

Onondaga County Bar Association

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ONONDAGA COUNTY BAR ASSOCIATION BAR REPORTER

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Holiday Luncheon Features Swearing-In of New OCBA Leadership and Directors

Nearly 40 Board members from the Onondaga County Bar Association, the Onondaga County Bar Foundation and the Volunteer Lawyers Project of Onondaga County joined together for a festive holiday luncheon held December 19 at the Central New York Philanthropy Center, the new home for the Association and Foundation.

Members appreciated the opportunity to visit with colleagues from the other organizations and with OCBA staff, who had decorated the offices for the holidays.

The purpose of the luncheon was to swear in OCBA's new President Jean Marie Westlake, and the new officers for 2015: President-Elect Anne Burak Dotzler, Vice President Jim Williams, Treasurer John McCann and Secretary Mark Wasmund. Supreme Court Justice Anthony J. Paris generously gave of his time to preside over those oaths of office.

New OCBA Directors were also sworn in and welcomed to the Board: Joseph J. Bufano, Paula Mallory Engel, Danielle M. Fogel, Frank B. Pelosi, Aaron J. Ryder and Kimberly M. Zimmer.

One highlight of the luncheon was the acknowledgment and appreciation for outgoing OCBA President Nick DeMartino,

who was presented with a Stickley clock as thanks for his year of leadership and hours of service.

Finally, those Board members who were completing their terms of service were thanked for their contributions. For the Association, those Directors were: Betsy Barker, Joe Callery, Fran Ciardullo, Emilee Lawson Hatch, Jim Messenger – who had served as OCBA's Treasurer – and Immediate Past President Nancy Pontius. For the Foundation, retiring Trustees included: Nancy Caple, Walt Kogut, Paul Mullin – who had served two terms as Foundation President – and Kristen Smith. All were thanked for their service.

All members in attendance appreciated the opportunity to network, to celebrate the successful year each organization enjoyed in 2014 – and to ring in 2015 with warm wishes for all.



UPCOMING 2015 EVENTS:

- | | |
|------------------------------|------------------------|
| OCBA Open House | Thursday February 12 |
| Memorial Observance Ceremony | Thursday February 19 |
| Annual Bridge the Gap CLE | Thursday April 9 |
| Annual Law Day Luncheon | Friday May 1 |

MISSION:

To maintain the honor and dignity of the profession of law, to cultivate social discourse among its members, and to increase its significance in promoting the due administration of Justice.

Criminal Case Notes

Bradley Keem, Associate | D.J. & J.A. Cirando



APPELLATE DIVISION | FOURTH DEPARTMENT Acting in Concert

People v. Davila, KA 12-00600, 1/2/15 – To establish an acting in concert theory involving the sale of drugs, the People must prove that defendant intentionally and directly assisted in achieving the ultimate goal of the illegal sale of a narcotic drug. In the case at bar, however, the defendant merely directed the buyer to a location where the buyer could purchase drugs. While such evidence demonstrated that defendant was able to identify a person who sold drugs, it did not show that he shared the seller's intent to bring the drug sale to fruition. Accordingly, the judgment of conviction was reversed, and the Indictment dismissed.

Codefendant's Invocation of 5th Amendment Privilege

People v. Chadick, KA-11-00971, 11/14/14 – A new trial was provided for defendant where the trial court sua sponte elected to strike the testimony of his codefendant, after the codefendant invoked his privilege against self-incrimination. In making such a determination, the trial court failed to “weigh the options” in a “threshold inquiry” to determine whether “less drastic alternatives” were available rather than striking the entire testimony of the codefendant. The codefendant's testimony was essential because it supported defendant's positions that he did not engage in a scheme to defraud, and that the codefendant pled guilty with respect to a similar charge only to avoid harsher penalties, not because codefendant engaged in any fraudulent conduct. Such testimony should have been considered by the jury.

Duplicity

People v. Dukes, KA-12-01621, 11/21/14 – Testimony by the alleged victim at trial indicated that defendant regularly and repeatedly forced her to engage in sexual intercourse and oral sexual conduct during the summer of 2010. The Indictment, however, alleged that defendant forcibly compelled the alleged victim to perform oral sex and engage in sexual intercourse with him in the summer of 2010.

Since each act of the alleged intercourse and oral sexual conduct constituted a separate and distinct offense, the victim's testimony was rendered duplicious in that it was impossible to determine whether the jury reached a unanimous verdict on those counts, or whether defendant was convicted of an act for which he was not indicted.

Moreover, preservation of the issue was not required because the defendant's right to be tried only on those crimes and theories charged in the Indictment, and the right to a jury's unanimous verdict are fundamental and nonwaivable,

Accordingly, the counts of the Indictment convicting defendant of Criminal Sexual Act in the First Degree and Rape in the First Degree were dismissed without prejudice for the People to re-present any appropriate charges to another Grand Jury.

Fair and Impartial Jury

People v. Tapia-DeJesus, KA-11-02476, 1/2/15 – Defense counsel, who had exhausted his peremptory challenges, requested a for cause challenge for a prospective juror who expressed the possibility that he would have “sympathy” for police officer witnesses. The prospective juror did not provide an unequivocal assurance that he would not be biased in favor of police. Nevertheless, the trial court denied defense counsel's challenge. As such, reversal of the judgment of conviction, and a new trial was necessary.

Failure to Rule on a Motion

People v. Hallmark, KA-12-02087, 11/21/14

People v. Mack, KA-12-01625, 11/21/14 – There was no indication that the trial court ruled on defendant's Motion to Withdraw his guilty plea. Accordingly, the matter was remitted to County Court for a decision on the Motion.

Grand Jury

People v. Hymes, KA-10-01590, 11/21/14 – The prosecutor notified defendant and his counsel at the arraignment on the felony complaint that the matter would be presented to the Grand Jury the next morning, which was notice of less than 24 hours. Later that day, defense counsel informed the trial court that he could no longer represent defendant due to a conflict of interest. The following morning, the Grand Jury voted to indict defendant. Successor defense counsel objected to the short notice of the Grand Jury proceeding and provided the prosecutor notice of defendant's intent to testify.

Under the particular circumstances of the instant case, defendant was not provided “reasonable time to exercise his right to appear as a witness” before the Grand Jury. Therefore, the Court dismissed the Indictment without prejudice to the People to re-present any appropriate charges to a new Grand Jury.

Guilty Plea---Coercion

People v. Boyde, KA-13-00991, 11/14/14 – During proceedings prior to a plea agreement, the trial court told defendant that it would impose the maximum permissible sentence of imprisonment in the event defendant was convicted following a trial. Such a statement was coercive as it failed to describe a range of potential sentences, but rather it constituted impermissible pressure on defendant to plead guilty. The plea was therefore determined to be involuntary, and vacated.

Guilty Plea---Sufficiency of Allocution

People v. Frysinger, KA-13-00624, 11/14/14 – Defendant allegedly provided alcoholic beverages to persons under 21 years of age, and thus was charged with the crime of Unlawfully Dealing with a Child in the First Degree. During her allocution, however, she never expressly admitted that she provided “alcohol,” and therefore, the plea and waiver of Indictment were vacated and the matter was remitted for further proceedings.

People v. Woods, KA-12-01947, 1/2/15 – Despite defendant's failure to preserve his challenge to the factual sufficiency of the plea, the case falls within the narrow exception to the preservation requirement due to the significant doubt as to the voluntariness of the plea. Specifically, defendant never explicitly pleaded guilty to the crime charged, and did not admit to any conduct underlying the crime.

People v. Harvey, KA-11-01211, 1/2/15 – The plea colloquy was insufficient to establish territorial jurisdiction. Although the Indictment alleged conduct by defendant that occurred in the State of Ohio and the City of Syracuse, during his plea colloquy defendant only admitting to possessing a weapon in Ohio. Defendant never mentioned possessing a weapon in Syracuse. The instant case, therefore, is analogous to those in which a defendant negates an element of the crime to which he is pleading guilty. The trial court did not make further inquiry to ensure territorial jurisdiction. As such, the judgment of conviction was reversed, the plea vacated, and the matter remitted for further proceedings on the Indictment.

Inclusory Concurrent Counts

People v. Ashline, KA-12-00437, 1/2/15 – Defendant was convicted of Murder in the First Degree and Murder in the Second Degree. Murder in the Second Degree is an inclusory concurrent count of Murder in the First Degree, and thus the counts convicting defendant of Murder in the Second Degree were reversed and dismissed.

Ineffective Assistance of Counsel

People v. Rosborough, KA-13-00399, 11/14/14 – A defendant's right to effective assistance of counsel includes defense counsel's reasonable investigation. Defendant's Criminal Procedure Law Article 440

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Criminal Case Notes

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Motion alleged facts that did not appear in the Record on his direct appeal, and if established would entitle him to relief. Therefore, the matter was remitted for a Hearing concerning appellant's claim of ineffective assistance of counsel.

Defendant also satisfied his burden of coming forward with allegations sufficient to create an issue of fact with respect to whether his guilty plea was rendered involuntary due to his use of medication. Therefore, an evidentiary Hearing was also necessary as to that claim.

People v. Dealmeida, KA-13-00336, 1/2/15 – Defense counsel's failure to move to suppress the drugs that the police seized from his person constituted the ineffective assistance of counsel. The Record indicated that the police officer's question as to whether defendant had anything illegal on his person was improper considering that such a question was a level two common-law inquiry requiring a founded suspicion that criminal activity was afoot. Defendant's nervousness and discrepancies in describing where he was coming from and going are not enough to give rise to a reasonable suspicion that criminal activity is afoot. Therefore, defendant's plea was vacated, and the matter was remitted for further proceedings.

Missing Witness Charge

People v. Fuqua, KA-11-00970, 11/14/14 – During Grand Jury proceedings, an eyewitness testified that he saw the defendant shoot the victim with a weapon that the defendant brought to the scene.

At trial, there was no testimony from the eyewitness. The prosecutor indicated that during a trial preparation session it was revealed that it was the eyewitness, not defendant, who brought the weapon to the

scene. As a result, the People revoked the cooperation agreement, and planned to prosecute the eyewitness. According to the prosecutor, the eyewitness was going to assert the 5th Amendment privilege at defendant's trial.

The Appellate Division determined that in such a situation defendant was entitled to a missing witness charge. The Court indicated that the mere word of the prosecutor that the eyewitness would "assert the Fifth" was insufficient to establish his unavailability. As such, a new trial was ordered.

Right to Counsel

People v. Barber, KA-10-01192, 1/2/15 – Testimony at the Suppression Hearing established that, before defendant was informed of his Miranda rights at the police station, defendant asked a police officer to retrieve the telephone number of defendant's attorney from defendant's wallet. The police officer acknowledged the request, but asked defendant to continue speaking with police. A videotape of the interview confirmed the testimony.

Under such circumstances, defendant unequivocally invoked his right to counsel. Accordingly, his statement was suppressed, the judgment of conviction reversed, and the matter remitted to County Court for further proceedings on the Indictment.

Sentence

People v. Ellison, KA-13-00035, 1/2/15 – Defendant was offered, prior to trial, the opportunity to plead guilty and be sentenced to two to four years of imprisonment. After trial, appellant was convicted of the charged crimes, and then determined to be a Persistent Felony Offender.

The Appellate Division, Fourth Department while recognizing defendant's extensive criminal record, and status as a "serial shoplifter" reduced the imposed sentence from 20 years to life to 15 years to life, as a matter of discretion in the interest of justice.

Standard of Proof

People v. Robinson, KA-11-01476, 11/14/14 – In denying defendant's suppression Motion, the trial court stated that a traffic stop was lawful based upon "a founded suspicion that criminal activity was afoot" (*People v. DeBour*, 40 N.Y.2d 210, 223). A police stop of an automobile, however, is only lawful when there exists a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime, or where the police have probable cause to believe that the driver has committed a traffic violation. Therefore, since the trial court failed to utilize the correct standard in denying appellant's Motion to Suppress, the matter was remitted to determine the Motion with the correct legal standard.

Voluntary Statement

People v. Knapp, KA-12-01870, 11/14/14 – Defendant, was an "intellectually handicapped" man with an IQ of 68 who lived in a trailer owned by his childhood friend, and occupied by the friend and her two children. After an incident with a three year old child, defendant was questioned by police. Defendant initially denied that anything sexual happened between him and the child, but ultimately admitted that he engaged in several sexual acts with the child on a regular basis.

The Record was clear that defendant had significant cognitive deficits. Defendant was classified as "mentally retarded" in school, and graduated with an IEP diploma. He was found to have extremely low range of intellectual functioning. Prior to the interview, the officer did not ask whether defendant could read or write, or defendant's level of education. Thus, under the totality of the circumstances, the People failed to meet their burden that defendant knowingly, intelligently, and voluntarily waived his Miranda rights.

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APPEALS

Civil, Criminal, Administrative
Referrals Welcome
(315) 474-1285

John A.

CIRANDO

Attorney at Law

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We APPEAL To You®

WE WANT YOU!

The Onondaga County Bar Association is always looking for members who wish to become active in the organization's committees, special events and member communications.

Bar Reporter | "Attorney Spotlight" Nominations

In this new year, OCBA is looking to expand its Bar Reporter newsletter Editorial Board and is seeking contributors for articles and legal updates. Contact Chele Stirpe (cstirpe@onbar.org) if you're interested in attending the Editorial Board meetings, or if you have an idea for an article or profile you'd like to submit.

One feature in the newsletter is our "Attorney Spotlight." If you'd like to recommend a local attorney or judge you feel has an interesting background or story to tell, has distinguished themselves in their career or, even if just starting out, has some unique experiences to share, contact Chele or Jeff Unaitis and we'll share your suggestions with the Editorial Board.

OCBA Seeks Volunteers to Judge Annual County High School Mock Trial Competition

It's that time of year when student teams at more than a dozen local high schools roll up their sleeves and dive into the New York State Bar Association's annual state-wide Mock Trial competition.

Our Onondaga County competitions during the past few years have been successful thanks to many lawyers and judges who volunteered their time to judge one or more of the rounds. This year, the preliminary rounds will once again, as they were last year,

be held at Nottingham High School on the following dates:

Thursday, February 26th – ALL SCHOOLS

Thursday, March 5th – ALL SCHOOLS

Thursday, March 12th – ALL SCHOOLS

Thursday, March 19th – 8 SCHOOLS – 4 advance

Last year, we expanded the competition so ALL teams now compete the first three rounds (one more than in past years), giving them more experience and greater opportunity for participation. That change also requires more judges.

Judges would need to arrive at Nottingham around 3:15, with matches getting under way as close to 3:30 as possible (based on when the school buses arrive.) All judges will receive the case materials and other background well in advance. The rounds last a couple of hours.

If you, or a colleague you know, are able to join us this year, contact OCBA Executive Director Jeff Unaitis at junaitis@onbar.org, or call 471-2667. Please indicate which date(s) you are available and willing to volunteer – and let us know if you can judge on more than one of those dates.

Thank you for your consideration and for helping to introduce hundreds of student participants to the legal profession and the courtroom.

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Neil J. Smith Elected President of Central New York Bankruptcy Bar Association

Neil J. Smith has been elected president of the Central New York Bankruptcy Bar Association. After graduating summa cum laude in 2002 from Syracuse University with a degree in public communications, Smith attended St. John's University School of Law, where he graduated with a Juris Doctorate in 2005.

Prior to joining Mackenzie Hughes, he was a member of the American Bankruptcy Institute Law Review. While there he wrote an article entitled "F.C.C. v. Nextwave: Plain Meaning or Just Plain Wrong?" which described conflicts between FCC regulations and bankruptcy law.

Smith is a member of the Onondaga, New York State, and American Bar Associations. He has served as President of the Central New York Bankruptcy Bar Association and is a member of the American Bankruptcy Institute. He also volunteers with the Volunteer Lawyers' Project. In his spare time, he enjoys playing the banjo, and is the Vice President of the Central New York Bluegrass Association.

Mary Anne Cody Receives Community Service Award

Mary Anne Cody was awarded the Community Award for outstanding volunteer service to the Camillus Fire Department by Chiefs Douglas Groesbeck and Jim McBride on January 17, 2015.

Cody, a partner at Mackenzie Hughes LLP, is an honorary member of the Camillus Fire Department. She is also a member of the Le Moyne College Board of Regents and of the Samaritan Center, in addition to being a volunteer education instructor at St. Joseph's Church in Camillus. Cody is a past president of the Vera House Board of Directors and previously served on the Board of Directors of Aurora and Literacy Volunteers of Greater Syracuse, now known as LiteracyCNY.

Cody is a member of the Onondaga County, New York State and American Bar Associations, and the Estate Planning Council of Central New York. She holds a juris doctorate from California Western School of Law, a bachelor's degree from Le Moyne College, and is also a New York State Certified Public Accountant.



Emilee K. Lawson Hatch and Cecelia R. S. Cannon elected Members of Bousquet Holstein PLLC.

Emilee Lawson Hatch is an attorney in the Trusts and Estates Practice Group and advises individuals worldwide in all aspects of estate planning. Emilee is a graduate of University of Miami School of Law, Syracuse University College of Law, and

Metropolitan State College of Denver.

Cecelia Cannon is an attorney in our Litigation Practice Group. Cecelia works with her clients to explore economical and efficient strategies and is a strong advocate in helping them reach their goals. Cecelia practices regularly in state and federal courts. She is a graduate of Cornell University Law School and Cornell University.



Doreen A. Simmons named Lawyer of the Year by Corporate LiveWire

Doreen A. Simmons, Esq. has been ranked as a "2014 Lawyer of the Year" by Corporate LiveWire magazine. The Corporate LiveWire Lawyer of the Year 2014 awards highlight the achievements of those individuals that have consistently shown exceptional practice and demonstrated excellence on the global and national stage. Ms. Simmons

is the Leader of the Hancock Estabrook Environmental Practice. She has more than 30 years of experience representing major and mid-sized industries, individuals, municipalities and not-for-profit organizations in environmental legal matters relating to regulatory proceedings, federal and state litigation, multi-compliance issues, acquisitions and permitting.

Thomas C. Cambier and Zachary M. Mattison promoted to partnership at Hancock Estabrook, LLP

Thomas C. Cambier has been promoted to the firm's partnership. As a member of Hancock Estabrook's Litigation Practice. Mr. Cambier represents businesses and individuals in commercial, construction, intellectual property and personal injury litigation, as well as matters involving creditors' rights. **Zachary M.**



Mattison's practice focuses on commercial, construction, banking and personal injury litigation matters for healthcare facilities, hospitals, municipalities, accounting firms, manufacturers and individuals. Congratulations to Mr. Cambier and Mr. Mattison for their achievements thus far in their careers and for their efforts on behalf of Hancock Estabrook!

John P. Coghlan and John (Jack) J. Phelan Join Smith, Sovik, Kendrick & Sugnet, PC

Smith Sovik is pleased to welcome John P. Coghlan, Esq., and John (Jack) J. Phelan, Esq. as Associate Attorneys at the Firm. John and Jack join Smith Sovik after participating in the firm's Summer Associate Program.



John Coghlan is a Magna Cum Laude graduate of Albany Law School where he was an Associate Editor of the Albany Law Review and a Sponsler Fellow. While in law school, John worked as an intern in the Schenectady County District Attorney's Office and represented victims of domestic abuse as a member of the Family Violence Litigation Clinic. John was also a finalist in the Karen C. McGovern Senior Prize

Trials.

Jack Phelan received his J.D. '11 Albany Law School where he served as an executive editor of the Albany Law Review and participated in the Senior Prize Trials. Jack also completed a judicial internship with the Honorable Edward O. Spain, in the Appellate Division, Third Department in Albany.



At the firm, John and Jack will be involved in all areas of litigation.

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FROM THE EDITORIAL BOARD

To advertise in the Bar Reporter, call the Onondaga County Bar Association at 315.579.2578.

The Editorial Board encourages members to submit articles for publication concerning issues presented in each edition or other issues related to the legal community. Submissions should be sent to OCBA, Attention Bar Reporter or Email cstirpe@onbar.org. *John A. Cirando, Editor Emeritus*

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DID YOU KNOW ...

OCBA receives calls every week from clients who are trying to locate documents or files once held by their attorneys, after that attorney has moved, stopped practicing or passed away.

If you know where your files will go after you're gone, Contact Membership Coordinator:

**Peggy Walker at 579-2582
or email pwalker@onbar.org**