In Brief

Quarterly Publication

McHenry County Bar Association

February 2021

The 2021 Law Day Theme is:

LAW DAY 2021
ADVANCING THE RULE OF LAW NOW

The rule of law is the bedrock of American rights and liberties—in times of calm and unrest alike. The 2021 Law Day theme—Advancing the Rule of Law, Now—reminds all of us that we the people share the responsibility to promote the rule of law, defend liberty, and pursue justice.

What is the Rule of Law?

The rule of law is a set of principles, or ideals, for ensuring an orderly and just society. Many countries throughout the world strive to uphold the rule of law where no one is above the law, everyone is treated equally under the law, everyone is held accountable to the same laws, there are clear and fair processes for enforcing laws, there is an independent judiciary, and human rights are guaranteed for all.

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Upcoming Events

Date	Event	Location	Time
February 4	Criminal Law Section Meeting	Virtual	Noon
February 9	Family Law Section Meeting	Virtual	Noon
February 11	Civil Law Section Meeting	Virtual	Noon
February 16	Board of Governors Meeting	Virtual	Noon
February 23	General Meeting	Virtual	Noon
March 4	Criminal Law Section Meeting	Virtual	Noon
March 9	Family Law Section Meeting	Virtual	Noon
March 16	Board of Governors Meeting	Virtual	Noon
March 23	General Meeting	Virtual	Noon
April 1	Criminal Law Section Meeting	Virtual	Noon
April 13	Family Law Section Meeting	Virtual	Noon
April 15	Civil Law Section Meeting	Virtual	Noon
April 20	Board of Governors Meeting	Virtual	Noon

Board Meeting Minutes

October Meeting Minutes

November Meeting Minutes

December Meeting Minutes

Inside this issue:

President's Page

By Jenette Schwemler

2020/21 MCBA President

A Covid-19 Case Out of McHenry County

Because Covid-19 is understandably at the front of everyone's minds, I thought it would be interesting to summarize one piece of litigation coming out of McHenry County: McHenry County Sheriff v. McHenry Department of Health, & City of McHenry, Village of Algonquin, City of Woodstock, Village of Lake in the Hills v. Mchenry County Department of Health, 2020 IL App (2d) 200339-U. Additionally, this case is a good reminder of what is necessary to obtain a temporary restraining order.

In this case, the McHenry County Sheriff, the City of McHenry, the Village of Algonquin, the City of Woodstock, the City of McHenry, and the Village of Lake in the Hills obtained a temporary restraining order ("TRO") requiring the McHenry Department of Heath to disclose to the McHenry County Emergency Telephone System Board the names and addresses of persons residing in McHenry County who test positive for the Covid-19 virus. McHenry County Sheriff v. McHenry Department of Health, et al., 2020 IL App (2d) 200339-U, ¶2. Plaintiffs argued that because their law enforcement officers would be placed in additional danger because of the risk of exposure and infection from the virus, disclosure of the names and addresses of those testing positive to the McHenry County Emergency Telephone System Board would allow individual officers to take "adequate precautions" to minimize risk of infection. Id. at ¶5. By routing this information through dispatch, officers would not be able to independently obtain the names of infected persons using the tools at their disposal, which Plaintiffs alleged would safeguard the privacy concerns of individuals. Id.

The McHenry Department of Health ("Department") had several objections: 1) the information sought was protected health information under HIPPA; 2) the information sought was ineffective for the purpose of protecting officers because of deficiencies in testing for infections based on the Department's belief that the infection rate was substantially higher than the number of confirmed cases; 3) there was little epidemiological value to the information sought to limit the spread of the virus; 4) the information sought could lull an officer into a false sense of security that an asymptomatic person or an infected but untested person with whom he or she was interacting was not infected. Id. at ¶6. Instead of providing all of the information requested, the Department agreed to provide the addresses of the infected persons, but not names. Id.

Although the Department agreed to provide the addresses of those infected, the McHenry County Sheriff and the municipalities each filed a three count complaint seeking declaratory judgment, a writ of mandamus and a permanent injunction. Id. at ¶7. All complaints sought the same relief: provision of the names and addresses of all county and/or municipal residents who tested positive. Id. The municipalities also filed an emergency motion for a TRO and preliminary injunction seeking the same relief as outlined in their complaints. Id. In support of their motion for TRO, they argued an exception to HIPPA applied because local health departments were permitted to disclose "information regarding individuals with positive tests for Covid-10" to law enforcement and first responders. Id.

The trial court granted the emergency motion for TRO. Id. at ¶11. It held Plaintiffs demonstrated a certain and clearly ascertainable right needing protection, namely, the right of officers to have these names, where the names could be secured to protect the privacy rights of individuals, for use by police without unnecessary dissemination, and would serve to assist officers in the performance of their duties. Id. It also reasoned that since officers are required to interact directly with potentially infected persons as part of their duties, this information could best

enable them to protect themselves and the community. Id. The trial court ordered the disclosure of the names and addresses of all individuals residing in McHenry County that test positive for Covid-19 to the emergency telephone system board. Id. at ¶12.

The Department filed a motion to reconsider and to dissolve the TRO. Id. at ¶13. The motion to reconsider was denied. Id. at ¶14. The trial court recognized that a TRO was designed to maintain the status quo until a hearing on the merits is held, and recounted the elements necessary for entry of a TRO (clearly ascertainable right in need of protection, lack of an adequate remedy at law, irreparable harm without the protection of a TRO, and likelihood of success on the merits). Id. In its holding, the trial court emphasized the essential crux of the court's finding in granting the TRO, under State and Federal law, the Department has the discretion to provide the requested information. Id. at ¶15. The Department's discretion was essential to the appellate court's analysis.

The Department appealed and argued the trial court usurped the Department's authority and substituted its judgment and improperly granted the TRO because Plaintiffs could not meet the requirements of a TRO and the trial court did not give proper weight to privacy rights. Id. at ¶19. In resolving issues involving whether the matter was properly before the trial court, the 2nd District concluded that although it would not entertain arguments that the trial court abused its discretion (direct review), review of the issuance of the TRO could still be approached in "other ways." Id. at ¶22. Specific arguments addressing the motion to dissolve the TRO could be addressed under Rule 307(d)(1), which allows for appellate review of the granting or denial of a TRO or an order modifying, dissolving, or refusing to dissolve or modify a TRO. Id. The 2nd District determined it would consider the Department's appeal to the extent it challenged the denial of its motion to dissolve. Id.

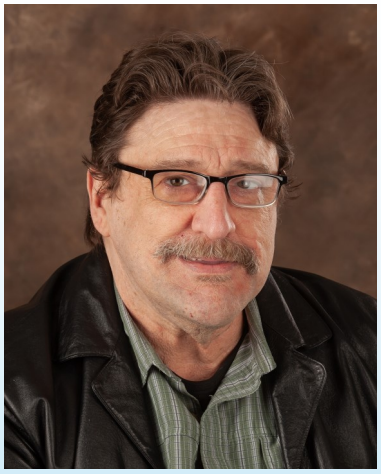
In its analysis, the 2nd District began with the issue before the court when reviewing a denial of a motion to dissolve a TRO, namely, whether the trial court abused its discretion. Id. at ¶23. The standard controlling a trial court's judgment on a motion to dissolve a TRO is whether the party in whose favor the TRO was issued demonstrated a fair question as to the existence of its rights. Id. at ¶24.

The "fair question" issue decided the case. Plaintiffs were required to demonstrate a fair question as to the right to the names and addresses of Covid-19 positive individuals. Id. at ¶32. The parties demonstrated that the information fell within an exception to HIPPA that ***permitted but did not require***, a local health department to release protected information. Id. at ¶33. Thus, the disclosure of names and addresses was permissive and not mandatory. Id. Where discretion to provide the information sought exists, the party seeking the information cannot claim a **right** to that information. Id. at ¶34. Citing Cordrey v. Prisoner Review Board, 2014 IL App 117155, the 2nd District stated to demonstrate a clear right to the relief sought, the proposed actor must have no discretion over performing the act sought to be performed. Id. Since the Department had discretion to turn over the information sought and thus was permissive, the Plaintiffs could not establish a fair question (a right to the information). Id. With no fair question, Plaintiffs could not show a likelihood of success on the merits. Id.

One of the other reasons I decided to focus on this case is that this is not a "normal" TRO case. It does not seek to restrain a party from doing something; it seeks to require a party to perform an act. We should all be reminded that we can seek what is called a "mandatory" injunction, which requires a party against whom such an order is entered to perform a specific act.

MEMBER NEWS

Welcome New Member Lou Rafti



Lou Rafti grew up in Los Angeles California. After he graduated U.C.L.A., he worked in the financial industry. Notably, as a Vice President in First Interstate Bank's Trust Department where he administered large Charitable Trusts and state, local government and government agency (Public Funds) investment accounts. Then, as an investment salesperson with Bank of America Securities, in San Francisco, where he maintained many of his Charitable Trusts and Public Funds clients.

One such client - the Los Angeles County Department of Health - asked Lou to represent them at C.A.E.A.R. ("Communities Advocating for Emergency AIDS Relief") Coalition in Washington D.C. There he lobbied congress for Ryan White Act funds and met his wife Jackie Bulczak, who represented McHenry County, Illinois. His success obtaining Ryan White Act funds led Lou to a grant to study Public Interest Law.

He attended Southwestern Law School in Los Angeles; was admitted to the California Bar Association and practiced law for the HIV/AIDS Legal Services Alliance; Public Counsel, the largest pro-bono law firm in the nation, and; the Legal Aid Foundation of Los Angeles. Lou's practice of law in case development of lawsuits against City and County Governments, government agencies and Non-Profit (501(c)3) organizations that violated anti-discrimination laws, constitutional rights, and defrauded thetax payers. These cases include (*Michael Nozzi et al v. Housing Authority of the City of Los Angeles,* Case No. CV00380) [Confidentiality waived by firms and clients] which was recently decided on Appeal to the 9th Circuit Court of Appeals in favor of the Plaintiffs.

Lou ensured that his clients' settlements were structured in a way that best served their interests. He found that the best result for his clients, all of whom very low income and many homeless, was to win a lawsuit for them that enabled home ownership. In order to do this, Lou utilized different types of trusts to be invested by settlement funds, and assisted heirs to clients whose law suit settlements were subject to probate.

Lou and Jackie Rafti now live in her hometown of Woodstock Illinois. There Jackie runs "Circle of Hope," a not-for-profit Healthcare Advocacy Organization. Lou familiarized himself with Illinois law by completing a Paralegal Certificate Program at McHenry County College, where he founded a Paralegal Students Association. He now enjoys putting his lifetime of legal and financial expertise to good use as a Probate Real Property Sales Specialist with Coldwell Banker Real Estate Group McHenry.

New Members—Welcome to the MCBA!

Eric Hendricks

Robert Schuman

Jacqueline Riotto

Louis Rafti

Maria Marek

Neil Adams

Jaclyn Wilcox

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Proudly Announces the addition of a new Associate Attorney

DANIEL J. WILBRANDT

Dan represents the third generation of attorneys working for the firm, founded by Robert A. Wilbrandt, Sr. in 1972.

Dan has been an Assistant State's Attorney for the McHenry County State's Attorney's Office for over eight years, becoming the Co-Chief of the Criminal Division.

Dan will concentrate on criminal defense matters with the firm.

DANIEL J. WILBRANDT *lives in West Dundee, with his wife, Nadia, and two daughters, while serving as an elected West Dundee Village Trustee for almost eight years.*

We are excited to announce that Joseph Ponitz and Steve Greeley, who have been partners at the firm for many years, are now named partners and the firm is now known as **Franks, Gerkin, Ponitz & Greeley PC.**

FGPG

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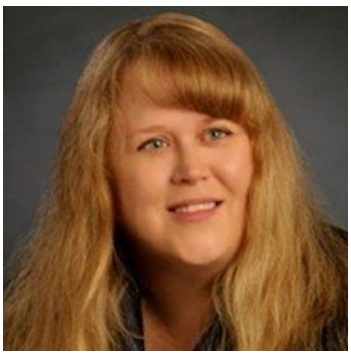


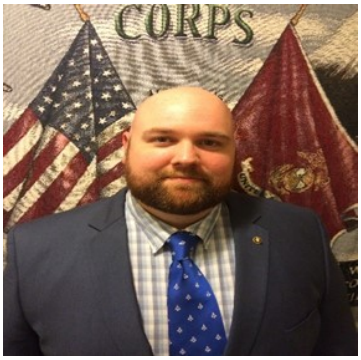
WOODSTOCK IL- Prime Law Group is proud to announce Nicole O'Connor has passed the BAR and will be Sworn in 1/14/21. Nicole looks to practice in personal injury, workers compensation, Social Security Disability as well as various civil litigation.

Nicole was working as a paralegal for over 20 years prior to this great achievement. Nicole is dedicated to bringing forth the best outcomes for all her clients.

Contact Nicole O'Connor:

Phone: 815- 338- 2040 Ext. 107

Email: noconnor@primelawgroup.com



WOODSTOCK IL- Prime Law Group is excited to announce the addition of attorney Mario Sankis. Mario, a former Marine and police officer is aware of the importance to protect and serve and brings that prior experience to his clients.

Mario looks to continue his practice in Criminal Law at Prime Law Group, and we could not be more excited. We take this time to welcome Mr. Sankis to the Prime Law Group family.

Contact Mario Sankis:

Phone: 815- 338- 2040 Ext. 108

Email: msankis@primelawgroup.com

Help!

Volunteers are needed to speak to 4th and 5th grade classrooms as well as High School students, via Zoom, in McHenry County as part of the 2021 Law Day Celebration. Each volunteer is matched with a class or classes. The volunteer and teacher agree on the topic and time. Visits will take place from Monday, April 5 through Friday, April 23, 2021.

If you wish to volunteer, please send an email to:

mchenrycountybar@gmail.com

Announcement

The Law Office of Zanck, Coen, Wright & Saladin, P.C. is pleased to announce that Vonda Vaughn Schmidt has become a partner in the firm. Ms. Schmidt has exclusively handled family law matters for over 25 years. She is a graduate of the John Marshall Law School (1993) and the University of Illinois (1990). She has served on the McHenry County Bar Association Board of Governors for over 11 years in various capacities and is currently the social chairperson. She is active in the community serving on the board of Friendship House childcare facility.

Additionally, the firm would like to welcome Sam J.H. Weyers as their newest associate. Mr. Weyers comes to the firm after spending five years as the co-chair of the litigation group at one of Lake County Illinois' largest law firms. Mr. Weyers assists clients who have been injured due to others' negligence as well as create estate plans and assist with the administration of both contested and uncontested estates and trusts. Mr. Weyers graduated from John Marshall Law School (2011). Mr. Weyers currently serves on the Council at Light of Christ Lutheran Church in Algonquin and on Luther College's Alumni Council.

Dissolution of Marriage and a Post-Judgment Conundrum: How to allocate *post-judgment* debt in a divorce case?

By Peter Carroll

Ten years ago, in 2010, I helped a woman obtain a dissolution of her marriage. The parties owned a home together. The Marital Settlement Agreement provided:

1. Within 5 years of the date of dissolution, Wife shall refinance the mortgage on the marital residence, removing Husband from any debt regarding the home.
2. The parties shall pay certain debts on a 50/50 basis. Wife shall be solely responsible for her student loan, and "Any other debts in Wife's name shall be her sole responsibility. Any other debts in Husband's name shall be his sole responsibility. Each responsible party shall hold the other harmless in reference to any such debt."

I drafted a quitclaim deed, which Husband signed, to be recorded when Wife completed her refinancing, and it sat in my file cabinet. For 10 years. Husband made no complaints about the delay in removing his name from the mortgage debt.

Finally, in 2020, Wife decided to obtain a loan and pay off the old mortgage. <u>But there was a problem</u>.

After the divorce, Husband accumulated credit card debt, which he failed to pay. In 2013, the credit card company sued Husband and obtained a judgment. They collected some of that judgment through garnishments, but then lost track of Husband's employment. But, like all successful bill collectors, they recorded a Memorandum of Judgment, which created a lien on any property in Husband's name in McHenry County. When Wife came to the closing on her new loan -- Surprise! She discovered that she had to pay off Husband's $7000 debt.

Here is my conundrum: The Marital Settlement Agreement did not address any post-judgment debt. Was Husband in contempt for allowing the Judgment against him to impede Wife's ability to obtain a loan and pay off the existing mortgage, additionally costing her over $7000? How to interpret the Settlement Agreement?

> As quoted in the 2019 un-published decision in *IRMO Notestine*:
>
> Rules of contract construction are applicable to the interpretation of provisions in a marital agreement. *In re Marriage of Carrier, 332 Ill. App. 3d 654, 658, 773 N.E.2d 657, 265 Ill. Dec. 893 (2002)*. <u>The primary objective is to effectuate the intent of the parties,</u> and that intent must be determined only by the language of agreement itself. *Carrier, 332 Ill. App. 3d at 658*. Courts review the interpretation of marital settlement agreements contained in dissolution decrees in the same manner as other contracts, *i.e.* as a question of law to be reviewed *de novo*. (Emphasis added.)

It was clear that the parties never intended Wife to pay Husband's credit card debt. But -- did they intend Husband to be solely liable for *any* debt in his name, even if accumulated after the divorce was finalized? There does not seem to be any other reasonable interpretation. I am hopeful that the presiding Judge will agree, find Husband in contempt, and award attorney's fees to Wife pursuant to 750 ILCS 5/508(b).

THE REST OF THE STORY. After a pretrial conference with the presiding Judge, my above hopes were not fulfilled. He correctly informed me and opposing counsel that he did not have jurisdiction over after-acquired debt. Although there was a consensus that the money is owed to Wife, there would be no jurisdiction to enter an Order in the divorce case requiring him to repay those funds to her. Although I could initiate discovery to find out if some of the $7000 judgment was pre-dissolution debt, my client wisely decided not to go down that rabbit hole. An out-of-court settlement will likely be reached. The other alternative? A Small Claims lawsuit.

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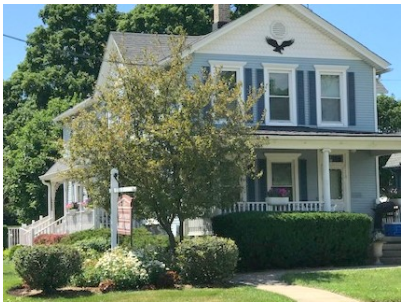

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Associate Attorney

Botto Gilbert Lancaster P.C., a general law practice located in McHenry County is seeking an Associate Attorney to join the firm in the family law department with opportunity to handle cases in other areas of law as well. Candidates must have the following credentials:

-JD degree from an ABA accredited school.

-Active Illinois Bar license in good standing.

-Proficient legal writing and legal research skills.

Ideal candidates will also have the following preferred qualities or skills:

-Value a team-based approach.

-Experience in family law

-Entrepreneurial spirit.

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McHenry County Prairie State Victories

By Steve Greeley

I have volunteered with Prairie State since I was a 2L and I now help lead this great organization as President of the Board. I oversee all 11 offices in Northern and Central Illinois but I am especially proud of the great work of the PSLS office here in our County. Below are summaries of some of their great results. They are able to do this work based on the donations of time and funds by our bar members. The pandemic has caused even greater need for volunteers and funding. If interested in assisting, please call me at 815-923-2107. You can donate online as well at pslegal.org.

PSLS Prevails in Multiple Appeals to Overcome Termination of SSI Benefits for Five Year Old Child. A five-year old child received SSI benefits due to multiple birth defects causing difficulty walking, doing fine motor activities, and forcing her to eat through a feeding tube. Nevertheless, Social Security terminated her SSI benefits, claiming that her health had improved, and her mom appealed. PSLS represented the parents on the appeal and won. The child started receiving the full monthly benefit amount again and a back award of $12,425. PSLS also successfully appealed the size of the back benefit amount, gaining the client four additional months of benefits. PSLS additionally appealed a notice of overpayment and won again, because Social Security had miscalculated the overpayment and had to issue a refund. But for all this advocacy, the child would have been without benefits going back to August 2014. The father worked but his earnings placed the family at 50% of the federal poverty level. The disability benefits for this child helped the family meet her basic needs and pay for her medical and educational expenses.

PSLS Successfully Defends Against Effort by Parents to Terminate Client's Guardianship of Her Sister. Client was the guardian for her sister, who lived in a residential childcare facility. The sister had a hard childhood because of her parent's substance abuse problems. By all accounts, the child was doing well at the facility. PSLS got involved when the biological parents filed to terminate the guardianship. PSLS represented the client throughout the proceedings, which included multiple court appearances, extensive communication with opposing counsel, the GAL, and staff of the facility. Eventually there was a contested evidentiary hearing, where the court found against the parents, and maintained the guardianship. We challenged the parents' failure to provide evidence of a change of circumstances. We also developed and introduced evidence of the best interest factors from the relevant section of the probate code. The guardianship remained in place, and client did not owe GAL fees.

PSLS Wins in Court Against a Landlord Who Tried to Raise the Rent in the Middle of a Lease Term. Our client is a senior with disabilities, in poor health and with limited income. Landlord sent the client a letter in the middle of his lease term telling him his rent was increasing. When the client continued to pay the amount in his lease, the landlord filed an eviction case against him, claiming nonpayment of rent for the extra rent that he claimed was owed beyond the amount in his lease. The eviction suit also claimed the client had an unauthorized occupant, but the landlord only served client with a 5-day notice for the rent and not a 10-day notice for the unknown occupant. At trial, the judge refused to hear any evidence about an alleged unauthorized occupant because the landlord did not give proper notice on that issue. The judge found in favor of the client on the rent issue, telling landlord that he cannot unilaterally increase the rent during the lease term. The judge dismissed the case and, at our request, sealed the court records.

PSLS Educates Mental Health Therapist About QMB Program So Client Can Receive Large Refund of Unlawfully Collected Co-Pays. Client is a senior with severe mental health conditions. Her therapy provider had been charging her copays for over five years, even though they were supposed to be charging the State because client had Qualified Medicare Beneficiary (QMB) benefits. When client asked the provider to stop charging her because she couldn't afford the copays anymore, they threatened to stop seeing her as a patient. This was devastating to client, who had developed a strong relationship with her therapist over the years and needed therapy to manage her disabling mental health conditions. PSLS contacted the provider and educated them about the QMB program. The provider agreed to stop charging copays immediately and refund $4,073 of copays the client had paid over the past five years. With this refund money, client had enough money to pay for a security deposit and other costs in connection with a move to a new apartment.

Client, a DV Victim with Green Card, Advised Regarding Her Plans to Leave Country and Return to Japan. Client, a victim of DV and green card holder, was living at a domestic violence shelter. She wanted to return to live in her home country of Japan with her two young children and did not feel safe here

facing homelessness. She hopes that one day she and her bipolar husband could get back together. Client wanted to know the ramifications to her green card of leaving to Japan for an extended period of time and whether she would need a court order. We fully advised the client, addressing both immigration and family law issues. The client was able to make up her mind about leaving to Japan.

PSLS Wins Two Eviction Cases Filed in Same Month By One Landlord. After PSLS defeated an earlier eviction case (by proving the client did not owe any rent), the landlord filed a second eviction case, claiming that client violated his lease by allowing his daughter to live with him for a few months earlier that year. Client is a senior with disabilities, with limited income, and his daughter had stayed with him at night to assist him with a new medical device. She had her own home elsewhere and did not move in with the client. Moreover, after the daughter stopped staying with client, the landlord had signed a new lease with the client and had accepted rent for three months. PSLS defeated the second eviction by proving that the landlord waived any lease violation as a result of these facts. The judge also granted our request to seal the court file. This allowed the client to remain in his home and making it easier for him to find housing elsewhere in the future without an eviction court record.

PSLS Overturns Termination of Client's Section 8 Voucher By Proving She Did Not Have an Unauthorized Occupant. The Housing Authority terminated our client's Section 8 voucher, claiming that she had an unauthorized occupant. PSLS represented the client at the voucher termination hearing. The hearing officer agreed with our position that the client could not have had an unauthorized occupant because she was a new participant in the voucher program, and was in the 11th day of her lease when the HA sent the termination notice. The HA's Admin Plan defines "unauthorized occupant" as a person who exceeds the time allowed for a visitor (14 overnights per year). The client and her boyfriend testified that he had only spent 3-4 overnights together. The hearing officer reversed the termination of the voucher. The decision prevented the client's imminent homelessness.

Successful Advocacy with Hardest Hit Program for DV Victim Who Could Not Produce a Divorce Decree. Client, a domestic violence victim with a young child, was going through foreclosure. She applied for the Hardest Hit Program (mortgage assistance to avoid foreclosure) but was denied because she could not produce a divorce decree, as the estranged husband was dragging out the divorce. PSLS advocated with the state agency that administers the Hardest Hit Program. The agency ultimately approved the client for the Program based on our showing that the client was a domestic violence victim and that her husband was not an owner of the property. The foreclosure case was dismissed.

PSLS Helps Senior Client Obtain Loan Modification to Save Home. Client is a senior citizen with a low fixed income. He was in foreclosure after getting behind in his mortgage payments due to a banking error, and was unable to get caught up. PSLS helped him apply for a loan modification. PSLS also asserted a defense and counterclaim in his foreclosure case - a violation of the Illinois Interest Act based on prohibited late fees and pre-payment penalties. The Illinois interest Act is very complicated and our Legal Help for Homeowners Program has done a fair amount of research on it. Client was approved for a modification that significantly reduced his monthly payment. He did not want to pursue his counterclaim as his goal of keeping the house had been accomplished.

PSLS Uses DHS Rules to Restore Elderly Client's SNAP Benefits. An older adult with disabilities contacted PSLS when Illinois reduced her SNAP benefits from $192 per month to $15. The woman had moved into the home of her ex-spouse to care for him after he had a surgery. When she did that, DHS counted the ex-spouse's income. The client appealed and sought legal counsel from PSLS. PSLS did some research and found that a person who meets the status of elderly and disabled and lives with others can be a separate SNAP unit. That means that the ex-spouse's income and assets do not affect the client's eligibility or benefit amounts for SNAP. PSLS provided the policy manual information to the client and explained how to present it at the pre-hearing conference at DHS. The client's SNAP benefit was restored to $194 and she got a supplemental allotment of $355 to help in the interim until the change took effect. This is a great example of how sound legal advice can have a major impact.

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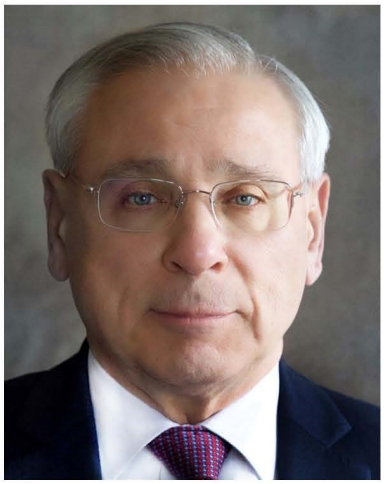
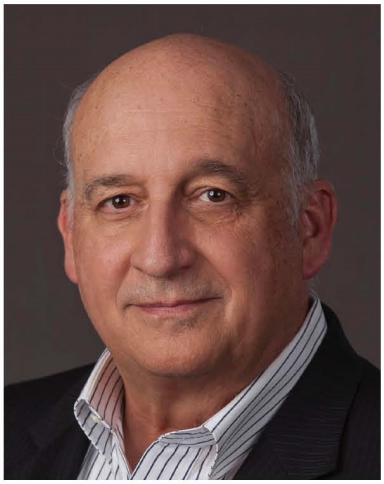


Hon. Michael J. Fusz, ret.



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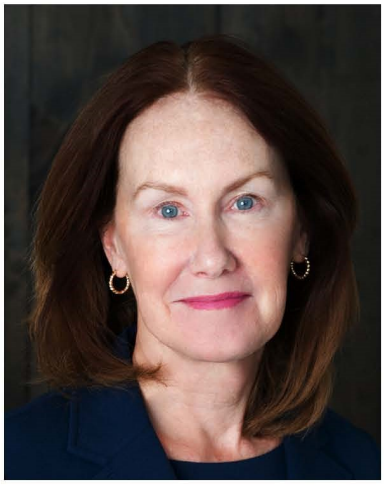
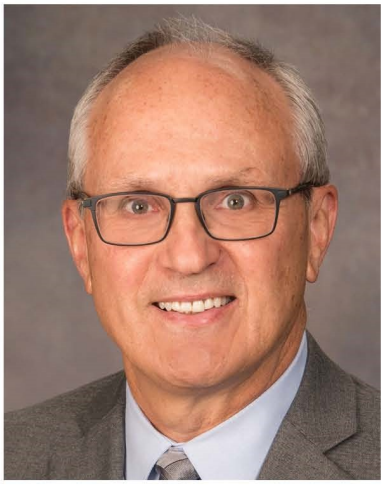


Hon. Margaret Mullen, ret.



Hon. J. Edward Prochaska, ret.

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Second District Appellate Decision Digest

4th Quarter 2020

Andrew J. Mertzenich

This digest seeks to summarize all criminal and civil Opinions issued by the Second District of the State of Illinois Appellate Court. The content, citations, and analysis provided are for informational use only. No legal advice is being presented herein. An in-person consultation coupled with in-depth and independent research should be made before citing a case.

Cases are arranged by type, and then chronologically by decision posting date with the most recent appearing last in the section. We are pleased to now offer Criminal Decisions in this Digest alongside Civil Decisions.

Table of Contents

Appellate Jurisdiction

National Rifle & Pistol Academy, LLC v. EFN Brookshire Property, LLC, 2020 IL App (2d) 191143

Date Published: 12/7/2020

County: Du Page

Facts: On November 15, 2018, plaintiff filed its original complaint. On January 22, 2019, defendant moved for a judgment on the pleadings. On April 11, 2019, after hearing arguments, the trial judge stated that a judgment for defendant was appropriate on count II because so many contractual details were unresolved that "the Court would, as a matter of law, be unable to render a decree of specific performance." The court entered a written order stating that it treated defendant's motion as one to dismiss for failure to state a cause of action. In September of 2019, the court entered a written finding that there was no just reason to delay the enforcement or appeal of the April 11, 2019, order granting defendant judgment on the pleadings.

Issues on Appeal: Whether the Appellate Court has jurisdiction over the matter.

Holding: Appeal Dismissed.

Analysis: A finding that there was no just reason to delay is reviewed for abuse of discretion. A trial court abuses its discretion if its decision is arbitrary, fanciful, or unreasonable. The appellate court discussed case law regarding 304(a) language and found that the Trial Court manifestly abused its discretion in granting the Rule 304(a) finding, resulting in an immediate appeal from the dismissal of count II of the original complaint. In this case, the trial court only considered one relevant factor, instead of all of them. Additionally, the court cited cases in support of granting the 304(a) language, even though the cases clearly instruct that, in the present situation, that 304(a) language should be denied. Appeal dismissed.

Assault and Battery

People v. Allen, 2020 IL App (2d) 180473

Date Published: 11/10/2020

Facts: Defendant was charged with domestic battery. At jury trial the victim testified that she and Defendant were dating for approximately 8 months as of the incident. However, their relationship was "on and off." Defendant also testified, but stated that their relationship was merely a sexual one. He did not consider them to be dating.

Issues on Appeal: Whether the State adequately proved that the Defendant and the victim were in a "dating relationship" under the Code and thus, for purposes of the proceedings, the Defendant was a "family or household member."

Holding: Affirmed

Analysis: A person commits the offense of domestic battery if he or she knowingly and without legal justification causes bodily harm to any family or household member or makes physical contact of an insulting or provoking nature with any family or household member. Family and household members include persons who are dating or have a dating or engagement relationship. Neither a casual acquaintanceship nor ordinary fraternization between 2 individuals in business or social contexts shall be deemed to constitute a dating relationship." The Appellate court found that previous case law was mistaken, and excluded far too many relationships from the definition proferred. Therefore, the analysis in what constitutes a romantic relationship with the concept of a "serious courtship."

At a minimum, a serious courtship is an established relationship with a significant romantic focus. The word, "romantic" encompasses both the conventional sense, as well as relationships that are mainly sexual. The Appellate Court also stated that a sexual relationship alone does not constitute a romantic one; there must be some degree of romantic reciprocity. If one party is merely the object of desire, then, even if a social relationship exists between the desired person and the desirous person, there is no dating relationship. On the other hand, the Appellate Court stated that where one party is making romantic advances that are not reciprocated creates too narrow a standard. Even "Ill-matched couples may nevertheless be couples." In that light, the State adequately proved that the Defendant was a family or household member due to his dating relationship with the victim.

Attorney and Client

People v. Lewis, 2020 IL App (2d) 170900

Date Published: 11/12/2020

County: Kane

Facts: This matter involves an indictment of an individual for involuntary servitude of a minor, travelling to meet a minor, and grooming. During deliberations, the jury submitted a question to the court as to the definition of "predisposed." However, while the court deliberated as to the instruction, it instructed the jury to keep deliberating. The jury again expressed confusion, and the court took input from counsel. During this conversation, the jury then returned a verdict of guilty on all three counts.

Issues on Appeal: (1) Whether the Defendant's sentence was a result of ineffective counsel in that counsel did not offer the jury instruction regarding the definition of the word "predisposed;" did not provide evidence of the Defendant's lack of a prior criminal record; and did not object to the State's entrapment argument.

Holding: Reversed and Remanded

Analysis: To establish ineffective assistance of counsel, a defendant must show both (1) deficient performance by counsel that fell below an objective standard of reasonableness and (2) prejudice, meaning a reasonable probability that absent counsel's error, the result would have been different. Predisposition, as understood in the entrapment context, focuses on the defendant's mens rea before the exposure to government agents. Predisposition is established by proof that the defendant was ready and willing to commit the crime without persuasion and before his or her initial exposure to government agents. Here,to ensure that the jury properly understood the concept of predisposition despite having twice expressed confusion about it, the trial court should have answered the jury's question with reference to the readily available explanation of predisposition set forth in case law. This error, however, is not on appeal for clear error, rather, as defense counsel acquiesced to the court's decision not to answer the jury's request.

This acquiesence, however, along with the error, constitutes ineffective counsel. As to the allegation that there was ineffective counsel regarding the failure to bring evidence of a lack of a prior criminal record, the lack of a criminal record is relevant to an entrapment defense because it tends to show that the defendant was less likely to be predisposed to commit the charged offense. Defendant had no criminal background at all, but his counsel did not present that fact to the jury. Defendant's lack of a criminal record was strong evidence demonstrating this lack of predisposition, and counsel's failure to present this evidence is an obvious failure to

function as the counsel guaranteed by the sixth amendment. During closing, the prosecutor told the jury, "[i]f you find that the police did incite or induce him, then you can look at the next step," which was predisposition. This articulation ignores that it became the State's burden to disprove inducement, or prove predisposition, beyond a reasonable doubt once the trial court decided the affirmative defense could be plead. Defense counsel's lack of objection to the mischaracterization of the burden of proof is unreasonable and ineffective.

The Appellate Court, upon finding these deficiencies, turns to the question of prejudice. The refusal to clarify the jury's confusion over the meaning of "predisposition" created a serious danger that the jury convicted defendant based upon a consideration of predisposition untethered from the relevant timeframe. Therefore, the Defendant was prejudiced in that regard, and deserves a new trial.

In re Marriage of Keller, 2020 IL App (2d) 180960

Date Published: 11/19/2020

County: Lake

Facts: Petitioner filed for divorce and filed a petition for interim and prospective attorneys' fees and costs. Petitioner's attorney filed a motion to withdraw and was granted judgment against the client. Petitioner and Respondent subsequently brought a joint motion to dismiss the Petition for dissolution. The court granted the motion to dismiss subject to payment of fees and costs to the attorney.

Issues on Appeal: (1) Whether the trial court properly granted the award for fees.

Holding: Affirmed

Analysis: As to the issue of fees, the question is one of abuse of discretion. Here, the trial court's entry of the order is, on its face, reasonable and no abuse of discretion occurred. The Act specifically allows attorneys to file for fees and to enforce judgments. The interim award in this matter had been converted to a judgment prior to the dismissal of the case.

Zemater v. Village of Waterman, 2020 IL App (2d) 190013

Date Published: 12/7/2020

County: Kendall

Facts: Plaintiff filed an action for malicious prosecution. While litigation was pending, Plaintiff tried to discuss the matter directly with the Village President. Counsel for the Village wrote Plaintiff, advising him to communicate directly with counsel. The Village also requested the court enter an order requireing Plaintiff to communicate only with counsel. The court granted the Order on June 22. On June 24, plaintiff wrote to the Village President regarding a foia request. On June 24, plaintiff wrote that the Village Attorney was "not doing his job." Defendant filed for a Rule to Show cause. The trial court found Defendant in contempt and ordered attorney fees and costs.

Issues on Appeal: (1) Whether the pro-se Plaintiff is subject to certain Rule of Professional Conduct regarding communications with a litigant represented by counsel; (2) whether the trial court properly found contempt and granted monetary sanctions.

Holding: Affirmed

Analysis: Pursuant to article VI, section 1, of the Illinois Constitution, trial courts have inherent authority to control the course of litigation, including making and enforcing procedural matters. Rule 4.2 refers to conduct of a "lawyer," but its title is more general. Given the persistence and hostility of plaintiff's direct communication with defendant and plaintiff's misapprehension of the law, the trial court had a reasonable basis for enforcing the protection of Rule 4.2. even as against a pro-se litigant.

As to the contempt issue, plaintiff's noncompliance was unreasonable due to his deliberate and pronounced disregard for the pretrial rule. Plaintiff improperly communicated directly with defendant twice within nine days of the court's order barring him from doing so. If plaintiff intended to abide by the court's order, he would have directed his communication on June 22 to defendant's counsel, not defendant. Therefore, The contempt finding was not an abuse of discretion.

People v. Shelton, 2020 IL App (2d) 170453-B

Date Published: 12/14/2020

County: Winnebago

Facts: Defendant was charged in the circuit court of Winnebago County with, among other things, one count of aggravated driving under the influence of alcohol. Before trial, defendant moved in limine to bar admission of the arresting officer's testimony that he was dispatched to investigate a 911 report of someone "asleep behind the wheel at a light or intersection." The trial court ruled that the officer could testify to certain aspects and not on others. Defendant's counsel did not file any further motions regarding suppression or barring of evidence. After jury trial, Defendant was convicted.

Issues on Appeal: Whether Defendant's counsel was inneffective in that they did not file a motion to suppress the testimony regarding the 911 dispatch.

Holding: Reversed and Remanded

Analysis: To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance was so deficient that it fell below an objective standard of

reasonableness and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. Decisions involving trial strategy generally will not support an ineffectiveness claim. Whether to move to suppress evidence generally is a matter of trial strategy. The court concluded that the 911 report that defendant was asleep at the wheel at an intersection provided reasonable suspicion to stop defendant and, thus, a motion to suppress would likely have failed. Thus, trial counsel was not ineffective for failing to file such a motion.

In re Willow M., 2020 IL App (2d) 200237

Date Published: 12/30/2020

County: Ogle

Facts: This is the respondent's third appeal in two years from orders terminating her parental rights. The initial hearing on fitness began on June 3, 2019. The respondent failed to appear despite multiple notifications to appear on that date. Her appointed counsel then asked to be discharged as he could not make a defense on the respondent's behalf. The trial court granted the request, and Riley left the courtroom before any evidence was presented. The hearing continued. Later, this was found in error, and the court vacated the termination order and remanded for a new hearing with her old appointed counsel having been ex parte reappointed. The next hearing, the respondent failed to appear. Her counsel renewed the oral motion to withdraw. The trial court stated that he must reduce the request to writing, and that any decisions would wait for a later date. The permanency hearing was continued. The motion to withdraw was submitted and brought to hearing and denied. The motion to withdraw was renewed at the next hearing date. Respondent again failed to appear. The trial court noted that the respondent did not take advantage of the opportunity to address the court regarding her desire for new counsel, and it again denied the motion to withdraw.

Issues on Appeal: Whether the trial court abused its discretion in denying the motions to withdraw and, as such, whether the defendant was denied due process.

Holding: Affirmed

Analysis: Under Rule 13(c)(3), a motion to withdraw "may be denied by the court if granting the motion would delay the trial of the case, or would otherwise be inequitable." Rule 13(c)(2) states, in pertinent part, that "the attorney must give reasonable notice of the time and place of the presentation of the motion for leave to withdraw, by personal service, certified mail, or a third-party carrier," or "electronically, if receipt is acknowledged by the party." Appointed counsel's motion to withdraw failed to comply with Rule 13(c)(2) in two respects. First, it did not advise the client of filing a supplemental appearance within 21 days to avoid default. Second, the respondent did not receive adequate notice. The record does not disclose that the respondent was served before presentment to the trial court. Due to these defects, the granting of the motion would have been an error. Because there was no error in denying the motion, the judgment should be affirmed.

Bail

People v. Patton, 2020 IL App (2d) 190488

Date Published: 12/29/2020

County: Kane

Facts: Defendant was charged with two counts of theft and unlawful possession of a weapon by a felon. The Defendant was in custody, though bond remained enforcable. The trial court later dismissed the indictments on the basis that it had set defendant's bail at an excessive amount. The State appealed.

Issues on Appeal: Whether (1) Defendant's bond was excessive, (2) the Defendant failed to utilize procedural safeguards against excessive bail, and (3) whether the Defendant had shown prejudice stemming from violations of due process.

Holding: Reversed and Remanded

Analysis: To support a claim that an indictment should be dismissed because of a due process violation, a defendant must show both actual and substantial prejudice. Here, even if defendant suffered a violation of his due process rights, dismissal of the indictment was not an appropriate remedy. Here, the trial court found that it violated defendant's due process rights when it set defendant's bail at $250,000 in each case for the sole purpose of keeping defendant in custody. However, the court failed to first consider whether the imposition of excessive bail was sufficiently prejudicial to warrant the dismissal. In this matter, actual and substantial prejudice in the context of an excessive bail claim would require defendant to establish that, had a lower bond been set, he could have posted the bond and gained his release from custody. Here, defendant's representations to the court revealed that he was unable to post bond.

Furthermore, even if prejudice were shown, further analysis is necessary. The question becomes as to whether the trial court abused its discretion in finding dismissal as an appropriate remedy. Here, there was an abuse. The defendant failed to take appropriate procedural action, and, by failing to do so, cannot show that dismissal was an appropriate remedy.

Burden of Proof

People v. Cox, 2020 IL App (2d) 171004

Date Published: 11/16/2020

County: De Kalb

Facts: Defendant was charged with driving or being in actual physical control of a vehicle while under the influence. De Kalb County Sheriff's Deputy Noelle Wold was dispatched to the scene. She saw defendant standing next to the driver's side of a blue Chevrolet Silverado. The truck was running, and the driver's side door was open. She saw signs that the defendant was under the influence of some substance. She also saw a bottle in the center console inside the vehicle. A breath test indicated the the defendant's blood alcohol content was over 0.08. After presenting the evidence, the defendant was found guilty of DUI as the defendant was in actual physical control of the vehicle.

Issues on Appeal: Whether the evidence was sufficient to indicate that the Defendant was in actual, physical control of the vehicle.

Holding: Affirmed

Analysis: In matters involving the sufficiency of evidence, the question on appeal is after viewing the evidence in the light most favorable to the prosecution, would any rational trier of fact find the essential elements of the crime proved beyond a reasonable doubt. One need not be in the driver's seat of a vehicle to be in actual physical control of it; he or she need only have the capability or potential of operating the vehicle. While exclusivity and ownership are not dispositive issues, in this case, the video entered into evidence indicated that the defendant was the owner and had control. After viewing the evidence in the light most favorable to the prosecution, the evidence was sufficient to support conviction.

Burden of Proof

People v. York, 2020 IL App (2d) 160463

Date Published: 12/7/2020

County: Du Page

Facts: After bench trial, Defendant was convicted or retail theft. Evidence of prior convictions as well as evidence of this instance was presented.

Issues on Appeal: Whether the evidence was sufficient to sustain Defendant's conviction.

Holding: Affirmed

Analysis: An inference of intent does not require the trier of fact to look at all possible explanations consistent with the defendant's innocence or to be satisfied that each circumstance was proved beyond a reasonable doubt. Rather, a defendant's intent is proved beyond a reasonable doubt based on all the evidence, when considered as a whole. After viewing the evidence in the light most favorable to the State, the appellate court concluded that a rational trier of fact could have found that defendant committed the theft. There was evidence he entered with the specific intent to steal the goods. As the trial court observed, defendant's actions in the store were quick and deliberate, a getaway driver was waiting for him far from the store's entrance, defendant had committed similar crimes in the past, and defendant suggested during his phone conversations that he had planned to commit a theft that day.

Child Support

People v. Chakona, 2020 IL App (2d) 190918

Date Published: 11/4/2020

County: Du Page

Facts: The Department of Healthcare and Family Services filed a petition alleging that the Respondent was father of a minor child. Respondent resided in the Cayman Islands. The petition sought a finding that respondent was father to the child and an order requiring him to pay support to the State Disbursement Unit. The court, upon taking the Petition to hearing, foud the Respondent to be the father and the court began hearing on the subject of payment amounts. After hearing argument, the court sided with Respondent, citing the statutory calculation guidelines and stating that it was the Petitioner's burden to prove the guidelines should not apply to an international case, and the State appealed.

Issues on Appeal: Whose burden it was (the State's or Respondent's) to prove that the Marriage Act guidelines should govern the amount of the award in support.

Holding: Remanded

Analysis: The trial court's ruling that it was Petitioner's burden to prove that the guidelines should apply to an international case goes against the plain language of the statute. The trial court must cite compelling reasons to deviate from the statute. Merely knowing that the Respondent lived abroad does not constitute a compelling reasons. Therefore, while the issue of parentage is affirmed, the resolution of support is remanded to the court.

Civil Procedure

Dzierwa v. Ori, 2020 IL App (2d) 190722

Date Published: 10/7/2020 Corrected:10/13/2020

County: Du Page County

Facts: Plaintiff's injury occurred at Defendant's home when Defendants were out of town and plaintiff was "house-sitting." The dog did not have any prior history of aggression towards the Plaintiff. Upon Motion of the Defendants, the court entered summary judgment on the Plaintiff's negligence claim and under applicable statute.

Issues on Appeal: Whether the trial court properly entered summary judgment in favor of the Defendant.

Holding: Affirmed

Analysis: Illinois precedent holds that the legal owner of a dog cannot be held liable for an injury caused by the dog where the owner was not in a position to control the dog or prevent the injury. In the present matter, the Defendant had relinquished control of the dog and was not in a position to prevent the Plaintiff's injuries at the time of the injury. Therefore, summary judgment as to the negligence claim and applicable statute was appropriate.

JPMorgan Chase Bank, N.A. v. Robinson, 2020 IL App (2d) 190275

Date Published: 11/5/2020

County: Du Page

Facts: Plaintiff filed a complaint to foreclose a mortgage on the Defendant's property. Defendant was served by special process server, but failed to appear. Judgment by default entered and the property was ordered sold. Almost seven years after the sale, defendant filed a petition to quash service of process and to vacate orders and judgments entered in the case. The trial court dismissed the petition.

Issues on Appeal: (1) Whether the trial court lacked personal jurisdiction over the Defendant and, therefore, erred in granting the motions to dismiss. (2) Whether the purchaser was a bona-fide purchaser of the foreclosed property.

Holding: Affirmed

Analysis: A lack of jurisdiction is apparent from the record if it does not require inquiry beyond the face of the record. In this case, the special-process-server affidavit shows that substitute service of the summons and the complaint was made on defendant. However, the affidavit did not indicate whether defendant was served in Cook or Du Page County. Thus, the affidavit does not establish a jurisdictional defect on its face. Defendant tried to argue that, because the zip code on the affidavit is entirely within the borders of Cook County, that there is a lack of jurisdiction. Citing to this fact, however, goes beyond the record, which means that no defect is found within the record. Therefore, the court had acquired jurisdiction over the Defendant and the property, and properly entered judgment by default. In addition, the purchasers were bona-fide purchasers, and, as such, were afforded protections under the statute.

Adler v. Bayview Loan Servicing, LLC, 2020 IL App (2d) 191019

Date Published: 12/29/2020

County: Kendall

Facts: Defendant, the Bank of New York Mellon, obtained a judgment of foreclosure against the plaintiffs. Plaintiffs then filed claims under the Real Estate Settlement Procedures Act and the Consumer Fraud and Deceptive Business Practices Act alleging that Defendants engaged in misconduct arising out of the foreclosure proceeding. Defendants filed a motion to dismiss under section 2-619 of the Code of Civil Procedure. The trial court found the claims barred under § 15-1509c of the Mortgage Foreclosure Act and dismissed the action. Plaintiffs appeal.

Issues on Appeal: Whether Plaintiffs' claims were barred under the Mortgage Foreclosure Act.

Holding: Affirmed

Analysis: A plain reading of 735 ILCS 5/15-1509 states that the legislature intended section 15-1509(c) to preclude all claims of parties to the foreclosure related to the mortgage or the subject property, except for claims regarding the interest in the proceeds of a judicial sale. The Plaintiffs' claim clearly falls into this category and is, therefore, barred. Dismissal was appropriate.

18 Rabbits, Inc. v. Hearthside Food Solutions, LLC, 2020 IL App (2d) 19057

Date Published: 12/29/2020

Facts: Plaintiff Corp resides in California. The Defendant is a Delaware LLC with headquarters in Downers Grove, IL. Defendant moved to dismiss plaintiff's complaint, alleging forum non conveniens, arguing certain aspects of manufacturing were undertaken in another State and that those courts were much less congested than the present forum. The trial court determined that defendant failed to show that they strongly favored transfer. It commented that it was unclear why plaintiff filed suit in Illinois, but the court reiterated that defendant had failed to show that the relevant factors strongly favored transfer to Michigan.

Issues on Appeal: Whether the trial court abused its discretion in denying the Motion to Dismiss due to forum

non conveniens, specifically, whether the State of Michigan was a viable alternative forum.

Holding: Affirmed

Analysis: The Illinois venue statute provides that an action must be commenced (1) in the county of residence of any defendant who is joined in good faith or (2) in the county in which the cause of action arose. If there exists more than one potential forum, the equitable doctrine of forum non conveniens may be invoked to determine the most appropriate forum. A court must balance the private and public interests in determining the appropriate forum in which the case should be tried. Plaintiff's chosen forum is presumed to be appropriate. Weighing the factors, the appellate court concluded that Illinois was an appropriate forum.

Ocwen Loan Servicing, LLC v. DeGomez, 2020 IL App (2d) 190774

Date Published: 12/30/2020

County: Du Page

Facts: Plaintiffs filed a foreclosure action. Judgment entered. In September 2018, more than eight years after the filing of the foreclosure action, defendants filed a petition for relief from void judgment, seeking to vacate the judgment of foreclosure and sale. Defendants argued that personal jurisdiction was lacking over them because they were improperly served.

Issues on Appeal: Whether there was personal jurisdiction subject to proper service.

Holding: Affirmed

Analysis: In determining whether a summons was sufficient to provide the opposing party with notice of the action, "we adhere to the principle that a court should not elevate form over substance but should construe a summons liberally." To determine whether the alleged technical defects in the summons were so severe as to preclude the court from obtaining personal jurisdiction over the defendant, the appellate court analyzed the substance of the summons. The summons did serve the proper function as to one defendant. As to the other, the summons did not indicate that defendant in any way. Therefore, the summons was improper. Nevertheless, Laches is an affirmative defense that is equitable and requires the party raising it to show that there was an unreasonable delay in bringing an action and that the delay caused prejudice. Laches "can preclude relief in an appropriate case where prejudice is demonstrated." Defendants do not argue that they were not served or had no knowledge of the foreclosure action. Indeed, it is undisputed that defendants were served with the complaint and summons. Although the summons fails to name on defendant on its face, defendants did nothing about the partially defective summons until filing their section 2-1401 petition approximately eight and one-half years later. This unreasonable delay allowed defendants to increase the damages they could claim without any detriment to them. As such, laches bars their claim.

Contracts

John Franklin & Dorothy Bickmore Living Trust v. Nanavati, 2020 IL App (2d) 190710

Date Published: 11/17/2020

County: Lake

Facts: Two defendants owned a property. Defendant 1 had quitclaimed an interest to themselves and Defendant 2 as part of a mortgage transaction, though the quitclaim was never recorded. Defendant 2, throughout the transaction, was under the impression that the Defendant 1 still had sole title. Defendant 1 listed the property and signed an agreement to sell the property. Defendant 2 never signed the agreement. The contract identified Defendant 1 as the sole owner and seller. Defendant 2 was dissatisfied with the purchase price and terminated the contract, even though there was no right to rescind the contract. No closing ocurred. The court entered judgment against the Defendants for damages for breach of contract. However, the plaintiffs had also alleged fraud as a count in the complaint. The court entered judgment in favor of the Defendants in that count. The court then proceeded to the issue of fees, and denied the petition for attorneys' fees for the Defendants, and then granted a Petition brought by the Plaintiffs.

Issues on Appeal: (1) Whether the trial erred in finding as a matter of law that the Defendant had breached the contract and (2) whether the other side was entitled to attorneys' fees pursuant to the contract when they had prevailed on one count of the Plaintiff's Complaint.

Holding: Affirmed, but Remanded for further proceedings

Analysis: The core requirements for the formation of a contract are an offer, acceptance, and consideration. However, just because one party does not sign a contract for sale does not necessarily mean that a contract did not occur. The rule that all sellers must sign a contract for sale for it to be enforcable does not mean that a single seller cannot be bound by accepting an offer to sell more than the interest she has in the property. Defendant 1, therefore, was bound to sell their interest. Furthermore, Defendant 2 knew about the contract and, the court found, had initially approved it. Therefore, no error occurred in the finding of breach. As to the attorneys' fees, this issue was forfeited for lack of an adequate record on appeal.

Costs

In re Marriage of Main, 2020 IL App (2d) 200131

Date Published: 11/2/2020

County: Lake

Facts: Petitioner had filed a notice of appeal challenging judgment in a divorce case. The Petitioner, representing themselves pro se throughout litigation, requested transcripts for the court proceedings. The petitioner served each of the court reporters who attended the relevant court dates a similar request, along with a copy of the trial court order granting a waiver of court fees, costs, and charges. The Petitioner was told that the waiver did not extend to providing transcripts without charge. The Petitioner moved for a waiver of the fees, which was denied by the trial court. the trial court denied the petitioner's request because the court administration would have to pay the costs of the transcripts if he did not, and the court believed that no statute or court rule required that result. Petitioner moved for reconsideration, which was considered by the trial court. The Trial court certified the question to the Appellate Court.

Issues on Appeal: (1) Whether an indigent, self-represented litigant may obtain transcripts without charge, we omit here most of the facts relating to the dissolution trial and judgment.

Holding: Certified Question Answered

Analysis: If the trial court finds that the applicant is an indigent person, the court shall grant the applicant a full fees, costs, and charges waiver entitling him or her to sue or defend the action without payment of any of the fees, costs, and charges. Review of the statutes and Supreme Court Rules shows that each uses slightly different language to describe what costs and/or charges can be waived. 735 ILCS 5/5-105.5(b) provides a waiver of fees for transcripts on appeal; however, that language is directed at individuals represented by a CLSP or pro bono attorney. Looking at the plain language of the Section at issue, the language alone does not answer the question. The Appellate Court, therefore, considered other canons of statutory construction, including harmonization and stautory purpose. The Appellate Court, upon considering these factors, states that the cost of transcripts necessary for an appeal is within the "fees, costs, and charges" that may be waived for indigent litigants, regardless of whether the litigant is represented by counsel under section 5-105.5 or is a self-represented applicant under section 5-105. Nothing in this statutory scheme demonstrates any intent, by either the legislature or the supreme court, to treat pro se indigent litigants less favorably or even differently than those who are represented by CLSP or pro bono attorneys. Viewing the relevant laws and rules as a whole, the slightly different language used in section 5-105.5(b) cannot be seen as establishing better treatment for indigent litigants who are fortunate enough to have counsel. As such, a self-represented litigant who has been granted a waiver of fees under section 5-105 is entitled to a waiver of transcript costs under Rule 298, which provides that waivable fees are those set out in section 5-105(a)(1). However, these costs are limited to those "deemed by the court to be necessary." A more complete answer to the question posed is that a self-represented litigant, when granted a waiver of fees under 735 ILCS 5/5-105, the litigant is entitled, under Rule 298 (and by reference, section 5-105), to a waiver of fees for transcripts that the trial court deems are necessary for the civil action, including on appeal.

Custody

In re S.F., 2020 IL App (2d) 190248

Date Published: 11/17/2020

County: Kendall

Facts: The minor child was placed in Respondent's care by her mother. In January 2015, respondent introduced S.F. to petitioners, for the purpose of determining whether it would be suitable for petitioners to adopt S.F. Shortly thereafter, S.F. began living with petitioners. Later that year, respondent became S.F.'s plenary guardian. Petitioners and respondent shared responsibilities regarding S.F.'s schooling and medical needs. Unfortunately, that relationship deteriorated. In December 2015, respondent indicated that S.F. was staying with her permanently. Petitioners filed a petition seeking removal of respondent as guardian. After hearing, the trial court removed respondent as guardian and placed S.F. in the care of petitioners.

Issues on Appeal: (1) Whether petitioners had standing to bring their petition. (2) Whether the trial court was warranted in removing respondent as guardian.

Holding: Affirmed

Analysis: The analysis beings as to whether the petitioners were "interested persons" under the Act. An interested person is one who has or represents a financial interest, property right, or fiduciary status at the time of reference which may be affected by the action. The Act is to be liberally construed and, in this case, petitioners' relationship with S.F. was "founded in trust" and, therefore, they were interested persons. They had a relationship with S.F. and took care of S.F. in significant ways before bringing the petition. Standing was therefore conferred.

As to the issue of removal, the trial court's decision to remove respondent as guardian for good cause was based

upon her "refusal to obey court orders, [and] to meet with the GAL, and her willingness to substitute her judgment for that of the court." This finding is supported in the record. Therefore, reversal would not be warranted.

Damages

Stanphill v. Ortberg, 2020 IL App (2d) 190769

Date Published: 12/29/2020

County: Winnebago

Facts: A doctor performed a suicide screening on plaintiff's father and found there was no imminent risk of harm. Nine days later, the patient committed suicide. Plaintiff (as executor of the estate) brought suit for wrongful death. Following jury trial, the jury returned a verdict in favor of the Plaintiff. After a long appeal process, and final affirmation of the verdict from the jury, the plaintiff filed a motion for entry of judgment against the defendants in an amount that included interest accruing from the date of the original return of the verdict from the jury. Defendants countered that interest should accrue as of the date that judgment actually entered. The trial court entered an Order calculating damages from the date judgment entered, not the date of the jury verdict.

Issues on Appeal: On appeal, the sole issue that we are confronted with is whether interest began to accrue on the date the jury returned the general verdict in favor of the plaintiff or the date the Appellate Court ordered entry of the judgment.

Holding: Affirmed

Analysis: Interest accrues from the time that any award, report, or verdict is issued. The question, therefore, is whether the jury's general verdict constituted a verdict for purposes of the statute governing judgment awards (735 ILCS 5/2-1303). According to case law, the jury's finding is not a verdict until the trial court accepts it. Second, the jury's finding that leads to a verdict is often referred to as a verdict as well. However, the fact that a jury's finding may be referred to as a verdict does not make it a verdict in the sense that it has been received and accepted by the trial court and entered of record. Here, the jury returned a general verdict in the plaintiff's favor. However, since the trial court did not accept it, it did not become a verdict.

Divorce

In re Marriage of Onishi-Chong, 2020 IL App (2d) 180824

Date Published: 10/19/2020

County: Du Page County

Facts: After a divorce decree entered, Petitioner alleged that, after the dissolution judgment, she discovered that respondent had misrepresented his actual income during the divorce proceedings and colluded with his partner to conceal his income to reduce maintenance and support. The parties litigated their divorce for a period of approximately 22 months. Throughout the proceedings the parties engaged in full discovery. After discovery closed, the parties sought to enter a Marital Settlement Agreement. Approximately 4 years after the case began, petitioner filed a motion pursuant to section 2-1401, alleging that respondent secreted his actual income and conspired to shelter income from the divorce. Respondent filed a motion for summary judgment, which was granted by the trial court.

Issues on Appeal: Whether summary judgment on the Section 2-1401 Petition was properly granted.

Holding: Affirmed

Analysis: Judgments for dissolution of marriage are afforded the same degree of finality as judgments in any other proceeding, even where they incorporate a Marital Settlement Agreement. In order to challenge the validity of an MSA beyond 30 days of the entry of judgment, a party must bring a petition pursuant to section 2-1401 or other method of postjudgment relief. To be entitled to relief under that section, a petitioner must set forth specific factual allegations showing the existence of a meritorious claim, demonstrate due diligence in presenting the claim to the circuit court in the original action, and act with due diligence in filing the petition. In the present matter, the Petitioner had access to and acknowledged the evidence that may have allowed her to raise a cause of action for fraud prior to the divorce judgment. However, because she had access to the information through discovery and settlement negotiations, the Petitioner did not exercise reasonable diligence in presenting the claim to vacate judgment. Therefore, judgment will not be vacated on this basis and summary judgment was appropriate.

In Re Marriage of Wig

Date Published: 12/29/2020

County: Du Page

Facts: Parties divorced in 2018. Incorporated into the dissolution judgment was the parties' marital settlement agreement. Ten days after the parties' marriage was dissolved, respondent was fired from her job. Effective January 1, 2019, before the trial court's hearing on the petition to set maintenance, section 504 was amended in two respects. In this matter, the legislature altered the formula for setting maintenance, and also provisions in response to federal law eliminating the deductibility of maintenance for federal tax purposes. At the hearing on

the petition, the parties disagreed over whether the former or 2019 version of section 504(b-1) applied to the calculation of maintenance. The parties did agree that, under the former version, petitioner would receive $423 in monthly maintenance, but under the 2019 version, he would receive only $3 in monthly maintenance. The trial court entered maintenance based upon the 2019 version of section 504.

Issues on Appeal: What law governs the calculation of maintenance based upon the Petition from December 2018.

Holding: Affirmed

Analysis: While the setting of maintenance changed from 2019 onward, it is noteworthy that the change in the law did not affect the parties' agreement. The agreement provides unambiguous terms for the calculation of maintenance. Because petitioner asked the trial court to set maintenance under that formula rather than to modify the agreement, the agreement controls exclusive of statutory provisions on maintenance.

The parties' agreement pertained to spousal maintenance, not child support or parental responsibility. Therefore, the agreement was binding absent a finding of unconscionability. Neither party asserts this argument. Here, the parties' agreement unambiguously provides that respondent shall pay petitioner maintenance amounting to 30% of her gross income minus 20% of petitioner's gross income. The trial court, by applying the 2019 version of the Act, was in error. However, the error was harmless because the trial court correctly applied the terms of the parties' agreement.

Speaking in dicta, the court noted that, if called upon to decide which version of the Act applied, they would hold that the former did. All substantive issues with the divorce ocurred in 2018, prior to the enactment.

Employment

Pacernick v. Board of Education of the Waukegan Community Unit School District No. 60, 2020 IL App (2d) 190959

Date Published: 12/1/2020

County: Lake

Facts: Plaintiff began working for the school district during the 2002-03 school year. During his time, he served as the head coach of both the WHS girls' track team and the boys' cross-country team, in addition to teaching English. In 2017, a complaint was filed indicating that the plaintiff had touched some of the girls on their buttocks. An investigation was conducted. On April 19, 2017, plaintiff's dismissal was recommended to the superintendent, who approved its presentation to the Board. The Board held hearing, where the plaintiff denied the allegations. The Board determined that plaintiff engaged in sexual harassment. Plaintiff exercised his right to a hearing before a hearing officer. At hearing, several witnesses testified. The officer found that the Board had proven that plaintiff engaged in the charged offenses and that the offenses constituted sufficient cause to dismiss him and recommended dismissal. Plaintiff sought administrative review of the Board's decision. The trial court affirmed the Board's findings and its dismissal of the plaintiff. Plaintiff appeals.

Issues on Appeal: (1) Whether the Board's findings of sexual harassment were in error, and (2) whether the Board had complied with applicable procedures for dismissing a tenured teacher for cause.

Holding: Affirmed

Analysis: Generally, Appellate review is limited to a Board's decision, not that of the hearing officer, which is merely a recommendation to the Board, or the trial court. Here, however, the Board adopted the hearing officer's findings and dismissal recommendation; therefore, that decision is under review.

As to the issue of cause, the Board charged plaintiff with sexual harassment of female students. A school board must prove, by a preponderance of the evidence, that there is cause for dismissal. Case law has held that conduct of a sexual nature constitutes immoral conduct or otherwise sufficient cause warranting dismissal. Plaintiff's conduct, which included touching students' buttocks and using sexual innuendoes, could reasonably be interpreted as immoral and having "no legitimate basis in school policy or society." The Board found the students credible, and made its decision pursuant to the evidence. Therefore, there was no reversible error.

As to the issue of irremediability, the test is (1) whether damages has been done to students, faculty, or the school, and (2) whether the conduct resulting in that damage could have been corrected had the teacher's superiors warned the teacher. In this case, witness testimony stated that many of the victims wanted to forget the experience. This shows that the discomfort plaintiff's conduct caused the students persisted several years after the conduct occurred, including after some of the students had graduated. Furthermore, the fact that victims reached out is notable. In the absence of action by the school, the students had to decide whether to tolerate plaintiff's conduct in order to play a sport they loved or quit and lose the opportunity to participate in the sport. That they overwhelmingly chose to continue to participate in track does not diminish the degree of the harm plaintiff caused under the circumstances in this case. Regarding whether the conduct could be corrected, the Board determined that

plaintiff's conduct would likely not have been corrected had he received a warning and an opportunity to correct. Given the variety of offensive conduct in which plaintiff engaged—touching, verbal sexual innuendoes, lack of awareness of personal space that included an instance of straddling an athlete's leg—over a period of at least two school years, there was no error in determining that plaintiff's conduct would not have changed had he been warned. As the Board noted, the conduct evinced "a fundamental lack of respect for the athletes as individuals." Finally, as to the procedural issues, the allegedly improper documents reasonably apprised plaintiff of the allegations against him.

Evidence

People v. Reyes, 2020 IL App (2d) 170379

Date Published: 11/25/2020

County: Lake

Facts: A minor child was abducted by the Defendant in 2013. Within two days, the Mundelein police identified defendant as a suspect in the kidnapping. They also tied defendant's vehicle to the abduction. Defendant was located and the vehicle was secured and a search warrant was issued for his residence and vehicle. The police siezed and secured three electronic devices from defendant's vehicle, which were analyzed by the police. The forensic analyst found images of the minor child in two videos showing the sexual assault. Defendant was charged with Counts of kidnapping and possession of child pornography. In pretrial, the Defendant moved to suppress the cell phone evidence, which was denied.

Issues on Appeal: (1) Whether there was probable cause to support issuing the warrant, (2) whether the officers executing the warrant acted in good faith, and (3) whether the Defendant's convictions should be vacated pursuant to the one-act, one-crime rule.

Holding: Affirmed

Analysis: A trial court's decisions regarding a motion to suppress will only be disturbed if "manifestly erroneous." The Appellate court must consider whether the judge issuing the search warrant had a substantial basis for concluding that probable cause existed. A sworn complaint seeking a search warrant is presumed true. While the Defendant argues that no witness saw him with an electronic device, the complaint made clear that the phone could be a source of photographs, video, voice recordings, and text communications. Such data, actively created by the user, theoretically could include recordings of the offenses. Here, the trial court could conclude that probable cause existed, and the complaint, though broad, sought data constituting evidence of the offenses, which is consistent with the test for probable cause. Therefore, there was cause to issue the warrant. Furthermore, as to the evidence seized, it is permissible for a warrant's scope to be governed by the nature of the items to be searched for—here GPS data—without precise specification of file names or locations. Here, the electronic devices siezed could contain the data searched for, and their nature, therefore, fell within the scope of the warrant, even if the warrant did not specifically state the devices or files to be siezed.

As to the issue of good faith, for suppression to be an appropriate remedy, it is necessary that the officers involved were not acting in good faith. An officer's decision to obtain a warrant is prima facia evidence that the officer was acting in good faith. Generally, good faith does not exist where a "magistrate simply rubberstamped the warrant application, the officers were dishonest or reckless in preparing the affidavit, or the warrant was so lacking in probable cause that no officer could have relied on it." None of that is indicated by the record.

Finally, as to the one-act, one argument rule, after discussing the precedent and supreme court cases, the Appellate court concluded that, just because acts are "closely related" in time and nature, does not mean that there is a violation of the one-act, one-crime principal. Therefore, judgment affirmed with special concurrence by Justice Birkett.

Evidence

People v. Nepras, 2020 IL App (2d) 180081

Date Published: 12/7/2020

County: McHenry

Facts: Before his jury trial, defendant disclosed as an expert witness who would testify to defendant's mental state. The state moved, in limine, to bar the testimony. The trial court granted the State's motion and barred the testimony. After conviction, Defendant appeals.

Issues on Appeal: Whether the trial court erred in barring admission of the expert testimony.

Holding: Affirmed

Analysis: well-established rules of evidence permit a trial court to exclude evidence if its probative value is outweighed by unfair prejudice, confusion of the issues, or potential to mislead the jury. A person commits burglary with the intent to commit a theft when he knowingly enters a building without authority and with the intent to commit a theft therein. Because a defendant's state of mind at the time of the crime is a question for the trier of fact, an expert witness who was not present when the defendant entered the premises cannot opine whether

the defendant acted with a specific mental state. Here, defendant sought to admit expert testimony to show that, at the time he entered the property, he could not form the specific intent to commit a theft. However, the proferred expert was not present when defendant entered and could not, therefore, give an opinion on the mental state of the Defendant.

People v. Baker, 2020 IL App (2d) 181048

Date Published: 12/14/2020

County: Kane

Facts: Defendant was convicted of first-degree murder, home invasion, and aggravated discharge of a firearm. Prior to charges being filed, defendant was arrested and interrogated. During the interrogation, defendant made unrecorded, incriminating statements. Defendant moved to suppress his statements, arguing that he was improperly interrogated after invoking his right to counsel and that the police failed to record the interrogation under section 103-2.1(b-5)(1) pertaining to the offense of attempted first-degree murder. The incriminating statements were made as to the other offenses, not just the one of first-degree murder.

Issues on Appeal: Whether the unrecorded statements, due to the delay in enactment of the statute, were barred because the statute authorizing them to be admitted was constitutionally deficient.

Holding: Affirmed

Analysis: Section 103-2.1(b-5) provides that statements made in a custodial interrogation concerning any of various offenses listed "shall be presumed to be inadmissible as evidence against the accused *** unless *** an electronic recording is made of the custodial interrogation." Previously, the statute applied only to various homicide offenses, but was amended to include additional offenses on a rolling basis over the ensuing periods. Here, the legislative history reflects a legitimate concern about the ability of law enforcement agencies to comply with the amendment if the additional offenses were all added at once. Accordingly, section 103-2.1(b-5) is not facially unconstitutional and the trial court did not err in denying the motion to suppress.

People v. Baker, 2020 IL App (2d) 180300

Date Published: 12/22/2020

County: Winnebago

Facts: Defendant filed a motion to quash his arrest and suppress cigarettes and money found in a search. The police sergeant, Johnson, at hearing, testified that he responded to a report of a robbery and found the Defendant, who matched the description sent from dispatch. In pursuit, Johnson observed the Defendant pause behind a tree and then reemerge. Johnson stopped the Defendant and conducted a search. He observed some cigarettes in defendant's pocket as well as gloves sticking out of his sweatshirt. Johnson then went to the tree and found a handgun on top of a pile of leaves. After watching security footage from the scene, he concluded that defendant's clothes matched those of the robber. The court denied the motion to suppress. A jury found the defendant guilty and the defendant was sentenced to 22 years imprisonment.

Issues on Appeal: Whether the evidence would not have been suppressed, even if Defendant was illegally arrested.

Holding: Affirmed

Analysis: The parties dispute whether defendant was illegally arrested, but that is not the operative issue here, because the evidence presented would have been discoverable regardless of the search. For the inevitable discovery doctrine to apply, three criteria must be met: (1) the condition of the evidence must be the same when found illegally as it would have been when found legally; (2) the evidence would have been found by an independent line of investigation untainted by the illegal conduct; and (3) the independent line of investigation must have already begun when the evidence was discovered illegally. Here, there is no question that the robbery investigation had already begun. As a part of that investigation, certain markers of identity would lead to probable cause to arrest the Defendant. At that point, any evidence on his person would have been discovered.

People v. Chambers, 2020 IL App (2d) 190041

Date Published: 12/29/2020

County: Kane

Facts: Following jury trial, Defendant was found guilty of criminal damage to property. A trial, the State presented evidence that defendant "keyed" a vehicle. The witness who testified for the value of damages (Roth) owned an automobile repair shop. Roth identified People's exhibit No. 4 as a written estimate that he prepared for the cost of repairing the Tahoe. Roth testified that he examined the damage to the Tahoe's right front fender and that he estimated the cost of repair to be $624 including approximately $12 in tax. Roth testified on cross-examination that he did not repair the vehicle and was unaware whether anyone else had. He acknowledged that, if the vehicle had been taken to different repair shops, those shops might have given different estimates.

Issues on Appeal: Whether the evidence presented was sufficient to sustain conviction.

Holding: Affirmed

Analysis: Although it appears that no Illinois case has considered whether a repair estimate can satisfy the

State's burden of proof of the dollar amount of damage in a prosecution for criminal damage to property, courts in other states have concluded that a repair estimate is sufficient. Here, the estimate was almost 25% higher than the $500 threshold for a Class 4 felony conviction. Notwithstanding the subjective element of estimating labor costs, the trier of fact could reasonably conclude that an auto repair shop owner with decades of experience could make an estimate within that large a margin of error. Furthermore, speculation about a hypothetical alternative repair estimate is no basis for disturbing the jury's determination of the weight to give to Roth's estimate. Therefore, the State's burden of proof was met.

People v. Althoff, 2020 IL App (2d) 180993

Date Published: 12/29/2020

County: De Kalb

Facts: After defendant was arrested for DUI, he asked the State to produce videos of his stop. Although the State eventually produced a video of some of what transpired, it did not produce video of the stop. During trial the defendant moved for a directed finding. The Court denied the Motion.

Issues on Appeal: Whether defendant should have been afforded any relief for the State's failure to produce videos of the stop and the entirety of what transpired upon his arrest and, as such, was there a violation by the State in Discovery?

Holding: Affirmed

Analysis: The mere fact that the evidence was discoverable does not mean that the State's failure to produce it amounted to a discovery violation. When evidence is potentially useful but not "material exculpatory evidence," a due process violation arises only if the defendant can show that the State acted in bad faith. Bad faith or the material exculpatory value of the evidence is not required for a discovery violation in this case. However, an entity cannot violate a discovery disclosure rule if what is sought does not exist. Here, no evidence indicates that a full recording of what transpired after Defendant's arrest ever existed. Given that the manifest weight of the evidence does not prove that recordings were ever made, no discovery violation occurred. Thus, the State could not provide that which does not exist and could not have committed a discovery violation. Because the State did not commit a discovery violation, defendant was not entitled to any relief.

People v. Neal, 2020 IL App (2d) 170356

Date Published: 12/31/2020

County: Kane

Facts: the defendant was arrested after he attempted to leave a store with packs of underwear that he had not paid for. The defendant was ultimately charged with committing retail thef. At trial, the State produced several witnesses, most of whom were store employees who identified the defendant as the culprit. In addition to this testimony about the charged offenses, the State introduced evidence regarding other crimes to show intent, modus operandi, and identity, among other things. Two witnesses testified regarding identification. The court found that the defendant was positively identified and the State had met its burden. It found the Defendant guilty on all counts. At sentencing, the court imposed two 13-year terms of imprisonment for the burglary convictions and two 5-year terms for the retail thefts, all to run concurrently.

Issues on Appeal: (1) Whether hearsay testimony identifying the defendant as the perpetrator was in error and (2) whether the defendant's sentence was excessive

Holding: Affirmed

Analysis: Section 115-12 of the Code permits a prior out-of-court identification of a defendant to be admitted as substantive evidence at trial if the identification was made "after perceiving" the defendant. Prior to the enactment of section 115-12, when a declarant testified and was subject to cross-examination, the declarant's prior statement identifying someone after seeing him or her (usually in a lineup or photo array) was admissible to corroborate the declarant's in-court identification, but it was not admissible as substantive evidence. In enacting section 115-12, the legislature was mostly focused on the admissibility of identification statements made by victims or eyewitnesses shortly after the offense. What it does not show, however, is any intent to limit the admission of prior identifications to only those made by victims and eyewitnesses. Therefore, the testimony was allowed. As to ths issue of sentencing, an appellate court cannot disturb a sentence within the applicable sentencing range unless the trial court abused its discretion. While a sentence of 13 years might be lengthy for the unarmed and nonviolent retail thefts committed here, we cannot say that it was an abuse of discretion. The trial court appropriately took into account not only the defendant's lifelong history of committing retail thefts and burglaries, but also the fact that the crime spree that resulted in his arrest involved multiple thefts over a period of several weeks.

Executive Orders

Fox Fire Tavern, LLC v. Pritzker, 2020 IL App (2d) 200623

Date Published: 11/13/2020

Facts: The governor of the State issued an Executive Order in October of 2020, which imposed certain restrictions on dining establishments in four counties. The Order imposed conditions on restaurants including: curfew, restrictions on dining location, spacing of customers, waiting areas, and reservation requirements. The Plaintiff filed a Complaint seeking declaratory judgment. The Plaintiff filed a motion seeking a Temporary Restraining Order, which was granted. Defendants now appeal.

Issues on Appeal: (1) Whether the Plaintiffs had established a liklihood of success on the merits. (2) whether the Governor had legal authority to proclaim successive disasters to address the ongoing pandemic.

Holding: Reversed and Remanded

Analysis: When seeking a TRO, the party seeking a preliminary injunction or TRO must establish facts demonstrating the traditional equitable elements that (1) it has a protected right; (2) it will suffer irreparable harm if injunctive relief is not granted; (3) its remedy at law is inadequate; and (4) there is a likelihood of success on the merits. In order to show a likelihood of success on the merits, the party seeking injunctive relief need only raise a fair question as to the existence of the right which it claims and lead the court to believe that it will probably be entitled to the relief requested if the proof sustains its allegations. In granting the TRO, the applicable statute does not contain any limitations on the Governor's authority to issue successive proclmations. a comprehensive reading of the Act at issue supports the conclusion that the legislature did not intend to limit the Governor's authority in such a manner. Because the trial court ignored the maxims of statutory interpretation, it abused its discretion and the TRO was improperly granted. As to the governor's power, all applicable statutes specifically allow the Governor to issue successive proclamations.

Insurance

3BC Properties, LLC v. State Farm Fire & Casualty Co., 2020 IL App (2d) 190501

Date Published: 10/30/2020

Facts: Plaintiff employed a manager to manage four restaurant franchises owned by Plaintiff. Plaintiff discovered that the manager had falsified time records for herself and her relatives, resulting in overpayment. Plaintiff reported the fraud to the authorities and tendered claims to their insurance company (Defendant). Defendants refused to pay out pursuant to the policy and Plaintiffs sued. Both parties filed motions for summary judgment. The trial court entered judgment in favor of the defendant, citing the policy's exclusion on paying regular salaries.

Issues on Appeal: Whether unearned salary payments are nonetheless salary and excluded from coverage.

Holding: Affirmed

Analysis: For the policy at issue, there is an exclusion for payment of salaries. The first clause states that the insurer will cover any loss intentionally caused by an employee to obtain a financial benefit "other than salaries, commissions, fees, bonuses, promotions, awards, profit sharing, pensions or other 'employee' benefits earned in the normal course of employment." The language at issuee has been boilerplate since the 1970's, and the overwhelming majority of courts have found that unearned salaries and unearned commissions are, nonetheless, salaries and commissions, and, therefore, subject to exclusion. Wage theft simply is not covered under the terms of the insurance policy

Jury Instructions

People v. Foster, 2020 IL App (2d) 170683

Date Published: 11/17/2020

County: Kane

Facts: A jury trial resulted in convictions on several sex-related offenses. At trial, the victim, a minor, gave inconsistent testimony as to her memory of the incidents and identity of the perpetrator. However, the prosecution offerred several witnesses over several years that gave evidence as the victim's statements regarding the alleged acts.

Issues on Appeal: (1) whether the evidence supports the Defendant's convictions; (2) was Defendant denied a fair trial due to a violation of Supreme Court Rule 431(b).

Holding: Reversed and Remanded

Analysis: The first issue is the hearsay testimony given. Under Illinois law regarding sexual acts against a minor under the age of 13, hearsay is admissible so long as the court finds there are sufficient safeguards of reliability and the child testifies at the proceeding. The court held a hearing and deemed that the minor had no motive to fabricate her statements to witnesses. Therefore, over defendant's objection, these statements were allowed before the jury. The court gave admonishments regarding this testimony. This was proper under the Act.

As to whether the evidence supports the Defendant's conviction of multiple instances of sexual penetration, the record reflects that the victim's own statements indicated multiple times that these incidents occurred. Therefore, the jury's conviction is supported by the admitted

evidence and such a finding cannot be disturbed as a matter of law.

As to the final count of penetration with an object, the legal distinction between penetration with a finger and with an object is that the State must prove an "intrusion" into the sex organ with a finger but only "contact" with the sex organ with an object. The victim's testimony indicated that the Defendant had touched her vagina with a pen. Even with inconsistent testimony and hearsay, the jury may have reasonably concluded that during her testimony in a formal courtroom setting, in front of defendant and many strangers, S.L. had difficulty communicating the instances of abuse. S.L.'s inability to testify to or remember what happened with the pen does not negate the testimony of the other witnesses. Therefore, the conviction is supported.

As to the issue of the Supreme Court Rule, the rule provides that jurors must be asked certain questions under the Zehr case. Otherwise, plain error exists. In this case, one of the jurors was not asked the Zehr questions. If jurors do not understand and accept that a defendant is presumed innocent, or that the State bears the burden of proving guilt beyond a reasonable doubt, then "credibility contests could lean in the State's favor, which also could tip the scales of justice against the defendant in a close case." Due to this error, the judgment must be reversed.

Negligence

Coley v. Bradshaw & Range Funeral Home, P.C., 2020 IL App (2d) 190627

Date Published: 12/21/2020

County: Lake

Facts: Decedent died in September of 2014 after being struck by her mother following a period of prolonged neglect and abuse. Her body was cremated later that month. Plaintiff (Coley) did not learn of the death and cremation until October of that same year. Coley filed (in the circuit court of Lake County) his first complaint. Defendant moved to dismiss, arguing several points, but, at its heart, was that Coley was outside the country at the time, and that another relative was available to decide the disposition. Coley countered that, under section 5 of the Remains Act, the funeral home was required to extend more effort to find him. The trial court dismissed the count and, after jury trial, the case was disposed in favor of the defendant.

Issues on Appeal: Whether section 45 of the Remains Act shields Bradshaw from liability under a claim of negligence.

Holding: Affirmed

Analysis: Section 5 of the Remains Act (755 ILCS 65/5 sets forth a list of individuals who have the right to dispose of a decedent's remains, prioritizing those individuals. The relevant section reads, "There shall be no liability for a cemetery organization, a business operating a crematory or columbarium or both, a funeral director or an embalmer, or a funeral establishment that carries out the written directions of a decedent or the directions of any person who represents that the person is entitled to control the disposition of the decedent's remains. Nothing herein shall be intended or construed to reduce or eliminate liability for the gross negligence or willful acts of any cemetery organization, business operating a crematory or columbarium or both, funeral director or embalmer, or funeral establishment." The plain language of section 45 contains no reference to reasonable reliance. Therefore, the negligence claim would not stand.

As to whether the funeral home was required to make reasonable efforts to locate the Plaintiff, the statute clearly places this obligation on the family, not on the funeral home. This is not to say that there are no circumstances under which a funeral establishment might be obligated to make reasonable efforts to locate a decedent's next of kin, however, Coley failed to demonstrate that under the circumstances of this case, the funeral home was obligated to make such efforts.

Section 45 of the Remains Act entitled Bradshaw to immunity from Coley's negligence claim because Bradshaw sufficiently established that it carried out the instructions of another family member, who represented that he was entitled to control the disposition of decedent's remains. The funeral home was not required to show that it reasonably relied on the other family member's instructions.

Pleading

People v. Dorado, 2020 IL App (2d) 190818

Date Published: 11/4/2020

County: Boone

Facts: Defendant plead guilty to unlawful possession of a controlled substance. In sentencing, Defendant received first-offender probation. Defendant at that time was a legal permanent resident of the United States and had a pending application for citizenship. The trial court gave admonishment to the Defendant and the Defendant affirmed that he had talked to his attorney about the case and possible defenses, that he was satisfied with his attorney's representation, and that the State made no promises that were left out of the agreement. Defendant later moved to withdraw his plea, arguing that it was based on a false promise by the State because, while the Act provided for the discharge of the conviction upon

completion of probation, the conviction would still stand under federal law, potentially resulting in adverse immigration consequences. Defendant also cited ineffective assistance of counsel. At hearing, the court noted that the Defendant was properly admonished of possible consequences and that his attorneys had adequately advised him. The Court denied the motion to withdraw and Defendant appeals.

Issues on Appeal: Was the Defendant entitled to withdraw his plea based on ineffective counsel and ineffective information from the trial court.

Holding: Affirmed

Analysis: There is a two-pronged test to determine whether counsel was ineffective. The test is whether counsel failed to ensure that defendant entered a plea voluntarily and intelligently, and, if so, whether the defendant was prejudiced by this. To establish prejudice, a defendant must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. One aspect of constitutionally effective representation requires defense counsel to advise noncitizen defendants regarding the immigration consequences of a guilty plea, particularly the risk of being removed from the United States. Thus, to fulfill his or her duties in advising a client during plea negotiations, counsel must inform the client that the plea carries a risk of deportation. In the instant case, Defendant's attorneys advised him of possible immigration troubles as a result of the plea. The court also specifically admonished defendant of the clear potential consequences of the plea, including the possibility of removal or the denial of naturalization. Therefore, counsels' representations were sufficient. As to the issue of the state's "promise" that the plea would not affect immigration status for the Defendant, the State had no power to change or negotiate the immigration consequences of defendant's conviction. Accordingly, the trial court correctly found that there was no unfulfillable promise made by the State.

People v. Winston, 2020 IL App (2d) 180289

Date Published: 11/9/2020

County: De Kalb

Facts: Pursuant to her plea agreement with the State, defendant was sentenced to a two-year term

of conditional discharge. She sought to withdraw the plea and set the matter for trial, alleging that the plea was involuntary because defendant was unaware that a felony conviction would adversely affect her educational opportunities and employment prospects. The motion further claimed that defendant entered the plea under duress because she believed that, if she did not plead guilty, her ongoing detention would jeopardize her employment and her opportunity to continue her studies to obtain a GED. The trial court denied the motion and Defendant appealed. The Appellate Court remanded the case because Defendant's counsel was ineffective as they failed to comply with Supreme Court 604(d). On remand, counsel filed a facially valid certificate of compliance with Rule 604(d). The trial court again denied the petition to withdraw the plea and Defendant appealed. The appellate court reversed again, citing a deficient hearing. On remand, counsel filed another certificate. The trial court then denied the motion to withdraw the guilty plea after hearing on the matter.

Issues on Appeal: Whether Defendant's counsel amended the motion to withdraw so as to adequately present defects in the entry of the plea.

Holding: Reversed and Remanded

Analysis: The attorney's certificate must strictly comply with the requirements of Rule 604(d). If the certificate does not satisfy this standard, a reviewing court must remand the case to the trial court for proceedings that strictly comply with Rule 604(d). See id. Moreover, even when the certificate is valid on its face, a remand will be necessary if the record refutes the certificate. In this matter, counsel offered that the State would not be able to prove its case beyond a reasonable doubt. Nevertheless, not only did counsel fail to include a sufficiency-ofthe-evidence claim supported by affidavits in the motion to withdraw, he raised the claim at the hearing without having secured the attendance of witnesses who arguably could have supported it. As such, even though the content of the witnesses' testimony is yet to be determined, prejudice is still present as they were not able to testify in the first place and be subject to the proceedings. Therefore, further proceedings are appropriate.

People v. Johnson, 2020 IL App (2d) 170646

Date Published: 11/9/2020

County: Kane

Facts: Following a jury trial, the defendant was found guilty of the first degree murder. The defendant was subsequently sentenced to 27 years' imprisonment. The defendant filed a motion for leave to file a successive postconviction petition, attaching the petition to the motion. The trial court denied the defendant's motion for leave to file a successive

postconviction petition.

Issues on Appeal: Whether the Unified Code of Corrections violates the Illinois and US Constitutions when it requires the Defendant to serve his entire sentence without the possibility of parole.

Holding: Affirmed

Analysis: The defendant argues that this provision of the Code is unconstitutional both facially and as applied. A statute is facially unconstitutional when there are no circumstances in which the statute could be validly applied. Courts have held that the truth in sentencing statute can be constitutionally applied under some circumstances. The defendant offers no reason to depart from these holdings, and the defendant's argument that section 3-6-3(a)(2)(i) of the Code is facially unconstitutional fails. As to the "as-applied" argument, case law states that before sentencing a juvenile, the trial court must have an opportunity to consider the juvenile's age at the time of the offense, that requirement was satisfied here. As both arguments of constitutionality fail, the Defendant has shown no prejudice and, thus, affirmation of the trial court's ruling is proper.

Post Conviction Relief

People v. Amor, 2020 IL App (2d) 190475

Date Published: 11/30/2020

County: Du Page

Facts: A fire resulted in the death of an occupant of a residence. After two trials, the Defendant was found guilty of Murder and Arson. The trial court, at the second trial before the bench, found defendant not guilty on all charges. Its extensive written order stated that, the trial court found that, though the Defendant had confessed to a scenario that was scientifically impossible (in the previous trial, Defendant confessed to accidentally starting a fire, whereas at the second scenario, the State sought to prove intentional arson), the import of that confession is that the Defendant admitted to starting the fire, but it was to an impossible scenario. The Defendant filed a petition for a certificate of innocence, seeking a certificate and expungement and impound of the criminal records. The State filed a motion to dismiss the petition, which was granted.

Issues on Appeal: Whether the Defendant was entitled to a Certificate of Innocence.

Holding: Affirmed

Analysis: To obtain a certificate of innocence under section 2-702, a defendant must prove by a preponderance of the evidence that (1) he was convicted of one or more felonies by the State of Illinois and subsequently sentenced to a term of imprisonment, and has served all or any part of the sentence; (2) the judgment of conviction was reversed or vacated, and the indictment or information dismissed or, if a new trial was ordered, either the petitioner was found not guilty at the new trial or the petitioner was not retried and the indictment or information dismissed; (3) he is innocent of the offenses charged in the indictment or information or his acts or omissions charged in the indictment or information did not constitute a felony or misdemeanor against the State; and (4) the petitioner did not by his own conduct voluntarily cause or bring about his conviction. Here, the trial court conducted a thorough examination of the record and applicable law. The court also acknowledged the uniqueness of the matter. Because the granting or denial of a Certificate of Innocence is within the jurisdiction of the trial court, and the trial court did not abuse that discretion, affirmation is proper.

People v. Shipp, 2020 IL App (2d) 190027

Date Published: 11/9/2020

County: Kendall

Facts: Defendant was charged after police responded to a report of a fight that possibly involved guns. Defendant was found near the scene with a loaded pistol, cocaine, and cannabis. Defendant moved to suppress the physical evidence, and for the most part, the evidence was undisputed. The trial court denied the motion to suppress. the parties agreed to a stipulated bench trial, and the State agreed to dismiss an unrelated charge. The stipulation included a recommended sentence and stated that defendant wished to preserve the suppression issue for appellate review. The parties agreed that the stipulation was tantamount to a guilty plea. Defendant was convicted, no posttrial motions were filed, and defendant appealed. In an unpublished order, the appellate court granted relief to the Defendant for a new trial on an unrelated matter. The issue of suppresion of evidence was not made part of the appeal. After disposition by the appellate court, Defendant filed his postconviction petition, alleging that appellate counsel was ineffective for failing to challenge the denial of the motion to suppress. The trial court denied the petition and, in a new appeal, the appellate court reversed, finding counsel was ineffective. The case was remanded. After remand, the court granted the petition.

Issues on Appeal: (1) Whether the postconviction court erred in granting defendant's amended petition after a third-stage evidentiary hearing. (2) Whether the state was precluded from raising the issue on remand of the Defendant's acts warranting the stop. (3) Whether the Defendant's actions gave the officers probable cause to initiate the stop.

Holding: Affirmed

Analysis: At a third-stage evidentiary hearing, the defendant bears the burden of making a substantial showing of a constitutional violation. The trial court took the appellate court's disposition as a mandate to grant the petition without any further analysis. However, this was in error. Furthermore, as to the forfeiture argument, the issues in this case are factual determinations that would

need to be made by the trial court before the State's arguments could be considered on remand. Therefore, the State had not forfeited the issues. In a motion to quash or suppress, once the defendant submits evidence that shows that, at the time of the arrest, he or she was doing nothing unusual, then the Defendant was arrested without a warrant, the defendant has made a prima facie case that the police lacked probable cause. The burden then shifts to the State to show that the warrantless arrest was based on probable cause; in other words, the State must demonstrate that the police had reasonable grounds to believe that the defendant had committed a crime. Here, the Defendant met their burden and, although the postconviction court erred in determining that we mandated that it grant the petition, the record shows that defendant made a substantial showing that his counsel was ineffective on direct appeal for failing to challenge the denial of the motion to suppresse State showing probable cause, the Defendant's counsel, in not challenging this, was ineffective. However, there were other grounds upon which to affirm the Defendant's conviction, and the appellate court did so.

Sentencing and Punishment

People v. Cavazos, 2020 IL App (2d) 120171-B

Date Published: 11/2/2020

County: Kane

Facts: The Defendant was convicted of murder and attempted murder and was sentenced to 75 years' imprisonment. After appeal, the Supreme Court of Illinois entered a supervisory order directing the Appellate court to vacate the prior judgment, consider the effect of a specific case on an appellate issue, and determine if a different result was warranted. On direct appeal after conviction and sentencing, defendant raised multiple arguments, including a challenge to the constitutionality of the statutory provisions that resulted in his trial in adult court and his ultimate sentence.

Issues on Appeal: Whether the defendant's sentence of a de-facto life sentence is constitutional.

Holding: Remanded

Analysis: The United States Supreme Court has issued a series of decisions that, collectively, reflect that mandatory life sentences for juvenile defendants violate the eighth amendment While not outright banning life sentences for juveniles convicted of homicide, the Court has held that a life sentence may not be mandated and that, before a life sentence may be imposed, the sentencing court must consider mitigating circumstances, such as the minor's youth and its "attendant characteristics." Illinois case law also provides that de-facto life sentences for juveniles are not allowable without consideration of mitigating circumstances and constitutional requirements. In the present case, the sentence violates the eighth amendment, and the defendant is entitled to a new sentencing hearing. When the court considered defendant's sentence, the relevant factors were not established. Mere general considerations are not enough in this case, the court must specifically consider each factor. A life sentence, even if only de-facto, for a juvenile is appropriate only where that defendant is the "rare juvenile offender" whose crime reflects "irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." Because these factors were not considered by the court, the defendant is entitled to a new sentencing hearing.

People v. Luna, 2020 IL App (2d) 121216-B

Date Published: 12/3/2020

County: Lake

Facts: In 2012, a jury convicted defendant, Dreshawn Luna, of first degree murder and aggravated battery with a firearm. The trial court sentenced defendant to consecutive prison terms totaling 61 years imprisonment. Following entry of a supervisory order by the Supreme Court, the appellate court has vacated the sentence and considered the effect of a new case issued in 2019 giving guidance as to de facto life sentences.

Issues on Appeal: Whether the defendant is serving a de facto life sentence.

Holding: Remanded

Analysis: The Supreme Court has issued a series of decisions that collectively, reflect that mandatory life sentences for juvenile defendants violate the eighth amendment. These decisions emphasize that juvenile offenders are inherently different from adult offenders. While the trial court considered factors appropriate to this analysis, consideration of the factors does not necessarily mean that those factors were adequately considered or evaluated to determine whether defendant was the rare juvenile simply beyond the possibility of rehabilitation. While this is perhaps a close case, it is prudent to err on the side of concluding that defendant's sentence violates the eighth amendment and that he is entitled to a new sentencing hearing. In doing so, the trial court cannot simply claim to have followed the factors. The judge must use the factors to evaluate the sentence.

People v. Ford, 2020 IL App (2d) 200252

Date Published: 12/14/2020

County: Winnebago

Facts: Defendant plead guilty to endangering the life of a child. On the day of sentencing, the prosecutor advised

the trial court that defendant had agreed to a sentence of "7 years in the Department of Corrections with 172 days credit for time served." Defendant confirmed that he wished to proceed with the plea. Defendant asked if he would "receive credit for the time [he] spent in [jail] since March 5th, 2017." The court said he would only receive credit on the case sentenced for. Defendant responded "okay" and without further question. The court then accepted the plea agreement and sentenced defendant. Defendant later filed a motion seeking credit for time served, which the State agreeing that a recalculation was necessary. The trial court conducted a hearing, at which time the State withdrew its motion to recalculate. The court found the original calculation correct and denied the Motion.

Issues on Appeal: Whether the Defendant was entitled to recalculation of credit for time served.

Holding: Reversed and Remanded

Analysis: Rule 472 provides that the trial court retains jurisdiction to correct certain sentencing errors at any time following judgment, even though, normally, jurisdiction would pass to the appellate court. Section 5-4.5-100(c) provides, in pertinent part, that an offender "arrested on one charge and prosecuted on another charge for conduct that occurred prior to his or her arrest shall be given credit *** for time spent in custody under the former charge not credited against another sentence." Under the plain language of section 5-4.5-100(c), defendant was eligible to receive credit for the time he spent in custody. The fact that the plea was negotiated does not negate the Defendant's ability to seek additional credit for time served.

People v. Cavazos, 2020 IL App (2d) 120171-B

Date Published: 12/14/2020

County: Kane

Facts: In 2011, a jury convicted defendant, Joshua Cavazos, of two counts of first degree murder. The case was appealed all the way to the Supreme Court of Illinois, which ordered the Appellate Court to re-evaluate its decision by considering the effect of People v. Buffer, 2019 IL 122327, on the issue of whether defendant's sentence constitutes an unconstitutional de facto life sentence.

Issues on Appeal: What the effect of case law had to determine if defendant's sentence was an unconstitutional sentence.

Holding: Affirmed in Part and Remanded

Analysis: The United States Supreme Court has issued a series of decisions that, collectively, reflect that mandatory life sentences for juvenile defendants violate the eighth amendment. The Unified Code of Corrections also provides that, when a person under 18 years of age commits an offense, the trial court at the sentencing hearing shall consider several mitigating factors. In this matter, defendant was sentenced prior to several developments in statutory and common law. When the court considered defendant's sentence, the relevant factors were not established. Mere general consideration of youth is a far cry from evaluating the relevant factors to find that defendant is that rare juvenile whose criminal conduct was indicative of irreparable corruption beyond the possibility of rehabilitation. All juveniles who are theoretically eligible for life sentences will have committed horrific crimes. Yet current case law instructs that not all of those juveniles eligible for life sentences should receive them. Therefore, the defendant, with this new case law, should be resentenced. Affirmed in part. Vacated in part. Remanded.

People v. Helgesen, 2020 IL App (2d) 160823-B

Date Published: 12/29/2020

County: Du Page

Facts: Defendant, upon conviction at age 17 of 10 counts of first-degree murder, was sentenced to natural life in prison. Subsequent case law has forbidden sentencing of juvenile offenders to life sentences. Defendant was resentenced to serve two concurrent 90-year prison terms. Defendant appeals.

Issues on Appeal: Whether the trial court properly considered defendant's youth and its attendant characteristics in imposing the sentences.

Holding: Affirmed

Analysis: Criminal punishment should be graduated and proportioned to both the offender and the offense; when a serious offense has been committed by a juvenile, "there is a genuine risk of disproportionate punishment." Sentencing courts are not foreclosed from the possibility of sentencing a juvenile to a life sentence, either natural or de facto, but may do so only if "the trial court determines that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." There is no dispute that defendant's 90-year concurrent sentences constitute de facto life imprisonment. Unlike other cases that were also remanded for reconsideration the trial court did not merely state that it considered the Miller factors; it specifically enumerated and weighed them. In sentencing defendant to concurrent 90-year sentences, the trial court recognized that subjecting juvenile defendants to such a harsh penalty would be uncommon. The court concluded, however, "that even though defendant was a juvenile at the time of the offense, given the nature of the crime, a significant jail sentence is appropriate." It should be noted

that each juvenile offender is different. Each case's facts are different. Each juvenile offender should be given an individualized sentence. Here, the court did just that.

People v. McGee, 2020 IL App (2d) 180998

Date Published: 12/29/2020

County: Du Page

Facts: Following a jury trial, Defendant was convicted of retail theft. Defendant's sentencing hearing was originally set for April 18, 2018, but he failed to appear, and a warrant was issued. He fled the jurisdiction and was arrested in another state. The matter proceeded to sentencing on November 20, 2018. Defendant's history detailed an extensive criminal history that included convictions of trespass to land, trespass to vehicles, attempted aggravated robbery, domestic battery, aggravated battery, resisting a peace officer, possession of cannabis, possession of a stolen motor vehicle, and driving on a revoked license. Defendant also had several prior retail theft convictions. Defendant had served prison sentences for several offenses and had several felony convictions. Defendant was sentenced to four years' extended-term imprisonment.

Issues on Appeal: Whether the Defendant's sentence was excessive.

Holding: Affirmed

Analysis: A trial court has wide latitude in sentencing a defendant, so long as it neither ignores relevant mitigating factors nor considers improper factors in aggravation. The General Assembly's decision to sentence certain defendants as Class X offenders reflects a legislative judgment that their crimes, in conjunction with their criminal histories, are more serious offenses warranting a severe penalty. The same is true of the General Assembly's decisions to enhance misdemeanor theft to a felony subject to an extended-term sentence. Given the evidence in aggravation—most notably defendant's extensive criminal history—defendant was not entitled to the three-year minimum extended-term sentence for a Class 4 felony. We cannot say that the trial court abused its discretion.

Statute of Limitations

People v. Meeks, 2020 IL App (2d) 180263

Date Published: 12/7/2020

County: Kane

Facts: On February 2, 2009, defendant was charged with several crimes. Defendant also a complaint against him from 2008. On December 10, 2009, the trial court reduced defendant's bond, and he filed a written demand for a speedy trial. The matter was set for trial on March 1, 2010. Defendant moved to dismiss the charges on the basis that the 160-day speedy trial period that started when the 2008 charge was nol-prossed had expired. The parties agreed that March 1, 2009, marked 161 days since the 2008 charge was nol-prossed, and the trial court granted the motion. However, the State successfully moved to reconsider, arguing that the last day of the speedy-trial term was a Sunday and that the State was therefore entitled to bring the matter to trial the next day that court was in session.

Issues on Appeal: Whether the speedy-trial period had expired and the Defendant was improperly convicted.

Holding: Affirmed

Analysis: Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by the defendant. Here, the State's decision on September 21, 2009, to nol-pros the 2008 charge was the functional equivalent of a change in election to proceed with the 2009 charges first. In this case, therefore, the speedy-trial clock for the 2009 charges did not relate back to the time of defendant's arrest. In either case, defendant was released from custody on December 11, 2009, at which point, section 103-5(e)'s 120-day speedy-trial period no longer applied.

Taxes

John P. Sanfilippo & Sons, Inc v Rickert, 2020 IL App (2d) 191012

Date Published: 12/9/2020

County: Kane

Facts: The school district voted to impose a special education tax levy. The levy was not submitted to voters for approval. The Objectors filed a 13-count tax rate objection alleging various taxing violations. One count (the only on appeal) alleged that the District was required to submit the levy to the voters for approval.

Issues on Appeal: (1) whether the levy at issue was subject to section 17-2.2a(c)'s referendum requirement because it exceeded 0.04% or, alternatively, the PTELL's referendum requirement for new tax rates. (2) Whether the appeal is frivolous and, as such, should be subject to sanctions.

Holding: Affirmed

Analysis: Clearly, section 17-2.2a(a) of the School Code limits the District to the maximum rate for the special education fund of 0.04%, unless, pursuant to section 17-2.2a(c), the District seeks referendum approval for a rate not to exceed 0.80%. However, section 17-2.2a(c) must

be interpreted in light of section 18-190(a) of the PTELL. PTELL unambiguously relieves the District of this obligation. Simply put, a plain reading of the PTELL demonstrates that, an existing levy rate may be extended at a higher rate without referendum so long as it does not exceed the statutory ceiling.

As to the issue of sanctions, while the Objectors arguably discounted language within the PTELL that permits the District to increase the existing special education tax rate without referendum, the case raises issues of first impression. Thus, sanctions will not be imposed.

Trusts

Centrue Bank v. Voga, 2020 IL App (2d) 190108

Date Published: 12/30/2020

County: Kendall

Facts: Pursuant to a trust, beneficiaries were to receive parcels of real property upon the grantor's death. Decedent executed a durable power of attorney that allowed his agent to amend, revoke, or excertise powers of existing trusts. However, it failed to specifically name any trust that the agent was entitled to amend. The agent executed an amendment to the Trust, which another beneficiary believed was invalid. Litigation ensued with the agent winning on motion for summary judgment.

Issues on Appeal: Whether the amendment to the trust was valid under the Power of Attorney Act.

Holding: Reversed and Remanded

Analysis: Section 2-9 of the Act states that an agent may not revoke or amend a trust revocable or amendable by the principal without specific authority and specific reference to the trust in the agency. Here, the agent received no specificity as to the trust they were allowed to amend. Therefore, under the canons of statutory interpretation, such amendment was invalid. Therefore, because the trial court disposed of the matter believing that the amendment was valid, the resulting orders were in error.

Witnesses

People v. Kent, 2020 IL App (2d) 180887

Date Published: 12/30/2020

County: Winnebago

Facts: Defendant was convicted of the first-degree murder. Prior to trial, the State sought to have testimony from an unavailable witness included. After trial, defendant sought to have the verdict set aside and to be granted a new trial. Defense counsel introduced a docket entry from a criminal misdemeanor case against Wesley (the unavailable witness) in the circuit court of Winnebago County. The misdemeanor case was active from September 11, 2017, to October 12, 2017, when Wesley received court supervision. The November 13, 2017, trial date in this case was set on September 6, 2017. Thus, defense counsel argued, the trial court erred in finding that Wesley was an unavailable witness, as the misdemeanor case was active during the time period in which the State could have served defendant. The court denied the Motion.

Issues on Appeal: (1) whether there was sufficient evidence to support the defendant's conviction, (2) whether the State had met its burden of proving that the witness was unavailable

Holding: Reversed and Remanded

Analysis: Defendant's conviction rested largely on several witness' testimony. Defendant points to deficiencies in a particular witness (Wesley). However, the deficiencies defendant cites in Wesley's testimony do not necessitate reversal of the conviction. Furthermore, there is enough other evidence which could lead a rational trier of fact cto find the essential elements of first-degree murder beyond a reasonable doubt. As to the confrontation clause issue, the confrontation clause of the sixth amendment to the United States Constitution guarantees the right of an accused in a criminal prosecution to "be confronted with the witnesses against him." The confrontation clause thus "prohibits the 'admission of testimonial statements of a witness who did not appear at trial unless [the witness] was unavailable to testify at trial, and the defendant had had a prior opportunity for cross-examination.'" The "unavailability" of a witness as "'a narrow concept, subject to a rigorous standard.'" The State is obliged to make a " 'good-faith effort' " to obtain the witness's presence at trial. Although not a requirement set forth in Rule 804, courts have held that a claim of unavailability must be "supported by affidavit or testimony." In this matter, the State's proffer was unsupported. Even if the State's proffer were sufficient in form, its substance and the record otherwise compel the conclusion that the trial court abused its discretion in finding that the State met its burden of establishing unavailability. To begin, the number of attempts to serve was never established.

Significantly, the State never asserted that further attempts to serve Wesley would be futile; to the contrary, as discussed, it represented that it would continue such attempts. Even a remote possibility that affirmative measures would have succeeded is relevant in assessing the State's good-faith efforts to produce a witness. The finding that the State made reasonable attempts to secure the witness' attendance was not reasonable. Thus, there was an abuse of discretion.

Worker's Compensation

West Bend Mutual Insurance Co. v. TRRS Corp., 2019 IL App (2d) 180934

Date Published: 10/16/2020

County: McHenry

Facts: Petitioner sustained an injury in a forklift accident in 2017 that required surgery. The employers chose to cover lost wages and medical expenses without reporting the incident to their Worker's Compensation Carrier. However, follow up surgery was needed, and this prompted petitioner to file an Application for Adjustment of Claim with the Workers Compensation Commission. Plaintiffs filed a complaint for declaratory judgment in the circuit court. A few days later Plaintiff filed an emergency motion to stay proceedings with the Commission until the declaratory judgment action was resolved. Before the Petitioner/Defendant could file a response and without their counsel present, the circuit court granted the emergency motion to stay. The petitioner then filed an emergency order to vacate the stay order, arguing that the Commission was the proper venue for ruling on coverage issues raised by the Plaintiff. The court held hearing and ultimately vacated the stay order, and then reimposed it.

Issues on Appeal: Whether the trial court had authority to grant the Plaintiff's Motion to stay proceedings.

Holding: Reversed and Remanded

Analysis: Ordinarily a circuit court's decision to grant or deny a motion to stay will not be overturned on appeal absent an abuse of discretion. The Appellate Court went on to elaborate on the doctrine of primary jurisdiction. Under the doctrine, when a court has jurisdiction over a matter, it should, on some occasions, stay the judicial proceedings pending referral of the controversy, or a portion of it, to an administrative agency having expertise in the area. In this matter, however, the circuit court did the opposite by staying an administrative proceeding pending resolution of the legal issues in the circuit court. The appellate court described the doctrine in detail, and finally established its disagreement with a previous case dealing with the doctrine. The entry of the stay order was a clear error on the part of the trial court. The Plaintiff's relief is with the IWCC, rather than the circuit court, in this stage of litigation.

About the Contributor

Andrew J. Mertzenich is appellate counsel at Prime Law Group, LLC. Andrew has argued before the Second District Appellate Court for the State of Illinois and contributes opinions on amicus briefs for organizations wishing to file into cases. Andrew also presents CLE on Appellate Practice for bar associations throughout the area and provides consultation services to local attorneys and litigants on how best to approach their appellate issues. He publishes the quarterly *Second District Civil Decision Digest* with several local bar associations.

Outside of law, Andrew is a passionate musician. He is Principal Organist at Court Street United Methodist Church in Rockford, IL. Andrew also volunteers with the Land of Lincoln Theatre Organ Society as a technician and performer. He donates regularly to several causes and sits on the Boards of the American Guild of Organists – Rockford Chapter and the Land of Lincoln Theatre Organ Society. He is also a regular listener and contributor to National Public Radio (NPR).

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