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

1151
KA 16-01964
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA COLEMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered September 1, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree (two counts).

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of two counts of criminal possession of a forged instrument in the second degree (Penal Law § 170.25). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, three counts of criminal possession of a forged instrument in the second degree (*id.*). We affirm in both appeals.

Defendant's contention in both appeals that County Court imposed certain surcharges and fees in violation of Penal Law § 60.35 is not preserved for our review and, in any event, it lacks merit because, at the time of sentencing, restitution had not yet "been made" (*People v Ziolkowski*, 9 AD3d 915, 915 [4th Dept 2004], *lv denied* 3 NY3d 683 [2004] [internal quotation marks omitted]; *see* § 60.35 [6]).

Contrary to defendant's further contention, he validly waived his right to appeal from both judgments (*see People v Tyes*, 160 AD3d 1447, 1447 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]; *People v Oberdorf*, 136 AD3d 1291, 1292 [4th Dept 2016], *lv denied* 27 NY3d 1073 [2016]; *People v Ripley*, 94 AD3d 1554, 1555 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]; *People v Frank*, 258 AD2d 900, 900 [4th Dept 1999], *lv denied* 93 NY2d 924 [1999]; *see generally People v Lopez*, 6 NY3d 248, 256-257 [2006]), and that waiver forecloses his challenge in each

appeal to the severity of his sentences (*see Lopez*, 6 NY3d at 255-256).

Finally, we note that the uniform sentence and commitment form in each appeal contains an incorrect offense date and must therefore be amended to reflect the correct dates set forth in the superior court information and indictment, respectively (*see People v Southard*, 163 AD3d 1461, 1462 [4th Dept 2018]).

All concur except NEMOYER, J., who concurs in the result in the following memorandum: I join the majority's disposition and its reasoning in all respects except its analysis of defendant's challenge to the mandatory fees and surcharges. In my view, because the various fees and surcharges required by Penal Law § 60.35 are not part of a criminal sentence (*see People v Guerrero*, 12 NY3d 45, 47 [2009]), defendant's valid, general, and unrestricted waiver of his right to appeal forecloses our review of his challenge to the legality of those assessments in this case (*see People v Wilson*, 168 AD3d 889, 890 [2d Dept 2019]; *People v Logan*, 125 AD3d 688, 688 [2d Dept 2015]; *People v Morales*, 119 AD3d 1082, 1084 [3d Dept 2014], *lv denied* 24 NY3d 1086 [2014]; *People v Frazier*, 57 AD3d 1460, 1461 [4th Dept 2008], *lv denied* 12 NY3d 783 [2009]). I would go no further than that.

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

1152
KA 16-01965
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA COLEMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered September 1, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree (three counts) and grand larceny in the third degree.

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

Same memorandum as in *People v Coleman* ([appeal No. 1] — AD3d — [Mar. 22, 2019] [4th Dept 2019]).

All concur except NEMOYER, J., who concurs in the result in the same concurring memorandum as in *People v Coleman* ([appeal No. 1] — AD3d — [Mar. 22, 2019] [4th Dept 2019]).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

1247
CA 18-00855
PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

CANANDAIGUA NATIONAL BANK AND TRUST COMPANY,
PLAINTIFF,

V MEMORANDUM AND ORDER

ACQUEST SOUTH PARK, LLC, DEFENDANT-RESPONDENT,
KINGSBURY CORPORATION, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

KINGSBURY CORPORATION, THIRD-PARTY
PLAINTIFF-APPELLANT,

V

WILLIAM L. HUNTRESS,
THIRD-PARTY DEFENDANT-RESPONDENT.

UNDERBERG & KESSLER LLP, ROCHESTER (RONALD G. HULL OF COUNSEL), FOR
DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (ANNE K. BOWLING OF
COUNSEL), FOR DEFENDANT-RESPONDENT AND THIRD-PARTY DEFENDANT-
RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered March 15, 2018. The order, insofar as appealed from, granted those parts of the motion of defendant Acquest South Park, LLC, to dismiss the fourth and fifth cross claims of defendant Kingsbury Corporation.

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

Memorandum: Defendant-third-party plaintiff, Kingsbury Corporation (Kingsbury), appeals from an order insofar as it granted those parts of the motion of defendant Acquest South Park, LLC (Acquest) to dismiss Kingsbury’s fourth and fifth cross claims, alleging tortious interference with contract and breach of the implied covenant of good faith and fair dealing, respectively. According to Kingsbury, Supreme Court erred in concluding that those cross claims fail to state a cause action (*see* CPLR 3211 [a] [7]). We affirm.

Kingsbury operated a manufacturing facility on premises it leased from Acquest pursuant to a written lease executed by the parties in

2012. Shortly after the lease was executed, Kingsbury borrowed from plaintiff, Canandaigua National Bank and Trust Company (CNB), approximately $6,000,000 pursuant to two loans that were partially secured by equipment and machinery used at the leased premises. Kingsbury failed to pay rent in September and October 2015, prompting Acquest to issue a Notice of Default advising Kingsbury that its failure to pay the amount due within five days could result in Acquest pursuing its remedies under the lease.

After Kingsbury failed to pay rent for an additional three months, Acquest sent an updated Notice of Default to Kingsbury. Approximately one month later, with the rent still unpaid, Acquest sent an email to Kingsbury indicating that it was considering allowing Kingsbury to move into another, smaller space. Three days later, however, Acquest entered the leased premises after hours and removed Kingsbury's equipment and machinery, which were placed in storage. Acquest thereafter formally notified Kingsbury in writing that it was terminating the lease based on nonpayment of rent. Without its equipment and machinery, Kingsbury was unable to conduct business. When CNB learned that Kingsbury had ceased doing business, it declared Kingsbury to be in default on the notes, which defined an event of default to include the situation in which the borrower "dissolves or ceases or suspends business."

CNB commenced this action against Kingsbury and Acquest, among other parties, asserting a cause of action for replevin against all defendants based on CNB's security interest in Kingsbury's equipment and machinery and a cause of action for breach of contract against Kingsbury based on its default under the notes. In its answer, Kingsbury asserted a number of cross claims against Acquest, two of which are relevant to this appeal. In its fourth cross claim, for tortious interference with contract, Kingsbury alleged that Acquest knew or should have known that causing Kingsbury to cease operations would deprive Kingsbury of the ability to pay its creditors, including CNB, thereby resulting in a default on the loans. According to the cross claim, Acquest, by causing Kingsbury to cease doing business, intentionally and wrongfully interfered with Kingsbury's contractual relations with CNB.

In its fifth cross claim, for breach of the implied covenant of good faith and fair dealing, Kingsbury alleged that Acquest was aware of Kingsbury's ongoing efforts to sell a portion of its business in order to raise the funds needed to satisfy the amount due under the lease, that Acquest "acted affirmatively to reassure Kingsbury that [Acquest] would continue to work with Kingsbury[,]" and that, by removing Kingsbury's equipment and machinery after leading Kingsbury to believe that a deal could be reached with respect to the unpaid rent, Acquest violated the implied covenant of good faith and fair dealing.

We reject Kingsbury's contention that the court erred in dismissing the cross claim for tortious interference with contract. "The tort of inducement of breach of contract, now more broadly known as interference with contractual relations, consists of four elements:

(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) *defendant's intentional inducement of the third party to breach or otherwise render performance impossible*; and (4) damages to plaintiff" (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993] [emphasis added]; *see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]; *KAM Constr. Corp. v Bergey*, 151 AD3d 1706, 1707 [4th Dept 2017]).

Here, although the cross claim alleges that Acquest caused Kingsbury to breach its contract with a third party, it does not allege that CNB or any other third party breached a contract with Kingsbury. Thus, contrary to Kingsbury's contention, the cross claim fails to state a cause of action for tortious interference with contract. Kingsbury relies on *Stiso v Inserra Supermarkets* (179 AD2d 878 [3d Dept 1992], *lv denied* 80 NY2d 757 [1992]) for the proposition that a cause of action for tortious interference with contract exists where the defendant caused the plaintiff to breach a contract with a third party. But *Stiso* predates *Kronos, Inc.* (81 NY2d at 94) and *Lama Holding Co.* (88 NY2d at 424-425), and in both of those cases the Court of Appeals explicitly stated that an element of the cause of action for tortious interference with contract is the defendant's intentional procurement of a third-party's breach of the contract without justification. We decline Kingsbury's invitation to modify the elements of the cause of action outlined by the Court of Appeals.

With respect to its cross claim for breach of the implied covenant of good faith and fair dealing, Kingsbury alleges that Acquest failed to renegotiate the lease in good faith. There was, however, no contractual requirement for Acquest to renegotiate the lease. Moreover, Kingsbury admits that it defaulted on the lease, the terms of which permitted Acquest to then terminate the lease, reenter the premises and remove Kingsbury's effects, which it did. "While the covenant of good faith and fair dealing is implicit in every contract, it cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights" (*Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 268 [1st Dept 2003]). Thus, Kingsbury cannot use the covenant of good faith and fair dealing to "negate a right of [Acquest] expressly granted by the lease" (*Baker v 16 Sutton Place Apt. Corp.*, 110 AD3d 479, 480 [1st Dept 2013]; *see 87 Mezz Member LLC v German Am. Capital Corp.*, 162 AD3d 524, 525 [1st Dept 2018]), and the court properly granted that part of the motion to dismiss the fifth cross claim for failure to state a cause of action.

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

1288
KA 17-00062
PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY L. WILLIAMS, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRITTANY GROME ANTONACCI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered December 20, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of marihuana 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 criminal possession of marihuana in the second degree (Penal Law § 221.25). Initially, we note that it is unnecessary to review defendant's challenge to his waiver of the right to appeal because, as the People correctly concede, "none of the issues he raises would be foreclosed from review by a valid waiver of the right to appeal" (*People v Irby*, 158 AD3d 1050, 1051 [4th Dept 2018], *lv denied* 31 NY3d 1014 [2018]; *see People v Lefler*, 159 AD3d 1427, 1427 [4th Dept 2018], *lv denied* 31 NY3d 1118 [2018]; *People v Dale*, 142 AD3d 1287, 1288 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]).

Defendant contends that his guilty plea was not knowingly, intelligently, and voluntarily entered and that County Court abused its discretion in denying his motion to withdraw his plea on that ground without first conducting a hearing. We reject defendant's contention that the court erred in failing to conduct an evidentiary hearing before denying his motion (*see generally People v Manor*, 27 NY3d 1012, 1013-1014 [2016]; *People v Stutzman*, 158 AD3d 1294, 1295 [4th Dept 2018], *lv denied* 31 NY3d 1122 [2018]). Contrary to defendant's further contention, the court properly denied his motion. "[P]ermission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence

of innocence, fraud, or mistake in inducing the plea" (*People v Schultz*, 158 AD3d 1058, 1058 [4th Dept 2018], *lv denied* 31 NY3d 1017 [2018] [internal quotation marks omitted]). Here, there is no support in the record for defendant's contention that the People committed a *Brady* violation that induced him to plead guilty (*see generally Brady v Maryland*, 373 US 83, 87 [1963]). Similarly, defendant's "conclusory and unsubstantiated assertion that his plea was coerced" by threats of additional prosecution was "refuted by his statements during the plea proceedings" (*People v McKinnon*, 5 AD3d 1076, 1076-1077 [4th Dept 2004], *lv denied* 2 NY3d 803 [2004] [internal quotation marks omitted]; *see People v Spates*, 142 AD3d 1389, 1389 [4th Dept 2016], *lv denied* 28 NY3d 1127 [2016]). Notably, defendant's own submissions on his motion establish that he was aware for over six months before pleading guilty that the People were not pursuing additional charges against him. In any event, "[t]he fact that the possibility of [additional charges] may have influenced defendant's decision to plead guilty is insufficient to establish that the plea was coerced" (*People v Wolf*, 88 AD3d 1266, 1267 [4th Dept 2011], *lv denied* 18 NY3d 863 [2011] [internal quotation marks omitted]). Although we agree with defendant that the prosecutor incorrectly stated that defendant could be sentenced as a persistent felony offender (*see People v Boykins*, 161 AD3d 183, 187 [4th Dept 2018], *lv denied* 31 NY3d 1145 [2018]), that fact " 'is not, in and of itself, dispositive' of the issue whether defendant's plea was knowingly and voluntarily entered" (*People v Johnson*, 24 AD3d 1259, 1259 [4th Dept 2005], *lv denied* 6 NY3d 814 [2006], quoting *People v Garcia*, 92 NY2d 869, 870 [1998]). Rather, in evaluating that issue, "various factors must be considered, 'including the nature and terms of the agreement, the reasonableness of the bargain, and the age and experience of the accused' " (*id.* at 1259, quoting *People v Hidalgo*, 91 NY2d 733, 736 [1998]). Here, defendant was 42 years old at the time he pleaded guilty and had a number of previous experiences with the criminal justice system. Defendant also received a sentencing commitment from the court of no more than shock probation. Based on the record before us, including defendant's statements during the plea colloquy that he was not threatened or forced to plead guilty, we conclude that the court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea.

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

1297
CAF 17-00778
PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF RICKY A., KARA A., AND
KADE G.

WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BARRY A., RESPONDENT,
AND SUZANNE C., RESPONDENT-APPELLANT.

TYSON BLUE, MACEDON, FOR RESPONDENT-APPELLANT.

HEATHER MAURE, LYONS, FOR PETITIONER-RESPONDENT.

SARA E. ROOK, ROCHESTER, ATTORNEY FOR THE CHILD.

PETER G. CHAMBERS, NEWARK, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Wayne County (John B. Nesbitt, J.), entered April 10, 2017 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Suzanne C. had neglected the subject children.

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

Memorandum: In this proceeding pursuant to article 10 of the Family Court Act, respondent-appellant (respondent) appeals from an order that, inter alia, determined that she neglected the subject children. Contrary to respondent's contention, Family Court's determination is supported by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]; *see generally Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). "In reviewing a determination of neglect, we must accord great weight and deference to the determination of [the court], including its drawing of inferences and assessment of credibility, and we should not disturb its determination unless clearly unsupported by the record" (*Matter of Shaylee R.*, 13 AD3d 1106, 1106 [4th Dept 2004]).

Here, the testimony presented at the fact-finding hearing established that respondent and the subject children, one of whom is respondent's natural child, live with respondent Barry A., who is respondent's boyfriend and the father of the children and who suffers from untreated posttraumatic stress and substance abuse disorders. The testimony further establishes that, on one occasion in particular,

the father returned home after drinking liquor and beer and displayed increasingly erratic behavior in the presence of the children. He and respondent became engaged in a verbal altercation, which became physical, and the father threw his phone into a fire that he had started in the backyard. Thereafter, respondent left the home with the father, leaving the children alone in the home without supervision. The children had no phone and no way to contact respondent. Respondent did not return to the house or communicate with the children for more than 24 hours and did not arrange for another adult to care for the children. In the meantime, having witnessed the domestic violence incident involving respondent and the father, as well as the father's intoxication and erratic behavior, the children became afraid when respondent did not return home or contact them. The children eventually contacted their older sister through Facebook and then waited two hours for her to travel from Utica to their home in Wayne County. The sister called 911 and reported respondent and the father as missing persons. When the police responded to the home, the children had been alone for approximately 20 hours. Respondent and the father drove past the home while multiple police cars were parked outside and chose not to stop to check on the children. Instead, respondent and the father stayed away from the children for four more hours.

We conclude that the record supports the court's determination that respondent's failure to provide adequate supervision for the children, combined with the children's exposure to domestic violence in the home and respondent's failure to take reasonable measures to protect the children from the effects of the father's unaddressed mental health and substance abuse issues, placed the children in imminent danger of physical, emotional, or mental impairment (*see* Family Ct Act § 1012 [f] [i] [B]; *Matter of Lasondra D. [Cassandra D.—Victor S.]*, 151 AD3d 1655, 1656 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]; *Matter of Trinity E. [Robert E.]*, 137 AD3d 1590, 1591 [4th Dept 2016]; *Matter of Raven B. [Melissa K.N.]*, 115 AD3d 1276, 1278-1279 [4th Dept 2014]; *see generally Nicholson*, 3 NY3d at 369-370).

Entered: March 22, 2019 Mark W. Bennett
Clerk of the Court

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

1309
CA 18-00457
PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ.

PATRICIA WIEDENBECK AND WILLIAM WIEDENBECK,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ALLISON LAWRENCE AND ROBERT LAWRENCE,
DEFENDANTS-RESPONDENTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SCHNITTER CICCARELLI MILLS PLLC, WILLIAMSVILLE (PATRICIA S. CICCARELLI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered October 12, 2017. The order granted the motion of defendants for summary judgment and dismissed plaintiffs' complaint.

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

Memorandum: Plaintiffs commenced this premises liability action seeking damages for injuries Patricia Wiedenbeck (plaintiff) allegedly sustained when she tripped and fell on a ridged metal threshold strip attached to the step in the entryway of defendants' commercial building. Supreme Court granted defendants' motion for summary judgment dismissing the complaint. We reverse.

We agree with plaintiffs that defendants failed to sustain their initial burden of establishing as a matter of law that the threshold strip was not inherently dangerous or defective (*see Grefrath v DeFelice*, 144 AD3d 1652, 1653 [4th Dept 2016]). "[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997] [internal quotation marks omitted]; *see Hayes v Texas Roadhouse Holdings, LLC*, 100 AD3d 1532, 1533 [4th Dept 2012]), and the existence or nonexistence of a defect or dangerous condition "is generally a question of fact for the jury" (*Trincere*, 90 NY2d at 977; *see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77 [2015]; *Tesak v Marine Midland Bank*, 254 AD2d 717, 717-718 [4th Dept 1998]). Defendants' submissions in support of their motion included excerpts of plaintiffs' deposition testimony and defendants' affidavits, which

raised a question of fact whether the threshold strip on the step created an unreasonably dangerous or defective condition. We further conclude that summary judgment dismissing the complaint was not warranted on the ground that the alleged defect was, as a matter of law, too trivial to be actionable. It is well settled that "a small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses, so that it 'unreasonably imperil[s] the safety of' a pedestrian" (*Hutchinson*, 26 NY3d at 78, quoting *Wilson v Jaybro Realty & Dev. Co.*, 289 NY 410, 412 [1943]). Here, it is impossible to ascertain from the black and white photographs submitted by defendants in support of the motion the width, depth, elevation, height differential or actual appearance of the threshold, and thus defendants failed to establish that the defect was, in fact, trivial. In addition, the threshold and step were located in a doorway, "where a person's attention would be drawn to the door, not to the [step]" (*Tesak*, 254 AD2d at 718; *see generally Belsinger v M&M Bowling & Trophy Supplies, Inc.*, 108 AD3d 1041, 1042 [4th Dept 2013]).

Even assuming, arguendo, that defendants' submissions were sufficient to meet their prima facie burden of establishing that no dangerous or defective condition existed, we conclude that plaintiffs' submissions in opposition raised a triable issue of fact (*see generally Hutchinson*, 26 NY3d at 82; *Grefrath*, 144 AD3d at 1653-1654). Indeed, plaintiffs submitted the affidavit of their expert, who opined that the tiers of the threshold posed an unsafe and defective condition that caused or contributed to plaintiff's fall (*see generally Murphy v Conner*, 84 NY2d 969, 972 [1994]).

Finally, defendants' own submissions in support of their motion affirmatively establish that defendants had constructive, if not actual, notice of the allegedly dangerous condition (*see generally Harris v Seager*, 93 AD3d 1308, 1308-1309 [4th Dept 2012]).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

1356
KA 16-01772
PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALONTE WORKS, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered August 22, 2016. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is modified on the law by vacating the surcharge, DNA databank fee, and crime victim assistance fee and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him as a juvenile offender upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]). As defendant contends and the People correctly concede, we conclude that the surcharge, DNA databank fee, and crime victim assistance fee imposed by County Court must be vacated because defendant is a juvenile offender (*see* Penal Law §§ 60.00 [2]; 60.10; *People v Sanchez*, 165 AD3d 1623, 1624 [4th Dept 2018]; *People v Stump*, 100 AD3d 1457, 1458 [4th Dept 2012], *lv denied* 20 NY3d 1104 [2013]). We therefore modify the judgment accordingly.

Contrary to defendant's further contention, however, we conclude that he validly waived his right to appeal (*see People v Miller*, 161 AD3d 1579, 1579 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018]; *People v Tyes*, 160 AD3d 1447, 1447 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]; *see generally People v Sanders*, 25 NY3d 337, 341 [2015]). Defendant's valid waiver of the right to appeal forecloses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

All concur except NEMOYER, and CURRAN, JJ., who concur in the result in the following memorandum: Although we concur in the result reached by the majority, we do so on different grounds with respect to the mandatory fees and surcharges. Initially, we agree with the majority that defendant executed a valid, general, and unrestricted

waiver of his right to appeal. Contrary to defendant’s contention, a juvenile offender can waive his or her right to appeal (*see e.g. People v Abreu*, 71 AD3d 534, 534 [1st Dept 2010], *lv denied* 15 NY3d 746 [2010]; *People v Gaines*, 234 AD2d 712, 712 [3d Dept 1996], *lv denied* 89 NY2d 1011 [1997]), and plea courts have no automatic obligation to explain the nature of the right to appeal in greater detail to such offenders (*see generally People v Sanders*, 25 NY3d 337, 341 [2015]).

As the majority determines, defendant’s valid appeal waiver forecloses his challenge to the severity of his sentence. In the typical case, defendant’s valid appeal waiver would also preclude appellate review of his challenge to the legality of the fees and surcharges (*see People v Wilson*, 168 AD3d 889, 890 [2d Dept 2019]; *People v Logan*, 125 AD3d 688, 688 [2d Dept 2015]; *People v Morales*, 119 AD3d 1082, 1084 [3d Dept 2014], *lv denied* 24 NY3d 1086 [2014]; *People v Frazier*, 57 AD3d 1460, 1461 [4th Dept 2008], *lv denied* 12 NY3d 783 [2009]). Nevertheless, by conceding that the fees and surcharges were improperly assessed and by affirmatively asking us to vacate those assessments, the People here have effectively “forfeit[ed] or waive[d]” defendant’s appeal waiver on that limited issue (*Garza v Idaho*, — US —, — , 139 S Ct 738, 745 [2019]; *see United States v Story*, 439 F3d 226, 231 [5th Cir 2006]). We therefore agree that the fees and surcharges, which are undisputedly illegal in this case (*see* Penal Law §§ 60.00 [2]; 60.10; *People v Stump*, 100 AD3d 1457, 1457-1458 [4th Dept 2012]), should be vacated, and we thus join the majority’s disposition because it accomplishes that result.

Entered: March 22, 2019 Mark W. Bennett
Clerk of the Court

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

1370
CA 18-01338
PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

DEANA GODWIN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KARLY MANCUSO, DEFENDANT-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (MARTHA E. DONOVAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

GOMEZ & BECKER, LLP, BUFFALO (BRETT D. TOKARCZYK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Sara Sheldon, A.J.), entered June 28, 2018. The order, among other things, denied the motion of defendant insofar as it sought in the alternative summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when her vehicle was struck by a vehicle operated by defendant. The accident occurred when plaintiff made a left turn in front of defendant's oncoming vehicle, which was traveling in a westerly direction in the right lane of Niagara Falls Boulevard. We conclude that Supreme Court erred in denying defendant's motion insofar as it sought in the alternative summary judgment dismissing the complaint. Defendant met her initial burden of establishing that she had the right-of-way, that she was operating her vehicle in a lawful and prudent manner, and that there was nothing she could have done to avoid the accident (*see Heltz v Barratt*, 115 AD3d 1298, 1299 [4th Dept 2014], *affd* 24 NY3d 1185 [2014]; *George v Cerat*, 118 AD3d 1475, 1476 [4th Dept 2014]; *Lescenski v Williams*, 90 AD3d 1705, 1705-1706 [4th Dept 2011], *lv denied* 18 NY3d 811 [2012]; *see also* Vehicle and Traffic Law § 1141).

Contrary to plaintiff's contention, she failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Viewing the evidence in the light most favorable to plaintiff (*see Pacino v Lewis*, 147 AD3d 1525, 1526 [4th Dept 2017]), we conclude that the record establishes that plaintiff made a left turn in front of defendant's oncoming vehicle, which was only four car lengths away from the intersection and traveling at the speed limit of

40 miles per hour. At that speed and distance, defendant entered the intersection with insufficient time to take evasive action to avoid the collision (*see Koenig v Lee*, 53 AD3d 567, 568 [2d Dept 2008]; *Dawley v McCumber*, 48 AD3d 1270, 1271 [4th Dept 2008]; *Lucksinger v M.T. Unloading Servs.*, 280 AD2d 741, 742 [3d Dept 2001]). Thus, defendant's vehicle was so close to the intersection as to constitute an immediate hazard to the left-turning plaintiff, and plaintiff was therefore required to yield the right-of-way to defendant (*see* Vehicle and Traffic Law § 1141).

In addition, plaintiff's assertion that the traffic light facing her vehicle had changed from green to yellow just before she started to make her left turn does not raise a question of fact inasmuch as a yellow light would not deprive defendant of the right-of-way and confer it upon plaintiff (*see id.*). Plaintiff's further assertion that the traffic light facing defendant's vehicle might have been red by the time plaintiff executed her left turn, thereby depriving defendant of the right-of-way, is raised for the first time on appeal, and it is therefore not properly before us (*see Rose v Leberth*, 128 AD3d 1492, 1493 [4th Dept 2015]; *Garza v Taravella*, 74 AD3d 1802, 1803 [4th Dept 2010]). In any event, there is no proof in the record that the traffic light was red, and thus plaintiff's contention is based solely on speculation (*see Limardi v McLeod*, 100 AD3d 1375, 1376 [4th Dept 2012]; *Maloney v Niewender*, 27 AD3d 426, 427 [2d Dept 2006]).

Finally, we reject plaintiff's contention that there is a question of fact whether defendant was negligent by being inattentive to the intersection and not seeing plaintiff's vehicle until just before the collision. Inasmuch as defendant was entitled to anticipate that plaintiff would yield the right-of-way, the fact that defendant did not notice plaintiff's vehicle until it turned in front of her does not raise a question of fact whether defendant was negligent (*see George*, 118 AD3d at 1476; *Limardi*, 100 AD3d at 1375-1376; *Pomietlasz v Smith*, 31 AD3d 1173, 1174 [4th Dept 2006]).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

1379
KA 16-00782
PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVINE M. HARMON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, SULLIVAN & CROMWELL LLP, NEW YORK CITY (JOHN P. COLLINS, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered January 13, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon 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 possession of a weapon in the third degree (Penal Law § 265.02 [5] [ii]). We reject defendant's contention that the police lacked the requisite reasonable suspicion to stop and detain him, and thus we conclude that County Court properly refused to suppress the gun recovered from his person. The record establishes that the arresting officer responded to a 911 call reporting two black males passing a gun between each other outside of a bar. The officer responded to the bar and spoke with the 911 caller, who pointed to another bar down the street and indicated that the suspects were "right down there." The officer observed a group of five to six men standing outside the second bar and approached them. Defendant, who matched the clothing description provided by the 911 caller, "swiftly" walked into the bar. The officer pursued defendant into the bar's bathroom, where the officer immediately placed handcuffs on defendant before escorting him outside. Once outside, the officer asked defendant if he had any objects on him that could harm the officer or anything that he "shouldn't have," and defendant replied that he had a gun. The officer then discovered a .22 caliber pistol on defendant's right hip.

We analyze this case in light of the framework stated in *People v De Bour* (40 NY2d 210, 222-223 [1976]). Based on the 911 call

regarding two black men passing a weapon, the fact that defendant matched the clothing description provided by the caller, the caller's subsequent indication that the suspects were "right down there" in front of another bar, and the temporal proximity between the moment the officer saw defendant and the moment when the 911 caller observed the men passing the weapon, the officer "initially had a common-law right of inquiry based upon a founded suspicion that criminal activity was afoot," thereby rendering the police encounter lawful at its inception (*People v Price*, 109 AD3d 1189, 1190 [4th Dept 2013], *lv denied* 22 NY3d 1043 [2013]; *see People v Gayden*, 126 AD3d 1518, 1518 [4th Dept 2015], *affd* 28 NY3d 1035 [2016]; *People v McKinley*, 101 AD3d 1747, 1748 [4th Dept 2012], *lv denied* 21 NY3d 1017 [2013]).

Although "[f]light alone 'is insufficient to justify pursuit' " (*People v Riddick*, 70 AD3d 1421, 1422 [4th Dept 2010], *lv denied* 14 NY3d 844 [2010], quoting *People v Holmes*, 81 NY2d 1056, 1058 [1993]), "a defendant's flight in response to an approach by the police, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, may give rise to reasonable suspicion" (*People v Sierra*, 83 NY2d 928, 929 [1994]; *see People v Martinez*, 59 AD3d 1071, 1072 [4th Dept 2009], *lv denied* 12 NY3d 856 [2009]). Here, defendant's flight into the bar, combined with the other circumstances described above, provided the officer with reasonable suspicion permitting pursuit (*see People v Woods*, 98 NY2d 627, 628-629 [2002]; *Martinez*, 59 AD3d at 1072).

We reject defendant's contention that the use of handcuffs transformed the encounter into an arrest prior to the discovery of the gun. The officer responded to a call regarding a weapons offense, and was thus "entitled to handcuff defendant to effect his nonarrest detention in order to ensure [his] own safety while [he] removed [defendant] to a more suitable location" (*People v Allen*, 73 NY2d 378, 379 [1989]; *see also People v Galloway*, 40 AD3d 240, 240-241 [1st Dept 2007], *lv denied* 9 NY3d 844 [2007]; *People v Robinson*, 282 AD2d 75, 80 [1st Dept 2001]). Upon discovering the weapon on defendant's person, the officer gained probable cause to arrest. In light of the foregoing, we also reject defendant's contention that the court should have suppressed his oral and written statements as the product of an illegal seizure.

We further reject defendant's contention that the court should have suppressed the statements as the product of a custodial interrogation prior to the reading of defendant's *Miranda* warnings. The officer's question whether defendant had "anything on him that will hurt [the officer], cut [him] or [that defendant] shouldn't have" did not require the officer to first read defendant his *Miranda* warnings (*see People v Chestnut*, 51 NY2d 14, 22-23 n 8 [1980], *cert denied* 449 US 1018 [1980]; *People v Rose*, 129 AD3d 1631, 1632 [4th Dept 2015], *lv denied* 27 NY3d 1005 [2016]; *People v Roseboro*, 124 AD3d 1374, 1375 [4th Dept 2015], *lv denied* 27 NY3d 1005 [2016]).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

1402
KA 15-00002
PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RASHOD HARVEY, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.) rendered September 18, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and tampering with physical evidence.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the period of postrelease supervision imposed for tampering with physical evidence and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and tampering with physical evidence (§ 215.40 [2]). The charges arose from the recovery of a handgun in a house that defendant had exited just prior to being apprehended by the police. We reject defendant's contention that the evidence is legally insufficient to support his conviction (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]). Additionally, viewing the evidence in light of the elements of the crimes as charged to the jury (*see id.*), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant further contends that defense counsel was ineffective for failing to move to suppress the handgun on the ground that police officers unlawfully seized him without the requisite reasonable suspicion of criminal behavior (*see generally People v Moore*, 6 NY3d 496, 500-501 [2006]; *People v De Bour*, 40 NY2d 210, 215 [1976]; *People v Burnett*, 126 AD3d 1491, 1492 [4th Dept 2015]). We reject that contention. It is well settled that "a showing that [defense] counsel failed to make a particular pretrial motion generally does not, by itself, establish ineffective assistance of counsel" (*People v Rivera*,

71 NY2d 705, 709 [1988]; *see People v Parker*, 148 AD3d 1583, 1584 [4th Dept 2017], *lv denied* 29 NY3d 1084 [2017]). "To prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for counsel's failure to request a particular hearing. Absent such a showing, it will be presumed that counsel acted in a competent manner and exercised professional judgment in not pursuing a hearing" (*Rivera*, 71 NY2d at 709). Furthermore, "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005], quoting *People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]).

Here, the trial testimony established that police officers responded to a report of trespassing at a vacant house and, upon arrival, observed defendant run or walk briskly away from that house holding his waistband in a manner that, based on the officers' knowledge and experience, suggested that defendant might be concealing a gun. Despite the officers' request for defendant to stop, defendant entered a neighboring house before emerging 10 to 15 seconds later, at which point he was apprehended by the officers and placed in the back of a patrol car. The officers then rang the doorbell at the neighboring house, received permission to enter, and observed the handgun in plain view on the floor of the foyer.

Initially, defendant does not dispute that he lacked standing to challenge the officers' entry into the neighboring house inasmuch as he did not live at that house and was at most a casual visitor there (*see People v Ortiz*, 83 NY2d 840, 842-843 [1994]; *People v Smith*, 155 AD3d 1674, 1675 [4th Dept 2017], *lv denied* 30 NY3d 1120 [2018]). Further, defendant's conclusory assertion that the discovery of the handgun was not attenuated from the officers' alleged illegal action in seizing him is unsupported by the record. It is well settled that "only evidence which has been come at by exploitation of [law enforcement] illegality should be suppressed" (*People v Arnau*, 58 NY2d 27, 32 [1982], *cert denied* 468 US 1217 [1984] [internal quotation marks omitted]; *see People v Ashford*, 142 AD3d 1371, 1372 [4th Dept 2016]; *People v Holmes*, 63 AD3d 1649, 1650 [4th Dept 2009], *lv denied* 12 NY3d 926 [2009]). Even assuming, arguendo, that the officers' actions in seizing defendant were illegal, we conclude that the observations that led the officers to seek permission to enter the neighboring house were made prior to the seizure of defendant. Thus, inasmuch as defendant would not have been able to establish that the alleged illegal conduct was causally related to the discovery of the handgun (*see Ashford*, 142 AD3d at 1372), a motion seeking to suppress the handgun would have had little or no chance of success.

Contrary to defendant's additional contention, the sentence is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]). According to the sentencing minutes, however, Supreme Court imposed a period of postrelease supervision in connection with defendant's conviction of tampering with physical evidence. That was error inasmuch as a period

of postrelease supervision is not authorized in connection with an indeterminate sentence (*see* Penal Law § 70.45 [1]; *People v Lockett*, 34 AD3d 1208, 1209 [4th Dept 2006], *lv denied* 8 NY3d 882 [2007], *reconsideration denied* 9 NY3d 847 [2007]). Although the issue is not raised by either party, we cannot allow an illegal sentence to stand (*see People v Considine*, 167 AD3d 1554, 1555 [4th Dept 2018]). We therefore modify the judgment by vacating that period of postrelease supervision (*see Lockett*, 34 AD3d at 1209).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

1432
KA 15-00839
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EVERETT D. BALKMAN, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered April 7, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). In August 2014, defendant was riding as a passenger in a vehicle that was stopped by an officer of the Rochester Police Department (RPD). Shortly after the officer approached the vehicle on foot, he observed a chrome handgun on the floor of the vehicle by defendant's feet. Defendant was arrested and indicted. In his omnibus motion, he sought, inter alia, to suppress physical evidence and statements on the ground that the officer lacked the requisite reasonable suspicion to stop the vehicle. After a hearing, County Court refused to suppress the physical evidence and statements. We affirm.

Contrary to defendant's contention, we conclude that the People established that the officer lawfully stopped the vehicle in which defendant was a passenger because the officer had reasonable suspicion that there was a warrant for the arrest of the registered owner of the vehicle. "Police stops of automobiles in New York State are legal 'when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime' " (*People v Bushey*, 29 NY3d 158, 164 [2017], quoting *People v Spencer*, 84 NY2d 749, 753 [1995], *cert denied* 516 US 905 [1995]). Reasonable suspicion is "the quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under

the circumstances to believe criminal activity is at hand” (*People v Cantor*, 36 NY2d 106, 112-113 [1975]; *see People v Brannon*, 16 NY3d 596, 601-602 [2011]). “Reasonable suspicion does not require absolute certainty” (*Brannon*, 16 NY3d at 602). Rather, we must uphold an automobile stop as having been based upon reasonable suspicion as long as the officer who initiated the stop can point to “specific and articulable facts which, along with any logical deductions, reasonably prompted th[e] intrusion” (*Cantor*, 36 NY2d at 113; *see Brannon*, 16 NY3d at 602).

The officer testified at the hearing that he stopped the vehicle in which defendant was a passenger because the onboard computer system in his patrol vehicle indicated a “similarity hit,” i.e., the existence of a similarity between the registered owner of the vehicle and a person with an active warrant. A similarity hit is based on a comparison of personal information such as names, aliases, and dates of birth. The system’s exact parameters are set by the New York State Department of Motor Vehicles. The officer, a 22-year RPD veteran, testified that he uses the computer system to run license plate numbers on a routine basis. When he runs the license plate number of a particular vehicle, the system provides him with information such as the vehicle’s registration and inspection status and whether the owner has a warrant for his or her arrest. That information is provided in messages through which the officer can scroll. The system generates approximately 11 or 12 messages for a typical vehicle, and it takes the officer approximately 10 or 15 seconds to read each message.

In this case, the plate number of the vehicle generated 25 messages including the similarity hit. The officer testified that it would have taken him several minutes to scroll through the messages and determine whether the warrant was issued for the owner of the vehicle but, because the officer was driving, he had mere seconds to compare the information. In those seconds, he noted that the similarity hit involved a warrant from the City of Rochester, as opposed to an out-of-state warrant, thus requiring heightened attention. He then activated his overhead lights and stopped the vehicle. The officer further testified that he did not review the information in the system prior to approaching the driver of the stopped vehicle because the delay would have given someone trying to evade capture the opportunity to flee. Instead, he immediately exited his patrol vehicle and approached the driver of the stopped vehicle on foot. The officer noticed a female driver, a male front passenger, a rear passenger, and a baby. The officer asked the driver for identification, checked the registration and inspection stickers and, within 20 or 30 seconds of his approach, observed the handgun in plain view. Based on the foregoing testimony, we conclude that the People established the requisite reasonable suspicion based on “specific and articulable facts” (*Cantor*, 36 NY2d at 113).

We further reject defendant’s contention that *People v Jennings* (54 NY2d 518 [1981]) compels suppression. The defendant in *Jennings* did not challenge the lawfulness of the vehicle stop (*id.* at 522). Rather, suppression was required because the defendant was arrested based upon the purported existence of a warrant that had already been

vacated (*id.* at 522-523). Here, in contrast, once the officer saw the handgun in plain view by defendant's feet, he had probable cause to effect defendant's arrest (*see People v East*, 119 AD3d 1370, 1371 [4th Dept 2014]; *see also People v Fields*, 127 AD3d 782, 783 [2d Dept 2015], *lv denied* 26 NY3d 1109 [2016]).

Finally, we have considered defendant's remaining contentions and conclude that they lack merit.

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

1449
KA 18-01077
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT J. HINSHAW, DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (HERBERT L. GREENMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (RYAN M. FLAHERTY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered September 15, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and unlawful possession of marihuana.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and unlawful possession of marihuana (§ 221.05). Contrary to defendant's contention, County Court properly refused to suppress physical evidence seized by the police after a traffic stop.

It is well settled that to conduct a traffic stop, police require either probable cause to believe that a traffic infraction has been committed, or "reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime" (*Matter of Deveines v New York State Dept. of Motor Vehs. Appeals Bd.*, 136 AD3d 1383, 1384 [4th Dept 2016] [internal quotation marks omitted]; *see People v Robinson*, 97 NY2d 341, 349 [2001]). Here, a New York State Trooper properly stopped the vehicle defendant was driving based on his check of Department of Motor Vehicles (DMV) computer records for the vehicle's license plate number, which revealed that the car had been impounded and thus should have been located in an impound lot (*see People v Boomer*, 187 AD2d 659, 660-661 [2d Dept 1992], *lv denied* 81 NY2d 882 [1993]; *see generally People v Bushey*, 29 NY3d 158, 160 [2017]). The Trooper testified at the suppression hearing that, based on the DMV records, he believed that he was required to conduct an investigation — i.e., stop the vehicle — to determine whether the vehicle had registration problems, the

license plates were suspended, the insurance was suspended, or if the vehicle was, in fact, stolen.

Our dissenting colleagues conclude that the Trooper did not have reasonable suspicion to stop defendant's vehicle because the Trooper disregarded cautionary language in the DMV impoundment record stating that it "should not be treated as a stolen vehicle hit[, and] [n]o further action should be taken based solely upon this impounded response." We conclude, however, that the Trooper's testimony that the cautionary language was "generic," inasmuch as it even "comes up with stolen vehicles," and that, based on his experience, he interpreted the impoundment record as requiring him to conduct a further investigation because the vehicle "should not be out on the road," establishes that the stop was not unreasonable. Rather, we conclude that the impoundment record, coupled with the Trooper's explanation of its import, provided reasonable suspicion to stop the vehicle. In disregarding the Trooper's explanation that the cautionary language was "generic," the dissent would obligate us to find unreasonable any stops where that same message appears, irrespective of the facts surrounding the stop. We reject such a categorical determination.

Furthermore, it is of no moment that the DMV impoundment record was later determined to be erroneous, because " '[a] mistake of fact . . . may be used to justify a [stop]' " (*People v Baker*, 87 AD3d 1313, 1314 [4th Dept 2011], *lv denied* 18 NY3d 857 [2011]; *see People v Smith*, 1 AD3d 965, 965 [4th Dept 2003]). When an officer makes a mistake of fact or law in conducting a traffic stop, "the relevant question . . . is . . . whether his belief that a traffic violation [or crime] had occurred was objectively reasonable" (*People v Guthrie*, 25 NY3d 130, 134 [2015], *rearg denied* 25 NY3d 1191 [2015]; *see also id*. at 134 n 2). Here, the Trooper's actions in temporarily stopping the car to investigate further were objectively reasonable (*see People v Johnson*, 178 AD2d 549, 550 [2d Dept 1991], *lv denied* 79 NY2d 920 [1992]). Once the Trooper smelled burnt marihuana and saw what he believed to be marihuana in plain view, he had probable cause to search the vehicle and its occupants (*see People v Walker*, 128 AD3d 1499, 1500 [4th Dept 2015], *lv denied* 26 NY3d 936 [2015]).

All concur except WHALEN, P.J., and CENTRA, J., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent. "[T]he stop of an automobile is a seizure implicating constitutional limitations" and is lawful only if the police have probable cause to believe a traffic infraction has been committed, or "when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime" (*People v Spencer*, 84 NY2d 749, 752-753 [1995], *cert denied* 516 US 905 [1995]). There is no dispute that the State Trooper here did not observe defendant committing any traffic infraction, thus the only issue is whether he had reasonable suspicion that defendant had committed a crime, that is, whether he had " 'the quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand' " (*People v Johnson*, 143 AD3d 1284, 1285

[4th Dept 2016], *lv denied* 28 NY3d 1146 [2017], quoting *People v Cantor*, 36 NY2d 106, 112-113 [1975]). The Trooper - who had not observed defendant engage in suspicious activity - performed a license plate check on his computer, which returned a report with the heading: "Confirm record with originator. The following has been reported as an impounded vehicle. It should not be treated as a stolen vehicle hit. *No further action should be taken based solely upon this impounded response*" (emphasis added). The Trooper testified that the significance of the notification was that the vehicle should have been in an impound lot and should not have been out on the road and, based solely on that notification, he stopped the vehicle.

The Trooper's interpretation of the cautionary statement in the report as not restricting law enforcement personnel from conducting an investigatory traffic stop is directly at odds with the very language of the report that "[n]o further action should be taken based solely upon this impounded response." Thus, to justify the stop, the Trooper needed to make the inference that the vehicle had been stolen from the impound lot. However, the likelihood of a vehicle being stolen from an impound lot is quite low, and the effort necessary to confirm whether a vehicle has been stolen from impound is minimal; further, the Trooper had the ability to continue following the vehicle while checking to see whether it had been stolen, and to stop the vehicle if its driver violated any traffic law. Contrary to the conclusion of the majority, the question is not whether "the Trooper's actions in temporarily stopping the car to investigate further were objectively reasonable." Rather, the appropriate inquiry is whether the Trooper's belief *that a crime occurred* was "objectively reasonable" (*People v Guthrie*, 25 NY3d 130, 134 [2015], *rearg denied* 25 NY3d 1191 [2015]). We conclude that it was not objectively reasonable for the Trooper to believe that any crime had been committed here to justify the stop of defendant's vehicle.

Moreover, the Trooper's actions are at odds with the constitutional "right to be let alone," which has been recognized as "the most comprehensive of rights and the right most valued by civilized men" (*Olmstead v United States*, 277 US 438, 478 [1928] [Brandeis, J., dissenting]). Although that right is not absolute, it should certainly be given more weight than the convenience or routine of law enforcement. County Court therefore erred in refusing to suppress the physical evidence seized after the traffic stop. Accordingly, we would reverse the judgment, vacate the plea, grant that part of defendant's motion seeking to suppress physical evidence recovered after the traffic stop, and remit the matter to County Court for further proceedings on the indictment.

Entered: March 22, 2019 Mark W. Bennett
Clerk of the Court

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

1462
CA 18-00506
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CURRAN, AND WINSLOW, JJ.

EARL OWENS AND LORRAINE OWENS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOMPKINS BANK OF CASTILE AND/OR TOMPKINS
FINANCIAL CORPORATION, DEFENDANTS-RESPONDENTS.

WELCH, DONLON & CZARPLES PLLC, CORNING (MEGAN COLLINS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

DAVIDSON FINK LLP, ROCHESTER (DAVID L. RASMUSSEN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered January 8, 2018. The order, among other things, granted defendants' motion for summary judgment on their counterclaim for attorneys' fees.

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

Memorandum: Plaintiffs appeal from an order that granted defendants' motion for summary judgment on their counterclaim for attorneys' fees and awarded defendants $20,564.72. Those expenses were incurred by defendants when enforcing their rights as mortgagee on property owned by plaintiffs by moving to intervene in two separate courses of litigation involving that property. After defendants' motions to intervene were denied upon stipulation of the parties, plaintiffs commenced this action seeking damages upon allegations that defendants, inter alia, breached their loan agreements with plaintiffs by making unfounded claims for attorneys' fees.

Plaintiffs contend that defendants' claim for attorneys' fees is barred by res judicata because the stipulated orders denying the motions to intervene did not award such fees. We reject that contention. " '[U]nder res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action' " (*Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 12 [2008], quoting *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]). "A voluntary discontinuance ordinarily is not a decision on the merits, and res judicata does not bar a [party] from maintaining another proceeding for the same claim unless the order of discontinuance recites that the claim was discontinued or settled on

the merits" (*Matter of AutoOne Ins. Co. v Valentine*, 72 AD3d 953, 955 [2d Dept 2010]). "Thus, a stipulation to discontinue an action without prejudice is not subject to the doctrine of res judicata" (*Maurischat v County of Nassau*, 81 AD3d 793, 794 [2d Dept 2011]). Here, the doctrine of res judicata did not bar defendants from asserting a counterclaim seeking to recover attorneys' fees inasmuch as the stipulated orders denying defendants' motions to intervene were not determined on the merits, and were not entered with prejudice.

We also reject plaintiffs' contention that, because the stipulated orders do not expressly reserve defendants' right to attorneys' fees, that claim is waived. A claim to attorneys' fees may be waived where parties enter into a settlement agreement that is " 'deemed to resolve all issues between' " them (*Gaisi v Gaisi*, 48 AD3d 744, 744 [2d Dept 2008]). In such cases, where " 'there [i]s no express reservation of rights with respect to the derivative issue of attorneys' fees, it must be deemed to have been waived and subsumed in the negotiated settlement' " (*id.* at 745). The stipulated orders here, however, do not purport to resolve any dispute except the motions to intervene. Rather, the stipulated orders provide that the parties agreed that defendants have a security interest in the proceeds of the underlying litigation regarding plaintiffs' property, and the orders do not have any provisions limiting the value or scope of defendants' claim for attorneys' fees.

Finally, we reject plaintiffs' contention that the award of attorneys' fees is unreasonable and unjustified. "Under the general rule in New York, attorneys' fees are deemed incidental to litigation and may not be recovered unless supported by statute, court rule or written agreement of the parties" (*Flemming v Barnwell Nursing Home & Health Facilities, Inc.*, 15 NY3d 375, 379 [2010], citing *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). Here, it is undisputed that plaintiffs agreed in the loan documents to pay defendants' reasonable fees and costs in connection with enforcing their rights under those agreements. "[I]t is well settled that a trial court is in the best position to determine those factors integral to fixing [attorneys'] fees . . . and, absent an abuse of discretion, the trial court's determination will not be disturbed" (*Pelc v Berg*, 68 AD3d 1672, 1673 [4th Dept 2009] [internal quotation marks omitted]). Upon our review of the record, we conclude that Supreme Court did not abuse its discretion in fixing the award.

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

1465
CA 18-00646
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CURRAN, AND WINSLOW, JJ.

KENNETH GLAZER, INDIVIDUALLY, AND AS
ADMINISTRATOR OF THE ESTATES OF LAURENCE GLAZER
AND JANE GLAZER, DECEASED, PLAINTIFF-APPELLANT,
AND CATLIN INSURANCE COMPANY, INC.,
PLAINTIFF-INTERVENOR,

V MEMORANDUM AND ORDER

SOCATA, S.A.S., ET AL., DEFENDANTS,
LIEBHERR-AEROSPACE TOULOUSE SAS, AND
LIEBHERR-ELEKTRONIK GMBH, DEFENDANTS-RESPONDENTS.

KREINDLER & KREINDLER LLP, NEW YORK CITY (DANIEL O. ROSE OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

WILLCOX & SAVAGE, P.C., NORFOLK, VIRGINIA (KEVIN L. KELLER, OF THE
VIRGINIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND HARRIS BEACH
PLLC, BUFFALO, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered November 20, 2017. The order, among other things, granted the motion of defendants Liebherr-Aerospace Toulouse S.A.S. and Liebherr-Elektronik GMBH to dismiss the amended complaint against them for lack of personal jurisdiction.

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

Memorandum: Kenneth Glazer, individually, and as administrator of the estates of Laurence Glazer and Jane Glazer, deceased (plaintiff), appeals from an order that, insofar as appealed from as limited by the brief, granted that part of the motion of defendants Liebherr-Aerospace Toulouse SAS (Aerospace) and Liebherr-Elektronik GMBH seeking to dismiss the amended complaint against Aerospace for lack of personal jurisdiction.

On September 5, 2014, plaintiff’s decedents departed the Rochester airport for Florida in an aircraft. During the flight, the plane’s cabin allegedly depressurized and caused plaintiff’s decedents to lose consciousness, which eventually resulted in a fatal plane crash in open water off the coast of Jamaica. The aircraft was manufactured by defendant Socata, S.A.S. (Socata), a French corporation, and the pressurization system was manufactured by Aerospace, also a French corporation. In his amended complaint,

plaintiff alleged, inter alia, that Aerospace was liable for the wrongful death of plaintiff's decedents under theories of negligence, strict product liability, and breach of implied warranty.

On appeal, plaintiff contends that personal jurisdiction over Aerospace was established through Aerospace's contract with Socata to provide the cabin pressurization system. Specifically, plaintiff contends that the contract required Aerospace to provide warranty services in New York for its cabin pressurization system, notwithstanding the fact that such services were never actually provided in New York.

CPLR 302 (a) (1) permits New York courts to exercise personal jurisdiction over any entity that "in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state." Jurisdiction can attach on the basis of one transaction, even if the defendant never enters the state, " 'so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted' " (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]; *see Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006], *cert denied* 549 US 1095 [2006]). "Purposeful" activities are those by which a defendant, "through volitional acts, 'avails itself of the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws' " (*Fischbarg*, 9 NY3d at 380; *see Cellino & Barnes, P.C. v Martin, Lister & Alvarez, PLLC*, 117 AD3d 1459, 1461 [4th Dept 2014], *lv dismissed* 24 NY3d 928 [2014]).

Initially, we conclude that plaintiff preserved for our review his contention that plaintiff's decedent Laurence Glazer (Laurence) was a third-party beneficiary to the contract between Socata and Aerospace. Nonetheless, we reject plaintiff's attempt to use that theory to establish that Aerospace contracted to supply services in New York and therefore is subject to personal jurisdiction under CPLR 302 (a) (1). To establish that Laurence was a third-party beneficiary, plaintiff has to show, among other things, "that the contract was intended for [Laurence's] benefit" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]; *see Logan-Baldwin v L.S.M. Gen. Contrs., Inc.*, 94 AD3d 1466, 1468 [4th Dept 2012]). Here, however, the contract for the purchase and sale of the cabin pressurization system was clearly intended for the benefit of the contracting parties. While it obliged Aerospace to provide certain warranty services to customers who purchased planes manufactured by Socata, the ultimate beneficiaries were the contracting parties (*cf. Logan-Baldwin*, 94 AD3d at 1469). Customers, such as Laurence, were at most incidental beneficiaries (*see Cole v Metropolitan Life Ins. Co.*, 273 AD2d 832, 833 [4th Dept 2000]; *Baker v Community Fin. Servs.*, 217 AD2d 979, 980 [4th Dept 1995]).

For the same reason, we conclude that the contract does not establish purposeful conduct on the part of Aerospace to provide services in New York. The purpose of the contract was for Aerospace to provide cabin pressurization systems to Socata to include in the aircraft that it manufactured. Inasmuch as Aerospace's purposeful

activity consisted of contracting with Socata to provide a component to the manufacturing of a plane that happened to end up in New York, that activity does not subject Aerospace to personal jurisdiction in New York (*see generally Fischbarg*, 9 NY3d at 380).

Plaintiff further contends that he is entitled to discovery on the issue of jurisdiction. We reject that contention inasmuch as plaintiff has not made a nonfrivolous showing "that facts *may exist* to exercise personal jurisdiction" over Aerospace (*Williams v Beemiller, Inc.*, 100 AD3d 143, 153 [4th Dept 2012], *amended on rearg* 103 AD3d 1191 [4th Dept 2013] [internal quotation marks omitted]; *see* CPLR 3211 [d]; *Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]). Although plaintiff contends that the possibility of an Aerospace-related aviation maintenance company located in New York warrants further discovery, we conclude that plaintiff failed to make the requisite nonfrivolous showing (*cf. Peterson*, 33 NY2d at 467; *Williams*, 100 AD3d at 153-154).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

1475
CAF 17-02037
PRESENT: SMITH, J.P., CARNI, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

IN THE MATTER OF JAXON S.

COMMISSIONER OF THE ONTARIO COUNTY DEPARTMENT
OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JASON S., RESPONDENT-APPELLANT.

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

HOLLY A. ADAMS, COUNTY ATTORNEY, CANANDAIGUA (WENDY R. WELCH OF COUNSEL), FOR PETITIONER-RESPONDENT.

TERESA M. PARE, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (Stephen D. Aronson, A.J.), entered October 31, 2017 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child on the ground of permanent neglect and freed the child for adoption. Initially, we note that the father's appeal from the order insofar as it concerns the disposition has been rendered moot by the subsequent adoption of the child (*see Matter of Iyanna KK. [Edward KK.]*, 141 AD3d 885, 886 [3d Dept 2016]; *Matter of Alexis C. [Jacqueline A.]*, 99 AD3d 542, 542-543 [1st Dept 2012], *lv denied* 20 NY3d 856 [2013]), and the exception to the mootness doctrine does not apply (*see Matter of Karlee JJ. [Jessica JJ.]*, 105 AD3d 1304, 1305 [3d Dept 2013]). Nonetheless, the father's appeal brings up for review the propriety of the order of fact-finding determining that he permanently neglected the child (*see Matter of Christopher D.S. [Richard E.S.]*, 136 AD3d 1285, 1286 [4th Dept 2016]; *Matter of Lisa E.* [appeal No. 1], 207 AD2d 983, 983 [4th Dept 1994]).

Contrary to the father's contention, we conclude that petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and the child (*see* Social Services Law § 384-b [7] [a]; *Matter*

of Soraya S. [Kathryne T.], 158 AD3d 1305, 1305-1306 [4th Dept 2018], *lv denied* 31 NY3d 908 [2018]). The evidence adduced at the fact-finding hearing established that petitioner's caseworker, inter alia, asked the father for names of relatives who might be a custodial resource for the child, ascertained the father's whereabouts when the father failed to maintain contact with the caseworker, informed the father of his right to visitation with the child while incarcerated, provided the father with informational updates and photographs of the child, and provided the father with reports prepared in conjunction with the permanency hearings ordered by Family Court (*see Matter of Caidence M. [Francis W.M.]*, 162 AD3d 1539, 1539-1540 [4th Dept 2018], *lv denied* 32 NY3d 905 [2018]; *Matter of Kaiden AA. [John BB.]*, 81 AD3d 1209, 1210 [3d Dept 2011]). We further conclude that, despite those diligent efforts, the father failed to plan for the future of the child (*see Soraya S.*, 158 AD3d at 1306). The father's plan, i.e., for the child to remain in foster care until the father was released from prison at some indefinite future time, was inadequate, particularly in light of the father's failure to engage in drug treatment and parenting classes while incarcerated (*see Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 430-431 [2012]; *Matter of Alex C., Jr. [Alex C., Sr.]*, 114 AD3d 1149, 1150 [4th Dept 2014], *lv denied* 23 NY3d 901 [2014]).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

6
KA 16-00980
PRESENT: WHALEN, P.J., CENTRA, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KHARYE JARVIS, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered June 2, 2016. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree (two counts).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of two counts of manslaughter in the first degree (Penal Law § 125.20 [1]). Defendant's sole contention on appeal is that Supreme Court erred in failing to determine at sentencing whether he should be afforded youthful offender status. We agree.

Defendant was previously tried and convicted by a jury in 1992 on two counts of murder in the second degree (Penal Law § 125.25 [1]), and we affirmed the judgment of conviction on direct appeal (*People v Jarvis*, 202 AD2d 1036 [4th Dept 1994], *lv denied* 83 NY2d 968 [1994]). In 2012, defendant moved for a writ of error coram nobis in this Court, asserting that appellate counsel was ineffective in failing to raise an issue on direct appeal that would have resulted in reversal, i.e., failing to argue ineffective assistance of trial counsel. We granted the writ, vacated the prior order, and on de novo review we reversed the judgment and granted defendant a new trial (*People v Jarvis*, 113 AD3d 1058, 1059 [4th Dept 2014], *affd* 25 NY3d 968 [2015]). On remittal, defendant pled guilty to two counts of manslaughter in the first degree.

As noted, defendant correctly contends that the court erred in failing to determine whether he should be afforded youthful offender status. Further, that contention survives his valid waiver of the right to appeal (*see People v Pacherille*, 25 NY3d 1021, 1023 [2015]).

Defendant was 17 years old at the time he committed the underlying crimes and, based on the record before us, he appears to be an eligible youth within the meaning of CPL 720.10 (2). Defendant was sentenced, however, without the benefit of an updated presentence report. The court obtained from defendant a waiver of an updated report, which is generally permissible where, as here, the "defendant had been continually incarcerated between the time of the initial sentencing and resentencing and at the time of . . . resentencing [the defendant] was afforded the opportunity to supply information about his [or her] subsequent conduct" (*People v Kuey*, 83 NY2d 278, 282-283 [1994]; *see People v Cobado*, 104 AD3d 1322, 1322-1323 [4th Dept 2013]). Nonetheless, "[w]hen determining whether a defendant is an eligible youth, the defendant's status at the time of the conviction—in this case at the time of his plea of guilty—is controlling" (*People v Brooks*, 160 AD3d 762, 764 [2d Dept 2018], *lv denied* 31 NY3d 1115 [2018]; *see People v Cecil Z.*, 57 NY2d 899, 901 [1982]; *People v Michael A.C.* [appeal No. 2], 128 AD3d 1359, 1360 [4th Dept 2015], *lv denied* 25 NY3d 1168 [2015]). The original presentence report prepared in 1992 on which the court relied is insufficient to establish that defendant was an eligible youth at the time he pled guilty to the manslaughter counts in 2016. We therefore hold the case, reserve decision, and remit the matter to Supreme Court to make and state for the record a determination whether defendant is an eligible youth within the meaning of CPL 720.10 (2) with the benefit of an updated presentence report and, if so, whether defendant should be afforded youthful offender status.

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

57
CAF 17-02173
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, DEJOSEPH, AND WINSLOW, JJ.

IN THE MATTER OF LIAM M.J.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CYRIL M.J., RESPONDENT-APPELLANT.

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

KEVIN EARL, COUNTY ATTORNEY, BATAVIA (COLLEEN S. HEAD OF COUNSEL), FOR PETITIONER-RESPONDENT.

JACQUELINE M. GRASSO, BATAVIA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered December 1, 2017 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected and abused the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order that, inter alia, found that he neglected and abused the subject child and placed the child in the custody of petitioner. We affirm.

The father contends that Family Court erred in denying his motion to dismiss the petition at the close of petitioner's proof because petitioner failed to prove by a preponderance of the evidence that the child was neglected or abused. We reject that contention. "While the burden of proving abuse or neglect always rests with petitioner, upon a motion . . . to dismiss a Family Court Act article 10 petition at the close of petitioner's case, the proper inquiry [is] whether petitioner [has] made out a prima facie case, thereby shifting the burden to respondent[] to rebut the evidence of parental culpability" (*Matter of Mary R.F. [Angela I.]*, 144 AD3d 1493, 1493 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017] [internal quotation marks omitted]). Petitioner met its initial burden by establishing that, within the time frame alleged in the petition, the father committed against the child an act constituting sexual abuse in the first degree in violation of Penal Law § 130.65 (3) (*see* Family Ct Act § 1012 [e] [iii] [A]; [f] [i] [B]).

Contrary to the father's further contention, we conclude that there is a sound and substantial basis for the court's ultimate determination that the child was neglected and abused as a result of the father's sexual abuse of the child (*see generally* Family Ct Act § 1046 [b] [i]; *Matter of Sean P. [Brandy P.]*, 156 AD3d 1339, 1339-1340 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]). Here, the child's disclosures of the sexual abuse were sufficiently corroborated by the testimony of a forensic expert, a caseworker, and the child's caretaker, who was not involved in the custody dispute between the mother and the father, as well as by the child's "age-inappropriate knowledge of sexual matters" (*Matter of Brooke T. [Justin T.]*, 156 AD3d 1410, 1411 [4th Dept 2017]; *see* § 1046 [a] [vi]). Furthermore, "the child gave multiple, consistent descriptions of the abuse and, '[a]lthough repetition of an accusation by a child does not corroborate the child's prior account of [abuse] . . . , the consistency of the child['s] out-of-court statements describing [the] sexual conduct enhances the reliability of those out-of-court statements' " (*Brooke T.*, 156 AD3d at 1411). The reliability of the corroboration is a "determination entrusted in the first instance to [the court's] considerable discretion" (*Matter of Timothy B. [Paul K.]*, 138 AD3d 1460, 1461 [4th Dept 2016], *lv denied* 28 NY3d 908 [2016] [internal quotation marks omitted]), and we find no reason to disturb the court's determination here.

Finally, we agree with the father that the court erred in drawing a negative inference against him based on his failure to call his girlfriend as a witness. "A party is entitled to a missing witness charge when the party establishes that an uncalled witness possessing information on a material issue would be expected to provide noncumulative testimony in favor of the opposing party and is under the control of and available to that party" (*Matter of Spooner-Boyke v Charles*, 126 AD3d 907, 909 [2d Dept 2015] [internal quotation marks omitted]; *see DeVito v Feliciano*, 22 NY3d 159, 165-166 [2013]). "The party seeking a missing witness inference has the initial burden of setting forth the basis for the request as soon as practicable . . . to[, inter alia,] avoid substantial possibilities of surprise" (*Matter of Lewis*, 158 AD3d 1247, 1250 [4th Dept 2018], *lv denied* 31 NY3d 909 [2018] [internal quotation marks omitted]; *see generally People v Nguyen*, 156 AD3d 1461, 1462 [4th Dept 2017], *lv denied* 31 NY3d 1016 [2018]). Here, in its written decision, "[t]he court sua sponte drew a negative inference based on the [father's] failure to call [his girlfriend] as a witness, and failed to advise [him] that it intended to do so" (*Spooner-Boyke*, 126 AD3d at 909). Thus, the father "lacked the opportunity to explain [his] failure to call [his girlfriend] as a witness, or to discuss whether [his girlfriend] was even available to testify or under [his] control" (*id.*). We conclude, however, that the error did not affect the result (*see generally Matter of Antoine C.*, 124 AD3d 433, 434 [1st Dept 2015], *lv denied* 25 NY3d 905 [2015]; *Matter of LaRussa v Williams*, 114 AD3d 1052, 1054 [3d Dept 2014]).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

58
CAF 17-01823
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, DEJOSEPH, AND WINSLOW, JJ.

IN THE MATTER OF ANDREW T. PAJEK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STEPHEN FEKETI AND EMILY KATHERINE IRELAND,
NOW KNOWN AS EMILY KATHERINE VALCIN,
RESPONDENTS-RESPONDENTS.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CHELSEA L. PALMISANO OF COUNSEL), FOR PETITIONER-APPELLANT.

STEPHEN FEKETI, RESPONDENT-RESPONDENT PRO SE.

EMILY KATHERINE IRELAND, NOW KNOWN AS EMILY KATHERINE VALCIN, RESPONDENT-RESPONDENT PRO SE.

Appeal from an order of the Family Court, Monroe County (James E. Walsh, Jr., J.), entered September 25, 2017 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order granting the motion of respondents, the custodians of the subject children, for dismissal of the father's petition seeking visitation with the children. We reject the father's contention that Family Court erred in granting the motion without conducting a hearing (*see Matter of Piwowar v Glosek*, 53 AD3d 1121, 1122 [4th Dept 2008]; *see generally Matter of Russo v Russo*, 282 AD2d 610, 610 [2d Dept 2001]). The court is "not required to conduct an evidentiary hearing where . . . it is clear from the record that the court 'possesse[s] sufficient information to render an informed determination that [is] consistent with the child[ren's] best interests' " (*Matter of Bogdan v Bogdan*, 291 AD2d 909, 909 [4th Dept 2002]; *see Matter of Lynda D. v Stacy C.*, 37 AD3d 1151, 1151 [4th Dept 2007]; *Matter of Oliver S. v Chemung County Dept. of Social Servs.*, 162 AD2d 820, 821-822 [3d Dept 1990]). At the time the petition was filed, the father was incarcerated based upon his conviction of murder in the second degree for killing the mother of the subject children. Family Court Act § 1085 and Domestic Relations Law § 240 (1-c) provide for "the rare but unthinkable scenario whereby one parent intentionally murders another yet seeks custody or visitation of the

children left behind to deal with their double tragedy" (*Matter of Scott JJ.*, 280 AD2d 4, 9 [3d Dept 2001]; *see Matter of Rumpel v Powell*, 129 AD3d 1344, 1346 [3d Dept 2015]). Under those statutes, there is a presumption that neither custody nor visitation with the murdering parent is appropriate or in the children's best interests (*see Rumpel*, 129 AD3d at 1346; *Scott JJ.*, 280 AD2d at 9). Although the presumption is rebuttable, the statutes prevent a court from making an award of custody or visitation to the murdering parent except under certain narrow circumstances, in addition to which "the court must still make an additional finding that visitation or custody is in the child[ren's] best interest[s]" (*Scott JJ.*, 280 AD2d at 9; *see Rumpel*, 129 AD3d at 1346). Inasmuch as the father failed to set forth allegations rebutting the presumption that visitation is not in the children's best interests, we conclude that the court properly dismissed the petition.

In light of the foregoing, we conclude that there is no merit to the father's further contention that the court abused its discretion in failing to appoint an attorney for the children to assess whether the children would assent to visitation (*see generally Matter of Farnham v Farnham*, 252 AD2d 675, 677 [3d Dept 1998]).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

80

CAF 17-00498

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF JILLIAN E. AND JULIANNA E.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JOLENE E., RESPONDENT-APPELLANT.

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

JOHN A. HERBOWY, UTICA, FOR PETITIONER-RESPONDENT.

WILLIAM KOSLOSKY, UTICA, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered January 18, 2017 in a proceeding pursuant to Family Court Act article 10. The order adjudged that respondent neglected the subject children.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by striking from the second ordering paragraph the reference to Family Court Act § 1012 (f) (i) (A) and replacing it with a reference to Family Court Act § 1012 (f) (i) (B) and as modified the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order of fact-finding that adjudicated the subject children to be neglected. Contrary to the mother's contention, we conclude that petitioner established that she neglected the children. "[A] party seeking to establish neglect must show, by a preponderance of the evidence . . . , first, that [the] child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent . . . to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* Family Ct Act §§ 1012 [f] [i]; 1046 [b] [i]). Here, petitioner met its burden by establishing by a preponderance of the evidence that drug paraphernalia used in the manufacture of methamphetamine, including acetone, was found in the home where the mother and the children resided in areas accessible to the children, which placed them at imminent risk of harm (*see Matter of Ahriiyah VV. [Rebecca VV.]*, 160 AD3d 1140, 1141-1142 [3d Dept 2018], *lv denied* 31 NY3d 911 [2018]; *Matter of Paige AA. [Anthony AA.]*, 85 AD3d 1213, 1216 [3d Dept 2011],

lv denied 17 NY3d 708 [2011]).

We note, however, that the order of fact-finding conflicts with Family Court’s oral decision: the order states that the children were neglected pursuant to Family Court Act § 1012 (f) (i) (A), whereas the court in its decision stated that the finding of neglect was premised on the mother’s failure to provide the children with proper supervision or guardianship pursuant to Family Court Act § 1012 (f) (i) (B). We therefore modify the order to conform to the decision (*see Matter of Esposito v Magill*, 140 AD3d 1772, 1773 [4th Dept 2016], *lv denied* 28 NY3d 904 [2016]) by striking from the second ordering paragraph the reference to Family Court Act § 1012 (f) (i) (A) and replacing it with a reference to Family Court Act § 1012 (f) (i) (B).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

141
KA 16-01937
PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISAIAH S. CORMACK, DEFENDANT-APPELLANT.

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

ISAIAH S. CORMACK, DEFENDANT-APPELLANT PRO SE.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (COLIN X. FITZGERALD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered October 13, 2016. The judgment convicted defendant, upon a nonjury verdict, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, after a nonjury trial, of assault in the first degree (Penal Law § 120.10 [1]). The charge arose after the victim, who had been in a relationship with defendant's wife, was shot and injured during a house party.

We reject defendant's contention in his main and pro se supplemental briefs that the evidence is legally insufficient to support the conviction. " 'It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial, viewed in the light most favorable to the People' " (*People v Clark*, 142 AD3d 1339, 1340 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]). Here, the fact that none of the witnesses testified as to seeing defendant fire the shot that injured the victim " 'does not render the evidence legally insufficient, inasmuch as there was ample circumstantial evidence establishing defendant's identity as the shooter' " (*id.* at 1341). Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention in his main and pro se supplemental briefs that the verdict is against the

weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant also contends in his main and pro se supplemental briefs that the verdict is repugnant because County Court acquitted him of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) but convicted him of assault in the first degree (§ 120.10 [1]). We reject that contention inasmuch as his acquittal of the weapon charge did not necessarily negate an essential element of the assault charge (*see People v DeLee*, 24 NY3d 603, 608 [2014], *rearg denied* 31 NY3d 1127 [2018]; *People v Muhammad*, 17 NY3d 532, 539-540 [2011]; *People v James*, 249 AD2d 919, 919 [4th Dept 1998], *lv denied* 92 NY2d 899 [1998]).

Defendant's additional contention in his pro se supplemental brief that the court erred in failing to hold an independent source hearing with respect to a witness's pretrial identification of him from a photo array is moot inasmuch as that witness did not identify defendant at trial (*see People v Goodrell*, 130 AD3d 1502, 1503 [4th Dept 2015]). Contrary to defendant's contention in his pro se supplemental brief, we conclude that defendant received meaningful representation (*see People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, we reject defendant's contention in his main brief that the sentence is unduly harsh and severe.

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

183
CA 18-01655
PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ.

ENERGY COOPERATIVE OF AMERICA, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LUIGI'S FAMILY BAKERY, INC., AND LUIGI'S
BAKERY CORP., DEFENDANTS-RESPONDENTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (ADAM M. BRASKY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RICHARD J. KUBINIEC, BUFFALO, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered March 5, 2018. The order denied the motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this action asserting a cause of action of de facto merger based on allegations that defendant Luigi's Bakery Corp. (Bakery Corp.) is liable for a judgment entered in plaintiff's favor against its predecessor, defendant Luigi's Family Bakery, Inc. (Family Bakery). Supreme Court denied plaintiff's motion for summary judgment on the complaint, and we now reverse. Factors courts consider in determining whether a de facto merger has occurred include "continuity of ownership; . . . a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; . . . assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and . . . a continuity of management, personnel, physical location, assets, and general business operation" (*Sweatland v Park Corp.*, 181 AD2d 243, 245-246 [4th Dept 1992]; *see R&D Elecs., Inc. v NYP Mgt., Co., Inc.*, 162 AD3d 1513, 1515 [4th Dept 2018]). Not all of these factors are required to demonstrate a merger; " 'rather, these factors are only indicators that tend to show a de facto merger' " (*Sweatland*, 181 AD2d at 246).

Here, defendants admitted to continuity of ownership between Family Bakery and Bakery Corp., and to two of the other factors of a de facto merger: cessation of ordinary business operations, and continuity of management, personnel, physical location, and general

business operation. In both their answer and their bill of particulars, defendants admitted that the successor corporation, Bakery Corp., was formed in the same month that the predecessor corporation, Family Bakery, ceased operations. They also admitted that the successor corporation used the same address and phone number as the predecessor corporation. We therefore conclude that the court erred in determining that there are issues of fact with respect to the date of incorporation of the successor corporation or the date of dissolution of the predecessor corporation. A case for de facto merger can be made without a legal dissolution where, as here, the predecessor company "has become, in essence, a shell" (*Matter of AT&S Transp., LLC v Odyssey Logistics & Tech. Corp.*, 22 AD3d 750, 753 [2d Dept 2005]). We also conclude that, because this was not a default judgment, the court erred in determining that plaintiff was required to submit affidavits of nonmilitary service (*see Matter of Roslyn B. v Alfred G.*, 222 AD2d 581, 581 [2d Dept 1995]; *Matter of Title Guar. & Trust Co. v Duffy*, 267 App Div 444, 446 [1st Dept 1944]).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

208
KA 18-00319
PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GLENN A. PENDERGRAPH, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (NICOLE K. INTSCHERT OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (Gordon J. Cuffy, A.J.), entered January 23, 2018. The order denied defendant's motion to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Onondaga County Court for a hearing pursuant to CPL 440.30 (5) in accordance with the following memorandum: Defendant appeals from an order summarily denying his motion pursuant to CPL 440.10 to vacate the judgment convicting him of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [former (2)]). Defendant contends that he was deprived of a fair trial because the prosecutor erroneously said on summation that a witness received no benefit for cooperating with the prosecution, and that he was denied effective assistance of counsel because defense counsel failed to object to the prosecutor's comment and because defense counsel told the jury that defendant would testify without first discussing that option with defendant.

Although on direct appeal we rejected defendant's contention that he was denied effective assistance of counsel (*People v Pendergraph*, 150 AD3d 1703, 1703-1704 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017]), we note that his present contentions are properly raised by way of a CPL 440.10 motion because they concern matters outside the record that was before us on his direct appeal (*see People v Conway*, 118 AD3d 1290, 1291 [4th Dept 2014]; *see generally People v Russell*, 83 AD3d 1463, 1465 [4th Dept 2011], *lv denied* 17 NY3d 800 [2011]). We also conclude that CPL 440.10 (3) (c) does not bar defendant's contentions. Although defendant made a prior CPL 440.10 motion, at that time defendant was not "in a position to adequately raise the

ground or issue underlying the present motion" (CPL 440.10 [3] [c]) and, in any event, we have the power to exercise our discretion to reach the merits of defendant's contention (*see People v Reed*, 159 AD3d 1551, 1552 [4th Dept 2018]; *People v Pett*, 148 AD3d 1524, 1524 [4th Dept 2017]).

With respect to the merits, we conclude that defendant is not entitled to a hearing regarding his contentions that the prosecutor committed misconduct during summation by saying that a witness received no benefit by cooperating with the prosecution and that counsel was ineffective by not objecting thereto. The evidence submitted in support of the CPL 440.10 motion establishes that, in consideration for his cooperation with defendant's prosecution, the witness received the minimum sentence as part of a separate plea deal in another county. Thus, the prosecutor incorrectly stated on summation that the witness received no benefit for cooperating. Nevertheless, we conclude that defendant is not entitled to a hearing on that issue because that one comment was not so egregious as to deprive defendant of a fair trial (*see People v Hendrix*, 132 AD3d 1348, 1348 [4th Dept 2015], *lv denied* 26 NY3d 1145 [2016]; *People v Lyon*, 77 AD3d 1338, 1339 [4th Dept 2010], *lv denied* 15 NY3d 954 [2010]). Thus, defense counsel's failure to object thereto did not deprive defendant of effective assistance (*see Hendrix*, 132 AD3d at 1348).

To the extent defendant contends in his CPL 440.10 motion that counsel was ineffective for not objecting to other comments made by the prosecutor on summation, we conclude that County Court properly denied the motion because this contention is based on matters in the record that were raised on direct appeal. Defendant is therefore not entitled to a hearing on that allegation of ineffective assistance of counsel (*see* CPL 440.10 [2] [a]; *People v McCullough*, 144 AD3d 1526, 1526-1527 [4th Dept 2016], *lv denied* 29 NY3d 999 [2017]).

We further conclude, however, that defendant is entitled to a hearing with respect to whether counsel was ineffective in telling the jury that defendant would testify at trial. In support of his motion, defendant submitted his own affidavit stating that his trial counsel never discussed with him whether testifying would be a good or bad idea, and that he never told counsel that he would testify at trial, and that trial counsel nevertheless told the jury that defendant would testify. Defendant's account is supported by the affirmation of defendant's appellate counsel, who stated that trial counsel admitted that defendant did not tell him before trial that he would testify. Thus, defendant's allegations are potentially supported by other evidence, and "it cannot be said that there is no reasonable possibility that [they are] true" (*People v Hill*, 114 AD3d 1169, 1169 [4th Dept 2014] [internal quotation marks omitted]). We therefore conclude that a hearing is required to afford defendant an opportunity to prove that trial counsel did not discuss with him whether he would testify before informing the jury that defendant would do so, and that there was no strategic or tactical explanation for telling the jury that defendant would testify (*see People v Washington*, 128 AD3d 1397, 1400 [4th Dept 2015]). Consequently, we reverse the order and remit

the matter to County Court to conduct a hearing on that part of defendant's motion.

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

209
KA 17-00946
PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ZACKARY S. DRESSNER, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Vincent M. Dinolfo, J.), entered March 9, 2017. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that County Court erred in granting an upward departure from his presumptive classification as a level one risk. We reject that contention. The record establishes that defendant, while employed as the senior pastor of a church and the principal of a school for children, possessed images and videos of child pornography. From a computer in his home, defendant used a peer-to-peer file sharing program to offer and receive the child pornography. Under the SORA guidelines, defendant's score on the risk assessment instrument resulted in a presumptive risk level one classification (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary [Guidelines] at 3 [2006]). It is well settled, however, that a court may grant an upward departure from a sex offender's presumptive risk classification when the People establish, by clear and convincing evidence (*see* § 168-n [3]; *People v Gillotti*, 23 NY3d 841, 861-862 [2014]), the existence of "an aggravating . . . factor of a kind, or to a degree, that is otherwise not adequately taken into account by the [risk assessment] guidelines" (Guidelines at 4). We conclude that the court's determination to grant the People's request for an upward departure is based on clear and convincing evidence of aggravating factors not adequately taken into account by the risk assessment guidelines (*see People v Lattimore*, 50 AD3d 1604, 1605 [4th Dept 2008], *lv denied* 10 NY3d 717

[2008]).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

226
KA 17-00863
PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

JEREMY L. SOUTAR, DEFENDANT-APPELLANT.

CHARLES A. MARANGOLA, MORAVIA, 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 (Thomas G. Leone, J.), rendered January 29, 2015. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]), defendant challenges the severity of the sentence. Defendant's waiver of the right to appeal is invalid because the perfunctory inquiry made by County Court was "insufficient to establish that the court 'engage[d] . . . defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Brown*, 296 AD2d 860, 860 [4th Dept 2002], *lv denied* 98 NY2d 767 [2002]; *see People v Hamilton*, 49 AD3d 1163, 1164 [4th Dept 2008]). Nevertheless, we conclude that the sentence is not unduly harsh or severe (*see People v Carter*, 147 AD3d 1514, 1516 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017]).

Entered: March 22, 2019   Mark W. Bennett
                                           Clerk of the Court

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

234

KAH 18-01640

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ANDRE DURHAM, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

CENTER FOR APPELLATE LITIGATION, NEW YORK CITY (JAN HOTH OF COUNSEL), FOR PETITIONER-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered July 30, 2018 in a habeas corpus proceeding. The judgment converted the proceeding into a CPLR article 78 proceeding and dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment that converted his habeas corpus proceeding into a CPLR article 78 proceeding and dismissed the petition. He contends that he is being held illegally beyond his conditional release date based on respondent’s erroneous position that petitioner’s release is conditioned on his compliance with Executive Law § 259-c (14), which, as relevant, prohibits a level three sex offender from residing within 1,000 feet of school grounds. Petitioner therefore contends that Supreme Court erred in dismissing the petition. We affirm.

Initially, we conclude that the court erred in converting petitioner’s habeas corpus proceeding into a CPLR article 78 proceeding because, if we were to accept his interpretation of Executive Law § 259-c (14), he would be entitled to immediate release (*see generally People ex rel. Garcia v Annucci*, 167 AD3d 199, 201 [4th Dept 2018]; *Matter of Johnson v Thompson*, 134 AD3d 1404, 1404-1405 [4th Dept 2015]). Indeed, there is no dispute that petitioner’s good behavior time exceeded the unserved part of his term of incarceration, entitling him to conditional release on his request (*see* Penal Law § 70.40 [1] [b]; *Garcia*, 167 AD3d at 201).

We also conclude, however, that the court properly dismissed the petition on the merits. We recently rejected petitioner's interpretation of Executive Law § 259-c (14) in *Garcia* (167 AD3d at 204-205), in which we concluded that, although the provision's language is ambiguous, its legislative history demonstrates that it "was intended to extend the school grounds mandatory condition to all persons conditionally released or released to parole who have been designated level three sex offenders" (*id.* at 204). Inasmuch as it is uncontested that petitioner is a level three sex offender and did not have a residence that complied with section 259-c (14), he did not establish that he was entitled to immediate release.

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

242
CA 17-01546
PRESENT: WHALEN, P.J., CARNI, NEMOYER, AND CURRAN, JJ.

QUINTIN A. NOWLIN, PLAINTIFF-APPELLANT,

V   MEMORANDUM AND ORDER

CHARLIE SCHIANO, JR., ESQ., CHARLIE
SCHIANO, SR., ESQ., AND THE SCHIANO LAW FIRM,
DEFENDANTS-RESPONDENTS.

QUINTIN A. NOWLIN, PLAINTIFF-APPELLANT PRO SE.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (PAUL G. FERRARA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Robert B. Wiggins, A.J.), entered January 11, 2017. The order granted the motion of defendants to dismiss the complaint.

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

Memorandum: In this legal malpractice action, plaintiff appeals from an order granting defendants' motion to dismiss the complaint pursuant to, inter alia, CPLR 3211 (a) (7). We affirm. Accepting as true the facts set forth in the complaint and according plaintiff the benefit of all favorable inferences arising therefrom, as we must in the context of the instant motion (*see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we conclude that the complaint fails to plead a cognizable theory for legal malpractice because plaintiff's allegations do not support even an inference that any alleged negligence by defendants was a proximate cause of plaintiff's damages (*see Alden v Brindisi, Murad, Brindisi, Pearlman, Julian & Pertz ["The People's Lawyer"]*, 91 AD3d 1311, 1311 [4th Dept 2012]; *Pyne v Block & Assoc.*, 305 AD2d 213, 213 [1st Dept 2003]). We have reviewed plaintiff's remaining contentions and conclude that none warrants reversal or modification of the order.

Entered: March 22, 2019   Mark W. Bennett
                                                                        Clerk of the Court

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

245
CA 18-01521
PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF THE ESTATE OF ANDREW F. HARTUNG,
ALSO KNOWN AS ANDREW F. HARTUNG, JR., DECEASED.
-- MEMORANDUM AND ORDER
ALICIA S. CALAGIOVANNI, ONONDAGA COUNTY PUBLIC
ADMINISTRATOR, C.T.A., PETITIONER-RESPONDENT;

JOSEPH H. HARTUNG, OBJECTANT-APPELLANT.

JOSEPH H. HARTUNG, OBJECTANT-APPELLANT PRO SE.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (ROBERT W. CONNOLLY OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Onondaga County (Ava S. Raphael, S.), entered December 14, 2017. The order, inter alia, awarded legal fees to counsel for the Public Administrator.

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

Memorandum: Objectant appeals from an order that, inter alia, awarded interim legal fees to petitioner. We reject the contention of objectant that Surrogate's Court erred in awarding those fees. "The Surrogate has wide discretion in fixing attorney's fees[,]" and the record here establishes that the court considered the proper factors and did not abuse its discretion in making the award (*Matter of Birnbaum*, 159 AD2d 997, 997 [4th Dept 1990], *appeal dismissed* 76 NY2d 783 [1990], *lv denied* 76 NY2d 709 [1990]; *see Matter of Costantino*, 67 AD3d 1412, 1413-1414 [4th Dept 2009]).

We have considered objectant's remaining contentions and conclude that none warrants reversal or modification of the order.

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

257
CAF 18-00212
PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND WINSLOW,

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IN THE MATTER OF LUCKEE D. NORDEE,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

KILSI C. NORDEE,
RESPONDENT-PETITIONER-RESPONDENT.

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

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

JENNIFER PAULINO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Brenda Freedman, J.), entered September 1, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, designated respondent-petitioner as the primary residential parent of the subject child.

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

Memorandum: In this Family Court Act article 6 proceeding, petitioner-respondent father appeals from an order that, inter alia, denied his amended petition seeking modification of a prior joint custody order by awarding him primary residential custody of and increased visitation with the parties' child and granted the cross petition of respondent-petitioner mother insofar as she sought modification of the prior custody order by directing that her address be used as the child's residential address for school purposes. Initially, we note that, inasmuch as both parties sought modification of the prior custody order, neither party "dispute[s] that there was 'a sufficient change in circumstances demonstrating a real need for a change in order to insure' the child['s] best interests" (*Matter of Schimmel v Schimmel*, 262 AD2d 990, 991 [4th Dept 1999], *lv denied* 93 NY2d 817 [1999]).

It is well settled that "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" (*Matter of Bryan K.B. v Destiny S.B.*,

43 AD3d 1448, 1449 [4th Dept 2007] [internal quotation marks omitted]; *see Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]). Contrary to the father's contentions, we conclude that Family Court properly considered and weighed the appropriate factors in denying the father's amended petition and in designating the mother as the primary residential parent for all purposes, including the use of her address for school purposes (*see generally Eschbach*, 56 NY2d at 172-173; *Fox v Fox*, 177 AD2d 209, 210 [4th Dept 1992]). We therefore "perceive no basis to disturb the court's determination where, as here, it is supported by a sound and substantial basis in the record" (*Matter of Kakwaya v Twinamatsiko*, 159 AD3d 1590, 1591 [4th Dept 2018], *lv denied* 31 NY3d 911 [2018]).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

277
KA 16-00759
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVIN D. ISIDORE, DEFENDANT-APPELLANT.

TULLY RINCKEY, PLLC, ROCHESTER (PETER J. PULLANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered March 23, 2016. The judgment convicted defendant, upon a jury verdict, of attempted predatory sexual assault against a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of attempted predatory sexual assault against a child (Penal Law §§ 110.00, 130.96). We reject defendant's contention that Supreme Court erred in admitting in evidence the results of his medical examination while incarcerated, which showed that he had chlamydia. Contrary to defendant's contention, the physician-patient privilege does not apply here. The physician-patient privilege "is not absolute . . . The Legislature has enacted a number of narrow exceptions abrogating it for various public policy reasons" (*People v Sinski*, 88 NY2d 487, 491 [1996], *rearg denied* 88 NY2d 1018 [1996]), and Public Health Law § 2101 (1), requiring disclosure of communicable diseases, including chlamydia (*see* 10 NYCRR 2.1 [a]), is one of them (*see Sinski*, 88 NY2d at 492; *Thomas v Morris*, 286 NY 266, 269 [1941]). We further agree with the court that Public Health Law § 2306 did not prohibit disclosure of the medical records inasmuch as the relevant medical records were released "by court order in a criminal proceeding" (*id.*).

We reject defendant's contention that he was deprived of a fair trial by prosecutorial misconduct on summation. "The allegedly improper comments were either a fair response to defense counsel's summation or fair comment on the evidence" (*People v Easley*, 124 AD3d 1284, 1285 [4th Dept 2015], *lv denied* 25 NY3d 1200 [2015] [internal quotation marks omitted]). Even assuming, arguendo, that some of the

prosecutor's comments were improper, we conclude that " 'they were not so egregious as to deprive defendant of a fair trial' " (*People v Stanley*, 108 AD3d 1129, 1131 [4th Dept 2013], *lv denied* 22 NY3d 959 [2013]; *see People v McEathron*, 86 AD3d 915, 916 [4th Dept 2011], *lv denied* 19 NY3d 975 [2012]). Contrary to defendant's further contention, the court did not abuse its discretion in precluding certain evidence of third-party culpability inasmuch as it was speculative (*see generally People v Powell*, 27 NY3d 523, 531 [2016]; *People v Schulz*, 4 NY3d 521, 529 [2005]). The sentence is not unduly harsh or severe.

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

288

KA 16-00732

PRESENT: WHALEN, P.J., SMITH, CARNI, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AL A. GIVANS, DEFENDANT-APPELLANT.

LAW OFFICES OF KEVIN A. LANE PLLC, BUFFALO (KEVIN A. LANE OF COUNSEL), FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (ZAKARY I. WOODRUFF OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (James P. McClusky, J.), rendered March 31, 2016. The appeal was held by this Court by order entered December 22, 2017, decision was reserved and the matter was remitted to Jefferson County Court for further proceedings (156 AD3d 1470). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, those parts of the omnibus motion seeking to suppress tangible property and statements are granted, the indictment is dismissed, and the matter is remitted to Jefferson County Court for proceedings pursuant to CPL 470.45.

Memorandum: We previously concluded that County Court erred in denying defendant's request for a *Darden* hearing, and we therefore held the case, reserved decision, and remitted the matter for the court to conduct an appropriate hearing (*People v Givans*, 156 AD3d 1470, 1470-1471 [4th Dept 2017]). Upon remittal, the court held a hearing in defendant's absence. The People offered only the alleged confidential informant's death certificate, which the court received in evidence. There was no testimony. Before the hearing, defendant was provided a redacted copy of the death certificate and was allowed to submit questions. After the hearing, the court concluded that the People could not produce the informant despite their diligent efforts and had established the existence of the informant through extrinsic evidence. That was error. We therefore reverse the judgment, grant those parts of defendant's omnibus motion seeking to suppress tangible property and his statements, and dismiss the indictment.

The People must produce a confidential informant for an *ex parte* hearing upon defendant's request where, as here, they rely on the statements of the confidential informant to establish probable cause (*see People v Edwards*, 95 NY2d 486, 493 [2000]; *People v Darden*, 34

NY2d 177, 181 [1974], *rearg denied* 34 NY2d 995 [1974]). At such a hearing, the court "should take testimony, with recognition of the special need for protection of the interests of the absent defendant, and make a summary report as to the existence of the informer and with respect to the communications made by the informer to the police to which the police testify. That report should be made available to the defendant and to the People, and the transcript of testimony should be sealed to be available to the appellate courts if the occasion arises" (*Darden*, 34 NY2d at 181). The purpose of the *Darden* hearing is to verify "the truthfulness of the police witness's testimony about his or her dealing with a known informant" (*People v Adrion*, 82 NY2d 628, 635 [1993]) by ensuring that the informant exists and that he or she provided the police with information about the specified criminal activity (*see People v Jones*, 149 AD3d 1580, 1581 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]; *People v Hernandez*, 143 AD3d 1280, 1281 [4th Dept 2016], *lv denied* 29 NY3d 1080 [2017]). The goal is to allay "any concerns that the informant 'might have been wholly imaginary and the communication from him [or her] entirely fabricated' " (*Hernandez*, 143 AD3d at 1281, quoting *Darden*, 34 NY2d at 182; *see Adrion*, 82 NY2d at 635-636).

There are, however, exceptions to the requirement that the People produce a confidential informant for a *Darden* hearing. If the People succeed in making a threshold showing that the informant "is unavailable and cannot be produced through the exercise of due diligence" (*Adrion*, 82 NY2d at 634; *see Edwards*, 95 NY2d at 494), they are permitted instead to establish the existence of the informant by extrinsic evidence (*see Edwards*, 95 NY2d at 493; *People v Carpenito*, 80 NY2d 65, 68 [1992]).

Even assuming, arguendo, that the People succeeded here in making such a threshold showing, we conclude that they nevertheless failed to establish the existence of the informant by extrinsic evidence (*see People v Phillips*, 242 AD2d 856, 856 [4th Dept 1997]). The evidence establishes only that a deposition was executed in the name of the alleged confidential informant, that the police obtained a search warrant using the deposition, and that a death certificate was later issued for a person having the same name as the confidential informant. There is no evidence that the alleged informant actually made the statements attributed to her (*cf. Jones*, 149 AD3d at 1581; *Hernandez*, 143 AD3d at 1281). The People could have met their burden by offering the testimony of a police witness, which is evidence that is explicitly contemplated in *Darden*. Yet, they did not. Without it, there is nothing to refute the possibility that the police fabricated the statements in the informant's purported deposition in order to conceal the fact that information critical to the probable cause inquiry was instead obtained through illegal police action.

In light of the foregoing, we need not consider the remaining

contentions in defendant’s main and supplemental briefs.

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

297
CAF 18-00745
PRESENT: SMITH, J.P., CARNI, LINDLEY, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF JESSICA W. BENSON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES T. SMITH, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

RAYMOND P. KOT, II, WILLIAMSVILLE, FOR PETITIONER-RESPONDENT.

MARYBETH D. BARNET, MIDDLESEX, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Mathew K. McCarthy, A.J.), entered April 2, 2018 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Family Court, Steuben County, for further proceedings in accordance with the following memorandum: In appeal No. 1, respondent father appeals from an order of protection issued upon a finding that he committed a family offense against petitioner mother. In appeal No. 2, the father appeals from an order that, inter alia, granted the mother's petition for sole custody of the parties' daughter and denied the father any visitation.

In each appeal, we agree with the father that Family Court failed to adequately set forth its essential findings of fact (*see* CPLR 4213 [b]; Family Ct Act § 165 [a]; *Matter of Graci v Graci*, 187 AD2d 970, 971 [4th Dept 1992]). In appeal No. 1, the court failed to specify the family offense upon which the order of protection was predicated (*see Matter of Langdon v Langdon*, 137 AD3d 1580, 1582 [4th Dept 2016]). In appeal No. 2, the court failed to "set forth its analysis of those factors that traditionally affect the best interests of a child, namely, the relative fitness of each party, each parent's ability to provide for the emotional and intellectual development of the child, the ability to provide financially for the child, the quality of the home environment, the length of time and stability of prior custodial arrangements, [and] the need of a child to reside with siblings[, if any] . . . As a result, we are unable to review [the court's] ultimate factual finding regarding each of those factors and

the weight it placed upon each factor relative to the best interests of the child[ ]" (*Graci*, 187 AD2d at 971-972). Under the circumstances of these cases, we decline to exercise our discretion to make the requisite findings (*see Matter of Rocco v Rocco*, 78 AD3d 1670, 1671 [4th Dept 2010]). We therefore hold the case in each appeal, reserve decision, and remit the matters to Family Court to make the requisite factual findings (*see Matter of Valentin v Mendez*, 165 AD3d 1643, 1643-1644 [4th Dept 2018]).

Finally, in the interest of judicial economy, we address the father's challenge to the court's refusal to adjourn the hearing and conclude that it lacks merit (*see Matter of Sanchez v Alvarez*, 151 AD3d 1869, 1869 [4th Dept 2017]). We further conclude that the father failed to preserve his contention that the court violated his due process rights by allowing him to be handcuffed at trial (*see People v Leitzsey*, 142 AD3d 918, 918-919 [1st Dept 2016], *lv denied* 28 NY3d 1147 [2017]).

Entered: March 22, 2019 Mark W. Bennett
Clerk of the Court

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

298
CAF 18-00746
PRESENT: SMITH, J.P., CARNI, LINDLEY, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF JESSICA W. BENSON,
PETITIONER-RESPONDENT,

V — MEMORANDUM AND ORDER

JAMES T. SMITH, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

RAYMOND P. KOT, II, WILLIAMSVILLE, FOR PETITIONER-RESPONDENT.

MARYBETH D. BARNET, MIDDLESEX, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Mathew K. McCarthy, A.J.), entered April 12, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody and placement of the subject child.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Family Court, Steuben County, for further proceedings in accordance with the same memorandum as in *Matter of Benson v Smith* ([appeal No. 1] — AD3d — [Mar. 22, 2019] [4th Dept 2019]).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

314

KA 18-01500

PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH HOUCK, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (Stephen J. Dougherty, J.), entered November 22, 2017. 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 failed to adequately set forth its conclusions of fact and law, requiring remittal. Although we agree with defendant that the court's written order did not set forth its "findings of fact and conclusions of law on which the determinations are based" (§ 168-n [3]; *see People v Smith*, 11 NY3d 797, 798 [2008]), we conclude that the court's written order together with its oral decision "are clear, supported by the record and sufficiently detailed to permit intelligent appellate review" (*People v Young*, 108 AD3d 1232, 1233 [4th Dept 2013], *lv denied* 22 NY3d 853 [2013], *rearg denied* 22 NY3d 1036 [2013] [internal quotation marks omitted]; *see People v McCabe*, 142 AD3d 1379, 1380 [4th Dept 2016]).

We reject defendant's contention that the court erred in assessing 20 points under risk factor 13 for unsatisfactory conduct while confined involving sexual misconduct. The record establishes that defendant had numerous disciplinary infractions, at least one of which was related to sexual misconduct. At the very least, he was properly assessed 10 points under that category for unsatisfactory conduct (*see People v Harris*, 46 AD3d 1445, 1446 [4th Dept 2007], *lv denied* 10 NY3d 707 [2008]). Even assuming, arguendo, that defendant should have been assessed only 10 points under risk factor 13 and that

defendant correctly asserts that the court erred in assessing 15 points under risk factor 12 for not accepting responsibility/refusing or being expelled from treatment, his presumptive risk level would not change inasmuch as the People met their burden of proving by clear and convincing evidence that defendant should have been assessed 30 points under risk factor 3 for having three or more victims (*see People v Gillotti*, 23 NY3d 841, 859-860 [2014]; *People v Bernecky*, 161 AD3d 1540, 1540-1541 [4th Dept 2018], *lv denied* 32 NY3d 901 [2018]; *see generally People v Aldrich*, 56 AD3d 1228, 1229 [4th Dept 2008]). Thus, contrary to defendant's contention, he was properly classified as a presumptive level two risk and not a presumptive level one risk.

Contrary to defendant's further contention, " '[t]he court's discretionary upward departure [to a level three risk] was based on clear and convincing evidence of aggravating factors to a degree not taken into account by the risk assessment instrument' " (*McCabe*, 142 AD3d at 1380). Those factors included the significant amount of child pornography in defendant's possession, the lengthy period of time that he collected the child pornography, the nature of the images, and his extensive activities in downloading, categorizing, and sharing the child pornography (*see People v Tatner*, 149 AD3d 1595, 1595-1596 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]; *People v Sczerbaniewicz*, 126 AD3d 1348, 1349 [4th Dept 2015]).

Entered: March 22, 2019 Mark W. Bennett
Clerk of the Court

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

321
CA 18-01228
PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, AND WINSLOW, JJ.

IN THE MATTER OF LORCEN BURROUGHS,
PETITIONER-APPELLANT,

V   MEMORANDUM AND ORDER

SUPERINTENDENT JOHN COLVIN, CAPTAIN DAVID M.
GLEASON, LT. ANDREW P. GIANNINO AND ANTHONY
ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENTS-RESPONDENTS.

LORCEN BURROUGHS, PETITIONER-APPELLANT PRO SE.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered April 16, 2018 in a CPLR article 78 proceeding. The judgment denied the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination finding him guilty, following a tier II hearing, of violating inmate rules 107.11 (7 NYCRR 270.2 [B] [8] [ii] [harassment]) and 180.11 (7 NYCRR 270.2 [B] [26] [ii] [facility correspondence violation]). Petitioner appeals from a judgment denying his petition. We affirm.

Petitioner's contention that the determination is not supported by substantial evidence was not raised in the petition and is therefore not properly before us (*see Matter of Cole v Goord*, 47 AD3d 1148, 1148 [3d Dept 2008]; *see generally Matter of Pigmentel v Selsky*, 19 AD3d 816, 817 [3d Dept 2005]; *Matter of Bones v Kelly*, 122 AD2d 593, 593 [4th Dept 1986]). Petitioner's further contention that the Hearing Officer erred in denying his request to call a certain witness at the hearing was not raised in petitioner's administrative appeal. Petitioner thus failed to exhaust his administrative remedies with respect to that contention (*see Matter of Ballard v Kickbush*, 165 AD3d 1587, 1589 [4th Dept 2018], *appeal dismissed* — NY3d — [Feb. 14, 2019]), and this Court " 'has no discretionary power to reach [it]' " (*Matter of Jones v Annucci*, 141 AD3d 1108, 1109 [4th Dept 2016]; *see*

Matter of Ross-Simmons v Fischer, 115 AD3d 1234, 1234 [4th Dept 2014]). Finally, contrary to petitioner's contention, Supreme Court did not err in rejecting his assertion that the Hearing Officer was biased or that the determination flowed from such alleged bias (*see Matter of Phillips v Annucci*, 150 AD3d 1673, 1674 [4th Dept 2017]; *Matter of Jeanty v Graham*, 147 AD3d 1323, 1325 [4th Dept 2017]).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

325
CA 18-01103
PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, AND WINSLOW, JJ.

WILLIAM CRAWFORD, PLAINTIFF-APPELLANT,

V   MEMORANDUM AND ORDER

R. JEWULA HOLDINGS LLC, AND THE ORIGINAL PANCAKE HOUSE OF ORCHARD PARK, INC., DEFENDANTS-RESPONDENTS.

THE HIGGINS KANE LAW GROUP, P.C., BUFFALO (TERRENCE P. HIGGINS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MELISSA FOTI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered May 26, 2017. The order, among other things, denied the cross motion of plaintiff to compel discovery.

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

Memorandum: Plaintiff appeals, as limited by his brief, from that part of an order that denied his cross motion to compel discovery of certain documents related to a prior lawsuit against defendants. Contrary to plaintiff's contention, Supreme Court did not abuse its discretion by denying the cross motion (*see Mosey v County of Erie*, 148 AD3d 1572, 1573 [4th Dept 2017]; *Voss v Duchmann*, 129 AD3d 1697, 1698 [4th Dept 2015]). "Discovery of evidence of prior similar accidents, while material in cases where a defect is alleged in the design or creation of a product or structure, is irrelevant and inappropriate in cases such as this, where no inherent defect is alleged" (*Daniels v Fairfield Presidential Mgt. Corp.*, 43 AD3d 386, 388 [2d Dept 2007]). Further, plaintiff concedes that his sole purpose for seeking the requested materials is to establish defendants' prior negligence, if any. The sought discovery therefore will not "assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]) because "evidence of unrelated bad acts" constitutes "the type of propensity evidence that lacks probative value concerning any material factual issue, and has the potential to induce the jury to decide the case based on evidence of defendant[s'] character" (*Mazella v Beals*, 27 NY3d 694, 710 [2016]; *see Trotman v*

New York City Tr. Auth., 168 AD3d 1116, 1117-1118 [2d Dept 2019]).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

330

KA 13-01173

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRELLIS L. PRESSLEY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (LINDA M. CAMPBELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered May 15, 2013. The appeal was held by this Court by order entered March 23, 2018, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (156 AD3d 1384 [4th Dept 2017], *amended on rearg* 159 AD3d 1619 [4th Dept 2018], *lv dismissed* 31 NY3d 1085 [2018]). The proceedings were held and completed.

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 rape in the first degree (Penal Law § 130.35 [1]) and criminal sexual act in the third degree (§ 130.40 [3]). We previously held the case, reserved decision and remitted the matter to Supreme Court for new proceedings on the People's motion to compel defendant to submit to a buccal swab for DNA testing following the assignment of counsel to represent defendant thereon (*People v Pressley*, 159 AD3d 1619 [4th Dept 2018]. Defendant correctly concedes that there was no error in the proceedings following remittal. His remaining contentions are not properly before us because they extend beyond the scope of that remittal and either were not raised by defendant prior to remittal or were previously considered by this Court (*see People v Butler*, 75 AD3d 1105, 1105 [4th Dept 2010], *lv denied* 15 NY3d 919 [2010]).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

332

TP 18-02024

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF TERELL VIERA, JR., PETITIONER,

V MEMORANDUM AND ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ROBYN P. RYAN OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered October 29, 2018) 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 amended petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul a determination, following a tier II disciplinary hearing, that he violated inmate rule 116.13 (7 NYCRR 270.2 [B] [17] [iv] [possession of stolen property]). Contrary to petitioner’s contention, the misbehavior report, the testimony of the author of that report, and the photograph of the property constitute substantial evidence to support the determination that he violated that inmate rule (*see Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]). Petitioner failed to exhaust his administrative remedies with respect to his contention that he was denied employee assistance, inasmuch as he failed to raise that contention in his administrative appeal, “ ‘and this Court has no discretionary authority to reach that contention’ ” (*Matter of McFadden v Prack*, 93 AD3d 1268, 1269 [4th Dept 2012]; *see Matter of Stewart v Fischer*, 109 AD3d 1122, 1123 [4th Dept 2013], *lv denied* 22 NY3d 858 [2013]; *Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071 [4th Dept 1992], *appeal dismissed* 81 NY2d 834 [1993]).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

333

KA 17-00622

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH HACKROTT, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Erie County Court (Sheila A. DiTullio, J.), dated March 7, 2017. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Contrary to defendant's contention, County Court properly assessed 15 points under risk factor 11 for a history of drug or alcohol abuse inasmuch as " '[t]he statements in the case summary . . . with respect to defendant's substance abuse constitute reliable hearsay supporting the court's assessment of points under [that] risk factor' " (*People v Kunz*, 150 AD3d 1696, 1696 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]; *see People v Jackson*, 134 AD3d 1580, 1580 [4th Dept 2015]). Furthermore, despite defendant's purported abstinence while incarcerated and while on "federal probation," it is well established that a defendant's "abstinence while incarcerated 'is not necessarily predictive of his behavior when [he is] no longer under such supervision' " (*Jackson*, 134 AD3d at 1580-1581).

We reject defendant's further contention that the court abused its discretion in granting the People's request for an upward departure to a level three risk. "It is well settled that a court may grant an upward departure from a sex offender's presumptive risk level when the People establish, by clear and convincing evidence . . . , the existence of an aggravating . . . factor of a kind, or to a degree, that is otherwise not adequately taken into account by the [risk assessment] guidelines" (*People v Cardinale*, 160 AD3d 1490,

1490-1491 [4th Dept 2018] [internal quotation marks omitted]). Here, we conclude that the determination to grant an upward departure was based on clear and convincing evidence of certain aggravating factors, including, inter alia, "the quantity and nature of the child pornography used by the defendant" (*People v McCabe*, 142 AD3d 1379, 1380 [4th Dept 2016]; *see People v Eiss*, 158 AD3d 905, 906-907 [3d Dept 2018], *lv denied* 31 NY3d 907 [2018]; *People v Sczerbaniewicz*, 126 AD3d 1348, 1349 [4th Dept 2015]), as well as defendant's attempt to arrange a sexual encounter with a minor and the evidence that he asked other people for advice about molesting an underage family member (*see People v Gosek*, 98 AD3d 1309, 1310 [4th Dept 2012]).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

334

KA 16-01085

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDDIE HAMELL, ALSO KNOWN AS CHOKE,
DEFENDANT-APPELLANT.

ANTHONY F. BRIGANO, UTICA, 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. Donalty, J.), rendered May 6, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (two counts) 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 modified as a matter of discretion in the interest of justice by reducing the sentence imposed on each count to a determinate term of five years of imprisonment and three years of postrelease supervision, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts each 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]) arising out of two separate drug transactions in which he sold a total of $80 of crack cocaine to a confidential informant. Although defendant pleaded guilty in exchange for a promised aggregate sentence of six years' imprisonment, County Court ultimately imposed an enhanced aggregate sentence of 16 years' imprisonment after defendant failed to appear for sentencing and remained at large for approximately two years.

Preliminarily, we agree with defendant that he did not validly waive his right to appeal. Although defendant executed a notice-of-right-to-appeal form (*see* former 22 NYCRR 1022.11 [a]), that form "does not constitute a proper written waiver of the right to appeal" (*People v Marshall*, 144 AD3d 1544, 1545 [4th Dept 2016]; *see People v Finster*, 136 AD3d 1279, 1280 [4th Dept 2016], *lv denied* 27 NY3d 1132 [2016]), and the court's colloquy "amounted to nothing more than a simple confirmation that the defendant signed" the form (*People v*

Alston, 163 AD3d 843, 844 [2d Dept 2018], *lv denied* 32 NY3d 1062 [2018] [internal quotation marks omitted]).

We further agree with defendant that the enhanced sentence is unduly harsh and severe, even in light of his criminal record and extended flight from justice (*see People v Kordish*, 140 AD3d 981, 983 [2d Dept 2016], *lv denied* 28 NY3d 1029 [2016]; *see also People v Tuff*, 156 AD3d 1372, 1379 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018]; *People v Lakatosz*, 59 AD3d 813, 816-817 [3d Dept 2009], *lv denied* 12 NY3d 917 [2009]). We therefore modify the judgment as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]) by reducing the sentence imposed on each count to a determinate term of five years' imprisonment and three years' postrelease supervision, which thereby produces an aggregate term of imprisonment of 10 years.

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

340

KA 16-01552

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMIL A. KNOX, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (A. VINCENT BUZARD OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMIL A. KNOX, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered July 22, 2016. The judgment convicted defendant, upon a jury verdict, of criminal possession of weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to suppress testimony regarding the showup identification of defendant by the noncomplainant witness is granted and the matter is remitted to Supreme Court, Monroe County for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention in his pro se supplemental brief that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant contends in his main brief that Supreme Court erred in refusing to suppress certain showup identification testimony with respect to him. We agree. "Showup identifications are disfavored, since they are suggestive by their very nature" (*People v Ortiz*, 90 NY2d 533, 537 [1997]; *see People v Johnson*, 81 NY2d 828, 831 [1993]). Such procedures, however, "are not presumptively infirm" (*People v Duuvon*, 77 NY2d 541, 543 [1991]), but must be shown to be " 'reasonable under the circumstances—i.e., justified by exigency or temporal and spatial proximity [to the crime]—and, if so, whether the showup as conducted was unduly suggestive' " (*People v Cedeno*, 27 NY3d 110, 123 [2016], *cert denied* — US —, 137 S Ct 205 [2016]; *see People v*

Gilford, 16 NY3d 864, 868 [2011]).

In this case, two showup identification procedures were conducted approximately 90 minutes after the crime, about five miles from the scene of the crime. The first showup, which is not at issue on appeal, occurred in the victim's hospital room and resulted in the victim identifying defendant as the person who shot him. The second showup—i.e., the one challenged on appeal—occurred in the hospital parking lot shortly after the first showup. During the second showup procedure, the noncomplainant witness to the shooting identified defendant as the shooter. We conclude that, "[g]iven the identification made by the victim" during the first showup, the noncomplainant witness's identification conducted far from the scene of the crime "is not rendered tolerable in the interest of prompt identification" (*People v Seegars*, 172 AD2d 183, 186 [1st Dept 1991], *appeal dismissed* 78 NY2d 1069 [1991]). The identification was also unjustified insofar as the noncomplainant witness was not present at the hospital as a victim (*cf. People v Blanche*, 90 NY2d 821, 822 [1997]; *People v Rivera*, 22 NY2d 453, 455 [1968], *cert denied* 395 US 964 [1969]). The People have proffered no reason that a lineup identification procedure would have been unduly burdensome under the circumstances (*see Seegars*, 172 AD2d at 186-187). Absent any exigency or spatial proximity to the crime scene, and given that the showup occurred "approximately 90 minutes after the occurrence of the crime, while defendant was handcuffed and" flanked by police, we conclude that, under the totality of the circumstances, the second "showup identification procedure was infirm" (*People v Burnice*, 113 AD3d 1115, 1115 [4th Dept 2014]). We further conclude that this error was not harmless, particularly because the victim could not identify his assailant at trial.

Inasmuch as the witness who identified defendant in the second showup procedure did not testify at the *Wade* hearing, "the People did not establish that [he] had an independent basis for [his] in-court identification of defendant" (*People v Hill*, 53 AD3d 1151, 1151 [4th Dept 2008]), and "there is no evidence upon which this Court can base such a determination" (*People v Walker*, 198 AD2d 826, 828 [4th Dept 1993]). We therefore conclude that defendant is entitled to a new *Wade* hearing on that issue (*see People v Blunt*, 71 AD3d 1380, 1382 [4th Dept 2010]). Thus, we reverse the judgment, grant that part of defendant's omnibus motion seeking to suppress the showup identification testimony of the noncomplainant witness, and remit the matter to Supreme Court for a new *Wade* hearing on the issue of whether that witness had an independent basis for his in-court identification of defendant, and a new trial on counts one and two of the indictment, if the People are so advised.

We have considered the remaining contentions in defendant's pro se supplemental brief, and we conclude that they are either unpreserved or without merit.

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

341

KA 15-01727

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN MURRAY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered July 7, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of two counts of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that the police lacked the requisite reasonable suspicion to prolong an otherwise legal stop of the vehicle in which he was a passenger, and thus that County Court erred in refusing to suppress the evidence seized and statements made as a result of that stop. We reject defendant's contention. The record of the suppression hearing establishes that the police had reasonable suspicion to prolong the stop and investigate defendant's potential connection to an attempted burglary based on the description of the vehicle that was broadcast over the police radio, the proximity of the vehicle to the area where the attempted burglary had occurred, the fact that the stop was close in time to the commission of the attempted burglary, and the testimony that, when an officer approached the vehicle, he observed that electronics of the type known to have been taken from previous burglaries were visible on the floor of the vehicle (*see People v Allen*, 78 AD3d 1521, 1521 [4th Dept 2010], *lv denied* 16 NY3d 827 [2011]; *People v Faller*, 19 AD3d 138, 139 [1st Dept 2005], *lv denied* 5 NY3d 828 [2005]; *People v Schwing*, 14 AD3d 867, 868 [3d Dept 2005]; *People v McFadden*, 244 AD2d 887, 888 [4th Dept 1997]). Defendant failed to preserve for our review his contention that the police did not have probable cause to arrest him (*see* CPL 470.05 [2]; *People v Mobley*, 49 AD3d 1343, 1343-1344 [4th Dept 2008], *lv denied* 11 NY3d 791

[2008]).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

343

KA 17-00491

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RUSSELL MERCHANT, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Walter W. Hafner, Jr., A.J.), rendered June 23, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act 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 and on the law by amending the order of protection to expire on March 26, 2034, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sexual act in the third degree (Penal Law § 130.40 [2]). Even assuming, arguendo, that the waiver of the right to appeal is invalid and thus does not preclude our review of defendant's challenge to the severity of his sentence (*see People v Johnson*, 161 AD3d 1529, 1529 [4th Dept 2018]), we conclude that the sentence is not unduly harsh or severe.

We agree with defendant that County Court erred in setting the expiration date of the order of protection. Although defendant failed to preserve that contention for our review (*see People v Nieves*, 2 NY3d 310, 315-316 [2004]), we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *People v Lopez*, 151 AD3d 1649, 1650 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]; *People v Richardson*, 134 AD3d 1566, 1567 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016]). The People correctly concede that the order of protection should expire on March 26, 2034, eight years after the maximum expiration date of defendant's term of incarceration (*see* CPL 530.13 [4] [A] [ii]), and we therefore modify

the judgment accordingly.

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

358
KA 16-00932
PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

OMAR I. BELLAMY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THEODORE W. STENUF, MINOA, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered March 30, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, coercion in the first degree and attempted coercion in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), coercion in the first degree (§ 135.65 [1]), and attempted coercion in the first degree (§§ 110.00, 135.65 [1]), defendant correctly contends that his waiver of the right to appeal is invalid. Although defendant signed a written waiver of his right to appeal, the colloquy between County Court and defendant was insufficient to ensure that the waiver " 'was knowingly, voluntarily and intelligently entered' " (*People v McCoy*, 107 AD3d 1454, 1454 [4th Dept 2013], *lv denied* 22 NY3d 957 [2013]; *see People v Carno*, 101 AD3d 1663, 1664 [4th Dept 2012], *lv denied* 20 NY3d 1060 [2013]).

While defendant's contention that his plea was coerced by statements made by the court or was otherwise involuntarily entered "survives even a valid waiver of the right to appeal" (*People v Cooper*, 79 AD3d 1684, 1684 [4th Dept 2010], *lv denied* 16 NY3d 857 [2011]; *see also People v Jennings*, 8 AD3d 1067, 1068 [4th Dept 2004], *lv denied* 3 NY3d 676 [2004]), we conclude that it is unpreserved for our review because he failed to move to withdraw his plea or vacate the judgment of conviction (*see People v Kelly*, 145 AD3d 1431, 1431 [4th Dept 2016], *lv denied* 29 NY3d 949 [2017]; *People v Robinson*, 112 AD3d 1349, 1349 [4th Dept 2013], *lv denied* 23 NY3d 1042 [2014]). We

decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant's further contention that he was denied effective assistance of counsel does not survive his plea of guilty because he "failed to demonstrate that 'the plea bargaining process was infected by [the] allegedly ineffective assistance or that he entered the plea because of his attorney['s] allegedly poor performance' " (*People v Lugg*, 108 AD3d 1074, 1075 [4th Dept 2013]; *see People v Robinson*, 39 AD3d 1266, 1267 [4th Dept 2007], *lv denied* 9 NY3d 869 [2007]).

Entered: March 22, 2019 Mark W. Bennett
Clerk of the Court

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

360

KA 16-00769

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

OMAR I. BELLAMY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THEODORE W. STENUF, MINOA, FOR DEFENDANT-APPELLANT.

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Donald E. Todd, J.), rendered October 26, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance (CPCS) in the third degree (Penal Law § 220.16 [1]) and CPCS in the fourth degree (§ 220.09 [1]), defendant contends that he did not knowingly, intelligently, and voluntarily waive his right to appeal. We reject that contention. County Court "conducted an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Burtes*, 151 AD3d 1806, 1806 [4th Dept 2017], *lv denied* 30 NY3d 978 [2017] [internal quotation marks omitted]), and defendant's valid waiver of the right to appeal encompasses his challenge to the court's suppression ruling (*see People v Kemp*, 94 NY2d 831, 833 [1999]; *People v Braxton*, 129 AD3d 1674, 1675 [4th Dept 2015], *lv denied* 26 NY3d 965 [2015]).

To the extent that he contends that his guilty plea was coerced, defendant failed to preserve his contention for our review because he did not move to withdraw the plea or vacate the judgment of conviction (*see People v Darling*, 125 AD3d 1279, 1279 [4th Dept 2015], *lv denied* 25 NY3d 1071 [2015]), and this case does not fall within the rare exception to the preservation doctrine (*see People v Lopez*, 71 NY2d

662, 666 [1988]).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

362

KA 16-01598

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL WHITING, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered August 16, 2016. 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]). Defendant's conviction stems from his brutal murder of his wife, who he stabbed 30 times in their bedroom in the middle of the night while their two infant children were also in the room. Defendant stabbed himself twice in the leg in an attempt to make it look like an intruder committed the crime.

We reject defendant's contention that County Court erred in refusing to suppress two statements that he made to police detectives while at the hospital, i.e., one that occurred shortly after the incident while defendant was awaiting surgery and another that occurred later in the day after his surgery. We agree with the court that defendant was not in custody during the first interview inasmuch as defendant was not physically restrained, and the questions asked were investigatory, not accusatory (*see People v Law*, 273 AD2d 897, 898-899 [4th Dept 2000], *lv denied* 95 NY2d 965 [2000]; *People v Bowen*, 229 AD2d 954, 955 [4th Dept 1996], *lv denied* 88 NY2d 1019 [1996]). In any event, defendant waived his *Miranda* rights before both interviews, and we agree with the court that the waivers were valid (*see People v Cimino*, 49 AD3d 1155, 1156-1157 [4th Dept 2008], *lv denied* 10 NY3d 861 [2008]). Although defendant was under the influence of medication, he was not intoxicated "to the degree of mania, or of being unable to understand the meaning of his statement[s]" (*People v Tracy*, 125 AD3d 1517, 1518 [4th Dept 2015], *lv denied* 27 NY3d 1008 [2016] [internal

quotation marks omitted]). Contrary to defendant's further contention, his statement to the detectives during the second interview to "[e]ither wrap this up or I'm going to say the word lawyer so that you wrap it up" was not an unequivocal request for an attorney (*see generally People v Glover*, 87 NY2d 838, 839 [1995]; *People v Higgins*, 124 AD3d 929, 931 [3d Dept 2015]). We also reject defendant's contention that he received ineffective assistance of counsel when defense counsel failed to call a toxicology expert to testify at the *Huntley* hearing. Defendant "failed to demonstrate the absence of a tactical or other legitimate explanation for counsel's decision" (*People v Bonelli*, 41 AD3d 972, 973 [3d Dept 2007], *lv denied* 9 NY3d 921 [2007]; *see People v Safford*, 74 AD3d 1835, 1837 [4th Dept 2010], *lv denied* 16 NY3d 746 [2011], *reconsideration denied* 16 NY3d 899 [2011]).

Defendant's contention that the evidence is legally insufficient to establish his identity as the perpetrator is not preserved for our review inasmuch as he failed to move for a trial order of dismissal on that ground (*see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, defendant's contention lacks merit. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The physical evidence and testimony from prosecution witnesses about their observations of the crime scene, which contradicted defendant's explanation about what occurred, together with the testimony of a neighbor who heard a man and a woman arguing before hearing sirens and the testimony of three jailhouse informants, established that defendant was the perpetrator. Indeed, we agree with the People that it defies logic that an unknown assailant would enter the bedroom of defendant and his wife in the middle of the night, stab the wife 30 times but defendant only twice, and then leave the house without a trace. In light of our determination, we reject defendant's contention that defense counsel was ineffective in failing to preserve his legal sufficiency challenge for our review. "A defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

The court held *Cardona* hearings (*see People v Cardona*, 41 NY2d 333 [1977]) with respect to the three jailhouse informants and, contrary to defendant's contention, we conclude that the record supports the court's determination that they were not acting as agents of the government when defendant made inculpatory statements to them (*see People v Allen*, 122 AD3d 1423, 1424 [4th Dept 2014], *lv denied* 25 NY3d 987 [2015], *reconsideration denied* 25 NY3d 1197 [2015]; *People v Young*, 100 AD3d 1427, 1427-1428 [4th Dept 2012], *lv denied* 20 NY3d 1105 [2013]). The fact that the informants received some consideration in exchange for their testimony at trial did not retroactively create an agency relationship. Finally, the sentence is

not unduly harsh or severe.

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

370
CA 18-01770
PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

DALE KLUCZYNSKI AND LYNDA KLUCZYNSKI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ADAM ZWACK AND MICHAEL RUSSELL,
DEFENDANTS-APPELLANTS.

BURDEN, HAFNER & HANSEN, LLC, BUFFALO (JACLYN S. WANEMAKER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HOGANWILLIG, PLLC, AMHERST (SCOTT MICHAEL DUQUIN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered March 23, 2018. The order denied the motion of defendants to dismiss the complaint.

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

Memorandum: Defendants, who are employees of the Village of Blasdell, appeal from an order denying their motion to dismiss the complaint on the ground that, inter alia, plaintiffs failed to comply with defendants' demand for an oral examination pursuant to General Municipal Law § 50-h (1). We agree with defendants that Supreme Court erred in denying the motion. "It is well settled that a plaintiff who has not complied with General Municipal Law § 50-h (1) is precluded from maintaining an action against a municipality" (*McDaniel v City of Buffalo*, 291 AD2d 826, 826 [4th Dept 2002]; *see Gravius v County of Erie*, 85 AD3d 1545, 1545 [4th Dept 2011], *appeal dismissed* 17 NY3d 896 [2011]). Here, plaintiffs failed to appear at the scheduled examination due to an apparent disagreement with their attorney. Under the circumstances, plaintiffs had the burden of rescheduling the examination and, because they failed to do so, they were barred by statute from commencing an action (*see* § 50-h [5]; *cf. Gravius*, 85 AD3d at 1545-1546). "Although compliance with General Municipal Law § 50-h (1) may be excused in 'exceptional circumstances' " (*McDaniel*, 291 AD2d at 826; *see Gravius*, 85 AD3d at 1546), there were no such circumstances here. Therefore, the complaint against defendants, who were acting within the scope of their duties as municipal employees, must be dismissed (*see McDaniel*, 291 AD2d at 826; *see generally*

§ 50-e [1] [a]).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

381
TP 18-00451
PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND TROUTMAN, JJ.

IN THE MATTER OF GREGORY THOMPSON, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, TIMOTHY B. LENNON, DEPUTY COMMISSIONER AND COUNSEL, NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES AND ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, STATE OF NEW YORK, RESPONDENTS.

TULLY RINCKEY PLLC, ROCHESTER (ZACHARY T. RUETZ OF COUNSEL), FOR PETITIONER.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [William K. Taylor, J.], entered October 27, 2017) to review a determination of respondents. The determination revoked petitioner's driving privileges in the State of New York.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to annul the determination revoking his driver's license and commercial driver's license based on his refusal to submit to a chemical test following his arrest for driving while intoxicated. We confirm the determination.

Contrary to petitioner's contention, the determination is supported by substantial evidence (*see Matter of Peeso v Fiala*, 130 AD3d 1442, 1443 [4th Dept 2015], *lv denied* 26 NY3d 910 [2015]). The arresting officer's testimony at the hearing established that the officer lawfully stopped the vehicle driven by petitioner for a traffic violation (*see generally People v Grimes*, 133 AD3d 1201, 1202 [4th Dept 2015]), possessed reasonable grounds to believe that petitioner had been driving while intoxicated based on, inter alia, petitioner's failure of field sobriety tests (*see Peeso*, 130 AD3d at 1443), and had probable cause to arrest petitioner (*see Matter of Sherwood v New York State Dept. of Motor Vehs.*, 153 AD3d 1022, 1024-1025 [3d Dept 2017]; *People v Lewis*, 124 AD3d 1389, 1390-1391 [4th

Dept 2015], *lv denied* 26 NY3d 931 [2015]). In addition, the officer's testimony, "along with his refusal report, which was entered in evidence, established that petitioner refused to submit to the chemical test after being warned twice of the consequences of such refusal" (*Matter of Huttenlocker v New York State Dept. of Motor Vehs. Appeals Bd.*, 156 AD3d 1464, 1464 [4th Dept 2017]). The Administrative Law Judge was entitled to discredit petitioner's testimony to the contrary (*see Matter of Bersani v New York State Dept. of Motor Vehs.*, 162 AD3d 1553, 1553 [4th Dept 2018]).

We have reviewed petitioner's remaining contentions and conclude that they do not require a different result.

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

383
CA 17-02195
PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND TROUTMAN, JJ.

CELLINO & BARNES, P.C., PLAINTIFF-RESPONDENT,

V ORDER

BRIAN CHAPIN YORK, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

BRIAN CHAPIN YORK, DEFENDANT-APPELLANT PRO SE.

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered September 29, 2017. The order, among other things, awarded plaintiff attorneys' fees.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

384
CA 18-00706
PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND TROUTMAN, JJ.

CELLINO & BARNES, P.C., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN CHAPIN YORK, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

BRIAN CHAPIN YORK, DEFENDANT-APPELLANT PRO SE.

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered January 8, 2018. The judgment, among other things, awarded plaintiff the sum of $32,028.28 as against defendant.

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

Memorandum: In this fee dispute between attorneys, defendant attorney appeals from a judgment that awarded plaintiff law firm one third of the attorneys' fees in the underlying personal injury litigation. We reject defendant's contention that Supreme Court abused its discretion in fashioning the award. In fixing the percentages to be awarded to the parties, the court properly considered "such factors as the amount of time spent by each lawyer on the case, the work performed and the amount of recovery" (*Lai Ling Cheng v Modansky Leasing Co.*, 73 NY2d 454, 458 [1989]; *see McCarthy v Roberts Roofing & Siding Co., Inc.*, 45 AD3d 1375, 1375-1376 [4th Dept 2007]).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court

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

396

KA 16-01335

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN,

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL SWEAT, DEFENDANT-RESPONDENT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), dated May 16, 2016. The appeal was held by this Court by order entered March 16, 2018, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (159 AD3d 1423). The proceedings were held and completed.

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

Memorandum: In this appeal regarding the legality of the warrantless search of a home wherein police officers recovered a gun, we previously held the case, reserved decision, and remitted the matter to Supreme Court to determine whether one of the lessors of the home consented to the search (*People v Sweat*, 159 AD3d 1423 [4th Dept 2018]). Upon remittal, the court (Buscaglia, A.J.) held a hearing after which it determined that any alleged consent to search did not attenuate the illegal police entry into the home. We agree.

An officer testified at the hearing that, after midnight on the day in question, he was driving his patrol vehicle down a street in Buffalo when he saw defendant and at least one other man standing on a porch. Defendant was staring at the vehicle and then ran into the home. The officer stopped the vehicle and walked onto the porch in time to encounter defendant exiting through the doorway. At that time, the officer recognized defendant as a man whom he had encountered on a daily basis and whom he knew to have had prior gun-related arrests. The officer asked defendant what he was doing. Defendant, who appeared nervous, did not immediately respond. The officer heard a baby cry, and he then entered the home. Asked by defense counsel why he entered the home, the officer testified, “An individual who’s known to carry guns entered that house running into that house actually, coming out acting nervous, there’s a baby crying

in the house, who is taking care of the baby?"

The officer further testified that, once inside the home, he observed a baby crying on a couch and a woman emerging from the kitchen with a bottle. The officer told her that "an individual ran inside the house" and may have brought an object inside that could hurt her children. Although the officer knew defendant's name and knew that defendant was the individual who ran into the home, he did not mention defendant's name to the woman. The officer testified that he did not "intentionally" withhold defendant's name from the woman. He acknowledged, however, that the term "individual" could refer to a stranger. The officer testified that the woman orally consented to a search of the home, and a gun was found in the front closet. Thereafter, a written permission-to-search form was presented to the woman for her signature, and she signed it.

The woman testified that, on the evening in question, she was sleeping and had been awakened when her baby starting crying. She went to the kitchen to get a bottle and saw police lights. When she came back from the kitchen, police officers were already searching the living room. One of the men on the porch at the time of the search was her fiancé, the baby's father. Her fiancé was talking to his brother, defendant, a man with whom the woman was familiar. She further testified that, after the gun was recovered, an officer threatened to call Child Protective Services if she refused to sign the permission-to-search form. In its decision, the court found that the officer, by withholding defendant's name from the woman, intentionally misled her into giving consent to search.

In their supplemental brief, the People correctly concede that the officer entered the home illegally. An illegal entry by the police requires the suppression of the fruits of an ensuing search notwithstanding a voluntary consent, unless the consent attenuates the taint of the illegal entry (*see Matter of Leroy M.*, 16 NY3d 243, 246 [2011], *cert denied* 565 US 842 [2011]). In determining whether the illegal entry is so attenuated, a court is required to consider a variety of factors, including: (1) the temporal proximity of the consent to the illegal entry; (2) whether there were intervening circumstances; (3) whether the purpose underlying the illegal entry was to obtain the consent or the fruits of the search; (4) whether the consent was volunteered or requested; (5) whether the person who gave consent was aware that he or she could refuse consent; and, most importantly, (6) the purpose and flagrancy of the misconduct (*see id.*; *People v Borges*, 69 NY2d 1031, 1033 [1987]).

Although the temporal proximity of the consent does not compel suppression by itself (*see Leroy M.*, 16 NY3d at 247), here, that factor and all of the other factors favor suppression (*cf. id.*). The purpose of the illegal entry was to recover a gun that the officer presumed was hidden inside. Any consent obtained thereafter was not volunteered. It was requested, and the woman was not advised that she could refuse consent. Although the People rely in part on intervening circumstances, i.e., the conversation during which the officer informed the woman that an unidentified "individual" had come into the

home and may have placed therein an object that could hurt her children, the court found the officer’s statements to be intentionally misleading and made in order to deceive the woman into giving her consent. Thus, we conclude that the conversation does not constitute an intervening circumstance favoring attenuation, but rather weighs in favor of suppression. Most importantly, the officer engaged in flagrant misconduct. Without having witnessed any illegality, the officer entered a private residence without permission, after midnight, while a woman in that residence was trying to feed her newborn child, and coerced her into consenting to a search of her home.

In sum, the court properly granted suppression because the gun was “ ‘come at by exploitation’ ” of illegal police action (*id.*, quoting *Brown v Illinois*, 422 US 590, 599 [1975]).

Entered: March 22, 2019

Mark W. Bennett
Clerk of the Court