SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 28, 2019

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

1470

KA 15-00039

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM L. RICHARDSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered August 7, 2014. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree, burglary in the first degree (two counts) and assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating that part of the sentence awarding restitution and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, robbery in the first degree (Penal Law § 160.15 [3]), defendant contends that he was deprived of his state constitutional right to counsel in connection with his decision to testify before the grand jury. Although defendant's deprivation of counsel contention is not forfeited by his guilty plea (*see People v Griffin*, 20 NY3d 626, 630-632 [2013]; *People v Smith*, 143 AD3d 31, 34 [1st Dept 2016], *mod on other grounds* 30 NY3d 626 [2017]; *People v Chappelle*, 121 AD3d 1166, 1168 [3d Dept 2014], *lv denied* 24 NY3d 1118 [2015]), it is nevertheless encompassed by his general, unrestricted, and unchallenged waiver of his right to appeal (*see People v Vanvleet*, 126 AD3d 1359, 1360 [4th Dept 2015], *lv denied* 26 NY3d 1012 [2015]; *see also People v Triplett*, 149 AD3d 1592, 1592-1593 [4th Dept 2017], *lv denied* 29 NY3d 1095 [2017]; *People v Whitfield*, 52 AD3d 748, 748 [2d Dept 2008], *lv denied* 11 NY3d 858 [2008]; *People v Segrue*, 274 AD2d 671, 672 [3d Dept 2000], *lv denied* 95 NY2d 908 [2000]). Notably, unlike in *People v Robbins* (33 AD3d 1127, 1128 [3d Dept 2006]), defendant does not assert that the alleged deprivation of his right to counsel infected the plea bargaining process or otherwise tainted the voluntariness of his guilty plea (*see Whitfield*, 52 AD3d at 748; *People v Wolmart*, 5 AD3d 706, 707 [2d Dept 2004], *lv denied* 4 NY3d 750 [2004]).

We decline to follow the Third Department's determination in *People v Trapani* (162 AD3d 1121, 1122 [3d Dept 2018]) that a deprivation of counsel contention survives a valid waiver of the right to appeal irrespective of whether the alleged deprivation infected the defendant's guilty plea.

Defendant's further contention that County Court erred in ordering him to pay restitution because restitution was not part of the plea agreement survives both his guilty plea and his unchallenged waiver of the right to appeal (*see People v Spencer*, 134 AD3d 1553, 1554 [4th Dept 2015]). Moreover, contrary to the People's contention, defendant preserved his contention for appellate review by objecting to the imposition of restitution on the same ground he now advances (*see People v Gilmore*, 12 AD3d 1155, 1156 [4th Dept 2004]). On the merits, it is undisputed that the plea bargain did not include restitution, and the court therefore erred in awarding restitution without affording defendant the opportunity to withdraw his plea (*see People v Pett*, 74 AD3d 1891, 1892 [4th Dept 2010]; *People v Hunter*, 72 AD3d 1536, 1536 [4th Dept 2010]; *Gilmore*, 12 AD3d at 1156). Therefore, as the People now request, we modify the judgment by vacating that part of the sentence awarding restitution (*see People v Annunziata*, 105 AD2d 709, 709 [2d Dept 1984]; *see also People v Feher*, 165 AD3d 1610, 1611 [4th Dept 2018], *lv denied* 32 NY3d 1171 [2019]).

Finally, we note that the uniform sentence and commitment form incorrectly indicates that defendant was sentenced to a definite term of incarceration, and it must be amended to reflect the court's imposition of a determinate term of imprisonment. The uniform sentence and commitment form must also be amended to clarify that the sentence imposed on count one of the indictment runs concurrently with the sentences imposed on the remaining counts thereof (*see People v Hoke*, 167 AD3d 1549, 1550 [4th Dept 2018], *lv denied* 33 NY3d 949 [2019]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

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KA 18-00335

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

STEVEN MORRIS, DEFENDANT-RESPONDENT.

PATRICK E. SWANSON, DISTRICT ATTORNEY, MAYVILLE (WENDY EVANS LEHMANN OF COUNSEL), FOR APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Chautauqua County Court (David W. Foley, J.), dated December 21, 2017. The order granted that part of defendant's omnibus motion seeking to suppress certain statements.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to suppress defendant's statements is denied, and the matter is remitted to Chautauqua County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking to suppress certain statements that he made during the investigation of his alleged unlawful sexual contact with a three-year-old child. We agree with the People that County Court erred in suppressing defendant's oral statements made to the mother of the alleged victim during a controlled telephone call that was recorded by the police. Although it is undisputed that the mother was acting as an agent of the police when she made the controlled call (*see People v Taplin*, 1 AD3d 1044, 1045 [4th Dept 2003], *lv denied* 1 NY3d 635 [2004]), we conclude that the mother "did not make a threat [or a promise] that would create a substantial risk that defendant might falsely incriminate himself" (*People v Bradberry*, 131 AD3d 800, 802 [4th Dept 2015], *lv denied* 26 NY3d 1086 [2015] [internal quotation marks omitted]; *see* CPL 60.45 [2] [b] [i]; *see also People v Price*, 285 AD2d 616, 616 [2d Dept 2001], *lv denied* 97 NY2d 708 [2002]; *People v Huntley*, 259 AD2d 843, 845-846 [3d Dept 1999], *lv denied* 93 NY2d 972 [1999]). We further conclude that the controlled call did not constitute an unconstitutionally coercive police tactic; nor were the tactics employed by the mother during the call unconstitutionally coercive (*see generally* CPL 60.45 [2] [b] [ii]; *People v Thomas*, 22 NY3d 629, 641-645 [2014]). "Police may generally engage in deception while investigating a crime" (*People v*

Colbert, 60 AD3d 1209, 1211 [3d Dept 2009]), and "[d]eceptive police stratagems in securing a statement 'need not result in involuntariness without some showing that the deception was so fundamentally unfair as to deny due process or that a promise or threat was made that could induce a false confession' " (*People v Dishaw*, 30 AD3d 689, 690 [3d Dept 2006], *lv denied* 7 NY3d 787 [2006], quoting *People v Tarsia*, 50 NY2d 1, 11 [1980]; *see Bradberry*, 131 AD3d at 802). In this case, we conclude that "there was no such showing" (*Bradberry*, 131 AD3d at 802; *cf. Thomas*, 22 NY3d at 645; *see generally People v Clark*, 139 AD3d 1368, 1369 [4th Dept 2016], *lv denied* 28 NY3d 928 [2016]).

We also agree with the People that the court erred in suppressing statements made by defendant during an interview with investigators from the Chautauqua County Sheriff's Office based upon a purported *Miranda* violation. It is well established that "both the elements of police 'custody' and police 'interrogation' must be present before law enforcement officials constitutionally are obligated to provide the procedural safeguards imposed upon them by *Miranda*" (*People v Huffman*, 41 NY2d 29, 33 [1976]; *see People v Hailey*, 153 AD3d 1639, 1640 [4th Dept 2017], *lv denied* 30 NY3d 1060 [2017]). Here, the evidence at the *Huntley* hearing established that the investigators subjected defendant to interrogation. Contrary to the court's conclusion, however, the evidence also established that defendant was not in custody when he made the statements.

"The standard for assessing a suspect's custodial status is whether a reasonable person innocent of any wrongdoing would have believed that he or she was not free to leave" (*People v Paulman*, 5 NY3d 122, 129 [2005]). The test is "not what the defendant thought, but rather what a reasonable [person], innocent of any crime, would have thought had he [or she] been in the defendant's position" (*People v Figueroa*, 156 AD3d 1348, 1348 [4th Dept 2017], *lv denied* 31 NY3d 1013 [2018] [internal quotation marks omitted]; *see People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]). In this case, although defendant's interview occurred at the Sheriff's Office, that fact "does not necessarily mean that he is to be considered 'in custody' " (*Yukl*, 25 NY2d at 589). Defendant voluntarily agreed to meet the investigators at the Sheriff's Office and arranged for his own transportation to and from the interview (*see People v Eriksen*, 145 AD3d 1110, 1111-1112 [3d Dept 2016], *lv denied* 28 NY3d 1183 [2017]; *People v Drennan*, 81 AD3d 1279, 1279 [4th Dept 2011], *lv denied* 16 NY3d 858 [2011], *reconsideration denied* 17 NY3d 816 [2011]). When defendant arrived, the investigators informed him that he was free to leave (*see People v Vargas*, 109 AD3d 1143, 1143 [4th Dept 2013], *lv denied* 22 NY3d 1044 [2013]; *People v Weakfall*, 108 AD3d 1115, 1115-1116 [4th Dept 2013], *lv denied* 21 NY3d 1078 [2013]). In fact, defendant left the Sheriff's Office at the conclusion of the interview despite making inculpatory statements. Further, defendant was not restrained during the interview, and the door to the interview room was unlocked (*see People v Cade*, 110 AD3d 1238, 1239 [3d Dept 2013], *lv denied* 22 NY3d 1155 [2014]; *Weakfall*, 108 AD3d at 1115-1116). Although the investigators confronted defendant with the statements that he made during the controlled call, the fact that the

questioning may have turned accusatory in nature did not render the interview custodial given the other circumstances present in this case (*see People v Brown*, 153 AD3d 1664, 1665 [4th Dept 2017], *lv denied* 30 NY3d 1103 [2018]; *People v Hernandez*, 25 AD3d 377, 378 [1st Dept 2006], *lv denied* 6 NY3d 834 [2006]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

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CA 18-01696

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

RICHARD METCALF, SR., AS ADMINISTRATOR OF THE ESTATE OF RICHARD METCALF, JR., DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, SCOTT EVANS, MICHAEL ANDERSON, MATTHEW O'CONNELL, EDWARD KAWALEK, ROBERT STATES, SCOTT EMERLING, RICHARD FRYS, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

BROWN CHIARI LLP, BUFFALO (TIMOTHY M. HUDSON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (JENNIFER C. PERSICO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered January 23, 2018. The order, among other things, granted the motion of defendants County of Erie, Scott Evans, Michael Anderson, Matthew O'Connell, Edward Kawalek, Robert States, Scott Emerling and Richard Frys for summary judgment dismissing plaintiff's fourth cause of action.

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

Memorandum: Plaintiff commenced this action seeking damages arising from fatal injuries sustained by plaintiff's decedent while in custody at the Erie County Holding Center. Plaintiff appeals from an order of Supreme Court that, among other things, granted the motion of defendants-respondents (defendants) seeking summary judgment dismissing plaintiff's fourth cause of action, which alleged, in relevant part, that defendant County of Erie (County) negligently hired, retained, and supervised the Sheriff's deputies responsible for the alleged injuries. We affirm.

The duty to supervise and train Sheriff's deputies rests with the Sheriff (*see Mosey v County of Erie*, 117 AD3d 1381, 1386 [4th Dept 2014]; *Pickett v County of Orange*, 62 AD3d 848, 850 [2d Dept 2009]; *Bardi v Warren County Sheriff's Dept.*, 194 AD2d 21, 24 [3d Dept 1993]; *see also* County Law § 652). Although not explicitly stated in the published memorandum, we previously concluded in *Villar v County of*

Erie (126 AD3d 1295, 1296 [4th Dept 2015]) that the County has no similar duty, and thus we determined that the court properly granted those parts of the County's motion to dismiss, for failure to state a cause of action, the plaintiff's second cause of action, alleging that the County was liable for its failure to supervise and train jail deputies. Defendants in this case therefore met their initial burden on the motion by establishing that the County was not liable under the theory stated in plaintiff's fourth cause of action.

In opposition, plaintiff failed to raise an issue of fact suggesting that the County assumed the Sheriff's duty. The deposition testimony of the Sheriff and Undersheriff established that the County was not involved in the hiring or termination of deputies, and the fact that the deputies may have received a W-2 from the County or that the deputies entered into a collective bargaining agreement with the County does not demonstrate that the County assumed responsibility for hiring, training, or supervising those deputies (*see generally Jones v Seneca County*, 154 AD3d 1349, 1350 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018]). We also reject plaintiff's contention that the County assumed that responsibility pursuant to a consent order entered in an unrelated action in the Western District of New York. By its own terms, that order "is not intended to expand the right of any person or entity who seeks relief against the County or its officials or employees."

We reject plaintiff's further contention that the County's representation that the Erie County Sheriff's Department lacked a separate legal identity from the County estops the County from contending that it is not the employer of the Sheriff's deputies. The County correctly stated that "the Sheriff's Department does not have a legal identity separate from the County . . . and thus an action against the Sheriff's Department is, in effect, an action against the County itself" (*Johanson v County of Erie*, 134 AD3d 1530, 1531-1532 [4th Dept 2015] [internal quotation marks omitted]). The Sheriff, however, is distinct from both the County and the Sheriff's Department (*see id.*), and thus the County's representation has no bearing on whether the Sheriff, as opposed to the County, bears the responsibility of hiring, training, and supervising the Sheriff's deputies.

Our holding in *Villar* does not support plaintiff's contention that the County owed a duty to plaintiff's decedent in this case (126 AD3d at 1296). Although we concluded in *Villar* that the County owes a duty "to safeguard [inmates] from foreseeable assaults [by] other inmates" (*id.* [internal quotation marks omitted]), that is not plaintiff's claim here. Indeed, as discussed above, we concluded in *Villar* that the court properly granted the County's motion to dismiss the plaintiff's second cause of action, alleging negligent training and supervision of the deputies (*see id.*).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

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KA 09-00914

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERROL MASSEY, DEFENDANT-APPELLANT.

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

TERROL MASSEY, DEFENDANT-APPELLANT PRO SE.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered April 20, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, conspiracy in the second degree, and criminal possession of a weapon in the fourth degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]) and conspiracy in the second degree (§ 105.15), defendant contends in his main brief that Supreme Court erred in denying his *Batson* challenge to the prosecutor's use of a peremptory challenge (*see Batson v Kentucky*, 476 US 79, 94-98 [1986]). Defendant failed to preserve for our review his contention "concerning the court's procedure for determining his *Batson* objection" (*People v Schumaker*, 136 AD3d 1369, 1371 [4th Dept 2016], *lv denied* 27 NY3d 1075 [2016], *reconsideration denied* 28 NY3d 974 [2016]; *see People v Collins*, 63 AD3d 1609, 1610 [4th Dept 2009], *lv denied* 13 NY3d 795 [2009]; *People v Parker*, 304 AD2d 146, 156 [4th Dept 2003], *lv denied* 100 NY2d 585 [2003]). Furthermore, defendant's contention that the reasons that the prosecutor gave for striking a prospective juror in response to his *Batson* challenge were pretextual is also unpreserved inasmuch as defendant "failed to articulate . . . any reason why he believed that the prosecutor's explanations were pretextual" (*People v Santiago*, 272 AD2d 418, 418 [2d Dept 2000], *lv denied* 95 NY2d 907 [2000]; *see People v Smocum*, 99 NY2d 418, 423-424 [2003]; *People v Cooley*, 48 AD3d 1091, 1092 [4th Dept 2008], *lv denied* 10 NY3d 861 [2008]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see*

CPL 470.15 [6] [a]).

We reject defendant's further contention in his main brief that the court erred in denying his request for a missing witness charge with respect to two nontestifying codefendants who had entered pleas of guilty. Although the prosecutor did not call those two codefendants to testify, it is well settled that "the mere failure to produce a witness at trial, standing alone, is insufficient to justify the charge. Rather, it must be shown that the uncalled witness is knowledgeable about a material issue upon which evidence is already in the case; that the witness would naturally be expected to provide noncumulative testimony favorable to the party who has not called him [or her], and that the witness is available to such party" (*People v Gonzalez*, 68 NY2d 424, 427 [1986]).

"The burden, in the first instance, is upon the party seeking the charge to promptly notify the court that there is an uncalled witness believed to be knowledgeable about a material issue pending in the case, that such witness can be expected to testify favorably to the opposing party and that such party has failed to call him [or her] to testify" (*id.*; *see People v Smith*, — NY3d —, —, 2019 NY Slip Op 04447, *2 [2019]). If a defendant shows that those factors are present, the People then bear the burden of demonstrating that the charge would not be appropriate (*see Smith*, — NY3d at —, 2019 NY Slip Op 04447, *2; *Gonzalez*, 68 NY2d at 428). That burden " 'can be met by demonstrating,' among other things, that 'the testimony would be cumulative to other evidence' " (*Smith*, — NY3d at —, 2019 NY Slip Op 04447, *2). Here, we conclude that, after defendant met his initial burden by demonstrating that the relevant three factors were present (*see Gonzalez*, 68 NY2d at 427), the court did not abuse its discretion in denying defendant's request upon concluding that the People demonstrated that the two witnesses in question would provide only cumulative testimony (*see People v Butler*, 140 AD3d 1610, 1611-1612 [4th Dept 2016], *lv denied* 28 NY3d 969 [2016]; *People v Goossens*, 92 AD3d 1281, 1282 [4th Dept 2012], *lv denied* 19 NY3d 960 [2012]). Moreover, such testimony "would [have been] 'presumptively suspect' . . . or subject to impeachment detrimental to the People's case" (*People v Arnold*, 298 AD2d 895, 895 [4th Dept 2002], *lv denied* 99 NY2d 580 [2003]; *see People v Parton*, 26 AD3d 868, 869 [4th Dept 2006], *lv denied* 7 NY3d 760 [2006]).

We also reject defendant's contention in his main brief that the court erred in refusing to suppress the statements that he made to the police on the ground that the police violated his right to counsel by using trickery to prevent him from speaking to his parents. Although defendant is correct that a statement made by a 17 year old is subject to suppression if it is obtained after the police "have sealed off the most likely avenue by which the assistance of counsel may reach [that person] by means of deception and trickery" (*People v Townsend*, 33 NY2d 37, 41 [1973]; *see also People v Bevilacqua*, 45 NY2d 508, 513 [1978]), suppression is not required on that ground where "there is no indication that he was threatened or coerced or that the police unlawfully isolated him from supportive adults who attempted to see

him" (*People v Tompkins*, 55 AD3d 1373, 1373 [4th Dept 2009], *lv denied* 15 NY3d 758 [2010]; *see generally People v Huff*, 133 AD3d 1223, 1225 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016]). Here, defendant failed to demonstrate that the police employed any " 'official deception or trickery' " to prevent him from speaking with his parents (*People v Martin*, 39 AD3d 1213, 1213 [4th Dept 2007], *lv denied* 9 NY3d 878 [2007]), and he is therefore not entitled, on that basis, "to the suppression of the statements that he made to the police after asking to [do so]" (*People v Harvey*, 70 AD3d 1454, 1455 [4th Dept 2010], *lv denied* 15 NY3d 750 [2010]).

Defendant further contends in his main brief that the court violated Judiciary Law § 21 because the Justice who decided that part of his omnibus motion seeking to suppress his statements to the police (Wolfgang, J.) was not the Justice who heard the testimony at the suppression hearing (Forma, J.). We reject that contention. Pursuant to the statute, a judge or justice "shall not decide or take part in the decision of a question, which was argued orally in the court, when he [or she] was not present and sitting therein" as a judge or justice (*id.*; *see generally Matter of Connelly-Logal v West*, 272 AD2d 920, 920 [4th Dept 2000]). Furthermore, "[i]t has been made clear that [section 21] applies not only to oral argument of motions, but to the taking of testimony, and violation is a defect so fundamental that it cannot be waived" (*People v Cameron*, 194 AD2d 438, 438 [1st Dept 1993]). Nevertheless, where a judge or justice replaces another judge or justice in the midst of litigation, the Court of Appeals "interprets section 21 by looking at whether the replacement judge [or justice] will be asked to make factual determinations, as opposed to reaching legal conclusions, and overall fairness" (*People v Hampton*, 21 NY3d 277, 285 [2013]).

Here, the first Justice heard the testimony at the hearing, but then made detailed findings of fact, encompassing five pages of hearing transcript. The second Justice explicitly stated that she was familiar with the proceedings, had reviewed the transcript from the hearing, and adopted the first Justice's findings of fact in their entirety. Although a single witness testified after the first Justice made his findings of fact, the second Justice did not, by determining that the testimony of that witness was credible, violate section 21 under the unique circumstances of this case. Notably, that witness was called by defendant, and defendant suffered no prejudice from the credibility determination, which was entirely in his favor. Thus, because the second Justice determined that the testimony of that witness did not require suppression of defendant's statements, we conclude that "purely legal questions were involved" (*Plunkett v Emergency Med. Serv. of N.Y. City*, 234 AD2d 162, 163 [1st Dept 1996]; *see Hampton*, 21 NY3d at 285), and "overall fairness" is served by permitting the second Justice to determine the legal ramifications of that witness's testimony (*Hampton*, 21 NY3d at 285).

Defendant further contends in his main brief that the court erred in directing a *Dunaway* hearing but failing to render a decision after the hearing. In his pro se supplemental brief, he contends that the court erred in refusing to suppress the statements in question because

they were the fruit of an illegal arrest and that the prosecutor engaged in misconduct by submitting such illegally obtained evidence at trial. At the start of the suppression hearing, Justice Forma directed the prosecution to conduct a combined *Huntley* and *Dunaway* hearing, and the prosecutor introduced evidence concerning the circumstances under which defendant was taken into custody. Although Justice Wolfgang refused to suppress defendant's statements, the court did not address the legality of defendant's detention or arrest. "CPL 470.15 (1) precludes [this Court] from reviewing an issue that was either decided in an appellant's favor or was not decided by the trial court" (*People v Ingram*, 18 NY3d 948, 949 [2012]; *see People v LaFontaine*, 92 NY2d 470, 473-474 [1998], *rearg denied* 93 NY2d 849 [1999]). Consequently, as the People correctly concede, we may not resolve defendant's contentions regarding the *Dunaway* issue, which was never addressed by the court. We therefore hold the case, reserve decision, and remit the matter to Supreme Court to determine whether the statements should be suppressed as the fruit of an illegal detention or arrest (*see generally People v Chattley*, 89 AD3d 1557, 1558 [4th Dept 2011]).

Contrary to defendant's contention in his main brief, the sentence is not unduly harsh or severe. We note, however, that the certificate of conviction contains an error regarding the sentence imposed on the conspiracy count and must therefore be amended to reflect that defendant was sentenced to an indeterminate term of incarceration of 6⅔ to 20 years on that count (*see e.g. People v Tumolo*, 149 AD3d 1544, 1544 [4th Dept 2017], *lv denied* 29 NY3d 1087 [2017]).

Defendant's further contention in his pro se supplemental brief that he was denied effective assistance of counsel is based on matters outside the record, and that contention must therefore be raised by way of a motion pursuant to CPL 440.10 (*see People v Mallard*, 151 AD3d 1957, 1958 [4th Dept 2017], *lv denied* 29 NY3d 1130 [2017]).

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

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

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CA 18-00880

PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ.

WALDEN BAILEY CHIROPRACTIC, P.C.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GEICO CASUALTY COMPANY, DEFENDANT-APPELLANT.

RIVKIN RADLER LLP, UNIONDALE (HENRY MASCIA OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE MORRIS LAW FIRM, BUFFALO (DANIEL K. MORRIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered October 26, 2017. The order, insofar as appealed from, denied in part the motion of defendant to dismiss the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of defendant's motion seeking to dismiss the 13th and 14th causes of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages arising from defendant's alleged failure to pay hundreds of insurance claims submitted to it by plaintiff for health care services that plaintiff rendered to defendant's insureds. Supreme Court granted in part defendant's motion to dismiss the amended complaint pursuant to CPLR 3211, and dismissed 13 of the 17 causes of action. The court denied defendant's motion with respect to the 3rd cause of action, for breach of contract, the 13th cause of action, for negligent hiring, supervision, or retention, and the 14th cause of action, for prima facie tort. The portion of the amended complaint titled "first cause of action" contained a factual background for the subsequent causes of action set forth in the amended complaint.

Accepting as true the facts alleged in the amended complaint, as we must on a motion to dismiss pursuant to CPLR 3211 (a) (7), and according plaintiff the benefit of every possible favorable inference (*see Hall v McDonald's Corp.*, 159 AD3d 1591, 1592 [4th Dept 2018]), we reject defendant's contention that the court erred in denying its motion to dismiss the first cause of action for failure to state a claim. We agree with plaintiff that there is no basis to dismiss what is erroneously entitled the "first cause of action" in the amended

complaint inasmuch as it is not a cause of action at all; rather, the statements thereunder merely set forth the transactions or occurrences intended to be proved and the amended complaint thereafter separately states the causes of action with incorporation by reference of those prior statements (*see* CPLR 3013, 3014; *see generally* CPLR 3026).

We agree with defendant, however, that plaintiff failed to allege facts constituting negligent hiring, supervision, or retention sufficient to survive defendant's motion to dismiss. "An employer may be liable for a claim of negligent hiring or supervision if an employee commits an independent act of negligence outside the scope of employment and the employer was aware of, or reasonably should have foreseen, the employee's propensity to commit such an act" (*Lamb v Stephen M. Baker, O.D., P.C.*, 152 AD3d 1230, 1231 [4th Dept 2017] [internal quotation marks omitted]). Here, plaintiff's cause of action for negligent hiring, supervision or retention is based on the factual allegations that defendant's employees denied or delayed the payment of claims to plaintiff and sent repetitive verification demands, and that defendant was aware of what its employees were doing and continued to employ them. Plaintiff, however, failed to allege that those acts were committed outside the scope of the employees' employment. Plaintiff also failed to allege how the employees' alleged acts of denying claims and sending verification demands constituted acts of negligence. Thus, we conclude that the court erred in denying that part of defendant's motion seeking to dismiss the 13th cause of action, and we therefore modify the order accordingly.

We further agree with defendant that plaintiff failed to allege facts sufficient to establish the elements of a cause of action for prima facie tort, i.e., "the intentional infliction of harm, . . . which results in special damages, . . . without any excuse or justification, . . . by an act or series of acts which would otherwise be lawful" (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985]). "There can be no recovery [for prima facie tort] unless a 'disinterested malevolence' to injure [the] plaintiff constitutes the sole motivation for defendant['s] otherwise lawful act" (*Backus v Planned Parenthood of Finger Lakes*, 161 AD2d 1116, 1117 [4th Dept 1990]). Here, plaintiff alleged that defendant acted in "bad faith" and intended harm by repeatedly sending plaintiff duplicitous requests for verification forms to be completed. Those conclusory statements in the amended complaint, however, fail to allege "a malicious [act] unmixed with any other and exclusively directed to [the] injury and damage of another" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983]). Furthermore, it is "[a] critical element of the cause of action . . . that plaintiff suffered specific and measurable loss" (*Freihofer*, 65 NY2d at 143), which "must be alleged with sufficient particularity to identify actual losses and be related causally to the alleged tortious acts" (*Lincoln First Bank of Rochester v Siegel*, 60 AD2d 270, 280 [4th Dept 1977]), but the injuries alleged by plaintiff are "couched in broad and conclusory terms" (*id.*), and do not constitute "specific and measurable loss" stated with particularity (*Freihofer*, 65 NY2d at 143; *cf. S. E. Nichols, Inc. v Grossman*, 50 AD2d 1086, 1086 [4th Dept 1975]). We

therefore further modify the order by granting that part of the motion seeking to dismiss the 14th cause of action.

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

106

CA 18-00063

PRESENT: SMITH, J.P., PERADOTTO, TROUTMAN, AND WINSLOW, JJ.

ANNE M. MANCUSO, FORMERLY KNOWN AS ANNE M. GRAHAM, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS S. GRAHAM, DEFENDANT-APPELLANT. (APPEAL NO. 1.)

ALDERMAN AND ALDERMAN, SYRACUSE (RICHARD B. ALDERMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

NANCY L. DYER, SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Martha Walsh Hood, A.J.), entered September 25, 2017. The order distributed the benefits of defendant under the New York State and Local Employees Retirement System.

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

Memorandum: These consolidated appeals arise from postjudgment proceedings in an action for divorce. In appeal No. 1, defendant appeals from a Domestic Relations Order (DRO) that distributed his retirement benefits under the New York State and Local Employees Retirement System (NYSLRS). In appeal No. 2, defendant appeals from an order denying his motion to vacate the DRO. With respect to appeal No. 1, we note "that no appeal as of right lies from a DRO" (*Andress v Andress*, 97 AD3d 1151, 1152 [4th Dept 2012]). Nevertheless, defendant "raised timely objections prior to the entry of the []DRO and thereby preserved a record for our review" (*Irato v Irato*, 288 AD2d 952, 952 [4th Dept 2001]), and we therefore treat the notice of appeal in appeal No. 1 as an application for leave to appeal, and we grant the application (*see Cuda v Cuda* [appeal No. 2], 19 AD3d 1114, 1114 [4th Dept 2005]; *Irato*, 288 AD2d at 952).

Upon considering the merits, we affirm the order in appeal No. 1. The parties' stipulation, which was incorporated but not merged into their judgment of divorce, provided that plaintiff's marital share of defendant's pension be calculated according to the formula articulated in *Majauskas v Majauskas* (61 NY2d 481, 489-491 [1984]). During the marriage, defendant was employed by the New York State Department of Aviation, where he accrued pension benefits under the NYSLRS. In

2003, after the judgment of divorce, defendant was transferred to the City of Syracuse Fire Department, where he accrued benefits under the New York State Police and Fire Retirement System (Police and Fire System) until he retired in January 2017. He elected upon retirement, however, to combine his service credits and collect a single retirement payment from NYSLRS.

We reject defendant's contentions that Supreme Court should have applied the *Majauskas* formula to only that part of the retirement benefits that he earned through the NYSLRS, and that his benefit from the Police and Fire System is an entirely separate benefit that he earned after the termination of the marriage. It is well settled that the "portion of a pension based on years of employment during the marriage is marital property" (*Olivo v Olivo*, 82 NY2d 202, 207 [1993]; *see Antinora v Antinora*, 125 AD3d 1336, 1340 [4th Dept 2015]; *Beiter v Beiter*, 67 AD3d 1415, 1416 [4th Dept 2009]). Therefore, "[a]long with pension rights earned during a marriage prior to a separation agreement or matrimonial action, enhanced retirement income is deemed marital property subject to equitable distribution" (*Raynor v Raynor*, 90 AD3d 1009, 1010 [2d Dept 2011]; *see also Loy v Loy*, 108 AD3d 1201, 1202 [4th Dept 2013], *lv dismissed* 22 NY3d 929 [2013]; *Beiter*, 67 AD3d at 1416]). Here, because defendant's final benefit included "compensation for past service [that occurred] during the marriage, it constituted marital property" (*Osorio v Osorio*, 84 AD3d 1333, 1335 [2d Dept 2011]; *see Antinora*, 125 AD3d at 1340).

We also affirm the order in appeal No. 2, but our reasoning differs from that of the motion court. Inasmuch as the DRO properly reflected the terms of the parties' stipulation that was incorporated, but not merged, in the judgment of divorce, we conclude that defendant's motion sought a revision of the terms and provisions of the parties' stipulation. Therefore, instead of denying the motion on the merits, the court should have denied the motion on the ground that "a motion is not the proper vehicle for challenging a [stipulation] incorporated but not merged into a divorce judgment. Rather, . . . defendant should have commenced a plenary action seeking [recission] or reformation of the [stipulation]" (*Spataro v Spataro*, 268 AD2d 467, 468 [2d Dept 2000]; *see Gartley v Gartley*, 15 AD3d 995, 996 [4th Dept 2005]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

107

CA 18-00064

PRESENT: SMITH, J.P., PERADOTTO, TROUTMAN, AND WINSLOW, JJ.

ANNE M. MANCUSO, FORMERLY KNOWN AS ANNE M. GRAHAM, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS S. GRAHAM, DEFENDANT-APPELLANT. (APPEAL NO. 2.)

ALDERMAN AND ALDERMAN, SYRACUSE (RICHARD B. ALDERMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

NANCY L. DYER, SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Martha Walsh Hood, A.J.), entered November 22, 2017. The order denied the motion of defendant to vacate a Domestic Relations Order.

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

Same memorandum as in *Mancuso v Graham* ([appeal No. 1] — AD3d — [June 28, 2019] [4th Dept 2019]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

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OP 18-01675

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

IN THE MATTER OF UNITED REFINING COMPANY
OF PENNSYLVANIA, PETITIONER,

V MEMORANDUM AND ORDER

TOWN OF AMHERST, RESPONDENT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (BRODY D. SMITH OF COUNSEL), FOR PETITIONER.

STANELY J. SLIWA, TOWN ATTORNEY, WILLIAMSVILLE, FOR RESPONDENT.

Proceeding pursuant to Eminent Domain Procedure Law § 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to annul a determination of respondent. The determination resolved to condemn certain real property.

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

Memorandum: Petitioner commenced this original proceeding pursuant to EDPL 207 seeking to annul the determination of respondent authorizing the condemnation of petitioner's real property. The property is located on the corner of Niagara Falls Boulevard and Kenmore Avenue in the Town of Amherst, New York. It is currently vacant, aside from an asphalt covering, and is surrounded by a series of concrete barriers.

Pursuant to EDPL 207, which governs judicial review of a determination to condemn property, our review is " 'very limited' " (*Matter of Syracuse Univ. v Project Orange Assoc. Servs. Corp.*, 71 AD3d 1432, 1433 [4th Dept 2010], *appeal dismissed and lv denied* 14 NY3d 924 [2010], quoting *Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 546 [2006]). We must either confirm or reject the condemnor's determination, and our review is "confined to whether (1) the proceeding was constitutionally sound; (2) the condemnor had the requisite authority; (3) its determination complied with the [State Environmental Quality Review Act ([SEQRA] ECL art 8)] and EDPL article 2; and (4) the acquisition will serve a public use" (*Grand Lafayette Props. LLC*, 6 NY3d at 546). "The burden is on the party challenging the condemnation to establish that the determination was without foundation and baseless . . . Thus, [i]f an adequate basis for a determination is shown and the objector cannot show that the determination was without foundation, the [condemnor's] determination

should be confirmed" (*Matter of GM Components Holdings, LLC v Town of Lockport Indus. Dev. Agency*, 112 AD3d 1351, 1352 [4th Dept 2013], *appeal dismissed* 22 NY3d 1165 [2014], *lv denied* 23 NY3d 905 [2014] [internal quotation marks omitted]; *see Matter of Eisenhauer v County of Jefferson*, 122 AD3d 1312, 1312 [4th Dept 2014]). Here, we conclude that petitioner failed to meet its burden.

We reject petitioner's contention that the condemnation will not serve a public use. "What qualifies as public purpose or public use is broadly defined as encompassing virtually any project that may confer upon the public a benefit, utility, or advantage" (*Syracuse Univ.*, 71 AD3d at 1433 [internal quotation marks omitted]). In its determination, respondent stated that petitioner's vacant property is located in an area "in dire need of . . . re-investment . . . especially [in] vacant and underutilized lots" and concluded that the condemnation and subsequent improvement of petitioner's property would benefit the area's redevelopment. It is well settled that redevelopment and urban renewal are valid public uses (*see Matter of Haberman v City of Long Beach*, 307 AD2d 313, 313-314 [2d Dept 2003], *appeal dismissed* 1 NY3d 535 [2003], *lv denied* 3 NY3d 601 [2004], *cert dismissed* 543 US 1086 [2005]; *Matter of Bendo v Jamestown Urban Renewal Agency*, 291 AD2d 859, 860 [4th Dept 2002], *lv denied* 98 NY2d 603 [2002]; *Sunrise Props. v Jamestown Urban Renewal Agency*, 206 AD2d 913, 913 [4th Dept 1994], *lv denied* 84 NY2d 809 [1994]; *see generally Matter of Goldstein v New York State Urban Dev. Corp.*, 13 NY3d 511, 525 [2009]). Here, respondent's condemnation of the vacant property serves the public use of redevelopment and urban renewal.

We likewise reject petitioner's contention that respondent's reasons for the taking were a pretext for unconstitutional action and that respondent could have constructed its proposed project, which included a park, bus stop improvements, and a mixed-use building, on a nearby parcel. As noted, respondent's action is intended to serve the public use of urban renewal. Even assuming that respondent could have constructed each of its proposed improvements on another parcel, this alternative action would not remedy the concern underlying the condemnation, i.e., the vacancy and underutilization of petitioner's property. We also reject petitioner's contention that respondent's determination should be annulled because petitioner offered to develop the property. The fact that petitioner claimed that it was "ready, willing, and able" to develop the property does not render respondent's action improper under these circumstances (*Haberman*, 307 AD2d at 314).

Petitioner further contends that respondent's condemnation was excessive or otherwise improper because respondent did not need to acquire the entire property in order to construct its proposed improvements and because respondent could have accomplished its goal by accepting petitioner's offer to lease the property to respondent or grant it an easement. We reject that contention. Respondent was not required to accept petitioner's proposal that respondent take less than full title (*see Matter of Doyle v Schuylerville Cent. School Dist.*, 35 AD3d 1058, 1059 [3d Dept 2006], *lv denied* 9 NY3d 804 [2007],

rearg denied 9 NY3d 939 [2007]), and "the condemnor has broad discretion in deciding what land is necessary to fulfill [its] purpose" (*Eisenhauer*, 122 AD3d at 1313 [internal quotation marks omitted]). On this record, we conclude that respondent neither abused nor improvidently exercised its discretion in determining the scope of the taking (*see id.*).

Lastly, we reject petitioner's contention that respondent failed to satisfy the requirements of SEQRA. Our review of respondent's SEQRA determination "is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination was affected by an error of law or was arbitrary and capricious or was an abuse of discretion" (*Akpan v Koch*, 75 NY2d 561, 570 [1990] [internal quotation marks omitted]). As limited by its petition, petitioner contends that respondent improperly "segmented" its SEQRA review. "Segmentation occurs when the environmental review of a single action is broken down into smaller stages or activities, addressed as though they are independent and unrelated, [which is prohibited in order to] prevent[ ] a project with potentially significant environmental effects from being split into two or more smaller projects, each falling below the threshold requiring full-blown review" (*Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven*, 204 AD2d 548, 550 [2d Dept 1994], *lv dismissed in part and denied in part* 85 NY2d 854 [1995]; *see Sun Co. v City of Syracuse Indus. Dev. Agency*, 209 AD2d 34, 47 [4th Dept 1995], *appeal dismissed* 86 NY2d 776 [1995]). Here, we conclude that respondent's SEQRA determination reflects that respondent considered the impact of each proposed improvement without improperly segmenting its review. To the extent that petitioner now raises contentions in its brief beyond those raised in its petition, those contentions are not properly before us (*see generally Matter of Alvarez v Fischer*, 94 AD3d 1404, 1405 [4th Dept 2012], *lv denied* 96 AD3d 1703 [2012]; *Matter of Tadasky Corp. v Village of Ellenville*, 45 AD3d 1131, 1132 [3d Dept 2007]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

158

CA 18-01674

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

IN THE MATTER OF GENEVA FOUNDRY LITIGATION.

MAIRA AGUILERA, ET AL., CLAIMANTS-APPELLANTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 129067.)

DOROTHY WILLIAMS, CLAIMANT-APPELLANT,

V

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 129460.)

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (DAVID M. KATZ OF COUNSEL), FOR CLAIMANTS-APPELLANTS.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Debra A. Martin, J.), entered January 23, 2018. The order granted defendant's motion to dismiss the claims.

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

Memorandum: Claimants commenced these actions asserting claims based on theories of, inter alia, negligence and inverse condemnation stemming from defendant's purported concealment of toxic contamination in the vicinity of a now-defunct factory in the City of Geneva. The Court of Claims thereafter granted defendant's motion to dismiss all of the claims, holding, inter alia, that the claims were jurisdictionally defective because they failed to adequately plead when they arose (*see generally* Court of Claims Act § 11 [b]). Claimants appeal, and we now affirm.

The State of New York is sovereign and has consented to be sued only in strict accordance with the requirements of the Court of Claims Act (*see* Court of Claims Act § 8; *Kolnacki v State of New York*, 8 NY3d 277, 280 [2007], *rearg denied* 8 NY3d 994 [2007]). Among those requirements is the claimant's duty to allege "the time when [the]

claim arose" (§ 11 [b]). The requirements of section 11 (b) are jurisdictional in nature (*see Kolnacki*, 8 NY3d at 281), and the failure to satisfy them mandates dismissal of the claim without regard to whether the State was prejudiced (*see Wilson v State of New York*, 61 AD3d 1367, 1368 [4th Dept 2009]) or had access to the requisite information from its own records (*see Lepkowski v State of New York*, 1 NY3d 201, 208 [2003]). As the Court of Appeals has explained, the State is not required "to ferret out or assemble information that section 11 (b) obligates the claimant to allege" (*id.*).

To adequately plead when the claim arose, the claimant must allege the date of the tort or other claim, as the case may be, with sufficient definiteness to enable the State to investigate the claim promptly and ascertain its potential liability (*see id.* at 207). In other words, the claimant must allege the "date, time and place of the mishap" (*Heisler v State of New York*, 78 AD2d 767, 768 [4th Dept 1980]). If the claimant fails to specify the dates relevant to the elements of the claim or provides only a broad range of dates, the claim is jurisdictionally defective and properly dismissed (*see e.g. Lepkowski*, 1 NY3d at 207; *Dixon v State of New York*, 153 AD3d 1529, 1530 [3d Dept 2017], *appeal dismissed* 30 NY3d 1087 [2018]; *Hargrove v State of New York*, 138 AD3d 777, 777-778 [2d Dept 2016]; *Jones v State of New York*, 56 AD3d 906, 907-908 [3d Dept 2008]; *Robin BB. v State of New York*, 56 AD3d 932, 932-933 [3d Dept 2008]).

Here, although claimants adequately specified when defendant's negligent acts allegedly occurred, they failed to supply any dates or ranges of dates regarding their alleged injuries, such as when they were exposed to toxins, when they developed symptoms, when they sought treatment, or when they were diagnosed with an illness. Instead, claimants alleged only the dates of their residence in Geneva and the dates when news of the contamination became public. Claimants' allegations are insufficient to enable defendant to adequately investigate the claims in order to ascertain its liability, if any. Given claimants' failure to provide any dates regarding their alleged injuries, defendant could not realistically differentiate between those injuries attributable to toxic exposure and those injuries attributable to other causes. We therefore conclude that claimants failed to adequately plead when the claims arose for purposes of Court of Claims Act § 11 (b). Consequently, the court properly dismissed the claims as jurisdictionally defective (*see Lepkowski*, 1 NY3d at 206-207; *Hargrove*, 138 AD3d at 777-778; *Jones*, 56 AD3d at 907-908).

We emphasize that the claims here are subject to dismissal because claimants failed to sufficiently plead when the claims "arose," not because they failed to allege the "accrual date." The timeliness of a claim is measured by its "accrual date" (Court of Claims Act § 10 [3], [7]), but the sufficiency of its pleading is measured by, inter alia, the claim's description of when it "arose" (§ 11 [b]). Although the terms are similar, they are not synonymous and should not be used interchangeably (*see e.g. Wilson*, 61 AD3d at 1368; *Breen v State of New York*, 179 Misc 42, 43 [Ct Cl 1942]). The parties' remaining contentions are academic in light of our

determination.

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

212

CA 18-01800

PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

CARRINGTON MORTGAGE SERVICES, LLC,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LINDA M. SUDANO, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

JEFFREY A. KOSTERICH, LLC, TUCKAHOE (MICHAEL LI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CASEY E. CALLANAN, CHEEKTOWAGA, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered March 5, 2018. The order dismissed plaintiff's action.

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

Memorandum: In this mortgage foreclosure action, plaintiff appeals from an order dismissing its action against, among others, Linda M. Sudano (defendant) on the ground that plaintiff failed to establish that it is the holder or assignee of both the note and mortgage. We affirm.

Plaintiff contends that the doctrine of collateral estoppel barred Supreme Court from reexamining the issue of plaintiff's standing because the court had already granted plaintiff's motion for summary judgment and dismissed defendant's affirmative defense that plaintiff lacked standing. We reject that contention. Collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Here, there is no such prior action or proceeding. Moreover, the court had authority to reexamine its prior ruling on the issue of standing inasmuch as "every court retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of the action" (*Liss v Trans Auto Sys.*, 68 NY2d 15, 20 [1986]; *see Kleinser v Astarita*, 61 AD3d 597, 598 [1st Dept 2009]; *Matter of International Assn. of Bridge, Structural & Ornamental Iron Workers, Local Union No. 6, AFL-CIO v State of New York*, 280 AD2d 713, 714 [3d Dept 2001]).

We reject plaintiff's further contention that the court erred in determining that plaintiff failed to establish that it was the holder or assignee of the note. To establish standing, plaintiff was required to show that, " 'at the time the action was commenced, [it] was the holder or assignee of the mortgage and the holder or assignee of the underlying note' " (*Bank of N.Y. Mellon v McClintock*, 138 AD3d 1372, 1373-1374 [3d Dept 2016]; *see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 360-362 [2015]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 279-280 [2d Dept 2011]), but here the record is inadequate to determine the date when the action was commenced, and it is likewise inadequate to determine the date or dates when plaintiff was an assignee or holder of the note and mortgage. We are unable to determine when the action was commenced inasmuch as plaintiff failed to include the summons and complaint in the record on appeal. Although there are indications in the record that the summons and complaint were filed on May 29, 2015, with service on defendant on June 13, 2015, we note that the order granting plaintiff's motion for summary judgment reflects that such relief was being granted on a complaint filed on April 5, 2016. Plaintiff contends that a copy of the note with a written endorsement to plaintiff "was presented at the time of the commencement of the action," but there is no evidence of that in the record on appeal, nor is there any evidence establishing to whom such documents were "presented."

Compounding the confusion is the fact that the record reflects that plaintiff made an assignment to another entity sometime after plaintiff's alleged acquisition of the mortgage and/or note in or around April 2014. It is unclear from the record, however, when that assignment took place and whether plaintiff assigned to the other entity the mortgage, the note, or both. Thus, even if on this record we were able to determine when the action was commenced, we would be unable to determine whether plaintiff was a holder or assignee of the note and mortgage on that date. It was plaintiff's obligation as the appellant in this case to assemble a proper record on appeal to support its contentions (*see Elwell v Shumaker*, 158 AD3d 1133, 1134-1135 [4th Dept 2018]; *see generally Hanspal v Washington Mut. Bank*, 153 AD3d 1329, 1332-1333 [2d Dept 2017]; *Lamini v Baroda Props., Inc.*, 128 AD3d 910, 911 [2d Dept 2015]), and its failure to do so compels us to affirm the court's order inasmuch as there is no evidence in the record establishing that plaintiff was the holder or assignee of the note on the date that this action was commenced.

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

221

CA 18-01594

PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

CAROL SMITH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LEAANN HAMASAKI AND ROSA SOSE HAMASAKI,
DEFENDANTS-APPELLANTS.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (MARK A. FORDEN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

VAN HENRI WHITE, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered September 28, 2017. The order, insofar as appealed from, granted that part of the motion of plaintiff seeking summary judgment on the issue of serious injury.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the motion is denied with respect to the issue of serious injury.

Memorandum: Defendants appeal from an order that, insofar as appealed from, granted that part of plaintiff's motion seeking summary judgment on the issue of serious injury within the meaning of Insurance Law § 5102 (d). We now reverse the order insofar as appealed from.

The court erred in granting that part of plaintiff's motion because plaintiff's own submissions raise triable issues of fact whether, as a result of a motor vehicle accident, she sustained a serious injury to her cervical spine under the categories of permanent consequential limitation of use and significant limitation of use (*see generally Gawron v Town of Cheektowaga*, 125 AD3d 1467, 1468 [4th Dept 2015]; *Thomas v Huh*, 115 AD3d 1225, 1225 [4th Dept 2014]; *Summers v Spada*, 109 AD3d 1192, 1192 [4th Dept 2013]). Although plaintiff's expert opined that plaintiff had limitations in range of motion that were causally related to the accident, some reports on which he relied included treatment records stating that plaintiff had a full range of motion, and stating that any injuries were caused by degenerative disease. Plaintiff's expert provided no explanation for those statements in plaintiff's own treatment records.

In any event, even assuming, arguendo, that plaintiff met her initial burden on her motion, we conclude that defendants raised an

issue of fact in opposition by submitting the affidavit of their own expert, who opined that two years after the traffic accident there was no objective evidence of an orthopedic condition (*see generally Jones v Leffel*, 125 AD3d 1451, 1452 [4th Dept 2015]). Giving defendants, as the non-moving party, the benefit of every reasonable inference (*see Houston v McNeilus Truck & Mfg., Inc.*, 124 AD3d 1210, 1211 [4th Dept 2015]), we conclude that their expert's opinion raised an issue of fact whether plaintiff's injuries, although reflected in the MRIs and medical records generated shortly after the accident, had resolved during the following two years (*see generally Lindo v Brett*, 149 AD3d 459, 462 [1st Dept 2017]; *Martinez v Pioneer Transp. Corp.*, 48 AD3d 306, 307 [1st Dept 2008]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

229

KA 16-02332

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DYQUANN M. TUCKER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered September 19, 2014. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a controlled substance in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]), we reject defendant's contention that the evidence is legally insufficient to establish his constructive possession of cocaine found in the basement of his parents' residence. During the execution of the search warrant for the residence, the police also found certain personal possessions in the basement, which was being used as a sleeping area. Those items included mail addressed to defendant at the residence searched, as well as a job application and prescriptions bearing defendant's name. Documents belonging to defendant were not found in any other sleeping area, nor did police recover items bearing any other family member's name from the basement. The evidence is thus legally sufficient to establish defendant's constructive possession of the cocaine (*see People v Holland*, 126 AD3d 1514, 1515 [4th Dept 2015], *lv denied* 25 NY3d 1165 [2015]; *People v Holley*, 67 AD3d 1438, 1439 [4th Dept 2009], *lv denied* 14 NY3d 801 [2010]; *People v Lopez*, 112 AD2d 739, 739-740 [4th Dept 1985]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In addition, 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 conclude that the verdict is not against the weight of the evidence (*see People v Archie*, 78 AD3d 1560, 1561-1562 [4th Dept 2010], *lv denied* 16 NY3d 856 [2011]; *People v Patterson*, 13 AD3d 1138, 1139 [4th Dept 2004], *lv denied* 4 NY3d 801 [2005]; *see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's further contention, the search warrant was valid and Supreme Court thus properly refused to suppress physical evidence seized during its execution. The court properly determined that the People established the reliability of their confidential informant and the basis for his knowledge in satisfaction of the *Aguilar-Spinelli* test (*see People v Baptista*, 130 AD3d 1541, 1541-1542 [4th Dept 2015], *lv denied* 27 NY3d 991 [2016]; *People v Henry*, 74 AD3d 1860, 1861-1862 [4th Dept 2010], *lv denied* 15 NY3d 852 [2010]; *see generally People v Bigelow*, 66 NY2d 417, 423 [1985]). Further, suppression was not warranted based on the inclusion of a no-knock provision in the warrant, even if the provision was not requested in the application for the warrant, inasmuch as the evidence in the application was sufficient to justify the provision (*see* CPL 690.35 [4] [b]; *People v Sherwood*, 79 AD3d 1286, 1288-1289 [3d Dept 2010]; *People v Rodriguez*, 270 AD2d 956, 956-957 [4th Dept 2000], *lv denied* 95 NY2d 870 [2000]).

Defendant also contends that the court erred in admitting in evidence an oral statement of defendant regarding his address for which no CPL 710.30 notice had been given. The statement at issue was defendant's response to a question about where he resided, and it was made to one of the principal investigators, who had executed a search warrant at the home of defendant's parents. As the People correctly concede, defendant's statement regarding his address was not pedigree information for which no CPL 710.30 notice was required (*see generally People v Slade*, 133 AD3d 1203, 1206 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016]) because, under the circumstances of this case, the investigator's question was likely to elicit an incriminating admission and had a "necessary connection to an essential element of [the possessory] crime[] charged" (*People v Velazquez*, 33 AD3d 352, 354 [1st Dept 2006], *lv denied* 7 NY3d 929 [2006]). The court thus erred in admitting the statement in evidence in the absence of a CPL 710.30 notice (*see People v Buza*, 144 AD3d 1495, 1496-1497 [4th Dept 2016]). We further conclude, however, that because the evidence against defendant is overwhelming and there is no reasonable possibility that the verdict would have been different had the statement been precluded, the error is harmless (*see People v Rupert*, 136 AD3d 1311, 1312 [4th Dept 2016], *lv denied* 27 NY3d 1075 [2016]; *People v Roosevelt*, 125 AD3d 1452, 1454 [4th Dept 2015], *lv denied* 25 NY3d 1076 [2015]; *see generally People v Crimmins*, 36 NY2d 230, 237 [1975]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

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CA 18-02017

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

KATHLEEN CUSHING, NOW KNOWN AS KATHLEEN WIATR,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ALLSTATE FIRE AND CASUALTY INS. CO., AND FRANK
BODEN INSURANCE AGENCY, DEFENDANTS-RESPONDENTS.

GUSTAVE J. DETRAGLIA, JR., UTICA, FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (BRITTANY L. HANNAH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered April 17, 2018. The order granted in part the motion of defendants for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action alleging, inter alia, that Allstate Fire and Casualty Ins. Co. (defendant) breached its insurance policy with her by refusing to provide coverage for several losses to her home occurring in 2014. She appeals from an order that, among other things, granted defendants' motion insofar as it sought summary judgment dismissing her second cause of action, for payment of replacement costs under the insurance policy to cover storm damage to her roof. We affirm.

The clear and unambiguous terms of the insurance policy required defendant to pay plaintiff the "actual cash value" of such damage and provided that defendant would pay additional repair or replacement costs only if plaintiff made such repairs or replacement within two years from the date of loss. Defendants thus met their initial burden on the motion by establishing that defendant paid plaintiff the actual cash value of the damage to the roof and that plaintiff did not repair or replace the roof within two years from the date of loss (*see generally Venigalla v Penn Mut. Ins. Co.*, 130 AD2d 974, 975 [4th Dept 1987], *lv dismissed* 70 NY2d 747 [1987]).

In opposition to the motion, plaintiff failed to raise an issue of fact concerning the applicability of the defense of estoppel (*see Enright v Nationwide Ins.* [appeal No. 2], 295 AD2d 980, 981 [4th Dept

2002]). Contrary to plaintiff's contention, there is no basis on which to estop defendant from invoking the two-year period under the insurance policy. "To establish the applicability of estoppel, plaintiff[] had to establish that defendant, by its conduct, lulled plaintiff[] into sleeping on [her] rights" (*id.*). In opposing defendants' motion, however, plaintiff did not identify any conduct by defendant that discouraged her from repairing or replacing the roof during the two-year period (*see Snyder v Allstate Ins. Co.*, 70 AD3d 670, 671 [2d Dept 2010], *lv denied in part and dismissed in part* 17 NY3d 748 [2011], *rearg denied* 17 NY3d 917 [2011]). Rather, by paying her the actual cash value of the roof damage, defendant enabled plaintiff to commence the repair or rebuilding process during the two-year period (*see Lovett v Allstate Ins. Co.*, 86 AD2d 545, 546 [1st Dept 1982], *affd* 64 NY2d 1124 [1985]; *Bartholomew v Sterling Ins. Co.*, 34 AD3d 1157, 1159 [3d Dept 2006]; *Enright*, 295 AD2d at 981). Because she did not, Supreme Court properly determined that the insurance policy entitled her only to the actual cash value of the roof damage (*see D.R. Watson Holdings, LLC v Caliber One Indem. Co.*, 15 AD3d 969, 969 [4th Dept 2005], *lv dismissed* 4 NY3d 882 [2005], *lv dismissed* 5 NY3d 842 [2005]; *Harrington v Amica Mut. Ins. Co.*, 223 AD2d 222, 228 [4th Dept 1996], *lv denied* 89 NY2d 808 [1997]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

241

CA 18-01301

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

RITA LAURICELLA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LC APARTMENTS, LLC, DEFENDANT-RESPONDENT.

THOMAS J. RZEPKA, ROCHESTER, FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, ROCHESTER (RAUL E. MARTINEZ OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered March 27, 2018. The order granted the motion of defendant for partial summary judgment dismissing the negligence claim and limiting damages in the breach of contract claim.

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

Memorandum: Plaintiff commenced this negligence and breach of contract action seeking damages for personal injuries allegedly arising from her exposure to second-hand smoke in an apartment that she leased from defendant. Plaintiff appeals from an order granting defendant's motion for partial summary judgment dismissing the negligence claim and limiting damages in the breach of contract claim. We affirm.

Initially, we note that plaintiff on appeal does not challenge the dismissal of her negligence claim and is therefore deemed to have abandoned any contention with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

We reject plaintiff's contention that Supreme Court erred in granting partial summary judgment limiting the damages that she may recover for breach of contract. Plaintiff sought to recover for personal injuries allegedly arising from second-hand smoke that entered her apartment, i.e., consequential damages (*see generally Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 192 [2008], *rearg denied* 10 NY3d 890 [2008]). It is well settled that "the constant refrain which flows throughout the legion of breach of contract cases . . . provides that damages which may be recovered by a party for breach of contract are restricted to those damages which were reasonably foreseen or contemplated by the parties during their negotiations or at the time the contract was executed. The evident

purpose of this well-accepted principle of contract law is to limit the liability for unassumed risks of one entering into a contract and, thus, diminish the risk of business enterprise" (*Kenford Co. v County of Erie*, 73 NY2d 312, 321 [1989]). Thus, in an action seeking damages "for breach of contract, a party's recovery is ordinarily limited to general damages which are the natural and probable consequence of the breach . . . ; any additional recovery must be premised upon a showing that the unusual or extraordinary damages sought were within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting" (*Brody Truck Rental v Country Wide Ins. Co.*, 277 AD2d 125, 125-126 [1st Dept 2000], *lv dismissed* 96 NY2d 854 [2001] [internal quotation marks omitted]; *see Charter Sch. for Applied Tech. v Board of Educ. for City Sch. Dist. of City of Buffalo*, 105 AD3d 1460, 1464 [4th Dept 2013]). Here, defendant met its initial burden on the motion by submitting evidence, including the lease agreement and addendum, demonstrating as a matter of law that the parties did not contemplate that defendant would be liable to plaintiff for damages for personal injuries arising from exposure to second-hand smoke, and plaintiff failed to raise a triable issue of fact in opposition (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Consequently, defendant was entitled to summary judgment dismissing plaintiff's claim for those consequential damages on the breach of contract claim.

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

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CA 18-00655

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ.

TOWN OF BRIGHTON AND WEST BRIGHTON FIRE PROTECTION DISTRICT, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

WEST BRIGHTON FIRE DEPARTMENT, INC., DEFENDANT-RESPONDENT.

HANNIGAN LAW FIRM PLLC, DELMAR (TERENCE S. HANNIGAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

PINSKY LAW GROUP, PLLC, SYRACUSE (DAVID B. GARWOOD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered May 17, 2017 in an action for specific performance. The order directed plaintiffs to pay monthly rent of $5,000.

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

Memorandum: On appeal from an order that, inter alia, directed them to pay defendant $5,000 per month for their "use and occupancy of any realty owned by [defendant]," plaintiffs contend that Supreme Court abused its discretion in granting any amount of rent to defendant inasmuch as the pleadings in the underlying action were devoid of any claim by defendant for such relief. Even assuming, arguendo, that plaintiffs are not precluded from raising that contention despite the fact that the court ordered rental payments "a year" before a December 2013 court appearance as well as in a 2014 order (*see generally Burke v Crosson*, 85 NY2d 10, 15 [1995]), we conclude that the contention lacks merit. In a 2012 order to show cause application in this action, plaintiffs sought an order directing defendant to allow them or their representative to occupy defendant's firehouse and to use defendant's equipment. Thus, the issue of rent, although not raised in the underlying pleadings, was properly before the court because it was "relief that [was] warranted by the facts plainly appearing on the papers . . . [, the relief was] not too dramatically unlike the relief sought [by plaintiffs in the order to show cause], the proof offered support[ed] it, and there [was] no prejudice to [plaintiffs]" in awarding it (*Frankel v Stavsky*, 40 AD3d 918, 918-919 [2d Dept 2007]; *see Tirado v Miller*, 75 AD3d 153, 158 [2d Dept 2010]). The rental obligation flows directly from plaintiffs' own request to use defendant's property and equipment, and plaintiffs

could not reasonably expect to occupy the fire station and use its equipment for free.

Contrary to plaintiffs' additional contention, the court did not abuse its discretion in declining to refer the matter to a referee after initially suggesting that such a reference would be made. "CPLR 4212 provides in pertinent part that, [u]pon the motion of a[ ] party . . . or on its own initiative, the court may submit any issue of fact required to be decided by the court to an advisory jury or, *upon a showing of some exceptional condition requiring it* . . . , to a referee to report . . . [T]he exceptional condition requirement of CPLR 4212 . . . is not met if the issue can be decided by the court without extraordinary impingement on [its] regular business" (*Luppino v Mosey*, 103 AD3d 1117, 1119 [4th Dept 2013] [internal quotation marks omitted]; *see e.g. Martin-Trigona v Waaler & Evans*, 148 AD2d 361, 363 [1st Dept 1989]; *Barcelona Hotel v Mahoney Hadlow & Adams*, 82 AD2d 790, 791 [1st Dept 1981]). Here, once the court concluded that the matter "was more simple than [it] thought" and could be decided "without extraordinary impingement on its regular business" (*Luppino*, 103 AD3d at 1119 [internal quotation marks omitted]), no reference was necessary.

Contrary to plaintiffs' further contention, we conclude that the court properly admitted and considered defendant's documentary evidence (*see* CPLR 4518 [a]; *see generally Federal Express Corp. v Federal Jeans, Inc.*, 14 AD3d 424, 424-425 [1st Dept 2005]). In addition, we reject plaintiffs' contention that the court erred in relying on inadmissible and speculative testimony and certain statements in a witness's affidavit. Plaintiffs failed to preserve that contention for our review (*see Volino v Long Is. R.R. Co.*, 83 AD3d 693, 694 [2d Dept 2011]). In any event, even assuming, arguendo, that some of that evidence was inadmissible, we presume that the court, in this bench hearing, was "able to distinguish between admissible evidence and inadmissible evidence and . . . render[ed] a determination based on the former" (*Matter of Backus v Clupper*, 79 AD3d 1179, 1181 [3d Dept 2010], *lv denied* 16 NY3d 704 [2011]; *see Matter of State of New York v Parrott*, 125 AD3d 1438, 1439 [4th Dept 2015], *lv denied* 25 NY3d 911 [2015]), and there is no basis in this record to conclude that the court did otherwise (*see People v O'Neill*, 169 AD3d 1515, 1516 [4th Dept 2019]). Based on the admissible evidence in the record, we conclude that the court's award of $5,000 per month in rent should not be disturbed inasmuch as it is reasonable and based on a fair interpretation of the evidence (*see generally Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992], *rearg denied* 81 NY2d 835 [1993]; *Black v State of New York* [appeal No. 2], 125 AD3d 1523, 1524-1525 [4th Dept 2015]). Contrary to plaintiffs' contention, there is no evidence that the court included any attorneys' fees that were " 'incidents of litigation' " in making its determination on the reasonable amount of rent owed by plaintiffs for their use of defendant's realty (*Zelasko Constr., Inc. v Merchants Mut. Ins. Co.*, 142 AD3d 1328, 1329 [4th Dept 2016], quoting *Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]; *see generally The Wharton Assoc., Inc. v Continental Indus. Capital LLC*, 137 AD3d 1753,

1755 [2016]).

Based on our determination, we do not address defendant's additional contentions in support of affirmance, and we note that, inasmuch as defendant did not file a cross appeal, it cannot seek affirmative relief on this appeal (*see generally Abbo-Bradley v City of Niagara Falls*, 132 AD3d 1318, 1320 [4th Dept 2015]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

270

KA 18-00522

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN E. SCHMIEGE, DEFENDANT-APPELLANT.

ROBERT M. GRAFF, LOCKPORT, FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered November 16, 2017. The judgment convicted defendant, upon his plea of guilty, of auto stripping 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 auto stripping in the second degree (Penal Law § 165.10 [2]). Defendant validly waived his right to appeal (*see People v Johnson*, 169 AD3d 1480, 1481 [4th Dept 2019], *lv denied* 33 NY3d 949 [2019]; *People v Link*, 166 AD3d 1581, 1581 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]), and that waiver forecloses his challenge to the severity of both the incarceration and restitution components of his sentence (*see Johnson*, 169 AD3d at 1481; *People v Kesick*, 119 AD3d 1371, 1372 [4th Dept 2014]; *see generally People v Allen*, 82 NY2d 761, 763 [1993]).

Defendant's further contention that Supreme Court violated CPL 430.10 by imposing restitution after the conclusion of the sentencing hearing implicates the legality of his sentence and thus survives his valid waiver of the right to appeal (*see People v Moore*, 124 AD3d 1386, 1387 [4th Dept 2015]; *People v Carpenter*, 19 AD3d 730, 731 [3d Dept 2005], *lv denied* 5 NY3d 804 [2005]; *see generally People v Campbell*, 97 NY2d 532, 535 [2002]). Nevertheless, that contention lacks merit because CPL 430.10 applies only to the incarceration component of a sentence, not to the restitution component (*see Matter of Pirro v Angiolillo*, 89 NY2d 351, 356 [1996]; *People v Johnson*, 208 AD2d 1175, 1175-1176 [3d Dept 1994], *lv denied* 85 NY2d 910 [1995]). Indeed, it is well established that a court may impose restitution within a reasonable time after the sentencing hearing if, as here, the People announce their intent to seek restitution during that hearing

(*see People v Swiatowy*, 280 AD2d 71, 73 [4th Dept 2001], *lv denied* 96 NY2d 868 [2001]).

Defendant next contends that his plea was involuntary because the court failed to inform him of a purportedly direct consequence thereof, i.e., the fact that a guilty plea would constitute a violation of his probation in another case. Although that contention survives defendant's valid waiver of the right to appeal (*see generally People v Empey*, 144 AD3d 1201, 1203 [3d Dept 2016], *lv denied* 28 NY3d 1144 [2017]), it is without merit because the plea's effect on defendant's probationary status in another case is merely a collateral consequence of his conviction in this case (*see People v Monk*, 21 NY3d 27, 32-33 [2013]).

Finally, defendant contends that the court lacked jurisdiction due to the alleged failure to comply with CPL 210.10. Even assuming, arguendo, that defendant's contention survives his valid waiver of the right to appeal and does not require preservation, we conclude that it is without merit (*see People v King*, 163 AD3d 1352, 1352 [3d Dept 2018], *lv denied* 32 NY3d 1206 [2019]; *see also People v Luckerson*, 135 AD3d 1186, 1187 [3d Dept 2016]). We note, however, that the uniform sentence and commitment form incorrectly indicates that the court awarded restitution in the amount of $8,859.31, and it must therefore be amended to reflect the correct amount of $8,895.31 (*see People v Abuhamra*, 107 AD3d 1630, 1631-1632 [4th Dept 2013], *lv denied* 22 NY3d 1038 [2013]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

285

CA 18-00329

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

IN THE MATTER OF PAT A. INZER, BRUCE HALL, DEAN C. MARSHALL, III, KEVIN HALL, JAMES QUINN, FOR JUDICIAL DISSOLUTION OF WEST BRIGHTON FIRE DEPARTMENT, INC., PURSUANT TO NOT-FOR-PROFIT CORPORATION LAW § 1102, AND TOWN OF BRIGHTON, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

WEST BRIGHTON FIRE DEPARTMENT, INC., RESPONDENT-APPELLANT, AND ERIC T. SCHNEIDERMAN, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, RESPONDENT.

PINSKY LAW GROUP, PLLC, SYRACUSE (DAVID B. GARWOOD OF COUNSEL), FOR RESPONDENT-APPELLANT.

HANNIGAN LAW FIRM PLLC, DELMAR (TERENCE S. HANNIGAN OF COUNSEL), FOR PETITIONER-RESPONDENT TOWN OF BRIGHTON.

LAW OFFICES OF MARK C. BUTLER, WILLIAMSVILLE (MARK C. BUTLER OF COUNSEL), FOR PETITIONERS-RESPONDENTS PAT A. INZER, BRUCE HALL, DEAN C. MARSHALL, III, KEVIN HALL, JAMES QUINN, FOR JUDICIAL DISSOLUTION OF WEST BRIGHTON FIRE DEPARTMENT, INC., PURSUANT TO NOT-FOR-PROFIT CORPORATION LAW § 1102.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered May 5, 2017. The order granted the petition for judicial dissolution of respondent West Brighton Fire Department, Inc.

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

Memorandum: Respondent West Brighton Fire Department, Inc. (WBFD) appeals from an order that granted pursuant to N-PCL 1102 (a) (2) (E) a petition seeking judicial dissolution of WBFD. We affirm.

WBFD contends that, inasmuch as the petition was not filed by the requisite 10% of WBFD's members (*see* N-PCL 1102 [a] [2]), Supreme Court erred in denying WBFD's motion to dismiss the petition. We reject that contention. The court granted an amendment of the petition to add two additional members of WBFD as petitioners and, pursuant to N-PCL 1105, such an amendment is deemed nunc pro tunc, i.e., as if the petition were originally filed as amended (*see*

generally La Sorsa v Algen Press Corp., 105 AD2d 771, 772 [2d Dept 1984]). Following the trial, WBFD contended for the first time that the court had lacked the authority to add the two additional members as petitioners because there was never any formal motion to do so and that courts cannot sua sponte add petitioners. Even assuming, arguendo, that WBFD's contention is properly before this Court, we conclude that it lacks merit.

It is well settled that oral motions, including oral motions to add petitioners, are not prohibited (*see Matter of Kirsch v Board of Educ. of Williamsville Cent. Sch. Dist.*, 152 AD3d 1218, 1219 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]; *see generally Matter of Shanty Hollow Corp. v Poladian*, 23 AD2d 132, 133-134 [3d Dept 1965], *affd* 17 NY2d 536 [1966]). Here, petitioners "present[ed] affidavits or other competent evidence in support of [their]" request to add two additional members of WBFD as petitioners (*Kaiser v J & S Realty*, 173 AD2d 920, 921 [3d Dept 1991]), and we conclude that the court granted an amendment of the petition to add those members in the "proper exercise of discretion" (*Shanty Hollow Corp.*, 23 AD2d at 134). Contrary to WBFD's contention, this is not a situation where a court added a petitioner "on its own initiative," i.e., independently of any request to do so (*New Medico Assoc. v Empire Blue Cross & Blue Shield*, 267 AD2d 757, 758 [3d Dept 1999]).

Additionally, WBFD contends in its main brief that petitioner Town of Brighton (Town) could not serve as a petitioner and should not have been permitted to present and cross-examine witnesses. In its reply brief, however, WBFD correctly concedes that the Town is a necessary party (*see* N-PCL 1402 [e] [1]; *Matter of Cloe v Attorney Gen. of the State of N.Y.*, 70 AD3d 1348, 1349 [4th Dept 2010]), but nevertheless contends that the Town was not empowered to commence a dissolution proceeding. That latter contention, although raised on the motion to dismiss the petition, was improperly raised on this appeal for the first time in WBFD's reply brief (*see Turner v Canale*, 15 AD3d 960, 961 [4th Dept 2005], *lv denied* 5 NY3d 702 [2005]). We therefore do not address it.

WBFD further contends that the court erred in according any weight to the opinion of respondent Eric T. Schneiderman, as Attorney General of the State of New York (Attorney General). We reject that contention. The Attorney General is a necessary party to judicial dissolution proceedings (*see* N-PCL 1102 [b]) and, as such, had the right to oppose or to support the petition (*see generally Cloe*, 70 AD3d at 1348).

Finally, we have reviewed WBFD's challenges to the ultimate determination of the court to grant the petition for dissolution on the ground that WBFD was "no longer able to carry out its purposes" (N-PCL 1102 [a] [2] [E]), and we conclude that they lack merit. WBFD correctly contends that petitioners had the burden to establish that WBFD was incapable of fulfilling its purposes (*see generally Matter of Cusato v Glen at Great Kills Homeowners Assn.*, 23 AD3d 464, 464 [2d Dept 2005]), but "[i]n the absence of a clear abuse of discretion" by

the court, we will not disturb its determination in a dissolution proceeding (*Matter of John Luther & Sons Co. v Geneva Bldrs. & Trade Assn.*, 52 AD2d 737, 738 [4th Dept 1976]; *see also Matter of Kemp & Beatley [Gardstein]*, 64 NY2d 63, 73 [1984]; *but see Matter of Singh v Baba Makhan Shah Lobana Sikh Ctr., Inc.*, 115 AD3d 962, 962 [2d Dept 2014]). The determination of the court in this nonjury trial that WBFD was no longer able to carry out "the purpose or purposes *for which it [was] formed*" (N-PCL 402 [a] [2-a] [emphasis added]; *see* N-PCL 1102 [a] [2] [E]), as opposed to its ability to carry out ancillary activities "in furtherance of such purpose or purposes" (N-PCL 402 [a] [2-a]), is based on a fair interpretation of the evidence and, therefore, should not be disturbed (*see Cianchetti v Burgio*, 145 AD3d 1539, 1540-1541 [4th Dept 2016], *lv denied* 29 NY3d 908 [2017]; *see generally Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992], *rearg denied* 81 NY2d 835 [1993]). Contrary to WBFD's contention, the court properly considered the "paramount" issue of the benefit of dissolution to the members of WBFD (N-PCL 1109 [b] [2]), and its determination that dissolution would benefit the members is supported by the evidence and also should not be disturbed (*see generally Cusato*, 23 AD3d at 464; *John Luther & Sons Co.*, 52 AD2d at 738).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

286

CA 18-02078

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, AND TROUTMAN, JJ.

IN THE MATTER OF CLOVER/ALLEN'S CREEK NEIGHBORHOOD ASSOCIATION LLC, PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA LLC, MARDANTH ENTERPRISES, INC., M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA LLC, MARDANTH ENTERPRISES, INC., COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY COMPANIES, TOWN OF BRIGHTON, TOWN BOARD OF TOWN OF BRIGHTON, COMPRISED OF SUPERVISOR WILLIAM MOEHLE AND MEMBERS JASON S. DIPONZIO, JAMES R. VOGEL, CHRISTOPHER K. WERNER, ROBIN R. WILT, IN THEIR CAPACITIES AS MEMBERS OF THAT BODY, RESPONDENTS-DEFENDANTS-RESPONDENTS, ET AL., RESPONDENTS-DEFENDANTS.

NIXON PEABODY LLP, ROCHESTER (LAURIE STYKA BLOOM OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA LLC, MARDANTH ENTERPRISES, INC., M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA LLC, AND MARDANTH ENTERPRISES, INC., COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY COMPANIES.

HARRIS BEACH PLLC, PITTSFORD (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS TOWN OF BRIGHTON, AND TOWN BOARD OF TOWN OF BRIGHTON, COMPRISED OF SUPERVISOR WILLIAM MOEHLE AND MEMBERS JASON S. DIPONZIO, JAMES R. VOGEL, CHRISTOPHER K. WERNER, ROBIN R. WILT, IN THEIR CAPACITIES AS MEMBERS OF THAT BODY.

HODGSON RUSS LLP, BUFFALO (CHARLES W. MALCOMB OF COUNSEL), FOR FINGER LAKES CONFERENCE, INC., CATSKILL MOUNTAIN CLUB, PARKS AND TRAILS NEW YORK, AND ADIRONDACK MOUNTAIN CLUB, NEW YORK, AMICUS CURIAE.

THE ZOGHLIN GROUP, PLLC, ROCHESTER (MINDY L. ZOGHLIN OF COUNSEL), FOR BRIGHTON GRASSROOTS, LLC, AMICUS CURIAE.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered July 6, 2018 in a CPLR article 78 proceeding and declaratory judgment action. The order and judgment granted the motions of respondents-defendants-respondents

to dismiss the petition-complaint against them and declared that the public trust doctrine is inapplicable to certain easements.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the motions in part with respect to the second cause of action and vacating the fifth and sixth decretal paragraphs and as modified the order and judgment is affirmed without costs.

Memorandum: Petitioner-plaintiff (petitioner), a limited liability company formed for the purpose of, among other things, protecting the recreational character of the area around Clover Street and Allen's Creek Road in respondent-defendant Town of Brighton (Town), commenced this hybrid CPLR article 78 proceeding and declaratory judgment action against the Town, respondent-defendant Town Board of the Town (Town Board), and respondents-defendants M&F, LLC, Daniele SPC, LLC, Mucca Mucca LLC, and Mardanth Enterprises, Inc., collectively doing business as Daniele Family Companies (collectively, developers), among others. This matter stems from petitioner's opposition to the developers' proposed project to build a 93,000-square-foot commercial plaza in the Town near Clover Street and Allen's Creek Road (project), which purportedly encroaches upon a 10-foot wide strip of land over which the Town has perpetual non-exclusive easements to maintain a pedestrian pathway for public use (Town Easements). As relevant to this appeal, petitioner sought in its second cause of action a judgment declaring that the Town Easements are subject to the public trust doctrine and that the Town cannot convey the easements to the developers until it obtains approval from the New York State Legislature. In its third cause of action, petitioner sought a judgment invalidating the actions of the Town and the Town Board (collectively, Town respondents) concerning the project taken at their meeting on January 24, 2018 based on the Town Board's purported violations of the Open Meetings Law.

After answering, the Town respondents and the developers separately moved to dismiss the petition-complaint against them under, inter alia, CPLR 3211 (a) (1) and (7) and CPLR 7804 (f). Supreme Court granted the motions, dismissed the first, third and fourth causes of action against the developers and the Town respondents (collectively, respondents), and issued a declaration in favor of respondents with respect to the second cause of action. As limited by its brief, petitioner appeals from the order and judgment insofar as it dismissed the third cause of action against respondents and issued a declaration in their favor with respect to the second cause of action.

We agree with petitioner that the court erred in declaring in favor of respondents that the public trust doctrine is inapplicable to the Town Easements, and we therefore modify the order and judgment accordingly. The public trust doctrine provides that dedicated parkland or public use land in New York is "impressed with a public trust, requiring legislative approval before it can be alienated or used for an extended period for non-park [or non-public] purposes" (*Friends of Van Cortlandt Park v City of New York*, 95 NY2d 623, 630

[2001]; *see Matter of Glick v Harvey*, 25 NY3d 1175, 1180 [2015]). Contrary to the court's determination and as respondents correctly concede, the application of the public trust doctrine does not depend on whether the municipality holds the property in fee simple or whether the municipality's property interest is subject to the rights of others (*see Matter of 10 E. Realty LLC v Incorporated Vil. of Val. Stream*, 11 Misc 3d 1074[A], 2006 NY Slip Op 50561[U], *2 [Sup Ct, Nassau County 2006]; *see e.g. Matter of Lake George Steamboat Co. v Blais*, 30 NY2d 48, 50-52 [1972]; *Long Is. Pine Barrens Socy., Inc. v Suffolk County Legislature*, 159 AD3d 805, 807 [2d Dept 2018], *lv denied* 32 NY3d 910 [2018]). Additionally, unlike the property interests involved in the cases relied on by the court, the Town Easements here were perpetual easements granted in favor of the Town and were not subject to a reversionary interest. Thus, the court's reliance on those cases in making its declaration that the public trust doctrine did not apply was misplaced (*cf. Matter of Rappaport v Village of Saltaire*, 130 AD3d 930, 931-932 [2d Dept 2015], *lv denied* 26 NY3d 912 [2015]; *Grant v Koenig*, 39 AD2d 1000, 1000-1001 [3d Dept 1972]*; Landmark West! v City of New York*, 9 Misc 3d 563, 573 [Sup Ct, NY County 2005]).

Respondents argue that the order and judgment should be affirmed, notwithstanding the court's erroneous rationale (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]; *Menorah Nursing Home v Zukov*, 153 AD2d 13, 19-20 [2d Dept 1989]), because petitioner failed to establish that the conveyances of the Town Easements contained either an express or implied dedication of the easement property for public or park use, and thus the court properly determined that the public use doctrine did not apply. We cannot conclude as a matter of law based upon the documentary evidence that the Town Easements were not dedicated parklands under the public trust doctrine.

To establish that property has been dedicated as a park or for public use, formal dedication by the legislature is not required. Rather, "a parcel of property may become a park by express provisions in a deed . . . or by implied acts, such as continued use [by the municipality] of the parcel as a park" (*Matter of Angiolillo v Town of Greenburgh*, 290 AD2d 1, 10-11 [2d Dept 2001], *lv denied* 98 NY2d 602 [2002]). "A party seeking to establish . . . an implied dedication and thereby successfully challenge the alienation of the land must show that (1) [t]he acts and declarations of the land owner indicating the intent to dedicate his [or her] land to the public use [are] unmistakable in their purpose and decisive in their character to have the effect of a dedication and (2) that the public has accepted the land as dedicated to a public use" (*Glick*, 25 NY3d at 1180 [internal quotation marks omitted]).

Here, petitioner alleged in its petition-complaint that the Town Easements were part of the "Auburn Trail linear park" and that they were parkland for purposes of the public trust doctrine. In support of that part of each motion seeking to dismiss the second cause of action under CPLR 3211 (a) (1), respondents submitted the conveyances that created the Town Easements. Inasmuch as those instruments

provided that the Town Easements were to be used as a "pedestrian pathway" for "public use" and required the Town to restore the easement property to "a park like condition" after construction of the pedestrian pathway, respondents' own documentary evidence creates issues of fact whether there was an express or implied dedication of the Town Easements subject to the public trust doctrine. Thus, respondents failed to meet their burden of submitting documentary evidence that conclusively refuted petitioner's allegations (*see Bakos v New York Cent. Mut. Fire Ins. Co.*, 83 AD3d 1485, 1486 [4th Dept 2011]; *see also Lots 4 Less Stores, Inc. v Integrated Props., Inc.*, 152 AD3d 1181, 1182-1183 [4th Dept 2017]). In addition, deeming the material allegations of the petition-complaint to be true, we conclude that "the allegations in the second cause of action presented a justiciable controversy sufficient to invoke the court's power to render a declaratory judgment," and thus respondents were not entitled to dismissal of that cause of action pursuant to CPLR 3211 (a) (7) (*Plaza Dr. Group of CNY, LLC v Town of Sennett*, 115 AD3d 1165, 1165 [4th Dept 2014]; *see County of Monroe v Clough Harbour & Assoc., LLP*, 154 AD3d 1281, 1282 [4th Dept 2017]).

Contrary to petitioner's contention, the court properly granted that part of each motion seeking to dismiss the cause of action under the Open Meetings Law (Public Officers Law art 7). That statute provides, as relevant here, that agency records shall be made available to the public "to the extent practicable as determined by the agency or the department, prior to or at the meeting during which the records will be discussed" (Public Officers Law § 103 [e]). Further, "such records shall be posted on the website to the extent practicable as determined by the agency or the department, prior to the meeting" (*id.*).

Petitioner concedes that the Town respondents posted the relevant agency documents on their website over seven hours prior to the Town Board meeting at which those documents were to be considered, but essentially argues that it was "practicable" for the Town respondents to have posted them sooner. However, the plain language of the statute requires only that the municipality post relevant documents on its website *prior to the meeting*, if practicable. Inasmuch as the legislature failed to include a specific time period other than prior to the meeting, there is an " 'irrefutable inference' " that the exclusion of such a specific time period was intended (*Village of Webster v Town of Webster*, 270 AD2d 910, 912 [4th Dept 2000], *lv dismissed in part and denied in part* 95 NY2d 901 [2000], quoting McKinney's Cons Laws of NY, Book 1, Statutes § 240; *see Pajak v Pajak*, 56 NY2d 394, 397 [1982]). "In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add or take away from the meaning" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998] [internal quotation marks omitted]; *see People v Hill*, 82 AD3d 77, 79 [4th Dept 2011]). Additionally, we note that prior versions of the Open Meetings Law, which required that records that were going to be discussed at an open meeting be posted at least

"seventy-two hours prior to the open meeting or as soon as practicable," were rejected (Letter from NY State Off of Temporary and Disability Assistance, August 19, 2011 at 35, Bill Jacket L 2011, ch 603). We therefore disagree with petitioner that the statute requires a municipality to post open meetings documents at a time other than prior to the meeting.

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

294

KA 16-01088

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD SPAGNUOLO, DEFENDANT-APPELLANT.

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

RICHARD SPAGNUOLO, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered March 18, 2016. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts) and criminal mischief 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 a jury verdict of, inter alia, two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]), defendant contends in his main brief that his attorney's failure to timely request a missing witness charge deprived him of effective assistance of counsel. We reject that contention.

Defense counsel sought the missing witness charge at the conclusion of defendant's testimony. After initially denying the request as untimely, Supreme Court reviewed the merits of the application and adhered to its determination to deny the request. Insofar as he contends that defense counsel was ineffective in failing to seek the missing witness charge in a timely manner, we conclude that defendant "failed to establish the absence of a legitimate explanation for defense counsel's failure to do so" (*People v Myers* [appeal No. 1], 87 AD3d 826, 828 [4th Dept 2011], *lv denied* 17 NY3d 954 [2011]).

We reject defendant's contention in his main brief that a timely request for the charge would have been successful. One of the two witnesses regarding whom defendant sought the missing witness charge

was a codefendant, charged as defendant's accomplice, who pleaded guilty before defendant's trial. We have stated that a defendant is not entitled to a missing witness charge based on the People's failure to call his accomplice as a witness because an accomplice's testimony would have been "presumptively suspect . . . or subject to impeachment detrimental to the People's case" (*People v Parton*, 26 AD3d 868, 869 [4th Dept 2006], *lv denied* 7 NY3d 760 [2006] [internal quotation marks omitted]; *see People v Burton*, 126 AD3d 1324, 1326 [4th Dept 2015], *lv denied* 25 NY3d 1199 [2015]), and we conclude that such is the case here as well. With respect to the other witness, defendant testified that the witness did not overhear the conversation that was at the heart of his request for a missing witness charge, and it is well settled that a "request for a missing witness charge is properly denied where, as here, the party requesting the charge does not establish that the witness could have been expected to testify concerning a material issue" (*People v Williams*, 13 AD3d 1173, 1174 [4th Dept 2004], *lv denied* 4 NY3d 892 [2005], *reconsideration denied* 5 NY3d 796 [2005]; *see People v Williams*, 163 AD3d 1422, 1423 [4th Dept 2018]). With respect to the remainder of the events for which that potential witness was allegedly present, we conclude, based on the evidence in the record, that his testimony would have been " 'trivial or cumulative' " (*People v Smith*, — NY3d —, 2019 NY Slip Op 04447, *3 [2019]), and thus denial of defendant's request would have been proper. Therefore, with respect to both witnesses, " '[d]efense counsel's failure to [timely] request a missing witness charge did not constitute ineffective assistance of counsel [inasmuch as t]here was no indication that the witness[es] would have provided noncumulative testimony favorable to the People' " (*People v Gonzales*, 145 AD3d 1432, 1433 [4th Dept 2016], *lv denied* 29 NY3d 1079 [2017]). We further conclude that, "even if counsel erred [in submitting his request too late,] this mistake was not so egregious and prejudicial as to constitute one of the rare cases where a single error results in ineffectiveness" (*People v McCauley*, 162 AD3d 1307, 1310 [3d Dept 2018], *lv denied* 32 NY3d 939 [2018] [internal quotation marks omitted]; *see generally People v Henry*, 95 NY2d 563, 565-566 [2000]; *People v Hobot*, 84 NY2d 1021, 1022 [1995]).

In his pro se supplemental brief, defendant contends that the evidence is legally insufficient to support the conviction on the criminal possession of a weapon in the second degree counts because the People failed to establish that he acted with the requisite mental culpability for accomplice liability. Defendant failed to preserve that contention inasmuch as his motion for a trial order of dismissal was not " 'specifically directed' " at the issue raised on appeal (*People v Gray*, 86 NY2d 10, 19 [1995]; *see People v Ford*, 148 AD3d 1656, 1657 [4th Dept 2017], *lv denied* 29 NY3d 1079 [2017]). In any event, defendant's contention lacks merit (*see People v Zuhlke*, 67 AD3d 1341, 1341 [4th Dept 2009], *lv denied* 14 NY3d 774 [2010]).

Defendant further contends in his main brief that the verdict is against the weight of the evidence. 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 that contention (*see*

generally People v Bleakley, 69 NY2d 490, 495 [1987]). Defendant presented his contention that the prosecution's witnesses were not credible to the jury, which rejected that argument, and it is well settled that "[g]reat deference is accorded to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor" (*id.*). Contrary to defendant's contention, "even if a witness has an 'unsavory and criminal background, and testifie[s] pursuant to a cooperation agreement,' such facts merely raise credibility issues for the jury to resolve" (*People v Barnes*, 158 AD3d 1072, 1072 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]; *see People v Golson*, 93 AD3d 1218, 1219 [4th Dept 2012], *lv denied* 19 NY3d 864 [2012]; *see also People v Moore* [appeal No. 2], 78 AD3d 1658, 1659-1660 [4th Dept 2010]), and here we perceive no basis on which to reject the jury's credibility determinations.

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

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

296

CAF 18-00883

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

IN THE MATTER OF DANIEL LEE FERRATELLA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ANGELA BEERS THOMAS, RESPONDENT-APPELLANT.

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

MICHELLE A. COOKE, CORNING, FOR PETITIONER-RESPONDENT.

BRITTANY L. LINDER, BATH, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Mathew K. McCarthy, A.J.), entered April 25, 2018 in a proceeding pursuant to Family Court Act article 8. The order determined that respondent violated an order of protection and imposed a 30-day suspended jail sentence.

It is hereby ORDERED that the order so appealed from is unanimously modified in the interest of justice and on the law by vacating that part finding that respondent willfully violated the order of protection when she left petitioner a voicemail and vacating the 30-day suspended jail sentence and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Steuben County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 8, respondent mother appeals from an order that, inter alia, imposed a 30-day suspended jail sentence based upon a determination after a hearing that she willfully violated an order of protection, dated September 26, 2017. In rendering its determination, Family Court found that the mother violated the order of protection on November 4, 2017, when she parked her vehicle outside petitioner father's residence with her engine off for approximately 30 minutes. The court further found that the mother had violated the order of protection when she left a voicemail for the father regarding a nonemergent issue. The court imposed the suspended jail sentence on the basis of both of those violations.

Contrary to the mother's contention, the court did not abuse its discretion in denying her attorney's request for an adjournment of the fact-finding hearing after the mother failed to appear. It is well settled that "[t]he grant or denial of a motion for 'an adjournment

for any purpose is a matter resting within the sound discretion of the trial court' " (*Matter of Steven B.*, 6 NY3d 888, 889 [2006]; *see Matter of Clausell v Salame*, 156 AD3d 1401, 1401-1402 [4th Dept 2017]), and here the mother's attorney "failed to demonstrate that the need for the adjournment . . . was not based on a lack of due diligence on the part of the mother or her attorney" (*Matter of Sophia M.G.-K. [Tracy G.-K.]*, 84 AD3d 1746, 1747 [4th Dept 2011]; *see Matter of Grice v Harris*, 114 AD3d 1276, 1276 [4th Dept 2014]).

The mother further contends that she was denied due process because she was not informed of her right to be present and to present proof on the hearing date and because the court considered conduct that was not alleged in the violation petition. Neither of her contentions is preserved for our review (*see Matter of Burley v Burley*, 128 AD3d 1421, 1421 [4th Dept 2015], *lv denied* 25 NY3d 914 [2015]; *see also Matter of Dakota H. [Danielle F.]*, 126 AD3d 1313, 1315 [4th Dept 2015], *lv denied* 25 NY3d 909 [2015]). We address the latter contention in the interest of justice because, as the father correctly concedes, the court considered conduct not alleged in the petition, i.e., the voicemail incident, in determining that the mother failed to comply with the order of protection and thus violated the mother's right to due process (*see generally Matter of Commissioner of Social Servs. v Turner*, 99 AD3d 1244, 1245 [4th Dept 2012]). "While Family Court proceedings are permitted to be informal, due process considerations require that a commitment be based on a petition alleging the facts supporting the commitment" (*Matter of Anderson v Anderson*, 25 AD2d 512, 512 [1st Dept 1966]; *see Matter of Felicia W. v Chandler C.*, 9 AD3d 830, 830 [4th Dept 2004]). Despite the court's error in considering conduct not alleged in the petition, we nevertheless conclude that reversal is not required "given the other evidence of the mother's [violation on November 4, 2017,] which was alleged in the petition and addressed at the fact-finding hearing" (*Matter of Brianna R. [Marisol G.]*, 78 AD3d 437, 439 [1st Dept 2010], *lv denied* 16 NY3d 702 [2011]).

However, while the court has the statutory authority to impose a period of incarceration for the mother's willful violation on November 4, 2017 (*see* Family Ct Act § 846-a), the court here stated that it imposed the 30-day suspended jail sentence based upon both violations and further stated that it found the mother's conduct with respect to the voicemail incident to be more concerning. Thus, in light of our conclusion, we modify the order by vacating that part finding that the mother willfully violated the order of protection by leaving the voicemail message and vacating the 30-day suspended jail sentence, and we remit the matter to Family Court to impose a punishment in its discretion based only on the November 4, 2017 incident (*see generally Matter of Stuttard v Stuttard*, 2 AD3d 1415, 1416-1417 [4th Dept 2003]).

Based upon our determination, the mother's remaining contentions are academic.

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

505

KA 16-00754

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MOHSIN H. ALSAAIDI, DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (JEFFREY WICKS 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 (Victoria M. Argento, J.), rendered September 3, 2015. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class D felony, aggravated unlicensed operation of a motor vehicle in the first degree and refusal to submit to a breath test.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]), aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]), and refusal to submit to a breath test (§ 1194 [1] [b]). County Court initially imposed a term of interim probation (*see* CPL 390.30 [6]), but the interim probation was revoked and defendant was sentenced to a term of incarceration.

Defendant failed to preserve his contention that the court failed to provide adequate notice regarding the alleged violations of the term of interim probation (*see generally People v Clough*, 306 AD2d 556, 556-557 [3d Dept 2003], *lv denied* 100 NY2d 593 [2003]). Defendant likewise failed to preserve his contention that the court conducted an insufficient inquiry before revoking his interim probation (*see People v Butler*, 151 AD3d 1959, 1960 [4th Dept 2017], *lv denied* 30 NY3d 948 [2017]). In any event, those contentions lack merit. The record establishes that, in accordance with the procedure set forth in CPL 400.10 (3), the court "advise[d] [defendant] of the factual contents of any report or memorandum it ha[d] received" regarding the alleged violations of interim probation (*id.*), allowed defendant to respond to those allegations, and conducted a sufficient summary hearing that "enable[d] the court to determine that defendant

failed to comply with the terms and conditions of his interim probation supervision" (*People v Rollins*, 50 AD3d 1535, 1536 [4th Dept 2008], *lv denied* 10 NY3d 939 [2008]; *see People v Wissert*, 85 AD3d 1633, 1633-1634 [4th Dept 2011], *lv denied* 17 NY3d 956 [2011]). The court was "not required to conduct an evidentiary hearing to determine the veracity of defendant's excuses" for violating interim probation, and was entitled "not to credit defendant's account of events" (*People v Albergotti*, 17 NY3d 748, 750 [2011]).

Defendant also contends that his sentence is unduly harsh and severe. Although defendant executed a waiver of the right to appeal as part of a plea bargain for a promised sentence of five years probation, the court later altered the terms of the plea bargain to include a one-year term of interim probation. Defendant reaffirmed his decision to plead guilty in light of the new terms, but he did not execute a new waiver of the right to appeal. Under these circumstances, the waiver executed by defendant does not foreclose defendant's challenge to the severity of his sentence (*see generally People v Gordon*, 53 AD3d 793, 794 [3d Dept 2008]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

519

KA 15-01819

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALI BLOODWORTH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered August 31, 2015. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree and grand larceny in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings on the superseding indictment.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]) and grand larceny in the third degree (§ 155.35 [1]). Defendant contends that he was denied effective assistance of counsel based on defense counsel's handling of the statutory speedy trial motions. We agree. Initially, we conclude that defendant's contention survives the plea inasmuch as "the plea bargaining process was infected" by the ineffective assistance, and defendant "entered the plea because of" it (*People v Abdulla*, 98 AD3d 1253, 1254 [4th Dept 2012], *lv denied* 20 NY3d 985 [2012] [internal quotation marks omitted]; *see People v Laraby*, 305 AD2d 1121, 1122 [4th Dept 2003]). Defense counsel asserted, and the People did not dispute, that the action was commenced on January 8, 2014, when charges were filed against defendant. On June 27, 2014, an indictment was filed, and defendant was arraigned on the indictment on July 14, 2014, at which time the People announced their readiness for trial. Defendant filed a pro se motion to dismiss the indictment pursuant to, inter alia, CPL 30.30. In denying the motion, Supreme Court noted the date of the filing of the indictment and that the People had announced their readiness for trial, but did not mention that the People had not announced their readiness until July 14.

After a superseding indictment was filed, defense counsel moved

to dismiss the superseding indictment pursuant to CPL 30.20 and 30.30. Although defense counsel set forth the pertinent dates of the commencement of the action and defendant's arraignment, at which time the People announced their readiness for trial (*see* CPL 30.30 [1] [a]), he failed to argue that the relevant period exceeded six months and was a clear violation of defendant's statutory speedy trial rights. Instead, defense counsel focused on the constitutional speedy trial claim. At oral argument of the motion, the court addressed the statutory speedy trial claim, set forth the pertinent dates, and then stated that, according to its calculation, "without specifically crunching the numbers, but by estimates, that is a period of five months and seven days." After addressing the circumstances of the superseding indictment and the constitutional speedy trial claim, the court asked defense counsel if there were "any fact[s] that would be pertinent that [it] did not recite in discussing the matter." Instead of pointing out the court's erroneous calculation of the statutory speedy trial period, defense counsel stated, "I think my motion was essentially based on the 30.20 Constitutional speedy trial . . ."

" '[I]t is well settled that a failure of counsel to assert a meritorious speedy trial claim is, by itself, a sufficiently egregious error to render a defendant's representation ineffective' " (*People v Sweet*, 79 AD3d 1772, 1772 [4th Dept 2010]; *see People v Garcia*, 33 AD3d 1050, 1052 [3d Dept 2006], *lv denied* 9 NY3d 844 [2007]). Here, although, as noted, defense counsel made a speedy trial claim, we conclude that there was no strategic or legitimate explanation for defense counsel's failure to alert the court that it had inaccurately calculated that only five months and seven days had passed between the commencement of the action and the People's statement of readiness and that, instead, more than six months had elapsed (*see generally People v Pavone*, 26 NY3d 629, 646-647 [2015]; *People v Caban*, 5 NY3d 143, 152 [2005]).

We reject the People's contention that defense counsel may have determined that the statutory speedy trial motion was without merit inasmuch as the filed indictment stated at the bottom, underneath the signature of the District Attorney, that " 'THE PEOPLE HEREBY ANNOUNCE READY FOR TRIAL ( ) / /.' " Notably, the "( )" after that statement of readiness does not have any check mark, thus suggesting that the People were affirmatively *not* ready. In any event, even if that statement in the indictment were considered a "statement of readiness," the People were required to provide written notice of readiness to defense counsel as well as the court, which they failed to do. "[T]here must be a communication of readiness by the People which appears on the trial court's record. This requires either a statement of readiness by the prosecutor in open court, transcribed by a stenographer, or recorded by the clerk or a written notice of readiness sent by the prosecutor to both defense counsel and the appropriate court clerk, to be placed in the original record" (*People v Kendzia*, 64 NY2d 331, 337 [1985]). The People's reliance on a footnote in that case to support their position is misplaced. That footnote states that, "[i]f the prosecutor's statement of readiness *in open court* were made without defense counsel present, the prosecutor

would have to promptly notify him of the statement of readiness" (*id.* at 337 n [emphasis added]). Here, the statement of readiness in the filed indictment was not one made in open court. Furthermore, the People's notice to defense counsel 17 days later, at defendant's arraignment, was not a prompt notification (*cf. People v Williams*, 167 AD2d 882, 882-884 [4th Dept 1990], *lv denied* 77 NY2d 845 [1991]; *People v Cole*, 90 AD2d 27, 28 [3d Dept 1982]).

In light of our conclusion, we do not address defendant's remaining contention.

Mark W. Bennett

Entered: June 28, 2019

Clerk of the Court

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

586

KA 17-00613

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JORGE A. FLORES RODRIGUEZ, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered December 21, 2016. The judgment convicted defendant, upon his plea of guilty, of identity theft in the first degree, grand larceny in the third degree, attempted grand larceny in the fourth degree, grand larceny in the fourth degree (two counts), attempted grand larceny in the third degree, and petit larceny.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, identity theft in the first degree (Penal Law § 190.80 [1]) and grand larceny in the third degree (§ 155.35 [1]). Contrary to his contention, defendant validly waived his right to appeal (*see People v Hoke*, 167 AD3d 1549, 1549-1550 [4th Dept 2018], *lv denied* 33 NY3d 949 [2019]; *People v Robinson*, 112 AD3d 1349, 1349 [4th Dept 2013], *lv denied* 23 NY3d 1042 [2014]). Defendant's contention that his plea was "not voluntarily entered because [he] provided only monosyllabic responses to [Supreme] Court's questions is actually a challenge to the factual sufficiency of the plea allocution" (*People v Hendrix*, 62 AD3d 1261, 1262 [4th Dept 2009], *lv denied* 12 NY3d 925 [2009]), which is encompassed by the valid waiver of the right to appeal (*see People v Alsaifullah*, 162 AD3d 1483, 1485 [4th Dept 2018], *lv denied* 32 NY3d 1062 [2018]).

Defendant's contention that the amount of restitution imposed by the court is unsupported by the record survives the valid waiver of the right to appeal inasmuch as restitution was not included in the terms of the plea agreement (*see generally People v Jorge N.T.*, 70 AD3d 1456, 1457 [4th Dept 2010], *lv denied* 14 NY3d 889 [2010]). We nonetheless conclude that defendant failed to preserve for our review

his contention that the amount of restitution ordered lacks a record basis inasmuch as he "fail[ed] to object to the imposition of restitution at sentencing or to request a hearing" (*People v Meyer*, 156 AD3d 1421, 1421 [4th Dept 2017], *lv denied* 31 NY3d 985 [2018]; *see People v Butler*, 170 AD3d 1496, 1497 [4th Dept 2019]). Moreover, defendant waived that contention because he "expressly consented to the amount of restitution" ordered (*People v Lewis*, 114 AD3d 1310, 1311 [4th Dept 2014], *lv denied* 22 NY3d 1200 [2014]; *see Butler*, 170 AD3d at 1497). Finally, the valid waiver of the right to appeal encompasses defendant's challenge to the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

613

CA 18-00504

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

IN THE MATTER OF DARREN DAVIS,
PETITIONER-APPELLANT,

V ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered February 22, 2018 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

629

KA 17-01637

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAMON BEDELL, DEFENDANT-APPELLANT.

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

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered June 6, 2017. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [3]), defendant contends that his plea was not knowingly, intelligently, and voluntarily entered. Defendant failed to preserve his contention for our review inasmuch as he did not move to withdraw his plea or to vacate the judgment of conviction pursuant to CPL article 440 (*see People v Sheppard*, 149 AD3d 1569, 1569 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]). This case does not fall within the rare exception to the preservation doctrine inasmuch as nothing in the plea colloquy "casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea" (*People v Lopez*, 71 NY2d 662, 666 [1988]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

656

CAF 18-00184

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

IN THE MATTER OF JACK S. AND MARLEY S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LEAH S., RESPONDENT,
AND FRANKLIN O.S., III, RESPONDENT-APPELLANT.

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

NICHOLAS G. LOCICERO, BUFFALO, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered January 9, 2018 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents had neglected the subject children.

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

Memorandum: In this Family Court Act article 10 proceeding, respondent father appeals from a "Corrected Order" that, inter alia, determined that he neglected the subject children pursuant to section 1012 (f) (i) (B). Initially, as the father contends and petitioner correctly concedes, "[t]he fact that the father is not aggrieved by the dispositional portion of the order [because he waived his right to a dispositional hearing and consented to the disposition] does not bar his appeal from that part of the order with respect to the finding of neglect, which followed a fact-finding hearing" (*Matter of Hailey W.*, 42 AD3d 943, 943 [4th Dept 2007], *lv denied* 9 NY3d 812 [2007]; *see Matter of Amiracle R. [Elizabeth H.]*, 169 AD3d 1453, 1453 [4th Dept 2019]; *see e.g. Matter of Ariel B. [Christine C.]*, 85 AD3d 1224, 1224 [3d Dept 2011]).

Contrary to the father's contention, however, a preponderance of the evidence establishes that he neglected the children (*see generally Matter of Kenneth C. [Terri C.]*, 145 AD3d 1612, 1612 [4th Dept 2016], *lv denied* 29 NY3d 905 [2017]). We further reject the father's contention that petitioner was required to establish a nexus between his drug use and the imminent danger of impairment of the children's physical, mental or emotional condition. Family Court Act § 1012 (f) (i) (B) provides in relevant part that a neglected child includes a child whose physical, mental or emotional condition has been impaired or is in imminent danger of being impaired as a result of his or her

parent's failure to exercise a minimum degree of care in providing the child with proper supervision or guardianship by "repeatedly misus[ing] a drug or drugs." "Section 1046 (a) (iii) . . . creates a presumption of neglect if the parent chronically and persistently misuses alcohol and drugs which, in turn, substantially impairs his or her judgment while [the] child[ren are] entrusted to his or her care . . . That presumption operates to eliminate a requirement of specific parental conduct vis-à-vis the child[ren] and neither actual impairment nor specific risk of impairment need be established" (*Matter of Timothy B. [Paul K.]*, 138 AD3d 1460, 1461 [4th Dept 2016], *lv denied* 28 NY3d 908 [2016] [internal quotation marks omitted]; *see Kenneth C.*, 145 AD3d at 1613). "Th[at] presumption is not rebutted by a showing that 'the children were never in danger and were always well kept, clean, well fed and not at risk' " (*Matter of Arthur S. [Rose S.]*, 68 AD3d 1123, 1124 [2d Dept 2009]).

Here, we conclude that petitioner established at the fact-finding hearing a presumption of neglect pursuant to Family Court Act § 1046 (a) (iii) by presenting evidence of the father's misuse of illegal drugs. In particular, there was evidence, credited by Family Court, that the father had used cocaine nearly non-stop for the week preceding the removal of the children, that he admitted being addicted to drugs, that respondent mother called the police who arrived while the father was in the midst of injecting cocaine, and that dozens of hypodermic needles were found in respondents' house. It is well settled that "the trial court's 'findings of fact are accorded deference and will not be disturbed unless they lack a sound and substantial basis in the record' " (*Matter of Jeromy J. [Latanya J.]*, 122 AD3d 1398, 1398-1399 [4th Dept 2014], *lv denied* 25 NY3d 901 [2015]), which is not the case here. In addition, the court "properly drew the strongest possible negative inference against the father after he failed to testify at the fact-finding hearing" (*Matter of Brittany W. [Patrick W.]*, 103 AD3d 1217, 1218 [4th Dept 2013] [internal quotation marks omitted]; *see Matter of Rashawn J. [Veronica H.-B.]*, 159 AD3d 1436, 1437 [4th Dept 2018]).

Contrary to the father's further contention, the presumption of neglect was not rebutted inasmuch as the evidence does not establish that he "is voluntarily and *regularly* participating in a recognized rehabilitative program" (*Matter of Brooklyn S. [Stafania Q.–Devin S.]*, 150 AD3d 1698, 1698-1699 [4th Dept 2017], *lv denied* 29 NY3d 919 [2017] [internal quotation marks omitted]). Here, although there was evidence that, if credited, suggested that the father had enrolled in a treatment program at some prior time, "the evidence does not support a finding that [he] was . . . regularly participating in [that] program" (*Matter of Luis B.*, 302 AD2d 379, 379 [2d Dept 2003]; *see Brooklyn S.*, 150 AD3d at 1699). Indeed, the record contains significant evidence establishing that he continued using drugs (*see Matter of Carter B. [Logan D.]*, 154 AD3d 1323, 1325 [4th Dept 2017], *lv denied* 30 NY3d 910 [2018]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

657

CAF 18-01321

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

IN THE MATTER OF KENNETH SULLIVAN AND
DEBBIE SULLIVAN, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

AMY SULLIVAN, RESPONDENT-APPELLANT,
AND CHRISTOPHER NELIPOWITZ, RESPONDENT-RESPONDENT.

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

CHARLES E. LUPIA, SYRACUSE, FOR PETITIONERS-RESPONDENTS.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Karen Stanislaus, R.), entered July 11, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioners sole legal and physical custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order, entered following the mother's failure to personally appear at the hearing on the petition, that granted sole legal and physical custody of the subject child to petitioners, the child's grandparents. Family Court denied the mother's request for an adjournment, and her attorney participated in the hearing in her absence.

We agree with the mother that the court abused its discretion in denying her request to adjourn the hearing. The record demonstrates that the mother presented a valid and specific reason for her inability to attend the hearing well before the hearing date and supported her request for an adjournment, which was her first, with a letter from her inpatient provider. Further, although the mother's counsel appeared on her behalf at the hearing, the record supports the mother's contention that she was prejudiced by her inability to provide testimony at the hearing. The court denied the adjournment based on its general desire to effect a quick and efficient resolution of this matter. There was, however, no evidence that the child would have been harmed by an adjournment. Under these circumstances, we conclude that the court abused its discretion in denying the mother's

request to adjourn the hearing (*see Matter of Drake v Riley*, 149 AD3d 1468, 1469 [4th Dept 2017]; *Matter of Cameron B. [Nicole C.]*, 149 AD3d 1502, 1503 [4th Dept 2017]). We therefore reverse the order and remit the matter to Family Court for further proceedings on the petition.

In light of our determination, we do not reach the mother's remaining contention.

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

668

KA 18-00155

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANK M. THOMAS, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara Sheldon, J.), rendered December 13, 2016. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Niagara County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). In a prior appeal from a judgment convicting defendant upon his plea of guilty to the lesser-included offense of attempted criminal possession of a weapon in the second degree (§§ 110.00, 265.03 [3]), we determined that an enhanced sentence had been improperly imposed and we therefore vacated the sentence and remitted the matter to County Court to impose the promised sentence or to afford defendant the opportunity to withdraw his guilty plea (*People v Thomas*, 140 AD3d 1615, 1616-1617 [4th Dept 2016]). Defendant withdrew his plea and, prior to trial, he moved, inter alia, to dismiss the indictment on the ground that the grand jury proceedings were defective within the meaning of CPL 210.35 (5). Specifically, counsel argued that certain instructions "should be given careful consideration," including burden of proof, legally sufficient evidence, reasonable cause and the term "possess," and he now contends, inter alia, that the court erred in refusing to dismiss the indictment. The record, however, is devoid of any ruling on that part of defendant's motion. It is well established that when the record does not reflect that the court ruled on a part of a motion, the failure to rule on that part cannot be deemed a denial thereof (*see People v Matthews*, 147 AD3d 1206, 1207 [3d Dept 2017]; *People v Stewart*, 111 AD3d 1395, 1396 [4th Dept 2013]; *see generally People v Concepcion*, 17 NY3d 192, 197-198 [2011]). We therefore hold the case,

reserve decision and remit the matter to County Court to decide that part of defendant's motion.

We reject defendant's further contention that, because he had neither actual nor constructive possession of the firearm, the evidence is legally insufficient to support the conviction. Viewing the evidence in the light most favorable to the People (*see People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001]), we conclude that there is a valid line of reasoning and permissible inferences that could lead the jury to conclude that defendant actually or constructively possessed the subject weapon (*see* Penal Law § 10.00 [8]; *see also People v Manini*, 79 NY2d 561, 573 [1992]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). To the extent that defendant challenges the sufficiency of the evidence before the grand jury, that contention is " 'not reviewable on this appeal from the ensuing judgment based upon legally sufficient trial evidence' " (*People v Gonzales*, 145 AD3d 1432, 1432 [4th Dept 2016], *lv denied* 29 NY3d 1079 [2017]). Furthermore, viewing the evidence in the light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

691

KA 15-00569

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REYNALDO PABON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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 (Francis A. Affronti, J.), rendered January 27, 2015. The judgment convicted defendant, upon his plea of guilty, of arson 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 arson in the second degree (Penal Law § 150.15). Contrary to defendant's contention, he validly waived his right to appeal (*see People v Sanders*, 25 NY3d 337, 342 [2015]; *People v Truitt*, 170 AD3d 1591, 1591 [4th Dept 2019] *lv denied* — NY3d — [May 31, 2019]; *People v Washington*, 160 AD3d 1437, 1438 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]), and that valid waiver encompasses his challenge to the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

692

KA 17-00583

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REYNALDO PABON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (Francis A. Affronti, J.), dated April 18, 2016. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant of arson in the second degree.

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

Memorandum: Defendant pleaded guilty to arson in the second degree (Penal Law § 150.15). After sentencing, defendant moved to vacate the judgment of conviction pursuant to CPL article 440, asserting in relevant part that defense counsel was ineffective for failing to move to suppress his confession on the ground that it was elicited in violation of his indelible right to counsel. Supreme Court denied the motion without a hearing. A Justice of this Court thereafter granted defendant's motion for leave to appeal, and we now affirm.

Even assuming, arguendo, that defendant's claim of ineffective assistance of counsel is neither forfeited by his guilty plea nor precluded by his valid waiver of the right to appeal (*see generally People v Mangarillo*, 152 AD3d 1061, 1064 n 2 [3d Dept 2017]), we nevertheless conclude that it lacks merit. Notably, both the Second and Third Departments have rejected the exact theory regarding the indelible right to counsel that defendant faults defense counsel for overlooking (*see People v Brown*, 174 AD2d 842, 842 [3d Dept 1991]; *People v Heller*, 99 AD2d 787, 788 [2d Dept 1984]; *see also People v Jordan*, 143 AD2d 367, 368-369 [2d Dept 1988], *lv denied* 73 NY2d 856 [1988]), and this Court has rejected an argument very similar to those

rejected in *Brown* and *Heller* (*see People v Brant*, 277 AD2d 1022, 1022 [4th Dept 2000], *lv denied* 96 NY2d 756 [2001]). Defendant identifies no authority to support his current assertion that the police questioned him in violation of his indelible right to counsel, and the premise underlying his attempt to distinguish *Heller* and its progeny has been explicitly rejected by the Court of Appeals (*see People v Colwell*, 65 NY2d 883, 885 [1985]; *see also People v Robles*, 72 NY2d 689, 695 [1988]; *People v Marshall*, 98 AD2d 452, 461-463 [2d Dept 1984]). Thus, because the governing law was unfavorable to a suppression motion on the precise theory upon which defendant now relies, defense counsel's failure to file such a motion cannot be deemed ineffective (*see People v Brunner*, 16 NY3d 820, 821 [2011]; *People v Bradford*, 118 AD3d 1254, 1255-1256 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]). We note that defendant does not contend that defense counsel was ineffective for failing to seek suppression on the ground that a *new* right to counsel attached indelibly upon the filing of a conditional discharge violation petition against him (*see generally People v Hilliard*, 20 AD3d 674, 676-678 [3d Dept 2005], *lv denied* 5 NY3d 853 [2005]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

694

CAF 17-01838

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

IN THE MATTER OF ALANA G., AIDEN D., ASHTON D., CAMERON C., AND JAIDE C.

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

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

DANIELLE I., RESPONDENT-APPELLANT.

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

NICHOLAS G. LOCICERO, BUFFALO, FOR PETITIONER-RESPONDENT.

JAMES A. KREUZER, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered October 4, 2017 in a proceeding pursuant to Family Court Act article 10. The order, among other things, determined that respondent 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 Family Court Act article 10, respondent mother appeals from a fact-finding and dispositional order that, inter alia, adjudged that she neglected her five children. Initially, we reject the mother's contention that the petitions that originated this proceeding were invalid inasmuch as they were not properly verified. Contrary to the mother's contention, petitions in neglect proceedings need not be verified (*see* Family Ct Act § 1031; Merril Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 1031 at 290 [2010 ed]; *see also Mamoon v Dot Net Inc.*, 135 AD3d 656, 657 [1st Dept 2016]; *see generally* Family Ct Act § 165 [a]).

The mother failed to preserve her contention that Family Court improperly admitted in evidence, without a proper foundation, the children's school records (*see Matter of Shirley A.S. [David A.S.]*, 90 AD3d 1655, 1655 [4th Dept 2011], *lv denied* 18 NY3d 811 [2012]). Indeed, the mother's attorney conceded that the records were properly admitted. In any event, we conclude that any error in admitting the records was harmless. Most of the information contained therein, including that regarding attendance and behavioral issues, was cumulative of testimony given by school social workers (*see Matter of Ezekiel C.*, 12 AD3d 333, 334 [1st Dept 2004]), and the court expressly

noted that its finding of neglect was *not* based on educational neglect. Thus, the result would have been the same even if the school records had been excluded (*see Matter of Kyla E. [Stephanie F.]*, 126 AD3d 1385, 1386 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

714

KA 17-00504

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PHILLIP G. YATES, DEFENDANT-APPELLANT.

CHARLES J. GREENBERG, AMHERST, FOR DEFENDANT-APPELLANT.

MARK S. SINKIEWICZ, ACTING DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered August 15, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the fifth degree (Penal Law § 220.31). Contrary to defendant's contention, we conclude that his waiver of the right to appeal was valid (*see People v Smith*, 164 AD3d 1621, 1621-1622 [4th Dept 2018], *lv denied* 32 NY3d 1177 [2019]). Here, County Court engaged defendant in a sufficient colloquy to ascertain that defendant's waiver of the right to appeal was made knowingly, intelligently, and voluntarily (*see People v Lopez*, 6 NY3d 248, 256 [2006]).

We further conclude that, "[a]lthough a valid waiver of the right to appeal would not preclude defendant's challenge to the voluntariness of his plea, defendant failed to preserve that challenge for our review inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction" (*People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]; *see People v Cruz*, 81 AD3d 1300, 1301 [4th Dept 2011], *lv denied* 17 NY3d 793 [2011]). Contrary to defendant's contention, this is not the "rare case in which the defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon [his] guilt or otherwise calls into question the voluntariness of the plea," and thus the exception to the preservation rule stated in *People v Lopez* (71 NY2d 662, 666 [1988]) does not apply (*Mobayed*, 158 AD3d at 1222 [internal quotation marks omitted]). Insofar as defendant also contests the factual sufficiency of the plea colloquy, that contention

is encompassed by his valid waiver of the right to appeal (*see People v Oswold*, 151 AD3d 1756, 1756 [4th Dept 2017], *lv denied* 29 NY3d 1131 [2017]).

Defendant's contention that he was denied effective assistance of counsel survives his guilty plea only insofar as he "contends that his plea was infected by the allegedly ineffective assistance and that he entered the plea because of his attorney's allegedly poor performance" (*People v Ware*, 159 AD3d 1401, 1402 [4th Dept 2018], *lv denied* 31 NY3d 1122 [2018] [internal quotation marks omitted]; *see People v Bethune*, 21 AD3d 1316, 1316 [4th Dept 2005], *lv denied* 6 NY3d 752 [2005]). Defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" (*People v Hernandez*, 22 NY3d 972, 975 [2013], *cert denied* 572 US 1070 [2014] [internal quotation marks omitted]). Here, defendant failed to allege that he would have proceeded to trial absent counsel's alleged deficiencies and does not explain how those alleged deficiencies impacted his decision to enter a guilty plea. Thus, his contention that he did not receive effective assistance of counsel does not survive his guilty plea (*see Ware*, 159 AD3d at 1402).

Finally, we note that the certificate of conviction erroneously reflects that defendant was convicted of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [1]) and, as defendant requests, it should be amended to reflect that he was convicted of criminal sale of a controlled substance in the fifth degree (§ 220.31; *see generally People v Armendariz*, 156 AD3d 1383, 1384 [4th Dept 2017], *lv denied* 31 NY3d 981 [2018]; *People v Maloney*, 140 AD3d 1782, 1783 [4th Dept 2016]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

722

CA 18-01949

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

IN THE MATTER OF MAURICIO ESPINAL,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered June 27, 2018 in a CPLR article 78 proceeding. The judgment dismissed 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 of the New York State Board of Parole (Board) denying his release to parole supervision. Supreme Court properly denied the petition inasmuch as the record reflects that the Board considered the required statutory factors and adequately set forth its reasons for denying petitioner's application (*see Matter of Siao-Pao v Dennison*, 11 NY3d 777, 778 [2008], *rearg denied* 11 NY3d 885 [2008]; *Matter of Hamilton v New York State Div. of Parole*, 119 AD3d 1268, 1272-1273 [3d Dept 2014]) and inasmuch as the Board's determination does not exhibit "irrationality bordering on impropriety" (*Matter of Kenefick v Sticht*, 139 AD3d 1380, 1381 [4th Dept 2016], *lv denied* 28 NY3d 902 [2016] [internal quotation marks omitted]). Contrary to petitioner's contention, the Board took into account petitioner's deportation order; it was, however, only one of the factors under consideration in the Board's determination (*see generally Matter of King v New York State Div. of Parole*, 190 AD2d 423, 431 [1st Dept 1993], *affd* 83 NY2d 788 [1994]). Petitioner's contention that the Board did not comply with Executive Law § 259-c (4) and Correction Law §§ 71-a and 112 (4) was not raised in his administrative appeal, and petitioner therefore has failed to exhaust his administrative remedies with respect to that contention (*see Matter of Peterson v Stanford*, 151 AD3d 1960, 1961 [4th Dept 2017];

Matter of Karlin v Cully, 104 AD3d 1285, 1286 [4th Dept 2013]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

731

CA 18-01278

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

VARINDER GILL, PLAINTIFF-APPELLANT,

V ORDER

JOSEPH LOMBARDO, PLATINUM CONSTRUCTION AND PLATINUM CONNECTION CONSTRUCTION, LLC, DEFENDANTS-RESPONDENTS.

STUART B. SHAPIRO, KENMORE, FOR PLAINTIFF-APPELLANT.

DIFILIPPO, FLAHERTY & STEINHAUS, PLLC, EAST AURORA (ROBERT D. STEINHAUS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.) entered June 19, 2018. The order denied plaintiff's motion to dismiss all counterclaims of the defendants and to preclude defendants from offering proof at trial.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 5, 2019,

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

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

741

KA 17-01788

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, DEJOSEPH, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAHEEM WHITE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered July 18, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the third degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v White* ([appeal No. 2] — AD3d — [June 28, 2019] [4th Dept 2019]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

742

KA 17-01789

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, DEJOSEPH, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAHEEM WHITE, ALSO KNOWN AS TYREE JOHNSON,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered July 18, 2017. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the third degree (Penal Law §§ 110.00, 140.20). In appeal No. 2, he appeals from a judgment that, upon his admission that he violated the terms and conditions of probation, revoked the sentence of probation previously imposed upon his conviction of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]) and sentenced him to a term of imprisonment. We note at the outset that we dismiss the appeal from the judgment in appeal No. 1 because defendant raises no contentions with respect thereto (*see People v Scholz*, 125 AD3d 1492, 1492 [4th Dept 2015], *lv denied* 25 NY3d 1077 [2015]).

With respect to appeal No. 2, even assuming, arguendo, that defendant's waiver of the right to appeal during the underlying plea proceeding was valid, we conclude that the waiver does not encompass his challenge to the severity of the sentence imposed following his violation of probation (*see People v Giuliano*, 151 AD3d 1958, 1959 [4th Dept 2017], *lv denied* 30 NY3d 949 [2017]; *People v Tedesco*, 143 AD3d 1279, 1279 [4th Dept 2016], *lv denied* 28 NY3d 1075 [2016]). Moreover, defendant's purported waiver of the right to appeal at the proceeding in which he admitted that he violated the terms of his probation is invalid inasmuch as County Court "failed to engage him in

an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Maloney*, 140 AD3d 1782, 1783 [4th Dept 2016] [internal quotation marks omitted]; *see People v Brown*, 296 AD2d 860, 860 [4th Dept 2002], *lv denied* 98 NY2d 767 [2002]; *see generally People v Lopez*, 6 NY3d 248, 256 [2006]). We further conclude, however, that the sentence imposed upon defendant's violation of probation is not unduly harsh or severe.

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

743

KA 17-00419

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, DEJOSEPH, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAUREAN L. WILSON, DEFENDANT-APPELLANT.

THOMAS L. PELYCH, HORNELL, FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered June 29, 2016. The judgment convicted defendant, upon a jury verdict, of conspiracy in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of conspiracy in the fourth degree (Penal Law § 105.10 [1]). Defendant's conviction stems from an incident in which he and three codefendants drove from New Jersey and parked their vehicle near a mobile home in Bath at approximately 4:30 a.m. The resident of the mobile home, hearing the unusual sound of car doors closing outside her residence, called the police. When the police arrived less than two minutes later, defendant and codefendants fled and were apprehended shortly thereafter. The police later found, inter alia, an airsoft pellet gun, head coverings, gloves, and garbage bags in the area near where defendant was apprehended.

Defendant contends that the verdict is repugnant because the jury acquitted him of attempted burglary in the second degree. We reject that contention. " '[A] conviction will be reversed [as repugnant] only in those instances where acquittal on one crime as charged to the jury is conclusive as to a necessary element of the other crime, as charged, for which the guilty verdict was rendered' " (*People v Madore*, 145 AD3d 1440, 1441 [4th Dept 2016], *lv denied* 29 NY3d 1034 [2017], quoting *People v Tucker*, 55 NY2d 1, 7 [1981], *rearg denied* 55 NY2d 1039 [1982]; *see generally People v Muhammad*, 17 NY3d 532, 538-541 [2011]). If "there is a possible theory under which a split verdict could be legally permissible, it cannot be repugnant, regardless of whether that theory has evidentiary support in a particular case" (*People v DeLee*, 24 NY3d 603, 608 [2014] [internal quotation marks omitted]). Upon reviewing the elements of the two crimes as charged to the jury (*see id.*), we conclude that the verdict of guilty of conspiracy in the fourth degree is not repugnant to the acquittal of attempted burglary in the second degree (*see People v*

Gary, 115 AD3d 760, 761 [2d Dept 2014], *affd* 26 NY3d 1017 [2015]; *People v Williams*, 146 AD3d 821, 822 [2d Dept 2017], *lv denied* 29 NY3d 1088 [2017]). Conspiracy in the fourth degree "is an offense separate and distinct from the crime" of attempted burglary in the second degree (*People v Bavisotto*, 120 AD2d 985, 986 [4th Dept 1986], *lv denied* 68 NY2d 912 [1986], *cert denied* 480 US 933 [1987]), and the two crimes have "different basic elements" (*People v Smith*, 61 AD2d 91, 98 [4th Dept 1978]).

We reject defendant's contention that the evidence is legally insufficient to establish that an agreement existed between defendant and his codefendants to commit burglary in the second degree. "A conspiracy consists of an agreement to commit an underlying substantive crime (here, [burglary in the second degree]), coupled with an overt act committed by one of the conspirators in furtherance of the conspiracy" (*People v Caban*, 5 NY3d 143, 149 [2005]; *see* Penal Law §§ 105.10 [1]; 105.20). An "agreement[, either express or implied,] may be established inferentially by circumstances indicating that defendant engaged in a common effort or acted in concert with others to achieve a common goal" (*People v Givens*, 181 AD2d 1031, 1031 [4th Dept 1992], *lv denied* 79 NY2d 1049 [1992]; *see generally People v Reyes*, 31 NY3d 930, 931 [2018]; *People v Smoke*, 43 AD3d 1332, 1333 [4th Dept 2007], *lv denied* 9 NY3d 1039 [2008]). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that " 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found [an agreement to commit burglary in the second degree] beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349 [2007]). In addition, viewing the evidence in light of the elements of the crime as charged to the jury (*see id.*), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

745

KA 17-01414

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, DEJOSEPH, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEBASTIAN L. BONK, DEFENDANT-APPELLANT.

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

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (SUSAN M. HOWARD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered May 22, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a forged instrument in the first degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [3]) and attempted criminal possession of a forged instrument in the first degree (§§ 110.00, 170.30). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Walls*, 166 AD3d 1528, 1528 [4th Dept 2018], *lv denied* 32 NY3d 1179 [2019]), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

746

KAH 18-01504

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, DEJOSEPH, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JERRY LINEBERGER, PETITIONER-APPELLANT,

V ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Orleans County (Michael M. Mohun, A.J.), entered March 14, 2018 in a habeas corpus proceeding. The judgment denied the petition.

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

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

747

TP 19-00191

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, DEJOSEPH, AND TROUTMAN, JJ.

IN THE MATTER OF ANTOINE PORTER, 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 (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered January 30, 2019) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rule 113.10 (7 NYCRR 270.2 [B] [14] [i]) and as modified the determination is confirmed without costs and respondent is directed to expunge from petitioner's institutional record all references to the violation of that inmate rule.

Memorandum: Petitioner commenced this CPLR article 78 proceeding, transferred to this Court pursuant to CPLR 7804 (g), seeking to annul that part of a determination, following a tier III disciplinary hearing, that he violated inmate rules 100.10 (7 NYCRR 270.2 [B] [1] [i] [assault on an inmate]) and 113.10 (7 NYCRR 270.2 [B] [14] [i] [weapon possession]). As respondent correctly concedes, the determination that petitioner violated inmate rule 113.10 is not supported by substantial evidence. We therefore modify the determination by granting the petition in part and annulling that part of the determination finding that petitioner violated that rule, and we direct respondent to expunge from petitioner's institutional record all references thereto (*see Matter of Washington v Annucci*, 150 AD3d 1700, 1700-1701 [4th Dept 2017]). Inasmuch as petitioner has already served the penalty and there was no recommended loss of good time, there is no need to remit the matter to respondent for reconsideration

of the penalty (*see id.* at 1701). Contrary to petitioner's contention, the determination finding that he violated rule 100.10 is supported by substantial evidence (*see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]; *People ex rel. Vega v Smith*, 66 NY2d 130, 139 [1985]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

754

TP 19-00004

PRESENT: SMITH, J.P., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF LUCIOUS PETERS, PETITIONER,

V ORDER

AUBURN CORRECTIONAL FACILITY, RESPONDENT.

JOHN M. REGAN, JR., ROCHESTER, FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Thomas G. Leone, A.J.], entered December 27, 2018) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

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

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

759

KA 15-02054

PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM J. NOTO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BENJAMIN L. NELSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered September 2, 2015. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Davis*, 114 AD3d 1166, 1167 [4th Dept 2014], *lv denied* 23 NY3d 1035 [2014]), we conclude that the sentence is not unduly harsh or severe.

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

760

TP 19-00140

PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF DAVIDE COGGINS, PETITIONER,

V ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered January 24, 2019) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

761

KA 18-01033

PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRONE BARBER, 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 20, 2018. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). Contrary to defendant's contention, County Court properly assessed 30 points on the risk assessment instrument (RAI) for risk factor 1 for being armed with a dangerous instrument. It is well settled that "[t]raditional principles of accessorial liability apply when calculating a sex offender's presumptive risk level" (*People v Rhodehouse*, 88 AD3d 1030, 1032 [3d Dept 2011]; *see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 7 [2006]). Here, the case summary clearly established that "under principles of accomplice liability (*see* Penal Law § 20.00), defendant used a dangerous instrument in his commission of the crime[s], in that he forced the victim[s] to submit to . . . sex crime[s] by taking advantage of his . . . accomplice's threatened use of a [knife]" (*People v Jack*, 15 AD3d 270, 270 [1st Dept 2005], *lv denied* 5 NY3d 708 [2005]).

Contrary to defendant's further contention, the court properly assessed 15 points under risk factor 11 for a history of alcohol abuse. The assessment is supported by reliable hearsay contained in the case summary (*see People v Mingo*, 12 NY3d 563, 573 [2009]), which provides that defendant admitted to the personnel of the Department of Corrections and Community Supervision that he had an alcohol problem and was willing to undergo treatment (*see People v Figueroa*, 141 AD3d

1112, 1113 [4th Dept 2016], *lv denied* 28 NY3d 907 [2016]). Furthermore, defendant participated in an alcohol treatment program while incarcerated, "thus further supporting the court's assessment of points for a history of . . . alcohol abuse" (*People v Mundo*, 98 AD3d 1292, 1293 [4th Dept 2012], *lv denied* 20 NY3d 855 [2013]). We note that defendant presented no evidence to the contrary but merely pointed to an inconsistent statement in the presentence report wherein he denied that his alcohol consumption was problematic (*see Figueroa*, 141 AD3d at 1113).

We agree with defendant that the People failed to prove by the requisite clear and convincing evidence that the victims were strangers to him and that the court thus erred in assessing 20 points on the RAI for risk factor 7 (*see People v Daniels*, 86 AD3d 921, 922 [4th Dept 2011], *lv denied* 17 NY3d 715 [2011]; *see generally People v Johnson*, 93 AD3d 1323, 1324 [4th Dept 2012]). Reducing defendant's score on the RAI by 20 points, however, does not alter his presumptive risk level (*see Daniels*, 86 AD3d at 922). We therefore conclude that the court properly determined that he is a level three risk.

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

762

TP 19-00192

PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF WILLIAM BUSH, PETITIONER,

V ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered January 30, 2019) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

766

TP 19-00429

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

IN THE MATTER OF ROBERT BENEDETTO, PETITIONER,

V ORDER

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

KAREN MURTAGH, EXECUTIVE DIRECTOR, PRISONERS' LEGAL SERVICES OF NEW YORK, BUFFALO (ANDREW STECKER OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Frank A. Sedita, III, J.], entered February 28, 2019) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

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

768

TP 19-00275

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

IN THE MATTER OF RALIK BAILEY, PETITIONER,

V ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered February 11, 2019) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: June 28, 2019

Mark W. Bennett
Clerk of the Court

MOTION NO. (511/89) KA 09-01741. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V NATHANIEL PITTMAN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, CURRAN, AND TROUTMAN, JJ. (Filed June 28, 2019.)

MOTION NO. (1713/04) KA 02-00981. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ALVIN FULTON, JR., ALSO KNOWN AS SHAIK S., ALSO KNOWN AS SHAIKH S. ABDMUQTADIR, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis and other relief denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, DEJOSEPH, AND CURRAN, JJ. (Filed June 28, 2019.)

MOTION NOS. (475-476/05) KA 02-02082. -- THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V JUDSON WATKINS, DEFENDANT-APPELLANT. (APPEAL NO. 1.) KA 03-00073. -- THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V JUDSON WATKINS, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, DEJOSEPH, AND WINSLOW, JJ. (Filed June 28, 2019.)

MOTION NO. (1088/11) KA 08-01131. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JONATHAN J. MEEK, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: CARNI, J.P., LINDLEY, TROUTMAN, AND WINSLOW, JJ. (Filed June 28, 2019.)

MOTION NO. (1336/14) KA 13-00745. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LONNIE SPEARS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ. (Filed June 28, 2019.)

MOTION NO. (1218/18) KA 15-01595. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JERRY BENTON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND NEMOYER, JJ. (Filed June 28, 2019.)

MOTION NO. (1450/18) KA 17-00608. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHARLES GRAHAM, ALSO KNOWN AS CHUCK GRAHAM, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CURRAN, AND WINSLOW, JJ. (Filed June 28, 2019.)