SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 14, 2014

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

856

CA 14-00282

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

CAROL L. JONES, AS EXECUTOR OF THE ESTATE OF DONALD J. JONES, CAROL L. JONES AND JONES-CARROLL, INC., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF CARROLL AND TOWN BOARD OF TOWN OF CARROLL, DEFENDANTS-APPELLANTS.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COHEN & LOMBARDO, P.C., BUFFALO (ANTHONY M. NOSEK OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered May 17, 2013. The judgment, inter alia, granted plaintiffs' motion to renew their motion for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion and vacating the declaration and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court, Chautauqua County, for further proceedings in accordance with the following Memorandum: As we noted when the parties were before us on three prior appeals (*Jones v Town of Carroll*, 32 AD3d 1216, *lv dismissed* 12 NY3d 880; *Jones v Town of Carroll* [appeal No. 1], 57 AD3d 1376, *revd* 15 NY3d 139, *rearg denied* 15 NY3d 820 [*Jones I*]; *Jones v Town of Carroll* [appeal No. 2], 57 AD3d 1379 [*Jones II*]), in 1984 plaintiff Carol L. Jones (Jones) and her husband, Donald J. Jones (decedent), purchased 50 acres of property in an agricultural/residential (AR-1) zoning district in defendant Town of Carroll (Town). In 1989, the Town's Zoning Board of Appeals granted decedent's application for a use variance permitting him to use the entire parcel as a construction and demolition landfill (C & D landfill) conditioned upon receipt of a permit from the New York State Department of Environmental Conservation (DEC). Decedent obtained a permit from the DEC permitting him to use "less than two acres" of the property as a C & D landfill and, in 1996, he obtained another permit from the DEC permitting him to construct a "one acre expansion." Plaintiff Jones-Carroll, Inc. (JCI) operated the landfill. After defendants were informed that a potential buyer of plaintiffs' property had applied for a DEC permit to operate a landfill on the entire parcel, defendants enacted Local Law No. 1 of

2005 (2005 Law), which eliminated landfills as a permitted use in AR-1 zoning districts. Section 2 of the 2005 Law provides that section 406-C of the Town's Zoning Law is amended to provide that "[s]anitary landfill/demolition landfill is eliminated as a use allowed by special use permit." Section 3 provides that landfills "operating under a permit issued by the [DEC] shall be allowed to continue without expansion[, but a]bsolutely no expansion of any landfill beyond the area and scope allowed under the operator[']s permit from the DEC as of the date of th[e] Local Law shall be allowed."

Plaintiffs commenced a CPLR article 78 proceeding to challenge the 2005 Law, and Supreme Court converted that proceeding to a declaratory judgment action. In *Jones I*, plaintiffs moved for summary judgment declaring that the 2005 Law is void, and defendants cross-moved for, inter alia, summary judgment declaring that the 2005 Law is valid. The court granted judgment in favor of plaintiffs declaring that sections 2 and 3 of the 2005 Law are invalid as they relate to plaintiffs' property. Defendants appealed. While that action was pending, defendants enacted Local Law No. 1 of 2007 (2007 Law), which provides that "[n]o solid waste management facility shall hereafter be constructed, allowed to commence operation or to continue operation within the Town." The law made the operation of solid waste management facilities in the Town a class A misdemeanor but exempted, inter alia, "[a]ny bona-fide solid waste management facility which is in operation under a permit issued by the [DEC] as of the date of this Local Law . . . under the current terms and conditions of its existing operating permit issued by the DEC." In *Jones II*, plaintiffs commenced an action seeking a judgment declaring that the 2007 Law is null and void. Defendants moved to dismiss the amended complaint pursuant to CPLR 3211 (a) (7) and (8) alleging, inter alia, that plaintiffs sought merely an advisory opinion. Plaintiffs cross-moved for summary judgment on the same grounds raised in their motion in *Jones I.* The court granted defendants' motion, and plaintiffs appealed.

In *Jones I*, we concluded that the court erred in granting judgment in favor of plaintiffs declaring sections 2 and 3 of the 2005 Law invalid as they relate to plaintiffs' property; that defendants complied with the State Environmental Quality Review Act ([SEQRA] ECL art 8) in issuing the negative declaration pursuant to SEQRA; and that there were issues of fact precluding judgment in favor of either party on plaintiffs' regulatory taking claim (*Jones I*, 57 AD3d at 1377-1379). In *Jones II*, we concluded that the court erred in granting defendants' motion to dismiss the amended complaint because "a justiciable controversy exists," but that plaintiffs were not entitled to summary judgment "for the reasons stated in our decision in [*Jones I*]" (*Jones II*, 57 AD3d at 1380).

The Court of Appeals granted leave to appeal in *Jones I* and reversed, concluding that "plaintiffs adequately demonstrated that they acquired a vested right to operate a C & D landfill on their entire parcel, subject to regulation by DEC, and that the 2005 local law could not extinguish their legal use of the land for that purpose" (*Jones I*, 15 NY3d at 145-146). The Court thus held that the 2005 Law

"does not apply to plaintiffs" (*id.* at 142). In light of its determination, the Court deemed it unnecessary to consider plaintiffs' remaining contentions (*id.* at 146 n 4).

Following the decision of the Court of Appeals in *Jones I*, plaintiffs filed an amended complaint in *Jones II*, adding a cause of action asserting that the Town was "collaterally estoppe[d]" from enforcing the 2007 Law based upon that decision. Plaintiffs thereafter moved to renew their motion for summary judgment declaring the 2007 Law "null and void" on the ground that *Jones I* was "clearly determinative of the 2007 Local Law under the same rationale the Court applied to the 2005 law." Defendants cross-moved for "a determination that the enactment of the [2007 Law] was a proper exercise of the [Town's] police power and did not result in a regulatory taking of Plaintiffs' property or interfere with Plaintiffs' contractual rights in violation of any state or federal law and that Plaintiffs must comply fully with the provisions of the [2007 Law]." By the judgment now on appeal, Supreme Court granted plaintiffs' motion, denied defendants' cross motion, and declared that the 2007 Law "is null and void and of no force and effect with respect to the Plaintiffs['] use and variance on the acreage owned and operated by the Plaintiffs upon the ground that the Local Law is unconstitutional under the United States and New York Constitutions because it takes Plaintiffs' property without compensation and unlawfully extinguishes Plaintiffs' vested rights in their property and in the use of their property."

Initially, we agree with defendants that collateral estoppel does not apply here. "The doctrine of 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' " (*Ridge v Gold*, 115 AD3d 1263, 1264, *appeal dismissed* 23 NY3d 1010, quoting *Ryan v New York Tel. Co.*, 62 NY2d 494, 500). The doctrine "applies only 'if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action' " (*City of New York v Welsbach Elec. Corp.*, 9 NY3d 124, 128; *see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455-456). "The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination" (*Kaufman*, 65 NY2d at 456; *see Ridge*, 115 AD3d at 1264). Here, the issue in this case—the legality of the 2007 Law as applied to plaintiffs—was neither raised by the parties nor decided by the Court of Appeals in *Jones I*. The issue before the Court of Appeals in *Jones I* was whether the 2005 Law was constitutional as applied to plaintiffs, i.e., whether the 2005 Law extinguished plaintiffs' legal use of their land for the purpose of operating a C & D landfill on the entire parcel (*see Jones I*, 15 NY3d at 145-146). The Court of Appeals held that "*the zoning ordinance at issue in this case* [i.e., the 2005 Law], which restricted the development of landfills, does not apply to plaintiffs because they acquired a vested right to use their 50-acre parcel as a landfill for construction and demolition debris before the enactment of the zoning law" (*id.* at 142 [emphasis added]).

Although the 2005 Law and the 2007 Law both regulate landfill operations, they are not identical. The 2005 Law amended the Zoning Law to eliminate sanitary and demolition landfills as a permitted use in the AR-1 zoning district. The 2007 Law did not amend the Zoning Law to eliminate landfills in a particular zoning district but, rather, it enacted a Town-wide ban on solid waste management facilities. In concluding that the 2005 Law did not apply to plaintiffs, the Court of Appeals relied upon its decisions in *Matter of Syracuse Aggregate Corp. v Weise* (51 NY2d 278), *Buffalo Crushed Stone, Inc. v Town of Cheektowaga* (13 NY3d 88, *rearg denied* 13 NY3d 808) and *Glacial Aggregates LLC v Town of Yorkshire* (14 NY3d 127) (*Jones I*, 15 NY3d at 142). Those cases involve the nonconforming use doctrine, which shields vested property rights from the retroactive effect of zoning ordinances (*see Glacial Aggregates LLC*, 14 NY3d at 135; *Buffalo Crushed Stone, Inc.*, 13 NY3d at 97; *Syracuse Aggregate Corp.*, 51 NY2d at 284).

The 2007 Law, however, is a health and safety regulation, not a retroactive zoning ordinance (*see Goldblatt v Town of Hempstead, N.Y.*, 369 US 590, 595-597; *Town of Plattekill v Dutchess Sanitation,* 56 AD2d 150, 152, *affd* 43 NY2d 662; *cf. Matter of Serota Brown Ct. II, LLC v Town of Hempstead*, 62 AD3d 715, 716-717, *lv dismissed in part and denied in part* 13 NY3d 832, *appeal dismissed* 14 NY3d 768; *see generally Ilasi v City of Long Beach*, 38 NY2d 383, 387). Unlike the 2005 Law, the 2007 Law does not "regulate[] the location of certain facilities within particular zoning districts" but, rather, it "generally regulat[es] the operation of [solid waste management] facilities in the interest of public safety and welfare" (*Serota Brown Ct. II, LLC*, 62 AD3d at 716). It is well established that "a municipality has the authority, pursuant to its police powers, to impose conditions of operation . . . upon preexisting nonconforming uses to protect public safety and welfare" (*id.*) and "may even eliminate [a] nonconforming use provided that termination is accomplished in a reasonable fashion" (*Syracuse Aggregate Corp.*, 51 NY2d at 287; *see Town Bd. of Town of Southampton v 1320 Entertainment*, 236 AD2d 387, 388; *Moran v Village of Philmont*, 147 AD2d 230, 233-235, *appeal dismissed* 74 NY2d 943; *Dutchess Sanitation*, 56 AD2d at 152; *see generally Modjeska Sign Studios v Berle*, 43 NY2d 468, 474-475, *rearg denied* 43 NY2d 951, *appeal dismissed* 439 US 809).

We thus conclude that, because this action involves a different legislative enactment than that at issue in *Jones I*, collateral estoppel does not apply (*see Matter of Henson v City of Syracuse*, 119 AD3d 1340, 1340-1341). As the United States Supreme Court wrote in *Goldblatt* (369 US at 597), "[t]he claim that rights acquired in previous litigation are being undermined is completely unfounded. A successful defense to the imposition of one regulation does not erect a constitutional barrier to all other regulation. The first suit was brought to enforce a zoning ordinance, while the present one is to enforce a safety ordinance. In fact no relevant issues presented here were decided in the first suit." For the same reasons, we conclude that plaintiffs' request for sanctions is without basis.

Turning to the merits, we agree with defendants that the court erred in granting plaintiffs' motion because there are issues of fact precluding summary judgment on the amended complaint. We note that the court did not address the second cause of action, alleging impairment of contracts, and that the parties have not briefed any issues related to that cause of action and therefore have abandoned any such issues (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). With respect to the first cause of action, in order to establish a substantive due process violation in the land-use context, a party must establish both "deprivation of a vested property interest" and that the challenged governmental action was "wholly without legal justification" (*Glacial Aggregates LLC*, 14 NY3d at 136; *see Matter of Raynor v Landmark Chrysler*, 18 NY3d 48, 59; *Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 627). Here, even assuming, arguendo, that plaintiffs established that the 2007 Law impaired their vested property rights based upon the analysis in *Jones I* (15 NY3d at 142), we conclude that plaintiffs have "failed to allege facts demonstrating that [the Town's] actions were 'wholly without legal justification' " (*Fike v Town of Webster*, 11 AD3d 888, 890, quoting *Bower*, 2 NY3d at 627; *see Raynor*, 18 NY3d at 59). For the same reasons, plaintiffs are not entitled to summary judgment on their fifth cause of action, which asserts that the 2007 Law is unreasonable, arbitrary, and capricious (*cf. Town of Orangetown v Magee*, 88 NY2d 41, 53).

With respect to the third cause of action, which alleges that the 2007 Law takes plaintiffs' property without just compensation, we conclude that plaintiffs "did not meet their heavy burden of showing that the [2007 Law] resulted in a regulatory taking" (*Matter of VTR FV, LLC v Town of Guilderland*, 101 AD3d 1532, 1535; *see Clearwater Holding v Town of Hempstead*, 237 AD2d 400, 401, *appeal dismissed and lv dismissed* 90 NY2d 1005; *see generally Zuckerman v City of New York,* 49 NY2d 557, 562). In any event, even if the 2007 Law effected a regulatory taking, the appropriate relief would be a hearing to determine "just compensation," not a declaration that the law is invalid (*see Lingle v Chevron U.S.A. Inc.*, 544 US 528, 536-537).

Finally, because the court declared that the 2007 Law was "null and void and of no force and effect" as applied to plaintiffs, the court did not reach plaintiffs' contention that the 2007 Law was enacted without adequate environmental review in violation of SEQRA as asserted in their fourth cause of action. We therefore remit the matter to Supreme Court for consideration of that issue, after any further briefing and motion argument that the court deems proper.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

858

CA 13-02010

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

IN THE MATTER OF COUNTY OF NIAGARA,
PETITIONER-PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NIRAV R. SHAH, M.D., M.P.H., COMMISSIONER,
NEW YORK STATE DEPARTMENT OF HEALTH AND
NEW YORK STATE DEPARTMENT OF HEALTH,
RESPONDENTS-DEFENDANTS-APPELLANTS.

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

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (CHRISTOPHER E. BUCKEY OF COUNSEL), AND NANCY ROSE STORMER, P.C., UTICA, FOR PETITIONER-PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Niagara County (Catherine R. Nugent Panepinto, J.), entered July 1, 2013 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, inter alia, directed respondents-defendants to pay petitioner-plaintiff's claims for reimbursement of overburden expenditures.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following Memorandum: Petitioner-plaintiff County of Niagara (petitioner) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to compel respondents-defendants (respondents) to pay petitioner's claims for reimbursement for certain expenditures known as overburden expenditures (*see generally Matter of Krauskopf v Perales*, 139 AD2d 147, *affd* 74 NY2d 730). The petition/complaint alleges that respondent-defendant New York State Department of Health (DOH) improperly billed petitioner for those expenditures prior to 2006, and that respondents have a continuing duty to reimburse petitioner for them.

Determination of this appeal requires some discussion of the legislation and prior litigation concerning these expenditures. With respect to most Medicaid costs, the initial statutory scheme provided that the federal government would reimburse the State for half of all Medicaid expenditures that were made, and in most cases the DOH would

then split the other half with the social services district in which the payment was made, including petitioner (*see* Social Services Law § 368-a [1] [d]). With respect to Medicaid payments made to treat the mentally ill individuals at issue in the overburden expenditures, however, it was mandated that, commencing January 1, 1984, the DOH would pay the entire non-federal share of the treatment (*see* § 368-a [1] [h]). As the costs arising from the Medicaid program as a whole began to grow exponentially, the Legislature changed the statutory scheme by enacting the Medicaid Cap Statute ([Cap Statute] L 2005, ch 58, § 1, part C, as amended by L 2006, ch 57, § 1, part A, § 60). Although the Cap Statute used a complex set of provisions to affix each social services district's liability for Medicaid expenses, it essentially provided that each social services district, including petitioner, would send the State a fixed amount of money per year, based on the amount spent by that social services district during the fiscal year beginning April 1, 2005, minus payments received by the social services district for those expenses (*see generally Matter of County of St. Lawrence v Shah*, 95 AD3d 1548, 1549-1550). The amounts are to be adjusted for inflation in subsequent years (*see id.*).

Petitioner contends that respondents failed to reimburse it for numerous overburden expenditures that it made prior to 2006, and it began submitting claims for reimbursement. Upon enactment of the Cap Statute, respondents began to deny those claims on the ground that the Cap Statute extinguished petitioner's right to seek reimbursement for those claims. On appeal from a judgment rejecting that ground for denial, this Court concluded that, "in light of the lack of legislative history or statutory language indicating that the Legislature intended that the statute . . . should be applied retroactively" (*Matter of County of Niagara v Daines*, 60 AD3d 1456, 1457, *lv denied* 13 NY3d 707), respondents' duty to reimburse social services districts for overburden expenditures incurred prior to January 1, 2006 was not extinguished by the Cap Statute (*id.*). In addition, we also rejected respondents' contention that petitioner's claims "were time-barred pursuant to 18 NYCRR 601.3 (c)" (*Matter of County of Niagara v Daines*, 79 AD3d 1702, 1705, *lv denied* 17 NY3d 703). Respondents thereafter took the position that petitioner's right to seek reimbursement for overburden expenditures was extinguished by a 2010 amendment to the Cap Statute (L 2010, ch 109, § 1, part B, § 24), and we likewise rejected that contention. We concluded that, "inasmuch as the plain language of the 2010 amendment does not mention overburden expenditures or respondents' preexisting duty to reimburse petitioner for such expenses incurred prior to 2006, that duty is not extinguished by the amendment" (*Matter of County of Niagara v Daines*, 91 AD3d 1288, 1289). We further stated that "[t]here is nothing in the legislative history indicating that the Legislature acted in response to the prior judicial decisions concerning the Medicaid Cap Statute" in enacting the 2010 amendment (*id.*).

Subsequent to our determination in that case, however, the Legislature inserted a provision in the executive budget for 2012-2013, stating that, "[n]otwithstanding the provisions of section 368-a of the social services law or any other contrary provision of law, no

reimbursement shall be made for social services districts' claims submitted on and after the effective date of this paragraph, for district expenditures incurred prior to January 1, 2006, including, but not limited to," overburden expenditures (L 2012, ch 56, § 1, part D, § 61 [hereafter, section 61]). Furthermore, the memorandum in support of the executive budget indicated that section 61 was proposed "to clarify that local governments cannot claim for overburden expenses incurred prior to January 1, 2006, when the [Cap Statute] took effect. This is necessary to address adverse court decisions that have resulted in State costs paid to local districts for pre-cap periods, which conflict with the original intent of the" Cap Statute.

After the effective date of section 61, petitioner submitted the claims at issue in this appeal. The DOH denied those claims on the ground that they were barred by section 61, and petitioner commenced this action. Respondents moved and petitioner cross-moved for summary judgment on the petition/complaint. Respondents appeal from a judgment that, inter alia, granted petitioner's cross motion and directed respondents to pay the claims. We agree with respondents that section 61 has retroactively changed the law with respect to this issue, and we therefore reverse.

Section 61 clearly states that no further claims for reimbursement of overburden expenditures will be paid, notwithstanding Social Services Law § 368-a. Thus, the unequivocal wording of section 61 retroactively extinguishes petitioner's right to submit claims for reimbursement of overburden expenditures made prior to 2006. "The retroactivity of a statute which is expressly retroactive, as here, will generally be defeated only if such retroactivity would violate due process or some other specific constitutional precept" (*Matter of City of New York v Lawton*, 128 AD2d 202, 206).

Here, however, in granting the cross motion, Supreme Court ordered that petitioner's claims be "treated under Social Services Law § 368-a as [they] existed at the time that Petitioner incurred the Overburden expenses on Respondents' behalf, pursuant to the special facts exception." We agree with respondents that the special facts exception does not apply in this situation. Insofar as relevant here, that exception provides that "a court may deny an agency the benefit of a change in the law when it has intentionally or even negligently delayed action on [a claim] until after the law had been amended to authorize denial of the" claim (*Matter of Faymor Dev. Co. v Board of Stds. & Appeals of City of N.Y.*, 45 NY2d 560, 565). There is no indication that resolution of the claims at issue was delayed until section 61 was enacted. To the contrary, respondents denied the claims immediately upon their submission, based on section 61. Although respondents unquestionably denied other, earlier claims based on other rationales, those claims have since been paid and are not at issue in this appeal. We reject petitioner's contention that the initial alleged failure of the State's computer to flag these payments as overburden expenditures, and all subsequent denials or delays in paying claims submitted by petitioner and other social services districts, should be classified as the requisite intentional or negligent failure to act. Any intentional or negligent computer

coding error occurred, if at all, when a computer coding process was allegedly changed at some unknown date prior to 2006, and section 61 was not enacted until six years later. It therefore cannot be said that the changes in the computer coding were made in anticipation of the imminent enactment of section 61, which was not contemplated at that time. Similarly, respondents' prior denial of claims and litigation occurred years before section 61 was first contemplated, and we therefore reject the contention that the delay was for the purpose of awaiting that legislative action. Thus, the court erred in determining that the special facts exception applies.

Petitioner further contends that section 61 is inapplicable because respondents have an ongoing duty to reimburse petitioner for all prior overburden expenditures without regard to whether petitioner submits a claim. Thus, according to petitioner, no claim for reimbursement is necessary, and section 61 therefore does not apply to this situation because it merely bars payment of claims. We reject that contention.

It is well settled that, in interpreting a statute, a court " 'must assume that the Legislature did not deliberately place a phrase in the statute that was intended to serve no purpose' " (*Matter of Rodriguez v Perales*, 86 NY2d 361, 366, quoting *Matter of Smathers*, 309 NY 487, 495), and must avoid an interpretation that " 'result[s] in the nullification of one part of [a statute] by another' " (*Rangolan v County of Nassau*, 96 NY2d 42, 48). Thus, "[a] construction that would render a provision superfluous is to be avoided" (*Majewski v Broadalbin-Perth Sch. Dist.*, 91 NY2d 577, 587; *see Matter of Branford House v Michetti*, 81 NY2d 681, 688). If we accept petitioner's contention that respondents must forthwith search out all prior possible instances of unreimbursed overburden expenditures and submit payment for them to petitioner notwithstanding section 61, then there is no situation in which a claim for such payment will be submitted. Thus, there will be no situation in which section 61 will apply, rendering it a nullity. Similarly, to accept petitioner's "proffered interpretation would be to return to the prior version of the statute, rendering the amendment a nullity" (*People v Thompson*, 99 NY2d 38, 42). We therefore reject petitioner's interpretation of the statutory scheme.

In its cross motion for summary judgment, petitioner sought, inter alia, judgment declaring that section 61 is unconstitutional because the statute deprived petitioner of due process by removing its vested rights. "[T]he traditional principle throughout the United States has been that municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation. This general incapacity to sue flows from judicial recognition of the juridical as well as political relationship between those entities and the State. Constitutionally as well as a matter of historical fact, municipal corporate bodies—counties, towns and school districts—are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents. Viewed, therefore, by the courts as

purely creatures or agents of the State, it followed that municipal corporate bodies cannot have the right to contest the actions of their principal or creator affecting them in their governmental capacity or as representatives of their inhabitants" (*City of New York v State of New York*, 86 NY2d 286, 289-290).

It is equally well settled, however, that "[t]he issue of lack of capacity to sue does not go to the jurisdiction of the court, as is the case when the plaintiffs lack standing. Rather, lack of capacity to sue is a ground for dismissal which must be raised by motion and is otherwise waived" (*id.* at 292). Here, petitioner cross-moved for summary judgment on several grounds, including the unconstitutionality of the statute, and it appears that the Attorney General was invited to participate based upon the challenge to the constitutionality of section 61. The record does not reflect whether respondents contested that part of the cross motion, or whether the Attorney General appeared with respect to that issue. Because the court decided the cross motion solely on the ground that the special facts exception barred the application of section 61, the court did not reach the issue. We therefore remit the matter to Supreme Court for consideration of the issue, after any further briefing and motion argument that the court deems proper.

Frances E. Cafarell

Entered: November 14, 2014

Clerk of the Court

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

870

KA 13-00399

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD D. ROSSBOROUGH, DEFENDANT-APPELLANT.

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

RONALD D. ROSSBOROUGH, DEFENDANT-APPELLANT PRO SE.

KEITH A. SLEP, DISTRICT ATTORNEY, BELMONT (AMANDA B. FINN 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 Allegany County Court (Thomas P. Brown, J.), entered January 11, 2013. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant of burglary in the second degree.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Allegany County Court for further proceedings in accordance with the following Memorandum: Defendant appeals by permission of this Court from an order denying his pro se motion pursuant to CPL article 440 seeking to vacate the judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). We previously affirmed that judgment of conviction (*People v Rossborough*, 105 AD3d 1332, *lv denied* 21 NY3d 1045).

Defendant contends that he was denied effective assistance of counsel because defense counsel failed to conduct an adequate investigation into the facts and failed to move to suppress his statement to the police. A defendant's right to effective assistance of counsel includes defense counsel's reasonable investigation (*see People v Jenkins*, 84 AD3d 1403, 1408, *lv denied* 19 NY3d 1026), and the failure to investigate may amount to ineffective assistance of counsel (*see People v Kurkowski*, 117 AD3d 1442, 1443). The failure to move for suppression may seriously compromise a defendant's right to a fair trial such that it may also qualify as ineffective representation (*see People v Hobot*, 84 NY2d 1021, 1022; *see also People v Flores*, 84 NY2d 184, 188; *People v Baldi*, 54 NY2d 137, 146-147). Here, we conclude that defendant alleged in support of his motion facts that did not

appear in the record on his direct appeal, and which, if established as true, could entitle him to the relief sought (*see People v Nau*, 21 AD3d 568, 569). We therefore reverse the order, and we remit the matter to County Court to conduct a hearing on defendant's claim of ineffective assistance of counsel pursuant to CPL 440.30 (5) (*see People v Conway*, 118 AD3d 1290, 1291).

With respect to defendant's contention that his plea was rendered involuntary by his use of medication, we conclude that defendant sustained his "burden of coming forward with allegations sufficient to create an issue of fact" whether the judgment is invalid on that ground (*People v Session*, 34 NY2d 254, 255-256). We agree with defendant that an evidentiary hearing is "required to determine the extent to which his mental capacity was impaired and whether this rendered him unable to enter a knowing, voluntary and intelligent guilty plea" (*People v Hennessey*, 111 AD3d 1166, 1168). We therefore further direct County Court to address that issue at the hearing on remittal (*see id*.).

With respect to the contention raised in defendant's pro se supplemental brief that his right to counsel was violated, we conclude that the court properly denied the motion without a hearing inasmuch as defendant's appeal was pending and "sufficient facts appear[ed] on the record with respect to [that contention] to permit adequate review thereof upon such . . . appeal" (CPL 440.10 [2] [b]; *see People v Cooks*, 67 NY2d 100, 104). Contrary to defendant's further contention raised in his pro se supplemental brief, the court properly denied without a hearing that part of his motion based on the alleged failure of the People to disclose three supporting depositions (*see Brady v Maryland*, 373 US 83). Evidence is not *Brady* material as a matter of law when a defendant has knowledge of its existence (*see People v Banks*, 130 AD2d 498, 499, *lv denied* 70 NY2d 709; *see also People v Fein*, 18 NY2d 162, 170, *cert denied* 385 US 649; *People v Buxton*, 189 AD2d 996, 997, *lv denied* 81 NY2d 1011). Here, even assuming, arguendo, that the supporting depositions were not provided to defendant or his counsel prior to his plea, we conclude that the record contained sufficient facts establishing that the supporting depositions were specifically identified and referenced in the accusatory instruments, which were provided to defendant at the time of arraignment. Thus, there were sufficient record facts for review of the *Brady* issue on direct appeal (*see* CPL 440.10 [2] [b]).

Finally, to the extent that defendant has failed to address the remaining grounds advanced in support of his CPL 440.10 motion, we deem any contentions with respect thereto abandoned (*see People v Witkop*, 114 AD3d 1242, 1243-1244, *lv denied* 23 NY3d 1069; *People v Dombrowski*, 87 AD3d 1267, 1267).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

879

CA 14-00370

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

DENISE D. SIMONEIT,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

MARK CERRONE, INC. AND JAMES A. FREEMAN,
DEFENDANTS-RESPONDENTS-APPELLANTS.

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

THE TARANTINO LAW FIRM, LLP, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered May 29, 2013. The order granted in part and denied in part the motion of plaintiff for partial summary judgment and granted the cross motion of defendants for leave to amend their answer.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion for partial summary judgment on the issue of defendants' negligence, denying that part of the motion seeking to dismiss the affirmative defense of plaintiff's culpable conduct and reinstating that defense, and denying the cross motion, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she allegedly sustained in a motor vehicle accident. At the time of the accident, plaintiff was working as a bus aide on a school bus. The bus was stopped and waiting to make a left turn when it was struck by a payloader operated by defendant James A. Freeman (Freeman) and owned by defendant Mark Cerrone, Inc. (Cerrone). Plaintiff appeals and defendants cross-appeal from an order that, inter alia, denied that part of plaintiff's motion for partial summary judgment on the issue of defendants' negligence, granted that part of the motion seeking dismissal of the affirmative defense of plaintiff's culpable conduct, and granted the cross motion of defendants for leave to amend their answer to assert various affirmative defenses based upon alleged brake failure.

We agree with plaintiff that Supreme Court abused its discretion in granting defendants' cross motion, and we therefore modify the

order accordingly. The motion was made seven months after plaintiff had filed the note of issue and more than two years after she commenced the action, yet defendants offered no excuse for their delay in making the motion (*see Simmons v Pierce*, 39 AD3d 1252, 1252-1253; *Gross, Shuman, Brizdle & Gilfillan, P.C. v Bayger*, 256 AD2d 1187, 1188). We further conclude that preclusion of the affirmative defenses based on brake failure is warranted as a sanction for spoliation (*see Simmons*, 39 AD3d at 1253). After the accident, Cerrone replaced the payloader's allegedly defective brake calipers and discarded the old calipers. It is well established that courts have "broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence," and "may, under appropriate circumstances, impose a sanction 'even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided [the party] . . . was on notice that the evidence might be needed for future litigation' " (*Iannucci v Rose*, 8 AD3d 437, 438). Here, Freeman drove a 32,000-pound construction vehicle into a school bus filled with children, several of whom were removed from the scene in ambulances. Under those circumstances, we conclude that defendants should have anticipated that litigation was likely (*see New York City Hous. Auth. v Pro Quest Sec., Inc.*, 108 AD3d 471, 473) and, therefore, they were on notice that the brake calipers might be needed for future litigation (*see Iannucci*, 8 AD3d at 438; *DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 53). Because the calipers were "a crucial piece of evidence with respect to the potential affirmative defense of brake failure," we conclude that denial of defendants' cross motion to amend their answer to include any such affirmative defense is the appropriate sanction for their disposal of the brakes (*Simmons*, 39 AD3d at 1253 [internal quotation marks omitted]; *see Cutroneo v Dryer*, 12 AD3d 811, 813).

We also agree with plaintiff that she is entitled to partial summary judgment on the issue of defendants' negligence, and we therefore further modify the order accordingly. Vehicle and Traffic Law § 1143 provides that "[t]he driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed." Here, plaintiff met her initial burden on the motion by establishing as a matter of law that " 'the sole proximate cause of the accident was [Freeman]'s failure to yield the right of way' " to the school bus in violation of section 1143 (*Guadagno v Norward*, 43 AD3d 1432, 1433; *see Garza v Taravella*, 74 AD3d 1802, 1804). At the time of the accident, the school bus was lawfully stopped on a public roadway, and the payloader collided with the school bus after entering the roadway from a parking lot (*see Whitcombe v Phillips*, 61 AD3d 1431, 1431). In opposition to the motion, defendants failed to provide a nonnegligent explanation for the accident (*see Long v Niagara Frontier Transp. Auth.*, 81 AD3d 1391, 1392; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We agree with defendants, however, that the court properly denied that part of plaintiff's motion for summary judgment on the issue of causation (*see Monette v Trummer* [appeal No. 2], 96 AD3d 1547, 1549). In opposition to that part of the motion, defendants submitted an

expert affirmation of a radiologist who opined that plaintiff was not injured in the accident and that any spinal injuries were preexisting and degenerative in nature, thereby raising an issue of fact with respect to causation (*see Zuckerman*, 49 NY2d at 562).

Finally, we agree with defendants that the court erred in dismissing their affirmative defense of plaintiff's culpable conduct, and we therefore further modify the order by reinstating that affirmative defense. CPLR 1411 provides that, "[i]n any action to recover damages for personal injury . . . , the culpable conduct attributable to the [plaintiff] . . . , including contributory negligence . . . , shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the [plaintiff] . . . bears to the culpable conduct which caused the damages." The statute encompasses any culpable conduct that had a "substantial factor in causing *the harm for which recovery is sought*" (*Arbegast v Board of Educ. of S. New Berlin Cent. Sch.*, 65 NY2d 161, 168 [emphasis added]). Here, as the court found, there is no question that the sole proximate cause of the accident was defendants' negligence. Defendants contend, however, that the injuries plaintiff allegedly sustained in the accident were caused, in whole or in part, by her position on the bus, i.e., the fact that she was kneeling or standing on the bus rather than sitting in a seat, and they submitted an expert affirmation to that effect (*see Harrity v Leone*, 93 AD3d 1204, 1206-1207; *see generally DiCicco v Cattani*, 59 AD3d 660, 661; *Warwick v Cruz*, 270 AD2d 255, 255).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

887

KA 11-00970

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRAUICE FUQUA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered February 25, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of the crime of murder in the second degree (Penal Law § 125.25 [1]), defendant contends, inter alia, that County Court erred in denying his request for a missing witness charge with respect to an eyewitness. We agree.

The parties agree that, when this matter was presented to the grand jury, the People called the eyewitness, who testified that he was in the room where the victim was shot and he saw defendant shoot her. The parties also agree that the witness testified at the grand jury that defendant shot the victim with a weapon that he brought to the crime scene. At trial, there was no testimony from any witness who was present during the shooting. At the close of the People's proof, defendant sought a missing witness instruction based on the prosecutor's failure to call the eyewitness. The prosecutor indicated in response that, in a trial preparation session with the prosecutor shortly before trial, the eyewitness said that he, rather than defendant, brought the weapon into the room and defendant later used it to kill the victim. The prosecutor further indicated that the remainder of the witness's testimony was unchanged. The prosecutor stated that she had revoked the cooperation agreement between the People and the eyewitness, that the eyewitness was subject to prosecution for this incident, and that the eyewitness was unavailable because he would invoke his Fifth Amendment rights. We agree with defendant that the court erred in denying his request for a missing

witness charge.

It is well settled that a "jury would have the right to infer that the evidence of an eye[]witness to a transaction would not be favorable to a party who voluntarily excluded such witness from testifying in the case" (*People v Hovey*, 92 NY 554, 560). Thus, the opposing party in such a situation is entitled to a missing witness charge allowing the jury to draw an unfavorable inference when a party fails to call such a witness, based on "the commonsense notion that the nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause" (*People v Savinon*, 100 NY2d 192, 196 [internal quotation marks omitted]; *see generally People v Gonzalez*, 68 NY2d 424, 427). "There are three preconditions to a missing witness instruction: 'First, the witness's knowledge must be material to the trial. Second, the witness must be expected to give noncumulative testimony favorable to the party against whom the charge is sought . . . Third, the witness must be available to that party' " (*People v Hall*, 18 NY3d 122, 131). "Once the party seeking the charge has established prima facie that an uncalled witness is knowledgeable about a pending material issue and that such witness would be expected to testify favorably to the opposing party, it becomes incumbent upon the opposing party, in order to defeat the request to charge, to account for the witness' absence or otherwise demonstrate that the charge would not be appropriate. This burden can be met by demonstrating[, among other possibilities,] . . . that the witness is not 'available[,]' or that the witness is not under the party's 'control' such that he would not be expected to testify in his or her favor" (*Gonzalez*, 68 NY2d at 428).

Here, defendant asked for a missing witness charge at the close of the People's proof, and the People do not contend that the request was untimely (*cf. People v Carr*, 14 NY3d 808, 809). Furthermore, "under any version of events, [the eyewitness] was a key witness. Undisputedly, his testimony would have been material and noncumulative . . . This case therefore turns on the availability and control elements of the rule" (*Savinon*, 100 NY2d at 197). "Having never raised an argument regarding 'control' in the trial court, [the People] failed to preserve [their] claim that the missing witness charge was" properly denied on that basis (*People v Brown*, 99 NY2d 488, 493; *see People v Erts*, 73 NY2d 872, 874; *People v Paulin*, 70 NY2d 685, 687). Consequently, the People were required to establish that the eyewitness was unavailable.

Contrary to the People's contention, they failed to establish that the eyewitness was unavailable. Although the People correctly note that "a witness who on Fifth Amendment grounds refuses to testify will be considered 'unavailable' although the witness's presence is known and apparent" (*Savinon*, 100 NY2d at 198), the People failed to establish that the eyewitness was unavailable on that ground. An uncharged accomplice may be considered unavailable in certain circumstances (*see id.* at 198-199), but the statements made by the prosecutor were not sufficient to establish that the eyewitness was an accomplice or that he faced any criminal liability for his actions

(*see generally People v Ingram*, 71 AD3d 786, 787, *lv denied* 15 NY3d 751). The People's further contention that the prosecutor could not call the eyewitness inasmuch "as his attorney will have him plead the Fifth Amendment" is not supported by evidence in the record before us. It is well settled that a trial court "should . . . be reasonably sure that the witness will in fact invoke the privilege, and where there is doubt the witness should be brought before the court and asked the relevant questions" (*Savinon*, 100 NY2d at 199 n 7). Here, the prosecutor did not call the eyewitness and there was no communication from the eyewitness's attorney; thus, "there was no verification that [the eyewitness] would plead the Fifth Amendment on the stand" (*People v Brown*, 4 AD3d 790, 791; *see People v Williams*, 256 AD2d 1110, 1111; *cf. People v Sulli*, 81 AD3d 1309, 1310, *lv denied* 17 NY3d 802). The People's "bare allegation that the witness in question 'apparently' would assert [his] Fifth Amendment privilege, in light of the attendant circumstances, did not render that witness unavailable" (*People v Neal*, 204 AD2d 132, 132, *lv denied* 84 NY2d 830; *see generally People v Macana*, 84 NY2d 173, 179-180).

Contrary to the People's further contention, the evidence is not overwhelming (*see generally People v Arafet*, 13 NY3d 460, 467; *People v Crimmins*, 36 NY2d 230, 241-242), and thus we cannot conclude that the error is harmless (*cf. People v McCullough*, 117 AD3d 1415, 1415, *lv denied* 23 NY3d 1040; *People v Thomas*, 96 AD3d 1670, 1672, *lv denied* 19 NY3d 1002). Therefore, we reverse and grant a new trial. In light of our resolution of this issue, we do not consider defendant's remaining contentions.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

905

CA 14-00345

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

DANIELLE WILLIAMS, PLAINTIFF-RESPONDENT,

V ORDER

LINDSEY E. JUDYCKI AND TERRI L. JUDYCKI,
DEFENDANTS-APPELLANTS.

BARTH SULLIVAN BEHR, SYRACUSE (ANDREW J. KOWALEWSKI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GEORGE F. ANEY, HERKIMER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered August 19, 2013. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment dismissing the complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on September 3, 2014, and filed in the Oneida County Clerk’s Office on September 18, 2014,

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

907

CA 13-02238

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

RACHEL HECKL, PERSONAL NEEDS GUARDIAN OF AIDA COREY, AN INCAPACITATED INDIVIDUAL, THOMAS J. COREY AND OLIVIA J. COREY, INTERIM CO-PROPERTY GUARDIANS OF AIDA COREY, AN INCAPACITATED INDIVIDUAL, AND PERMCLIP PRODUCTS CORPORATION, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

DANIEL M. WALSH, FRANK PANARO, ET AL., DEFENDANTS, HSBC NORTH AMERICA, INC. AND HSBC BANK USA N.A., DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (BRADLEY A. HOPPE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (BRENDAN H. LITTLE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered April 10, 2013. The order, among other things, denied in part the motions of defendants Frank Panaro, HSBC North America, Inc. and HSBC Bank USA N.A., to dismiss the amended complaint.

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

Same Memorandum as in *Heckl v Walsh* ([appeal No. 2] ___ AD3d ___ [Nov. 14, 2014]).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

908

CA 13-02239

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

RACHEL HECKL, PERSONAL NEEDS GUARDIAN OF AIDA COREY, AN INCAPACITATED INDIVIDUAL, THOMAS J. COREY AND OLIVIA J. COREY, CO-PROPERTY GUARDIANS OF AIDA COREY, AN INCAPACITATED INDIVIDUAL, AND PERMCLIP PRODUCTS CORPORATION, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

DANIEL M. WALSH, FRANK PANARO, ET AL., DEFENDANTS, HSBC NORTH AMERICA, INC. AND HSBC BANK USA N.A., DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (BRADLEY A. HOPPE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (BRENDAN H. LITTLE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered June 18, 2013. The order, among other things, granted plaintiffs' motion seeking leave to reargue and, upon reargument, denied those parts of the motions of defendants Frank Panaro, HSBC North America, Inc. and HSBC Bank USA N.A. to dismiss the fraud cause of action as asserted by plaintiff Permclip Products Corporation.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion of defendants HSBC North America, Inc. and HSBC Bank USA N.A. to dismiss the conversion and replevin causes of action against them and as modified the order is affirmed without costs.

Memorandum: Plaintiff guardians and plaintiff Permclip Products Corporation (Permclip) commenced this action asserting causes of action for conversion, replevin and fraud in connection with the alleged embezzlement of funds by defendants Daniel M. Walsh and Frank Panaro from Aida Corey, the incapacitated individual represented by plaintiff guardians and the widow of Permclip's founder. HSBC North America, Inc. and HSBC Bank USA N.A. (HSBC defendants) are alleged to be vicariously liable as Panaro's employer.

By the order in appeal No. 1, Supreme Court, inter alia, granted

those parts of the motions of Panaro and the HSBC defendants to dismiss the amended complaint as asserted by Permclip pursuant to CPLR 3211 (a) (5) and denied those parts of the motions of Panaro and the HSBC defendants to dismiss the amended complaint as asserted by plaintiff guardians pursuant to CPLR 3211 (a) (7) and 3016 (b). By the order in appeal No. 2, the court granted plaintiffs' motion for leave to reargue and, upon reargument, denied those parts of the motions of the HSBC defendants and Panaro to dismiss the fraud cause of action as asserted by Permclip, and otherwise adhered to its prior decision. The HSBC defendants now appeal.

We note at the outset that the appeal by the HSBC defendants from the order in appeal No. 1 must be dismissed because that order was superseded by the order in appeal No. 2 (*see generally Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985). We further note that, although plaintiffs purport to cross-appeal from the order in appeal No. 1, their brief on appeal seeks only an affirmance. Inasmuch as plaintiffs did not timely perfect a cross appeal seeking affirmative relief, their cross appeal was deemed dismissed (*see generally* 22 NYCRR 1000.12 [b]; *Edgett v Clarelli*, 72 AD3d 1635, 1635).

It is well settled that, " '[i]n considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the facts pleaded must be presumed to be true and accorded every favorable inference, and the sole criterion is whether from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law' " (*Stormes v United Water N.Y., Inc.*, 84 AD3d 1352, 1353).

Here, we conclude that the court erred in denying those parts of the motion of the HSBC defendants with respect to plaintiff guardians' causes of action for conversion and replevin, but properly denied that part of the motion with respect to plaintiffs' fraud cause of action. We therefore modify the order in appeal No. 2 accordingly.

Addressing first the replevin cause of action, we note that replevin is a remedy employed to recover a specific, identifiable item of personal property (*see Khoury v Khoury*, 78 AD3d 903, 904), and "[o]rdinary currency, as a rule, is not subject to replevin" (*Matter of Equitable Life Assur. Socy. of U.S. v Branch*, 32 AD2d 959, 960). Unless the currency can be specifically identified, i.e., it consists of specific, identifiable bills or coins, replevin does not lie (*see id.*). Here, the amended complaint alleges that the individual defendants "have used some or all of Aida Corey's $4 million in cas[h] to purchase real and personal property and other tangible assets" and that they "have taken approximately $4 million of Aida Corey's cash and/or personal property." The sole focus of the parties, both in Supreme Court and on appeal, however, has been on the money allegedly taken by the HSBC defendants, and we therefore deem abandoned any allegations by plaintiffs concerning personal property (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). We thus conclude that the amended complaint fails to state a cause of action for replevin, because there is no "specifically identified" money that plaintiffs

seek to recover (*Equitable Life Assur. Socy. of U.S.*, 32 AD2d at 960).

With respect to the plaintiff guardians' cause of action for conversion, the amended complaint likewise alleges that the individual defendants "have taken approximately $4 million of Aida Corey's cash and/or personal property," but as with the replevin cause of action we conclude that plaintiffs have abandoned any allegations concerning personal property (*see Ciesinski*, 202 AD2d at 984). Money may be the subject of a cause of action for conversion only if "it can be identified and segregated as a chattel can be" (*Payne v White*, 101 AD2d 975, 976), i.e., "where there is a specific, identifiable fund" *(Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 124, *lv denied* 77 NY2d 803; *see Thys v Fortis Sec.*, 74 AD3d 546, 547). Contrary to the contentions of plaintiff guardians, the sums allegedly converted here do not constitute the type of specific, identifiable fund that would support a conversion cause of action (*see 9310 Third Ave. Assoc. v Schaffer Food Serv. Co.*, 210 AD2d 207, 208; *see also Vital Crane Servs., Inc. v Micucci*, 118 AD3d 1404, 1405).

Contrary to the contention of the HSBC defendants, however, the court properly refused to dismiss the fraud cause of action against them. A fraud cause of action must allege that the defendant: (1) made a representation to a material fact; (2) the representation was false; (3) the defendant intended to deceive the plaintiff; (4) the plaintiff believed and justifiably relied on the statement and in accordance with the statement engaged in a certain course of conduct; and (5) as a result of the reliance, the plaintiff sustained damages (*see Ross v Louis Wise Servs., Inc.*, 8 NY3d 478, 488). The allegations in the complaint must set forth the "basic facts constituting the fraud" (*Pace v Raisman & Assoc., Esqs., LLP*, 95 AD3d 1185, 1189), to "inform a defendant of the complained-of incidents" (*Eurycleia Partners, LP v Seward & Kissell, LLP*, 12 NY3d 553, 559). The Court of Appeals has "cautioned that [CPLR] 3016 (b) should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting the fraud" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [internal quotation marks omitted]). Here, much of the detail surrounding the alleged fraud is " 'peculiarly within the knowledge' " of the individual defendants and the HSBC defendants, and we agree with plaintiffs that an inference of fraud arises from the circumstances alleged in the amended complaint (*id.*; *see Matter of Gordon v Bialystoker Ctr. & Bikur Cholim*, 45 NY2d 692, 698-699; *Sepulveda v Aviles*, 308 AD2d 1, 8; *Spatz v Bajramoski*, 214 AD2d 436, 436-437).

In view of our decision, there is no need to address the remaining contentions of the HSBC defendants.

As a final point, we note that prior to oral argument this Court was made aware of the existence of a second amended complaint, which is not included in the record before us, and counsel for plaintiffs contended at oral argument that the second amended complaint renders this appeal moot. Plaintiffs did not properly seek that relief by way

of motion, even though there was adequate time in which to do so, and

thus their contention is not properly before us.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

911

TP 14-00333

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

IN THE MATTER OF GERALDINE COLES, PETITIONER,

V MEMORANDUM AND ORDER

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

LAW OFFICE OF LINDY KORN, PLLC, BUFFALO (CHARLES MILLER OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Donna M. Siwek, J.], entered January 27, 2014) to review a determination of respondent New York State Division of Human Rights. The determination rejected petitioner's claim that respondent Erie County Sheriff's Office discriminated against her based on a disability.

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

Memorandum: Petitioner commenced this proceeding pursuant to Executive Law § 298 seeking to annul the determination that she failed to establish that respondent Erie County Sheriff's Office (ECSO) discriminated against her based on a disability. Following its investigation of petitioner's complaint, respondent New York State Division of Human Rights (SDHR) found that probable cause existed to sustain the complaint, and the case was referred for a hearing before an administrative law judge (ALJ). Based upon the ALJ's recommendations, the Commissioner of SDHR concluded, inter alia, that petitioner did not establish that ECSO failed to provide her with reasonable accommodations for her disability, as required by Executive Law § 296 (3). We now confirm the determination.

"Pursuant to Executive Law § 296 (3) (b), employers are required to make reasonable accommodations to disabled employees, provided that the accommodations do not impose an undue hardship on the employer. A reasonable accommodation is defined in relevant part as an action that permits an employee with a disability to perform his or her job activities in a reasonable manner" (*Matter of New Venture Gear, Inc. v New York State Div. of Human Rights*, 41 AD3d 1265, 1266 [internal

quotation marks omitted]; *see* § 292 [21-e]). "In reviewing the determination of SDHR's Commissioner, this Court may not substitute its judgment for that of the Commissioner . . . , and 'we must confirm the determination so long as it is based on substantial evidence' " (*New Venture Gear, Inc*., 41 AD3d at 1266; *see Matter of State Div. of Human Rights [Granelle]*, 70 NY2d 100, 106; *Matter of Mohawk Val. Orthopedics, LLP v Carcone*, 66 AD3d 1350, 1351).

ECSO does not dispute that petitioner's epilepsy constitutes a disability (*see Martinson v Kinney Shoe Corp*., 104 F3d 683, 686). Petitioner, a deputy sheriff assigned to the position of "inmate escort" at ECSO's correctional facility, does not dispute that her epilepsy does not permit her to be assigned to duties involving direct inmate contact, i.e., duties that require uninterrupted vigilance and emergency response capability (*see Kees v Wallenstein*, 973 F Supp 1191, 1197, *affd* 161 F3d 1196; *Martinson*, 104 F3d at 687). Thus, petitioner also does not dispute that she cannot perform the essential functions of an "inmate escort" without presenting a direct threat to her own safety and others in the workplace (*see* 42 USC § 12113 [b]; *see generally McKenzie v Benton*, 388 F3d 1342, 1348-1349, *cert denied* 544 US 1048). In order to accommodate her disability, however, petitioner ultimately requested assignment to a light-duty position. It is well settled that an employer is neither required to create a new light-duty position to accommodate a disability (*see* 9 NYCRR 466.11 [f] [6]; *see also Hardy v Village of Piermont, N.Y.*, 923 F Supp 604, 610), nor to assign an employee with more than a temporary disability to a position in a light-duty program designed to accommodate only temporary disabilities (*see Kees*, 973 F Supp at 1194). The fact that an employer has been lax in enforcing the temporary nature of its light-duty policy does not convert the policy into a permanent one (*see id.* at 1197; *Champ v Baltimore County*, 884 F Supp 991, 999-1000, *affd* 91 F3d 129). Although ECSO maintained a "light-duty" program (Policy # 03-01-07, Light Duty Assignments), the purpose of that program is to assist employees with temporary disabilities by modifying work assignments and duties or arranging for a temporary transfer to a "Transitional Duty Assignment (TDA)" until the employee is medically released to resume regular duties. The express intent of ECSO's "policy is not to create a permanent Transitional Duty Assignment, nor is [the policy] to be used in cases where an employee cannot perform the essential functions of a job with reasonable accommodation." Petitioner's epilepsy seizure disorder was described by her own treating physician as "long-term." Thus, we conclude that there is no basis to disturb SDHR's determination that petitioner's disability was of a permanent nature and that ECSO had no permanent light-duty police assignments available. Consequently, and contrary to petitioner's contention, ECSO was not required under the Americans with Disabilities Act (42 USC § 12101 *et seq*.) or the New York State Human Rights Law (*see* Executive Law § 296) to accommodate petitioner by creating such a position for her (*see King v Town of Wallkill*, 302 F Supp 2d 279, 292).

We reject petitioner's further contention that ECSO erred in failing to engage in the interactive process. The Commissioner of SDHR properly determined that no reasonable accommodation was

available for her particular condition and that she was unable to perform the essential functions of her "inmate escort" assignment or any other deputy sheriff assignment that petitioner identified and, therefore, there was no duty for ECSO to engage in such interactive process (*see McElwee v County of Orange*, 700 F3d 635, 642).

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

914

KA 11-00971

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER CHADICK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered March 29, 2011. The judgment convicted defendant upon a jury verdict, of scheme to defraud in the second degree, scheme to defraud in the first degree, grand larceny in the fourth degree (three counts) and petit larceny (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, a new trial is granted on counts two, five, six, seven, eight and nine of the indictment, and count one of the indictment is dismissed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, scheme to defraud in the first degree (Penal Law § 190.65 [1] [b]). Contrary to defendant's contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We agree with defendant, however, that County Court erred in sua sponte striking the entire testimony of his codefendant after the codefendant invoked his privilege against self-incrimination, and we therefore reverse the judgment and grant a new trial on counts two, five, six, seven, eight and nine of the indictment. We conclude that the court erred in failing to "weigh the options" in a "threshold inquiry" to determine whether "less drastic alternatives" were available, other than striking the entire testimony of the codefendant (*People v Vargas*, 88 NY2d 363, 380). Here, the codefendant provided testimony that, if allowed to remain in the record, would have supported defendant's positions that defendant did not engage in any scheme to defraud, and that the codefendant had pleaded guilty with respect to similar charges brought against him in order to avoid

harsher penalties, and not because the codefendant had engaged in any fraudulent conduct. We further conclude that defendant had the right to have such "relevant and exculpatory testimony considered by the jury" (*People v Cummings*, 191 AD2d 1012, 1013). We also conclude that the court's error in striking the codefendant's testimony is not harmless inasmuch as "the proof against defendant [is] not overwhelming and there is a reasonable probability that defendant would have been acquitted but for the error" (*id.*, citing *People v Johnson*, 57 NY2d 969, 970).

Finally, we note that the court reduced the charge of count one of the indictment from scheme to defraud in the first degree (Penal Law § 190.65 [1] [a]) to scheme to defraud in the second degree (§ 190.60) on the ground that the grand jury minutes were not legally sufficient to support the more serious charge. The record establishes that, although the People accepted the court's order, they failed to file a reduced indictment as required by CPL 210.20 (6) (a) (*see People v Casey*, 66 AD3d 1128, 1129-1130). Inasmuch as " '[a] valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution' " (*People v Dumay*, 23 NY3d 518, 522, quoting *People v Dreyden*, 15 NY3d 100, 103; *see generally* CPL 200.10), count one of the indictment must be dismissed (*see Casey,* 66 AD3d at 1129-1130).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

921

CA 14-00091

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

BRISTOL HOMEOWNERS ENVIRONMENTAL PRESERVATION ASSOCIATES, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF SOUTH BRISTOL, TOWN OF SOUTH BRISTOL PLANNING BOARD, SOUTH BRISTOL RESORTS, LLC, BRISTOL HARBOUR DEVELOPMENT, LLC, CHRISANNTHA CONSTRUCTION, IVERSEN CONSTRUCTION AND CHRISTOPHER IVERSEN, DEFENDANTS-RESPONDENTS.

FRANK A. ALOI, ROCHESTER, AND PHILIP ABRAMOWITZ, BUFFALO, FOR PLAINTIFF-APPELLANT.

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (JEREMY M. SHER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS TOWN OF SOUTH BRISTOL AND TOWN OF SOUTH BRISTOL PLANNING BOARD.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR DEFENDANTS-RESPONDENTS SOUTH BRISTOL RESORTS, LLC, BRISTOL HARBOUR DEVELOPMENT, LLC, CHRISANNTHA CONSTRUCTION, IVERSEN CONSTRUCTION AND CHRISTOPHER IVERSEN.

Appeal from an order and judgment (one paper) of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered October 29, 2013. The order and judgment granted the motions of defendants to dismiss the complaint, dismissed the complaint and denied the cross motion of plaintiff for a preliminary injunction.

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

Memorandum: In 2005, defendant Town of South Bristol Planning Board (Planning Board) issued a negative declaration of environmental significance and site plan approval for a 24-unit townhouse construction project. In 2009, as a result of the developer's conversion of the project to one involving condominiums, the Planning Board issued a second negative declaration and site plan approval. On October 19, 2012, the Planning Board approved a resubdivision of the site from 24 individual lots to 2 lots. No CPLR article 78 challenge was taken by plaintiff at any time with respect to any of the above administrative actions.

The Town of South Bristol Town Code (Code) includes a provision

that site plan approval "will automatically terminate two years after the same is granted unless significant work has commenced on the project" (§ 170-94 [J]). At a regular meeting of the Planning Board on December 19, 2012, the agenda included a discussion item concerning the definition of "significant work" within the meaning of Code § 170-94 (J). The Planning Board Chairman read into the record the written opinion of the Town Code Enforcement Officer, i.e., that "significant work" on a condominium project was not limited to actual physical construction on the project site, but could include substantial financial investment and effort spent in gaining state approval of the condominium project. The Town Code Enforcement Officer further determined that "significant work has commenced on the project." No CPLR article 78 challenge was taken by plaintiff with respect to that determination.

Plaintiff commenced this action on July 17, 2013 seeking a declaration that, inter alia, the 2009 site plan approval had automatically terminated because "significant work" had not been timely commenced on the project. Defendants moved pursuant to, inter alia, CPLR 3211 (a) (5) to dismiss the complaint on the ground that all causes of action were time-barred. Plaintiff cross-moved pursuant to CPLR article 63 for a preliminary injunction halting any construction work or development of the site. Supreme Court granted defendants' motions and denied plaintiff's cross motion. We affirm.

We reject plaintiff's contention that the action was timely and properly brought as a declaratory judgment action pursuant to CPLR 3001. Although a six-year limitations period governs declaratory judgment actions (*see* CPLR 213 [1]), it is well settled that if such claim could have been brought in another form, then the shorter limitations period applies (*see Solnick v Whalen*, 49 NY2d 224, 229-230). Here, Town Law § 274-a (11) provides for a 30-day limitations period for challenging "a decision of the [planning] board or any officer, department, board or bureau of the town" under CPLR article 78. Thus, plaintiff's challenge to the Town Code Enforcement Officer's determination of the meaning of "significant work" under Code § 170-94 (J) could have been brought in a CPLR article 78 proceeding under Town Law § 274-a (11). Assuming arguendo, as plaintiff contends, that no administrative appeal from such determination was required or available, the action was not commenced within the 30-day limitations period set forth in section 274-a (11), and the court therefore properly granted defendants' motions to dismiss on that ground (*see Kreamer v Town of Oxford*, 91 AD3d 1157, 1158-1159). Likewise, any challenge to the 2005, 2009 or 2012 Planning Board's actions could have been brought in a CPLR article 78 proceeding, and thus the instant action, even though denominated as one for a declaratory judgment, also was not timely commenced within the 30-day limitations period applicable to each such action of the Planning Board (*see* Town Law § 274-a [11]; *see also* Town Law §§ 267-c [1]; 282).

We reject plaintiff's further contention that, with respect to the Town Code Enforcement Officer's determination, there was no administrative action and thus "nothing to appeal." Contrary to

plaintiff's contention, Code § 170-92 (B) specifically provides for an appeal to the Zoning Board of Appeals where it is alleged that there is an error in any order or decision made by an administrative officer or body in the enforcement of the Code (*see generally Matter of Mamaroneck Beach & Yacht Club, Inc. v Fraioli*, 24 AD3d 669, 670). Thus, plaintiff failed to pursue the available administrative appeal (*see Matter of Charest v Morrison*, 48 AD3d 1178, 1179), and the 30-day period of limitations applicable to judicial review therefrom cannot be circumvented by "the simple expedient of denominating the action one for declaratory relief" (*Matter of Cullinan v Ahern*, 212 AD2d 103, 105).

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

957

KA 13-00409

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JON N. ROBLEE, DEFENDANT-APPELLANT.

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

JON N. ROBLEE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered February 28, 2013. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal contempt in the first degree (Penal Law § 215.51 [b] [iii]). The charge stems from defendant's violation of an order of protection in favor of the victim. As a preliminary matter, we reject defendant's contention that County Court erred in admitting evidence of an incident of domestic violence that occurred on February 26, 2009. According to defendant, such evidence went beyond the scope of the People's pretrial notice. Defendant's contention is without merit inasmuch as the People's pretrial notice concerned evidence of defendant's intent and the victim's reasonable fear under a *Molineux* theory (*see People v Small*, 12 NY3d 732, 733; *People v Torres*, 300 AD2d 46, 46-47, *lv denied* 99 NY2d 633; *cf.* CPL 240.43). We therefore have considered that evidence as part of our analysis of the legal sufficiency and weight of the evidence.

We reject defendant's contention in his main and pro se supplemental briefs that the conviction is not supported by legally sufficient evidence. Initially, we note that defendant's contention is preserved only to the extent that he challenged in his motion for a trial order of dismissal the sufficiency of the evidence with respect to his intent to put the victim in reasonable fear of "physical injury, serious physical injury, or death" (Penal Law § 215.51 [b]

[iii]; *see People v Gray*, 86 NY2d 10, 19). We decline to exercise our power to review defendant's other legal insufficiency claims as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). With respect to the element of intent, it is well established that "[i]ntent may be inferred from conduct as well as the surrounding circumstances" (*People v Steinberg*, 79 NY2d 673, 682; *see also People v Kelly*, 79 AD3d 1642, 1642, *lv denied* 16 NY3d 832). Here, we conclude that there is a "valid line of reasoning and permissible inferences" from which the jury reasonably could have concluded that defendant had the requisite intent to commit the crime charged (*People v Bleakley*, 69 NY2d 490, 495; *see People v Tomasky*, 36 AD3d 1025, 1026, *lv denied* 8 NY3d 927). The record establishes that, during the long history between the defendant and victim, defendant has made violent threats against the victim on more than one occasion and even has thrown a knife at her during one of their altercations. Taking into account the circumstances surrounding the crime—defendant told the victim over the telephone that he was going to "get" her and another individual "if it takes the rest of my life"—we further conclude that the evidence is legally sufficient to establish that defendant intended to place the victim "in reasonable fear of physical injury, serious physical injury or death" (Penal Law § 215.51 [b] [iii]; *see Tomasky*, 36 AD3d at 1026).

Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]) and, here, we see no reason to disturb the jury's resolution of those issues. Contrary to defendant's contention, the fact that the victim's testimony regarding the crime herein varied slightly from her statement to the police does not make her testimony incredible as a matter of law (*see People v Ford*, 114 AD3d 1273, 1275, *lv denied* 23 NY3d 962).

Defendant contends that the indictment should be dismissed because the grand jury instructions were improper or incomplete, an insufficient number of grand jurors heard the evidence presented, and an insufficient number of grand jurors voted to indict. Those contentions are not reviewable by this Court inasmuch as defendant has failed to provide us with the entire record of the grand jury proceedings (*see People v Hawkins*, 113 AD3d 1123, 1125, *lv denied* 22 NY3d 1156; *People v Dilbert*, 1 AD3d 967, 967-968, *lv denied* 1 NY3d 626).

We reject defendant's further contention that the court failed to comply with its core responsibilities under CPL 310.30 by not giving defense counsel meaningful notice of the crossed-out portion of a jury note. On the jury note, the words "Grand Jury testimony and" were crossed out by three lines. Contrary to the People's position, we conclude that defendant was not required to preserve his contention inasmuch as there is no evidence in the record that defense counsel

was made aware of the crossed-out portion of the note (*see People v Kalinowski*, 84 AD3d 1739, 1740; *see also People v Walston*, 23 NY3d 986, 989-990). We nevertheless conclude that the court provided defense counsel with "meaningful notice . . . of the specific content of the *jurors' request*" (*see People v Alcide*, 21 NY3d 687, 692 [emphasis added]), and we further conclude that the crossed-out portion of the note cannot be characterized as part of that request.

Defendant further contends that he was deprived of a fair trial by prosecutorial misconduct based on statements, comments, and objections during voir dire, opening statements, and summations. Defendant's contention is preserved for our review only in part inasmuch as he failed to object to several of the prosecutor's alleged improprieties (*see People v Jones*, 114 AD3d 1239, 1241, *lv denied* 23 NY3d 1038). To the extent that defendant's contention is preserved, we conclude that it lacks merit. "Reversal based on prosecutorial misconduct is 'mandated only when the conduct [complained of] has caused such substantial prejudice to the defendant that he has been denied due process of law' " (*People v Jacobson*, 60 AD3d 1326, 1328, *lv denied* 12 NY3d 916) and, here, " '[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial' " (*Jones*, 114 AD3d at 1241; *see People v Stanley*, 108 AD3d 1129, 1131, *lv denied* 22 NY3d 959; *People v Ward*, 107 AD3d 1605, 1606-1607, *lv denied* 21 NY3d 1078).

Defendant contends that it was unnecessary for the court to charge the jury with respect to admissions inasmuch as there were no admissions in the case, but we note that defendant failed to preserve that contention for our review (*see generally* CPL 470.05 [2]; *People v Williams*, 118 AD3d 1295, 1297). In any event, the contention lacks merit inasmuch as the court's charge on admissions was accurate, itself, and also fit within the greater context of the general evidentiary standards that the court was conveying to the jury (*see generally People v McCallum*, 96 AD3d 1638, 1639, *lv denied* 19 NY3d 1103), and we therefore conclude that the charge could not have led to jury confusion (*see generally People v Bridenbaker*, 266 AD2d 875, 875, *lv denied* 94 NY2d 917). Defendant concedes that his contention regarding the court's alleged failure to instruct the jury on how to evaluate certain testimony regarding an altercation between defendant and the victim's husband in February or March 2011 is not preserved for our review (*see generally People v Madera*, 103 AD3d 1197, 1199, *lv denied* 21 NY3d 1006), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice.

We reject defendant's further contention in his main and pro se supplemental briefs that he was denied effective assistance of counsel, which is premised on defendant's claims that counsel allegedly failed to make certain motions or arguments. We conclude, however, that such motions or arguments would not have been successful, and it is well settled that a defendant "is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702).

Defendant's contention that the court failed to substitute counsel in a timely fashion is also without merit. At a court appearance on August 28, 2012, the purpose of which was to afford the parties an opportunity to address defendant's refusal to undergo a required CPL article 730 psychiatric examination, defendant told the court that he had "fired" his first attorney, and he stated that he wanted new counsel. Given defendant's refusal and the timing of his request for new counsel, we conclude that the court did not err in adjourning the proceeding for two months, ordering defendant to undergo two psychiatric examinations during that time, and reviewing the results of those psychiatric examinations before determining at the next court appearance that the appointment of new counsel was appropriate (*see People v Linares*, 2 NY3d 507, 511).

Contrary to defendant's further contention, the court did not err in designating the victim's husband—a member of the victim's household and a witness to defendant's behavior towards the victim—an appropriate person to be covered by an order of protection (*see* CPL 530.12 [5]; *see generally People v Konieczny*, 2 NY3d 569, 572).

Finally, the sentence is not unduly harsh or severe.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

969

CA 14-00251

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

DONNA RITCHIE, AS PARENT AND NATURAL GUARDIAN
OF THOMAS RITCHIE, JR., AN INFANT,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHURCHVILLE-CHILI CENTRAL SCHOOL DISTRICT AND
AARON TWIGG, AS AN EMPLOYEE OF CHURCHVILLE-CHILI
CENTRAL SCHOOL DISTRICT, DEFENDANTS-RESPONDENTS.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (VALERIE L. BARBIC OF COUNSEL), FOR PLAINTIFF-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (AIMEE LAFEVER KOCH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered May 10, 2013. The order granted defendants' motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries sustained by her infant son when he was struck by a motor vehicle. Shortly before the accident, plaintiff's son, a student in defendant Churchville-Chili Central School District was dropped off across the street from a lacrosse team fundraiser, in which he and his mother planned on participating. Plaintiff directed her son to "stay there" with the other team members in order to direct vehicles into the parking area for the fundraiser while she went across the street to assist with serving food. A teammate told plaintiff's son to confirm his attendance by going to check in with a coach. Plaintiff's son crossed the street to do so and was struck by a passing vehicle.

Defendants moved for summary judgment dismissing the complaint contending, inter alia, that they owed no duty of care to plaintiff's son because he was not in their custody or control when the accident occurred. We conclude that Supreme Court properly granted the motion.

As a preliminary matter, we reject plaintiff's contention that defendants' motion for summary judgment was premature (*see Resetarits Constr. Corp. v Elizabeth Pierce Olmstead, M.D. Center for the Visually Impaired* [appeal No. 2], 118 AD3d 1454, 1455-1456). With

respect to the merits of the case, it is well settled that "[t]he duty of a school district to its students is strictly limited by time and space and exists only so long as a student is in its care and custody" (*Harker v Rochester City Sch. Dist.*, 241 AD2d 937, 938 [internal quotation marks omitted], *lv denied* 90 NY2d 811, *rearg denied* 91 NY2d 957; *see Dalton v Memminger*, 67 AD3d 1350, 1350-1351; *Norton v Canandaigua City Sch. Dist.*, 208 AD2d 282, 285, *lv denied* 85 NY2d 812, *rearg denied* 86 NY2d 839; *see also Pratt v Robinson*, 39 NY2d 554, 560). We reject plaintiff's contention that defendants owed plaintiff's son a duty of care under the circumstances here. When plaintiff dropped off her son and told him to "stay there," she made a parental decision to keep her son across the street because she was concerned about him "crossing over" given that there was "lots of traffic" in the intersection where the accident occurred. Thus, plaintiff had not relinquished control of her son, and defendants had not yet gained the physical custody or control of him that is a prerequisite to imposing a legal duty on them (*see e.g. Norton*, 208 AD2d at 287; *see also Ramo v Serrano*, 301 AD2d 640, 641; *Silver v Cooper*, 199 AD2d 255, 256, *lv denied* 83 NY2d 753). The fact that plaintiff's son disobeyed plaintiff's directive and crossed the street does not change that legal result.

We reject plaintiff's further contention that defendants owed plaintiff's son a duty because the defendants placed plaintiff's son in a "for[e]seeably dangerous setting that the [defendants] had a hand in creating." Because the child was never in the physical custody or control of the defendants, however, the defendants were "never in a position to . . . release [plaintiff's son] into a hazardous setting" (*Williams v Weatherstone*, 23 NY3d 384, 401).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

994

CA 14-00123

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

MARILYN ULICKI, AS EXECUTRIX OF THE ESTATE OF
MARY A. MACHNIK, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RAYMOND P. JARKA, ET AL., DEFENDANTS,
AND COUNTY OF ERIE, DEFENDANT-RESPONDENT.

LAW OFFICE OF ERIC B. GROSSMAN, WILLIAMSVILLE (ERIC B. GROSSMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (ANTHONY B. TARGIA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered August 29, 2013. The order, insofar as appealed from, granted the motion of defendant County of Erie for summary judgment.

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

Memorandum: Plaintiff commenced this personal injury and wrongful death action on behalf of the estate of her mother (decedent), who was struck and killed by a vehicle operated by defendant Raymond P. Jarka. At the time of the accident, decedent was walking either to or from her mailbox across a street owned and maintained by defendant County of Erie (County). According to plaintiff, the County was negligent in, inter alia, improperly maintaining a street with poor visual sight lines, improper lane widths, manhole covers out of position or loosened, and other dangers posed to residents who attempt to cross the road to retrieve mail. We conclude that Supreme Court properly granted the County's motion for summary judgment dismissing the complaint against it. Even assuming, arguendo, that the County breached its duty to maintain the road in a reasonably safe condition (*see generally Lifson v City of Syracuse*, 41 AD3d 1292, 1293), we conclude that the County established that any such breach was not a proximate cause of the accident (*see Hamilton v State of New York*, 277 AD2d 982, 984, *lv denied* 96 NY2d 704), and plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In support of the motion, the County submitted the deposition testimony of Jarka in which he testified that decedent was fully in his lane of travel at the time of impact; his view was unobstructed; he did not recall

having to take any evasive maneuvers because of a manhole cover; he had driven over the accident scene at least 100 times prior thereto; and decedent walked in front of his truck. Under these circumstances, any negligence on the part of the County cannot be deemed a proximate cause of decedent's injuries and death (*see Dennis v Vansteinburg*, 63 AD3d 1620, 1620-1621).

Contrary to plaintiff's further contention, the *Noseworthy* doctrine (*see Noseworthy v City of New York*, 298 NY 76, 80-81) is not applicable in this case inasmuch as the County and plaintiff were "on an equal footing with respect to knowledge of the occurrence" (*Lynn v Lynn*, 216 AD2d 194, 195; *see Morris v Solow Mgt. Corp. Townhouse Co., L.L.C.*, 46 AD3d 330, 331, *lv dismissed* 11 NY3d 751).

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

996

CA 13-01391

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

DEVON FAISON AND TIERRA FAISON, AN INFANT, BY HER PARENT AND NATURAL GUARDIAN, KIMBERLY BARNETT, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

LEE LUONG, JAMES L. CUYLER AND GEORGIA CUYLER, DEFENDANTS-RESPONDENTS-APPELLANTS. (APPEAL NO. 1.)

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO ATHARI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

SLIWA & LANE, BUFFALO (STANLEY J. SLIWA OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT LEE LUONG.

BURGIO, KITA, CURVIN & BANKER, BUFFALO (STEVEN P. CURVIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS JAMES L. CUYLER AND GEORGIA CUYLER.

Appeal and cross appeals from a judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered May 9, 2013. The judgment and order denied the motion and cross motions of the parties for summary judgment.

It is hereby ORDERED that the judgment and order so appealed from is unanimously modified on the law by granting the motion and dismissing the complaint against defendant Lee Luong and by granting the cross motion of defendants James L. Cuyler and Georgia Cuyler and dismissing the cause of action for negligent ownership and maintenance against them for the time period prior to September 30, 1994 and as modified the judgment and order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by plaintiff Devon Faison and his sister, Tierra Faison, as a result of their exposure to lead paint as children. The consolidated complaint asserted causes of action for negligent ownership and maintenance of the subject properties, as well as negligent abatement of the lead paint hazards. Defendant Lee Luong, the landlord of one of the properties, moved for summary judgment dismissing the complaint against him, which was limited to allegations concerning Devon. Plaintiffs cross-moved for, inter alia, summary judgment on the issues of “liability (notice, negligence and substantial factor) against defendants” and dismissal of various

defenses. Defendants James L. Cuyler and Georgia Cuyler, the landlords of the other subject property, cross-moved for partial summary judgment. By the judgment and order in appeal No. 1, Supreme Court denied the motion and cross motions. Thereafter, the order in appeal No. 2 was entered, which again denied the Cuylers' cross motion, and the order in appeal No. 3 was entered, which, inter alia, again denied Luong's motion. Plaintiffs appeal and defendants cross-appeal from the judgment and order in appeal No. 1. In addition, the Cuylers appeal from the order in appeal No. 2, and plaintiffs appeal and Luong cross-appeals from the order in appeal No. 3.

At the outset, we note that the "judgment and order" in appeal No. 1 encompasses Supreme Court's determination of the motion and cross motions before it, and the orders in appeal Nos. 2 and 3 contain no material or substantial change from the judgment and order in appeal No. 1. We therefore dismiss the appeal from the order in appeal No. 2 and the appeal and cross appeal from the order in appeal No. 3, inasmuch as the appeal properly lies from the judgment and order in appeal No. 1 (*see generally Matter of Kolasz v Levitt*, 63 AD2d 777, 779).

Even assuming, arguendo, that plaintiffs tendered admissible evidence establishing that Devon and Tierra were exposed to lead paint, we conclude that the court properly denied that part of plaintiffs' cross motion for summary judgment on the issues of "liability (notice, negligence and substantial factor)." "In order for a landlord to be held liable for a lead paint condition, it must be established that the landlord had actual or constructive notice of the hazardous condition and a reasonable opportunity to remedy it, but failed to do so" (*Spain v Holl*, 115 AD3d 1368, 1369; *see Pagan v Rafter*, 107 AD3d 1505, 1506; *see generally Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646). We conclude that plaintiffs failed to meet their initial burden of establishing that defendants had actual or constructive notice (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We reject plaintiffs' further contention that the court erred in denying that part of their cross motion seeking dismissal of the Cuylers' second affirmative defense, alleging plaintiffs' failure to mitigate. Here, plaintiffs "failed to show that [the] defense[] lacked merit as a matter of law" (*Pagan*, 107 AD3d at 1507).

We agree with Luong, however, that he met his burden on his motion with respect to the cause of action for negligent ownership and maintenance of the subject property by establishing that he did not have actual or constructive notice of the hazardous lead paint condition, and Devon failed to raise a triable issue of fact (*see Spain*, 115 AD3d at 1369; *see generally Chapman v Silber*, 97 NY2d 9, 15). We further agree with Luong that he met his burden with respect to the negligent abatement cause of action by establishing that he abated the lead paint hazard in a reasonable manner, and Devon failed to raise an issue of fact (*cf. Pagan*, 107 AD3d at 1506-1507; *see generally Juarez*, 88 NY2d at 646). We therefore modify the judgment and order in appeal No. 1 by granting Luong's motion and dismissing the complaint against him. Inasmuch as the complaint against Luong is

dismissed, we do not address the contentions of plaintiffs concerning the court's refusal to dismiss Luong's various defenses.

We agree with the Cuylers that the court erred in denying their cross motion for partial summary judgment dismissing the cause of action for negligent ownership and maintenance against them insofar as it concerns the time period prior to September 30, 1994, the date on which they received notification of a lead paint hazard from the Monroe County Department of Health. We therefore further modify the judgment and order in appeal No. 1 accordingly. Those defendants established that, prior to that date, they did not have actual or constructive notice of a lead paint hazard at the subject property, and plaintiffs failed to raise a triable issue of fact (*see Spain*, 115 AD3d at 1369; *see generally Chapman*, 97 NY2d at 15).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

997

CA 13-01392

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

DEVON FAISON AND TIERRA FAISON, AN INFANT, BY HER PARENT AND NATURAL GUARDIAN, KIMBERLY BARNETT, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

LEE LUONG, DEFENDANT, JAMES L. CUYLER AND GEORGIA CUYLER, DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

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

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO ATHARI OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered June 4, 2013. The order denied the cross motion of defendants James L. Cuyler and Georgia Cuyler for partial summary judgment.

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

Same Memorandum as in *Faison v Luong* ([appeal No. 1] ___ AD3d ___ [Nov. 14, 2014]).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

998

CA 13-01394

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

DEVON FAISON AND TIERRA FAISON, AN INFANT, BY HER PARENT AND NATURAL GUARDIAN, KIMBERLY BARNETT, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

LEE LUONG, DEFENDANT-RESPONDENT-APPELLANT, JAMES L. CUYLER, ET AL., DEFENDANTS. (APPEAL NO. 3.)

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO ATHARI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

SLIWA & LANE, BUFFALO (STANLEY J. SLIWA OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered June 7, 2013. The order, among other things, denied the motion of defendant Lee Luong for summary judgment and denied the cross motion of plaintiffs for summary judgment.

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

Same Memorandum as in *Faison v Luong* ([appeal No. 1] ___ AD3d ___ [Nov. 14, 2014]).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1007

OP 14-00279

PRESENT: CENTRA, J.P., FAHEY, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF JON E. BUDELMANN, DISTRICT ATTORNEY OF CAYUGA COUNTY, PETITIONER,

V MEMORANDUM AND ORDER

HON. THOMAS G. LEONE, COUNTY COURT JUDGE, CAYUGA COUNTY, AND ADAM C. SMITH, RESPONDENTS.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT HON. THOMAS G. LEONE, COUNTY COURT JUDGE, CAYUGA COUNTY.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to, inter alia, vacate the guilty plea of respondent Adam C. Smith.

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

Memorandum: Respondent Adam C. Smith (hereafter, defendant) was charged with various crimes in two separate indictments. In satisfaction of both indictments, defendant pleaded guilty in County Court to one count each of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), conspiracy in the fourth degree (§ 105.10 [1]), and criminal possession of marihuana in the third degree (§ 221.20). The Hon. Thomas G. Leone (respondent) presided over defendant's plea proceeding, and petitioner appeared on the People's behalf. Prior to eliciting defendant's guilty plea, respondent stated that the aggregate "agreed-upon sentence [was] no worse than six years." While placing the terms of the plea on the record, respondent informed defendant that the deal "worked out between [petitioner] and your attorney" calls for "a cap of six years" in state prison. Respondent ultimately sentenced defendant to an aggregate determinate term of five years of imprisonment, and defendant began serving his sentence in state prison one week later (*see generally* § 70.30 [1]).

Thereafter, petitioner commenced the instant CPLR article 78 proceeding in this Court (*see* CPLR 506 [b] [1]). According to the petition, petitioner's consent to defendant's plea was specifically

conditioned on the imposition of a determinate, six-year term of imprisonment. The petition alleges that, by sentencing defendant to only five years of imprisonment respondent violated CPL 220.10 (4) (a), which provides that, "where the indictment charges two or more offenses in separate counts, the defendant may, with both the permission of the court and the *consent of the people*, enter a plea of . . . [g]uilty of one or more but not all of the offenses charged . . ." (emphasis added). Petitioner therefore seeks an order from this Court compelling respondent to vacate defendant's guilty plea and to "restore the matter to its pre-plea status."

Preliminarily, we reject respondent's contention that the petition seeks relief in the nature of prohibition and therefore should be dismissed as moot. Although the petition would be moot under the circumstances presented herein if petitioner were seeking relief in the nature of prohibition (*see People v Cosme*, 80 NY2d 790, 791-792), we conclude that, given "the substance of the relief sought" (*Matter of Dziedzic v Gallivan*, 28 AD3d 1087, 1087), petitioner is seeking relief in the nature of mandamus (*see generally Matter of Henry OO. v Main*, 307 AD2d 615, 616, *lv denied* 1 NY3d 501; *Matter of Vargason v Brunetti*, 241 AD2d 941, 941).

On the merits, we dismiss the petition. The extraordinary remedy of mandamus " 'is never granted for the purpose of compelling the performance of an unlawful act' " (*Matter of Council of City of N.Y. v Bloomberg*, 6 NY3d 380, 388, quoting *Matter of People ex rel. Sherwood v State Bd. of Canvassers*, 129 NY 360, 370), and the Court of Appeals has repeatedly held that, after the entry of judgment and the commencement of sentence, courts have no statutory or inherent authority to vacate, over a defendant's objection, a plea taken in contravention of CPL 220.10 or related statutory provisions (*see People v Moquin*, 77 NY2d 449, 452-455, *rearg denied* 78 NY2d 952; *Matter of Kisloff v Covington*, 73 NY2d 445, 450-452; *Matter of Campbell v Pesce*, 60 NY2d 165, 167-169; *see also People v Antonelli*, 250 AD2d 999, 1000; *People v Donnelly*, 176 AD2d 404, 405). Indeed, absent extrinsic fraud, "[i]n no instance ha[s the Court of Appeals] recognized a court's inherent [or statutory] power to vacate a plea and sentence over defendant's objection where the error goes beyond mere clerical error apparent on the face of the record and where the proceeding has terminated by the entry of judgment" (*Campbell*, 60 NY2d at 169). Thus, mandamus does not lie here because we cannot compel respondent to exceed his statutory and inherent authority by directing him to vacate a plea taken in violation of CPL 220.10 (4) (a) after the commencement of sentence.

Furthermore, "restor[ing] the matter to its pre-plea status," as petitioner seeks, would violate defendant's constitutional protections against double jeopardy (*see Moquin*, 77 NY2d at 455; *Kisloff*, 73 NY2d at 452; *Campbell*, 60 NY2d at 169; *People v Sanders*, 89 AD3d 106, 110-111, *lv denied* 18 NY3d 861). Contrary to petitioner's contention, CPL 40.30 (3) "does not aid the analysis of the double jeopardy issue" (*Moquin*, 77 NY2d at 455). The Court of Appeals has held that a plea taken without the People's consent is not a nullity for purposes of

that provision (*see id.* at 454 n 2; *Sanders*, 89 AD3d at 108-111).

Apart from the legal infirmities of petitioner's position, we further conclude that the record does not factually support that position. Specifically, the record belies petitioner's contention that his consent to defendant's plea was conditioned on the imposition of a determinate, six-year term of imprisonment. At the plea colloquy, petitioner himself described the agreed-upon sentence as "six years at the moment, but based upon things we talked about [off-record], it could . . . move downward from that." That description is entirely consistent with respondent's recitation of an "agreed-upon sentence of no worse than six years." Moreover, petitioner never objected after respondent informed defendant that the deal "worked out between [petitioner] and your attorney" calls for "a *cap* of six years" in state prison (emphasis added). Additionally at no point prior to the imposition of sentence did petitioner purport to withdraw his consent to the plea, nor did he state, "in unmistakable terms, on the record," that his consent was conditioned on the imposition of a six-year term of imprisonment (*People v Frederick*, 45 NY2d 520, 526; *see People v Da Forno*, 53 NY2d 1006, 1007). Based on the above record facts, we are compelled to conclude that respondent did not violate CPL 220.10.

Finally, petitioner's alternative request for an order compelling respondent to "dispose of Counts II, III and IV of [the first indictment] pursuant to law" is barred by CPL 220.30 (2) and double jeopardy.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1011

CA 14-00269

PRESENT: CENTRA, J.P., FAHEY, WHALEN, AND DEJOSEPH, JJ.

HAMILTON EQUITY GROUP, LLC, AS ASSIGNEE OF HSBC BANK USA, NATIONAL ASSOCIATION, PLAINTIFF-RESPONDENT,

V ORDER

BRIAN KUMAHOR, INDIVIDUALLY AND DOING BUSINESS AS BKUMAHOR CONSULTING, DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

LAW OFFICES OF JASON A. SHEAR, LACKAWANNA (JASON A. SHEAR OF COUNSEL), FOR DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (ERIN L. CODY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered April 26, 2013. The order, inter alia, granted the motion of plaintiff for summary judgment.

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1015

CA 14-00062

PRESENT: CENTRA, J.P., FAHEY, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF
THE FINAL ACCOUNT OF JPMORGAN CHASE BANK N.A.,
PETITIONER-RESPONDENT,
AS TRUSTEE OF THE TRUST CREATED UNDER THE LAST WILL AND TESTAMENT OF LUCY GAIR GILL, DECEASED, DATED OCTOBER 26, 1975, FOR THE BENEFIT OF MARY GILL ROBY, ET AL.

ELIZABETH LEE ROBY, KATHRYN STARR ROBY JOHNSON, AND WILLIAM S. ROBY, III, OBJECTANTS-APPELLANTS.

MEMORANDUM AND ORDER

WILLIAM S. ROBY, III, ROCHESTER, OBJECTANT-APPELLANT PRO SE, AND FOR ELIZABETH LEE ROBY AND KATHRYN STARR ROBY JOHNSON, OBJECTANTS-APPELLANTS.

NIXON PEABODY LLP, ROCHESTER (STEPHANIE T. SEIFFERT OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an amended order of the Surrogate's Court, Monroe County (Edmund A. Calvaruso, S.), entered October 7, 2013. The amended order granted petitioner's motion to dismiss the objections.

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

Memorandum: Objectants Elizabeth Lee Roby (Elizabeth), Kathryn Starr Roby Johnson (Kathryn), and William S. Roby, III, (William), appeal from an amended order granting the motion of petitioner JPMorgan Chase Bank N.A. to dismiss the objections filed by objectants. Lucy Gair Gill died in 1983, and her will established a trust for the benefit of her daughter, Mary Gill Roby (Mary), with petitioner's predecessor in interest, Lincoln First Bank, named as trustee. The trust provided that income and principal would be paid to Mary and her children and grandchildren for Mary's lifetime and, upon Mary's death, the trust would terminate and the remainder of the trust would be distributed pursuant to Mary's limited power of appointment. Mary had three children: William, Peter Roby (Peter), and Gill Roby DeChario (Gill). Mary died on July 9, 2010, and she exercised her limited power of appointment in her will to distribute the trust assets to Peter, Gill, William, and each of William's daughters, Elizabeth and Kathryn.

As trustee, petitioner prepared an accounting and distributed it with proposed releases to the trust beneficiaries. Kathryn, Peter,

and Gill executed releases in January and February 2011, thereby releasing petitioner from any liability related to the administration of the trust. On January 29, 2012, apparently due to an inability to reach a voluntary settlement with the other beneficiaries, petitioner filed a petition for judicial settlement and final accounting in Suffolk County. Petitioner retained some portion of the trust funds pending judicial settlement for payment of legal fees and other expenses. The matter thereafter was transferred to Monroe County upon William's motion.

On March 11, 2013, objectants filed verified objections to the final accounting. The primary objection raised by objectants concerned petitioner's investment of the trust assets in mutual funds managed by petitioner (proprietary funds) and petitioner's refusal to consider investing in mutual funds managed by third parties (nonproprietary funds). In 2000 and 2001, the beneficiaries had expressed in writing their displeasure with petitioner's investment strategy and demanded that petitioner resign as trustee. According to objectants, petitioner's refusal to consider investment in nonproprietary funds was a breach of fiduciary duty that caused objectants "great loss," inasmuch as the growth of investment proceeds from the trust assets failed to keep pace with the Standard and Poor's 500 index and the Dow Jones Industrial Average. Objectants alleged that petitioner should have resigned as trustee upon the demand of the beneficiaries.

Petitioner subsequently moved to dismiss the objections pursuant to CPLR 3211 (a) (1) and (7) and, in an amended decision and order, Surrogate's Court granted petitioner's motion. The Surrogate held, inter alia, that, inasmuch as objectants took no action when petitioner repeatedly advised them in 2000 and 2001 that it would not invest in nonproprietary funds, the objections were barred by the defense of laches. The Surrogate also agreed with petitioner that the "open repudiation rule" did not apply because that rule had originated as a toll of the statute of limitations to protect beneficiaries who were not aware that a fiduciary had ceased to act in that capacity (*see Access Point Med., LLC v Mandell*, 106 AD3d 40, 45) and, here, the beneficiaries were aware of petitioner's investment strategy. Although we affirm the amended order, we do so on grounds other than those relied on by the Surrogate (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546; *Summers v City of Rochester*, 60 AD3d 1271, 1273; *Cataract Metal Finishing, Inc. v City of Niagara Falls*, 31 AD3d 1129, 1130).

We agree with objectants that the Surrogate erred in dismissing the objections on the ground that the objections were barred by the defense of laches. Contrary to petitioner's contention, the open repudiation rule applies to the defense of laches (*see Matter of Barabash*, 31 NY2d 76, 82, *rearg denied* 31 NY2d 963; *Knobel v Shaw*, 90 AD3d 493, 496; *Matter of Baird*, 58 AD3d 958, 960; *Matter of Meyer*, 303 AD2d 682, 683; *Matter of Rodken*, 270 AD2d 784, 785). As the Court of Appeals stated in *Barabash*, "[a] fiduciary is not entitled to rely upon the laches of his beneficiary as a defense, unless he repudiates

the relation to the knowledge of the beneficiary" (31 NY2d at 82 [internal quotation marks omitted]). Moreover, the open repudiation rule "requires proof of a repudiation by the fiduciary which is *clear* and made known to the beneficiaries" (*id.* at 80). In other words, the rule requires "either an *open repudiation of the fiduciary's obligation* or a judicial settlement of the fiduciary's account" (*Meyer*, 303 AD2d at 683 [emphasis added]; *see Rodken*, 270 AD2d at 785). Here, we conclude that petitioner's refusal to consider investing trust assets in nonproprietary funds in accordance with the desires of the beneficiaries did not constitute an open repudiation of petitioner's role as fiduciary. To the contrary, petitioner asserted in letters to the beneficiaries that it continued to act "as trustee" and that petitioner's investment strategy was based upon its belief that investing in proprietary funds was in the best interest of the beneficiaries and was an exercise of its fiduciary responsibilities. Thus, petitioner did not repudiate its role as fiduciary but, rather, expressly continued to fulfill it (*see Baird*, 58 AD3d at 959-960; *see also Barabash*, 31 NY2d at 81). Inasmuch as petitioner's repudiation of its role of fiduciary was a prerequisite to its assertion of the defense of laches, and because no such repudiation occurred, we conclude that the Surrogate erred in permitting petitioner to assert that defense and in dismissing the objections on the ground that the objections were barred thereby.

We agree with petitioner, however, that the objections should be dismissed for failure to state a cause of action. On a motion to dismiss pursuant to CPLR 3211 (a) (7), "we . . . must accept the facts as alleged in the [objections] as true, accord [objectants] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory . . . [T]he criterion is whether [objectants have] a cause of action, not whether [they have] stated one" (*Genesee/Wyoming YMCA v Bovis Lend Lease LMB, Inc.*, 98 AD3d 1242, 1244 [internal quotation marks omitted]; *see Leon v Martinez*, 84 NY2d 83, 87-88; *see also Matter of Budd*, 267 App Div 966, 966). The elements of a cause of action for breach of fiduciary duty are " 'the existence of a fiduciary duty, misconduct by the [petitioner] and damages that were directly caused by the [petitioner's] misconduct' " (*McGuire v Huntress* [appeal No. 2], 83 AD3d 1418, 1420, *lv denied* 17 NY3d 712). As a preliminary consideration, we reject objectants' contention that they raised 17 separate and distinct objections and, instead, we conclude that they raised only five distinct objections in the context of alleging breach of fiduciary duty, each of which we will address in turn.

We reject objectants' contention that they stated a cause of action for breach of fiduciary duty by filing an objection to petitioner's refusal to consider investment in nonproprietary funds. Objectants correctly concede that the Prudent Investor Act permits petitioner to invest trust assets in proprietary funds (*see* EPTL 11-2.3 [d]). The Prudent Investor Act also requires a trustee such as petitioner with "special investment skills" to "exercise such diligence in investing and managing assets as would customarily be exercised by prudent investors of discretion and intelligence having

special investment skills" (EPTL 11-2.3 [b] [6]). Even under this standard, however, " 'it is not sufficient that hindsight might suggest that another course would have been more beneficial; nor does a mere error of investment judgment mandate a surcharge' " (*Matter of HSBC Bank USA, N.A. [Knox]*, 98 AD3d 300, 309, *lv dismissed* 20 NY3d 860, quoting *Matter of Bank of N.Y.*, 35 NY2d 512, 519; *see Matter of Chase Manhattan Bank*, 26 AD3d 824, 828, *lv denied* 7 NY3d 824, *reconsideration denied* 7 NY3d 922). Thus, it is well settled that " 'a fiduciary's conduct is not judged *strictly* by the success or failure of the investment . . . In short, the test is prudence, not performance, and therefore evidence of losses following the investment decision does not, by itself, establish imprudence' " (*Knox*, 98 AD3d at 309, quoting *Matter of Janes*, 223 AD2d 20, 27, *affd* 90 NY2d 41, *rearg denied* 90 NY2d 885). Here, objectants merely alleged that the proprietary funds were underperforming, which is insufficient to state a cause of action for breach of fiduciary duty (*see Knox*, 98 AD3d at 309; *Matter of Morgan Guar. Trust Co. of N.Y.*, 89 Misc 2d 1088, 1092).

We further conclude that objectants' claim that petitioner did not consider the tax consequences of its investment in tax-exempt municipal bonds failed to state a cause of action for breach of fiduciary duty. The Prudent Investor Act requires trustees "to consider . . . the expected tax consequences of investment decisions or strategies" (EPTL 11-2.3 [b] [3] [B]). We agree with petitioner, however, that its letters to the beneficiaries, which are attached to the objections, demonstrate that petitioner considered the investment in municipal bonds as part of its overall investment strategy and, further, that petitioner properly considered the tax consequences of that investment decision. The mere fact that Mary allegedly lost interest income in return for a "negligible break on her tax return," as the objectants characterize it, does not establish that petitioner was imprudent in choosing to invest in fixed-income assets such as tax-exempt municipal bonds (*see Knox*, 98 AD3d at 309).

Objectants failed to state a cause of action for breach of fiduciary duty on the ground that petitioner failed to advise the beneficiaries of changes in the law and further failed to take any action based on those changes. Objectants provide no support for their assertion that trustees have a fiduciary duty to advise beneficiaries of changes in the EPTL. In any event, the provisions of the EPTL cited by objectants merely authorize particular actions by a trustee in its discretion (*see* EPTL 11-2.3 [b] [5] [A]; 11-2.4 [e] [1] [B]); thus, even if it were true that petitioner "took no action pursuant to th[ose] change[s] in the law," such inaction does not establish a breach of fiduciary duty.

We agree with petitioner that the allegations in the objections regarding petitioner's failure to communicate and consult with the beneficiaries regarding investment decisions failed to state a cause of action for breach of fiduciary duty. "[A] trustee may not delegate his or her investment authority to a beneficiary or others" (*Matter of Saxton*, 274 AD2d 110, 120; *see Matter of Roche*, 233 App Div 236, 237, *mod on other grounds* 259 NY 458). Thus, that part of the objections

stating that petitioner excluded the beneficiaries from choosing between proprietary funds or nonproprietary alternatives and failed to consider the beneficiaries' investment advice does not state a cause of action for breach of fiduciary duty. In any event, the factual basis for the objectants' claim is belied by the record. A trustee has a duty to communicate material facts to beneficiaries (*see Janes*, 223 AD2d at 32; *Matter of Wood*, 177 AD2d 161, 167, citing Restatement [Second] of Trusts § 170) and, here, objectants did not allege that petitioner failed to communicate material facts to the beneficiaries regarding investment strategy; rather, the record supports the conclusion that the beneficiaries merely disagreed with the strategy as properly communicated by petitioner. Moreover, the record establishes that petitioner repeatedly advised the beneficiaries that it welcomed their input regarding the management of the trust.

Objectants also alleged that petitioner required all beneficiaries, even those who had signed releases, to contribute part of their share of the trust distribution to a litigation reserve pending judicial settlement and that petitioner withheld the entirety of the objectants' interest in the trust for the litigation reserve. We conclude that such allegations do not state a cause of action for breach of fiduciary duty. To the extent that objectants contend that petitioner wrongfully withheld a portion of the shares of Gill and Peter in the litigation reserve, we conclude that objectants do not have standing to challenge petitioner's conduct relating to non-objecting beneficiaries (*see Matter of Schultz*, 104 AD3d 1146, 1147). In any event, the Surrogate required petitioner to pay costs associated with the litigation from William's share and to distribute Peter's and Gill's shares as soon as practicable. In addition, the Surrogate had discretion to allocate expenses among the objecting beneficiaries only (*see generally Matter of Hyde*, 15 NY3d 179, 186-187), and the objections do not state that petitioner failed to comply with the Surrogate's order. Finally, objectants cite no legal authority prohibiting petitioner from delaying distribution of trust assets pending judicial settlement in order to pay for legal fees and other expenses. The objections therefore fail to state a cause of action for breach of fiduciary duty based on petitioner's creation of a litigation reserve.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1021

CA 14-00390

PRESENT: CENTRA, J.P., FAHEY, WHALEN, AND DEJOSEPH, JJ.

BERO FAMILY PARTNERSHIP, JOHN J. BERO, III, DONALD G. BERO, II, MARGARET B. BERO MAGGIONE, DOROTHY C. BERO, JUDITH A. BERO, DONALD G. BERO, THOMAS J. BERO, JOHN J. BERO, JR., MARION P. BERO, ROBERT M. BERO, STEVEN M. BERO, DAVID M. BERO, LORRAINE A. BERO MCGUIGAN, CHRISTINE M. MOORE AND GREGORY MOORE, PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

DONALD ELARDO, DEFENDANT-APPELLANT, AND L.M. SESSLER EXCAVATING & WRECKING, INC., DEFENDANT-RESPONDENT.

DONALD ELARDO, THIRD-PARTY PLAINTIFF-APPELLANT,

V

L.M. SESSLER EXCAVATING & WRECKING, INC., THIRD-PARTY DEFENDANT-RESPONDENT, ET AL., THIRD-PARTY DEFENDANT.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-APPELLANT.

PHILLIPS LYTLE LLP, ROCHESTER (CHAD W. FLANSBURG OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (THOMAS R. SMITH OF COUNSEL), FOR DEFENDANT-RESPONDENT AND THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered August 9, 2013. The order, among other things, granted the motion of defendant-third-party defendant L.M. Sessler Excavating & Wrecking, Inc. seeking summary judgment dismissing the third amended complaint and the third-party complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of defendant-third-party defendant in part, and reinstating the 15th and 16th causes of action in the third amended complaint, as well as the first and second causes of action in the third-party complaint to the extent that those causes of action seek “response costs” incurred within six

years of the commencement of the third-party action, and as modified the order is affirmed without costs in accordance with the following Memorandum: Plaintiffs, Bero Family Partnership (Partnership) and the current and former members thereof, commenced this action seeking, inter alia, damages for the cost of remediating petroleum-contaminated property in the Town of Fayette. The Partnership acquired the property from Bero Construction, which, during the period of its ownership, stored gasoline, diesel fuel and waste oil in underground storage tanks (USTs) on the property. The Partnership hired defendant-third-party defendant L.M. Sessler Excavating & Wrecking, Inc. (Sessler) in 1995 to remove the USTs.

The Partnership thereafter sold the property to defendant-third-party plaintiff Donald Elardo in 2000 for less than a quarter of its assessed value. Pursuant to the purchase and sale contract, Elardo executed and delivered a note and mortgage to plaintiffs John J. Bero, III, Donald G. Bero, II, and Christine M. Moore (collectively Mortgagees). The note provided in relevant part that, "[i]f [Elardo] learns or is notified that any removal or other remediation of any hazardous substance is necessary, [Elardo] shall promptly take all necessary remedial actions, and will indemnify and hold Mortgagee[s] harmless for all damages, costs and expenses of any kind . . . related to any such removal or remediation, regardless of the source or cause of the contamination or other environmental law violation."

In 2008, the New York State Department of Environmental Conservation (DEC) notified plaintiffs that petroleum contamination had been detected in the former UST pits, and that DEC considered plaintiffs to be responsible for the cleanup and removal of the petroleum discharge. Pursuant to a stipulation with DEC, plaintiffs completed the cleanup and removal. Plaintiffs thereafter commenced this action against Elardo, who commenced a third-party action against Sessler. Plaintiffs later added Sessler as a defendant in the third amended complaint.

Supreme Court properly granted that part of plaintiffs' motion seeking summary judgment on the seventh cause of action, for breach of contract against Elardo, and properly denied that part of Elardo's motion seeking summary judgment dismissing that cause of action. Plaintiffs established as a matter of law that they are entitled to judgment pursuant to the indemnification provision of the note. The language of that provision, considered in light of the circumstances of the sale of the property, clearly expresses the intention of the parties to the note that Elardo would indemnify plaintiffs for the costs of any environmental remediation (*see Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777; *Schreiber v Cimato*, 281 AD2d 961, 961-962; *see generally Duffy v Hobaica*, 170 AD2d 1031, 1032). The court properly rejected Elardo's contention that the term "hazardous substances" in the indemnification provision was intended not to include petroleum. The language of the provision expresses the understanding of the parties to the note that Elardo was assuming responsibility for all environmental "remediation, regardless of the source or cause of the contamination" (*cf. Time Warner Entertainment Co. v Brustowsky*, 221 AD2d 268, 268). In contrast, nothing in the

record supports Elardo's contention that the parties intended to adopt the definition of "hazardous substance" in the Comprehensive Environmental Response, Compensation, and Liability Act (42 USC § 9601 [14]), which does not include petroleum (*see generally Last Time Beverage Corp. v F & V Distrib. Co., LLC*, 98 AD3d 947, 951-952).

The court also properly rejected Elardo's further contention that the discharge of the mortgage in 2006 extinguished his obligations under the indemnification provision of the note (*see Copp v Sands Point Mar.*, 17 NY2d 291, 293-294; *CIT Group/Bus. Credit, Inc. v Walentas*, 28 AD3d 224, 224). Finally, even if we were to agree with Elardo's further contention that the indemnification provision was intended to benefit the Mortgagees rather than the Partnership, we would nevertheless conclude that his obligations under that provision would remain the same. His obligations are not limited by virtue of the fact that they are owed to only three of the plaintiff partners rather than the Partnership (*see generally Gramercy Equities Corp. v Dumont*, 72 NY2d 560, 565-566).

The court erred, however, in granting those parts of Sessler's motion seeking summary judgment dismissing the 15th and 16th causes of action in the third amended complaint against it, for common-law indemnification and for contribution pursuant to CPLR 1401, respectively, and further erred in granting those parts of Sessler's motion seeking summary judgment dismissing the first and second causes of action in the third-party complaint against it, for violating the Navigation Law and seeking "response costs," including attorneys' fees, incurred by Elardo within six years of the commencement of the third-party action in connection with such violation, and we therefore modify the order accordingly (*see Sunrise Harbor Realty, LLC v 35th Sunrise Corp.*, 86 AD3d 562, 566; *Starnella v Heat*, 14 AD3d 694, 694-695). We agree with Sessler that it may be liable as a discharger under the Navigation Law only if it actively contributed to the contamination of the property by introducing petroleum-contaminated backfill from off site (*see Smith v Cassidy*, 93 AD3d 1306, 1307). We conclude, however, that Sessler failed to establish as a matter of law that it did not introduce such petroleum-contaminated backfill onto the property and, in any event, the opinion of Elardo's expert environmental geologist is sufficient to raise a triable issue of fact with respect to Sessler's liability under the Navigation Law (*see generally Angona v City of Syracuse*, 118 AD3d 1318, 1320-1321). We further conclude that Sessler failed to establish as a matter of law that plaintiffs alone are at fault for the contamination of the property, and thus it failed to establish that plaintiffs should be barred from seeking common-law indemnification or contribution pursuant to CPLR 1401 (*see Sweet v Texaco, Inc.*, 67 AD3d 1322, 1323; *Union Turnpike Assoc., LLC v Getty Realty Corp.*, 27 AD3d 725, 727).

We have considered the parties' remaining contentions and

conclude that none requires further modification of the order.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1023

KA 12-01870

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

ROBERT M. KNAPP, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

CHARLES MARANGOLA, MORAVIA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered September 25, 2012. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, criminal sexual act in the first degree (four counts), aggravated sexual abuse in the third degree, sexual abuse in the first degree (three counts) and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to suppress defendant's statements is granted, counts 1, 2, 3, 12, 13, 14 and 17 of the indictment are dismissed, and a new trial is granted on counts 4, 5 and 18 of the indictment.

Opinion by PERADOTTO, J.: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, rape in the first degree (Penal Law § 130.35 [3]) and, in appeal No. 2, he appeals from a judgment convicting him upon a jury verdict of endangering the welfare of a child (§ 260.10 [1]). Defendant contends in both appeals that County Court erred in refusing to suppress his confession on two grounds, i.e., that he did not knowingly, voluntarily, and intelligently waive his *Miranda* rights because he lacked the capacity to do so, and because his intellectual limitations, combined with coercive police tactics, rendered his statements involuntary. We agree.

I

In the fall of 2008, defendant, an "intellectually handicapped" man with an IQ of 68, moved into a trailer owned by his childhood friend and occupied by the friend and her two children. According to the friend, during the two years in which he lived there, defendant "seemed like part of the family" and was "really close" with the

children. On October 26, 2010, however, the friend (hereafter, mother) walked into defendant's portion of the trailer and found her three-year-old daughter standing with her pants down a few feet away from defendant. Defendant was sitting on his bed in his boxer shorts with a sheet or blanket partially covering his lap. The mother asked the child why her pants were down, and she replied that defendant had touched her "tu-tu," the child's term for her vagina. The mother called 911.

The police responded to the trailer and, after speaking with the mother and the child, located the defendant on a farm where he apparently worked "doing hay." Defendant agreed to accompany the police to the station, stopping first at the trailer, where defendant consented to a search of his living quarters. At the station, a detective read defendant the *Miranda* warnings, and he waived his rights and agreed to speak to the police. Defendant initially denied that anything happened between him and the child. He ultimately admitted, however, that he had engaged in several sexual acts with the child on a regular basis beginning in September 2010.

By indictment No. 2011-073 (hereafter, first indictment), defendant was charged with 18 counts of sexual misconduct against the child (identified as M.A.). The first five counts of the indictment (counts 1-5) charged defendant with rape in the first degree (Penal Law § 130.35 [3]), criminal sexual act in the first degree (two counts) (§ 130.50 [3]), aggravated sexual abuse in the third degree (§ 130.66 [1] [c]), and sexual abuse in the first degree (§ 130.65 [3]), all based upon the October 26, 2010 incident. The indictment alleged that, on that date, defendant engaged in sexual intercourse with M.A., placed his mouth on her vagina, put his penis in her mouth, inserted a foreign object (a medicine dropper) into her vagina, and touched her vagina. The next six counts of the indictment (counts 6-11) charged defendant with rape in the first degree based on conduct allegedly occurring on a weekly basis beginning the week of September 12, 2010 and ending the week of October 17, 2010. Defendant was also charged with two counts of criminal sexual act in the first degree (oral sexual conduct) and one count of sexual abuse in the first degree (vaginal touching) based on alleged incidents occurring between October 1 and 25, 2010 (counts 12-14), as well as two counts of criminal sexual act in the first degree (oral sexual contact) and one count of sexual abuse in the first degree (vaginal touching) based on alleged incidents occurring between September 8 and September 30, 2010 (counts 15-17). Finally, defendant was charged with endangering the welfare of a child (§ 260.10 [1]) (count 18) by subjecting M.A. to sexual contact between September 2009 and October 2010.

M.A.'s brother, J.A., then four, and their cousin, C.S., then six, thereafter made disclosures to the police. By indictment No. 2011-145 (hereafter, second indictment), defendant was charged with course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [a]) and endangering the welfare of a child (§ 260.10 [1]) based on the allegation that he engaged in two or more acts of sexual conduct with C.S. and "repeatedly subjected her to sexual contact" between October 2008 and October 2010 (counts 1 and 2).

Counts 3-5 charged defendant with sexual abuse in the first degree (§ 130.65 [3]) (two counts) and endangering the welfare of a child (§ 260.10 [1]) based upon allegations that between January 2010 and October 2010, defendant touched J.A.'s penis and buttocks. The two indictments were consolidated over defendant's objection.

Defendant thereafter moved to suppress his statement to the police on the grounds that he lacked the capacity to knowingly and intelligently waive his *Miranda* rights, and that his mental limitations, combined with the police interrogation tactics, rendered his confession involuntary. Defendant submitted the report of a forensic psychologist who examined defendant on two dates in June 2011, took his history, reviewed the videotape of the interrogation, and performed a number of psychological tests. The defense expert opined that defendant was "not capable of intelligently waiving his *Miranda* [r]ights" due to his "cognitive and abstracting deficits," and that he was "a suggestible and overly compliant individual, . . . causing him to be easily intimidated by the interrogation process."

At the *Huntley* hearing, the People presented the expert testimony of a forensic psychiatrist who interviewed defendant in jail and reviewed the videotape of his confession. The People's expert acknowledged that defendant was "intellectually handicapped," with a full-scale IQ of 68, but concluded that defendant was "not that retarded" and could understand his *Miranda* rights. The defense expert testified that defendant's IQ placed him in the "mentally retarded range of intellectual functioning." Defendant's verbal IQ was 63, which placed him in the first percentile, meaning that he performed worse than 99% of the test population. Based upon defendant's "very poor" level of verbal functioning, the defense expert opined that, although defendant was "able to understand the words of the *Miranda* rights," he was "not capable of intelligently waiving" those rights. He further opined that defendant was "a very suggestible and very compliant man as is not atypical of persons who are mentally retarded," which placed him at risk of falsely confessing.

The court denied defendant's motion, concluding that defendant knowingly, voluntarily, and intelligently waived his *Miranda* rights. The court determined that, although defendant "has impaired intelligence and limited verbal comprehension ability," there was "no evidence of mental retardation so great as to render [him] completely incapable of understanding the meaning and effect of the confession." The court further determined that the police conduct "did not overbear the defendant's will or . . . undermine his ability to make a choice whether or not to make a statement."

By its verdict, the jury convicted defendant of rape in the first degree (Penal Law § 130.35 [3]), criminal sexual act in the first degree (four counts) (§ 130.50 [3]), aggravated sexual abuse in the third degree (§ 130.66 [1] [c]), sexual abuse in the first degree (three counts) (§ 130.65 [3]), and endangering the welfare of a child (§ 260.10 [1]) as charged in counts 1-5, 12-14, and 17-18 of the first indictment. The jury also convicted defendant of endangering the welfare of a child (§ 260.10 [1]) as charged in count 2 of the second

indictment. Defendant now appeals.

II

It is well established that, "[f]or a statement to be admissible, the People must prove a voluntary, knowing, and intelligent waiver of the privilege against self-incrimination" (*People v Aveni*, 100 AD3d 228, 236, *appeal dismissed* 22 NY3d 1114; *see People v Rodney*, 85 NY2d 289, 292; *People v Williams*, 62 NY2d 285, 288). "Whether a defendant knowingly and intelligently waived his or her rights to remain silent and to an attorney is determined upon an inquiry into the totality of the circumstances surrounding the interrogation" (*People v Santos*, 112 AD3d 757, 758, *lv denied* 22 NY3d 1158 [internal quotation marks omitted]; *see Williams*, 62 NY2d at 288), including the defendant's "age, experience, education, background, and intelligence, and . . . whether he [or she] has the capacity to understand the warnings given him [or her], the nature of his [or her] Fifth Amendment rights, and the consequences of waiving those rights" (*Fare v Michael C.*, 442 US 707, 725, *reh denied* 444 US 887).

Where a "person of subnormal intelligence" is involved, "close scrutiny must be made of the circumstances of the asserted waiver" (*Williams*, 62 NY2d at 289). "A defendant's mental deficiency weighs against the admissibility of an elicited confession, so that any such confession must be measured by the degree of the defendant's awareness of the nature of the rights being abandoned and the consequences of the decision to abandon them" (*People v Dunn*, 195 AD2d 240, 242, *affd* 18 NY2d 956). A suspect of "subnormal intelligence" may effectively waive his or her *Miranda* rights "so long as it is established that he or she understood the immediate meaning of the warnings" (*Williams*, 62 NY2d at 287), i.e., "how the *Miranda* rights affected the custodial interrogation" (*id.* at 289). It must therefore be shown that the suspect "grasped that he or she did not have to speak to the interrogator; that any statement might be used to the subject's disadvantage; and that an attorney's assistance would be provided upon request, at any time, and before questioning is continued. What will suffice to meet this burden will vary from one case to the next" (*id.*).

In addition to establishing the validity of a defendant's waiver of his or her *Miranda* rights, it is also "the People's burden to prove beyond a reasonable doubt that statements of a defendant they intend to rely upon at trial are voluntary" (*People v Thomas*, 22 NY3d 629, 641; *see People v Guilford*, 21 NY3d 205, 208). "[C]onvictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand" (*Rogers v Richmond*, 365 US 534, 540). Like the determination of whether a defendant effectively waived his or her privilege against self-incrimination, proof of voluntariness compatible with due process "takes into consideration 'the totality of all the surrounding circumstances—*both the characteristics of the accused and the details of the interrogation*' " (*Dickerson v United States*, 530 US 428, 434 [emphasis added]; *see Guilford*, 21 NY3d at

208). The critical question is " 'whether a defendant's will was overborne' by the circumstances surrounding the giving of a confession" (*Dickerson*, 530 US at 434), which " 'depend[s] upon a weighing of the circumstances of pressure against the power of resistance of the person confessing' " (*id.*; *see Thomas*, 22 NY3d at 642 [the voluntariness of a statement "depend[s] upon the facts of each case, both as they bear upon *the means employed and the vulnerability of the declarant*" (emphasis added)]). Thus, the voluntariness inquiry "is not limited to instances in which the claim is that the police conduct was 'inherently coercive' " (*Miller v Fenton*, 474 US 104, 110). Rather, it "applies equally when the interrogation techniques were improper only because, *in the particular circumstances of the case*, the confession is unlikely to have been the product of a free and rational will" (*id.* [emphasis added]).

III

We turn first to defendant's contention that the People failed to establish beyond a reasonable doubt that he knowingly, voluntarily, and intelligently waived his rights to remain silent and to an attorney. The record establishes and, indeed, it is undisputed, that defendant has significant cognitive deficits. Defendant was classified as "mentally retarded" in school, and graduated with an Individualized Education Program diploma. The defense expert testified at the *Huntley* hearing that defendant received a full-scale IQ score of 68 on the Wechsler Adult Intelligence Scale-IV (WAIS-IV), compared to an average score of 100, which placed him in the "[e]xtremely [l]ow range of intellectual functioning" and classified him as "[m]entally retarded" (*see Atkins v Virginia*, 536 US 304, 309 n 5 [describing an IQ below 75 as within the range of mental retardation]). Defendant's IQ placed him in the second percentile, meaning that he "scored lower than did 98% of the people his age who were administered the WAIS-III during its development." Significantly, defendant received a verbal comprehension IQ score of 63, indicating a "very, very low, very poor" level of verbal functioning. The defense expert testified at the *Huntley* hearing that defendant read at a second- or third-grade level, which he described at trial as "what we know as Dick and Jane ran up the hill, that kind of stuff." He estimated that defendant's "comprehension of the words would be considerably lower than the third grade."

The defense expert also administered several tests that were specifically designed to assess defendant's understanding and appreciation of the *Miranda* warnings. The defense expert testified that defendant's performance on those tests indicated that he "would have difficulty intelligently assessing [and] weighing the circumstances that he's involved in at a particular time." Defendant scored "very poorly," i.e., in the second percentile, on the Function of Rights in Interrogation test. According to the defense expert, that meant that, although defendant understood the individual words used in the *Miranda* warnings, he was unable to comprehend the import of the warnings or to "intelligently weigh the consequences" of waiving his rights. The defense expert thus opined that, because of

defendant's "cognitive and abstracting deficits," he "was not capable of intelligently waiving his *Miranda* rights" (*see Fare*, 442 US at 725; *Dunn*, 195 AD2d at 242-243).

The People's expert, who admitted at trial that he had "limited experience in dealing with people with mental retardation," did not dispute defendant's IQ score or take issue with the specific tests administered by the defense expert. Indeed, he characterized the defense expert's report as "well balanced." He concluded, however, that defendant was "not that retarded." The People's expert noted that defendant "knew that there were seven days in a week" and that, although defendant thought that there were six months in a year, he was able to name all of the months. The People's expert did not assess defendant's reading ability or comprehension. The People's expert concluded that, because the *Miranda* rights "are fairly simple [and] straightforward," defendant was "able to understand the rights when they were read to him." His conclusion was primarily based upon the belief that defendant was "able to function" in the activities of daily living, including personal hygiene, driving and handling his SSI funds. According to the People's expert, defendant

> "could live alone. He had a girlfriend. He's been deemed able to handle his own funds. He could buy a truck. He could buy insurance for the truck. So, from my point of view and in talking to him, it was my feeling that, that he could understand the rights."

There is no evidence in the record, however, that defendant was able to live alone or that he had lived alone at any point in his life. Indeed, the record reflects that defendant lived with his parents into adulthood and that, after their death, he lived with other relatives and friends. There is likewise no evidence that defendant "had a girlfriend." Defendant told the police that he had never had a girlfriend, and the record contains no evidence to the contrary. Finally, there is no evidence that defendant was "deemed" or "found" competent by the Social Security Administration to handle his own funds; in that respect, the record establishes only that defendant was the payee on his SSI checks.

Of equal importance was the manner in which the rights were administered to defendant. The defense expert, who reviewed the videotape of the interrogation, noted that the *Miranda* warnings "were read to [defendant] in a relatively rapid fashion which likely only further confused him given his mental retardation." Our review of the videotape confirms that characterization. In delivering the *Miranda* warnings, the detective recited each of the rights at a fairly rapid pace, particularly as compared to the pace of the remainder of the interview. The detective then handed defendant a waiver of rights form with defendant's responses already filled in and asked defendant to place his initials next to each of the rights. Significantly, the detective never asked defendant whether he could read or write, and did not inquire about defendant's level of education. The defense expert concluded that defendant "could not read his [*Miranda*] [r]ights

on his own because of his 3rd grade reading level." Indeed, even the People's expert acknowledged that the detective "didn't spend a lot of time dwelling on the *Miranda* rights."

This case is thus distinguishable from *Williams* (62 NY2d at 287), in which the Court of Appeals concluded that a 20-year-old "functionally illiterate, borderline mentally retarded man" effectively waived his *Miranda* rights. The Court noted that "the detective who administered the *Miranda* warnings did not restrict himself to a mere reading of the rights from a card, as is usually done by police officers. Instead, the officer described the rights in more detail and simpler language, verifying that defendant understood each right before proceeding to the next warning" (*id.* at 288; *see id.* at 289 ["(T)o an individual of subnormal intelligence, stating the *Miranda* warnings in sophisticated terms would be as incomprehensible as though they were spoken in a foreign language . . . (T)he detective here was careful to reduce the warnings to simple terms that defendant could understand"]). No such precautions were taken in this case despite the clear indications, discernible on our review of the videotape, that defendant's intellectual ability was limited.

We therefore conclude, based upon the totality of the circumstances, that the People failed to meet their burden of establishing beyond a reasonable doubt that defendant knowingly, voluntarily, and intelligently waived his *Miranda* rights, and thus that the court should have suppressed defendant's confession on that ground (*see Santos*, 112 AD3d at 757-759; *Aveni*, 100 AD3d at 237).

IV

In addition to his *Miranda* contention, defendant contends that the People failed to meet their "heavy burden" of proving the voluntariness of defendant's statements beyond a reasonable doubt (*People v Holland*, 48 NY2d 861, 862; *see Thomas*, 22 NY3d at 641; *Guilford*, 21 NY3d at 208), and thus that the court should have suppressed his confession on that ground as well (*see Thomas*, 22 NY3d at 636). "[B]efore and apart from *Miranda*, courts have long held that a person's limited intellectual ability bears appreciably on the voluntariness of the person's response to interrogation" (*Dunn*, 195 AD2d at 243). People with intellectual disabilities are particularly "vulnerab[le] and susceptib[le] to overreaching" by law enforcement (*id.* at 244; *see Colorado v Connelly*, 479 US 157, 165 ["(M)ental condition is surely relevant to an individual's susceptibility to police coercion"]; *United States v Preston*, 751 F3d 1008, 1020 [noting that reduced mental capacity may render a suspect " 'more susceptible to subtle forms of coercion' "]), and are "more likely to give false confessions" (*Hall v Florida*, ___ US ___, ___, 134 S Ct 1986, 1993; *see Preston*, 751 F3d at 1018 n 13 [noting "abundant research that the intellectually disabled 'are more likely to confess falsely for a variety of reasons' "]). Thus, " '[o]fficial conduct that does not constitute impermissible coercion when employed with nondisabled persons may impair the voluntariness of the statements of persons who are mentally ill or mentally retarded' " (*Preston*, 751 F3d at 1016-

1017; *see Stein v New York*, 346 US 156, 185, *reh denied* 346 US 842 [“What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal”]).

Here, the defense expert opined that defendant is “a suggestible and overly compliant individual, which is not unusual in mentally retarded individuals who are frequently ‘yea-saying,’ in turn causing him to be easily intimidated by the interrogation process” (*see Preston*, 751 F3d at 1022 [“These traits–being ‘easily confused,’ ‘highly suggestible and easy to manipulate’–are consistent with characteristics of the intellectually disabled in general”]). The People’s expert acknowledged that “people with an IQ of 68 certainly can be suggestible and can have a need to be compliant.” According to the defense expert, individuals who are “yea-sayers” are more likely to agree with a statement if repeatedly asked; thus, prodding or intensive questioning will tend to elicit an affirmative response. In addition to noting his own clinical impressions, the defense expert administered tests specifically designed to measure interrogative susceptibility and compliance, i.e., the “Gudjonsson scales.” On the suggestibility scale, defendant scored a 15, which is “higher than the normative data provided for adults, court referrals, and persons with intellectual disabilities, whose average ‘total suggestibility’ scores were 7.5, 10.9 [and] 12.5 respectively.” Defendant also scored a 15 on the compliance scale, much higher than the average score of 9 and higher than “the average score for false confessors,” i.e., 14.4. According to the defense expert, a person with a score of 15 on the compliance scale would be particularly sensitive to threats and promises made during interrogation. He thus opined, based upon his interview and the test results, that defendant “falls within the parameters of a person who is in danger of false confessions.”

We have reviewed the videotape of the interrogation and are therefore “ ‘not consigned to an evaluation of a cold record, or limited to reliance on the detectives’ testimony’ ” (*Preston*, 751 F3d at 1020). Our review confirms the defense expert’s observation that the detective “used techniques that are popularly used in convincing someone to answer questions in a particular way.” Specifically, the detective “tried to appear to be a friendly soul, a good cop that might do something to help [defendant] if he gave the correct answer.” The detective told defendant that he “knew he wasn’t a bad guy”; asked defendant whether he was “an evil man” or “a guy that has a problem that we need to try and fix”; and told defendant “[y]ou don’t want people to think that you’re an evil person . . . I might be able to help you” (*see id.* at 1023-1024 [concluding that the confession of an intellectually-disabled defendant was involuntarily given where, among other things, the police asked defendant “to choose . . . whether he was a monster–a sexual predator who repeatedly preys on children–or if the abuse of the child was a one-time occurrence”]). Most of the detective’s questions were leading in nature, and he repeated a question when he was not satisfied with defendant’s response, urging defendant to “be honest” with him and to tell the truth (*see id.* at 1024 [“(W)hen presented with leading or suggestive questions,” people with intellectual disabilities “ ‘frequently seek to conform to the perceived desires of the interrogator’ ”]; *Wilson v Lawrence County*,

260 F3d 946, 953 [confession involuntary where, inter alia, "the officers relied largely on leading questions to secure th[e] confession"]). Notably, the People's expert testified at trial that, when interviewing a suggestible subject, it is important not to ask leading questions "[b]ecause they will think that's what [you] want to hear and people are liable to say yes or be agreeable, so forth."

As the defense expert testified at trial, "[w]hat became very clear in the video . . . was that [defendant] changed his answers based on the kind of questioning that was done to him. In other words, he was asked the question, the same question over and over again. So it no doubt became clear to him that he was answering the wrong way. So he changed his answers to be what he believed the cop wanted to know." Many, although not all, of defendant's responses consisted of "mmm-hmm," yes, and a parroting back of the detective's statements. The detective also told defendant that he had spoken to the victim and her mother, that the victim was "not lying," and that the medical examination was going to show that "something happened" between defendant and the victim. The defense expert testified that such tactics "would lead [defendant] to question his own memory of the situation which isn't good to begin with. He's got deficits in memory. So if presented with memory that would counteract what he believed to be true, he would change his answer."

We therefore conclude, based upon the totality of the circumstances, including defendant's intellectual limitations, his suggestibility and compliance tendencies, and the tactics employed by the interviewer in this case, that defendant's confession was not voluntary and thus that it should have been suppressed on that ground as well (*see Preston*, 751 F3d at 1027-1028; *see generally Dickerson*, 530 US at 434; *Miller*, 474 US at 110; *Thomas*, 22 NY3d at 642). Thus, we conclude that the judgment should be reversed, defendant's confession suppressed, and a new trial granted (*see People v Cotton*, 280 AD2d 188, 193, *lv denied* 96 NY2d 827).

V

Defendant further contends that his conviction is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence. We agree in part. Because there was no evidence, other than defendant's confession, that the crimes charged in counts 12, 13, 14 and 17 of the first indictment "were, in fact, committed" (*People v Whitney*, 105 AD2d 1111, 1112; *see People v Chico*, 90 NY2d 585, 589-590), we agree with defendant that those counts must be dismissed (*see People v Maldonado*, 40 AD3d 436, 436; *Whitney*, 105 AD2d at 1112). We further agree with defendant that the verdict with respect to counts 1, 2, and 3 of the first indictment is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495), and we therefore dismiss those counts as well. Although the physical evidence establishes that defendant ejaculated and that some of the ejaculate ended up on the victim's shirt, no sperm or seminal fluid was detected on any of the samples taken from the victim's body. Further, the victim's sexual assault examination was "normal," with "no tears, notches, tags, [or] bruises" detected on the hymen.

Contrary to the contention of defendant, we conclude that his conviction of the remaining counts in the two indictments is supported by legally sufficient evidence, and that the verdict with respect to those counts is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). In light of our determination that defendant is entitled to a new trial based upon the improper admission of his confession, we do not reach defendant's remaining contentions.

VI

Accordingly, we conclude that the judgment in appeal No. 1 should be reversed, that part of the omnibus motion seeking to suppress defendant's statements granted, counts 1, 2, 3, 12, 13, 14 and 17 of the first indictment dismissed, and a new trial on counts 4, 5 and 18 in the first indictment granted. We likewise conclude that the judgment in appeal No. 2 should be reversed, that part of the omnibus motion seeking to suppress defendant's statements granted, and a new trial on count 2 of the second indictment granted.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1024

KA 12-01871

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

ROBERT M. KNAPP, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CHARLES MARANGOLA, MORAVIA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered September 25, 2012. The judgment convicted defendant, upon a jury verdict, of endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to suppress defendant's statements is granted, and a new trial is granted on count two of the indictment.

Same Opinion by PERADOTTO, J. as in *People v Knapp* ([appeal No. 1] ___ AD3d ___ [Nov. 14, 2014]).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1026

KA 11-01476

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LARON ROBINSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered May 23, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment that convicted him upon a guilty plea of attempted criminal possession of a weapon in the third degree (Penal Law §§ 110.00, 265.02 [5] [ii]). Defendant contends that County Court erred in refusing to suppress the evidence seized as the result of the allegedly unlawful stop of the vehicle that he was driving. We conclude that the court applied the wrong standard in denying defendant's suppression motion. We therefore hold the case, reserve decision, and remit the matter to County Court to determine the motion in accordance with the correct legal standard.

At the suppression hearing, the People presented evidence that, while the police were engaged in surveillance of targeted residences, a lieutenant involved in the operation observed an individual, later identified as defendant, driving slowly down the street toward one of the subject residences. Although the lieutenant observed defendant exit the vehicle and walk toward another individual who had exited the subject residence, he did not see them interact or engage in any hand-to-hand transactions. He also failed to see any drugs or weapons. When defendant returned to the vehicle, he appeared to hand something to the passenger in the front seat and appeared to drink from a beer can, but the lieutenant was unsure. The lieutenant ordered a fellow detective to stop defendant's vehicle, which he did, and the detective observed an open beer can in the vehicle. Defendant engaged in furtive actions when questioned by the detective and was subjected to

a pat frisk, whereupon cocaine was found on his person. Defendant attempted to flee, but was apprehended and arrested. From outside the vehicle, the lieutenant then observed the handle of a handgun protruding from underneath the driver's seat, which the detective who stopped the vehicle recovered upon a subsequent search of the vehicle.

In denying defendant's suppression motion, the court concluded that the traffic stop was lawful based upon "a founded suspicion that criminal activity [was] afoot" (*People v De Bour*, 40 NY2d 210, 223). That was error. It is well established that " 'police stops of automobiles in this State are legal only pursuant to routine, nonpretextual traffic checks to enforce traffic regulations or when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime' " (*People v Washburn*, 309 AD2d 1270, 1271, quoting *People v Spencer*, 84 NY2d 749, 753, *cert denied* 516 US 905), or "where the police have 'probable cause to believe that the driver . . . has committed a traffic violation' " (*id.*, quoting *People v Robinson*, 97 NY2d 341, 349). Here, the People do not contend that this was a routine check to enforce traffic regulations, and instead rely on defendant's commission of a traffic infraction under Vehicle and Traffic Law § 1227 (1), prohibiting the consumption or possession of an open container containing an alcoholic beverage in a motor vehicle on a public highway, to justify the stop of defendant's vehicle. Here, the court did not apply the correct standard in denying defendant's suppression motion, i.e., it did not determine whether the police had probable cause to believe that defendant had committed a traffic infraction (*see Robinson*, 97 NY2d at 349; *People v East*, 119 AD3d 1370, 1371; *see generally People v Concepcion*, 17 NY3d 192, 195). Inasmuch as "[w]e have no power to 'review issues either decided in appellant's favor, or not ruled upon, by the trial court' " (*People v Coles*, 105 AD3d 1360, 1363, quoting *Concepcion*, 17 NY3d at 195), we hold the case, reserve decision, and remit the matter to County Court to rule on that issue.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1037

CA 14-00223

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

BEVERLY A. KIRBY, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF RICHARD C. KIRBY, DECEASED, PLAINTIFF,

V MEMORANDUM AND ORDER

KENMORE MERCY HOSPITAL, CATHOLIC HEALTH SYSTEMS, INC., DEFENDANTS-RESPONDENTS, FARIDA BARODAWALA, M.D., ANESTHESIA CONSULTANT ASSOCIATES, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

RICOTTA & VISCO, BUFFALO (TOMAS J. CALLOCCHIA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DAMON MOREY LLP, BUFFALO (JULIE M. BARGNESI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered October 28, 2013. The order, insofar as appealed from, denied in part the motion of defendants Farida Barodawala, M.D. and Anesthesia Consultant Associates for a protective order.

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

Memorandum: Plaintiff, individually and as executrix of the estate of Richard C. Kirby (decedent), commenced this personal injury and wrongful death action seeking damages based on defendants' allegedly negligent treatment of decedent, their patient. Farida Barodawala, M.D. and Anesthesia Consultant Associates (defendants) moved, inter alia, for a protective order pursuant to CPLR 3103 and Public Health Law § 230 with respect to a report prepared by the Office of Professional Medical Conduct (OPMC), a nonparty, following an investigation into the circumstances of decedent's death. During the discovery phase of the litigation, plaintiff testified at her deposition that "New York State" had sent her a copy of the report, which was subsequently disclosed by plaintiff to all defendants. Supreme Court granted defendants' motion only in part, directing that the report shall be kept confidential and shall not be further disseminated or referenced during the deposition of Dr. Barodawala. The order specified that the remainder of the motion was denied

without prejudice to renew following the completion of Dr. Barodawala's deposition testimony. We note at the outset that, contrary to the contention of defendants-respondents, "the order is appealable pursuant to CPLR 5701 (a) (2) (v) . . . , notwithstanding that the motion was denied without prejudice to renew" (*Allen v General Elec. Co.*, 11 AD3d 993, 994).

With respect to the merits, we conclude that Supreme Court erred in granting defendants' motion only in part, and should have granted the motion in its entirety. "Pursuant to Public Health Law § 230 (10) (a) (v), the files of OPMC concerning possible instances of professional misconduct are confidential, subject to [certain] exceptions," including Public Health Law § 230 (9), which are not applicable here (*Hunold v Community Gen. Hosp. of Greater Syracuse*, 61 AD3d 1331, 1332-1333). Inasmuch as there is no evidence in the record that the OPMC proceeded past the interview phase of Dr. Barodawala's alleged misconduct with respect to decedent, the OPMC report is not discoverable as a matter of law (*see* § 230 [10] [a] [v]). Thus, we conclude that the court erred in failing to restore this matter to the "status quo prior to the [inadvertent] disclosure" (*Matter of Beiny [Weinberg]*, 129 AD2d 126, 138, *lv dismissed* 71 NY2d 994).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1040

CA 13-02136

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

DAVID M. HOLMES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHRISTOPHER MINNAMON, KMMR BUSINESS GROUP INC.
AND FEDEX GROUND PACKAGE SYSTEM, INC.,
DEFENDANTS-RESPONDENTS.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (DAVID G. BROCK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BURDEN, GULISANO & HICKEY, LLC, BUFFALO (SARAH HANSEN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered August 15, 2013. The order granted the motion of defendants to dismiss the amended complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when the vehicle he was driving collided with a vehicle driven by defendant Christopher Minnamon and owned by the two remaining defendants. We agree with plaintiff that Supreme Court abused its discretion in granting defendants' motion seeking dismissal of the amended complaint based on plaintiff's failure to comply with a discovery order. "[I]t is axiomatic that before an order may be enforced, notice of such order must be given to the party against whom it is sought to be enforced" (*Matter of Raes Pharm. v Perales*, 181 AD2d 58, 62). Thus, "[w]here a party's rights will be affected by an order, the successful party must serve a copy of the order on the adverse party in order to give it validity" (*Cultural Ctr. Commn. v Kokoritsis*, 103 AD2d 1018, 1018), and the period for compliance with an order begins to run on the date the order is served upon the adverse party. Here, the discovery order required that plaintiff disclose various materials "within forty-five (45) days of this Order." The order was served by mail, so an additional five days is added to the 45-day period set forth in the order (*see* CPLR 2103 [b] [2]; *Pace v Oliver*, 204 AD2d 1058, 1058-1059). Plaintiff was therefore required to comply with the order within 50 days of the date of service, and defendants moved to dismiss the amended complaint for failure to comply with the order several days before the expiration of

the 50-day period. Thus, defendants' motion was premature, and the court erred in granting it (*see generally Carpenter v Browning-Ferris Indus.*, 307 AD2d 713, 715-716).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1041

CA 13-01445

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

JENNIFER L. RECH, PLAINTIFF-RESPONDENT,

V ORDER

MICHAEL B. RECH, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ZDARSKY, SAWICKI & AGOSTINELLI, LLP, BUFFALO (GERALD T. WALSH OF COUNSEL), FOR DEFENDANT-APPELLANT.

EVANS & FOX LLP, ROCHESTER (MATTHEW M. PISTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

KIMBERLY W. WEISBECK, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Supreme Court, Monroe County (John M. Owens, J.), entered April 17, 2013 in a divorce action. The order, among other things, distributed the marital assets.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Aho*, 39 NY2d 241, 248).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1042

CA 13-01495

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

JENNIFER L. RECH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL B. RECH, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ZDARSKY, SAWICKI & AGOSTINELLI, LLP, BUFFALO (GERALD T. WALSH OF COUNSEL), FOR DEFENDANT-APPELLANT.

EVANS & FOX LLP, ROCHESTER (MATTHEW M. PISTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

KIMBERLY W. WEISBECK, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from a judgment of the Supreme Court, Monroe County (John M. Owens, J.), entered July 25, 2013 in a divorce action. The judgment, among other things, dissolved the marriage between the parties.

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

Memorandum: On appeal from the parties' judgment of divorce, defendant husband contends that Supreme Court erred in denying his motion, made during the pendency of the divorce action, to modify the existing custody arrangement by transferring primary residential custody of the parties' child from plaintiff to him. In addition, he challenges the equitable distribution award, as well as the denial of his motion for a downward modification of child support, made during the pendency of the divorce action, and the award of counsel fees to plaintiff. We affirm.

The court did not abuse its discretion in denying defendant's motion to modify the existing custody arrangement. Although it is undisputed that there were sufficiently changed circumstances to justify the court's re-examination of the stipulated custody arrangement (*see generally Matter of Wilson v McGlinchey*, 2 NY3d 375, 380-381), we conclude that there is a sound and substantial basis in the record for the court's determination that the child's best interests were served by retaining primary residential custody with plaintiff (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171; *Fox v Fox*, 177 AD2d 209, 210). Defendant's contention to the contrary reflects mere disagreement with the court's determination, and cannot

surmount the great deference given to trial courts under these circumstances (*see Matter of McDonald v Terry*, 100 AD3d 1531, 1531).

We likewise reject defendant's challenges to the equitable distribution award. Defendant contends that the court erred in refusing to order plaintiff to reimburse defendant for half of the prejudgment carrying costs for the marital residence. It is well settled, however, that the court has broad discretion to require one party to pay all of the carrying costs of the marital residence where that party has been its sole occupant during the course of the action (*see Soles v Soles*, 41 AD3d 904, 906; *Martin v Martin*, 82 AD2d 431, 435-436), and it is undisputed that defendant maintained sole occupancy of the marital residence after this action was commenced (*see e.g. Quarty v Quarty*, 96 AD3d 1274, 1281). Moreover, by ordering plaintiff to sell her interest to defendant, the court effectively awarded him the value of the reduced mortgage principal and the corresponding increase in home equity, and defendant has also had the tax benefit of paying interest on the mortgage (*see Chambers v Chambers*, 259 AD2d 807, 808). Defendant's remaining challenges to the equitable distribution award are either unsupported or affirmatively contradicted by the record.

The court did not err in summarily denying defendant's motion to reduce his child support obligation inasmuch as defendant failed to provide an updated statement of net worth in support of his motion (*see* 22 NYCRR 202.16 [k] [2]; *Garcia v Garcia*, 104 AD3d 806, 806). Finally, given the substantial wealth disparity between plaintiff and defendant, we cannot say that the court erred in awarding counsel fees to plaintiff (*see generally DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881; *Leonard v Leonard*, 109 AD3d 126, 129-130).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1044

TP 14-00362

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

IN THE MATTER OF ELIJAH BELL, PETITIONER,

V ORDER

SOCIAL WORKER JOHNSON, SUPERINTENDENT SHEAHAN
AND HEARING OFFICER GIANNIN, RESPONDENTS.

ELIJAH BELL, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered February 20, 2014) to review a determination of respondents. 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).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1045

TP 14-00762

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

IN THE MATTER OF TERRENCE JACKSON, 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 (ADAM W. KOCH OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered April 22, 2014) 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.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated various inmate rules. Contrary to petitioner's contention, the determination is supported by substantial evidence, including confidential testimony (*see Matter of Stuart v Fischer*, 109 AD3d 1122, 1123, *lv denied* 22 NY3d 858; *see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139). We reject petitioner's further contention that the hearing officer was biased or that the determination flowed from the alleged bias (*see Matter of Colon v Fischer*, 83 AD3d 1500, 1501-1502). Petitioner contends that he was denied his right to call certain witnesses and present certain documentary evidence in support of his defense of retaliation. We reject that contention. "The additional testimony [and documentary evidence] requested by petitioner would have been either redundant or immaterial" (*Matter of Sanchez v Irvin*, 186 AD2d 996, 996, *lv denied* 81 NY2d 702; *see Matter of Burr v Fischer*, 95 AD3d 1538, 1538-1539, *lv denied* 19 NY3d 811). Finally, we reject petitioner's contention that this matter was improperly transferred to this Court because respondent failed to include a record of the administrative appeal with his answer. That record could not be located and, in view of

respondent's assertion that he would not make a claim that petitioner failed to exhaust his administrative remedies, we conclude that Supreme Court properly determined that there was no "fatal defect" and transferred the proceeding to this Court (*see generally Matter of Duchmann v Town of Hamburg*, 93 AD3d 1289, 1289).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1046

TP 14-00597

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

IN THE MATTER OF ANGEL GONZALEZ, 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.

ERIC T. SCHNEIDERMAN, 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 March 21, 2014) 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: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1049

KA 09-02531

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN A. HOWINGTON, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (Joseph E. Fahey, J.), entered October 30, 2009. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

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

Memorandum: Defendant appeals from an order denying his motion to vacate the judgment convicting him of, inter alia, robbery in the first degree (Penal Law § 160.15 [4]) on the grounds that material evidence at trial was false and was known by the prosecutor to be false, there was prosecutorial misconduct, and there is newly discovered evidence (*see* CPL 440.10 [1] [c], [f], [g]). Contrary to defendant's contention, County Court did not err in denying his motion without conducting a hearing inasmuch as defendant's motion papers did "not contain sworn allegations substantiating or tending to substantiate all the essential facts" of defendant's claims (CPL 440.30 [4] [b]; *see People v Vigliotti*, 24 AD3d 1216, 1216). The recantation affidavit of a prosecution witness submitted by defendant in support of the motion does not establish that the prosecutor knew or should have known that his trial testimony was false (*see* CPL 440.10 [1] [c]; *People v Lent*, 204 AD2d 855, 855, *lv denied* 84 NY2d 869). Similarly, defendant failed to submit evidence supporting his contention that the prosecutor engaged in improper and prejudicial conduct within the meaning of CPL 440.10 (1) (f), i.e., "[i]mproper and prejudicial conduct not appearing in the record [that] occurred during a trial resulting in the judgment" that would have required reversal "if it had appeared in the record" (CPL 440.10 [1] [f]). As noted, the recantation affidavit does not establish that the prosecutor knew or should have known that the trial testimony was

false, and thus defendant failed to establish that the prosecutor engaged in improper conduct. Moreover, a claim of such misconduct also requires a showing of prejudice (*see generally People v Jackson*, 78 NY2d 638, 646-647), and there is no indication that defendant was prejudiced by the alleged improper conduct. Furthermore, the recantation affidavit does not qualify as newly discovered evidence pursuant to CPL 440.10 (1) (g) because the issues raised in the affidavit would merely impeach or contradict the trial testimony of the prosecution witness, and the new evidence therefore is not "of such character as to create a probability that . . . the verdict would have been more favorable to the defendant" had the evidence been introduced (*id.*; *see People v Miles*, 136 AD2d 958, 959, *lv denied* 71 NY2d 971).

Finally, we do not address defendant's contention that he was denied effective assistance of appellate counsel on his direct appeal, raised in the context of this CPL article 440 motion. The proper vehicle for raising that contention "is by way of a motion for a writ of error coram nobis" (*People v Smith*, 78 AD3d 1583, 1584) or, when the record is adequate, that contention may be raised, pro se, on direct appeal (*see People v McKinney*, 302 AD2d 993, 995).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1051

KA 08-01053

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT J. HARTLE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered March 7, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the first degree (two counts), murder in the second degree and arson in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of murder in the first degree (Penal Law § 125.27 [1] [a] [viii]; [b]), and one count each of murder in the second degree (§ 125.25 [1]), and arson in the third degree (§ 150.10 [1]). We reject defendant's contention that Supreme Court erred in allowing a medical professional to testify to statements defendant made to her while being examined at the hospital after his arrest. Defendant contends that his statements were subject to the physician-patient privilege despite the presence of a police investigator in the examination room because he was in custody and was not able to tell the investigator to leave the room. The physician-patient privilege, which is "entirely a creature of statute" (*Dillenbeck v Hess*, 73 NY2d 278, 283), is set forth in CPLR 4504 (a), and is applicable to criminal proceedings by virtue of CPL 60.10 (*see People v Wilkins*, 65 NY2d 172, 176). In determining whether the physician-patient privilege applies, we must consider "whether in the light of all the surrounding circumstances, and particularly the occasion for the presence of the third person, the communication was intended to be confidential" (*People v Decina*, 2 NY2d 133, 145; *see State of New York v General Elec. Co.*, 201 AD2d 802, 803). Here, we conclude that defendant did not meet his burden of establishing that the privilege applied (*see Decina*, 2 NY2d at 141), because there was no showing that he intended that his statements be confidential. Defendant was aware

of the investigator's presence, but he did not ask to speak with the medical professional privately. Additionally, defendant made numerous statements to others that were similar to the statements he made to the medical professional, both before and after making them to her. In any event, even if the physician-patient privilege applied, we conclude that any error in allowing the testimony is harmless. The evidence of guilt is overwhelming, and there is no significant probability that the absence of the error would have led to an acquittal (*see People v Ballard*, 173 AD2d 480, 480, *lv denied* 78 NY2d 961; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

We reject defendant's further contention that he was denied effective assistance of counsel. Defendant, relying on *People v Colville* (20 NY3d 20, 32), contends that he was denied the "expert judgment of counsel" when defense counsel decided not to request that the court charge murder in the second degree as a lesser included offense of murder in the first degree. Contrary to defendant's contention, the record does not establish that defense counsel deferred to defendant the decision not to request the lesser included offense. Defense counsel requested a recess to confer with defendant regarding lesser included offenses and, after that conference, defense counsel stated to the court that, "[a]fter consulting with my client, we will not be requesting any chargedowns with regard to [the first degree murder counts]." Therefore, there is "no indication in the record that defense counsel's position differed from" defendant's position (*People v Gottsche*, 118 AD3d 1303, 1304).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1053

KA 11-01743

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PABLO ESTIVAREZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered March 21, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession of marihuana in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of marihuana in the third degree (Penal Law § 221.20), defendant contends that Supreme Court erred in refusing to suppress marihuana seized by the police from the vehicle in which defendant was a passenger following a traffic stop. Defendant sought suppression of the marihuana on the ground that it was the product of an illegal search of a locked container within the trunk of the vehicle, and he now contends for the first time on appeal that the officer who stopped the vehicle gave testimony " 'patently tailored to nullify constitutional objections' " with respect to the traffic stop (*People v Lebron*, 184 AD2d 784, 784). That contention therefore is not preserved for our review (*see* CPL 470.05 [2]; *People v Buckman*, 66 AD3d 1400, 1401, *lv denied* 13 NY3d 937), and is without merit in any event. The hearing record supports the court's determination that the officer lawfully stopped the vehicle for having an inadequate muffler in violation of Vehicle and Traffic Law § 375 (31) (*see People v Thomas*, 210 AD2d 269, 269-270, *lv denied* 84 NY2d 1039).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see People v Velez*, 78 AD3d 1522, 1522; *see*

generally People v Bleakley, 69 NY2d 490, 495).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1054

CAF 13-02130

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

IN THE MATTER OF THOMAS CARDWELL,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JESSICA MIGHELLS, RESPONDENT-RESPONDENT.

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., OLEAN (JESSICA L. ANDERSON OF COUNSEL), FOR PETITIONER-APPELLANT.

MARK S. WILLIAMS, PUBLIC DEFENDER, OLEAN (DARRYL R. BLOOM OF COUNSEL), FOR RESPONDENT-RESPONDENT.

BRIDGET A. MCCUE-MARSHALL, ATTORNEY FOR THE CHILD, RANDOLPH.

Appeal from an order of the Family Court, Cattaraugus County (Ronald D. Ploetz, A.J.), entered August 21, 2013 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: Petitioner father commenced this Family Court Act article 6 proceeding seeking visitation with the parties' two-year-old daughter. Following a trial, Family Court dismissed the petition without prejudice to reapply for visitation upon the fulfillment of certain conditions, including completion of another sex offender risk assessment. We affirm.

"[T]he propriety of visitation is generally left to the sound discretion of Family Court[,] whose findings are accorded deference by this Court and will remain undisturbed unless lacking a sound basis in the record" (*Matter of Golda v Radtke*, 112 AD3d 1378, 1378 [internal quotation marks omitted]). Although we recognize the rebuttable presumption that visitation with the noncustodial parent is in the child's best interests (*see Matter of Granger v Misercola*, 21 NY3d 86, 90-91; *Matter of Cormier v Clarke*, 107 AD3d 1410, 1411, *lv denied* 21 NY3d 865), we also recognize the principle that the court "may deny visitation to parties that refuse to submit to examinations" (*Matter of Rogers v Fodor*, 307 AD2d 395, 396). Here, the record reflects that the father is a level one sex offender who was convicted of rape in the third degree for having sexual intercourse with the then-underage respondent mother and that the subject child is the product of the

rape. At trial, the father admitted that he failed to complete the court-ordered sex offender risk assessment. We thus conclude that the court was authorized to deny visitation (*see generally id.*). Additionally, the court's determination to deny the father visitation is supported by the father's failure to accept fault for the rape of the mother (*see Matter of Amparo B.T. [Carlos B.E.]*, 118 AD3d 809, 811-812; *see also Matter of Enrique T. v Annamarie M.*, 15 AD3d 310, 310-311; *Matter of Robbins v Albany County Dept. of Social Servs.*, 179 AD2d 908, 908-909). We thus see no basis to disturb the court's determination that visitation should be denied at this time.

Contrary to the father's further contention, the court did not abuse its discretion in ordering that he undergo another sex offender risk assessment before reapplying for visitation. "Family Court has the authority to order a sex-offender evaluation in order to determine [a party]'s proclivities toward such activity" (*Matter of Selena L.*, 289 AD2d 35, 37), particularly where, as here, "[t]he record establishes that . . . the court had a well-reasoned basis for ordering" such an evaluation (*Matter of Dylan L.*, 55 AD3d 1343, 1344). Although the father claimed that a prior assessment conducted by his ongoing treatment provider should have been an acceptable substitute for the court-ordered assessment, the court found that his ongoing treatment provider was not impartial and thus that the father's alleged prior assessment conducted by that treatment provider was insufficient. Deferring to "the court's firsthand assessment of the character and credibility" of the witnesses (*Matter of Thayer v Thayer*, 67 AD3d 1358, 1359), we conclude that the court did not abuse its discretion in ordering the father to undergo another sex offender risk assessment with an objective evaluator and " 'not one chosen by a party to the proceeding' " (*Matter of Armstrong v Heilker*, 47 AD3d 1104, 1106; *see Matter of Michelle A.*, 140 AD2d 604, 605).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1055

CAF 13-01255

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

IN THE MATTER OF SONYA GELSTER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TERRY BURNS, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

DOMINIC PAUL CANDINO, BUFFALO (JASON C. HENSKEE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered June 21, 2013 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition of Sonya Gelster for modification of an order of custody and visitation.

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

Memorandum: In appeal No. 1, Sonya Gelster, the petitioner in appeal No. 1 and the respondent in appeal No. 2 (hereafter, mother), appeals from an order granting the motion of Terry Burns, the respondent in appeal No. 1 and the petitioner in appeal No. 2 (hereafter, father), to dismiss her petition at the close of her proof. In her petition, the mother sought to modify a prior consent order, pursuant to which the parties had joint custody of the parties' son and the father had primary physical placement of him, by granting sole custody of the parties' son to her. In appeal No. 2, the mother appeals from an order granting the father's petition seeking to modify the prior consent order by granting sole custody to him.

We agree with the mother in appeal No. 1 that Family Court erred in dismissing the petition at that juncture of the proceeding. "Where, as here, 'a respondent moves to dismiss a modification proceeding at the conclusion of the petitioner's proof, the court must accept as true the petitioner's proof and afford the petitioner every favorable inference that could be reasonably drawn therefrom' " (*Matter of Walters v Francisco*, 63 AD3d 1610, 1611). Accepting the mother's proof as true, we conclude that she established that she successfully completed a substance abuse program and thus, in

accordance with a provision in the prior consent order, she satisfied the requisite significant change of circumstances to permit the court to consider whether a change of custody is in the best interests of the child (*see generally Matter of Moore v Moore*, 78 AD3d 1630, 1630-1631, *lv denied* 16 NY3d 704). Further, the mother and the child's maternal grandmother testified with respect to, inter alia, the marked change in the child's demeanor and behavior since residing with the father, and the mother presented evidence of a significant bruise on the child's back, which she believed was inconsistent with the child's explanation for the bruise. We therefore conclude that the court erred in failing to " 'afford the [mother] every favorable inference that could be reasonably drawn' " from the evidence presented by her (*Walters*, 63 AD3d at 1611).

Although the court erred in granting the father's motion to dismiss at the close of the mother's proof, here, the father presented evidence, on his petition, that refuted the mother's evidence, and the mother had an opportunity to cross-examine the father's witnesses (*cf. Matter of David WW. v Laureen QQ.*, 42 AD3d 685, 686). " 'Our authority in determinations of custody is as broad as that of Family Court' " (*Matter of Howell v Lovell*, 103 AD3d 1229, 1231) and, based upon our review of the entire record, we conclude that the mother failed to establish that it was in the best interests of the child to award sole custody to her (*see generally Matter of Brandyn P.*, 278 AD2d 533, 535). The father presented evidence that the mother had made numerous unfounded reports of alleged physical abuse of the child both to Child Protective Services and to the police. The father also presented evidence from a neighbor, who is a mandated reporter and who had a close relationship with the child, regarding the child's demeanor and behavior while living at the father's house. We therefore affirm the order denying the mother's petition in appeal No. 1.

We likewise affirm the order in appeal No. 2. The father testified that the parties are unable to communicate without acrimony, and that they communicate only through the maternal grandmother, or by letters carried by the child, or by counsel. The father's evidence mirrored the mother's evidence in that respect. Thus, the record supports the court's determination in appeal No. 2 that the acrimonious relationship of the parties warranted a change from joint custody to sole custody and that the best interests of the child would be served by awarding sole custody to the father (*see Matter of Leonard v Leonard*, 109 AD3d 126, 128; *Matter of Dube v Dube*, 259 AD2d 1041, 1041). We have reviewed the mother's remaining contention in appeal No. 2 and conclude that it is without merit.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1056

CAF 13-01256

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

IN THE MATTER OF TERRY BURNS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SONYA GELSTER, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

DOMINIC PAUL CANDINO, BUFFALO (JASON C. HENSKEE OF COUNSEL), FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered June 21, 2013 in a proceeding pursuant to Family Court Act article 6. The order granted sole custody of the child to Terry Burns.

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

Same Memorandum as in *Matter of Gelster v Burns* ([appeal No. 1] ___ AD3d ___ [Nov. 14, 2014]).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1057

CAF 13-00472

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

IN THE MATTER OF SAPPHIRE A.J.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ANGELICA J., RESPONDENT-APPELLANT.

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT.

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

RHIAN D. JONES, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered February 8, 2013 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child on the ground of permanent neglect and freed the child for adoption. Contrary to the mother's contention, petitioner established "by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between [the mother] and the child" (*Matter of Ja-Nathan F.*, 309 AD2d 1152, 1152; *see* § 384-b [3] [g] [i]; [7] [a]). "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child, providing services to the parent[] to overcome problems that prevent the discharge of the child into [his or her] care, and informing the parent[] of [the] child's progress" (*Matter of Jessica Lynn W.*, 244 AD2d 900, 900-901; *see* § 384-b [7] [f]). Here, the mother was in foster care at the time of the child's birth pursuant to a PINS order and, among other things, petitioner provided the mother with referrals to parenting classes and with placements that would give her the structured environment she needed.

Contrary to the further contention of the mother, Family Court properly determined that she failed to plan for the future of the child, although able to do so (*see Matter of Whytnei B. [Jeffrey B.]*,

77 AD3d 1340, 1341). The mother did not comply with her service plan, inasmuch as she did not engage in mental health counseling or parenting classes as recommended by petitioner. In addition, she fled her placements on numerous occasions, each time missing visits with the child.

Finally, the court did not abuse its discretion in refusing to enter a suspended judgment. The record supports the court's determination that a suspended judgment, i.e., "a brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Michael B.*, 80 NY2d 299, 311), was not in the best interests of the child (*see Matter of Alexander M. [Michael A.M.]*, 106 AD3d 1524, 1525). The mother's "negligible progress" in addressing the issues that initially necessitated the child's removal from her custody was " 'not sufficient to warrant any further prolongation of the child's unsettled familial status' " (*Alexander M.*, 106 AD3d at 1525).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1067

CA 14-00483

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

IN THE MATTER OF EXCELSIOR, PETITIONER-RESPONDENT,

V ORDER

ASSESSOR, TOWN OF AMHERST, ET AL., RESPONDENTS.

AMHERST CENTRAL SCHOOL DISTRICT,
INTERVENOR-APPELLANT.

HODGSON RUSS LLP, BUFFALO (JOSHUA FEINSTEIN OF COUNSEL), FOR INTERVENOR-APPELLANT.

WOLFGANG & WEINMANN, LLP, BUFFALO (PETER ALLEN WEINMANN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 3, 2013 in a proceeding pursuant to RPTL article 7. The order, inter alia, denied the motion of the Amherst Central School District to dismiss the petition.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 16 and 17, 2014,

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1068

TP 13-01627

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

IN THE MATTER OF WONDER WILLIAMS, PETITIONER,

V ORDER

HAROLD GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT.

WONDER WILLIAMS, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered September 4, 2013) 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 said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1069

TP 13-01806

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

IN THE MATTER OF WILLIE JAMES, PETITIONER,

V ORDER

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

WILLIE JAMES, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Thomas G. Leone, A.J.], entered September 27, 2013) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1070

TP 14-00598

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

IN THE MATTER OF JOEL O'KEEFE, 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.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered March 21, 2014) 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: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1071

KA 13-02112

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC EASTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered July 15, 2013. The judgment convicted defendant, upon his plea of guilty, of reckless endangerment in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of reckless endangerment in the first degree (Penal Law § 120.25). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver encompasses his challenge to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1073

KAH 13-00252

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
RENE PETERSON, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

PATRICIA E. LECONEY, SUPERINTENDENT, CAPE VINCENT
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment of the Supreme Court, Jefferson County (James P. McClusky, J.), entered September 24, 2012 in a habeas corpus proceeding. The judgment denied the petition.

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

Memorandum: Petitioner appeals from a judgment that denied his petition for a writ of habeas corpus. The appeal has been rendered moot by petitioner's release to parole supervision (*see People ex rel. Baron v New York State Dept. of Corrections*, 94 AD3d 1410, 1410, *lv denied* 19 NY3d 807), and the exception to the mootness doctrine does not apply (*see id.*; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715). Under the circumstances of this case, we decline to exercise our power to convert the habeas corpus proceeding into a CPLR article 78 proceeding (*see People ex rel. Keyes v Khahaifa*, 101 AD3d 1665, 1665, *lv denied* 20 NY3d 862).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1074

KA 10-02419

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAQUAN CRIMM, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered October 6, 2010. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree (two counts), assault in the first degree and grand larceny in the fourth degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following Memorandum: On appeal from a judgment convicting him upon his guilty plea of, inter alia, two counts of robbery in the first degree (Penal Law § 160.15 [1], [3]), defendant contends and the People correctly concede that County Court erred in failing to determine whether defendant, an eligible youth (*see* CPL 720.20 [1]), should be afforded youthful offender status. Pursuant to CPL 720.20 (1), the sentencing court must make "a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain" (*People v Rudolph*, 21 NY3d 497, 501; *see People v Scott*, 115 AD3d 1342, 1343; *People v Smith*, 112 AD3d 1334, 1334). Here, there was no mention during the plea proceeding or at sentencing whether defendant would be adjudicated a youthful offender. We therefore hold the case, reserve decision, and remit the matter to County Court to make and state for the record "a determination of whether defendant is a youthful offender" (*Rudolph*, 21 NY3d at 503).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1075

KA 13-00441

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RIAN T. SMITH, DEFENDANT-APPELLANT.

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

RIAN T. SMITH, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Niagara County Court (Angelo J. Morinello, A.J.), rendered November 29, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession 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 possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]). We reject defendant's contention that his waiver of the right to appeal was invalid. Here, County Court's plea colloquy and defendant's execution of a written waiver of the right to appeal demonstrate that defendant's " 'waiver of the right to appeal was a knowing and voluntary choice' " (*People v Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767; *see People v Kemp*, 255 AD2d 397, 397). In addition, we conclude that defendant was "adequately apprised . . . that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Buske*, 87 AD3d 1354, 1354, *lv denied* 18 NY3d 882 [internal quotation marks omitted]). We further conclude that defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lococo*, 92 NY2d 825, 827; *People v Raynor*, 107 AD3d 1567, 1568, *lv denied* 22 NY3d 1090).

To the extent that defendant contends in his main brief that defense counsel was ineffective for failing to challenge the search warrant, we note that such contention "does not survive [his] plea or [his] valid waiver of the right to appeal because [he] failed to demonstrate that the plea bargaining process was infected by [the]

allegedly ineffective assistance or that [he] entered the plea because of [his] attorney[’s] allegedly poor performance” (*People v Gleen*, 73 AD3d 1443, 1444, *lv denied* 15 NY3d 773 [internal quotation marks omitted]; *see People v Wright*, 66 AD3d 1334, 1334, *lv denied* 13 NY3d 912). To the extent that defendant contends in his pro se supplemental brief that the plea bargaining process was infected by defense counsel’s allegedly ineffective assistance, we further note that defendant’s specific claims, i.e., that defense counsel failed to investigate and failed to make a suppression motion, are “not properly before us because [they] involve[] matters outside the record on appeal and thus must be raised by way of a motion pursuant to CPL article 440” (*People v Monaghan*, 101 AD3d 1686, 1686, *lv denied* 23 NY3d 965; *see People v Johnson*, 81 AD3d 1428, 1428, *lv denied* 16 NY3d 896).

Finally, we reject defendant’s contention that the court erred in denying his motion to withdraw his guilty plea without an evidentiary hearing. “ ‘The decision to permit a defendant to withdraw a guilty plea rests in the sound discretion of the court’ ” (*People v Falaro*, 284 AD2d 972, 972; *see People v Burroughs*, 224 AD2d 1034, 1034, *lv denied* 88 NY2d 845), and where, as here, a defendant’s motion to withdraw is “patently insufficient on its face,” the court may summarily deny the motion (*People v Mitchell*, 21 NY3d 964, 967).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1076

KA 13-00991

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHNNY BOYDE, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MISHA A. COULSON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered February 15, 2011. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree, sexual abuse in the second degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law, the plea is vacated, and the matter is remitted to Onondaga County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [2]), sexual abuse in the second degree (§ 130.60 [2]), and endangering the welfare of a child (§ 260.10 [1]). Defendant contends that his plea should be vacated on the ground that it was coerced by County Court's statement that it would impose the maximum permissible sentence of imprisonment in the event defendant was convicted following a trial. As the People correctly concede, defendant's contention " 'survives [a] valid waiver of the right to appeal' " (*People v Zimmerman*, 100 AD3d 1360, 1362, *lv denied* 20 NY3d 1015; *see People v Sparcino*, 78 AD3d 1508, 1509, *lv denied* 16 NY3d 746). Although "[d]efendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve for our review his contention that his plea was coerced" (*People v Lando*, 61 AD3d 1389, 1389, *lv denied* 13 NY3d 746; *see People v Boyd*, 101 AD3d 1683, 1683), we exercise our power to review his contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). We agree with defendant that "the court's statement[] do[es] not amount to a description of the range of the potential sentences but, rather,[it] constitutes impermissible coercion, 'rendering the plea

involuntary and requiring its vacatur' " (*People v Flinn*, 60 AD3d 1304, 1305; *see People v Kelley*, 114 AD3d 1229, 1230).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1081

CA 13-01787

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

IN THE MATTER OF CHARLES VENTURA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered August 19, 2013 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition pursuant to CPLR article 78 in which he sought to annul the Parole Board's determination denying his request for release to parole supervision. "This appeal must be dismissed as moot because the determination expired during the pendency of this appeal, and the Parole Board denied petitioner's subsequent request for parole release" (*Matter of Patterson v Berbary*, 1 AD3d 943, 943, *appeal dismissed and lv denied* 2 NY3d 731; *see Matter of Robles v Evans*, 100 AD3d 1455, 1455). Contrary to petitioner's contention, the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1082

CA 14-00428

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

SHARELLE REYNOLDS, PLAINTIFF-APPELLANT,

V ORDER

RICHARD KELLY, BETTE KELLY AND MARK KELLY,
DEFENDANTS-RESPONDENTS.

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO ATHARI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOEGGEMAN, GEORGE & CORDE, P.C., ALBANY (PAUL A. HURLEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered December 9, 2013. The order denied plaintiff's motion for, inter alia, a protective order striking a certain report.

It is hereby ORDERED that said appeal is unanimously dismissed with costs (*see Pagan v Rafter*, 107 AD3d 1505, 1507).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1086

TP 14-00416

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

IN THE MATTER OF COUNTY OF ERIE AND ERIE COUNTY SHERIFF'S OFFICE, PETITIONERS,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND JOHN T. GALLIVAN, RESPONDENTS.
(PROCEEDING NO. 1.)

IN THE MATTER OF JOHN T. GALLIVAN, PETITIONER,

V

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND ERIE COUNTY SHERIFF'S OFFICE, RESPONDENTS.
(PROCEEDING NO. 2.)

WEBSTER SZANYI LLP, BUFFALO (JEREMY A. COLBY OF COUNSEL), FOR PETITIONERS IN PROCEEDING NO. 1 AND RESPONDENT ERIE COUNTY SHERIFF'S OFFICE IN PROCEEDING NO. 2.

LINDY KORN, BUFFALO, FOR RESPONDENT JOHN T. GALLIVAN IN PROCEEDING NO. 1 AND PETITIONER IN PROCEEDING NO. 2.

Proceedings pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Donna M. Siwek, J.], entered March 4, 2014) to review a determination of the New York State Division of Human Rights. The determination found that the Erie County Sheriff's Office did not unlawfully fail to accommodate the request of John T. Gallivan for accommodation for disability.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the petition and "cross petition" in proceeding No. 1 are granted to that extent, and the petition in proceeding No. 2 is dismissed.

Memorandum: The two proceedings herein arise from the same disability discrimination complaint filed by respondent-petitioner, John T. Gallivan, against petitioner-respondent Erie County Sheriff's Office (Sheriff's Office) and petitioner County of Erie (County), in which he alleged that they refused his request for reasonable accommodations. Gallivan, a deputy sheriff who worked in the Erie County Holding Center, alleged discrimination under the Americans with

Disabilities Act (42 USC § 12101 *et seq*.) and the New York State Human Rights Law (Executive Law § 296). By their petition and "cross petition" in proceeding No. 1 pursuant to Executive Law § 298 and CPLR article 78, the County and the Sheriff's Office sought, inter alia, to confirm the determination of the Commissioner of respondent New York State Division of Human Rights (SDHR) dismissing the disability discrimination complaint, and they also moved to transfer the matter to this Court. Gallivan filed the petition in proceeding No. 2 seeking, among other things, to annul the Commissioner's determination, and he also moved to transfer the matter to this Court. Supreme Court transferred the matter to this Court.

In order to succeed on his discrimination claim, Gallivan was required to demonstrate, among other things, that the County and the Sheriff's Office failed to make reasonable accommodations for his disability. "A reasonable accommodation is defined in relevant part as an action that permits an employee with a disability to perform his or her job activities in a reasonable manner" (*Matter of New Venture Gear, Inc. v New York State Div. of Human Rights*, 41 AD3d 1265, 1266 [internal quotation marks omitted]; *see* Executive Law § 292 [21-e]; *Matter of DiNatale v New York State Div. of Human Rights*, 77 AD3d 1341, 1342, *lv denied* 16 NY3d 711). Furthermore, a reasonable accommodation, "does not impose an 'undue hardship' on the employer's business" (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 834). "Thus, a proper . . . claim must be supported by substantiated allegations that, upon the provision of reasonable accommodations, [the employee] could perform the essential functions of [his or] her job, and the employee bears the burden of proof on this issue at trial" (*id.* [internal quotation marks omitted], quoting *Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 884; *see Matter of Abram v New York State Div. of Human Rights*, 71 AD3d 1471, 1473). When reviewing a determination of the Commissioner, this Court's scope of review is limited to whether the determination "is supported by substantial evidence in the record" (*Matter of State Div. of Human Rights [Granelle]*, 70 NY2d 100, 106). Here, we conclude that substantial evidence supports the Commissioner's determination that the accommodations requested by Gallivan were incompatible with the essential functions of his job, and thus we conclude that substantial evidence supports the Commissioner's determination to dismiss the disability discrimination complaint (*see generally id.*). Consequently, we grant the petition and the "cross petition" in proceeding No. 1 insofar as they seek to confirm the Commissioner's determination, and we dismiss the petition in proceeding No. 2.

In light of our determination, the remaining contentions of the County and the Sheriff's Office are moot.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1087

CA 13-01835

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

IRONWOOD, L.L.C. AND STEELWAY REALTY CORPORATION,
PLAINTIFFS-RESPONDENTS,

V ORDER

JGB PROPERTIES, LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

CAMARDO LAW FIRM, P.C., AUBURN (RAYMOND M. SCHLATHER OF COUNSEL), FOR DEFENDANT-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered July 25, 2013. The order, inter alia, vacated the stipulation and order dated May 2, 2011.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Debcon Fin. Servs., Inc. v 83-17 Broadway Corp.*, 61 AD3d 712, 714).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1088

CA 13-01837

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

IRONWOOD, L.L.C. AND STEELWAY REALTY CORPORATION,
PLAINTIFFS-RESPONDENTS,

V ORDER

JGB PROPERTIES, LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CAMARDO LAW FIRM, P.C., AUBURN (RAYMOND M. SCHLATHER OF COUNSEL), FOR DEFENDANT-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered July 25, 2013. The order and judgment, inter alia, awarded plaintiff Ironwood, L.L.C. compensatory damages in the amount of $141,572 together with costs and interest, against defendant.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Debcon Fin. Servs., Inc. v 83-17 Broadway Corp.*, 61 AD3d 712, 714).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1089

CA 14-00277

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

IRONWOOD, L.L.C. AND STEELWAY REALTY CORPORATION,
PLAINTIFFS-RESPONDENTS,

V ORDER

JGB PROPERTIES, LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

CAMARDO LAW FIRM, P.C., AUBURN (RAYMOND M. SCHLATHER OF COUNSEL), FOR DEFENDANT-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered January 23, 2014. The order denied defendant’s motion to dismiss.

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1091

CA 13-00011

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

IN THE MATTER OF DANIEL JONES,
PETITIONER-APPELLANT,

V ORDER

ERIE COUNTY CLERK'S OFFICE,
RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

DANIEL JONES, PETITIONER-APPELLANT PRO SE.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (JEREMY C. TOTH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), dated June 26, 2012. The order dismissed the proceeding for lack of personal jurisdiction.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1092

CA 13-00178

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

IN THE MATTER OF DANIEL JONES,
PETITIONER-APPELLANT,

V ORDER

ERIE COUNTY CLERK'S OFFICE,
RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

DANIEL JONES, PETITIONER-APPELLANT PRO SE.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (JEREMY C. TOTH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), dated October 31, 2012. The order granted the motion of petitioner for leave to reargue and, upon reargument, adhered to a prior order dismissing the proceeding for lack of personal jurisdiction.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1094

KA 11-02049

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE SYKES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 16, 2011. The appeal was held by this Court by order entered October 4, 2013, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (110 AD3d 1437). The proceedings were held and completed (M. William Boller, A.J.).

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

Memorandum: We previously held this case, reserved decision, and remitted the matter to Supreme Court to determine whether the police officer had a founded suspicion of criminal activity to justify his inquiry (*People v Sykes*, 110 AD3d 1437, 1438). Upon remittal, the court denied defendant's request for suppression, and we now affirm. The court properly concluded that the police officer developed a founded suspicion based upon defendant's inability to produce a vehicle registration or driver's license or any form of identification, his nervous and fidgety behavior, and his suspicious answers regarding his destination (*see People v McCarley*, 55 AD3d 1396, 1396-1397, *lv denied* 11 NY3d 899; *see also People v Garcia*, 20 NY3d 317, 322; *see generally People v Hollman*, 79 NY2d 181, 191-192; *People v De Bour*, 40 NY2d 210, 223). We reject defendant's contention that the police officer's testimony was "incredible" and "self-contradictory," and we conclude that the court's credibility determinations are entitled to deference (*see People v Prochilo*, 41 NY2d 759, 761; *People v Twillie*, 28 AD3d 1236, 1237, *lv denied* 7 NY3d 795). Finally, we reject defendant's contention that the court exceeded the scope of the remittal order. The court was required to "make findings of fact essential to the determination" whether the

police officer had the requisite founded suspicion (CPL 710.60 [4]).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1095

TP 14-00430

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

IN THE MATTER OF NATHANIEL C. PARARA, PETITIONER,

V MEMORANDUM AND ORDER

MICHELLE A. ARTUS, SUPERINTENDENT,
LIVINGSTON CORRECTIONAL FACILITY, RESPONDENT.

NATHANIEL C. PARARA, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (J. RICHARD BENITEZ 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, Livingston County [Dennis S. Cohen, A.J.], entered March 6, 2014) 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 so appealed from is unanimously modified on the law without costs, the petition is granted and respondent is directed to expunge from petitioner's institutional record all references to the violation of inmate rules 106.10 (7 NYCRR 270.2 [B] [7] [i]) and 118.30 (7 NYCRR 270.2 [B] [19] [viii]).

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul that part of the determination, following a tier II disciplinary hearing, that he violated inmate rules 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusing a direct order]) and 118.30 (7 NYCRR 270.2 [B] [19] [viii] [untidy cell]). We agree with petitioner that the determination that he violated those disciplinary rules is not supported by substantial evidence (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139), and we therefore modify the determination accordingly. "Although a misbehavior report may by itself constitute substantial evidence of guilt" (*Matter of Elder v Fischer*, 115 AD3d 1177, 1177; *see Vega*, 66 NY2d at 140), here the misbehavior report failed to establish that petitioner refused a direct order or that his cube was in any way untidy. There was likewise no evidence to that effect presented in the transcribed portions of the disciplinary hearing. At most, the evidence established that petitioner left property on top of his locker, the location of which was never disclosed. When petitioner thereafter questioned the absence of his property and received an unsatisfactory answer, he asked to speak with a sergeant. The misbehavior report alleges that, after he was told of

a delay in speaking with the sergeant, petitioner yelled that he wanted to see the sergeant immediately. At that point, petitioner was ordered "to go to his cube[] and be quiet[,] which he did." There is thus no evidence that petitioner refused a direct order or that his cube was untidy.

Based on our determination, we do not address petitioner's remaining contentions.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1096

KA 12-01463

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAMES F. O'DELL, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (ROBERT C. JEFFRIES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered August 24, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal sale of marihuana in the second degree.

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1097

KA 12-01464

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAMES F. O'DELL, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (ROBERT C. JEFFRIES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered August 24, 2011. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree (four counts) and endangering the welfare of a child.

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1098

KA 12-01465

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAMES F. O'DELL, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (ROBERT C. JEFFRIES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered August 24, 2011. The judgment convicted defendant, upon his plea of guilty, of rape in the second degree.

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1099

KA 12-00107

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID COLON, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (PATRICK J. MARTHAGE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered September 13, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal contempt in the first degree (Penal Law § 215.51 [b] [iii]), defendant challenges the validity of his waiver of the right to appeal. We conclude that "County Court did not improperly conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea" (*People v Bentley*, 63 AD3d 1624, 1625, *lv denied* 13 NY3d 742; *see People v Bradshaw*, 18 NY3d 257, 264; *People v Lopez*, 6 NY3d 248, 256), and that the record establishes that the court engaged defendant "in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Burt*, 101 AD3d 1729, 1730, *lv denied* 20 NY3d 1060 [internal quotation marks omitted]). Defendant's valid waiver encompasses his challenge to the severity of the sentence (*see generally People v Lococo*, 92 NY2d 825, 827).

Although defendant's contentions that his plea was coerced and that he is innocent survive the valid waiver of the right to appeal (*see People v Merritt*, 115 AD3d 1250, 1251; *People v Lewandowski*, 82 AD3d 1602, 1602), we conclude that those contentions are without merit. "The court was presented with a credibility determination when defendant moved to withdraw his plea and advanced his belated claims of innocence and coercion, and it did not abuse its discretion in discrediting those claims" (*People v Sparcino*, 78 AD3d 1508, 1509, *lv denied* 16 NY3d 746). Indeed, we conclude that "defendant's assertions

of innocence and coercion were conclusory and belied by defendant's statements during the plea colloquy" (*People v Wright*, 66 AD3d 1334, 1334, *lv denied* 13 NY3d 912; *see People v Allen*, 99 AD3d 1252, 1252).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1101

KA 13-01490

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW GOFORTH, DEFENDANT-APPELLANT.

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

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered June 10, 2013. The judgment convicted defendant, upon his plea of guilty, of assault in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the third degree (Penal Law § 120.00 [1]). By pleading guilty, defendant forfeited his contention that County Court should have dismissed the indictment because the prosecutor failed to introduce exculpatory evidence before the grand jury (*see People v Crumpler*, 70 AD3d 1396, 1397, *lv denied* 14 NY3d 839). Defendant's further contention that he was denied effective assistance of counsel "does not survive his plea of guilty inasmuch as '[t]here is no showing that the plea bargaining process was infected by any allegedly ineffective assistance or that defendant entered the plea because of his attorney[']s allegedly poor performance' " (*People v Fomby*, 42 AD3d 894, 895; *see People v Jackson*, 99 AD3d 1240, 1240, *lv denied* 20 NY3d 987).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1104

KA 13-00939

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRE N. JACKSON, DEFENDANT-APPELLANT.

DONALD R. GERACE, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered February 8, 2013. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of one count of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and two counts of criminal possession of a weapon in the third degree (§ 265.02 [1], [3]). To the extent that defendant contends on appeal that the conviction is not supported by legally sufficient evidence, we reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of the crimes in this bench trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). The People presented evidence that defendant was apprehended in proximity to the victim's body. The recently-fired revolver, which was defaced, was recovered within 100 feet of defendant within the secured crime scene, while defendant's shoes and socks were located within 13 feet of the secreted revolver. Furthermore, DNA evidence revealed that it was probable that defendant had handled the revolver. Although the recovered ammunition had a firing pin impression, the firearms examiner successfully discharged the revolver with the recovered ammunition on his first attempt. Thus, contrary to defendant's contention, we conclude that County Court could have reasonably inferred that, " 'at some point before the defendant's apprehension by the police and the concomitant recovery of the [defaced revolver], he possessed a firearm loaded with operable ammunition' " (*People v*

Taylor, 83 AD3d 1505, 1506, *lv denied* 17 NY3d 822; *see People v Cavines*, 70 NY2d 882, 883).

Although defendant challenges the sufficiency of the evidence before the grand jury, we note that such a challenge is not properly before us. It is well settled that such a challenge is "not reviewable on this appeal from the ensuing judgment based upon legally sufficient trial evidence" (*People v Edgeston*, 90 AD3d 1535, 1535-1536, *lv denied* 19 NY3d 973; *see* CPL 210.30 [6]). Finally, contrary to defendant's further contention, we conclude that defendant's sentence is not unduly harsh or severe.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1112

CA 14-00644

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

DORIS PIM, PLAINTIFF-APPELLANT,

V ORDER

SISTERS OF CHARITY HOSPITAL, ST. JOSEPH'S CAMPUS, DEFENDANT-RESPONDENT.

MUSCATO & SHATKIN, LLP, BUFFALO (MARC SHATKIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (DAVID M. STILLWELL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), dated November 26, 2013. The order, insofar as appealed from, granted the motion of defendant for summary judgment dismissing the complaint.

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1118

OP 14-00510

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

IN THE MATTER OF ROSCOE A. EISENHAUER, JR.,
PETITIONER,

V MEMORANDUM AND ORDER

COUNTY OF JEFFERSON, RESPONDENT.

EISENHAUER LAW FIRM, WATERTOWN (ROSCOE A. EISENHAUER, JR., OF COUNSEL), FOR PETITIONER.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (JULIAN B. MODESTI OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to EDPL 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to annul a determination of respondent to condemn certain real property by eminent domain.

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

Memorandum: Petitioner commenced this proceeding pursuant to EDPL 207, seeking judicial review of respondent's determination to condemn certain real property for the purpose of expanding a runway at a public airport. Preliminarily, we note that "[t]he 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, *appeal dismissed* 22 NY3d 1165, *lv denied* 23 NY3d 905 [internal quotation marks omitted]).

We reject petitioner's contention that respondent failed to demonstrate that an actual public use, benefit, or purpose will be served by the proposed taking. "A 'public use, benefit or purpose' must exist to warrant the exercise of the power of eminent domain (EDPL 204 [B] [1])" (*Matter of Syracuse Univ. v Project Orange Assoc. Servs. Corp.*, 71 AD3d 1432, 1433, *appeal dismissed and lv denied* 14 NY3d 924), and " '[w]hat 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' " (*id.*). " 'Whether a use to which property is to be devoted by a condemnor is, in fact, for the public benefit is a question to be determined by

[this] [C]ourt[] based on the record' " (*id.*), and on these facts we conclude that the taking is for the public benefit.

We also reject petitioner's contention that the taking is excessive, both in volume and in nature. " 'While it is well established that a condemnor cannot take, by use of the power of eminent domain, property not necessary to fulfill the public purpose, it is generally accepted that the condemnor has broad discretion in deciding what land is necessary to fulfill that purpose' " (*Matter of Doyle v Schuylerville Cent. Sch. Dist.*, 35 AD3d 1058, 1059, *lv denied* 9 NY3d 804, *rearg denied* 9 NY3d 939; *see Hallock v State of New York*, 32 NY2d 599, 605). On this record, we conclude that respondent neither abused nor improvidently exercised its discretion in determining the scope of the taking (*see Matter of Butler v Onondaga County Legislature*, 39 AD3d 1271, 1272).

Finally, petitioner contends that respondent failed to comply with EDPL 207 (4) and article 8 of the Environmental Conservation Law ([SEQRA] State Environmental Quality Review Act). " 'Judicial review of a lead agency'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 an abuse of discretion" ' (*Akpan v Koch*, 75 NY2d 561, 570 [1990], quoting CPLR 7803 [3]). 'In assessing an agency's compliance with the substantive mandates of the statute, the courts must "review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" ' (*id.*, quoting *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]" (*Matter of Chinese Staff & Workers' Assn. v Burden*, 19 NY3d 922, 924; *see Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 688). Applying those rules here, we reject petitioner's instant contention (*see generally Matter of Hartford/North Bailey Homeowners Assn. v Zoning Bd. of Appeals of Town of Amherst*, 63 AD3d 1721, 1723-1724, *lv denied in part and dismissed in part* 13 NY3d 901).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1119

CA 14-00636

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

CATTARAUGUS COUNTY BANK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COREY W. BROWN AND GREEN GABLE VILLAGE, LIMITED, DEFENDANTS-RESPONDENTS.

GOODELL & RANKIN, JAMESTOWN (KIMBERLY M. THRUN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

R. MICHAEL GOLDMAN, JAMESTOWN, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered July 22, 2013. The order denied plaintiff's motion for summary judgment in lieu of complaint.

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

Memorandum: Plaintiff appeals from an order that denied its motion for summary judgment in lieu of complaint pursuant to CPLR 3213. We reverse. Plaintiff met its initial burden by submitting the promissory note, the unconditional guarantee of defendant Green Gable Village, Limited, and evidence of defendant Corey W. Brown's default on the note (*see Counsel Fin. Servs., LLC v David McQuade Leibowitz, P.C.*, 67 AD3d 1483, 1484; *LaMar v Vasile* [appeal No. 4], 49 AD3d 1218, 1219), and defendants failed to raise a triable issue of fact. Defendants' conclusory, unsubstantiated and irrelevant allegations that the promissory note was to be paid in full by the purchaser of the real property securing the note are insufficient to defeat the motion (*see generally Quadrant Mgt. Inc. v Hecker*, 102 AD3d 410, 410-411).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1122

KA 09-02340

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE C. RAINEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered March 18, 2009. The appeal was held by this Court by order entered October 4, 2013, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (110 AD3d 1464). The proceedings were held and completed (Douglas A. Randall, J.).

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

Memorandum: We previously held this case, reserved decision, and remitted the matter to County Court to determine, in the context of defendant's contention that the court erred in denying his suppression motion, "whether the police engaged in a pursuit and if so, whether that pursuit was legal" (*People v Rainey*, 110 AD3d 1464, 1466). Upon remittal, the court found that the police officers were not in pursuit of defendant when he discarded the drugs, and we now affirm. The court properly concluded that the police officers were engaged in mere observation, which does not require reasonable suspicion (*see People v Howard*, 50 NY2d 583, 592, *cert denied* 449 US 1023). The testimony at the suppression hearing established that defendant's freedom of movement was not restricted because the police officer who followed defendant did not draw his gun, did not prevent defendant from moving, and did not give any verbal commands to defendant until *after* defendant dropped the plastic bag containing drugs (*see People v Bora*, 83 NY2d 531, 535-536; *Howard*, 50 NY2d at 592).

Defendant's sentence is not unduly harsh or severe.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1123

TP 14-00596

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

IN THE MATTER OF ROY TARBELL, PETITIONER,

V ORDER

B. MCAULIFFE, DEPUTY SUPERINTENDENT OF SECURITY, CAPE VINCENT CORRECTIONAL FACILITY, RESPONDENT.

ROY TARBELL, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, 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, Jefferson County [James P. McClusky, J.], entered December 4, 2013) 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).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1125

KA 13-00624

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHARON L. FRYSINGER, DEFENDANT-APPELLANT.

RICHARD C. ROXIN, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JAMES P. MILLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered October 19, 2012. The judgment convicted defendant, upon her plea of guilty, of unlawfully dealing with a child in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of unlawfully dealing with a child in the first degree (Penal Law § 260.20 [2]). As we concluded on the appeal of defendant's husband and codefendant (*People v Frysinger*, 111 AD3d 1397), County Court erred in denying defendant's motion to vacate her guilty plea insofar as it challenged the factual sufficiency of the plea allocution (*see People v Lopez*, 71 NY2d 662, 665). "Defendant was expressly charged with the act of providing alcoholic beverages to persons under 21 years of age, but during the brief factual colloquy at the plea proceeding [s]he never admitted that [s]he provided alcohol" (*Frysinger*, 111 AD3d at 1398). In view of our decision, we do not address defendant's remaining contentions.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1126

KA 12-01690

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYREEK WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered July 2, 2012. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. Although the record establishes that defendant knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), we conclude that the valid waiver of the right to appeal does not encompass the challenge to the severity of the sentence inasmuch as Supreme Court failed to advise defendant of the potential periods of incarceration or the potential maximum term of incarceration (*see People v Newman*, 21 AD3d 1343, 1343; *People v McLean*, 302 AD2d 934, 934; *cf. People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1128

KA 14-00432

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

CHARLES MICHAEL ENRIGHT, DEFENDANT-RESPONDENT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH MERVINE OF COUNSEL), FOR APPELLANT.

STEPHEN M. LEONARDO, ROCHESTER (MICHAEL S. STEINBERG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Monroe County Court (Douglas A. Randall, J.), entered May 28, 2013. The order granted defendant's motion to suppress the results of the chemical test of defendant's blood.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and on the facts, the motion is denied, and the matter is remitted to Monroe County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order granting defendant's motion to suppress the results of a chemical test of defendant's blood, which had been taken from defendant more than two hours after his arrest (*see generally* Vehicle and Traffic Law § 1194 [2] [a] [1]). The motion was made on May 21, 2013, more than 45 days after defendant's arraignment on February 14, 2013, and was therefore untimely as a matter of law (*see* CPL 255.20 [1]). We conclude that County Court abused its discretion in entertaining and granting the untimely motion because there was no good cause shown by defendant for an extension of time (*see* CPL 255.20 [3]; *see generally People v Lawrence*, 64 NY2d 200, 206; *People v Cimino*, 49 AD3d 1155, 1156, *lv denied* 10 NY3d 861). Contrary to the court's determination that it should or could in its discretion entertain the motion because defendant did not learn of the time of the arrest until a *Mapp* hearing on May 10, 2013, we note that the discovery packet provided to defendant by the People on March 5, 2013 showed the time of defendant's arrest, thereby providing him with a basis for moving to suppress the blood test results within 45 days of arraignment.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1139

KA 13-00264

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERAD STALKER, DEFENDANT-APPELLANT.

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

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered January 14, 2013. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree and petit larceny (two counts).

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, burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that he was deprived of a fair trial by the improper admission of rebuttal testimony and the failure of County Court to give the jury a limiting instruction with respect to the use of such testimony. The rebuttal testimony concerned a statement made by defendant to a State Trooper regarding property stolen during the burglary. We note at the outset that, by failing to seek a ruling with respect to the statement at issue or to object to its admission at trial, defendant abandoned any contention that the statement should have been suppressed (*see People v Adams*, 90 AD3d 1508, 1509, *lv denied* 18 NY3d 954; *People v Nix*, 78 AD3d 1698, 1699, *lv denied* 16 NY3d 799, *cert denied* ___ US ___, 132 S Ct 157). Defendant failed to preserve for our review his further contentions that the statement was improperly admitted in evidence as an admission (*see generally People v Broadus*, 8 AD3d 398, 398, *lv denied* 3 NY3d 657), and that the court erred in failing to give a limiting instruction with respect to its use (*see* CPL 470.05 [2]; *People v Portis*, 141 AD2d 773, 773-774, *lv denied* 72 NY2d 913). 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]). In addition, we conclude that defendant was not denied effective assistance of counsel based upon defense counsel's failure to move to suppress the statement to the Trooper (*see People v De Mauro*, 48 NY2d

892, 893-894), or to request a limiting instruction with respect to that statement (*see People v VanDemps*, 118 AD3d 1146, 1148, *lv denied* 23 NY3d 1061).

Defendant also failed to preserve for our review his contentions that the evidence is not legally sufficient to support the conviction (*see People v Gray*, 86 NY2d 10, 19), and that he was deprived of a fair trial by the prosecutor's allegedly improper remarks during summation (*see People v James*, 114 AD3d 1202, 1206-1207, *lv denied* 22 NY3d 1199). 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]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We further conclude that the court's *Sandoval* ruling did not constitute an abuse of discretion (*see People v Stevens*, 109 AD3d 1204, 1205, *lv denied* 23 NY3d 1043). Finally, the sentence is not unduly harsh or severe.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1142

CA 13-01283

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

IN THE MATTER OF BERNICE MALCOLM,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF LABOR UNEMPLOYMENT INSURANCE BOARD'S ADMINISTRATIVE LAW JUDGE SECTION, ADMINISTRATIVE LAW JUDGE ANNETTE GAUL, IN HER OFFICIAL CAPACITY AND INDIVIDUALLY, NEW YORK STATE DIVISION OF HUMAN RIGHTS, HONEOYE FALLS-LIMA CENTRAL SCHOOL DISTRICT, MICHELLE KAVANAUGH, IN HER OFFICIAL CAPACITY AS SUPERINTENDENT OF SCHOOLS AND INDIVIDUALLY, AND WAYNE A. VANDER BYL, IN HIS OFFICIAL CAPACITY AS SCHOOL ATTORNEY AND INDIVIDUALLY,
RESPONDENTS-RESPONDENTS.

BERNICE MALCOLM, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF LABOR UNEMPLOYMENT INSURANCE BOARD'S ADMINISTRATIVE LAW JUDGE SECTION, AND ADMINISTRATIVE LAW JUDGE ANNETTE GAUL, IN HER OFFICIAL CAPACITY AND INDIVIDUALLY.

HARTER SECREST & EMERY LLP, BUFFALO (ROBERT C. WEISSFLACH OF COUNSEL), FOR RESPONDENTS-RESPONDENTS HONEOYE FALLS-LIMA CENTRAL SCHOOL DISTRICT, MICHELLE KAVANAUGH, IN HER OFFICIAL CAPACITY AS SUPERINTENDENT OF SCHOOLS AND INDIVIDUALLY, AND WAYNE A. VANDER BYL, IN HIS OFFICIAL CAPACITY AS SCHOOL ATTORNEY AND INDIVIDUALLY.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), entered September 6, 2012 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 vacate the determination of respondent New York State Division of Human Rights (SDHR), which had dismissed her discrimination complaint against, inter alia, respondent New York State Department of Labor (DOL), for lack of jurisdiction. We

conclude that Supreme Court's dismissal of the petition was not arbitrary or capricious (*see Matter of Stoudymire v New York State Div. of Human Rights*, 109 AD3d 1096, 1096, *affg for reasons stated* 36 Misc 3d 919, 920-921; *cf. Matter of Scopelliti v Town of New Castle*, 210 AD2d 339, 339-340). DOL "was not petitioner's employer. Nor is it an employment agency or a labor organization. Therefore, section 296 of the Executive Law is inapplicable and [the SDHR] has no jurisdiction over the matters alleged in the complaint" (*State Div. of Human Rights v New York State Dept. of Labor, Unemployment Ins. Div.*, 84 AD2d 961, 961-962).

Contrary to petitioner's contention, respondents were not required to move pursuant to CPLR 3211 to dismiss the petition. This is a CPLR article 78/Executive Law § 298 special proceeding to review the determination of the SDHR (*see Matter of Kaplan v New York State Div. of Human Rights*, 95 AD3d 1120, 1122-1123), and therefore the court was permitted to make a summary determination upon the pleadings to the extent that no triable issues of fact were raised (*see* CPLR 409 [b]), without the need for a CPLR 3211 motion. We have reviewed petitioner's remaining contentions and conclude that they are without merit or not properly before us.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1143

CA 14-00508

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

SHANA FUENTES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KEITH A. HOFFMAN, ET AL., DEFENDANTS,
MARIO BEVIVINO AND ANTONIA BEVIVINO,
DEFENDANTS-RESPONDENTS.

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO ATHARI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BAILEY, KELLEHER & JOHNSON, P.C., ALBANY (MARC J. KAIM OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered January 10, 2014. The order denied the motion of plaintiff for leave to reargue and renew the motion of defendants Mario Bevivino and Antonia Bevivino to dismiss the complaint against them.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: On a prior appeal, we held that Supreme Court properly granted the motion of Mario Bevivino and Antonia Bevivino (defendants) pursuant to CPLR 3215 (c) to dismiss the complaint against them as abandoned (*Fuentes v Hoffman*, 118 AD3d 1324). Plaintiff thereafter moved for leave to reargue or to renew that motion (*see* CPLR 2221 [d], [e]) and, alternatively, for vacatur of the court's dismissal order on the ground that it had been procured by fraud, misrepresentation, or other misconduct of defendants' attorney (*see* CPLR 5015 [a] [3]). The court denied the motion. As a preliminary matter, we note that the appeal from the order insofar as it denied that branch of plaintiff's motion seeking leave to reargue must be dismissed because "no appeal lies from an order denying leave to reargue" (*Hill v Milan*, 89 AD3d 1458, 1458).

We conclude that the court properly denied that branch of the motion seeking leave to renew. "A motion for leave to renew 'shall be based upon new facts not offered on the prior [application] that would change the prior determination' (CPLR 2221 [e] [2]), and 'shall contain reasonable justification for the failure to present such facts on the prior [application]' (CPLR 2221 [e] [3])" (*Doe v North*

Tonawanda Cent. Sch. Dist., 91 AD3d 1283, 1284; *see Jones v City of Buffalo Sch. Dist.*, 94 AD3d 1479, 1479). We conclude that plaintiff failed to establish that her purported new facts were not in existence at the time of the prior motion, and that she also did not meet her burden of setting forth a reasonable justification for the failure to present such facts on the prior motion (*see generally DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 120 AD3d 909, 910; *Chiappone v William Penn Life Ins. Co. of N.Y.*, 96 AD3d 1627, 1627).

We further conclude that the court properly denied plaintiff's alternative request for relief pursuant to CPLR 5015 (a) (3) (*see generally Matter of Wagner*, 114 AD3d 1235, 1237; *Abbott v Crown Mill Restoration Dev., LLC*, 109 AD3d 1097, 1100). Finally, we have considered plaintiff's remaining contention, and we conclude that it is without merit.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1145

CA 14-00774

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

JULIO ESPAILLAT, CLAIMANT-RESPONDENT,

V ORDER

ERIE COUNTY MEDICAL CENTER CORPORATION,
RESPONDENT-APPELLANT.

RICOTTA & VISCO, BUFFALO (FRANK C. CALLOCCHIA OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered July 1, 2013. The order granted the application of claimant for leave to serve a late notice of claim.

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1147

CA 14-00377

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

BRITT BIRD, PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

GEICO GENERAL INSURANCE COMPANY,
DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

LAW OFFICES OF WAYNE C. FELLE, P.C., WILLIAMSVILLE (ELIZABETH A. BRUCE OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (LAUREN M. YANNUZZI OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered May 22, 2013. The order, inter alia, granted in part the motion of plaintiff for leave to amend her complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 16, 2014,

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1148

CA 14-00378

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

BRITT BIRD, PLAINTIFF-APPELLANT,

V ORDER

GEICO GENERAL INSURANCE COMPANY,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

LAW OFFICES OF WAYNE C. FELLE, P.C., WILLIAMSVILLE (ELIZABETH A. BRUCE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (LAUREN M. YANNUZZI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered July 24, 2013. The order denied the motion of plaintiff for leave to renew her motion for leave to amend her complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 16, 2014,

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1151

CA 14-00591

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

IN THE MATTER OF THE ARBITRATION BETWEEN
METLIFE INSURANCE COMPANY,
PETITIONER-APPELLANT,

AND ORDER

CHRISTINA COLOSIMO, RESPONDENT-RESPONDENT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ROBERT E. SCOTT OF COUNSEL), FOR PETITIONER-APPELLANT.

WILLIAM K. MATTAR, P.C., WILLIAMSVILLE (CHERYL M. REED OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered December 18, 2013 in a proceeding pursuant to CPLR article 75. The order, among other things, granted respondent's cross motion to confirm an arbitration award.

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1153

KA 11-00966

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVAN DARK, ALSO KNOWN AS MIKE,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered April 11, 2011. The appeal was held by this Court by order entered March 15, 2013, decision was reserved and the matter was remitted to Erie County Court for further proceedings (104 AD3d 1158). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). We previously held the case, reserved decision and remitted the matter to County Court to rule on defendant's request for a *Wade* hearing with respect to the identification procedures referenced in the People's CPL 710.30 notice (*People v Dark*, 104 AD3d 1158, 1159). Upon remittal, the court concluded that defendant had withdrawn his request for a *Wade* hearing, and defendant now contends that defense counsel was ineffective for withdrawing that request. We reject that contention.

An attorney's "failure to 'make a motion or argument that has little or no chance of success' " does not amount to ineffective assistance (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Here, two undercover officers were involved in the purchase of narcotics from defendant on February 4, 2010. Defendant was not arrested at that time, but he was arrested for a different offense on March 3, 2010. One of the two undercover officers involved in the February 4, 2010 transaction went to the scene of defendant's March 3, 2010 arrest and, while at the

scene, that officer used binoculars to identify defendant, who was handcuffed in the back of a police vehicle less than 50 feet away. The People correctly concede that such identification was not merely confirmatory (*see People v Newball*, 76 NY2d 587, 592), but even assuming, arguendo, that defense counsel could have established suggestiveness of the identification procedure, we agree with the People that defense counsel could have concluded that there was an independent source for the identification of defendant by the subject undercover officer at trial (*see People v Claitt*, 222 AD2d 1038, 1038-1039, *lv denied* 88 NY2d 982; *see generally People v Chipp*, 75 NY2d 327, 335, *cert denied* 498 US 833). Specifically, during the February 4, 2010 transaction, the interaction between the subject undercover officer and defendant lasted for about 10 minutes, and the subject undercover officer was only 2½ feet away from defendant when the transaction occurred (*see People v Maryon*, 20 AD3d 911, 912, *lv denied* 5 NY3d 854; *Claitt*, 222 AD2d at 1038-1039; *see generally People v Bell*, 286 AD2d 940, 940-941, *lv denied* 97 NY2d 654; *People v Quinitchett*, 210 AD2d 438, 439, *lv denied* 85 NY2d 942; *People v Rowan*, 199 AD2d 546, 547, *lv denied* 83 NY2d 810; *People v Buchanon*, 186 AD2d 864, 866, *lv denied* 81 NY2d 785, *reconsideration denied* 81 NY2d 882). We therefore conclude that any attempt by defense counsel to suppress the identification of defendant by the subject undercover officer through a *Wade* hearing would have failed, and that defense counsel thus was not ineffective (*see Caban*, 5 NY3d at 152; *People v Smith*, 118 AD3d 1492, 1493). We have considered defendant's remaining contention and conclude that it is without merit.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1154

TP 14-00469

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

IN THE MATTER OF LATIQUE JOHNSON, PETITIONER,

V MEMORANDUM AND ORDER

ALBERT PRACK, DIRECTOR, SPECIAL HOUSING/INMATE DISCIPLINARY, RESPONDENT.

LATIQUE JOHNSON, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Thomas G. Leone, A.J.], entered March 6, 2014) 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 annulled on the law without costs and the matter is remitted to respondent for a new hearing.

Memorandum: In this CPLR article 78 proceeding, petitioner seeks to annul respondent's determination, following a tier III disciplinary hearing, that petitioner violated inmate rules 104.11 (7 NYCRR 270.2 [B] [5] [ii] [violent conduct]); 104.13 (7 NYCRR 270.2 [B] [5] [iv] [creating a disturbance]); 105.13 (7 NYCRR 270.2 [B] [6] [iv] [gangs]); and 105.14 (7 NYCRR 270.2 [B] [6] [v] [unauthorized organizations]). We note at the outset that, contrary to petitioner's contention, the determination is supported by substantial evidence (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139). We agree with petitioner, however, that he was denied the right to call witnesses.

Generally, an inmate has a conditional right to call witnesses at a prison disciplinary hearing when doing so does not threaten institutional safety or correctional goals (*see Matter of Santiago v Fischer*, 76 AD3d 1127, 1127; *Matter of Alvarez v Goord*, 30 AD3d 118, 119). Here, as respondent correctly concedes, the Hearing Officer violated petitioner's right to call witnesses as provided in the regulations (*see* 7 NYCRR 254.5; *see generally Matter of Barnes v LeFevre*, 69 NY2d 649, 650). Although petitioner seeks expungement, he is not entitled to that relief at this juncture. Where, as here, "a

good faith reason for the denial appears on the record, this amounts to a regulatory violation" rather than a violation of petitioner's constitutional rights, "requiring that the matter be remitted for a new hearing" (*Matter of Morris-Hill v Fischer*, 104 AD3d 978, 978; *see Santiago*, 76 AD3d at 1127). We therefore annul the determination and remit the matter to respondent for a new hearing.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1155

KA 11-02314

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

RASHOD JOHNSON, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (DAVID A. COOKE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered July 19, 2010. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of rape in the first degree (Penal Law § 130.35 [1]), defendant contends that his waiver of the right to appeal is invalid because it was not knowingly, voluntarily, and intelligently entered. We reject that contention. The record establishes that County Court engaged defendant " 'in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Ripley*, 94 AD3d 1554, 1554, *lv denied* 19 NY3d 976), and "that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256; *see People v Korber*, 89 AD3d 1543, 1543, *lv denied* 19 NY3d 864). We conclude that defendant's "responses during the plea colloquy and his execution of a written waiver of the right to appeal establish that he intelligently, knowingly, and voluntarily waived his right to appeal" (*People v Rumsey*, 105 AD3d 1448, 1449, *lv denied* 21 NY3d 1019; *see generally Lopez*, 6 NY3d at 256), and that valid waiver forecloses any challenge by defendant to the severity of his bargained-for sentence (*see Lopez*, 6 NY3d at 256).

We reject the further contention of defendant that his plea was not knowingly, intelligently, and voluntarily entered and thus that the court erred in denying his motion to withdraw his plea. "Permission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of discretion unless there is some evidence of

innocence, fraud, or mistake in inducing the plea" (*People v Robertson*, 255 AD2d 968, 968, *lv denied* 92 NY2d 1053; *see People v Zimmerman*, 100 AD3d 1360, 1361, *lv denied* 20 NY3d 1015). We perceive no abuse of discretion here. Defendant's claims that he did not "understand this legal proceeding stuff" and that he "didn't really want to take this plea" are belied by his statements during the plea proceeding (*see People v Leach*, 119 AD3d 1429, 1429; *People v Lewicki*, 118 AD3d 1328, 1329, *lv denied* 23 NY3d 1064). The record establishes that "defendant knowingly and intelligently, with neither 'confusion' nor 'coercion' present . . . , and with a full opportunity to assess the advantages and disadvantages of a plea versus a trial . . . , made his election" (*People v Pearson*, 55 AD2d 685, 687).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1156

KA 14-00677

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN C. SMITH, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (GREGORY A. KILBURN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (MARSHALL A. KELLY OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Wyoming County Court (Mark H. Dadd, J.), dated July 17, 2013. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We reject defendant's contention that County Court erred in denying his request for a downward departure from his presumptive risk level. A departure from the presumptive risk level is warranted if there is "an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006] [Guidelines]). "A defendant seeking a downward departure has the initial burden of '(1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence' " (*People v Watson*, 95 AD3d 978, 979; *see People v Gillotti*, 23 NY3d 841, 861; *People v Worrell*, 113 AD3d 742, 742-743). "A sex offender's successful showing by a preponderance of the evidence of facts in support of an appropriate mitigating factor does not automatically result in the relief requested, but merely opens the door to the SORA court's exercise of its sound discretion upon further examination of all relevant circumstances" (*Worrell*, 113 AD3d at 743 [internal quotation marks omitted]). Although defendant correctly contends that the Guidelines recognize that "[a]n offender's response to treatment, if exceptional,

can be the basis for a downward departure" (Guidelines, at 17), we note that the Guidelines are merely permissive. Even assuming, arguendo, that defendant established facts that his response to treatment was exceptional so as to warrant a downward departure, we conclude upon examining all of the relevant circumstances that the court providently exercised its discretion in denying defendant's request for a downward departure (*see Worrell*, 113 AD3d at 743).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1158

KA 13-01484

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ROBERT W. MILLER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered March 22, 2013. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1160

KA 12-01812

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MIKEL R. ODLE, DEFENDANT-APPELLANT.

THE GLENNON LAW FIRM, P.C., ROCHESTER (PETER J. GLENNON OF COUNSEL), FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered June 8, 2012. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree, attempted murder in the first degree and reckless endangerment in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), defendant contends that he did not knowingly, voluntarily and intelligently waive his right to appeal. We reject that contention. Defendant waived his right to appeal both orally and in writing, and we conclude that defendant's "responses during the plea colloquy and his execution of a written waiver of the right to appeal establish that he intelligently, knowingly, and voluntarily waived his right to appeal" (*People v Rumsey*, 105 AD3d 1448, 1449, *lv denied* 21 NY3d 1019).

Defendant further contends that his plea was not knowingly, voluntarily, and intelligently entered and thus that County Court erred in denying his motion to withdraw his plea. We reject that contention. "Permission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea" (*People v Robertson*, 255 AD2d 968, 968, *lv denied* 92 NY2d 1053; *see People v Garner*, 86 AD3d 955, 955). We perceive no abuse of discretion here. Defendant's assertions that he was "threatened" and "coerced" into accepting the plea are belied by his statements during the plea proceeding (*see People v McNew*, 117 AD3d 1491, 1492; *People v Witkop*, 114 AD3d 1242, 1243, *lv denied* 23 NY3d 1069). Moreover, "[t]he fact

that defendant may have pleaded guilty to avoid receiving a harsher sentence does not render his plea coerced" (*People v Villone*, 302 AD2d 866, 866, *lv denied* 4 NY3d 768; *see People v Zimmerman*, 100 AD3d 1360, 1362, *lv denied* 20 NY3d 1015). Defendant's challenge to the sufficiency of the plea allocution is encompassed by his valid waiver of the right to appeal (*see People v Rosado*, 70 AD3d 1315, 1316, *lv denied* 14 NY3d 892). In any event, defendant also failed to preserve that challenge for our review by moving to withdraw his plea on that ground, and the narrow exception to the preservation doctrine does not apply here (*see People v Smith*, 43 AD3d 474, 475, *lv denied* 9 NY3d 1009; *People v Anaya*, 8 AD3d 33, 33, *lv denied* 3 NY3d 670).

Finally, defendant contends that he was denied effective assistance of counsel. To the extent that defendant's contention survives his guilty plea and valid waiver of the right to appeal (*see People v Strickland*, 103 AD3d 1178, 1178), we conclude that it lacks merit. The record establishes that defendant "receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1165

CAF 13-00738

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

IN THE MATTER OF BONNIE A. WILL,
PETITIONER-APPELLANT,

V ORDER

JEFFREY M. ZDROJEWSKI, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

TRIGILIO CIAMBRONE PARTNERSHIP, BUFFALO (ELIZABETH J. CIAMBRONE OF COUNSEL), FOR PETITIONER-APPELLANT.

J. ADAMS AND ASSOCIATES, PLLC, WILLIAMSVILLE (JOAN CASILIO ADAMS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

CATHERINE E. NAGEL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered March 20, 2013 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 8, 2014,

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1166

CAF 13-00739

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

IN THE MATTER OF BONNIE A. WILL,
PETITIONER-APPELLANT,

V ORDER

JEFFREY M. ZDROJEWSKI, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

TRIGILIO CIAMBRONE PARTNERSHIP, BUFFALO (ELIZABETH J. CIAMBRONE OF COUNSEL), FOR PETITIONER-APPELLANT.

J. ADAMS AND ASSOCIATES, PLLC, WILLIAMSVILLE (JOAN CASILIO ADAMS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

CATHERINE E. NAGEL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered April 11, 2013 in a proceeding pursuant to Family Court Act article 6. The order determined the petition withdrawn.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 8, 2014,

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1167

CAF 13-00740

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

IN THE MATTER OF BONNIE A. WILL,
PETITIONER-APPELLANT,

V ORDER

JEFFREY M. ZDROJEWSKI, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

TRIGILIO CIAMBRONE PARTNERSHIP, BUFFALO (ELIZABETH J. CIAMBRONE OF COUNSEL), FOR PETITIONER-APPELLANT.

J. ADAMS AND ASSOCIATES, PLLC, WILLIAMSVILLE (JOAN CASILIO ADAMS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

CATHERINE E. NAGEL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered April 11, 2013 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for a modification of custody.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 8, 2014,

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1170

CAF 13-01089

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

IN THE MATTER OF JACOB K. HAUDENSHILD,
PETITIONER-RESPONDENT,

V ORDER

JENNIFER M. WILLIAMS, RESPONDENT-APPELLANT.

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

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

ARDETH L. HOUDE, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered March 29, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, ordered that the parties shall have joint custody of the subject child.

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1175

CA 14-00602

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

THE MARRANO/MARC EQUITY CORPORATION AND PLEASANT MEADOWS ASSOCIATES, LLC, PLAINTIFFS-RESPONDENTS,

V ORDER

TOWN OF LANCASTER, DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (CHARLES W. MALCOMB OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAMON MOREY LLP, CLARENCE (COREY A. AUERBACH OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered June 20, 2013. The order denied the motion of defendant for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 26, 2014,

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1176

CA 13-01268

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

IN THE MATTER OF DANIEL ALVAREZ,
PETITIONER-APPELLANT,

V ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered June 10, 2013 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1178

CA 14-00494

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

ELISABETH L. PIPER AND SHARON RITER,
PLAINTIFFS-RESPONDENTS,

V ORDER

LEWIS G. GIGLIA, D.P.M., JOHN E. TURANO, D.P.M.,
AND EASTSIDE PODIATRY, DEFENDANTS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KEVIN E. HULSLANDER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FARACI LANGE, LLP, ROCHESTER (BRIAN M. ZORN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered September 9, 2013. The order denied the motion of defendants to compel disclosure.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 8, 2014,

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1179

TP 14-00599

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

IN THE MATTER OF ADAM BENNEFIELD, PETITIONER,

V MEMORANDUM AND ORDER

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

ADAM BENNEFIELD, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered March 21, 2014) to review determinations of respondent. Respondent denied grievances filed by petitioner and determined after a tier II hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this proceeding seeking to annul a disciplinary determination that he violated certain inmate rules and challenging the determinations denying two unrelated grievances. After the proceeding was transferred to this Court pursuant to CPLR 7804 (g), respondent issued an administrative order reversing the disciplinary determination. Respondent directed that all references to the disciplinary proceeding be expunged and that petitioner be refunded a $5 hearing surcharge.

As a preliminary matter, we note that "Supreme Court erred in transferring that part of the proceeding related to the . . . grievances to this Court inasmuch as any determinations with respect to those grievances were not made as a result of a hearing held . . . pursuant to direction by law" (*Matter of Alvarez v Fischer*, 94 AD3d 1404, 1407 [internal quotation marks omitted]). We nevertheless "address the contentions with respect thereto in the interest of judicial economy" (*id.*).

We agree with respondent that the petition must be dismissed as moot to the extent that it concerns the expunged disciplinary

determination (*see Matter of Silva v Walker*, 245 AD2d 1115, 1115; *Matter of Free v Coombe*, 234 AD2d 996, 996). Although petitioner seeks monetary damages related to the disciplinary proceeding, his claims for monetary damages "must be asserted in the Court of Claims, not within a CPLR article 78 proceeding" (*Matter of Taylor v Kennedy*, 159 AD2d 827, 827). Contrary to petitioner's contention, damages for loss of privileges and confiscated property, unlike reimbursement for hearing surcharges, are consequential damages and are not "incidental to the primary relief sought by petitioner" (*Matter of Hodges v Jones*, 195 AD2d 647, 648; *see* CPLR 7806; *Matter of Loftin v New York City Dept. of Social Servs.*, 267 AD2d 78, 78, *lv dismissed* 95 NY2d 897, *rearg denied* 96 NY2d 755; *cf. Matter of Campbell v Hollins*, 249 AD2d 994, 995; *see generally Matter of Gross v Perales*, 72 NY2d 231, 237, *rearg denied* 72 NY2d 1042).

To the extent that petitioner, in his CPLR article 78 petition, sought to prevent the staff at Attica Correctional Facility from retaliating against him, we note that petitioner has since been transferred to a different facility and is no longer subject to the authority of the staff at Attica. Thus, he is no longer aggrieved with respect to that issue, and we therefore further dismiss that part of the petition as moot (*see Matter of McKenna v Goord*, 245 AD2d 1074, 1075, *lv denied* 91 NY2d 812; *see also Matter of Abreu v Bellamy*, 81 AD3d 1004, 1004-1005; *Matter of Kalwasinski v Fischer*, 68 AD3d 1722, 1723).

With respect to petitioner's challenges to the grievance determinations, we conclude that petitioner failed to exhaust his administrative remedies with respect to those determinations, and we therefore further dismiss the remainder of the petition. "A petitioner must exhaust all administrative remedies before seeking judicial review unless an agency's action is challenged as either unconstitutional or wholly beyond its grant of power . . . or when resort to an administrative remedy would be futile . . . or when its pursuit would cause irreparable injury" (*Matter of Ross v Ricks*, 268 AD2d 925, 925-926 [internal quotation marks omitted]). Petitioner has failed "to establish that any of the exceptions to the exhaustion doctrine applied" (*id.* at 926; *see Matter of Abdullah v Girdich*, 297 AD2d 844, 845), and this Court lacks the discretionary authority to address his contentions (*see Matter of Allen v Goord*, 4 AD3d 635, 636-637; *see generally Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071, *appeal dismissed* 81 NY2d 834).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1180

KA 09-01271

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD GIBSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.) rendered March 17, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]) and, in appeal No. 2, he appeals from another judgment convicting him upon his plea of guilty of manslaughter in the first degree (§ 125.20). In both appeals, defendant contends that Supreme Court erred in failing to make a determination whether he should be adjudicated a youthful offender. Defendant, an eligible youth, pleaded guilty pursuant to a plea bargain that included promised sentences, and a waiver of the right to appeal covering both convictions. The court did not indicate during the plea proceedings whether it would adjudicate defendant a youthful offender, and the terms of the plea bargain did not address the issue. At sentencing, the court did not expressly rule on the issue, although the sentence imposed on the conviction in appeal No. 2 was incompatible with youthful offender treatment.

It is well settled that "at the time of pronouncing sentence the court must determine whether or not the eligible youth is a youthful offender" (CPL 720.20 [1]). A sentencing court must determine whether to grant youthful offender status to every defendant who is eligible for it because, inter alia, "[t]he judgment of a court as to which young people have a real likelihood of turning their lives around is just too valuable, both to the offender and to the community, to be

sacrificed in plea bargaining" (*People v Rudolph*, 21 NY3d 497, 501). Thus, "[t]he sentencing court must make 'a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain' " (*People v Hall*, 119 AD3d 1349, 1350, quoting *Rudolph*, 21 NY3d at 501). Here, as the People correctly concede, the record fails to establish that such a determination was made in either appeal No. 1 or appeal No. 2 and, therefore, we hold the cases, reserve decision, and remit the matters to Supreme Court to make and state for the record a determination in each case whether defendant is a youthful offender (*see People v Barnes*, 119 AD3d 1374, 1375; *People v Munoz*, 117 AD3d 1585, 1585-1586).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1181

KA 09-01300

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD GIBSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.) rendered March 17, 2009. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the same Memorandum as in *People v Gibson* ([appeal No. 1] ___ AD3d ____ [Nov. 14, 2014]).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1182

KA 13-01826

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ALBERTINO J. THOMAS, DEFENDANT-APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (DAVID M. PARKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Wayne County Court (Dennis M. Kehoe, J.), dated June 18, 2013. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1186

KA 13-01146

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRELL W. VANDEMORTEL, DEFENDANT-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, FOR DEFENDANT-APPELLANT.

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered March 4, 2013. The judgment convicted defendant, upon a jury verdict, of criminal possession of stolen property in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [1]), defendant contends that the evidence is not legally sufficient to establish that the value of the stolen property, i.e., a backhoe, exceeded $1,000 at the time of the crime. We reject that contention. It is well settled that "the market value of a stolen item is to be measured by what the thief would have had to pay had he purchased the item instead of stealing it" (*People v Harold*, 22 NY2d 443, 445). "It is axiomatic that in determining value the condition of the item must be taken into account" (*People v Bayusik*, 192 AD2d 1073, 1074, *affd* 83 NY2d 774). Furthermore, "[w]here . . . the cost of the property at issue is 'substantially above the monetary value prescribed by the applicable penal statute and other facts adduced at trial, such as the description of the condition of the property at the time of the [crime] and the period of time [that] elapsed between the date of purchase and the date of [crime], negate the possibility that the [property's] market value has significantly depreciated, there exists sufficient evidence from which the jury could infer, beyond a reasonable doubt, that the market value of the [property] at the time and place of the [crime] was in excess of the statutory minimum necessary to sustain a conviction' " (*People v Alexander*, 41 AD3d 1200, 1201, *lv denied* 9 NY3d 920, quoting *People v James*, 111 AD2d 254, 255-256, *affd* 67 NY2d 662).

Here, the People introduced evidence that the backhoe was manufactured in the early 1970s, and that the owner bought it several

years before the crime for $6,500. The People also introduced evidence that the backhoe's owner maintained it and installed several new parts, including a fuel pump that cost nearly $725. In addition, the People introduced evidence that the backhoe remained operational and that the owner used it every summer until the summer of 2011 when it was stolen. We conclude that the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish that the value of the backhoe exceeded the statutory threshold of $1,000 at the time of the crime (*see People v Stein*, 172 AD2d 1060, 1060-1061, *lv denied* 78 NY2d 975).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1195

OP 13-01937

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

IN THE MATTER OF TONAWANDA SENECA NATION,
PETITIONER,

V MEMORANDUM AND ORDER

HON. ROBERT C. NOONAN, A COUNTY COURT JUDGE,
TEMPORARILY ASSIGNED TO SURROGATE'S COURT,
COUNTY OF GENESEE, COREEN N. THOMPSON, AS
BENEFICIARY AND ADMINISTRATRIX OF THE ESTATE
OF DAVID C. PETERS, DECEASED, AND JOAN F. PETERS
AND THOMAS W. PETERS, AS BENEFICIARIES OF THE
ESTATE OF DAVID C. PETERS, DECEASED, RESPONDENTS.

MURPHY MEYERS LLP, ORCHARD PARK (MARGARET A. MURPHY OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT HON. ROBERT C. NOONAN, A COUNTY COURT JUDGE, TEMPORARILY ASSIGNED TO SURROGATE'S COURT, COUNTY OF GENESEE.

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (JOHN P. BARTOLOMEI OF COUNSEL), FOR RESPONDENT COREEN N. THOMPSON, AS BENEFICIARY AND ADMINISTRATRIX OF THE ESTATE OF DAVID C. PETERS, DECEASED.

COLUCCI & GALLAHER P.C., BUFFALO (PAUL G. JOYCE OF COUNSEL), FOR RESPONDENT JOAN F. PETERS, AS BENEFICIARY OF THE ESTATE OF DAVID C. PETERS, DECEASED.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to prohibit respondent Hon. Robert C. Noonan, S., from exercising jurisdiction over any real property situated within the territory of the Tonawanda Seneca Nation, and for other relief.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding in this Court purportedly pursuant to CPLR 506 (b) (1) seeking, inter alia, to prohibit respondent Hon. Robert C. Noonan (respondent) from exercising jurisdiction over any real property situated within the territory of the Tonawanda Seneca Nation. We conclude that the

proceeding was improperly commenced in this Court and that, therefore, the amended petition must be dismissed. It is well settled that "[a] CPLR article 78 proceeding against a Judge of the Surrogate's Court should be commenced in Supreme Court and is not properly commenced in this Court" (*Matter of Pavlovic v Czajka*, 27 AD3d 983, 983; *see* CPLR 506 [b] [1]; *Matter of Juracka v Severson*, 115 AD2d 102, 102, *lv denied* 67 NY2d 603; *see generally Matter of Nolan v Lungen*, 61 NY2d 788, 790). CPLR 506 (b) (1) "has been narrowly construed [as] depriving appellate jurisdiction to all such [CPLR article 78] proceedings [commenced in the Appellate Division] unless one of the specifically delineated Judges is a named respondent" (*Matter of Berkman v Family Ct. of Nassau County*, 146 Misc 2d 733, 735; *see generally* CPLR 7804 [b]; *Nolan*, 61 NY2d at 790). To the extent that CPLR 506 (b) concerns subject matter jurisdiction, its provisions cannot be waived (*see Nolan*, 61 NY2d at 790).

Contrary to petitioner's contention, respondent is the duly elected Surrogate for Genesee County, a position not specifically delineated in CPLR 506 (b) (1) and, therefore, a proceeding against him must be commenced in Supreme Court. Even if we assume, arguendo, that respondent was elected as a County Court Judge and was thereafter assigned to "be and serve as" a Surrogate (Judiciary Law § 184 [2]), petitioner is seeking to prohibit respondent from acting in the role of Surrogate. We thus conclude that jurisdiction remains in Supreme Court (*cf. Matter of County of Onondaga v Brunetti*, 108 AD3d 1138, 1139; *Matter of Vargason v Brunetti*, 241 AD2d 941, 941; *see also Matter of Collins v Lamont*, 273 AD2d 528, 528-529).

Relying on *Matter of B.T. Prods. v Barr* (44 NY2d 226), petitioner contends that jurisdiction is properly with this Court. We reject that contention. In *B.T. Prods.*, the petitioner challenged the actions of a County Court Judge in issuing a search warrant while the Judge was acting as a local criminal court. Pursuant to CPL 10.10 (3) (g), a "[l]ocal criminal court" is defined as "[a] county judge sitting as a local criminal court." As a result, the Judge's power to act as a local criminal court was "a part of his authority as a County Court Judge" (*B.T. Prods.*, 44 NY2d at 234). Therefore, the proceeding in that case was properly commenced in the Appellate Division (*see* CPLR 506 [b] [1]; 7804 [b]).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1200.1
KA 11-01185

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MUSTAFA BURRELL, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MISHA A. COULSON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered March 21, 2011. The appeal was held by this Court by order entered August 8, 2014, decision was reserved and the matter was remitted to Onondaga County Court for further proceedings (120 AD3d 911).

Now, upon reading and filing the stipulation of discontinuance signed by the defendant on September 26, 2014, and by the attorneys for the parties on September 26, 2014,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1202

KA 12-01366

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRENCE DAMES, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (PATRICK J. MARTHAGE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered April 16, 2012. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention, his waiver of the right to appeal was knowingly, voluntarily, and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256; *People v Barber*, 117 AD3d 1430, 1430; *People v Durodoye*, 113 AD3d 1130, 1131). The record establishes that "defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*Barber*, 117 AD3d at 1430). Although defendant's contention that his guilty plea was not knowing, voluntary, and intelligent survives the waiver of the right to appeal and is preserved for our review by his motion to withdraw the plea (*cf. id.* at 1430-1431), it is without merit. His assertions at sentencing that he was innocent, under duress, and coerced into taking the plea were belied by the statements he made during the plea colloquy (*see People v Leach*, 119 AD3d 1429, 1430; *People v Williams*, 90 AD3d 1546, 1547, *lv denied* 19 NY3d 978). The valid waiver by defendant of the right to appeal encompasses his challenges to the severity of the sentence (*see Lopez*, 6 NY3d at 256; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1203

KA 13-00886

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AARON VOYMAS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Ontario County Court (William F. Kocher, J.), dated January 25, 2013. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Although the Board of Examiners of Sex Offenders (Board) recommended a downward departure from the presumptive classification of defendant as a level two risk, County Court "was not bound by the Board's recommendation and, in the proper exercise of its discretion, the court determined defendant's risk level based upon the record before it" (*People v Woodard*, 63 AD3d 1655, 1656, *lv denied* 13 NY3d 706). The record establishes that defendant failed to allege mitigating circumstances that are, as a matter of law, of a kind or to a degree not adequately taken into account by the Risk Assessment Guidelines and Commentary and, to the extent defendant did allege such mitigating circumstances, he failed to prove their existence by a preponderance of the evidence (*see People v Gillotti*, 23 NY3d 841, 861).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1206

KA 13-02201

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILSON J. TARDI, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered December 2, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and petit larceny.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and petit larceny (§ 155.25), defendant contends that County Court erred in refusing to suppress the evidence seized from his vehicle because his vehicle was towed for being illegally parked and the search thus was unconstitutional. Defendant failed to preserve that contention for our review "inasmuch as defendant failed to raise it either in his motion papers or before the suppression court" (*People v Fuentes*, 52 AD3d 1297, 1298, *lv denied* 11 NY3d 736; *see People v Facen*, 117 AD3d 1463, 1464, *lv denied* 23 NY3d 1020). In any event, that contention is without merit, as is defendant's contention that the court also erred in refusing to suppress the evidence seized during the search on the grounds that the Cheektowaga Police Department's written policy on inventory searches is unconstitutional and the police officers acted improperly when they impounded and towed his car.

The police officers arrested defendant for stealing property from a Target store. After the arrest, store security personnel informed the officers that they had observed defendant, who was known to them from prior thefts, drive the vehicle to the store, and that he was the sole occupant of the vehicle. In addition, store personnel indicated that they wanted the vehicle removed from the store's parking lot. The officers, acting in accordance with that indication and pursuant to a written Cheektowaga Police Department policy, impounded the

vehicle and performed an inventory search of its contents prior to towing it away. A handgun was found in the vehicle during that search.

It is well settled that, "[w]hen the driver of a vehicle is arrested, the police may impound the car, and conduct an inventory search, where they act pursuant to 'reasonable police regulations relating to inventory procedures administered in good faith' " (*People v Walker*, 20 NY3d 122, 125, quoting *Colorado v Bertine*, 479 US 367, 374). Thus, "[h]aving arrested the defendant [in] a public [parking lot], the officers were thereafter entitled to impound the vehicle" (*People v Gallego*, 155 AD2d 687, 689, *lv denied* 75 NY2d 919; *see People v Walker*, 267 AD2d 994, 994-995, *lv denied* 94 NY2d 953). Furthermore, "[i]t is settled law that the police may search an impounded vehicle to inventory its contents" (*People v Gonzalez*, 62 NY2d 386, 388). "Such searches, conducted as routine procedures, are permitted to protect an owner's property while it remains in police custody, to protect the police against false claims for missing property and to protect the police from potential danger" (*id.* at 388-389). Here, the police officers properly impounded the vehicle that defendant drove to the scene of the crime and performed an inventory search of that vehicle pursuant to a reasonable Cheektowaga Police Department procedure, during which they discovered the handgun. Consequently, the court properly refused to suppress the evidence seized during that inventory search.

We have considered defendant's remaining contentions regarding the search and conclude that they are without merit.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1207

KA 11-01866

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYSHAWN JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 27, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree, criminal possession of a weapon in the third degree and attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [3]). We reject defendant's contention that the showup identification procedures were unduly suggestive. The suppression court found that defendant was not in handcuffs at the time of the showup identification procedures, and we see no basis to disturb the court's findings (*see generally People v Prochilo*, 41 NY2d 759, 761). In any event, as Supreme Court further concluded, the showup identification procedures were not rendered unduly suggestive even if defendant was in handcuffs and in the presence of uniformed police officers (*see People v Santiago*, 83 AD3d 1471, 1471, *lv denied* 17 NY3d 800; *People v Davis*, 48 AD3d 1120, 1122, *lv denied* 10 NY3d 957). The showup identification procedures were conducted in geographic and temporal proximity to the crime, and the procedures used were not unduly suggestive (*see People v Brisco*, 99 NY2d 596, 597; *People v Williams*, 118 AD3d 1478, 1479). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1213

CAF 14-00522

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

IN THE MATTER OF SYANNE L.T.,
RESPONDENT-APPELLANT.
---------- ORDER
NIAGARA COUNTY ATTORNEY AND CARRIE B.,
PETITIONERS-RESPONDENTS.

THOMAS M. O'DONNELL, ATTORNEY FOR THE CHILD, NIAGARA FALLS, FOR RESPONDENT-APPELLANT.

CLAUDE A. JOERG, COUNTY ATTORNEY, LOCKPORT (KATHERINE D. ALEXANDER OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Family Court, Niagara County (Kathleen M. Wojtaszek-Gariano, J.), entered May 28, 2013 pursuant to Family Court Act article 7. The order, among other things, placed respondent in the custody of the Commissioner of Social Services of Niagara County for a period of 12 months.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Haley M.T.*, 96 AD3d 1549, 1549; *Matter of Alice P.*, 254 AD2d 770, 770).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1214

CAF 13-00442

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

IN THE MATTER OF WILLIAM VAN COURT, II,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NICOLE WADSWORTH, RESPONDENT-APPELLANT.

PAUL M. DEEP, UTICA, FOR RESPONDENT-APPELLANT.

CALLI, CALLI & CULLY, UTICA (HERBERT J. CULLY OF COUNSEL), FOR PETITIONER-RESPONDENT.

PAUL SKAVINA, ATTORNEY FOR THE CHILD, ROME.

MICHAEL N. KALIL, ATTORNEY FOR THE CHILD, UTICA.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered January 4, 2013 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner sole custody of the subject children.

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

Memorandum: In this custody proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, inter alia, modified an existing custody order by awarding sole custody of the parties' children to petitioner father and supervised visitation to the mother. "Inasmuch as the mother does not challenge Family Court's finding that a change in circumstances existed, we need only address whether it was in the child[ren]'s best interests to award sole custody to the father" (*Matter of Dubuque v Bremiller*, 79 AD3d 1743, 1744).

We note at the outset that, contrary to the mother's contention, the gaps in the trial transcript resulting from inaudible portions of the audio recording are not so significant as to preclude meaningful review of the order on appeal (*see Matter of Devre S. [Carlee C.]*, 74 AD3d 1848, 1849; *cf. Matter of Alessio v Burch*, 78 AD3d 1620, 1620). Also contrary to the mother's contention, the court did not abuse its discretion in awarding sole custody of the children to the father. "Generally, a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight

and will not be set aside unless it lacks an evidentiary basis in the record . . . We see no basis to disturb the court's determination inasmuch as it was based on the court's credibility assessments of the witnesses and is supported by a sound and substantial basis in the record" (*Dubuque*, 79 AD3d at 1744 [internal quotation marks omitted]). Finally, "even assuming, arguendo, that the court erred in transferring temporary custody to the father," we conclude that reversal is not required "because the court 'subsequently conducted the requisite evidentiary hearing, and the record of that hearing fully supports the court's determination following the hearing' " (*Matter of Ward v Ward*, 89 AD3d 1518, 1519).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1218

CA 14-00740

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

ROBERT MORTIMER, PLAINTIFF-APPELLANT,

V ORDER

GLS LEASCO, CENTRAL TRANSPORT NORTH AMERICA, INC. AND LODAIN C. ELLIOTT, DEFENDANTS-RESPONDENTS.

DENNIS J. BISCHOF, LLC, WILLIAMSVILLE (DENNIS J. BISCHOF OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ALTREUTER BERLIN, BUFFALO (WILLIAM C. ALTREUTER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered February 26, 2014. The order granted in part the motion of defendants for summary judgment.

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1222

KA 13-01494

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO,

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD BAUSANO, DEFENDANT-APPELLANT.

CHARLES MARANGOLA, MORAVIA, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRIAN N. BAUERSFELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered August 15, 2013. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]) in connection with the sale to a confidential informant (CI) of 25 oxycodone pills. Contrary to defendant's contention, County Court properly granted the People's motion to amend the indictment to reflect that the controlled substance at issue was oxycodone, and not cocaine. Although the grand jury minutes are not included in the record on appeal, the record nevertheless establishes that the laboratory report admitted in evidence during the grand jury proceeding identified the pills that were analyzed as oxycodone. We therefore conclude that the court's determination to amend the indictment based upon a scrivener's error neither changed the theory of the prosecution nor tended to prejudice defendant on the merits (*see People v Wright*, 107 AD3d 1398, 1400, *lv denied* 23 NY3d 1026; *cf. People v McKinney*, 91 AD3d 1300, 1300). We reject defendant's further contention that the court's *Sandoval* ruling constitutes reversible error. The court did not abuse its discretion, but instead " 'weighed appropriate concerns and limited both the number of convictions and scope of permissible cross-examination' " (*People v Reed*, 115 AD3d 1334, 1336, *lv denied* 23 NY3d 1024, quoting *People v Hayes*, 97 NY2d 203, 208).

By making only a general motion to dismiss the indictment (*see*

People v Gray, 86 NY2d 10, 19), and failing to renew that motion at the close of his case (*see People v Hines*, 97 NY2d 56, 62, *rearg denied* 97 NY2d 678), defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence. In any event, we conclude that defendant's contention is without merit. In addition to the testimony of the CI, two police witnesses testified regarding their continuous observations of the CI, including his meeting with defendant. Both police witnesses testified that, after he left defendant, the CI turned over to the police 25 oxycodone pills, i.e., the precise purchase amount that had been arranged, and that the CI did not have the buy money on his person or in his vehicle. Viewing the evidence in the light most favorable to the People, we conclude that the evidence is legally sufficient to support the conviction (*see People v Bleakley*, 69 NY2d 490, 495). We further conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). In contrast to the People's witnesses, defendant testified that he met with the CI to sell him a laptop computer and, although he admitted that he had a prescription for oxycodone pills, he denied that he sold any to the CI. Defendant explained that he had served eviction papers on the CI several months before and thus that the CI had a motive to lie about the purpose of their meeting. There is no basis to conclude that the jury failed to give the conflicting evidence the weight it should be accorded (*see id.*). The sentence is not unduly harsh and severe.

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1227

KA 14-00407

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO,

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V ORDER

JUSTIN T. FRANK, DEFENDANT-RESPONDENT.

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

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN C. RUSSO-MCLAUGHLIN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Erie County Court (Michael F. Pietruszka, J.), dated October 18, 2013. The order granted defendant's motion to suppress physical evidence and statements made by defendant to police officers.

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

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1228

KA 13-00522

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO,

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CURLIE GREEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered January 2, 2013. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree, robbery in the second degree (three counts) and robbery in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of rape in the first degree (Penal Law § 130.35 [1]), three counts of robbery in the second degree (§ 160.10 [2] [b]), and robbery in the third degree (§ 160.05). Contrary to defendant's contention, the record establishes that his waiver of the right to appeal was made knowingly, voluntarily and intelligently (*see People v Lopez*, 6 NY3d 248, 256). Defendant's valid waiver of the right to appeal encompasses his contentions that Supreme Court erred in denying his motions to suppress the physical evidence seized from his home and the identification evidence (*see People v Kemp*, 94 NY2d 831, 833; *People v Williams*, 36 NY2d 829, 830, *cert denied* 423 US 873; *People v Jenkins*, 117 AD3d 1528, 1529, *lv denied* 23 NY3d 1063). The waiver also encompasses his contention that the sentence is unduly harsh and severe (*see Lopez*, 6 NY3d at 255). In any event, we conclude that the contentions with respect to the suppression motions and the sentence are without merit.

Defendant's contention that the plea was not knowing and voluntary survives his valid waiver of the right to appeal (*see People v Lawrence*, 118 AD3d 1501, 1501), and defendant preserved that contention for our review by moving to withdraw the plea (*see People v Lopez*, 71 NY2d 662, 665). We nevertheless conclude that defendant's contention is belied by the record inasmuch as there is nothing in the record to cast doubt on the voluntariness of the plea (*see People v*

Knoxsah, 94 AD3d 1505, 1505). The record establishes that defendant pleaded guilty voluntarily, that he had ample time to discuss the plea with his attorney, and that he admitted the factual allegations of each of the five counts of the indictment.

We reject defendant's contention that the court abused its discretion in denying his motion to withdraw his plea without conducting a hearing. Defendant alleged that he was coerced by his attorney to plead guilty to crimes of which he was innocent. "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry 'rest[s] largely in the discretion of the Judge to whom the motion is made' and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116, quoting *People v Tinsley*, 35 NY2d 926, 927). Here, the court provided defendant with ample opportunity to present his claims in support of his motion to withdraw his plea (*see People v Walker*, 114 AD3d 1257, 1258, *lv denied* 23 NY3d 1044), and there was nothing in the record, with the exception of defendant's self-serving statements and his attorney's assertions made upon information and belief, that supported his allegation that he was coerced into pleading guilty (*cf. Brown,* 14 NY3d at 117).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

MOTION NO. (849/00) KA 99-01550. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TIMOTHY MULDROW, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, AND CARNI, JJ. (Filed Nov. 14, 2014.)

MOTION NO. (802/03) KA 01-00914. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHARROWL DAVIS, ALSO KNOWN AS SHARROD DAVIS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND WHALEN, JJ. (Filed Nov. 14, 2014.)

MOTION NO. (286/07) KA 05-02660. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOSE A. GOMEZ, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis granted. Memorandum: Defendant contends that he was denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal, specifically, whether the court placed on the record a reasonable basis for restraining defendant before the jury. Upon our review of the motion papers, we conclude that the issue may have merit. Therefore, the order of March 16, 2007 is vacated and this Court will consider the appeal de novo (*see People v LeFrois*, 151 AD2d 1046). Defendant is directed to file and serve his records and briefs with this Court on or before February 13, 2015. PRESENT: SCUDDER, P.J, CENTRA, FAHEY, PERADOTTO, AND LINDLEY, JJ. (Filed Nov. 14, 2014.)

MOTION NO. (829/11) KA 09-00514. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL T. CHICHERCHIA, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, CARNI, AND SCONIERS, JJ. (Filed Nov. 14, 2014.)

MOTION NO. (795/12) KA 10-00667. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAVID MCCALLUM, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed Nov. 14, 2014.)

MOTION NO. (1239/12) KA 11-02401. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHARLES G. JAMIESON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND WHALEN, JJ. (Filed Nov. 14, 2014.)

MOTION NO. (1304/13) CA 13-00161. -- ERIC M. FISHER AND DENISE E. FISHER, PLAINTIFFS-RESPONDENTS, V NATHANIEL C. HILL AND MELINDA J. HILL, DEFENDANTS-APPELLANTS. -- Motion for modification denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, SCONIERS, AND WHALEN, JJ. (Filed Nov. 14, 2014.)

MOTION NO. (352/14) CA 13-01387. -- SPOLETA CONSTRUCTION, LLC, PLAINTIFF-APPELLANT, V ASPEN INSURANCE UK LIMITED, C/O ASPEN SPECIALTY INSURANCE MANAGEMENT COMPANY, DEFENDANT-RESPONDENT, 1255 PORTLAND, LLC,

HUB-LANGIE PAVING, INC., AND SHANE VANDERWALL, DEFENDANTS. -- Motion for reargument denied. Motion for leave to appeal to the Court of Appeals granted. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND VALENTINO, JJ. (Filed Nov. 14, 2014.)

MOTION NO. (562/14) KA 12-00893. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LARRY WILLIAMS, DEFENDANT-APPELLANT. -- Motion for reargument and leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, WHALEN, AND DEJOSEPH, JJ. (Filed Nov. 14, 2014.)

MOTION NO. (573/14) CA 13-00220. -- TIMOTHY D. GAY, PLAINTIFF-APPELLANT, V MARIA GAY, DEFENDANT-RESPONDENT. (APPEAL NO. 1.) -- Motion for reargument, reconsideration or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, SCONIERS, WHALEN, AND DEJOSEPH, JJ. (Filed Nov. 14, 2014.)

MOTION NO. (574/14) CA 13-00909. -- TIMOTHY D. GAY, PLAINTIFF-APPELLANT, V MARIA GAY, DEFENDANT-RESPONDENT. (APPEAL NO. 2.) -- Motion for reargument, reconsideration or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, SCONIERS, WHALEN, AND DEJOSEPH, JJ. (Filed Nov. 14, 2014.)

MOTION NO. (575/14) CA 13-00910. -- TIMOTHY D. GAY, PLAINTIFF-APPELLANT, V MARIA GAY, DEFENDANT-RESPONDENT. (APPEAL NO. 3.) -- Motion for reargument,

reconsideration or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, SCONIERS, WHALEN, AND DEJOSEPH, JJ. (Filed Nov. 14, 2014.)

MOTION NO. (576/14) CA 13-00911. -- TIMOTHY D. GAY, PLAINTIFF-APPELLANT, V MARIA GAY, DEFENDANT-RESPONDENT. (APPEAL NO. 4.) -- Motion for reargument, reconsideration or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, SCONIERS, WHALEN, AND DEJOSEPH, JJ. (Filed Nov. 14, 2014.)

MOTION NO. (577/14) CA 13-00912. -- TIMOTHY D. GAY, PLAINTIFF-APPELLANT, V MARIA GAY, DEFENDANT-RESPONDENT. (APPEAL NO. 5.) -- Motion for reargument, reconsideration or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, SCONIERS, WHALEN, AND DEJOSEPH, JJ. (Filed Nov. 14, 2014.)

MOTION NO. (624/14) CA 13-00998. -- KAI LIN, PLAINTIFF-APPELLANT, V DEPARTMENT OF DENTISTRY, UNIVERSITY OF ROCHESTER MEDICAL CENTER, UNIVERSITY DENTAL FACULTY GROUP, DR. CARLO ERCOLI, DR. JANE BREWER, OSBORN, REED & BURKE, LLP, CHRISTIAN C. CASINI, ESQ., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed Nov. 14, 2014.)

MOTION NO. (668/14) CA 13-02066. -- IN THE MATTER OF MATTHEW GRAF AND BETH GRAF, PETITIONERS-APPELLANTS, V TOWN OF LIVONIA, FINGER LAKES TIMBER COMPANY, INC., AND TOWN OF LIVONIA JOINT ZONING BOARD OF APPEALS, RESPONDENTS-RESPONDENTS. -- Motion for reargument denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, SCONIERS, AND DEJOSEPH, JJ. (Filed Nov. 14, 2014.)

KA 12-00159. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JONATHAN MERINO, DEFENDANT-APPELLANT. –- Motion to dismiss granted. Memorandum: The matter is remitted to Monroe County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745). PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Nov. 14, 2014.)

KA 12-00821. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V THOMAS H. SEISER, ALSO KNOWN AS JOHN DOE, DEFENDANT-APPELLANT. –- Motion to dismiss granted. Memorandum: The matter is remitted to Monroe County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745). PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Nov. 14, 2014.)

KA 11-00311. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KEVIN LEE MARTIN, DEFENDANT-APPELLANT. -- Appeal dismissed as moot. Counsel's motion to be relieved of assignment granted. (Appeal from Order of Supreme Court, Monroe County, Joseph D. Valentino, J. - Criminal Sale of a Controlled Substance, 3rd Degree). PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed Nov. 14, 2014.)

KA 10-00808. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JUAN C. MEDINA, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon his *Alford* plea of attempted promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25 [2]). Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38). Our review of the record reveals a nonfrivolous issue concerning the voluntariness of defendant's plea (*see People v Peque*, 22 NY3d 168). We therefore relieve counsel of his assignment and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from Judgment of Jefferson County Court, Kim Hawn Martusewicz, J. - Attempted Promoting Prison Contraband, 1st Degree). PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed Nov. 14, 2014.)