, unconscionability, ineffective assistance of counsel, and the best interests of the child and to transfer the matter to Surrogate's Court because that court had previously appointed her as the child's guardian. Family Court denied respondent's motion, and this appeal ensued.

Both Family Court and Surrogate's Court are courts of limited jurisdiction, with concurrent jurisdiction in certain areas and exclusive jurisdiction in other areas (see *Matter of Aleksander K. v Elena K.*, 2 Misc 3d 1005[A], 2004 NY Slip Op 50156[U], *8; *Matter of Rita N.*, 122 Misc 2d 1, 3; *Matter of Eden M. v Ines R.*, 97 Misc 2d 256, 257; see also Family Ct Act § 115). "Neither court is superior to the other and neither court's order[s] take[] priority over the other's" (*Aleksander K.*, 2004 NY Slip Op 50156[U], *8). Family Court and Surrogate's Court share concurrent jurisdiction over the guardianship of minors (see *Matter of Fuss v Niceforo*, 244 AD2d 858, 858-859; *Matter of Kummer*, 93 AD2d 135, 168), although only Surrogate's Court can appoint a guardian of both the person and the property of the child (see SCPA 1701; Family Ct Act § 661; *Baker v Bronx Lebanon Hosp. Ctr.*, 53 AD3d 21, 24).

Where courts have concurrent jurisdiction, "the seemingly administration of the law demands that their orders do not conflict" (*Matter of Lee*, 220 NY 532, 539, *rearg denied* 221 NY 542). Thus, "[i]t is well established that, when two courts have concurrent subject matter jurisdiction, once one has exercised jurisdiction in the matter, it should not be entertained by the other" (*Matter of Walsh*, 128 Misc 2d 694, 694; see *Colson v Pelgram*, 259 NY 370, 375).

Here, in October 2009, the father, the child's only living parent and legal custodian, commenced proceedings in Surrogate's Court to designate respondent as the child's standby guardian in the event of his physical incapacitation or death. SCPA 103 (24) defines "[g]uardian" as "[a]ny person to whom letters of guardianship have been issued by a court of this state, pursuant to this act, the family court act or article 81 of the mental hygiene law." "[L]etters granted by the [Surrogate] are conclusive evidence of the authority of the persons to whom they are granted until the decree granting them is reversed or modified upon appeal or the letters are suspended, modified or revoked by the [Surrogate] granting them" (SCPA 703 [1]). Thus, once Surrogate's Court issued letters of guardianship to respondent in May 2010, she became the child's legal guardian.

Five months after the issuance of the letters of guardianship, petitioner commenced this custody proceeding. While guardianship and custody are separate concepts, "[c]ustody decrees and those appointing a legal guardian of the person create the same sort of relationship between the child . . . and the person to whose care he [or she] is awarded" (Restatement [Second] of Conflict of Laws, § 79 Custody of the Person, Comment *d*). Indeed, in amending the provisions of the Family Court Act and the SCPA in 2008 concerning the legal powers of custodians and guardians of children, the Legislature stated that "there is no substantive difference between the rights and responsibilities of a custodian or guardian of a child" (Assembly Mem in Support, Bill Jacket, L 2008, ch 404). Thus, "[t]he general rule is that guardianship of the person of an infant implies the custody and control of the person of an infant" (*Matter of Yardum*, 228 App Div 854, 855; see *Matter of Thoemmes*, 238 App Div 541, 452; *Matter of Alana M.*, 34 Misc 3d 1202[A], 2011 NY Slip Op 52321[U], *9; see also Family Ct Act § 657 [c]).

We conclude that Family Court erred in ignoring the letters of guardianship and the prior decree of Surrogate's Court, and in entertaining the petition inasmuch as Family Court lacked jurisdiction from the outset. Nothing in the Family Court Act permits Family Court to amend or supersede an order of Surrogate's Court, which is in essence what Family Court did when it awarded custody of the child to petitioner despite the letters of guardianship appointing respondent as the child's guardian. SCPA 701 (3) specifically provides that "[n]o court except the court which issues letters [of guardianship] shall have power to suspend, modify or revoke them, so long as the court issuing them has jurisdiction of the estate or matter in which the letters were issued." Family Court therefore lacked authority to act as it did, by in effect revoking the letters of guardianship granted to respondent. Indeed, petitioner should have pursued the matter in Surrogate's Court (see *Fuss*, 244 AD2d at 858-859; *Rita N.*, 122 Misc 2d 1; cf. *Yardum*, 228 App Div at 855).

We further note that, aside from general principles of comity and the first-in-time rule (see *Colson*, 259 NY at 375), Surrogate's Court is the proper forum in which to determine the custody and guardianship of the child in light of the father's designation of respondent as the

child's guardian in his will (see SCPA 1701). A court "cannot disregard the testamentary provisions for guardianship, unless the welfare of the child[] demands it" (*Matter of Lewis's Will*, 74 NYS2d 865, 867; see *Matter of Sapanara*, 89 Misc 2d 956, 960). Although the father's will had not been submitted to probate prior to commencement of this proceeding, the will was subsequently filed with Surrogate's Court and a probate petition was pending when respondent moved to vacate the modification order.

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

805

CA 11-02566

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

BONN, SHORTSLEEVE & RAY, LLP, KENNETH BONN, JR.,
MICHAEL S. RAY AND JOSEPH P. DIOGUARDI, JR.,
PLAINTIFFS-RESPONDENTS,

V

ORDER

TIMOTHY S. SHORTSLEEVE, DEFENDANT-APPELLANT.

UNDERBERG & KESSLER LLP, ROCHESTER (COLIN D. RAMSEY OF COUNSEL), FOR
DEFENDANT-APPELLANT.

HARRIS, CHESWORTH, O'BRIEN, JOHNSTONE & WELCH, LLP, ROCHESTER (KAREN
R. SANDERS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered October 28, 2011 in a breach of contract action. The order denied the motion of defendant to disqualify counsel for plaintiffs and granted the cross motion of plaintiffs for partial summary judgment dismissing defendant's breach of contract counterclaim.

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

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

808

CA 11-01863

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

MARCIA G. BRYNDLE, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

JOSEPH J. KNAB, DEFENDANT-APPELLANT,
AND THOMAS E. KNAPP, DEFENDANT-RESPONDENT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (DANIEL J. GURASCI OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM K. MATTAR, P.C., WILLIAMSVILLE (APRIL J. ORLOWSKI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AMANDA L. MACHACEK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered April 18, 2011 in a personal injury action. The order, among other things, granted the motion of defendant Thomas E. Knapp for summary judgment seeking dismissal of the complaint against him.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the vehicle driven by defendant Joseph J. Knab rear-ended the vehicle driven by plaintiff, causing plaintiff's vehicle to make contact with the vehicle driven by defendant Thomas E. Knapp. At the time of the accident, plaintiff was attempting to turn into a driveway that served as the entrance and exit to a parking lot. Knapp was attempting to exit the parking lot using the same driveway. According to plaintiff, she was unable to turn into the driveway because Knapp's vehicle was in the center of the driveway, whereupon the vehicle driven by Knab rear-ended plaintiff's vehicle while plaintiff was either coasting or had fully stopped.

We conclude that Supreme Court properly granted the motion of Knapp for summary judgment seeking, inter alia, dismissal of the complaint against him, but our reasoning differs from that of the court. Knapp established as a matter of law that he was not negligent, and both plaintiff and Knab failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557,

562). "The fact that [Knapp] positioned his motor vehicle in the middle of the driveway does not raise a triable issue of fact as to whether the accident was caused by negligence on his part" (*Bous v Fahey*, 250 AD2d 638).

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

813

TP 11-02388

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

IN THE MATTER OF ROBERT CUMBERLAND, PETITIONER,

V

ORDER

HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT.

ROBERT CUMBERLAND, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Thomas G. Leone, A.J.], entered November 17, 2011) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated an inmate rule.

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

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

814

KA 11-01344

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TIMOTHY D. WOOTEN, 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 Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered June 28, 2011. The judgment convicted defendant, upon his plea of guilty, of assault in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the third degree (Penal Law § 120.00 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

816

KA 11-01653

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

GEORGE L. STEWART, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered July 15, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree and criminal mischief in the fourth degree.

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

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

817

KA 09-01853

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CARL GOOSSENS, DEFENDANT-APPELLANT.

JOHN E. TYO, SHORTSVILLE, FOR DEFENDANT-APPELLANT.

RONALD A. CICORIA, ACTING DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered April 22, 2008. The judgment convicted defendant, upon a jury verdict, of endangering the welfare of a child (two counts) and unlawfully dealing with a child in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of two counts each of endangering the welfare of a child (Penal Law § 260.10 [1]), and unlawfully dealing with a child in the first degree (§ 260.20 [2]). Contrary to defendant's contention, County Court properly exercised its discretion in denying his motion for new assigned counsel on the morning of the commencement of trial inasmuch as there was no showing of good cause for substitution of counsel (*see People v Porto*, 16 NY3d 93, 100; *People v Linares*, 2 NY3d 507, 511; *People v Singletary*, 63 AD3d 1654, *lv denied* 13 NY3d 839). Defendant's oral request raised the same concerns raised by defendant in a prior motion for new assigned counsel, i.e., that defense counsel recommended that he accept a plea offer and that defense counsel would not provide meaningful representation at trial. That prior motion had been granted by the court with respect to the first attorney assigned in the case.

"In determining whether good cause exists, a trial court must consider the timing of the defendant's request, its effect on the progress of the case and whether present counsel will likely provide the defendant with meaningful assistance" (*Linares*, 2 NY3d at 510). The record establishes that there was no good cause for substitution of counsel here. Defendant had made similar requests for new assigned counsel both in this matter and in others of which the court was aware; the trial would be delayed if the request was granted; defense

counsel had actively participated in conferences and a pretrial hearing and set forth his efforts to prepare a defense for trial; and, "[t]o the extent defendant's relationship with counsel soured with the approach of trial, the fault lies wholly with defendant" (*id.* at 511). In addition, although defense counsel initially stated that the attorney/client relationship was irretrievably broken based upon defendant's request for new counsel and the difficulty he had in communicating with defendant, upon further "diligent and thorough" inquiry by the court, counsel implicitly stated that he would provide meaningful representation at trial (*id.*; *cf. People v Sides*, 75 NY2d 822, 824-825). "Substitution of counsel is an instrument designed to remedy meaningful impairments to effective representation, not to reward truculence with delay" (*Linares*, 2 NY3d at 512).

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

818

KA 09-02177

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOHN KELLY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Onondaga County Court (Anthony F. Aloï, J.), rendered October 1, 2009. Defendant was resentenced upon his conviction of assault in the second degree.

It is hereby ORDERED that the resentence so appealed from is unanimously reversed on the law, the original sentence is reinstated and the matter is remitted to Onondaga County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a resentence pursuant to which, following a hearing, County Court sentenced him to a five-year period of postrelease supervision. As the People correctly concede, the court erred in imposing a period of postrelease supervision after defendant had been conditionally released from the previously imposed determinate sentence of incarceration. Inasmuch as he had been released from custody, defendant had "a legitimate expectation that the sentence, although illegal under the Penal Law, [was] final and the Double Jeopardy Clause prevents a court from modifying the sentence to include a period of postrelease supervision" (*People v Williams*, 14 NY3d 198, 219-220, cert denied ___ US ___, 131 S Ct 125; see *People v Viehdeffer*, 75 AD3d 1112, 1113).

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

819

KA 10-02063

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MARQUEZ MACK, 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 (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered June 4, 2010. The judgment convicted defendant, upon his plea of guilty, of robbery 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 robbery in the second degree (Penal Law § 160.10 [2] [b]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to County Court's suppression ruling (*see People v Kemp*, 94 NY2d 831, 833; *People v Velardi*, 93 AD3d 1238, 1239). The waiver also encompasses defendant's challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

820

KA 10-01431

PRESENT: SCUDDER, P.J., CARNI, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSEPH G. SHAFFNER, DEFENDANT-APPELLANT.

DOMINIC PAUL CANDINO, BUFFALO, FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.), rendered January 13, 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 affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [2]). Upon "considering all the relevant facts and circumstances surrounding [defendant's] waiver" of the right to appeal, we agree with defendant that the record fails to demonstrate that the waiver was knowingly, intelligently and voluntarily entered (*People v Seaberg*, 74 NY2d 1, 11; see *People v Lopez*, 6 NY3d 248, 256). Thus, we consider the merits of his challenge to the severity of the sentence (*cf. Lopez*, 6 NY3d at 255). Contrary to defendant's contention, however, the sentence is not rendered unduly harsh or severe by the fact that his codefendant received a lesser sentence (see *People v Whitehead*, 49 AD3d 1242), or by the fact that defendant was offered a lesser sentence as part of an earlier plea bargain. The sentence otherwise is not unduly harsh or severe. To the extent that defendant's contention that he was denied effective assistance of counsel at sentencing survives his guilty plea, we conclude that it lacks merit (see *People v LaCroce*, 83 AD3d 1388, 1388, lv denied 17 NY3d 807). Defendant "receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404).

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

821

KAH 11-02006

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
CHARLES JACKSON, ALSO KNOWN AS HASAN RAQIYB,
PETITIONER-APPELLANT,

V

ORDER

ROBERT A. KIRKPATRICK, SUPERINTENDENT, WENDE
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

Appeal from a judgment (denominated order) of the Supreme Court,
Erie County (Russell P. Buscaglia, A.J.), entered July 13, 2011 in a
habeas corpus proceeding. The judgment denied the petition.

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

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

824

KA 11-01633

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

LAMONT C. WASHINGTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (William J. Watson, A.J.), rendered April 27, 2011. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

825

KA 11-00845

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WEYMAN TINCH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered January 25, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

826

KA 11-01823

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

STANLEY L. HOWARD, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a resentence of the Cayuga County Court (Thomas G. Leone, J.), rendered June 30, 2011. Defendant was resented upon his conviction of robbery in the first degree (three counts), criminal possession of a weapon in the second degree and criminal possession of stolen property in the fifth degree.

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

Memorandum: Defendant was convicted following a jury trial of three counts of robbery in the first degree (Penal Law § 160.15 [2] - [4]), and one count each of criminal possession of a weapon in the second degree (§ 265.03 [former (2)]), and criminal possession of stolen property in the fifth degree (§ 165.40), and he appeals from a resentence with respect to those convictions. County Court (Corning, J.) originally sentenced defendant as a second felony offender to determinate concurrent terms of imprisonment, the longest of which was 15 years, but failed to impose periods of postrelease supervision (PRS) for the determinate terms as required by Penal Law § 70.45 (1). To remedy that error (see Correction Law § 601-d), County Court (Leone, J.) later resented defendant to the same terms of imprisonment with corresponding periods of PRS.

Because defendant was still serving his original sentence at the time he was resented, we reject his contention that the resentence violated his rights under the Double Jeopardy Clause of the Fifth Amendment (see *People v Lingle*, 16 NY3d 621, 630-631; *People v Nunes*, 89 AD3d 1559, 1560, *lv denied* 18 NY3d 885; cf. *People v Williams*, 14 NY3d 198, 217-220, *cert denied* ___ US ___, 131 S Ct 125; *People v Kelly*, ___ AD3d ___ [June 29, 2012]). We likewise reject defendant's contention that there was a violation of CPL 380.30 based on the delay

between his original sentencing and his resentencing that deprived County Court (Leone, J.) of its jurisdiction to resentence him. Where, as here, the "defendant[] w[as] resented within a reasonable time after [the Department of Correctional Services] notified the court[] that" he qualified as a " 'designated person[]" under Correction Law § 601-d," there is no violation of CPL 380.30 (*Williams*, 14 NY3d at 213).

Although defendant's further contention that the court failed to resentence him within the time limits set forth in Correction Law § 601-d (4) (a) and (c) is factually correct, it is well settled that such failures do not provide a basis for reversal (see *People v Savery*, 90 AD3d 1505, 1505, lv denied 18 NY3d 928; *People v Becker*, 72 AD3d 1290, 1291, lv denied 15 NY3d 747; *People v Thomas*, 68 AD3d 514, 515). Finally, we reject defendant's contention that the sentence imposed, with the addition of terms of PRS, constituted cruel and unusual punishment. The court was statutorily mandated to impose five-year terms of PRS as to defendant's convictions of robbery and criminal possession of a weapon (see Penal Law § 70.06 [former (6)]; § 70.45 [former (1)], [former (2)]), and it cannot be said that those terms were " 'grossly disproportionate to the crime[s]' " (*People v Holmquist*, 5 AD3d 1041, 1042, lv denied 2 NY3d 800; see *People v Wright*, 85 AD3d 1642, 1644, lv denied 17 NY3d 863). We have considered defendant's remaining contentions and conclude that they are without merit.

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

828

KA 11-01475

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GERARD J. RYAN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Niagara County Court (Sara S. Sperrazza, J.), entered July 7, 2011. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court's upward departure from his presumptive classification as a level two risk to a level three risk is not supported by clear and convincing evidence. Contrary to defendant's contention, we conclude that the People presented "the requisite clear and convincing evidence 'that there exist[] . . . aggravating . . . factor[s] of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines' " (*People v McCollum*, 41 AD3d 1187, 1188, *lv denied* 9 NY3d 807; see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [2006]; see also *People v Howe*, 49 AD3d 1302).

Initially, we note that, although defendant was not assessed any points under the risk assessment instrument for a prior sex crime, there is clear and convincing evidence that he committed various sex offenses during the summers of 2005 and 2006 that resulted in two separate convictions in different counties. Such concurrent convictions may provide the basis for an upward departure if they are "indicative that the offender poses an increased risk to public safety" (Risk Assessment Guidelines and Commentary, at 14; see *People v Vasquez*, 49 AD3d 1282, 1284-1285; see also *People v Neuer*, 86 AD3d 926, 927, *lv denied* 17 NY3d 716). There is also clear and convincing

evidence that defendant lived a transient lifestyle, traveling between campgrounds (see *People v Briggs*, 86 AD3d 903, 905) and, indeed, that he committed sex offenses at those campgrounds.

Finally, it appears that the Board of Examiners of Sex Offenders did not consider defendant's convictions of endangering the welfare of a child in its assessment of points under the risk assessment instrument, inasmuch as that offense does not fall within the definition of a sex offense for registration purposes (see Correction Law § 168-a [2]; *People v Brown*, 45 AD3d 1123, 1124, lv denied 10 NY3d 703). Nevertheless, defendant's convictions of endangering the welfare of a child appear to have been based on his having exposed himself to his stepgrandchildren, and we agree with the court that such conduct was not adequately taken into account by the risk assessment instrument (see *Brown*, 45 AD3d at 1124; see also *Vasquez*, 49 AD3d at 1283-1285). We thus conclude that the record establishes that "the risk of repeat offense is high and there exists a threat to the public safety" to warrant an upward departure to a level three risk (§ 168-1 [6] [c]).

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

829

KA 11-02030

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT J. KING, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered August 16, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal solicitation in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal solicitation in the third degree (Penal Law § 100.08), defendant contends that County Court abused its discretion in denying his request for youthful offender status. That contention is encompassed by defendant's valid waiver of the right to appeal, however, and therefore is not properly before us (*see People v Rush*, 94 AD3d 1449, 1449-1450; *People v Lyons*, 86 AD3d 930, 931, *lv denied* 17 NY3d 954; *cf. People v Anderson*, 90 AD3d 1475, 1476, *lv denied* 18 NY3d 991).

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

830.1

CAF 12-00063

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

IN THE MATTER OF SHAWN G. GRANGER,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

DANIELLE D. MISERCOLA, RESPONDENT-APPELLANT.

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

CHARLES J. GREENBERG, BUFFALO, FOR PETITIONER-RESPONDENT.

MELISSA L. KOFFS, ATTORNEY FOR THE CHILD, CHAUMONT, FOR TRENTIN T.M.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered December 7, 2011 in a proceeding pursuant to Family Court Act article 6. The order granted the petition for visitation.

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

Memorandum: Petitioner father commenced this Family Court Act article 6 proceeding seeking visitation with the parties' child at the correctional facility where he was then incarcerated. Family Court granted the father's petition and, inter alia, awarded him "one four hour visit during the months of January and April 2012 and then every other month commencing in July 2012." We affirm.

" 'It is generally presumed to be in a child's best interest[s] to have visitation with his or her noncustodial parent and the fact that a parent is incarcerated will not, by itself, render visitation inappropriate' " (*Matter of Thomas v Thomas*, 277 AD2d 935; see *Matter of Cierra L.B. v Richard L.R.*, 43 AD3d 1416, 1416-1417). "Unless there is a compelling reason or substantial evidence that visitation with an incarcerated parent is detrimental to a child's welfare, such visitation should not be denied" (*Thomas*, 277 AD2d 935; see *Matter of Rhynes v Rhynes*, 242 AD2d 943, 943). "[V]isitation decisions are generally left to Family Court's sound discretion, requiring reversal only where the decision lacks a sound and substantial basis in the record" (*Matter of Helles v Helles*, 87 AD3d 1273, 1273 [internal quotation marks omitted]).

Contrary to the contentions of respondent mother and the Attorney

for the Child, we conclude that there is a sound and substantial basis in the record to support the court's determination to grant the father visitation with the child in accordance with the schedule set forth in the order (see *Matter of Culver v Culver*, 82 AD3d 1296, 1298-1299, appeal dismissed 16 NY3d 884, lv denied 17 NY3d 710; *Matter of Baker v Blanchard*, 74 AD3d 1427, 1428-1429; *Rhynes*, 242 AD2d at 943-944; cf. *Matter of Albanese v Albanese*, 44 AD3d 1117, 1120; see generally *Matter of Nicole J.R. v Jason M.R.*, 81 AD3d 1450, 1451, lv denied 17 NY3d 701). In reaching that conclusion, we defer to the court's opportunity to assess firsthand the character and credibility of the parties (see *Helles*, 87 AD3d at 1273-1274; *Nicole J.R.*, 81 AD3d at 1451).

The record establishes that the father was convicted of various felony drug charges, for which he was sentenced to an aggregate term of incarceration of eight years. Prior to his incarceration, the father was present for the birth of the child, and he testified that, during the six or seven months in which he was not incarcerated following the child's birth, he visited with the child on approximately 12 occasions. Although the father has not seen the child since the father was incarcerated, at which time the child was only a year old, the father has repeatedly requested that the mother transport the child to the correctional facility for visitation, and he has attempted to maintain a relationship with the child over the telephone and by sending letters, cards, and gifts. We thus conclude that the father made, and continues to make, efforts to establish a relationship with the child, and it cannot be said that he is "a stranger to the child" (*Culver*, 82 AD3d at 1299 [internal quotation marks omitted]).

We recognize that the three-year-old child will be required to travel a distance of over two hours in both directions to effectuate visitation. Nevertheless, the fact "[t]hat the child is young and will likely need to travel a considerable distance between [his] residence and the father's prison does not necessarily preclude visitation" (*id.*). We note that the father has arranged for his mother and sisters to transport the child for visitation. Although it is apparent from the record that the child is not familiar with those members of the father's family, making them "virtual strangers" (*Matter of Goldsmith v Goldsmith*, 68 AD3d 1209, 1210), the court purposely scheduled limited visits during the initial six-month period to afford the parties the opportunity to familiarize the child with the father's mother and sisters, and the court thus fashioned a visitation plan that was " 'viable and workable' " (*Culver*, 82 AD3d at 1299). The record further establishes that the father's earliest release date is not until September 2016, and we agree with the court that such a long period of separation could be detrimental to the established relationship between the father and the child.

Finally, although it appears that the father was transferred to another correctional facility after the court issued its determination, which the mother alleges will lengthen the distance that the child must travel to effectuate visitation, we note that "any change in circumstance is more appropriately the subject of a

modification petition" (*Matter of Moore v Schill*, 44 AD3d 1123, 1123).

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

831

TP 12-00283

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

IN THE MATTER OF RONALD RASCOE, PETITIONER,

V

ORDER

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

RONALD RASCOE, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Christopher J. Burns, J.], entered December 27, 2011) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

832

KA 11-01589

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JONATHAN A. HOWARD, 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 (Barry M. Donalaty, J.), rendered February 20, 2009. The judgment convicted defendant, upon his plea of guilty, of robbery 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 robbery in the second degree (Penal Law § 160.10 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

833

KA 11-00993

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRAVEON GRANT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered December 20, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Contrary to defendant's contention, his valid waiver of the right to appeal forecloses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737). Supreme Court advised defendant at the time of the waiver of the potential maximum term of incarceration, and thus the waiver encompasses defendant's present challenge to the sentence (*see Lococo*, 92 NY2d at 827; *cf. People v Newman*, 21 AD3d 1343; *People v McLean*, 302 AD2d 934).

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

834

KA 09-00383

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ISIAH FINCH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered January 27, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). Although defendant did not waive the right to appeal and thus his challenge to the severity of the sentence is properly before us (*see generally People v Lopez*, 6 NY3d 248, 255; *People v Hidalgo*, 91 NY2d 733, 737), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

835

KAH 11-01134

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ALBERT WILLIAMS, PETITIONER-APPELLANT,

V

ORDER

HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment (denominated order) of the Supreme Court,
Cayuga County (Mark H. Fandrich, A.J.), entered March 14, 2011 in a
habeas corpus proceeding. The judgment denied and dismissed the
petition.

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

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

836

KAH 11-02285

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JAMES ROBERT MOORE, PETITIONER-APPELLANT,

V

ORDER

NEW YORK STATE DIVISION OF PAROLE,
RESPONDENT-RESPONDENT.

JAMES ROBERT MOORE, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court,
Cayuga County (Mark H. Fandrich, A.J.), entered September 16, 2011.
The judgment converted the matter to a CPLR article 78 proceeding and
denied the petition.

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

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

837

KAH 11-01670

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
MICHAEL GONZALEZ, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

WAYNE COUNTY SHERIFF AND NEW YORK STATE DIVISION
OF PAROLE, RESPONDENTS-RESPONDENTS.

ROBERT TUCKER, PALMYRA, FOR PETITIONER-APPELLANT.

MICHAEL GONZALEZ, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF
COUNSEL), FOR RESPONDENT-RESPONDENT NEW YORK STATE DIVISION OF PAROLE.

Appeal from a judgment (denominated order) of the Supreme Court, Wayne County (Dennis M. Kehoe, A.J.), entered April 18, 2011 in a proceeding pursuant to CPLR article 70. The judgment dismissed the petition for a writ of habeas corpus.

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

Memorandum: Supreme Court properly dismissed the petition for a writ of habeas corpus. "The challenges by petitioner to the determination of the Administrative Law Judge following his final parole revocation hearing 'could have been addressed in the course of [an] administrative appeal,' and thus petitioner failed to exhaust his administrative remedies" (*People ex rel. Giguere v Barkley*, 70 AD3d 1321, lv denied 14 NY3d 710; see *People ex rel. Bratton v Mellas*, 28 AD3d 1207, 1207-1208, lv denied 7 NY3d 705; see also 9 NYCRR 8006.3 [a], [b]). "Moreover, even if petitioner's purported constitutional claims might otherwise 'justify a departure from the general rule requiring exhaustion of administrative remedies' . . . , habeas corpus relief nonetheless is unavailable as such claims, even if meritorious, would not entitle petitioner to immediate release" (*People ex rel. Ariola v Sears*, 53 AD3d 1001, 1002, lv denied 11 NY3d 710; see *People ex rel. Wethington v Beaver*, 306 AD2d 945, 946).

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

839

CAF 10-00927

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

IN THE MATTER OF LORI J. CHASE-TRIOU,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES M. TRIOU, JR., RESPONDENT-APPELLANT.

TYSON BLUE, MACEDON, FOR RESPONDENT-APPELLANT.

REED N. SUMMERS, WEBSTER, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Wayne County (Daniel G. Barrett, J.), entered March 19, 2010 in a proceeding pursuant to Family Court Act article 8. The order granted petitioner an order of protection through March 19, 2011.

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

Memorandum: Respondent appeals from an order of protection entered in favor of petitioner and her two daughters. We conclude that Family Court properly determined that petitioner met her burden of establishing by a preponderance of the evidence that respondent committed the family offense of harassment in the second degree (see Family Ct Act § 812 [1]; Penal Law § 240.26 [3]; see generally *Matter of Harrington v Harrington*, 63 AD3d 1618, 1619, lv denied 13 NY3d 705), thus warranting the issuance of an order of protection.

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

840

TP 12-00389

PRESENT: SCUDDER, P.J., SMITH, CENTRA, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF JAMES REYES, PETITIONER,

V

ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered February 22, 2012) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

841

KA 11-01491

PRESENT: SCUDDER, P.J., SMITH, CENTRA, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DONALD J. RICHARDSON, DEFENDANT-APPELLANT.

TIMOTHY J. BRENNAN, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered April 27, 2010. The judgment convicted defendant, upon his plea of guilty, of assault 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 assault in the second degree (Penal Law § 120.05 [6]), defendant's sole challenge is to the severity of the sentence. Defendant's unrestricted waiver of the right to appeal encompasses that challenge (*see People v Lopez*, 6 NY3d 248, 255; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

842

KA 11-00415

PRESENT: SCUDDER, P.J., SMITH, CENTRA, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RAYNA A. KELLY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered December 2, 2010. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree.

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

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [1]) and criminal possession of stolen property in the fourth degree (§ 165.45 [1]), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. Although the record establishes that defendant knowingly, voluntarily, and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), we conclude that the valid waiver of the right to appeal does not encompass the challenge to the severity of the sentence because Supreme Court failed to advise defendant of the potential periods of incarceration or the potential maximum term of incarceration (*see People v Newman*, 21 AD3d 1343; *People v McLean*, 302 AD2d 934; *cf. People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737), and there was no specific sentence promise at the time of the waiver (*cf. People v Semple*, 23 AD3d 1058, 1059, *lv denied* 6 NY3d 852). Nevertheless, on the merits, we conclude that the sentence is not unduly harsh or severe.

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

843

KA 11-00846

PRESENT: SCUDDER, P.J., SMITH, CENTRA, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTHONY J. RAVARINI, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Mark A. Violante, A.J.), rendered April 6, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted assault 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 assault in the second degree (Penal Law §§ 110.00, 120.05 [2]), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. Although the record establishes that defendant knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), we conclude that the valid waiver of the right to appeal does not encompass the challenge to the severity of the sentence because County Court failed to advise defendant of the potential periods of incarceration or the potential maximum term of incarceration (*see People v Newman*, 21 AD3d 1343; *People v McLean*, 302 AD2d 934; *cf. People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737), and there was no specific sentence promise at the time of the waiver (*cf. People v Semple*, 23 AD3d 1058, 1059, *lv denied* 6 NY3d 852). Nevertheless, on the merits, we conclude that the sentence is not unduly harsh or severe.

Entered: June 29, 2012

Frances E. Cafarell
Clerk of the Court

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

844

KA 11-01824

PRESENT: SCUDDER, P.J., SMITH, CENTRA, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

STANLEY L. HOWARD, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a resentence of the Cayuga County Court (Thomas G. Leone, J.), rendered June 30, 2011. Defendant was resentenced upon his conviction of criminal possession of a controlled substance in the fifth degree and assault in the second degree.

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

Memorandum: Defendant was convicted upon his plea of guilty of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]) and assault in the second degree (§ 120.05 [7]), and he appeals from a resentence on those convictions. County Court (Corning, J.) originally sentenced defendant as a second felony offender to an indeterminate term of imprisonment on the conviction of criminal possession of a controlled substance and a determinate term of imprisonment of five years on the conviction of assault, but it failed to impose a period of postrelease supervision (PRS) on the determinate sentence as required by Penal Law § 70.45 (1). County Court (Leone, J.), with the People's consent, thereafter resentenced defendant to the same terms of imprisonment previously imposed, without adding a term of PRS (see § 70.85; see also Correction Law § 601-d).

To the extent that defendant challenges the severity of his resentence, that challenge is beyond the scope of our review. 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)—“[t]he defendant’s right to appeal is limited to the correction of errors or the abuse of discretion at the resentencing proceeding,” and this Court “may not reduce the [defendant’s] prison sentence on appeal in the interest of

justice" (*People v Lingle*, 16 NY3d 621, 635; see *People v Covington*, 88 AD3d 486, 486-487, *lv denied* 18 NY3d 858).

Defendant failed to preserve for our review his contention that, at resentencing, the People were required to re-prove his status as a second felony offender and the court (Leone, J.) was required to re-adjudicate him as such (see generally CPL 470.05 [2]). In any event, that contention lacks merit. At defendant's original sentencing, the People and the court (Corning, J.) complied with the requirements of CPL 400.21, and defendant admitted his status as a second felony offender. Thus, we conclude that there was "substantial compliance" with CPL 400.21 at resentencing despite the court's failure to adjudicate defendant a second felony offender again (*People v Mateo*, 53 AD3d 1111, 1112, *lv denied* 11 NY3d 791).

We have reviewed defendant's remaining contention and conclude that it does not require reversal or modification of the sentence.

MOTION NOS. (153-154/96) KA 05-01122. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER YOUNG, DEFENDANT-APPELLANT. KA 05-01123. -
- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER YOUNG, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied.
PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND MARTOCHE, JJ. (Filed June 29, 2012.)

MOTION NO. (1116/99) KA 99-00063. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SAMUEL MCNEAR, DEFENDANT-APPELLANT. -- Motion for reargument granted, and upon reargument, the coram nobis motion is denied. PRESENT: SCUDDER, P.J., FAHEY, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed June 29, 2012.)

MOTION NO. (2106/00) KA 99-05100. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMAR SULLIVAN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND LINDLEY, JJ. (Filed June 29, 2012.)

MOTION NO. (1011/07) KA 06-00940. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EDUNDABIRA O. OJO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND SCONIERS, JJ. (Filed June 29, 2012.)

MOTION NO. (1122/10) KA 07-01855. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD SEMRAU, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed June 29, 2012.)

MOTION NO. (77/11) KA 06-02430. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT A. LYNCH, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed June 29, 2012.)

MOTION NO. (286/12) CAF 11-01896. -- IN THE MATTER OF BARNEY M. MATHEWSON, JR., PETITIONER-RESPONDENT, V ELIZABETH S. SESSLER, RESPONDENT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed June 29, 2012.)

MOTION NO. (319/12) CA 11-01843. -- IN THE MATTER OF THE ARBITRATION BETWEEN STARPOINT CENTRAL SCHOOL DISTRICT, PETITIONER-APPELLANT, AND CSEA, INC., LOCAL 872, STARPOINT CENTRAL SCHOOL DISTRICT BUILDINGS AND GROUNDS UNIT #7698, RESPONDENT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, AND SCONIERS, JJ. (Filed June 29, 2012.)

MOTION NO. (323/12) CA 10-02489. -- IN THE MATTER OF THE STATE OF NEW YORK,

PETITIONER-APPELLANT, V RICHARD LESTER, A PATIENT IN THE CARE AND CUSTODY OF ST. LAWRENCE PSYCHIATRIC CENTER, RESPONDENT-RESPONDENT. -- Motion for reargument, renewal or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, AND SCONIERS, JJ. (Filed June 29, 2012.)

MOTION NO. (405/12) TP 11-01530. -- IN THE MATTER OF RAMON ALVAREZ, PETITIONER, V BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed June 29, 2012.)

MOTION NO. (420/12) CA 11-02212. -- SHAMEL SANDERS, PLAINTIFF-RESPONDENT, V SCOTT PATRICK, KURT ROESNER, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed June 29, 2012.)

MOTION NO. (431/12) TP 11-02330. -- IN THE MATTER OF DEWITT GIBSON, PETITIONER, V BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT. -- Motion for reargument is granted and, upon reargument, the order entered April 20, 2012 (94 AD3d 1418) is amended by deleting the ordering paragraph and substituting the following ordering paragraph, "It is hereby ordered that the determination is unanimously

modified on the law and the petition is granted in part by annulling those parts of the determination finding that petitioner violated inmate rules 102.10 (7 NYCRR 270.2 [b] [3] [i]) and 104.11 (7 NYCRR 270.2 [B] [5] [ii]) and vacating the recommended loss of good time and as modified the determination is confirmed without costs, respondent is directed to expunge from petitioner's institutional record all references to the violation of those inmate rules, and the matter is remitted to respondent for further proceedings," and by adding the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a Tier III hearing, that petitioner had violated various inmate rules, including inmate rules 102.10 (7 NYCRR 270.2 [B] [3] [i] [threats]) and 104.11 (7 NYCRR 270.2 [B] [5] [ii] [violent conduct]). As respondent correctly concedes, the determination with respect to those two inmate rules is not supported by substantial evidence (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139). We therefore modify the determination and grant the petition in part by annulling those parts of the determination finding that petitioner violated those two inmate rules, and we direct respondent to expunge from petitioner's institutional record all references to the violation of those rules. Although we need not remit the matter to respondent for reconsideration of those parts of the penalty already served by petitioner, we note that there was also a recommended loss of good time, and the record does not reflect the relationship between the violations and that recommendation. We therefore further modify the determination by vacating the recommended loss of good time, and we remit the matter to respondent for reconsideration of that recommendation. We

have considered petitioner's remaining contentions and conclude that they are without merit. PRESENT: SMITH, J.P., LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed June 29, 2012.)

MOTION NO. (495/12) CA 11-01286. -- IN THE MATTER OF THE APPLICATION OF PETITIONER/CONDEMNOR NEW YORK STATE URBAN DEVELOPMENT CORPORATION, DOING BUSINESS AS EMPIRE STATE DEVELOPMENT CORPORATION, PETITIONER-RESPONDENT, TO ACQUIRE IN FEE SIMPLE CERTAIN REAL PROPERTY CURRENTLY OWNED BY FALLSITE, LLC, AND KNOWN AS: 232 SIXTH STREET, CITY OF NIAGARA FALLS, 700 RAINBOW BLVD., CITY OF NIAGARA FALLS, 231 SIXTH STREET, CITY OF NIAGARA FALLS, 626 RAINBOW BLVD., CITY OF NIAGARA FALLS, 701 FALLS STREET, CITY OF NIAGARA FALLS, SITUATED IN THE COUNTY OF NIAGARA, STATE OF NEW YORK AND HAVING, RESPECTIVELY; THE FOLLOWING TAX SECTIONS, BLOCKS, AND LOTS:

159.09-2-25.122, 159.09-2-25.112, 159.09-2-25.121, 159.09-2-25.111, 159.09-2-25.211 TOGETHER WITH ALL COMPENSABLE INTERESTS THEREIN CURRENTLY OWNED BY FALLSITE, LLC, FALLSVILLE SPLASH, LLC AND ANY OTHER CONDEMNNEES WHO ARE CURRENTLY UNKNOWN. FALLSITE, LLC AND FALLSVILLE SPLASH, LLC, RESPONDENTS-APPELLANTS. -- Motion for reargument, reconsideration or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed June 29, 2012.)

MOTION NO. (565/12) CA 11-02418. -- GAIL E. PATTERSON, PLAINTIFF-RESPONDENT, V CENTRAL NEW YORK REGIONAL TRANSPORTATION AUTHORITY (CNYRTA) AND CENTRO, INC., DEFENDANTS-APPELLANTS. -- Motion for reargument,

reconsideration or leave to appeal to the Court of Appeals denied.

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

(Filed June 29, 2012.)

MOTION NO. (589/12) CA 11-01870. -- JEREMY S. GNADE, PLAINTIFF-RESPONDENT, V SUNBURST OPTICS, INC., DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: SMITH, J.P., FAHEY, PERADOTTO, AND LINDLEY, JJ. (Filed June 29, 2012.)

KA 11-02027. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM MORRISON, DEFENDANT-APPELLANT. -- Counsel's motion to be relieved of assignment granted and appeal dismissed as abandoned. (Appeal from Judgment of Wayne County Court, Daniel G. Barrett, J. - Aggravated Unlicensed Operation of a Motor Vehicle, 1st Degree). PRESENT: SCUDDER, P.J., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed June 29, 2012.)

KAH 11-01165. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. HENRY VARGAS, PETITIONER-APPELLANT, V THE PEOPLE OF THE STATE OF NEW YORK DEPARTMENT OF CORRECTIONS, SUPERINTENDENT EKPE D. EKPE, RESPONDENT-RESPONDENT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Supreme Court, Jefferson County, Hugh A. Gilbert, J. - Habeas Corpus). PRESENT: SCUDDER, P.J., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed June 29, 2012.)

KA 11-00674. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LEON WILLIAMS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Supreme Court, Erie County, M. William Boller, J. - Assault, 1st Degree). PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ. (Filed June 8, 2012.)