SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MAY 7, 2010

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. SALVATORE R. MARTOCHE

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. SAMUEL L. GREEN

HON. ELIZABETH W. PINE

HON. JEROME C. GORSKI, ASSOCIATE JUSTICES

PATRICIA L. MORGAN, CLERK

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

167

CA 09-01524

PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND PINE, JJ.

ERIC CRAGG, AS ADMINISTRATOR OF THE ESTATE
OF KAYLA MARGARET ROSE CRAGG, DECEASED,
PLAINTIFF-APPELLANT,

V OPINION AND ORDER

ALLSTATE INDEMNITY CORPORATION,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

LAW OFFICE OF JOHN J. FROMEN, BUFFALO, MAGAVERN MAGAVERN GRIMM LLP (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (KIMBERLY E. WHISTLER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered October 27, 2008 in a declaratory judgment action. The judgment granted the motion of defendant Allstate Indemnity Corporation for summary judgment.

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

Opinion by CARNI, J.: This appeal presents the issue, apparently one of first impression in New York, whether an insurer is required to defend or indemnify its insureds for the wrongful death of an insured person, here, plaintiff's decedent. We conclude that the plain language of the policy in question excludes coverage for bodily injury to an insured person when such coverage would enure to the benefit of an insured person. We therefore further conclude that Supreme Court properly granted the motion of defendant Allstate Indemnity Corporation (Allstate) for summary judgment seeking a declaration that it has no duty to defend or indemnify the remaining defendants, the grandparents and mother of plaintiff's decedent (collectively, defendants), in the underlying personal injury and wrongful death action commenced against them by plaintiff.

Plaintiff's decedent sustained fatal injuries when she drowned in a swimming pool located at the residence of her grandparents, where she resided with her mother. Plaintiff, decedent's father, did not reside there. It is undisputed that plaintiff's decedent and defendants were insured under a homeowners' insurance policy issued by Allstate to defendant grandparents. Allstate disclaimed coverage for

defendants under the policy pursuant to the provision excluding coverage for "**bodily injury** to an **insured person** . . . whenever any benefit of this coverage would accrue directly or indirectly to an **insured person**."

Plaintiff thereafter commenced a wrongful death action against defendants in his capacity as administrator of his daughter's estate, and he was the sole distributee identified in the complaint. Decedent's mother defaulted in the action and, following an inquest on damages, plaintiff obtained a judgment against her in excess of $100,000 for his pecuniary loss. Plaintiff subsequently commenced this declaratory judgment action.

We agree with the court that Allstate's policy excludes from coverage any claim to recover for the injury or resultant death of an insured person (*see Brown v Madison*, 139 Ohio App 3d 867, 870-871, 745 NE2d 1141, 1144). We reject the contention of plaintiff that the derivative nature of his wrongful death action renders the policy exclusion inapplicable. "By focusing on his independent right to bring a wrongful death claim, and in ignoring the plain language of the policy, which excludes liability coverage for bodily injury to an insured, including claims resulting from . . . death, [plaintiff] has lost sight of the relevant issue at hand, [i.e.], whether there is policy coverage that would trigger [Allstate's] duty to indemnify and/or defend the insured in the wrongful death lawsuit" (*Cincinnati Indem. Co. v Martin*, 85 Ohio St 3d 604, 608, 710 NE2d 677, 680). There is no coverage for the simple reason that a homeowners' insurance policy is essentially designed to indemnify the policy holders against liability for injuries sustained by noninsureds (*see Brown*, 139 Ohio App 3d at 871, 745 NE2d at 1144). Here, neither decedent nor her mother would be entitled to indemnification from Allstate for the injuries and death of decedent. Additionally, indemnification by Allstate on behalf of decedent's mother would result in the receipt by the mother, an insured, of the benefits of the policy in the form of the satisfaction of the money judgment obtained against her for the death of her daughter, also an insured. That result violates the plain language of the policy and thus is untenable. We therefore conclude that the court properly applied the case law of Ohio in support of its determination that an insurer has no duty to defend or indemnify its insured in a wrongful death action brought by a noninsured based upon the death of an insured where, as here, the policy excludes coverage for claims based on the death of an insured (*see Cincinnati Indem. Co.*, 85 Ohio St 3d at 609, 710 NE2d at 680). Accordingly, we conclude that the judgment should be affirmed.

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

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

233

CA 09-01697

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

MICRO-LINK, LLC, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF AMHERST, DEFENDANT-APPELLANT-RESPONDENT.

E. THOMAS JONES, TOWN ATTORNEY, WILLIAMSVILLE (PHILLIP ABRAMOWITZ OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

TANNENBAUM HELPERN SYRACUSE & HIRSCHTRITT LLP, NEW YORK CITY (DAVID A. PELLEGRINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered October 29, 2008 in a breach of contract action. The order denied in part defendant's motion to dismiss the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in its entirety and reinstating the first and second causes of action in their entirety and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking payment based on a performance contract pursuant to which plaintiff managed a wastewater treatment plant on defendant's behalf. Defendant moved to dismiss the amended complaint on the grounds that plaintiff, inter alia, failed to file a timely notice of claim and that the action is time-barred. Supreme Court granted those parts of the motion seeking to dismiss the first cause of action, for breach of contract, and the second cause of action, for account stated, insofar as they are based on invoices submitted from February 2002 through December 2005 (hereafter, first category of claims). The court denied those parts of the motion seeking to dismiss the first and second causes of action insofar as they are based on invoices submitted from January 2006 through March 2006 (hereafter, second category of claims) and November 2006 through December 2006 (hereafter, third category of claims), as well as the third cause of action, for unjust enrichment. We note at the outset that defendant failed to raise any issues with respect to the court's denial of that part of its motion seeking to dismiss the third cause of action, and we therefore deem any such issues abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

Contrary to defendant's contention, the court applied the appropriate standard in determining the accrual dates of the first and

second causes of action pursuant to Town Law § 65 (3), which requires a notice of claim to be filed within six months of accrual and an action to be commenced within 18 months of accrual. Where a "cause of action seeks to compel payment for work, labor and services rendered under a contract, the cause of action accrues when the claim is actually or constructively rejected" (*Town of Nassau v Westchester Fire Ins. Co.*, 281 AD2d 803, 804; *see Schacker Real Estate Corp. v Town of Babylon*, 278 AD2d 221, *lv dismissed* 96 NY2d 745; *Trison Contr. v Town of Huntington*, 227 AD2d 397, *lv dismissed* 88 NY2d 1018). We reject defendant's contention that CPLR 206 (a) should be read in conjunction with Town Law § 65 (3) to limit or alter that well-established principle.

Contrary to defendant's further contention, the Court of Appeals' decision in *C.S.A. Contr. Corp. v New York City School Constr. Auth.* (5 NY3d 189) does not render the "actual or constructive rejection" no longer applicable. In that case, the Court of Appeals determined that the notice of claim was untimely because it was not submitted within three months of accrual of the plaintiff's claims pursuant to Public Authorities Law § 1744 (2) (*id.* at 192-193). The Court relied on *Matter of Board of Educ. of Enlarged Ogdensburg City School Dist. (Wager Constr. Corp.)* (37 NY2d 283, 290-291), in which it determined that the claim of a contractor accrues when its damages are ascertainable, despite the fact that a cause of action has not yet accrued. The language of Public Authorities Law § 1744 (2), however, is substantially different from that of Town Law § 65 (3) and, inasmuch as the *Wager* doctrine has been generally disfavored by the courts and the Legislature, we decline to extend it here (*see C.S.A. Contr. Corp.*, 5 NY3d at 194-195 [Smith, J., concurring]).

Applying the "actual or constructive rejection" standard to determine the relevant accrual dates, we conclude that the court properly denied those parts of the motion seeking to dismiss the first and second causes of action insofar as they are based on the second and third categories of claims. Contrary to defendant's contention, the second and third categories of claims did not accrue as a matter of law in February 2006, when the contract expired and the Town Board passed a resolution authorizing the hiring of an accountant to determine whether overpayments had been made to plaintiff. That resolution did not place plaintiff on notice that its claims were being rejected and, indeed, we note that plaintiff alleged that defendant "specifically represented to[it] that if no problems were identified by the audit, [plaintiff] would be paid all outstanding amounts . . . ."

Defendant further contends, in the alternative, that the second and third categories of claims accrued as a matter of law on March 20, 2006, when the Town Board passed a second resolution prohibiting the Town Supervisor and Comptroller from paying any outstanding claims from plaintiff "until the Town Board makes a final decision and reviews all such claims that are to be made and have been made." We reject that contention. The terms of that resolution establish that the Town Board had not yet made a "final decision" whether to pay the claims, and thus it cannot be said that plaintiff's claims were

thereby actually or constructively rejected. We therefore conclude that defendant failed to meet its burden of establishing that the notices of claim were untimely with respect to the second and third category of claims and that the first and second causes of action were time-barred insofar as they are based on those categories of claims (*see Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815; *Matter of Edwards v Coughlin*, 191 AD2d 1044).

We agree with plaintiff on its cross appeal, however, that the court erred in granting those parts of the motion seeking to dismiss the first and second causes of action insofar as they are based upon the first category of claims. According to plaintiff, defendant did not explicitly reject the first category of claims and agreed to arbitrate them with the former Town Comptroller, who had previously resolved similar disputes between the parties. The court found plaintiff's allegations concerning arbitration "inherently incredible" because, inter alia, the former Town Comptroller had not been employed by defendant since 2003. The court thus determined that the first category of claims accrued when the contract expired in February 2006 inasmuch as "it was reasonable for plaintiff to conclude [at that time] that those claims had been actually or at least constructively rejected by [defendant]." In determining a motion to dismiss, however, the court is required to accept the facts as alleged in the complaint as true, and the plaintiff should be accorded the benefit of every possible favorable inference (*see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570; *Leon v Martinez*, 84 NY2d 83, 87-88; *190 Murray St. Assoc., LLC v City of Rochester,* 19 AD3d 1116). Thus, we conclude that the court erred in determining that the notice of claim was untimely with respect to the first category of claims and that the first and second causes of action insofar as they are based on the first category of claims are time-barred. We therefore modify the order accordingly.

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

273

KA 07-02345

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL L. SCHROCK, DEFENDANT-APPELLANT.

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

MICHAEL L. SCHROCK, DEFENDANT-APPELLANT PRO SE.

EDWARD M. SHARKEY, DISTRICT ATTORNEY, LITTLE VALLEY (LORI PETTIT RIEMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered October 9, 2007. The judgment convicted defendant, upon a jury verdict, of attempted murder in the first degree (two counts), aggravated assault upon a police officer, criminal possession of a weapon in the second degree, robbery in the first degree (four counts), grand larceny in the fourth degree, menacing a police officer and escape in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the sentence imposed for robbery in the first degree under count seven of the indictment shall run concurrently with the sentence imposed for attempted murder in the first degree under count one of the indictment and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, two counts of attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [i]; [b]), defendant contends that the verdict is against the weight of the evidence inasmuch as the jury rejected the affirmative defense that he lacked criminal responsibility by reason of mental disease or defect (*see* § 40.15). 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 reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). "Where, as here, there was conflicting expert testimony on the issue of defendant's mental condition, the determination of the trier of fact to accept or reject the opinion of an expert, in whole or in part, is entitled to deference" (*People v Amin*, 294 AD2d 863, 863, *lv denied* 98 NY2d 672, 674; *see People v Coombs*, 56 AD3d 1195, 1196, *lv denied* 12 NY3d 782). Despite the evidence that defendant was mentally

ill at the time he committed the offenses, the jury was entitled to credit the testimony of the forensic psychiatrist who examined defendant and concluded that defendant appreciated the nature and consequences of his actions (*see People v Hill*, 276 AD2d 716, *lv denied* 96 NY2d 735). In addition, the knowledge of defendant that his conduct was wrong was demonstrated by his statement to the police that, after he assaulted and attempted to shoot the Sheriff's Deputy, he drove away in the patrol vehicle because he realized he was in "trouble."

Defendant failed to preserve for our review the contention in his main and pro se supplemental briefs that the prosecutor engaged in misconduct by eliciting testimony with respect to defendant's past incidents of domestic violence (*see* CPL 470.05 [2]). In any event, that contention is without merit because such evidence was relevant to the defense concerning defendant's mental condition, and County Court gave an appropriate limiting instruction to the jury. Contrary to the further contention of defendant in his main and pro se supplemental briefs, we conclude that he was not denied effective assistance of counsel based on defense counsel's failure to object to the testimony with respect to those prior bad acts. Defendant failed "to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's failure to object to that testimony (*People v Rivera*, 71 NY2d 705, 709). We note that evidence that defendant engaged in assaultive behavior may be considered consistent with the behavior of an individual who suffers from a mental disease or defect and, indeed, defendant's expert witness testified that defendant suffered from bipolar disorder, a component of which is aggressive and assaultive behavior.

Defendant contends in his main brief that the court erred in failing to comply with the procedures set forth in CPL article 730. We reject that contention. During defendant's arraignment on the felony complaint, the court ordered a psychiatric examination pursuant to CPL 730.30 (1). At the next appearance following indictment, the court indicated that it had received and reviewed the examination reports of the evaluating psychiatrist, who found defendant competent to stand trial. Defense counsel acknowledged receipt of those reports and did not request a competency hearing. Defense counsel further stated that she had spoken to defendant and that she did not object to the finding that defendant was competent to proceed "at this time." Although the prosecutor stated that he had not received those reports, we reject the contention of defendant that he therefore was deprived of his right "to a full and impartial determination of his mental capacity" to stand trial (*People v Armlin*, 37 NY2d 167, 172; *cf. People v Marasa*, 270 AD2d 902). The further contention of defendant in his main brief that he was improperly restrained at trial by a stun belt is unpreserved for our review (*see generally People v Lowmack*, 23 AD3d 1087, *lv denied* 6 NY3d 850). In any event, that contention involves matters outside the record on appeal, and it therefore must be raised by way of a motion pursuant to CPL 440.10 (*see People v King*, 56 AD3d 1193, *lv denied* 11 NY3d 926; *People v Peterson*, 56 AD3d 1230).

Defendant contends in his main brief that the sentences imposed on counts five through eight of the indictment, for robbery in the first degree, must run concurrently with the sentence imposed on count one of the indictment, for attempted murder in the first degree. We agree with defendant in part and conclude that the sentence imposed for robbery in the first degree under count seven of the indictment must run concurrently with the sentence imposed for attempted murder in the first degree under count one of the indictment, and we therefore modify the judgment accordingly. Pursuant to Penal Law § 70.25 (2), sentences imposed for "two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other," must run concurrently (*see People v Laureano*, 87 NY2d 640, 643). Here, defendant's firing of the gun at the Sheriff's Deputy constituted attempted murder in the first degree under count one, and it is also an element of robbery in the first degree under count seven, which alleged that defendant forcibly stole property by use or threatened use of a dangerous instrument (*see People v Lemon*, 38 AD3d 1298, 1299, *lv denied* 9 NY3d 846, 962). The sentence as modified is not unduly harsh or severe.

Defendant contends in his pro se supplemental brief that the court failed to administer the oath of truthfulness to prospective jurors pursuant to CPL 270.15 (1) (a). By failing to "draw [the court's] attention to the purported error," however, defendant failed to preserve that contention for our review (*People v Hampton*, 64 AD3d 872, 877, *lv denied* 13 NY3d 796), and we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We have reviewed the remaining contention of defendant in his pro se supplemental brief and conclude that it is without merit.

Entered: May 7, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

292

KA 08-02021

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL MARTINEZ, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered March 28, 2008. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree and assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]). 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 reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant further contends that the evidence is legally insufficient to support the conviction because his intoxication precluded him from forming the requisite intent to commit the crimes. Although defendant correctly concedes that he failed to preserve that contention for our review inasmuch as he made only a general motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19; *People v Lamica*, 53 AD3d 1109, *lv denied* 11 NY3d 833), he contends that he thereby was denied effective assistance of counsel. We reject that contention because defendant failed to demonstrate that his "contention [with respect to the legal sufficiency of the evidence] would be meritorious upon [our] review" (*People v Basset*, 55 AD3d 1434, 1438, *lv denied* 11 NY3d 922). "Although there was evidence at trial that defendant consumed a significant quantity of alcohol on the night of the incident, [a]n intoxicated person can form the requisite criminal intent to commit a crime, and it is for the trier of fact to decide if the extent of the intoxication acted to negate the element of intent" (*People v Mateo*, 70 AD3d 1331). Viewing the evidence in the light most favorable to

the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that a rational trier of fact could find that defendant had the requisite intent to commit the crimes of which he was convicted (*see People v Hunter*, 70 AD3d 1388).

We further conclude that defendant was not denied effective assistance of counsel based on the failure of defense counsel to object to certain photographs admitted in evidence and his alleged failure to prepare for trial adequately. "[T]he record, viewed as a whole, reflects that defense counsel provided meaningful representation" (*People v Daniels*, 68 AD3d 1711, 1712; *see generally People v Baldi*, 54 NY2d 137, 147). Finally, the sentence is not unduly harsh or severe.

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

327

KA 08-01009

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL ELLIS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC., CONFLICT DEFENDERS, WARSAW (ANNA JOST OF COUNSEL), FOR DEFENDANT-APPELLANT.

THOMAS E. MORAN, DISTRICT ATTORNEY, GENESEO (ERIC R. SCHIENER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered September 4, 2007. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree.

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

Memorandum: In appeal No. 1 defendant appeals from a judgment convicting him, upon his plea of guilty, of sexual abuse in the first degree (Penal Law § 130.65 [3]), and in appeal No. 2 he appeals from a judgment convicting him, upon his plea of guilty, of course of sexual conduct against a child in the first degree (§ 130.75 [1] [a]). Defendant contends in each appeal that County Court erred in refusing to suppress his statements to the police. We note at the outset that, although the court issued a bench decision with respect to defendant's suppression motion "the exception set forth in CPL 710.70 (2) allowing appellate review with respect to orders that 'finally den[y] a motion to suppress evidence' is not applicable because defendant pleaded guilty before the court issued such an order" (*People v Leary,* 70 AD3d 1394, 1395). In any event, we conclude that defendant's contention is without merit. We conclude that defendant was not in custody when he made the first statement inasmuch as, under the circumstances of this case, a reasonable person innocent of any crime would not have believed that he or she was in custody at that time (*see generally People v Yukl,* 25 NY2d 585, 589, *cert denied* 400 US 851). "Because the initial statement was not the product of pre-*Miranda* custodial interrogation, the post-*Miranda* [statement] given by defendant cannot be considered the fruit of the poisonous tree" (*People v Flecha*, 195 AD2d 1052, 1053). Moreover, under the circumstances of this case, the fact that defendant was transported

approximately 25 miles from his house to the police station and the fact that he was informed that he failed a polygraph test, viewed together or separately, did not render defendant's statement "the product of deception, misrepresentation or improper inducement . . . and did not create a risk that defendant's will was overborne" (*People v Guthrie*, 222 AD2d 1084, 1084, *lv denied* 87 NY2d 973; *see People v Tankleff*, 84 NY2d 992, 994).

To the extent that defendant may be deemed to contend that the People committed a *Brady* violation by failing to provide him with the results of the polygraph test allegedly administered during the course of his interrogation, we conclude that his contention is unpreserved for our review (*see People v Thompson*, 54 AD3d 975, 976, *lv denied* 11 NY3d 858). Indeed, defendant's contention concerns matters outside the record on appeal, which contains no polygraph test results, and thus defendant's contention may properly be raised by way of a motion pursuant to CPL article 440 (*see generally People v Burroughs,* 71 AD3d 1447). Furthermore, to the extent that the contention of defendant that he received ineffective assistance of counsel survives his plea of guilty (*see People v Adams,* 66 AD3d 1355, *lv denied* 13 NY3d 858), we conclude that defendant's contention lacks merit (*see generally People v Ford*, 86 NY2d 397, 404). Finally, the sentence is not unduly harsh or severe.

Entered: May 7, 2010 Patricia L. Morgan
Clerk of the Court

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

328

KA 08-01010

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL ELLIS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC., CONFLICT DEFENDERS, WARSAW (ANNA JOST OF COUNSEL), FOR DEFENDANT-APPELLANT.

THOMAS E. MORAN, DISTRICT ATTORNEY, GENESEO (ERIC R. SCHIENER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered September 4, 2007. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree.

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

Same Memorandum as in *People v Ellis* ([appeal No. 1] ___ AD3d ___ [May 7, 2010]).

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

333

KA 07-01487

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFERY H. MILLER, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), rendered October 23, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, assault in the second degree, criminal possession of a weapon in the second degree, and criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), criminal possession of a weapon in the second degree (§ 265.03 [former (2)]), and criminal possession of a weapon in the third degree (§ 265.02 [former (4)]), defendant contends that reversal is required because the verdict sheet contained improper annotations and legal instructions. We agree.

Inasmuch as "two or more counts charging offenses set forth in the same article of the law" were submitted to the jury, i.e., the two weapons possession counts (CPL 310.20 [2]), Supreme Court was permitted to provide the jury with a verdict sheet "set[ting] forth the dates, names of complainants or specific statutory language, without defining the terms, by which the counts may be distinguished" (*id.*). Here, the court included in the verdict sheet an instruction that the jury was to determine whether "the Defendant established by a preponderance of the evidence that he acted under Extreme Emotional Disturbance." We conclude that the court thereby exceeded the statutory bounds of CPL 310.20 (2) by giving the jury a written legal instruction on the burden of proof, rather than merely complying with "the statutory purpose of enabling the jury to distinguish between

[the two weapons possession counts]" (*People v Rosario*, 26 AD3d 206, 207, *lv denied* 7 NY3d 762; *see People v Sotomayer*, 173 AD2d 500, 506-506, *affd* 79 NY2d 1029).

We reject the People's contention that harmless error analysis may be applied. The Court of Appeals expressly rejected the application of harmless error analysis to verdict sheet errors in *People v Damiano* (87 NY2d 477, 484-485), and the Court thereafter wrote that the submission of a verdict sheet to which the defendant had not consented "affects the mode of proceedings prescribed by law" (*People v Collins*, 99 NY2d 14, 17), which constitutes per se reversible error (*see generally People v Kisoon,* 8 NY3d 129). Contrary to the People's contention, nothing in the amendments to CPL 310.20 (2), or their statutory history, suggests a legislative intent to overrule *Damiano* in that regard.

In light of our determination, we do not reach defendant's remaining contentions.

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

343

CA 09-01803

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ.

IN THE MATTER OF KEMET ALLAH, FORMERLY KNOWN AS BENJAMIN LOFTON, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JAMES HENDRICKS, IN HIS CAPACITY AS CHIEF CLERK, SUPREME AND COUNTY COURTS, SEVENTH JUDICIAL DISTRICT, RESPONDENT-RESPONDENT, AND MICHAEL C. GREEN, MONROE COUNTY DISTRICT ATTORNEY, INTERVENOR-RESPONDENT-RESPONDENT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (DONALD M. THOMPSON OF COUNSEL), FOR PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), INTERVENOR-RESPONDENT-RESPONDENT PRO SE.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered June 23, 2009 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding in the nature of mandamus to compel respondent Chief Clerk, Supreme and County Courts, Seventh Judicial District to issue an amended sentencing commitment form and certificate of conviction (hereafter, commitment papers) accurately indicating the new sentence imposed upon defendant's resentencing pursuant to the 2005 Drug Law Reform Act ([DLRA-2] L 2005, ch 643, § 1). We conclude that Supreme Court properly dismissed the petition. Petitioner was convicted of, inter alia, criminal sale of a controlled substance in the first degree (Penal Law § 220.43 [1]) based on one criminal transaction involving the sale of cocaine to an undercover officer, and he was convicted of, inter alia, robbery in the first degree (§ 160.15 [4]) based on a subsequent criminal transaction involving the same undercover officer (*People v Lofton*, 226 AD2d 1082, *lv denied* 88 NY2d 938, 1022). The sentences originally imposed on the drug charges ran concurrently with each other and consecutively to the sentences imposed on the robbery

charges. At the hearing conducted on defendant's application for resentencing on two of the drug charges pursuant to DLRA-2, County Court indicated that the new sentences imposed on those charges would run concurrently with each other, but it did not explicitly state whether they would continue to run consecutively to the sentences imposed on the robbery charges.

Petitioner contends that the commitment papers do not accurately reflect the new sentences imposed by the court inasmuch as they indicate that the new sentences are to run consecutively to the sentences imposed on the robbery charges. Even assuming, arguendo, that the court had the authority to order that the sentences imposed on the robbery charges run concurrently with the new sentences on two of the drug charges (*but see People v Acevedo*, 61 AD3d 692, 693, *lv granted* 12 NY3d 912), we nevertheless conclude that the extraordinary remedy of mandamus does not lie because the issue whether the commitment papers accurately reflect the new sentences imposed could have been raised on petitioner's direct appeal (*see Veloz v Rothwax*, 65 NY2d 902, 904; *Matter of De Jesus v Armer*, 74 AD2d 736; *see e.g. People v Owens*, 51 AD3d 1369, 1372-1373, *lv denied* 11 NY3d 740; *People v Lamphier*, 302 AD2d 864, 865, *lv denied* 99 NY2d 656).

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

355

KA 07-00624

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM J. RELEFORD, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (PATRICK H. FIERRO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered January 16, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant contends that County Court erred in determining that the identification of him by the undercover police officer in a showup procedure was confirmatory without first conducting a hearing pursuant to *People v Rodriguez* (79 NY2d 445). We reject that contention. " 'A guilty plea generally results in a forfeiture of the right to appellate review of any nonjurisdictional defects in the proceedings' " (*People v Leary*, 70 AD3d 1394, 1395, quoting *People v Fernandez*, 67 NY2d 686, 688), and the exception set forth in CPL 710.70 (2) does not apply here because defendant pleaded guilty before "an order finally denying" his suppression motion was issued (*People v Rodriguez*, 33 AD3d 401, *lv denied* 7 NY3d 904).

In any event, although there is no "categorical rule exempting from requested *Wade* hearings confirmatory identifications by police officers by merely labeling them as such" (*People v Wharton*, 74 NY2d 921, 923), a hearing is not required where the defendant in a "buy and bust" operation is identified "by a trained undercover officer who observed [the] defendant during the face-to-face drug transaction knowing [that the] defendant would shortly be arrested" (*Wharton*, 74 NY2d at 922; *see People v Stubbs*, 6 AD3d 1109, *lv denied* 3 NY3d 663; *People v Blocker*, 309 AD2d 1240, *lv denied* 1 NY3d 568). Here, the identification was made approximately seven minutes after the

undercover officer purchased drugs from defendant in a hand-to-hand transaction in broad daylight. The officer also observed defendant moments before the transaction when defendant told her to drive down the street where the exchange took place. Under the circumstances, a *Rodriguez* hearing was not required.

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

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

367

CA 09-00635

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

JOHN GRONSKI AND NANCY GRONSKI,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

COUNTY OF MONROE, DEFENDANT-RESPONDENT.

THE WOLFORD LAW FIRM LLP, ROCHESTER (MICHAEL R. WOLFORD OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (VICTOR A. OLIVERI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered March 20, 2009 in a personal injury action. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries allegedly sustained by John Gronski (plaintiff) when he was struck by a corrugated bale of recycling material, weighing almost one ton, while working at a recycling facility owned but not operated by defendant. Pursuant to an Operations and Maintenance Agreement (Agreement), defendant assigned operational control over the facility to plaintiff's employer, Metro Waste Paper Recovery U.S., Inc. (Metro).

We conclude that Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint. Pursuant to the Agreement, defendant delegated all responsibility for operation and maintenance of the facility to Metro, including responsibility for safety measures. Contrary to plaintiffs' contention, the court properly analogized this case to those cases involving out-of-possession landlords (*see e.g. Ferro v Burton*, 45 AD3d 1454; *Regensdorfer v Central Buffalo Project Corp.*, 247 AD2d 931, 932). " 'It is well settled that an out-of-possession landlord who relinquishes control of the premises and is not contractually obligated to repair unsafe conditions is not liable to employees of a lessee for personal injuries caused by an unsafe condition existing on the premises' " (*Regensdorfer*, 247 AD2d at 932). Defendant met its initial burden of establishing that it "did not exercise control over

the subject [facility] or assume any contractual responsibility to maintain and repair it. Rather, [Metro] was contractually obligated . . . to repair and maintain" the facility (*Thompson v Port Auth. of N.Y. & N.J.*, 305 AD2d 581, 582). Plaintiff failed to raise a triable issue of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Inasmuch as defendant did not retain operational control over the facility, we reject plaintiffs' further contention that defendant, as the landowner, owed a nondelegable duty to provide for plaintiff's safety (*cf. Bart v Universal Pictures*, 277 AD2d 4, 5). We further conclude that the Department of Environmental Conservation permit obtained for the facility did not impose upon defendant any such nondelegable duty.

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

462

KA 09-01805

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. SOLOMON, DEFENDANT-APPELLANT.

HARRINGTON & MAHONEY, BUFFALO (MARK J. MAHONEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Peter L. Broderick, Sr., J.), rendered November 17, 2005. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, course of sexual conduct against a child in the first degree, course of sexual conduct against a child in the second degree, rape in the second degree (10 counts), criminal sexual act in the second degree, rape in the second degree (10 counts), criminal sexual act in the second degree (7 counts) and use of a child in a sexual performance (4 counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, rape in the first degree (Penal Law § 130.35 [1]). Defendant contends that he was denied effective assistance of counsel because County Court failed to conduct the requisite meaningful inquiry to ensure that defendant was aware of the possible risks posed by defense counsel's simultaneous representation of a key prosecution witness or to elicit defendant's informed consent to such representation (*see People v McDonald*, 68 NY2d 1, 8, *rearg dismissed* 69 NY2d 724; *People v Sutton*, 220 AD2d 351, *lv denied* 87 NY2d 925; *People v Stewart*, 126 AD2d 943, 945). Although defense counsel disclosed the potential conflict to the court and defendant purported to waive any conflict, we conclude that defendant's waiver was invalid. We agree with defendant that the inquiry by the court was insufficient, and a "[w]aiver occurs when a defendant intentionally relinquishes or abandons a known right" (*People v Hansen,* 95 NY2d 227, 230 n 1). Nevertheless, we conclude that defendant was not thereby denied effective assistance of counsel because he failed to establish that any "conflict affected the conduct of the defense" (*People v Ortiz*, 76 NY2d 652, 657; *see People v Abar*,

99 NY2d 406, 410; *Sutton*, 220 AD2d at 351). Indeed, contrary to the further contention of defendant, defense counsel's representation, viewed in its entirety and as of the time of the representation, was meaningful (*see generally People v Baldi*, 54 NY2d 137, 147).

We further reject the contention of defendant that the suppression court erred in determining that he voluntarily waived his *Miranda* rights prior to making certain statements to the police and thus that the court erred in refusing to suppress those statements. The record of the suppression hearing establishes that defendant voluntarily accompanied the detectives to the police station, where he was seated in an interview room and provided with coffee. A detective then read defendant his rights from a standard *Miranda* waiver form, and defendant initialed each of those rights on the form. Defendant thereafter indicated that he was willing to make a statement and stated that he had received no promises and was not threatened in any way. Thus, affording deference to the suppression court's determination (*see generally People v Prochilo*, 41 NY2d 759, 761), we conclude that defendant knowingly waived his *Miranda* rights (*see People v McAvoy*, 70 AD3d 1467; *People v Shaw*, 66 AD3d 1417, 1418, *lv denied* 14 NY3d 773). Also contrary to the contention of defendant, it is well settled that " 'the failure to record [his] interrogation electronically does not constitute a denial of due process' " (*People v Lomack*, 63 AD3d 1658, *lv denied* 13 NY3d 798; *see People v Mendez*, 50 AD3d 1526, *lv denied* 11 NY3d 739), and he therefore was not entitled to suppression of his statements in the absence of an electronic recording of the interrogation (*see People v Kunz*, 31 AD3d 1191, *lv denied* 7 NY3d 868).

We further conclude that the court did not err in admitting in evidence tape-recorded conversations between the victim and defendant. The victim's statements were not offered for their truth and therefore did not constitute hearsay (*see generally People v Wynn*, 55 AD3d 1378, 1379, *lv denied* 11 NY3d 901). Defendant failed to preserve for our review his contention that his "responses" to the victim constituted inadmissible pre-arrest "silence" (*see generally People v Nicholopoulos*, 289 AD2d 1087, 1088, *lv denied* 97 NY2d 758) and, in any event, there is no merit to that contention. Contrary to the contention of defendant, he did not remain silent in response to the victim's accusations, but he instead made inculpatory statements that were properly admitted in evidence "as legally admissible hearsay against [defendant]" (*People v Chico*, 90 NY2d 585, 589). "[A]dmissions by a party of any fact material to the issue are always competent evidence against him [or her], wherever, whenever, or to whomsoever made" (*id.* [internal quotation marks omitted]; *see People v Webb*, 60 AD3d 1291, 1292, *lv denied* 12 NY3d 930; *People v O'Connor*, 21 AD3d 1364, 1366, *lv denied* 6 NY3d 757).

Defendant failed to preserve for our review his contentions that the court erred in failing to instruct the jury with respect to the voluntariness of his statements to the police (*see People v Cefaro*, 23 NY2d 283, 288-289; *People v Sanderson*, 68 AD3d 1716, 1717), and in failing to instruct the jury that the consciousness of guilt charge

applied to particular evidence. Defendant also failed to preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct during the prosecutor's opening and closing statements (*see* CPL 470.05 [2]; *People v Beggs*, 19 AD3d 1150, 1151, *lv denied* 5 NY3d 803). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

464

KA 07-01140

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL D. BRYANT, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered February 28, 2007. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree, attempted robbery in the first degree, criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree (two counts) 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 of, inter alia, burglary in the first degree (Penal Law § 140.30 [1]), defendant contends that Supreme Court erred in admitting certain evidence at trial because it was obtained directly or indirectly in violation of his physician-patient privilege (*see* CPLR 4504 [a]). We reject that contention. "[E]ven if there was a violation of the physician-patient privilege, the suppression of the evidence found as a result is not required. The physician-patient privilege is based on statute, not the State or Federal Constitution . . . [and] a violation of a statute does not, without more, justify suppressing the evidence to which that violation leads" (*People v Greene*, 9 NY3d 277, 280; *see People v Drayton*, 56 AD3d 1278, 1278-1279, *appeal dismissed* 13 NY3d 902). The further contention of defendant that the court improperly limited his cross-examination of a prosecution witness is also without merit. "It is well settled that '[t]he scope of cross-examination is within the sound discretion of the trial court' " (*People v Baker*, 294 AD2d 888, 889, *lv denied* 98 NY2d 708). Here, the record establishes that defendant was given wide latitude in cross-examining the witness

in question, and the court limited the cross-examination in merely a single instance that could not have affected the outcome of the trial.

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

467

KA 08-02403

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TOMEA GLEEN, DEFENDANT-APPELLANT.

THOMAS E. ANDRUSCHAT, EAST AURORA, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered October 1, 2008. The judgment convicted defendant, upon her plea of guilty, of attempted kidnapping in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of attempted kidnapping in the second degree (Penal Law §§ 110.00, 135.20). Contrary to defendant's contention, the record of the plea proceeding establishes that defendant understood that the waiver of the right to appeal was separate from her plea of guilty (*see People v Dillon*, 67 AD3d 1382), and we conclude that her waiver of the right to appeal was knowingly, intelligently, and voluntarily entered (*see People v Lopez*, 6 NY3d 248, 256). Defendant failed to preserve for our review her challenge to the factual sufficiency of the plea allocution by moving to withdraw the plea on that ground or by way of a motion pursuant to CPL 440.10 (*see People v Lopez*, 71 NY2d 662, 665) and, in any event, that challenge is encompassed by her valid waiver of the right to appeal (*see People v Grimes*, 53 AD3d 1055, 1056, *lv denied* 11 NY3d 789). The further contention of defendant that she was denied effective assistance of counsel likewise does not survive her plea or her valid waiver of the right to appeal because defendant "failed to demonstrate that 'the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [her] attorney['s] allegedly poor performance' " (*People v Wright*, 66 AD3d 1334, *lv denied* 13 NY3d 912; *see People v McDuffie*, 43 AD3d 559, 560, *lv denied* 9 NY3d 992). In any event, the record establishes that defendant received meaningful representation (*see generally People v Ford*, 86 NY2d 397, 404).

Finally, we conclude that County Court did not abuse its discretion in denying the motion of defendant to withdraw her plea based upon her unsubstantiated assertions of innocence during the course of the presentence investigation. "[A] defendant is not entitled to withdraw [her] guilty plea based on a subsequent unsupported claim of innocence, where the guilty plea was voluntarily made with the advice of counsel following an appraisal of all the relevant factors" (*People v Alexander*, 97 NY2d 482, 485 [internal quotation marks omitted]). Here, defendant did not contend during the plea proceeding that she was innocent and, contrary to her contention, the record before us contains no evidence that her plea was coerced (*see People v Zakrzewski*, 7 AD3d 881, 882).

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

468

KA 07-01699

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN ELLIOTT, DEFENDANT-APPELLANT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC., WARSAW (KEVIN G. VAN ALLEN OF COUNSEL), FOR DEFENDANT-APPELLANT.

THOMAS E. MORAN, DISTRICT ATTORNEY, GENESEO (ERIC R. SCHIENER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered June 28, 2007. The judgment convicted defendant, upon a jury verdict, of use of a child in a sexual performance (three 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 three counts of use of a child in a sexual performance (Penal Law § 263.05), defendant contends that the evidence is legally insufficient to support the conviction because the sexual performances were not exhibited before an audience but, rather, were observed by defendant alone. Defendant failed to preserve that contention for our review inasmuch as he failed to renew his motion for a trial order of dismissal on that ground after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). 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 generally People v Bleakley*, 69 NY2d 490, 495).

We also reject the contention of defendant that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). With respect to defense counsel's failure to object to certain derogatory testimony concerning defendant's drug use and corporal punishment of the children in question, defendant failed " 'to demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712; *see People v Douglas*, 60 AD3d 1377, *lv denied* 12 NY3d 914). The record does not support defendant's contention that defense counsel failed to conduct an adequate

investigation into the reliability of child abuse accommodation syndrome. In any event, even assuming, arguendo, that defense counsel could have presented alternative psychological theories to the jury, we conclude that his failure to do so was not so " 'egregious and prejudicial as to compromise [] defendant's right to a fair trial' " (*People v Washington*, 60 AD3d 1454, 1455, *lv denied* 12 NY3d 922). Finally, the sentence, the maximum of which is 10 to 20 years, is not unduly harsh or severe.

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

474

CA 09-02418

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

IN THE MATTER OF SHANOR ELECTRIC SUPPLY, INC.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

FAC CONTINENTAL, LLC AND FRANK A. CHINNICI,
RESPONDENTS-APPELLANTS.

LEWANDOWSKI & ASSOCIATES, WEST SENECA (BRIAN N. LEWANDOWSKI OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

ROBSHAW & ASSOCIATES, P.C., WILLIAMSVILLE (JEFFREY F. VOELKL OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered February 25, 2009. The judgment, following a hearing, granted petitioner's request for a permanent injunction.

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

Memorandum: Petitioner commenced this proceeding seeking, inter alia, a permanent injunction enjoining respondents from interfering with petitioner's use of a 38-foot-wide easement over a portion of respondents' property. According to the petition, the easement is necessary to enable petitioner to receive products in delivery trucks from manufacturers and to load the trucks for delivery to petitioner's customers. Respondents appeal from a judgment, issued following a hearing on petitioner's order to show cause, granting petitioner's "request for a permanent injunction restraining respondents from interfering with its ability to load and unload its trucks in the service bay area . . . ." We affirm.

We note at the outset that, contrary to respondents' contention, petitioner did not fail to join necessary parties in this proceeding (*see generally* CPLR 1001 [a]; *Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals*, 5 NY3d 452, 457-459). Respondents have not identified any parties who would be inequitably affected by a decision on the petition and, even assuming, arguendo, that such parties exist, we conclude that their interests "are so intertwined [with those of respondents] that there is virtually no prejudice to the nonjoined part[ies]" (*Matter of Long Is. Contractors' Assn. v Town of Riverhead*, 17 AD3d 590, 594; *see* CPLR 1001 [b] [2];

see generally Matter of Jim Ludtka Sporting Goods, Inc. v City of Buffalo School Dist., 48 AD3d 1103, 1104, *lv denied* 11 NY3d 704).

Contrary to respondents' further contention, Supreme Court properly determined that petitioner is entitled to use the easement for the loading and unloading of delivery trucks inasmuch as petitioner established "irreparable injury and an inadequate remedy at law," two of the three factors necessary for the issuance of a permanent injunction (*DiMarzo v Fast Trak Structures*, 298 AD2d 909, 911). " '[W]here, as here, the language of the grant contains no restrictions or qualifications and the purpose of the easement is to provide ingress and egress, any reasonable lawful use within the contemplation of the grant is permissible' " (*Albright v Davey*, 68 AD3d 1490, 1492; *see generally Joss v Niagara Mohawk Power Corp.*, 41 AD2d 596). We conclude that petitioner's use of the easement for the loading and unloading of trucks "is a reasonable use incidental to the purpose of the easement" (*Higgins v Douglas*, 304 AD2d 1051, 1055), and petitioner established that such use is required to enable it to conduct its business.

Contrary to respondents' further contention, we conclude that petitioner established a balancing of the equities in its favor, the third factor necessary for the issuance of a permanent injunction (*see DiMarzo*, 298 AD2d at 911). Respondents contend that petitioner's use of the easement reduces the number of vehicles that respondents are able to park in the area of the easement. Petitioner, however, "is entitled to full and complete use" of the easement without interference from respondents (*Hullar v Glider Oil Co.*, 219 AD2d 825, 826), and the inconvenience of reduced parking does not override the harm to petitioner's business in the event that petitioner is prevented from using the easement (*see generally Credit Index v RiskWise Intl.*, 282 AD2d 246, 247; *Hullar*, 219 AD2d at 826).

Entered: May 7, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

477

CA 09-02317

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

RICHARD GRAVINO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALLSTATE INSURANCE COMPANY, DEFENDANT-APPELLANT.

LAW OFFICES OF MARY A. BJORK, ROCHESTER (THOMAS P. DURKIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF MICHAEL PILARZ, BUFFALO (MICHAEL PILARZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 18, 2009 in a breach of contract action. The order and judgment denied defendant's motion for summary judgment and granted plaintiff's cross motion for partial summary judgment.

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

Memorandum: Plaintiff commenced this action against his insurer seeking coverage for damage to an in-ground swimming pool pursuant to the terms of his homeowners' insurance policy. Plaintiff had drained the pool in June in order to paint it, but the painting was delayed due to rain. On the fifth day after draining the pool, plaintiff noticed that one end of the pool had lifted out of the ground and that the concrete around the pool had been damaged. Defendant disclaimed coverage for the loss based on, inter alia, a provision in the policy excluding damage to a swimming pool caused by "pressure or weight of water."

We conclude that Supreme Court erred in granting plaintiff's cross motion for partial summary judgment "declaring" that the policy covered the damage to the swimming pool. Indeed, we vacate the declaration inasmuch as this is an action for breach of contract and is not a declaratory judgment action (*see Niagara Falls Water Bd. v City of Niagara Falls*, 64 AD3d 1142, 1144). We conclude that the court instead should have granted defendant's motion for summary judgment dismissing the complaint. Defendant met its initial burden on its motion by establishing as a matter of law that the exclusion for damages caused by "pressure or weight of water" upon which

defendant relied unambiguously applied to plaintiff's loss, and plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The experts for each party agreed that the pool had lifted from the ground because of the hydrostatic pressure in the soil surrounding the pool. The fact that plaintiff's expert stated in his affidavit that the damage would not have occurred if plaintiff had not emptied the pool does not remove the loss from the policy exclusion. The policy expressly provides that, where the damage has two or more causes, the loss is not covered if the "predominant cause(s) of loss is (are) excluded" under the policy. Here, "[t]o determine causation, [we must] look[] to the 'efficient or dominant cause of the loss', not the event that 'merely set the stage for that later event' " (*Kosich v Metropolitan Prop. & Cas. Ins. Co.*, 214 AD2d 992, *lv denied* 86 NY2d 707). Here, although the drainage of the pool may have been a precondition to the lifting of the pool from the ground, we conclude that defendant established as a matter of law that the groundwater pressure was the "predominant cause" of the loss, thus rendering applicable the policy exclusion for damages caused by "pressure or weight of water" (*see Jahier v Liberty Mut. Group*, 64 AD3d 683, 685).

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

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

497

CA 09-01979

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND PINE, JJ.

JOSEPH A. CATANZARO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF LEWISTON AND DOUGLAS E. BURNETT,
DEFENDANTS-RESPONDENTS.

LAW OFFICE OF JOHN J. FROMEN, ESQ., BUFFALO, MAGAVERN MAGAVERN GRIMM LLP (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WALSH & MORENUS, BUFFALO (KEVIN D. WALSH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered November 21, 2008 in a personal injury action. The order granted defendants' motion for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, injuries he sustained when a snowplow truck driven by defendant Douglas E. Burnett, an employee of defendant Town of Lewiston, collided with his vehicle. Supreme Court granted defendants' motion for summary judgment dismissing the complaint. We affirm. In support of their motion, defendants submitted the deposition testimony of Burnett and his "wing man," who each testified that the snowplow truck was stopped at an intersection and that plaintiff's vehicle slid out of control toward the intersection. Burnett testified that he took evasive action to avoid the collision but that plaintiff's vehicle hit the front of the snowplow. In opposition to the motion, plaintiff submitted his own deposition testimony in which he provided a completely different version of the accident. Plaintiff testified that the snowplow truck was traveling too fast for the conditions and that its back wheels locked, causing it to slide into the intersection.

We conclude that defendants met their initial burden of establishing that the snowplow truck was "actually engaged in work on a highway" and that they did not act with "reckless disregard for the safety of others" (Vehicle and Traffic Law § 1103 [b]; *see Primeau v Town of Amherst*, 17 AD3d 1003, *affd* 5 NY3d 844; *see Bliss v State of New York*, 95 NY2d 911, 913; *see generally Saarinen v Kerr*, 84 NY2d

494, 501). In opposition to the motion, plaintiff failed to raise a triable question of fact with respect to the issue of reckless disregard (*see Hughes v Chiera*, 4 AD3d 872).

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

503

KA 09-01042

PRESENT: SCUDDER, P.J., MARTOCHE, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PHILLIP TRUNZO, JR., DEFENDANT-APPELLANT.

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

PHILLIP TRUNZO, JR., DEFENDANT-APPELLANT PRO SE.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JEFFREY L. TAYLOR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, J.), rendered April 17, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree and escape 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 guilty plea, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and escape in the first degree (§ 205.15 [2]) and sentencing him as a second felony offender to concurrent terms of imprisonment totaling eight years. Contrary to defendant's contention, the sentence with respect to criminal sale of a controlled substance is not unduly harsh or severe. Moreover, contrary to the contention of defendant in his pro se supplemental brief, the record establishes that County Court did in fact properly sentence him in accordance with the 2009 Drug Law Reform Act (CPL 440.46), which took effect shortly before the sentencing date. We have considered the remaining contentions of defendant in his pro se supplemental brief and conclude that they are without merit.

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

507

KA 08-02642

PRESENT: SCUDDER, P.J., MARTOCHE, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT AIKEN, 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 (DOUGLAS A. GOERSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Amodeo, A.J.), rendered June 17, 2008. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, as a class E felony.

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 felony driving while intoxicated (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (i)]). The record establishes that defendant knowingly, intelligently, and voluntarily waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256), and that valid waiver encompasses his challenge to County Court's suppression ruling (*see People v Kemp*, 94 NY2d 831, 833).

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

511

KAH 09-00756

PRESENT: SCUDDER, P.J., MARTOCHE, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
DAVID DONATO, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered January 12, 2009 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Supreme Court properly dismissed the petition for a writ of habeas corpus. The contention of petitioner that he was improperly sentenced as a persistent violent felony offender could have been raised on direct appeal from the judgment of conviction or by way of a motion pursuant to CPL article 440 and thus habeas corpus relief does not lie (*see People ex rel. Sims v Senkowski*, 226 AD2d 800, *lv denied* 88 NY2d 807; *see generally People ex rel. Johnson v Graham*, 67 AD3d 1452, *lv denied* 14 NY3d 704).

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

512

TP 09-00451

PRESENT: SCUDDER, P.J., MARTOCHE, LINDLEY, GREEN, AND GORSKI, JJ.

IN THE MATTER OF THOMAS HARRIS, PETITIONER,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION, UNION SPRINGS CENTRAL SCHOOL DISTRICT, THOMAS WEAVER, SR., PRESIDENT, RESPONDENTS.

D. JEFFREY GOSCH, SYRACUSE, FOR PETITIONER.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (FRANK W. MILLER 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, Cayuga County [Thomas G. Leone, A.J.], entered February 18, 2009) to annul a determination of respondent Board of Education, Union Springs Central School District. The determination, inter alia, terminated the employment of petitioner.

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 dismissing him from his employment as a school bus driver. We note at the outset that, prior to transferring the proceeding to this Court pursuant to CPLR 7804 (g), Supreme Court determined that the notice of claim served on petitioner's behalf by the union representing employees of respondent School District complied with Education Law § 3813. "Because resolution of [that] issue . . . would not have terminate[d] the proceeding within the meaning of CPLR 7804 (g) . . ., Supreme Court erred in deciding [it]. The matter now being before us, however, we may decide the issue de novo" (*Matter of Pieczonka v Jewett*, 273 AD2d 842, 842; *see Matter of Farabell v Town of Macedon*, 62 AD3d 1246), and we conclude that the notice of claim properly complied with Education Law § 3813 (*see* § 3813 [2]; *Matter of Figueroa v City of New York*, 279 App Div 771). "The prime, if not the sole, objective of the notice requirements of such a statute is to assure the [respondents] an adequate opportunity to investigate . . . and to explore the merits of the claim while information is still readily available" (*Teresta v City of New York*, 304 NY 440, 443; *see Goodwin v New York City Hous. Auth.*, 42 AD3d 63, 68), and the notice of claim served by the union

satisfied that objective.

Nevertheless, we confirm the determination and dismiss the petition. Contrary to the contention of petitioner, the determination finding him guilty of three charges of misconduct or incompetence is supported by substantial evidence (*see generally Matter of Chiarelly v Watertown City School Dist. Bd. of Educ.*, 34 AD3d 1219). Also contrary to petitioner's contention, respondent Board of Education was not bound by the Hearing Officer's recommendation in determining the appropriate penalty (*see Matter of Welch v Weinstein*, 114 AD2d 463), and we conclude that the penalty of dismissal is not "so disproportionate to the offense as to be shocking to one's sense of fairness" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 237).

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

514

CA 09-01713

PRESENT: SCUDDER, P.J., MARTOCHE, LINDLEY, GREEN, AND GORSKI, JJ.

IN THE MATTER OF ROBERT M. WEICHERT,
PETITIONER-APPELLANT,
ET AL., PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
RESPONDENT,
AND KRISTY MONTANARO, RESPONDENT-RESPONDENT.

ROBERT M. WEICHERT, PETITIONER-APPELLANT PRO SE.

RONALD L. VAN NORSTRAND, SYRACUSE, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered August 5, 2009. The order granted the motion of respondent Kristy Montanaro and held petitioner Robert M. Weichert in civil contempt.

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

Memorandum: Supreme Court erred in holding Robert M. Weichert (petitioner) in civil contempt for failing to pay attorney's fees to Kristy Montanaro (respondent), as directed in a prior money judgment. That judgment was enforceable by execution pursuant to CPLR article 52, and thus holding petitioner in contempt was not an appropriate remedy. "Judiciary Law § 753 (A) (3) generally forbids the use of the court's civil contempt powers to enforce such [a] judgment[] . . ., and none of the exceptions to the general rule are applicable here (*see* CPLR 5104)" (*Wiebusch v Hayes*, 263 AD2d 389, 390-391; *see 4504 New Utrecht Ave. Corp. v Pita Parlor*, 143 AD2d 171).

Finally, we note that, although petitioner contends that the underlying judgment awarding attorney's fees to respondent was improper, petitioner failed to perfect his appeal from that judgment. Thus, "issues concerning the propriety of th[e] underlying [judgment] are not properly before us" (*Data-Track Account Servs. v Lee*, 291 AD2d 827, 827, *lv dismissed* 98 NY2d 727, *rearg denied* 99 NY2d 532). "Having failed to appeal [from the underlying judgment], petitioner may not disregard [it] with impunity nor may he use the contempt citation to revive any right to appeal or otherwise challenge the underlying [judgment], which right terminated as a result of his

failure to appeal therefrom" (*People ex rel. Sassower v Cunningham*, 112 AD2d 119, 120, *appeal dismissed* 66 NY2d 914).

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

561

KA 08-01383

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL G. MILCZAKOWSKYJ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, J.), rendered June 3, 2008. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and harassment 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, following a jury trial, of assault in the second degree (Penal Law § 120.05 [1]) and harassment in the second degree (§ 240.26 [1]) resulting from two incidents of domestic violence between defendant and his girlfriend. Defendant was convicted of assault based on the first incident, during which he punched the victim in her left breast and broke two of her ribs. According to the victim, the second incident occurred approximately seven weeks later, when defendant threw her to the ground and landed on top of her, further injuring her ribs. The victim also alleged that defendant held her against her will at gunpoint and that, the following evening, he threatened to shoot her with a rifle if she left the house. Defendant was convicted of harassment as a result of the second incident but acquitted of all other related charges, including felony assault and unlawful imprisonment.

Defendant failed to preserve for our review his contention that the evidence of serious physical injury is legally insufficient to support the assault conviction inasmuch as he made only a general motion for a trial order of dismissal that was not directed at that ground (*see People v Gray*, 86 NY2d 10, 19). Defendant likewise failed to preserve for our review his further contention that County Court erred in allowing an expert to testify concerning the effects of posttraumatic stress disorder on battered women (*see* CPL 470.05 [2]). In any event, “[t]hat testimony was relevant to explain behavior on

the part of the [victim] that might seem unusual to a lay jury unfamiliar with the patterns of response exhibited by a person who has been physically . . . abused over a period of time" (*People v Nelson*, 57 AD3d 1441, 1442 [internal quotation marks omitted]; *see generally People v Hodgins*, 277 AD2d 911, *lv denied* 99 NY2d 784).

Contrary to defendant's further contention, the court properly granted the motion of the People to amend the indictment to reflect the correct date of the first incident. Defendant was provided with ample notice of the proposed amendment, and the amendment did not change the theory of the prosecution (*see People v Hale* [appeal No. 1], 236 AD2d 807, *lv denied* 89 NY2d 1036; *see generally People v Dudley*, 28 AD3d 1182, *lv denied* 7 NY3d 788, 791). Defendant failed to preserve for our review the majority of his present objections to alleged instances of prosecutorial misconduct (*see* CPL 470.05 [2]). In any event, even assuming, arguendo, that some of the alleged instances were improper, we conclude that none was so egregious as to deny defendant a fair trial (*see People v Hightower*, 286 AD2d 913, 915, *lv denied* 97 NY2d 656). The sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that none requires reversal.

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

565

CA 09-01899

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

GREGG C. TWEEDY, PLAINTIFF-RESPONDENT,

V ORDER

BONNIE CASTLE YACHT BASIN, INC.,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ANTONUCCI LAW FIRM, LLP, WATERTOWN (J.R. SANTANA CARTER OF COUNSEL), FOR DEFENDANT-APPELLANT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (TIMOTHY J. FENNELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered May 18, 2009 in a breach of contract action. The order granted plaintiff's motion to settle the form and content of the judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Coastal Oil N.Y. v Diversified Fuel Carriers Corp.*, 303 AD2d 251, 251-252, *lv denied* 100 NY2d 512).

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

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

566

CA 09-01900

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

GREGG C. TWEEDY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BONNIE CASTLE YACHT BASIN, INC.,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ANTONUCCI LAW FIRM, LLP, WATERTOWN (J.R. SANTANA CARTER OF COUNSEL), FOR DEFENDANT-APPELLANT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (TIMOTHY J. FENNELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered May 18, 2009 in a breach of contract action. The judgment, among other things, awarded plaintiff damages against defendant upon a jury verdict.

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

Memorandum: Plaintiff commenced this action seeking damages for breach of his bailment agreement with defendant, pursuant to which defendant was to winterize and then store plaintiff's approximately 40-foot motor boat in defendant's marina. The matter proceeded to trial and, at the close of proof, defendant conceded the existence of a bailment agreement. Plaintiff moved for a directed verdict pursuant to CPLR 4401 on the issues of liability and damages. Supreme Court granted that part of the motion with respect to liability, determining that plaintiff established that the boat was delivered to defendant in good condition and was damaged when it was returned to plaintiff, and that defendant failed to rebut the presumption of negligence resulting from plaintiff's prima facie case (*see* PJI 4:93; *Damast v New Concepts in Jewelry*, 86 AD2d 886). The jury thereafter returned a verdict awarding plaintiff the sum of $200,000 representing the diminished market value of the boat, and the court awarded plaintiff prejudgment interest of approximately $53,000.

The record does not support defendant's contention that the court erroneously imposed a standard of "best care" rather than the proper standard of "reasonable care" set forth in PJI 4:93 in determining plaintiff's motion. There is nothing in the record to support defendant's assertion that, in determining the motion, the court

relied upon the testimony of defendant's marina manager that it was "good practice" to plug the boat into a source of electric power while moored in the water at defendant's marina. Indeed, the record establishes that the court in fact did not rely upon that testimony. Rather, the record establishes that the court properly concluded that plaintiff established a prima facie case with respect to defendant's liability by submitting competent evidence that the boat was delivered in good condition and returned in a damaged condition. Defendant offered no evidence concerning the condition of the boat at the time of delivery, and it is undisputed that defendant did not inspect and inventory the boat at the time of delivery. "[T]he law [thus] presumes that the [damage] was the result of [defendant's] negligence" inasmuch as defendant failed to establish how the damage occurred and thus failed to establish that it did not occur as a result of its negligence (PJI 4:93; *see generally Dalton v Hamilton Hotel Operating Co.*, 242 NY 481, 488-489). "Upon [plaintiff's having] establish[ed] a prima facie case in . . . negligence, it became incumbent upon the defendant[] to come forward with evidence to explain what happened to the [boat]," and defendant failed to do so (*Damast*, 86 AD2d 886).

We reject defendant's further contention that the court erred in awarding plaintiff prejudgment interest. CPLR 5001 (a) provides that "[i]nterest shall be recovered upon a sum awarded because of a breach of performance of a contract . . . ." As previously noted, it is undisputed that there was a "contract of bailment" (*Johnson v Gumer*, 149 AD2d 933, 933, *lv denied* 74 NY2d 609), and we conclude that defendant breached the contract by returning the boat in a damaged condition.

Entered: May 7, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

571

CA 09-01984

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

CORIEY REYNOLDS AND PENNY REYNOLDS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MILLARD J. KNIBBS AND REBECCA KNIBBS,
DEFENDANTS-APPELLANTS.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO & BARNES, P.C., ROCHESTER (ROBERT L. VOLTZ OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered June 23, 2009 in a personal injury action. The order denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by plaintiff Coriey Reynolds when he fell while descending the stairs to the basement of their residence, which they rented from defendants. According to plaintiffs, the stairs detached from the wall and collapsed. Supreme Court erred in denying the motion of defendants seeking summary judgment dismissing the complaint. We note at the outset that plaintiffs on appeal do not contend that defendants created the defective condition and thus have abandoned any issue with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984). Defendants met their initial burden of establishing that they had no actual or constructive notice of any defective condition of the staircase (*see Heckman v Skelly*, 63 AD3d 1712, 1713; *Lal v Ching Po Ng*, 33 AD3d 668), and plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). With respect to actual notice, Millard J. Knibbs (defendant) testified that he inspected the stairs prior to plaintiff’s accident and believed that they were adequately secured. Defendants also submitted evidence that no one previously had a problem with the stairs or complained about them prior to plaintiff’s accident.

With respect to constructive notice, it is well established that "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant[s] to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837). "[C]onstructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection" (*Curiale v Sharrotts Woods, Inc.*, 9 AD3d 473, 475; *see Lal*, 33 AD3d at 668). As noted by the dissent, in opposition to the motion plaintiffs submitted the affidavit of an expert who averred that the stairs were improperly secured to the concrete wall and that the defect "would have been clearly obvious to anyone with construction experience." The dissent also notes that defendant had over 30 years of experience as a contractor. In addition, the expert stated that the stairs were improperly secured based on the use of concrete nails rather than concrete fasteners with metal washers. Plaintiffs, however, did not thereby raise a triable issue of fact with respect to actual or constructive notice because the expert's opinion was both speculative and conclusory (*see Ciccarelli v Cotira, Inc.*, 24 AD3d 1276, 1277; *Aungst v Slippery Slats & All That*, 6 AD3d 1078, 1079). The expert never specified the kind of construction experience needed to determine whether the defect was "obvious," nor did he state, e.g., whether the use of concrete fasteners with metal washers as opposed to concrete nails was standard in the industry or whether a building inspector would have noted that alleged defect.

All concur except GREEN and GORSKI, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent, and would affirm the order. Even assuming, arguendo, that defendants met their initial burden on their motion for summary judgment dismissing the complaint against them, we conclude that plaintiffs raised a triable issue of fact whether defendants had constructive notice of the defective condition of the basement stairs where plaintiff Coriey Reynolds was injured (*see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838). In opposition to the motion, plaintiffs submitted the affidavit of an expert stating that the stairs were improperly secured to the concrete wall and that such a defect would have been obvious upon inspection by anyone with construction experience (*cf. Lee v Bethel First Pentecostal Church of Am.*, 304 AD2d 798, 799-800). In addition, plaintiffs submitted the deposition testimony of defendant Millard J. Knibbs, one of the lessors of the property, who testified that he had over 30 years of experience as a contractor and that he had inspected the stairs prior to plaintiffs' tenancy, which began approximately a month prior to the accident. We thus conclude that plaintiffs thereby raised an issue of fact with respect to constructive notice (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: May 7, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

583

KA 07-02094

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CICELY HAWKINS, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LESLIE E. SWIFT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered March 28, 2007. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a forged instrument in the second degree (two counts), grand larceny in the third degree, attempted grand larceny in the third degree, criminal possession of stolen property in the fifth degree and criminal impersonation in the second degree.

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

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

588

CA 09-02367

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, GREEN, AND GORSKI, JJ.

IN THE MATTER OF KEVIN FAGER, THOMAS GILLETT,
AND OTHER PETITIONERS UNITED IN INTEREST,
PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION, ROCHESTER CITY SCHOOL
DISTRICT, RESPONDENT-RESPONDENT.

JAMES R. SANDNER, LATHAM (JAMES D. BILIK OF COUNSEL), FOR PETITIONERS-APPELLANTS.

CHARLES G. JOHNSON, ROCHESTER (MICHAEL E. DAVIS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (David Michael Barry, J.), entered January 26, 2009 in a proceeding pursuant to CPLR article 78. The judgment granted respondent's motion to dismiss the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated and respondent is granted 20 days after service of the order of this Court with notice of entry to serve and file an answer.

Memorandum: Supreme Court erred in granting respondent's motion to dismiss the petition in this CPLR article 78 proceeding as time-barred, and we therefore reverse. "A CPLR article 78 proceeding must be commenced within four months after the determination sought to be reviewed becomes final and binding . . .[, i.e.,] when it definitively impacts and aggrieves the party seeking judicial review" (*Matter of Scott v City of Albany*, 1 AD3d 738, 739; *see* CPLR 217 [1]; *Matter of Novillo v Board of Educ. of Madison Cent. School Dist.*, 17 AD3d 907, 909, *lv denied* 5 NY3d 714). Here, petitioners commenced the proceeding less than four months after respondent's determination became final and binding.

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

590

CA 09-02543

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, GREEN, AND GORSKI, JJ.

IN THE MATTER OF RICHARD E. SLAGLE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN KEENEY, INDIVIDUALLY AND AS MAYOR
OF CELORON, AND VILLAGE OF CELORON,
NEW YORK, RESPONDENTS-APPELLANTS.

GOODELL & RANKIN, JAMESTOWN (ANDREW W. GOODELL OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

JAMES P. SUBJACK, FREDONIA, FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered November 23, 2009 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, granted the petition in part.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs and the petition is dismissed in its entirety.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the allegedly wrongful termination of his employment as Code Enforcement Officer for respondent Village of Celoron (Village) in August 2009. We agree with respondents that Supreme Court should have dismissed the petition in its entirety. Pursuant to the Village's Local Law No. 2-1985, a term of office for the position of Code Enforcement Officer is two years. It is undisputed that the term of petitioner's predecessor ended in March 2007 and that petitioner was appointed in April 2008. We note that the record is unclear whether petitioner's predecessor was reappointed to a two-year term in 2007 pursuant to Local Law No. 2-1985. In the event that he was reappointed and the position thereafter became vacant, petitioner's term would have been "for the balance of [the] unexpired term[]" of petitioner's predecessor pursuant to Village Law § 3-312 (3) (a). If no action was taken to reappoint petitioner's predecessor, then the predecessor held the position through April 2008 in a holdover capacity pursuant to Public Officers Law § 5. "An appointment for a term shortened by reason of a predecessor holding over[] shall be for the residue of the term only" (*id.*). Thus,

regardless of which statute applies, petitioner’s term of office ended in March 2009, prior to petitioner’s termination.

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

594

CA 09-02419

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, GREEN, AND GORSKI, JJ.

JOANNE M. WARMUS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LARRY E. SUTTON AND RELCO SYSTEMS, INC.,
DEFENDANTS-RESPONDENTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (KEVIN VASQUEZ HUTCHESON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF TAYLOR & SANTACROSE, BUFFALO (CHRISTOPHER R. TURNER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered September 2, 2009 in a personal injury action. The order, insofar as appealed from, denied that part of the motion of plaintiff for summary judgment on the issue of proximate cause.

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 commenced this action seeking damages for injuries she allegedly sustained when a tractor-trailer owned by defendant Relco Systems, Inc. and operated by defendant Larry E. Sutton struck a motorcycle on which plaintiff was a passenger. Supreme Court granted those parts of plaintiff's motion seeking summary judgment on the issue of negligence and dismissing the first affirmative defense. Plaintiff appeals from the order insofar as it denied that part of her motion seeking summary judgment on the issue of proximate cause, and we reverse. Plaintiff met her initial burden with respect thereto, and defendants failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

604

KA 08-02136

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THANH C. VO, DEFENDANT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered August 18, 2008. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree (two counts), criminal possession of a controlled substance in the third degree (four counts), criminal possession of a controlled substance in the seventh degree, criminal possession of marihuana in the fifth degree, and a traffic infraction.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), and four counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1], [12]). We reject the contention of defendant that he was denied his right to effective assistance of counsel (*see generally People v Turner*, 5 NY3d 476, 480; *People v Baldi*, 54 NY2d 137, 147). The failure of defense counsel to request an entrapment charge was consistent with his defense strategy that defendant had not sold any drugs (*see generally People v Leigh*, 232 AD2d 904, 906, *lv denied* 89 NY2d 1036, 1037), " 'and defendant failed to meet his burden of establishing the absence of any legitimate explanations for' " that strategy (*People v Douglas*, 60 AD3d 1377, 1377, *lv denied* 12 NY3d 914).

We reject the further contention of defendant that defense counsel was ineffective for failing to move to suppress the contraband recovered when the police stopped his vehicle. "Defendant has failed to establish that 'the motion, if made, would have been successful and has failed to establish that counsel failed to provide meaningful

representation' " (*People v Peterson,* 19 AD3d 1015, 1015, *lv denied* 6 NY3d 851). Finally, the sentence is not unduly harsh or severe.

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

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

615

CA 09-01970

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

HENRY BRITT, PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

CARRIE MONACHINO AND WAL-MART STORES, INC.,
DEFENDANTS-APPELLANTS-RESPONDENTS.
(APPEAL NO. 1.)

SCHRÖDER, JOSEPH & ASSOCIATES, LLP, BUFFALO (ALICIA C. ROOD OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

LAW OFFICE OF DAVID J. CLEGG, KINGSTON (DAVID J. CLEGG OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered May 29, 2009 in an action for false arrest and malicious prosecution. The order denied defendants' motion for a directed verdict and denied plaintiff's motion to set aside the award of punitive damages and for a new trial on punitive damages.

It is hereby ORDERED that said appeal and cross appeal are unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; *see also* CPLR 5501 [a] [1], [2]).

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

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

616

CA 09-01971

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

HENRY BRITT, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

CARRIE MONACHINO AND WAL-MART STORES, INC.,
DEFENDANTS-APPELLANTS-RESPONDENTS.
(APPEAL NO. 2.)

SCHRÖDER, JOSEPH & ASSOCIATES, LLP, BUFFALO (ALICIA C. ROOD OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

LAW OFFICE OF DAVID J. CLEGG, KINGSTON (DAVID J. CLEGG OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered August 6, 2009 in an action for false arrest and malicious prosecution. The judgment awarded plaintiff damages upon a jury verdict.

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

Memorandum: Plaintiff commenced this action against defendants Wal-Mart Stores, Inc. (Wal-Mart) and one of its managers, asserting causes of action for, inter alia, false arrest and malicious prosecution. Plaintiff had been arrested and charged with petit larceny after defendants reported to the police that he was involved in the theft of four tires from Wal-Mart's Tire Lube Express Department, where he was employed as a service manager. A trial was held, following which the jury returned a verdict in favor of plaintiff on both causes of action and awarded him compensatory and punitive damages totaling approximately $106,000, with costs and disbursements.

With respect to the appeal taken by defendants, we reject their contention that the evidence is legally insufficient to establish the requisite element of lack of probable cause with respect to both causes of action. Although defendants are correct that "[p]robable cause to believe that a person committed a crime is a complete defense to [plaintiff's causes of action for] false arrest and malicious prosecution" (*Fortunato v City of New York*, 63 AD3d 880, 880; *see Quigley v City of Auburn*, 267 AD2d 978, 979), we agree with plaintiff that the evidence is legally sufficient to establish that there was no probable cause, particularly in view of the lack of direct evidence

that plaintiff committed the larceny of the four tires or profited therefrom.

We also reject defendants' contention that the evidence is legally insufficient with respect to the requisite element of malice in connection with the cause of action for malicious prosecution. "The 'actual malice' element of a malicious prosecution [cause of] action does not require a plaintiff to prove that the defendant[s were] motivated by spite or hatred . . . Rather, it means that the defendant[s] must have [instigated the commencement of] the prior criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served" (*Nardelli v Stamberg*, 44 NY2d 500, 502-503; *see Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128, 132). Having found that there was no probable cause, the jury was thus also entitled to find malice based on the absence of probable cause, together with evidence that Wal-Mart's policy was to prosecute employee thefts whenever possible and the evidence at trial concerning the public nature of plaintiff's arrest. Thus, contrary to defendants' contention, the evidence of malice is legally sufficient to support the finding of the jury that defendants were motivated by "something other than a desire to see the ends of justice served" (*Nardelli*, 44 NY2d at 503).

Finally, with respect to defendants' appeal, we reject defendants' contentions that the findings with respect to liability and the award of punitive damages are against the weight of the evidence. It cannot be said that the verdict could not have been reached on any fair interpretation of the evidence (*see generally Lolik v Big V Supermarkets*, 86 NY2d 744, 746).

We have reviewed the contentions raised by plaintiff on his cross appeal and conclude that they are unpreserved and, in any event, that they are without merit.

Entered: May 7, 2010 Patricia L. Morgan
Clerk of the Court

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

617

CA 09-00895

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

MICHAEL J. REW, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF NIAGARA, COUNTY OF NIAGARA SHERIFF'S DEPARTMENT, NIAGARA COUNTY SHERIFF THOMAS A. BEILEIN, AND JOHN DOE (SAID DEFENDANT BEING DEPUTY ON DUTY AND INVOLVED IN SHOOTING INCIDENT ON NOVEMBER 11, 2007), DEFENDANTS-APPELLANTS. (APPEAL NO. 1.)

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ELIZABETH M. BERGEN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered December 8, 2008 in a personal injury action. The order denied the motion of defendant John Doe to dismiss the complaint against him.

It is hereby ORDERED that the appeal insofar as taken by defendants County of Niagara, County of Niagara Sheriff's Department, and Niagara County Sheriff Thomas A. Beilein is unanimously dismissed (*see Town of Massena v Niagara Mohawk Power Corp.*, 45 NY2d 482, 488; *Matter of Brown v Starkweather*, 197 AD2d 840, 841, *lv denied* 82 NY2d 653; *see also* CPLR 5511) and the order is otherwise affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he was shot by defendant John Doe (defendant deputy), a Sheriff's Deputy employed by defendant County of Niagara Sheriff's Department (defendant County). Contrary to the contention of defendant deputy, Supreme Court properly denied his motion to dismiss the complaint against him based on plaintiff's failure to name him in the notice of claim. General Municipal Law § 50-e bars an action against an individual who has not been named in a notice of claim only where such notice is required by law (*see Cropsey v County of Orleans Indus. Dev. Agency*, 66 AD3d 1361, 1362). The naming of a county employee in the notice of claim, and thus the service of the notice of claim upon the employee, "is not a condition precedent to the commencement of an action against such person unless the county is required to indemnify such person" (*Bardi v Warren*

County Sheriff's Dept., 194 AD2d 21, 23-24, citing General Municipal Law § 50-e [1] [b]). A county's duty to indemnify an employee "turns on whether [the employee was] acting within the scope of [his or her] employment (*see* Public Officers Law § 18 [1] [a], [b]; [4] [a]),"and whether the obligation to indemnify the employee was formally adopted by a local governing body (*Grasso v Schenectady County Pub. Lib.*, 30 AD3d 814, 818; *see* Public Officers Law § 18 [2] [a]; *Matter of Coker v City of Schenectady*, 200 AD2d 250, 252-253, *appeal dismissed* 84 NY2d 1027). Here, even assuming, arguendo, that defendant County was required to indemnify defendant deputy, which is not clear from the record before us, we note that plaintiff alleged that defendant deputy "did willfully, maliciously, and intentionally discharge his weapon and shoot without provocation." Thus, "the conduct of [defendant deputy] as alleged in the complaint amounts to [an] intentional tort[]" that falls outside the scope of his employment and thus is not encompassed within the duty to indemnify (*Grasso*, 30 AD3d at 818; *see* Public Officers Law § 18 [4] [b]).

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

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

618

CA 09-00896

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

MICHAEL J. REW, PLAINTIFF-RESPONDENT,

V ORDER

COUNTY OF NIAGARA, COUNTY OF NIAGARA SHERIFF'S DEPARTMENT, NIAGARA COUNTY SHERIFF THOMAS A. BEILEIN, AND JOHN DOE (SAID DEFENDANT BEING DEPUTY ON DUTY AND INVOLVED IN SHOOTING INCIDENT ON NOVEMBER 11, 2007), DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ELIZABETH M. BERGEN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered March 10, 2009 in a personal injury action. The order granted the motion of plaintiff to serve a late notice of claim and amended summons and complaint.

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

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

631

CA 09-01965

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

IN THE MATTER OF THE ESTATE OF IRA ROBERT RANDALL, DECEASED.

GEORGE MITRIS AND CINDY BAGLEY, PETITIONERS-APPELLANTS;

MEMORANDUM AND ORDER

THOMAS RANDALL, RESPONDENT-RESPONDENT.

CROUCHER AND JONES, CANANDAIGUA (WALTER W. JONES, JR., OF COUNSEL), FOR PETITIONERS-APPELLANTS.

PHILLIPS LYTLE LLP, ROCHESTER (CHAD W. FLANSBURG OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Ontario County (Frederick G. Reed, S.), entered June 24, 2009. The order, insofar as appealed from, denied in part petitioners' motion for summary judgment.

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

Memorandum: Petitioners appeal from an order denying that part of their motion for summary judgment dismissing respondent's objection to probate of decedent's will based on undue influence. We affirm.

Petitioners met their initial burden by establishing that the will was the product of the personal relationship of petitioner Cindy Bagley with decedent, including his affection for her and gratitude for her having cared for him (*see generally Matter of Branovacki*, 278 AD2d 791, 792, *lv denied* 96 NY2d 708; PJI 7:55). Indeed, Bagley served as the sole caretaker of decedent for approximately two years prior to his death. In opposition to the motion, however, respondent submitted circumstantial evidence of a substantial nature sufficient to raise a triable issue of fact whether Bagley actually wielded undue influence (*see Matter of Johnson*, 6 AD3d 859, 861; *see generally Branovacki*, 278 AD2d at 792).

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

638

CA 09-02554

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

FARRAH DONALD, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 115414.)

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MICHAEL S. BUSKUS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MCKAIN LAW FIRM, P.C., ROCHESTER (KEVIN K. MCKAIN OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Court of Claims (Frank P. Milano, J.), entered February 27, 2009. The order granted the motion of claimant for partial summary judgment on liability and denied the cross motion of defendant to dismiss the claim.

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

Memorandum: Claimant was convicted upon his plea of guilty of criminal possession of a weapon in the third degree (Penal Law § 265.02 [former (4)]), a class D violent felony (§ 70.02 [1] [former (c)]). In a prior appeal, we affirmed the judgment convicting claimant of that offense (*People v Donald*, 5 AD3d 1043, *lv denied* 3 NY3d 639). Because Supreme Court had failed to impose a period of postrelease supervision, the Department of Correctional Services (DOCS) added a three-year period of postrelease supervision upon claimant's release from prison. During that period of postrelease supervision, claimant was convicted of another offense. We also affirmed the judgment convicting claimant of the new offense in a prior appeal (*People v Donald*, 6 AD3d 1177, *lv denied* 3 NY3d 639). Claimant was returned to prison to serve the sentence remaining on his conviction of criminal possession of a weapon, the remaining period of postrelease supervision and the sentence imposed on the new conviction. He was subsequently released from prison, however, when his petition for a writ of habeas corpus was granted pursuant to *People ex rel. Burch v Goord* (48 AD3d 1306, 1307), in which we concluded that, "in the event that a court does not impose a period of postrelease supervision as part of a defendant's sentence, the sentence has no postrelease supervision component" (*see generally Matter of Garner v New York State Dept. of Correctional Servs.*, 10

NY3d 358; *People v Sparber*, 10 NY3d 457).

Claimant thereafter commenced this action seeking damages based on his "unlawful incarceration." In support of the claim, he contended that, because DOCS impermissibly added the three-year period of postrelease supervision to his sentence on the criminal possession of a weapon conviction, he was forced to spend an additional 676 days in prison. Based on our holding in *Collins v State of New York* (69 AD3d 46), we conclude that the Court of Claims erred in granting claimant's motion for partial summary judgment on liability and in denying defendant's cross motion to dismiss the claim on the ground that it failed to state a cause of action (*Donald v State of New York*, 24 Misc 3d 329).

Claimant contends that this case is distinguishable from *Collins* because the court could have exercised its discretion to impose a lesser period of postrelease supervision. We reject that contention. At the time claimant was sentenced on his conviction for criminal possession of a weapon, Penal Law § 70.45 (former [2]) stated that the period of postrelease supervision for a class D violent felony "shall be three years . . . provided, however, that when a determinate sentence is imposed [for such a felony], the court, at the time of sentence, *may* specify a shorter period of [postrelease] supervision of not less than . . . [1½] years" (emphasis added). Pursuant to the law at that time, the three-year period was imposed automatically if the court was silent with respect to postrelease supervision (*see e.g. People v Crump*, 302 AD2d 901, *lv denied* 100 NY2d 537; *People v Thweatt*, 300 AD2d 1100). Thus, the imposition of the three-year period of postrelease supervision by DOCS in this case was no less privileged than the imposition of the mandatory five-year period of postrelease supervision by the Division of Parole in *Collins*. In each case, the nonjudicial body imposed the default period of postrelease supervision consistent with the law at the time of sentencing and thus acted "beyond [its] limited jurisdiction" rather than in the absence of jurisdiction (*Garner*, 10 NY3d at 362; *see Collins*, 69 AD3d at 52).

Entered: May 7, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

660

KA 09-00487

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW W.B., 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 (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from an adjudication of the Supreme Court, Erie County (M. William Boller, A.J.), rendered February 24, 2009. The adjudication revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant was adjudicated a youthful offender based upon his plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [1]). On appeal from an adjudication revoking the sentence of probation imposed upon the youthful offender finding and sentencing him to an indeterminate term of imprisonment, defendant contends that Supreme Court erred in imposing a DNA databank fee in violation of section 60.02 (3). That contention is not properly before us inasmuch as that fee was imposed in the prior youthful offender adjudication from which no appeal was taken. The sentence is not unduly harsh or severe.

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

661

KA 07-01399

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES DWYER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (GERALD T. BARTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRENTON P. DADEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered April 30, 2007. The judgment convicted defendant, upon his plea of guilty, of 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 his guilty plea, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). We conclude that defendant forfeited his contention that Supreme Court erred in refusing to suppress the evidence seized from his person when the police stopped his vehicle, inasmuch as he pleaded guilty before the court issued a final suppression order (*see* CPL 710.70 [2]; *People v Powless*, 66 AD3d 1353). In any event, that contention is without merit. The People established the reliability and basis of knowledge of the informant who provided the police with information concerning defendant's drug activities (*see People v DiFalco*, 80 NY2d 693, 696-697; *see generally Spinelli v United States*, 393 US 410; *Aguilar v Texas*, 378 US 108), and the police had reasonable suspicion to stop defendant's vehicle based on that information. "Upon making the valid traffic stop, the officer[was] entitled . . . to conduct the limited protective pat-down search of defendant for the presence of weapons" (*People v Douglas*, 42 AD3d 756, 757-758, *lv denied* 9 NY3d 922). After defendant was informed that his girlfriend had admitted that there were drugs at the couple's residence, defendant spontaneously stated that the drugs were his and began reaching into his jacket pocket. Thus, "the officer[]-having no knowledge as to what defendant was reaching for-acted reasonably and lawfully in attempting to stop [defendant]" and reaching into defendant's pocket himself (*People v Williams*, 25 AD3d 927, 929, *lv denied* 6 NY3d 840). The discovery of

cocaine in defendant's pocket gave the police probable cause to arrest defendant (*see id*.). Contrary to the further contention of defendant, the court properly determined that his girlfriend's consent to search their residence was not coerced. "[M]uch weight must be accorded the determination of the suppression court with its peculiar advantages of having seen and heard the witnesses" (*People v Prochilo*, 41 NY2d 759, 761; *see People v Witherspoon*, 66 AD3d 1456, 1458, *lv denied* 13 NY3d 942).

Finally, to the extent that the contention of defendant that he was deprived of effective assistance of counsel is not forfeited by the plea (*see People v Santos*, 37 AD3d 1141, *lv denied* 8 NY3d 950), it lacks merit. The record establishes that defendant received an advantageous plea, and nothing in the record suggests that defense counsel's representation of defendant was anything less than meaningful (*see generally People v Ford*, 86 NY2d 397, 404).

Entered: May 7, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

662

KA 07-01128

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JULIO R. NUNEZ, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY A. GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered April 18, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance 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 criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]). We reject the contention of defendant that County Court erred in failing to address his requests to proceed pro se. "Defendant never made an unequivocal invocation of his right of self-representation[] because each of his requests to proceed pro se was made in the context of a request for substitution of counsel" (*People v McClam*, 297 AD2d 514, 514, *lv denied* 99 NY2d 537; *see also People v Caswell*, 56 AD3d 1300, 1301-1302, *lv denied* 11 NY3d 923, 12 NY3d 781; *see generally People v Gillian*, 8 NY3d 85, 88).

We conclude that "[d]efendant forfeited the right to our review of [his further] contention[] . . . that the court should have suppressed evidence seized [from his residence] inasmuch as he pleaded guilty before the court determined whether suppression was warranted" (*People v Graham*, 42 AD3d 933, 933-934, *lv denied* 9 NY3d 876). "A guilty plea 'generally results in a forfeiture of the right to appellate review of any nonjurisdictional defects in the proceedings' " (*People v Powless*, 66 AD3d 1353, quoting *People v Fernandez*, 67 NY2d 686, 688). Although a defendant convicted upon a plea of guilty may seek review of "[a]n order finally denying a motion

to suppress evidence" (CPL 710.70 [2]) upon an appeal from the judgment of conviction, no such order was issued in this case.

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

666

KA 09-00098

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES SMITH, 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 (DOUGLAS A. GOERSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered June 13, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), arising from an incident in which defendant stabbed his neighbor with a knife in the hallway of their duplex apartment. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we reject the contention of defendant that the evidence is legally insufficient to establish that he possessed the knife with the intent to use it unlawfully. The evidence at trial established that the victim knocked on defendant's door in response to loud music, that defendant answered the door with the knife already in his hand, and that he stabbed the victim with the knife three times. Even assuming, arguendo, that defendant initially possessed the knife for a lawful purpose, we conclude that there is ample evidence from which the jury could infer that, at some point during the altercation, defendant formed the requisite intent to use it unlawfully (*see People v Gonzalez*, 64 AD3d 1038, 1041, *lv denied* 13 NY3d 796; *see also People v Porter*, 284 AD2d 931, *lv denied* 96 NY2d 906; *People v Leon*, 163 AD2d 740, 742, *lv denied* 77 NY2d 879).

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 generally People v Bleakley*, 69 NY2d 490,

495). Although there were inconsistencies in the trial testimony of the victim and between his grand jury and trial testimony, the victim's testimony was not so inconsistent as to be incredible as a matter of law (*see People v Black*, 38 AD3d 1283, 1285, *lv denied* 8 NY3d 982). Testimony will be deemed incredible as a matter of law only where it is "manifestly untrue, physically impossible, contrary to experience or self-contradictory" (*People v Stroman*, 83 AD2d 370, 373), and that is not the case here. Further, it is well settled that credibility issues are best resolved by the jury (*see People v Harris*, 15 AD3d 966, *lv denied* 4 NY3d 831), and we perceive no basis to disturb its determination.

The contention of defendant that he was deprived of a fair trial by prosecutorial misconduct on summation is not preserved for our review (*People v Pringle*, 71 AD3d 1450). In any event, the prosecutor's allegedly improper comments did not " 'cause[] such substantial prejudice to the defendant that he has been denied due process of law' " (*People v Rubin*, 101 AD2d 71, 77, *lv denied* 63 NY2d 711). Finally, considering the violent nature of the crime and the injury sustained by the victim, we conclude that the sentence is not unduly harsh or severe.

Entered: May 7, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

667

KA 08-02371

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY AUSTIN, ALSO KNOWN AS KHALI ALI,
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 (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered September 5, 2008. The judgment convicted defendant, upon a nonjury verdict, of 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 following a nonjury trial of robbery in the third degree (Penal Law § 160.05). Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence (*see People v Gray*, 86 NY2d 10, 19). We reject the contention of defendant that defense counsel was ineffective in failing to preserve that challenge for our review inasmuch as defendant failed to demonstrate that it would be meritorious (*see People v Bassett*, 55 AD3d 1434, 1438, *lv denied* 11 NY3d 922). Viewing the evidence in light of the elements of the crime in this nonjury trial (*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).

Contrary to defendant's further contention, "the showup identification procedure, which was conducted in geographic and temporal proximity to the crime, was not unduly suggestive" (*People v Davis*, 48 AD3d 1120, 1122, *lv denied* 10 NY3d 957; *see People v Duuvon*, 77 NY2d 541, 545), despite the fact that defendant was seated in a police vehicle when viewed by the victim (*see People v Robinson*, 8 AD3d 1028, 1029-1030, *affd* 5 NY3d 738, *cert denied* 546 US 988; *Duuvon*,

77 NY2d at 545; *People v Ricks*, 270 AD2d 882, *lv denied* 95 NY2d 802). The sentence is not unduly harsh or severe.

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

674

TP 09-02451

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

IN THE MATTER OF LORI GOKEY, PETITIONER,

V MEMORANDUM AND ORDER

BETH BERLIN, EXECUTIVE DEPUTY COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, AND LAURA CEROW, COMMISSIONER, JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENTS.

LEGAL AID SOCIETY OF MID-NEW YORK, INC., WATERTOWN (TERRENCE J. WHELAN OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENT BETH BERLIN, EXECUTIVE DEPUTY COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE.

CARACCIOLI & NELSON, PLLC, OSWEGO (KEVIN C. CARACCIOLI OF COUNSEL), FOR RESPONDENT LAURA CEROW, COMMISSIONER, JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES.

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 [Hugh A. Gilbert, J.], entered November 19, 2009) to review a determination of respondents. The determination sanctioned petitioner for failure to comply with the requirements of a work experience program.

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

Memorandum: The determination sanctioning petitioner for failure to comply with the requirements of a work experience program without good cause is supported by substantial evidence (*see Matter of LaSalle v Wing*, 256 AD2d 1243; *Matter of Bishop v New York State Dept. of Social Servs.*, 246 AD2d 391, *lv denied* 91 NY2d 813; *see also Matter of Kelly v Wing*, 237 AD2d 976). The medical reports presented at the fair hearing and submitted thereafter do not support the contention of petitioner that she was incapable of participating in the work experience program or that she suffered from limitations that would justify her noncompliance (*see* Social Services Law § 131 [7] [b]). We

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

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

675

CA 09-02326

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

SANDRA CONTI, PLAINTIFF,
AND TIMOTHY CONTI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID F. SCHWAB AND JAMIE L. SCHWAB,
DEFENDANTS-RESPONDENTS.

LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (SCOTT D. CARLTON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (JILL Z. FLORKOWSKI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered February 5, 2009 in a personal injury action. The order, inter alia, denied the motion of plaintiff Timothy Conti for summary judgment dismissing the counterclaim against him.

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

Memorandum: Plaintiffs commenced this action seeking damages sustained by plaintiff Sandra Conti when the vehicle operated by Timothy Conti (plaintiff) and in which she was a passenger collided with a vehicle owned by defendant Jamie L. Schwab and operated by David F. Schwab (defendant). Defendants asserted a counterclaim against plaintiff, alleging that he was negligent in the operation of his vehicle. Contrary to the contention of plaintiff, we conclude that Supreme Court properly denied his motion for summary judgment dismissing the counterclaim.

In support of the motion, plaintiff submitted evidence that, as he was traveling southbound and approaching the intersection in question, the traffic signal turned yellow when he was “maybe just a few car lengths away.” At the time plaintiff entered the intersection, defendant’s vehicle was traveling northbound “in the turning lane out in the intersection.” When defendant’s vehicle began to turn, it collided with plaintiff’s vehicle. Plaintiff also submitted evidence establishing that the other lanes of southbound traffic had come to a complete stop before he entered into the intersection. We thus conclude that, by his own submissions, plaintiff raised triable issues of fact whether he entered the intersection when the traffic signal was turning red or whether he

failed to use reasonable care in entering the intersection against a yellow signal (*see e.g. Whitford v Carlson*, 19 AD3d 1177; *Sauer v Diaz*, 300 AD2d 1136). Inasmuch as plaintiff failed to meet his initial burden of establishing his entitlement to judgment as a matter of law, the burden never shifted to defendants to raise a triable issue of fact (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

682.1

CA 10-00274

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND PINE, JJ.

SUTHERLAND GLOBAL SERVICES, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS STUEWE, DEFENDANT-APPELLANT.

MODICA & ASSOCIATES, ATTORNEYS, PLLC, ROCHESTER (STEVEN V. MODICA OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered November 5, 2009. The order granted plaintiff's motion for a preliminary injunction.

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

Memorandum: Plaintiff commenced this action seeking to enforce the restrictive covenants contained in a "Non-Competition and Non-Solicitation Agreement" (Agreement) that defendant signed while he was employed by plaintiff. Defendant appeals from an order granting the motion of plaintiff seeking a preliminary injunction enjoining defendant from, inter alia, accepting employment from plaintiff's alleged competitors.

We agree with defendant that Supreme Court abused its discretion in issuing the preliminary injunction. "Preliminary injunctive relief is a drastic remedy [that] is not routinely granted" (*Marietta Corp. v Fairhurst*, 301 AD2d 734, 736; *see Peterson v Corbin*, 275 AD2d 35, 37, *appeal dismissed* 95 NY2d 919; *Cool Insuring Agency v Rogers*, 125 AD2d 758, 759, *appeal dismissed* 69 NY2d 1037). "In order to establish its entitlement to a preliminary injunction, the party seeking the injunction must establish, by clear and convincing evidence . . ., three separate elements[, including,] . . . ' . . . a likelihood of ultimate success on the merits' " (*Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 216, quoting *Doe v Axelrod*, 73 NY2d 748, 750; *see Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862; *J. A. Preston Corp. v Fabrication Enters.*, 68 NY2d 397, 406).

Here, we agree with defendant that plaintiff failed to

demonstrate by clear and convincing evidence that the Agreement was enforceable and thus that there was a likelihood of success on the merits. "While restrictive covenants tending to prevent an employee from pursuing a similar vocation after termination of employment are, as a general rule, disfavored by the courts, they will be enforced if they are[, inter alia,] . . . necessary to protect the employer's legitimate interests" (*Asness v Nelson*, 273 AD2d 165; *see BDO Seidman v Hirshberg*, 93 NY2d 382, 388-389; *Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.*, 42 NY2d 496, 499). We agree with defendant that plaintiff failed to demonstrate the need for an injunction to protect its legitimate interests, which are "limited to the protection of [its] trade secrets or confidential customer lists, or protection from an employee whose services are unique or extraordinary" (*Riedman Corp. v Gallager*, 48 AD3d 1188, 1189; *see BDO Seidman*, 93 NY2d at 389; *Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 308, *rearg denied* 40 NY2d 918). We therefore reverse the order, deny the motion and vacate the preliminary injunction.

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court