2023 Annual Conference

Syracuse, New York

Probation, Interim Probation, Conditional Discharges & ACD Violations

Date: Tuesday, October 3, 2023
Instructors:
Joshua S. Shapiro, Esq.
Michael Sharbaugh
MCLE: 1.0 Professional Practice

This program has been approved for credit in New York State for all attorneys including those who are Newly Admitted (less than 24 months) and administered by the Onondaga County Bar Association

Presenters

Joshua S. Shapiro Esq. is the Special Counsel for the Town and Village Courts to the Administrative Judge of the Sixth Judicial District. In that role he primarily works with the District Supervising Judges, providing support and assistance to the 174 Town and Village Courts located within the Sixth District. Prior to that position Joshua spent 11 years as an Assistant District Attorney, beginning his career with the Suffolk County District Attorney and ending with the Broome County District Attorney, where he prosecuted violent felony offenses and homicides. During his career he has tried numerous criminal cases in Village, Town, District, County, and Supreme Courts in both Suffolk and Broome counties, running the gamut from simple misdemeanors up to and including murder cases. Joshua graduated from Binghamton University in 2003 and earned his JD from the University of Richmond School of Law in 2006. Joshua is admitted to practice law in New York State.

Michael Sharbaugh – Director, Cattaraugus County Probation Department. Mr. Sharbaugh has worked in Probation for 22-plus years, as an Officer, Supervisor, Deputy Director, and Director since 2019. Served as Executive Secretary and Vice President of the NYS Probation Officers Association, and is currently the Vice President of the NYS Council of Probation Administrators. Has served on numerous state and local coalitions, committees, commissions, councils, and task forces related to Probation and community corrections. Certified in cognitive behavioral interventions including Offender Workforce Development and Employment Retention, Motivational Interviewing, Thinking for a Change, Interactive Journaling, Aggression Replacement Training, and Sex Offender Group Treatment. Graduated cum laude from the University of Pennsylvania with Bachelor's degrees in Sociology and Psychology, and a Master's degree in Sociology.

Revocable Sentences

Presented by

Joshua S. Shapiro
Special Counsel for Town and Village Courts
6th Judicial District
(607) 240-5372 (Office)
(607) 766-1079

Michael Sharbaugh
Cattaraugus County Probation Director
mrshabaugh@catto.org

2023 Edition

1

What is a Revocable Sentence?

A sentence that may be rescinded by the Court if the defendant fails to abide by conditions set forth in the sentence.

2

Types of Revocable Sentences

1. **Probation** (P.L. § § 65 et seq & CPL § § 410 et seq)
2. **Conditional Discharge** (P.L. § § 65 et seq & CPL § § 410 et seq)
3. **Intermittent Imprisonment** (P.L. § § 85 et seq)
4. **Interim Probation** (C.P.L. § §390.30(6))*
5. **Adjournment in Contemplation of Dismissal** (ACD/ACoD) (C.P.L. § § 170.55 & 170.56)*

*Interim Probation and ACD's are not true final sentences within the meaning of the Penal Law.

3

Probation

4

Eligible Offenses

Governed By PL §65.00

1. **Class 'A' Misdemeanors;**
2. **Class 'B' Misdemeanors;**
3. **"Unclassified Misdemeanors"**

But Not: Traffic Infractions or Violations

5

Periods of Probation

P.L. §65.00(3)

1. **Class 'A' misdemeanor sexual assault: 6 years;**
2. **Other Class 'A' misdemeanors: 2 or 3 years;**
3. **Class 'B' misdemeanor public lewdness (P.L. 245): 1-3 years;**
4. **Other Class 'B' Misdemeanors: 1 year;**
5. **"Unclassified" misdemeanors punishable by more than 90 days in jail: 2 or 3 years;**
6. **Other "Unclassified" misdemeanors: 1 year;**

6

Conditions of Probation

P.L. §65.10

1. Avoid vicious or injurious habits;
2. Refrain from frequenting unlawful or disreputable places or consorting with disreputable persons;
3. Work faithfully at a suitable employment or faithfully pursue a course of study or of vocational training that will equip him for suitable employment;
4. Undergo available medical or psychiatric treatment and remain in a specified institution when required for that purpose;
5. Participate in an alcohol or substance abuse program…
6. Participate in a motor vehicle accident prevention course…(when the defendant was convicted of a traffic infraction for causing the SPI or death of another);
7. Support his dependents and meet other family responsibilities;
8. Make restitution

7

Conditions of Probation

P.L. §65.10

9. Perform community service (non-profit or governmental organization, where the defendant has consented);
10. Post a bond for performance of conditions imposed;
11. Observe conditions related to an order of protection;
12. Install and maintain a functionating ignition interlock (Only for violations of V.T.L. § § 1192.2, 1192.2-a, 1192.3, or any other alcohol related vehicular crime;
13. Satisfy any other conditions reasonably related to his rehabilitation

8

Conditions of Probation

P.L. §65.10

9. Perform community service (non-profit or governmental organization, where the defendant has consented);
10. Post a bond for performance of conditions imposed;
11. Observe conditions related to an order of protection;
12. Install and maintain a functionating ignition interlock (Only for violations of V.T.L. § § 1192.2, 1192.2-a, 1192.3, or any other alcohol related vehicular crime;
13. Satisfy any other conditions reasonably related to his rehabilitation

9

Conditional Discharge

10

Conditions

As with probation, governed by P.L. § 65.10

11

Violations

12

Categories of Violation

1. **The commission of an offense, other than a traffic infraction. C.P.L. §410.10(2)***

   ***This need not be specified in the conditions of proobation**

2. **Failure to comply with enumerated conditions of Probation (Technical Violations)**

13

Declaration of Delinquency

If at any time during the period of a sentence of probation or of conditional discharge the court has reasonable cause to believe that the defendant has violated a condition of the sentence, it may declare the defendant delinquent and file a written declaration of delinquency. When the court receives a request for a declaration of delinquency by a probation officer it shall make a decision on such request within seventy-two hours of its receipt of the request. Upon filing a written declaration of delinquency, the court must promptly take reasonable and appropriate action to cause the defendant to appear before it for the purpose of enabling the court to make a final determination with respect to the alleged delinquency... C.P.L. §410.30.

14

Declaration of Delinquency

The filing of the DOD tolls (pauses) the period of probation. People v. Douglas, 94 N.Y.2d 807, 808 (1999); People v. Shabazz, 12 A.D.3d 782, 783 (3rd Dept. 2004);

15

Declaration of Delinquency

Must be brought before the expiration of the revocable sentence. Failure to do so is a non-waivable jurisdictional defect. People v. Leo, 20 Misc.3d 1 (Sup. Ct. App. Term. 9th & 10th Jud. Dists. 2008);

16

Declaration of Delinquency

How is the defendant brought back to court?

1. **Notice to appear. CPL §410.40(1)**
   a. **May be mailed to or served personally upon the defendant as the court may direct.**
   b. **If based upon a violation petition, must direct appearance within 10 days of the court's order.**
   c. **Failure to appear constitutes a new violation of probation.**

17

Declaration of Delinquency

How is the defendant brought back to court?

2. **Warrant. CPL §410.40(2)**
   a. **Where probation officer has requested a warrant, the court must make a decision within 72 hours.**
   b. **Must be based upon reasonable grounds to believe the defendant has violated a condition of sentence.**
   c. **The court may attach a "summary of the basis" to the warrant.**

18

Arraignment on VOP Petition

CPL §410.60

A person who has been taken into custody… for violation of a condition of a sentence of probation or ao sentence of conditional discharge must forthwith be brought before the court that imposed the sentence…. If the court has reasonable cause to believe that such person has violated a condition of the sentence, it may commit such person to the custody of the sheriff, fix bail, release such person under non-monetary conditions or release such person on such person's own recognizance…

19

Arraignment on VOP Petition

Things to Note:

1. **CPL §410.60 is not governed by CPL §§ 510 & 530. In other words, bail reform "qualifying offense" rules do not apply;**
2. **Remand without bail is allowed for a revocable sentence, even for misdemeanor level offenses;**
3. **A principal already under a sentence of probation supervision may not be released to pre-trial release;**
4. **The court should consider any summary attached to the warrant by the sentencing court;**

20

Prompt Hearing (CPL §410.70)

The defendant has a right to counsel at every stage of the proceeding, including at the initial appearance and at the hearing

21

Prompt Hearing (CPL §410.70)

Defendant is entitled to a prompt hearing, but no firm definition as to "prompt."

-15 Month delay at request of defendant ok. People v. Cangialosi, 277 AD2d 897 (4th Dept. 2000);

--Conduct of Defendant in absenting himself precludes a claim of delay chargeable to the Department of Probation. People v. Diaz 101 A.D.2d 841 (2nd Dept. 1984).

22

Prompt Hearing (CPL §410.70)

The defendant has a right to make a statement before the court with respect to the violation. C.P.L. §410.70(2) (Admit/Deny/Stand Moot);

23

Conduct of Hearing & Rules of Evidence

CPL 410.70(3)

1. **The hearing is a "summary" one without a jury.**
2. **All relevant evidence not legally privileged is admissible. (Ie: Hearsay is admissible);**
3. **The burden of proof is "preponderance of the evidence."**
4. **The People may be represented by the District Attorney's Office or a probation department attorney. Darvin M. v. Jacobs, 69 N.Y.2d 957 (1987).**

24

Let's talk more about hearsay

The statutory requirement that any finding of a violation be based on a preponderance of the evidence requires that there must be "a residuum of competent legal evidence in the record" to support the finding. People v. Machia, 96 A.D.2d 1113, 1114 (3rd Dept. 1983).

A finding that rests "entirely on hearsay" is insufficient to support a finding of a violation. People v. Hubel, 158 A.D.3d 539 (1st Dept. 2018). (Court's determination in Hubel was based entirely on grand jury minutes).

25

What about the Exclusionary Rule?

Illegally seized evidence is not admissible at a VOP hearing. People v. Robinson, 128 A.D.3d 1464 (4th Dept. 2015).

But there is no right to a "pre-trial" (really pre-hearing) hearing to determine the admissibility of the evidence. Rather, the determination would likely be made contemporaneously with the VOP hearing itself.

26

What about the 5th Amendment & *Miranda*?

Whether statements taken by a probation officer in the absence of *Miranda* warnings depends on whether the probation officer is acting as a counselor or law enforcement officer in questioning the probationer; whether the statements are taken in an "atmosphere of custodial interrogation," and whether the statements are for use at a probation revocation hearing or at a criminal prosecution. See People v. Ronald W., 24 N.Y.2d 732 (1969).

27

Resentencing

28

Early Termination CPL §410.90

The court may at any time terminate a period of probation or conditional discharge. C.P.L. §410.90(1).

The court shall grant a request for termination of a sentence of probation… when the court is of the opinion that:

1. **The probationer is no longer in need of such guidance, training or other assistance which would otherwise be administered through probation supervision;**
2. **The probationer has diligently complied with the terms and conditions of the sentence of probation; and**
3. **The termination of the sentence of probation is not adverse to the protection of the public.**

29

Early Termination CPL §410.90

Termination cannot be granted unless the petitioner has made good faith efforts to pay restitution (if they are financially able to do so). C.P.L. 410.90(3)(a)

30

Early Termination CPL §410.90

The court shall grant a request for termination [of a conditional discharge]… when the court is of the opinion that:

1. **The defendant has diligently complied with the terms and conditions of the sentence of conditional discharge; and**
2. **Termination of the sentence of conditional discharge is not adverse to protection of the public. C.P.L. 410.90(3)(b)**

31

Early Termination CPL §410.90

The court shall grant a request for termination [of a conditional discharge]… when the court is of the opinion that:

1. **The defendant has diligently complied with the terms and conditions of the sentence of conditional discharge; and**
2. **Termination of the sentence of conditional discharge is not adverse to protection of the public. C.P.L. 410.90(3)(b)**

32

Adjournment in Contemplation of Dismissal (ACD/ACoD)

33

Adjournment in Contemplation of Dismissal (ACD/ACoD)

C.P.L. §§ 170.55 & 170.56

1. **Of the charges (C.P.L §170.10(2))**

34

Adjournment in Contemplation of Dismissal (ACD/ACoD)

C.P.L. §170.55

1. **Requires consent of the prosecution;**
2. **No statutory standards or criteria;**
3. **No motion or hearing required, no reasons need to be placed on the record.**
4. **If the matter is not restored to the calendar, the matter is dismissed and sealed. C.P.L. §160.50(3)**

35

Adjournment in Contemplation of Dismissal (ACD/ACoD)

C.P.L. §170.55

1. **Requires consent of the prosecution;**
2. **No statutory standards or criteria;**
3. **No motion or hearing required, no reasons need to be placed on the record.**
4. **If the matter is not restored to the calendar, the matter is dismissed and sealed. C.P.L. §160.50(3)**

36

Adjournment in Contemplation of Dismissal (ACD/ACoD)

Time Periods:

1. **One Year for family Offenses as defined in C.P.L. §530.11**
2. **Six Months for all other offenses. C.P.L. §170.55(2)**

37

Adjournment in Contemplation of Dismissal (ACD/ACoD)

Possible Conditions:

1. **Temporary Order of Protection; C.P.L. §170.55(3);**
2. **Domestic Violence or Spousal Abuse Education; C.P.L. §170.55(4);**
3. **Dispute resolution; C.P.L. §170.55(5);**
4. **Community Service; C.P.L. §170.55(6);**
5. **Education Reform Program; C.P.L. §170.55(7);**
6. **Attendance at an alcohol awareness program; C.P.L. §170.55(8);**

38

Adjournment in Contemplation of Dismissal (ACD/ACoD)

Restoration to Calendar:

1. **May only be done upon application of the people, made before the expiration of the ACD. C.P.L. §170.55(2)**
2. **Restoration must be upon application of the People. The court cannot do this *sua sponte*. People v. Antis, 147 Misc.2d 513 (Fulton Co. Ct., 1990).**

39

Adjournment in Contemplation of Miscellaneous

No Traffic Tickets! (Except for Parking) C.P.L. §170.55(9).

Improper for the prosecutor to condition a defendant waiving a civil liability claim against the officer or municipality as a condition of the ACD. Cowles v. Brownell, 73 N.Y.2d 382 (1989).

40

Interim Probation

C.P.L. 390.30(6)

1. **Up to 1 year;**
2. **May include P.L. 65.10 Conditions;**
3. **Defendant is entitled to a hearing on violation;**

41

Contact Information

Joshua S. Shapiro
Special Counsel for the Town and Village Courts
Office: (607) 240-5372
Cell Phone: (607) 766-1079

42

Thank You.

43

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Two. Sentences
Title E. Sentences
Article 65. Sentences of Probation, Conditional Discharge and Unconditional Discharge (Refs & Annos)

McKinney's Penal Law § 65.00

§ 65.00 Sentence of probation

Effective: February 9, 2014
Currentness

1. Criteria. (a) Except as otherwise required by section 60.04 or 60.05 of this title, and except as provided by paragraph (b) hereof, the court may sentence a person to a period of probation upon conviction of any crime if the court, having regard to the nature and circumstances of the crime and to the history, character and condition of the defendant, is of the opinion that:

(i) Institutional confinement for the term authorized by law of the defendant is or may not be necessary for the protection of the public;

(ii) the defendant is in need of guidance, training or other assistance which, in his case, can be effectively administered through probation supervision; and

(iii) such disposition is not inconsistent with the ends of justice.

(b) The court, with the concurrence of either the administrative judge of the court or of the judicial district within which the court is situated or such administrative judge as the presiding justice of the appropriate appellate division shall designate, may sentence a person to a period of probation upon conviction of a class A-II felony defined in article two hundred twenty, the class B felony defined in section 220.48 of this chapter or any other class B felony defined in article two hundred twenty of this chapter where the person is a second felony drug offender as defined in paragraph (b) of subdivision one of section 70.70 of this chapter, if the prosecutor either orally on the record or in a writing filed with the indictment recommends that the court sentence such person to a period of probation upon the ground that such person has or is providing material assistance in the investigation, apprehension or prosecution of any person for a felony defined in article two hundred twenty or the attempt or the conspiracy to commit any such felony, and if the court, having regard to the nature and circumstances of the crime and to the history, character and condition of the defendant is of the opinion that:

(i) Institutional confinement of the defendant is not necessary for the protection of the public;

(ii) The defendant is in need of guidance, training or other assistance which, in his case, can be effectively administered through probation supervision;

(iii) The defendant has or is providing material assistance in the investigation, apprehension or prosecution of a person for a felony defined in article two hundred twenty or the attempt or conspiracy to commit any such felony; and

(iv) Such disposition is not inconsistent with the ends of justice.

[Eff. until Sept. 1, 2025, pursuant to L.1995, c. 3, § 74, par. d. See, also, closing par. below.] Provided, however, that the court shall not, except to the extent authorized by paragraph (d) of subdivision two of section 60.01 of this chapter, impose a sentence of probation in any case where it sentences a defendant for more than one crime and imposes a sentence of imprisonment for any one of the crimes, or where the defendant is subject to an undischarged indeterminate or determinate sentence of imprisonment which was imposed at a previous time by a court of this state and has more than one year to run.

[Eff. Sept. 1, 2025. See, also, closing par. above.] Provided, however, that the court shall not, except to the extent authorized by paragraph (d) of subdivision two of section 60.01 of this chapter, impose a sentence of probation in any case where it sentences a defendant for more than one crime and imposes a sentence of imprisonment for any one of the crimes, or where the defendant is subject to an undischarged indeterminate or reformatory sentence of imprisonment which was imposed at a previous time by a court of this state and has more than one year to run.

2. Sentence. When a person is sentenced to a period of probation the court shall, except to the extent authorized by paragraph (d) of subdivision two of section 60.01 of this chapter, impose the period authorized by subdivision three of this section and shall specify, in accordance with section 65.10, the conditions to be complied with. The court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the period of probation.

3. Periods of probation. Unless terminated sooner in accordance with the criminal procedure law, the period of probation shall be as follows:

(a)(i) For a felony, other than a class A-II felony defined in article two hundred twenty of this chapter or the class B felony defined in section 220.48 of this chapter, or any other class B felony defined in article two hundred twenty of this chapter committed by a second felony drug offender, or a sexual assault, the period of probation shall be a term of three, four or five years;

(ii) For a class A-II felony drug offender as defined in paragraph (a) of subdivision one of section 70.71 of this chapter as described in paragraph (b) of subdivision one of this section, or a class B felony committed by a second felony drug offender described in paragraph (b) of subdivision one of this section, the period of probation shall be life and for a class B felony defined in section 220.48 of this chapter, the period of probation shall be twenty-five years;

(iii) For a felony sexual assault, the period of probation shall be ten years.

(b)(i) For a class A misdemeanor, other than a sexual assault, the period of probation shall be a term of two or three years;

(ii) For a class A misdemeanor sexual assault, the period of probation shall be six years.

(c) For a class B misdemeanor, the period of probation shall be one year, except the period of probation shall be no less than one year and no more than three years for the class B misdemeanor of public lewdness as defined in section 245.00 of this chapter;

(d) For an unclassified misdemeanor, the period of probation shall be a term of two or three years if the authorized sentence of imprisonment is in excess of three months, otherwise the period of probation shall be one year.

For the purposes of this section, the term "sexual assault" means an offense defined in article one hundred thirty or two hundred sixty-three, or in section 255.25, 255.26 or 255.27 of this chapter, or an attempt to commit any of the foregoing offenses.

4. If during the periods of probation referenced in subparagraph (i) of paragraph (a), subparagraph (i) of paragraph (b) and paragraph (d) of subdivision three of this section an alleged violation is sustained following a hearing pursuant to section 410.70 of the criminal procedure law and the court continues or modifies the sentence, the court may extend the remaining period of probation up to the maximum term authorized by this section. Provided, however, a defendant shall receive credit for the time during which he or she was supervised under the original probation sentence prior to any declaration of delinquency and for any time spent in custody pursuant to this article for an alleged violation of probation.

5. In any case where a court pursuant to its authority under subdivision four of section 60.01 of this chapter revokes probation and sentences such person to imprisonment and probation, as provided in paragraph (d) of subdivision two of section 60.01 of this chapter, the period of probation shall be the remaining period of the original probation sentence or one year whichever is greater.

Credits

(L.1965, c. 1030. Amended L.1971, c. 1097, § 73; L.1973, c. 276, § 7; L.1973, c. 277, § 5; L.1973, c. 278, §§ 2, 3; L.1973, c. 676, § 29; L.1973, c. 1051, § 2; L.1974, c. 835, § 2; L.1979, c. 410, §§ 4, 5; L.1980, c. 471, §§ 19, 20; L.1985, c. 79, § 1; L.1995, c. 3, § 1-a; L.2000, c. 1, § 10, eff. Feb. 1, 2001; L.2003, c. 264, § 5, eff. Nov. 1, 2003; L.2004, c. 568, § 1, eff. Nov. 1, 2004; L.2004, c. 738, § 25, eff. Jan. 13, 2005; L.2004, c. 738, § 26, eff. Dec. 27, 2004; L.2006, c. 320, § 3, eff. Nov. 1, 2006; L.2009, c. 56, pt. AAA, §§ 19, 20, eff. April 7, 2009; L.2013, c. 556, §§ 1 to 4, eff. Feb. 9, 2014; L.2014, c. 17, § 1, eff. Feb. 9, 2014.)

McKinney's Penal Law § 65.00, NY PENAL § 65.00
Current through L.2023, chapters 1 to 191. Some statute sections may be more current, see credits for details.

End of Document

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Two. Sentences
Title E. Sentences
Article 65. Sentences of Probation, Conditional Discharge and Unconditional Discharge (Refs & Annos)

McKinney's Penal Law § 65.05

§ 65.05 Sentence of conditional discharge

Currentness

1. Criteria. (a) Except as otherwise required by section 60.05, the court may impose a sentence of conditional discharge for an offense if the court, having regard to the nature and circumstances of the offense and to the history, character and condition of the defendant, is of the opinion that neither the public interest nor the ends of justice would be served by a sentence of imprisonment and that probation supervision is not appropriate.

(b) When a sentence of conditional discharge is imposed for a felony, the court shall set forth in the record the reasons for its action.

2. Sentence. Except to the extent authorized by paragraph (d) of subdivision two of section 60.01 of this chapter, when the court imposes a sentence of conditional discharge the defendant shall be released with respect to the conviction for which the sentence is imposed without imprisonment or probation supervision but subject, during the period of conditional discharge, to such conditions as the court may determine. The court shall impose the period of conditional discharge authorized by subdivision three of this section and shall specify, in accordance with section 65.10, the conditions to be complied with. If a defendant is sentenced pursuant to paragraph (e) of subdivision two of section 65.10 of this chapter, the court shall require the administrator of the program to provide written notice to the court of any violation of program participation by the defendant. The court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the period of conditional discharge.

3. Periods of conditional discharge. Unless terminated sooner in accordance with the criminal procedure law, the period of conditional discharge shall be as follows:

(a) Three years in the case of a felony; and

(b) One year in the case of a misdemeanor or a violation.

Where the court has required, as a condition of the sentence, that the defendant make restitution of the fruits of his or her offense or make reparation for the loss caused thereby and such condition has not been satisfied, the court, at any time prior to the expiration or termination of the period of conditional discharge, may impose an additional period. The length of the additional

period shall be fixed by the court at the time it is imposed and shall not be more than two years. All of the incidents of the original sentence, including the authority of the court to modify or enlarge the conditions, shall continue to apply during such additional period.

Credits

(L.1965, c. 1030. Amended L.1971, c. 1097, § 74; L.1972, c. 157, § 2; L.1973, c. 276, § 8; L.1973, c. 277, § 6; L.1973, c. 1051, § 20; L.1974, c. 835, § 3; L.1980, c. 471, § 21; L.1981, c. 742, §§ 1, 2; L.1992, c. 618, § 14.)

McKinney's Penal Law § 65.05, NY PENAL § 65.05
Current through L.2023, chapters 1 to 191. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Two. Sentences
Title E. Sentences
Article 65. Sentences of Probation, Conditional Discharge and Unconditional Discharge (Refs & Annos)

McKinney's Penal Law § 65.10

§ 65.10 Conditions of probation and of conditional discharge

Effective: July 2, 2020
Currentness

1. In general. The conditions of probation and of conditional discharge shall be such as the court, in its discretion, deems reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so.

2. Conditions relating to conduct and rehabilitation. When imposing a sentence of probation or of conditional discharge, the court shall, as a condition of the sentence, consider restitution or reparation and may, as a condition of the sentence, require that the defendant:

(a) Avoid injurious or vicious habits;

(b) Refrain from frequenting unlawful or disreputable places or consorting with disreputable persons;

(c) Work faithfully at a suitable employment or faithfully pursue a course of study or of vocational training that will equip him for suitable employment;

(d) Undergo available medical or psychiatric treatment and remain in a specified institution, when required for that purpose;

(e) Participate in an alcohol or substance abuse program or an intervention program approved by the court after consultation with the local probation department having jurisdiction, or such other public or private agency as the court determines to be appropriate;

(e-1) Participate in a motor vehicle accident prevention course. The court may require such condition where a person has been convicted of a traffic infraction for a violation of article twenty-six of the vehicle and traffic law where the commission of such violation caused the serious physical injury or death of another person. For purposes of this paragraph, the term “motor vehicle accident prevention course” shall mean a motor vehicle accident prevention course approved by the department of motor vehicles pursuant to article twelve-B of the vehicle and traffic law;

(f) Support his dependents and meet other family responsibilities;

(g) Make restitution of the fruits of his or her offense or make reparation, in an amount he can afford to pay, for the actual out-of-pocket loss caused thereby. When restitution or reparation is a condition of the sentence, the court shall fix the amount thereof, the manner of performance, specifically state the date when restitution is to be paid in full prior to the expiration of the sentence of probation and may establish provisions for the early termination of a sentence of probation or conditional discharge pursuant to the provisions of subdivision three of section 410.90 of the criminal procedure law after the restitution and reparation part of a sentence of probation or conditional discharge has been satisfied. The court shall provide that in the event the person to whom restitution or reparation is to be made dies prior to the completion of said restitution or reparation, the remaining payments shall be made to the estate of the deceased. [1]

(g-1) Repealed by L.2018, c. 480, § 2, eff. June 26, 2019.

(h) Perform services for a public or not-for-profit corporation, association, institution or agency, including but not limited to services for the division of substance abuse services, services in an appropriate community program for removal of graffiti from public or private property, including any property damaged in the underlying offense, or services for the maintenance and repair of real or personal property maintained as a cemetery plot, grave, burial place or other place of interment of human remains. Provided however, that the performance of any such services shall not result in the displacement of employed workers or in the impairment of existing contracts for services, nor shall the performance of any such services be required or permitted in any establishment involved in any labor strike or lockout. The court may establish provisions for the early termination of a sentence of probation or conditional discharge pursuant to the provisions of subdivision three of section 410.90 of the criminal procedure law after such services have been completed. Such sentence may only be imposed upon conviction of a misdemeanor, violation, or class D or class E felony, or a youthful offender finding replacing any such conviction, where the defendant has consented to the amount and conditions of such service;

(i) If a person under the age of twenty-one years, (i) resides with his parents or in a suitable foster home or hostel as referred to in section two hundred forty-four of the executive law, (ii) attends school, (iii) spends such part of the period of the sentence as the court may direct, but not exceeding two years, in a facility made available by the division for youth pursuant to article nineteen-G of the executive law, provided that admission to such facility may be made only with the prior consent of the division for youth, (iv) attend a non-residential program for such hours and pursuant to a schedule prescribed by the court as suitable for a program of rehabilitation of youth, (v) contribute to his own support in any home, foster home or hostel;

(j) Post a bond or other security for the performance of any or all conditions imposed;

(k) Observe certain specified conditions of conduct as set forth in an order of protection issued pursuant to section 530.12 or 530.13 of the criminal procedure law.

(k-1) Install and maintain a functioning ignition interlock device, as that term is defined in section one hundred nineteen-a of the vehicle and traffic law, in any vehicle owned or operated by the defendant if the court in its discretion determines that such a condition is necessary to ensure the public safety. The court may require such condition only where a person has been convicted of a violation of subdivision two, two-a or three of section eleven hundred ninety-two of the vehicle and traffic law, or any crime defined by the vehicle and traffic law or this chapter of which an alcohol-related violation of any provision of section

eleven hundred ninety-two of the vehicle and traffic law is an essential element. The offender shall be required to install and operate the ignition interlock device only in accordance with section eleven hundred ninety-eight of the vehicle and traffic law.

(k-2) (i) Refrain, upon sentencing for a crime involving unlawful sexual conduct committed against a metropolitan transportation authority passenger, customer, or employee or a crime involving assault against a metropolitan transportation authority employee, committed in or on any facility or conveyance of the metropolitan transportation authority or a subsidiary thereof or the New York city transit authority or a subsidiary thereof, from using or entering any of such authority's subways, trains, buses or other conveyances or facilities specified by the court for a period of up to three years, or a specified period of such probation or conditional discharge, whichever is less. For purposes of this section, a crime involving assault shall mean an offense described in article one hundred twenty of this chapter which has as an element the causing of physical injury or serious physical injury to another as well as the attempt thereof.

(ii) The court may, in its discretion, suspend, modify or cancel a condition imposed under this paragraph in the interest of justice at any time. If the person depends on the authority's subways, trains, buses, or other conveyances or facilities for trips of necessity, including, but not limited to, travel to or from medical or legal appointments, school or training classes or places of employment, obtaining food, clothing or necessary household items, or rendering care to family members, the court may modify such condition to allow for a trip or trips as in its discretion are necessary.

(iii) A person at liberty and subject to a condition under this paragraph who applies, within thirty days after the date such condition becomes effective, for a refund of any prepaid fare amounts rendered unusable in whole or in part by such condition including, but not limited to, a monthly pass, shall be issued a refund of the amounts so prepaid.

(l) Satisfy any other conditions reasonably related to his rehabilitation.

3. Conditions relating to supervision. When imposing a sentence of probation the court, in addition to any conditions imposed pursuant to subdivision two of this section, shall require as conditions of the sentence, that the defendant:

(a) Report to a probation officer as directed by the court or the probation officer and permit the probation officer to visit him at his place of abode or elsewhere;

(b) Remain within the jurisdiction of the court unless granted permission to leave by the court or the probation officer. Where a defendant is granted permission to move or travel outside the jurisdiction of the court, the defendant shall sign a written waiver of extradition agreeing to waive extradition proceedings where such proceedings are the result of the issuance of a warrant by the court pursuant to subdivision two of section 410.40 of the criminal procedure law based on an alleged violation of probation. Where any county or the city of New York incurs costs associated with the return of any probationer based on the issuance of a warrant by the court pursuant to subdivision two of section 410.40 of the criminal procedure law, the jurisdiction may collect the reasonable and necessary expenses involved in connection with his or her transport, from the probationer; provided that where the sentence of probation is not revoked pursuant to section 410.70 of the criminal procedure law no such expenses may be collected.

(c) Answer all reasonable inquiries by the probation officer and notify the probation officer prior to any change in address or employment.

4. Electronic monitoring. When imposing a sentence of probation the court may, in addition to any conditions imposed pursuant to subdivisions two and three of this section, require the defendant to submit to the use of an electronic monitoring device and/or to follow a schedule that governs the defendant's daily movement. Such condition may be imposed only where the court, in its discretion, determines that requiring the defendant to comply with such condition will advance public safety, probationer control or probationer surveillance. Electronic monitoring shall be used in accordance with uniform procedures developed by the office of probation and correctional alternatives.

4-a. Mandatory conditions for sex offenders. (a) When imposing a sentence of probation or conditional discharge upon a person convicted of an offense defined in article one hundred thirty, two hundred thirty-five or two hundred sixty-three of this chapter, or section 255.25, 255.26 or 255.27 of this chapter, and the victim of such offense was under the age of eighteen at the time of such offense or such person has been designated a level three sex offender pursuant to subdivision six of section 168-l of the correction law, the court shall require, as a mandatory condition of such sentence, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds, as that term is defined in subdivision fourteen of section 220.00 of this chapter, or any other facility or institution primarily used for the care or treatment of persons under the age of eighteen while one or more of such persons under the age of eighteen are present, provided however, that when such sentenced offender is a registered student or participant or an employee of such facility or institution or entity contracting therewith or has a family member enrolled in such facility or institution, such sentenced offender may, with the written authorization of his or her probation officer or the court and the superintendent or chief administrator of such facility, institution or grounds, enter such facility, institution or upon such grounds for the limited purposes authorized by the probation officer or the court and superintendent or chief officer. Nothing in this subdivision shall be construed as restricting any lawful condition of supervision that may be imposed on such sentenced offender.

(b) When imposing a sentence of probation or conditional discharge upon a person convicted of an offense for which registration as a sex offender is required pursuant to subdivision two or three of section one hundred sixty-eight-a of the correction law, and the victim of such offense was under the age of eighteen at the time of such offense or such person has been designated a level three sex offender pursuant to subdivision six of section one hundred sixty-eight-l of the correction law or the internet was used to facilitate the commission of the crime, the court shall require, as mandatory conditions of such sentence, that such sentenced offender be prohibited from using the internet to access pornographic material, access a commercial social networking website, communicate with other individuals or groups for the purpose of promoting sexual relations with persons under the age of eighteen, and communicate with a person under the age of eighteen when such offender is over the age of eighteen, provided that the court may permit an offender to use the internet to communicate with a person under the age of eighteen when such offender is the parent of a minor child and is not otherwise prohibited from communicating with such child. Nothing in this subdivision shall be construed as restricting any other lawful condition of supervision that may be imposed on such sentenced offender. As used in this subdivision, a “commercial social networking website” shall mean any business, organization or other entity operating a website that permits persons under eighteen years of age to be registered users for the purpose of establishing personal relationships with other users, where such persons under eighteen years of age may: (i) create web pages or profiles that provide information about themselves where such web pages or profiles are available to the public or to other users; (ii) engage in direct or real time communication with other users, such as a chat room or instant messenger; and (iii) communicate with persons over eighteen years of age; provided, however, that, for purposes of this subdivision, a commercial social networking website shall not include a website that permits users to engage in such other activities as are not enumerated herein.

5. Other conditions. When imposing a sentence of probation the court may, in addition to any conditions imposed pursuant to subdivisions two, three and four of this section, require that the defendant comply with any other reasonable condition as the court shall determine to be necessary or appropriate to ameliorate the conduct which gave rise to the offense or to prevent the incarceration of the defendant.

5-a. Other conditions for sex offenders. When imposing a sentence of probation upon a person convicted of an offense for which registration as a sex offender is required pursuant to subdivision two or three of section one hundred sixty-eight-a of the correction law, in addition to any conditions required under subdivisions two, three, four, four-a and five of this section, the court may require that the defendant comply with a reasonable limitation on his or her use of the internet that the court determines to be necessary or appropriate to ameliorate the conduct which gave rise to the offense or to protect public safety, provided that the court shall not prohibit such sentenced offender from using the internet in connection with education, lawful employment or search for lawful employment.

Credits

(L.1965, c. 1030. Amended L.1973, c. 676, § 30; L.1974, c. 930, § 3; L.1975, c. 667, § 35; L.1978, c. 500, § 1; L.1980, c. 270, § 1; L.1980, c. 284, § 1; L.1980, c. 471, § 22; L.1980, c. 530, § 16; L.1981, c. 583, § 1; L.1981, c. 742, § 3; L.1982, c. 782, §§ 1, 2; L.1984, c. 335, § 2; L.1984, c. 417, § 1; L.1985, c. 672, §§ 1, 2; L.1986, c. 552, § 1; L.1989, c. 443, § 1; L.1992, c. 465, § 51; L.1992, c. 618, § 15; L.1995, c. 536, § 2; L.1996, c. 186, § 1; L.1996, c. 653, § 1; L.1997, c. 181, § 1, eff. July 8, 1997; L.2000, c. 1, § 7, eff. Feb. 1, 2001; L.2001, c. 508, § 1, eff. Jan. 20, 2002; L.2005, c. 544, § 1, eff. Sept. 1, 2005; L.2006, c. 320, § 4, eff. Nov. 1, 2006; L.2006, c. 571, § 6, eff. Nov. 1, 2006; L.2007, c. 669, § 1, eff. Oct. 27, 2007; L.2008, c. 67, §§ 7, 8, eff. April 28, 2008; L.2008, c. 406, § 2, eff. Aug. 5, 2008; L.2010, c. 56, pt. A, § 46, eff. June 22, 2010; L.2010, c. 56, pt. D, § 8, eff. Sept. 20, 2010; L.2018, c. 480, § 2, eff. June 26, 2019; L.2020, c. 56, pt. VV, § 1, eff. July 2, 2020.)

Footnotes

1 So in original. Probably should be a semicolon.

McKinney's Penal Law § 65.10, NY PENAL § 65.10
Current through L.2023, chapters 1 to 191. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Two. Sentences
Title E. Sentences
Article 65. Sentences of Probation, Conditional Discharge and Unconditional Discharge (Refs & Annos)

McKinney's Penal Law § 65.15

§ 65.15 Calculation of periods of probation and of conditional discharge

Effective: November 20, 2015
Currentness

1. A period of probation or a period or additional period of conditional discharge commences on the day it is imposed. Multiple periods, whether imposed at the same or at different times, shall run concurrently.

2. When a person has violated the conditions of his or her probation or conditional discharge and is declared delinquent by the court, the declaration of delinquency shall interrupt the period of the sentence as of the date of the delinquency and such interruption shall continue until a final determination as to the delinquency has been made by the court pursuant to a hearing held in accordance with the provisions of the criminal procedure law. Any order for the installation and maintenance of a functioning ignition interlock device imposed pursuant to section 60.21 of this title shall remain in effect throughout the delinquency and the court may extend the period of such installation and maintenance by the period of the delinquency; provided, however, that the defendant shall get credit for any period where the device was installed and maintained during the delinquency.

3. [Eff. until Sept. 1, 2025, pursuant to L.1995, c. 3, § 74, par. d. See, also, subd. 3 below.] In any case where a person who is under a sentence of probation or of conditional discharge is also under an indeterminate or determinate sentence of imprisonment, imposed for some other offense by a court of this state the service of the sentence of imprisonment shall satisfy the sentence of probation or of conditional discharge unless the sentence of probation or of conditional discharge is revoked prior to the next to occur of parole or conditional release under, or satisfaction of, the sentence of imprisonment. Provided, however, that the service of an indeterminate or determinate sentence of imprisonment shall not satisfy a sentence of probation if the sentence of probation was imposed at a time when the sentence of imprisonment had one year or less to run.

3. [Eff. Sept. 1, 2025. See, also, subd. 3 above.] In any case where a person who is under a sentence of probation or of conditional discharge is also under an indeterminate sentence of imprisonment, or a reformatory sentence of imprisonment authorized by section 75.00, [1] imposed for some other offense by a court of this state the service of the sentence of imprisonment shall satisfy the sentence of probation or of conditional discharge unless the sentence of probation or of conditional discharge is revoked prior to the next to occur of parole or conditional release under, or satisfaction of, the sentence of imprisonment. Provided, however, that the service of an indeterminate or a reformatory sentence of imprisonment shall not satisfy a sentence of probation if the sentence of probation was imposed at a time when the sentence of imprisonment had one year or less to run.

Credits
(L.1965, c. 1030. Amended L.1971, c. 1097, § 75; L.1995, c. 3, § 1-b; L.2015, c. 440, § 1, eff. Nov. 20, 2015.)

Footnotes

1 Repealed.

McKinney's Penal Law § 65.15, NY PENAL § 65.15
Current through L.2023, chapters 1 to 191. Some statute sections may be more current, see credits for details.

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Two. Sentences
Title E. Sentences
Article 85. Sentence of Intermittent Imprisonment (Refs & Annos)

McKinney's Penal Law § 85.00

§ 85.00 Sentence of intermittent imprisonment

Currentness

1. Definition. A sentence of intermittent imprisonment is a revocable sentence of imprisonment to be served on days or during certain periods of days, or both, specified by the court as part of the sentence. A person who receives a sentence of intermittent imprisonment shall be incarcerated in the institution to which he is committed at such times as are specified by the court in the sentence.

2. Authorization for use of sentence. The court may impose a sentence of intermittent imprisonment in any case where:

(a) the court is imposing sentence, upon a person other than a second or persistent felony offender, for a class D or class E felony or for any offense that is not a felony; and

(b) the court is not imposing any other sentence of imprisonment upon the defendant at the same time; and

(c) the defendant is not under any other sentence of imprisonment with a term in excess of fifteen days imposed by any other court; and

(d) Repealed

3. Duration of sentence. A sentence of intermittent imprisonment may be for any term that could be imposed as a definite sentence of imprisonment for the offense for which such sentence is imposed. The term of the sentence shall commence on the day it is imposed and shall be calculated upon the basis of the duration of its term, rather than upon the basis of the days spent in confinement, so that no person shall be subject to any such sentence for a period that is longer than a period that commences on the date the sentence is imposed and ends on the date the term of the longest definite sentence for the offense would have expired, after deducting the credit that would have been applicable to a definite sentence for jail time but without regard to any credit authorized to be allowed against the term of a definite sentence for good behavior. The provisions of section five hundred-*l* of the correction law shall not be applicable to a sentence of intermittent imprisonment.

4. Imposition of sentence. (a) When the court imposes a sentence of intermittent imprisonment the court shall specify in the sentence:

(i) that the court is imposing a sentence of intermittent imprisonment;

(ii) the term of such sentence;

(iii) the days or parts of days on which the sentence is to be served, but except as provided in paragraph (iv) hereof such specification need not include the dates on which such days fall; and

(iv) the first and last dates on which the defendant is to be incarcerated under the sentence.

(b) The court, in its discretion, may specify any day or days or parts thereof on which the defendant shall be confined and may specify a period to commence at the commencement of the sentence and not to exceed fifteen days during which the defendant is to be continuously confined.

Credits
(Added L.1970, c. 477, § 1. Amended L.1973, c. 277, § 11; L.1973, c. 523, § 1; L.1987, c. 304, § 2.)

McKinney's Penal Law § 85.00, NY PENAL § 85.00
Current through L.2023, chapters 1 to 191. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title H. Preliminary Proceedings in Local Criminal Court
Article 170. Proceedings upon Information, Simplified Traffic Information, Prosecutor's Information and Misdemeanor Complaint from Arraignment to Plea (Refs & Annos)

McKinney's CPL § 170.55

§ 170.55 Adjournment in contemplation of dismissal

Effective: July 8, 2015
Currentness

1. Upon or after arraignment in a local criminal court upon an information, a simplified information, a prosecutor's information or a misdemeanor complaint, and before entry of a plea of guilty thereto or commencement of a trial thereof, the court may, upon motion of the people or the defendant and with the consent of the other party, or upon the court's own motion with the consent of both the people and the defendant, order that the action be "adjourned in contemplation of dismissal," as prescribed in subdivision two.

2. An adjournment in contemplation of dismissal is an adjournment of the action without date ordered with a view to ultimate dismissal of the accusatory instrument in furtherance of justice. Upon issuing such an order, the court must release the defendant on his own recognizance. Upon application of the people, made at any time not more than six months, or in the case of a family offense as defined in subdivision one of section 530.11 of this chapter, one year, after the issuance of such order, the court may restore the case to the calendar upon a determination that dismissal of the accusatory instrument would not be in furtherance of justice, and the action must thereupon proceed. If the case is not so restored within such six months or one year period, the accusatory instrument is, at the expiration of such period, deemed to have been dismissed by the court in furtherance of justice.

3. In conjunction with an adjournment in contemplation of dismissal the court may issue a temporary order of protection pursuant to section 530.12 or 530.13 of this chapter, requiring the defendant to observe certain specified conditions of conduct.

4. Where the local criminal court information, simplified information, prosecutor's information, or misdemeanor complaint charges a crime or violation between spouses or between parent and child, or between members of the same family or household, as the term "members of the same family or household" is defined in subdivision one of section 530.11 of this chapter, the court may as a condition of an adjournment in contemplation of dismissal order, require that the defendant participate in an educational program addressing the issues of spousal abuse and family violence.

5. The court may grant an adjournment in contemplation of dismissal on condition that the defendant participate in dispute resolution and comply with any award or settlement resulting therefrom.

6. The court may as a condition of an adjournment in contemplation of dismissal order, require the defendant to perform services for a public or not-for-profit corporation, association, institution or agency. Such condition may only be imposed where the defendant has consented to the amount and conditions of such service. The court may not impose such conditions in excess of the length of the adjournment.

6-a. The court may, as a condition of an authorized adjournment in contemplation of dismissal, where the defendant has been charged with an offense and the elements of such offense meet the criteria of an "eligible offense" and such person qualified as an "eligible person" as such terms are defined in section four hundred fifty-eight-l of the social services law, require the defendant to participate in an education reform program in accordance with section four hundred fifty-eight-l of the social services law.

7. The court may, as a condition of an adjournment in contemplation of dismissal order, where a defendant is under twenty-one years of age and is charged with (a) a misdemeanor or misdemeanors other than section eleven hundred ninety-two of the vehicle and traffic law, in which the record indicates the consumption of alcohol by the defendant may have been a contributing factor, or (b) a violation of paragraph (a) of subdivision one of section sixty-five-b of the alcoholic beverage control law, require the defendant to attend an alcohol awareness program established pursuant to subdivision (a) of section 19.07 of the mental hygiene law.

8. The granting of an adjournment in contemplation of dismissal shall not be deemed to be a conviction or an admission of guilt. No person shall suffer any disability or forfeiture as a result of such an order. Upon the dismissal of the accusatory instrument pursuant this section, the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution.

9. Notwithstanding any other provision of this section, a court may not issue an order adjourning an action in contemplation of dismissal if the offense is for a violation of the vehicle and traffic law related to the operation of a motor vehicle (except one related to parking, stopping or standing), or a violation of a local law, rule or ordinance related to the operation of a motor vehicle (except one related to parking, stopping or standing), if such offense was committed by the holder of a commercial learner's permit or a commercial driver's license or was committed in a commercial motor vehicle, as defined in subdivision four of section five hundred one-a of the vehicle and traffic law.

Credits

(L.1970, c. 996, § 1. Amended L.1972, c. 661, § 42; L.1980, c. 24, § 1; L.1980, c. 530, § 13; L.1981, c. 847, § 2; L.1982, c. 134, § 1; L.1985, c. 672, § 5; L.1988, c. 39, § 1; L.1990, c. 683, § 3; L.1994, c. 222, § 33; L.1998, c. 383, § 8, eff. April 1, 1999; L.2011, c. 58, pt. CC, § 8, eff. May 30, 2011; L.2012, c. 55, pt. V, § 7, eff. May 20, 2012; L.2015, c. 58, pt. I, § 9, eff. July 8, 2015.)

McKinney's CPL § 170.55, NY CRIM PRO § 170.55
Current through L.2023, chapters 1 to 191. Some statute sections may be more current, see credits for details.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title H. Preliminary Proceedings in Local Criminal Court
Article 170. Proceedings upon Information, Simplified Traffic Information, Prosecutor's Information and Misdemeanor Complaint from Arraignment to Plea (Refs & Annos)

McKinney's CPL § 170.56

§ 170.56 Adjournment in contemplation of dismissal in cases involving marihuana

Effective: March 31, 2021
Currentness

1. Upon or after arraignment in a local criminal court upon an information, a prosecutor's information or a misdemeanor complaint, where the sole remaining count or counts charge a violation or violations of section 222.10, 222.15, 222.25, 222.30, 222.45 or 222.50 of the penal law, or upon summons for a nuisance offense under section sixty-five-c of the alcoholic beverage control law and before the entry of a plea of guilty thereto or commencement of a trial thereof, the court, upon motion of a defendant, may order that all proceedings be suspended and the action adjourned in contemplation of dismissal, or upon a finding that adjournment would not be necessary or appropriate and the setting forth in the record of the reasons for such findings, may dismiss in furtherance of justice the accusatory instrument; provided, however, that the court may not order such adjournment in contemplation of dismissal or dismiss the accusatory instrument if: (a) the defendant has previously been granted such adjournment in contemplation of dismissal, or (b) the defendant has previously been granted a dismissal under this section, or (c) the defendant has previously been convicted of any offense involving controlled substances, or (d) the defendant has previously been convicted of a crime and the district attorney does not consent or (e) the defendant has previously been adjudicated a youthful offender on the basis of any act or acts involving controlled substances and the district attorney does not consent. Notwithstanding the limitations set forth in this subdivision, the court may order that all proceedings be suspended and the action adjourned in contemplation of dismissal based upon a finding of exceptional circumstances. For purposes of this subdivision, exceptional circumstances exist when, regardless of the ultimate disposition of the case, the entry of a plea of guilty is likely to result in severe or ongoing consequences, including, but not limited to, potential or actual immigration consequences.

2. Upon ordering the action adjourned in contemplation of dismissal, the court must set and specify such conditions for the adjournment as may be appropriate, and such conditions may include placing the defendant under the supervision of any public or private agency. At any time prior to dismissal the court may modify the conditions or extend or reduce the term of the adjournment, except that the total period of adjournment shall not exceed twelve months. Upon violation of any condition fixed by the court, the court may revoke its order and restore the case to the calendar and the prosecution thereupon must proceed. If the case is not so restored to the calendar during the period fixed by the court, the accusatory instrument is, at the expiration of such period, deemed to have been dismissed in the furtherance of justice.

3. Upon or after dismissal of such charges against a defendant not previously convicted of a crime, the court shall order that all official records and papers, relating to the defendant's arrest and prosecution, whether on file with the court, a police agency, or the New York state division of criminal justice services, be sealed and, except as otherwise provided in paragraph (d) of

subdivision one of section 160.50 of this chapter, not made available to any person or public or private agency; except, such records shall be made available under order of a court for the purpose of determining whether, in subsequent proceedings, such person qualifies under this section for a dismissal or adjournment in contemplation of dismissal of the accusatory instrument.

4. Upon the granting of an order pursuant to subdivision three, the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution.

Credits

(Added L.1971, c. 1042. Amended L.1973, c. 276, § 22; L.1977, c. 360, § 9; L.1977, c. 905, § 2; L.2021, c. 92, § 22, eff. March 31, 2021.)

McKinney's CPL § 170.56, NY CRIM PRO § 170.56

Current through L.2023, chapters 1 to 191. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title L. Sentence
Article 390. Pre-Sentence Reports (Refs & Annos)

McKinney's CPL § 390.30

§ 390.30 Scope of pre-sentence investigation and report

Effective: November 12, 2019
Currentness

1. The investigation. The pre-sentence investigation consists of the gathering of information with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education, and personal habits. Such investigation may also include any other matter which the agency conducting the investigation deems relevant to the question of sentence, and must include any matter the court directs to be included.

2. Physical and mental examinations. Whenever information is available with respect to the defendant's physical and mental condition, the pre-sentence investigation must include the gathering of such information. In the case of a felony or a class A misdemeanor, or in any case where a person under the age of twenty-one is convicted of a crime, the court may order that the defendant undergo a thorough physical or mental examination in a designated facility and may further order that the defendant remain in such facility for such purpose for a period not exceeding thirty days.

3. The report and victim impact statement. (a) The report of the pre-sentence investigation must contain an analysis of as much of the information gathered in the investigation as the agency that conducted the investigation deems relevant to the question of sentence. The report must also include any other imformation [1] that the court directs to be included and the material required by paragraph (b) of this subdivision which shall be considered part of the report.

(b) The report shall also contain a victim impact statement, unless it appears that such information would be of no relevance to the recommendation or court disposition, which shall include an analysis of the victim's version of the offense, the extent of injury or economic loss and the actual out-of-pocket loss to the victim and the views of the victim relating to disposition including the amount of restitution and reparation sought by the victim after the victim has been informed of the right to seek restitution and reparation, subject to the availability of such information. In the case of a homicide or where the victim is unable to assist in the preparation of the victim impact statement, the information may be acquired from the victim's family. The victim impact statement shall be made available to the victim by the prosecutor pursuant to subdivision two of section 390.50 of this article. Nothing contained in this section shall be interpreted to require that a victim supply information for the preparation of this report.

4. Abbreviated investigation and short form report. In lieu of the procedure set forth in subdivisions one, two and three of this section, where the conviction is of a misdemeanor the scope of the pre-sentence investigation may be abbreviated and a short form report may be made. The use of abbreviated investigations and short form reports, the matters to be covered therein and the form of the reports shall be in accordance with the general rules regulating methods and procedures in the administration of probation as adopted from time to time by the commissioner of the division of criminal justice services pursuant to the provisions of article twelve of the executive law. No such rule, however, shall be construed so as to relieve the agency conducting the investigation of the duty of investigating and reporting upon:

(a) the extent of the injury or economic loss and the actual out-of-pocket loss to the victim including the amount of restitution and reparation sought by the victim, after the victim has been informed of the right to seek restitution and reparation, or

(b) any matter relevant to the question of sentence that the court directs to be included in particular cases.

5. Information to be forwarded to the state office of probation and correctional alternatives. Investigating agencies under this article shall be responsible for the collection, and transmission to the state office of probation and correctional alternatives, of data on the number of victim impact statements prepared. Such information shall be transmitted annually to the office of victim services and included in the office's biennial report pursuant to subdivision twenty-one of section six hundred twenty-three of the executive law.

6. Interim probation supervision. (a) In any case where the court determines that a defendant is eligible for a sentence of probation, the court, after consultation with the prosecutor and upon the consent of the defendant, may adjourn the sentencing to a specified date and order that the defendant be placed on interim probation supervision. In no event may the sentencing be adjourned for a period exceeding one year from the date the conviction is entered, except that upon good cause shown, the court may, upon the defendant's consent, extend the period for an additional one year where the defendant has agreed to and is still participating in a treatment program in connection with a court designated a treatment court by the chief administrator of the courts. When ordering that the defendant be placed on interim probation supervision, the court shall impose all of the conditions relating to supervision specified in subdivision three of section 65.10 of the penal law and the court may impose any or all of the conditions relating to conduct and rehabilitation specified in subdivisions two, four, five and five-a of section 65.10 of such law. The defendant must receive a written copy of any such conditions at the time he or she is placed on interim probation supervision. The defendant's record of compliance with such conditions, as well as any other relevant information, shall be included in the presentence report, or updated presentence report, prepared pursuant to this section, and the court must consider such record and information when pronouncing sentence. If a defendant satisfactorily completes a term of interim probation supervision, he or she shall receive credit for the time served under the period of interim probation supervision toward any probation sentence that is subsequently imposed in that case.

(b) In its discretion, the supervising probation department may utilize the provisions of sections 410.20, 410.30, 410.40, 410.50, 410.60 and 410.92 of this title, where applicable.

Credits

(L.1970, c. 996, § 1. Amended L.1971, c. 450; L.1982, c. 612, § 2; L.1985, c. 14, §§ 2, 3; L.1985, c. 134, § 26; L.1991, c. 530, § 1; L.1992, c. 618, §§ 3, 4; L.1998, c. 159, § 1, eff. Oct. 5, 1998; L.1999, c. 216, § 1, eff. Oct. 4, 1999; L.2009, c. 56, pt. O, § 1, eff. June 6, 2009; L.2009, c. 56, pt. AAA, § 5, eff. April 7, 2009; L.2010, c. 56, pt. A, § 50, eff. June 22, 2010; L.2010, c. 56, pt. A-1, § 29, eff. June 22, 2010; L.2014, c. 489, §§ 3, 4, eff. Dec. 17, 2014; L.2019, c. 279, § 1, eff. Nov. 12, 2019.)

Footnotes

1 So in original. Probably should read “information”.

McKinney's CPL § 390.30, NY CRIM PRO § 390.30
Current through L.2023, chapters 1 to 191. Some statute sections may be more current, see credits for details.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title L. Sentence
Article 410. Sentences of Probation, Conditional Discharge and Parole Supervision [Heading Will Revert to "Sentences of Probation and of Conditional Discharge" on Sept. 1, 2025, Pursuant to L.1995, C. 3, § 74, Subd. D.] (Refs & Annos)

McKinney's CPL § 410.10

§ 410.10 Specification of conditions of the sentence

Effective: October 22, 2021
Currentness

1. When the court pronounces a sentence of probation or of conditional discharge it must specify as part of the sentence the conditions to be complied with. Where the sentence is one of probation, the defendant must be given a written copy of the conditions at the time sentence is imposed. In any case where the defendant is given a written copy of the conditions, a copy thereof must be filed with and become part of the record of the case, and it is not necessary to specify the conditions orally.

2. Commission of an additional offense, other than a traffic infraction, after imposition of a sentence of probation or of conditional discharge, and prior to expiration or termination of the period of the sentence, constitutes a ground for revocation of such sentence irrespective of whether such fact is specified as a condition of the sentence.

3. When the court pronounces a sentence of probation or conditional discharge for a specified crime defined in paragraph (e) of subdivision one of section six hundred thirty-two-a of the executive law, in addition to specifying the conditions of the sentence, the court shall provide written notice to such defendant concerning any requirement to report to the office of victim services funds of a convicted person as defined in section six hundred thirty-two-a of the executive law, the procedures for such reporting and any potential penalty for a failure to comply.

4. When the court pronounces a sentence of probation or conditional discharge, the court shall provide that the performance of bona fide work for an employer, including travel time to and from bona fide work, regardless if such work or related travel time is performed during curfew times set by conditions of probation, parole, presumptive release, conditional release, release to post-release supervision or any other type of supervised release, shall not be considered a violation of such sentence of probation or conditional discharge. For purposes of this section, bona fide work is work performed as an employee for an employer, as defined in section two of the labor law.

Credits
(L.1970, c. 996, § 1. Amended L.2001, c. 62, § 12, eff. June 25, 2001; L.2010, c. 56, pt. A-1, § 44, eff. June 22, 2010; L.2021, c. 487, § 1, eff. Oct. 22, 2021.)

McKinney's CPL § 410.10, NY CRIM PRO § 410.10
Current through L.2023, chapters 1 to 191. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title L. Sentence
Article 410. Sentences of Probation, Conditional Discharge and Parole Supervision [Heading Will Revert to "Sentences of Probation and of Conditional Discharge" on Sept. 1, 2025, Pursuant to L.1995, C. 3, § 74, Subd. D.] (Refs & Annos)

McKinney's CPL § 410.30

§ 410.30 Declaration of delinquency

Effective: November 1, 2009
Currentness

If at any time during the period of a sentence of probation or of conditional discharge the court has reasonable cause to believe that the defendant has violated a condition of the sentence, it may declare the defendant delinquent and file a written declaration of delinquency. When the court receives a request for a declaration of delinquency by a probation officer, it shall make a decision on such request within seventy-two hours of its receipt of the request. Upon filing a written declaration of delinquency, the court must promptly take reasonable and appropriate action to cause the defendant to appear before it for the purpose of enabling the court to make a final determination with respect to the alleged delinquency in accordance with section 410.70 of this article.

Credits
(L.1970, c. 996, § 1. Amended L.2008, c. 652, § 3, eff. Nov. 1, 2009.)

McKinney's CPL § 410.30, NY CRIM PRO § 410.30
Current through L.2023, chapters 1 to 191. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title L. Sentence
Article 410. Sentences of Probation, Conditional Discharge and Parole Supervision [Heading Will Revert to "Sentences of Probation and of Conditional Discharge" on Sept. 1, 2025, Pursuant to L.1995, C. 3, § 74, Subd. D.] (Refs & Annos)

McKinney's CPL § 410.40

§ 410.40 Notice to appear, warrant

Effective: October 1, 2019
Currentness

1. Notice to appear. The court may at any time order that a person who is under a sentence of probation or of conditional discharge appear before it. Such order may be in the form of a written notice, specifying the time and place of appearance, mailed to or served personally upon the defendant as the court may direct. In the absence of a warrant issued pursuant to subdivision two of this section, where a probation officer has submitted a violation petition and report, the court shall promptly consider such petition and, where the court issues a notice to appear, the court shall direct that the defendant appear within ten business days of the court's order. When the order is in the form of such a notice, failure to appear as ordered without reasonable cause therefor constitutes a violation of the conditions of the sentence irrespective of whether such requirement is specified as a condition thereof.

2. Warrant. (a) Where the probation officer has requested that a probation warrant be issued, the court shall, within seventy-two hours of its receipt of the request, issue or deny the warrant or take any other lawful action including issuance of a notice to appear pursuant to subdivision one of this section. If at any time during the period of a sentence of probation or of conditional discharge the court has reasonable grounds to believe that the defendant has violated a condition of the sentence, the court may issue a warrant to a police officer or to an appropriate peace officer directing him or her to take the defendant into custody and bring the defendant before the court without unnecessary delay; provided, however, if the court in which the warrant is returnable is a superior court, and such court is not available, and the warrant is addressed to a police officer or appropriate probation officer certified as a peace officer, such executing officer may unless otherwise specified under paragraph (b) of this subdivision, bring the defendant to the local correctional facility of the county in which such court sits, to be detained there until not later than the commencement of the next session of such court occurring on the next business day; or if the court in which the warrant is returnable is a local criminal court, and such court is not available, and the warrant is addressed to a police officer or appropriate probation officer certified as a peace officer, such executing officer must without unnecessary delay bring the defendant before an alternate local criminal court, as provided in subdivision five of section 120.90 of this chapter. A court which issues such a warrant may attach thereto a summary of the basis for the warrant. In any case where a defendant arrested upon the warrant is brought before a local criminal court other than the court in which the warrant is returnable, such local criminal court shall consider such summary before issuing a securing order with respect to the defendant.

(b) If the court in which the warrant is returnable is a superior court, and such court is not available, and the warrant is addressed to a police officer or appropriate probation officer certified as a peace officer, such executing officer shall, where a defendant is sixteen years of age or younger who allegedly commits an offense or a violation of his or her probation or conditional discharge imposed for an offense on or after October first, two thousand eighteen, or where a defendant is seventeen years of age or younger who allegedly commits an offense or a violation of his or her probation or conditional discharge imposed for an offense on or after October first, two thousand nineteen, bring the defendant without unnecessary delay before the youth part, provided, however that if the youth part is not in session, the defendant shall be brought before the most accessible magistrate designated by the appellate division.

Credits

(L.1970, c. 996, § 1. Amended L.1980, c. 843, § 18; L.1993, c. 161, § 1; L.1996, c. 115, § 1; L.2008, c. 652, § 4, eff. Nov. 1, 2009; L.2017, c. 59, pt. WWW, § 32.)

McKinney's CPL § 410.40, NY CRIM PRO § 410.40
Current through L.2023, chapters 1 to 191. Some statute sections may be more current, see credits for details.

End of Document

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title L. Sentence
Article 410. Sentences of Probation, Conditional Discharge and Parole Supervision [Heading Will Revert to "Sentences of Probation and of Conditional Discharge" on Sept. 1, 2025, Pursuant to L.1995, C. 3, § 74, Subd. D.] (Refs & Annos)

McKinney's CPL § 410.60

§ 410.60 Appearance before court

Effective: January 1, 2020
Currentness

A person who has been taken into custody pursuant to section 410.40 or section 410.50 of this article for violation of a condition of a sentence of probation or a sentence of conditional discharge must forthwith be brought before the court that imposed the sentence. Where a violation of probation petition and report has been filed and the person has not been taken into custody nor has a warrant been issued, an initial court appearance shall occur within ten business days of the court's issuance of a notice to appear. If the court has reasonable cause to believe that such person has violated a condition of the sentence, it may commit such person to the custody of the sheriff, fix bail, release such person under non-monetary conditions or release such person on such person's own recognizance for future appearance at a hearing to be held in accordance with section 410.70 of this article. If the court does not have reasonable cause to believe that such person has violated a condition of the sentence, it must direct that such person be released.

Credits
(L.1970, c. 996, § 1. Amended L.2008, c. 652, § 5, eff. Nov. 1, 2009; L.2019, c. 59, pt. JJJ, § 23, eff. Jan. 1, 2020.)

McKinney's CPL § 410.60, NY CRIM PRO § 410.60
Current through L.2023, chapters 1 to 191. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title L. Sentence
Article 410. Sentences of Probation, Conditional Discharge and Parole Supervision [Heading Will Revert to "Sentences of Probation and of Conditional Discharge" on Sept. 1, 2025, Pursuant to L.1995, C. 3, § 74, Subd. D.] (Refs & Annos)

McKinney's CPL § 410.70

§ 410.70 Hearing on violation

Effective: February 9, 2014
Currentness

1. In general. The court may not revoke a sentence of probation or a sentence of conditional discharge, or extend a period of probation, unless (a) the court has found that the defendant has violated a condition of the sentence and (b) the defendant has had an opportunity to be heard pursuant to this section. The defendant is entitled to a hearing in accordance with this section promptly after the court has filed a declaration of delinquency or has committed him or has fixed bail pursuant to this article.

2. Statement; preliminary examination. The court must file or cause to be filed with the clerk of the court a statement setting forth the condition or conditions of the sentence violated and a reasonable description of the time, place and manner in which the violation occurred. The defendant must appear before the court within ten business days of the court's issuance of the notice to appear and the court must advise him of the contents of the statement and furnish him with a copy thereof. At the time of such appearance the court must ask the defendant whether he wishes to make any statement with respect to the violation. If the defendant makes a statement, the court may accept it and base its decision thereon. If the court does not accept it, or if the defendant does not make a statement, the court must proceed with the hearing. Provided, however, that upon request, the court must grant a reasonable adjournment to the defendant to enable him to prepare for the hearing.

3. Manner of conducting hearing. The hearing must be a summary one by the court without a jury and the court may receive any relevant evidence not legally privileged. The defendant may cross-examine witnesses and may present evidence on his own behalf. A finding that the defendant has violated a condition of his sentence must be based upon a preponderance of the evidence.

4. Counsel. The defendant is entitled to counsel at all stages of any proceeding under this section and the court must advise him of such right at the outset of the proceeding.

5. Revocation; modification; continuation. At the conclusion of the hearing the court may revoke, continue or modify the sentence of probation or conditional discharge. Where the court revokes the sentence, it must impose sentence as specified in subdivisions three and four of section 60.01 of the penal law. Where the court continues or modifies the sentence, it must vacate the declaration of delinquency and direct that the defendant be released. If the alleged violation is sustained and the court

continues or modifies the sentence, it may extend the sentence up to the period of interruption specified in subdivision two of section 65.15 of the penal law, but any time spent in custody in any correctional institution pursuant to section 410.60 of this article shall be credited against the term of the sentence. Provided further, where the alleged violation is sustained and the court continues or modifies the sentence, the court may also extend the remaining period of probation up to the maximum term authorized by section 65.00 of the penal law. Provided, however, a defendant shall receive credit for the time during which he or she was supervised under the original probation sentence prior to any declaration of delinquency and for any time spent in custody pursuant to this article for an alleged violation of probation.

Credits

(L.1970, c. 996, § 1. Amended L.1977, c. 355, § 1; L.1985, c. 112, § 1; L.2008, c. 652, § 6, eff. Nov. 1, 2009; L.2013, c. 556, § 5, eff. Feb. 9, 2014; L.2014, c. 17, §§ 2, 3, eff. Feb. 9, 2014.)

McKinney's CPL § 410.70, NY CRIM PRO § 410.70

Current through L.2023, chapters 1 to 191. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title L. Sentence
Article 410. Sentences of Probation, Conditional Discharge and Parole Supervision [Heading Will Revert to "Sentences of Probation and of Conditional Discharge" on Sept. 1, 2025, Pursuant to L.1995, C. 3, § 74, Subd. D.] (Refs & Annos)

McKinney's CPL § 410.90

§ 410.90 Termination of sentence

Currentness

1. The court may at any time terminate either a period of probation, other than a period of lifetime probation, for conviction to a crime or a period of conditional discharge for an offense.

2. The court may terminate a period of probation for a person who is subject to lifetime probation and who has been on unrevoked probation for a least five consecutive years.

3. (a) The court shall grant a request for termination of a sentence of probation under this section when, having regard to the conduct and condition of the probationer, the court is of the opinion that:

(i) the probationer is no longer in need of such guidance, training or other assistance which would otherwise be administered through probation supervision;

(ii) the probationer has diligently complied with the terms and conditions of the sentence of probation; and

(iii) the termination of the sentence of probation is not adverse to the protection of the public.

No such termination shall be granted unless the court is satisfied that the probationer, who is otherwise financially able to comply with an order of restitution or reparation, has made a good faith effort to comply therewith.

(b) The court shall grant a request for termination of a sentence of conditional discharge under this section when, having regard to the conduct and condition of the defendant, the court is of the opinion that:

(i) the defendant has diligently complied with the terms and conditions of the sentence of conditional discharge; and

(ii) termination of the sentence of conditional discharge is not adverse to protection of the public.

Credits

(L.1970, c. 996, § 1. Amended L.1973, c. 278, § 4; L.1979, c. 410, § 27; L.1980, c. 238, § 1; L.1982, c. 782, § 3; L.1992, c. 618, § 5.)

McKinney's CPL § 410.90, NY CRIM PRO § 410.90
Current through L.2023, chapters 1 to 191. Some statute sections may be more current, see credits for details.

End of Document

73 N.Y.2d 382, 538 N.E.2d 325, 540 N.Y.S.2d 973

Stephen M. Cowles, Appellant,
v.
Thomas V. N. Brownell, Respondent.

Court of Appeals of New York
31
Argued January 12, 1989;
decided April 6, 1989

CITE TITLE AS: Cowles v Brownell

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered April 7, 1988, which affirmed an order of the Supreme Court (Carrol S. Walsh, Jr., J.), entered in Fulton County, granting a motion by defendant to dismiss the complaint and dismissing the complaint.

Cowles v Brownell, 138 AD2d 877, reversed.

HEADNOTES

Release
Enforceability
Release of Civil Claims in Return for Dismissal of Criminal Charges

(1) In an action to recover damages for malicious prosecution, false arrest, assault and battery, arising from allegations that defendant, a police officer, arrested plaintiff without cause and beat him without provocation, a motion by defendant to dismiss the complaint on the ground that plaintiff had previously given a release of all claims against defendant, as well as another police officer and the employer municipality, as a condition of the District Attorney's consent to dismissal of criminal harassment charges, is denied. The voluntariness of the release is not the central consideration in determining whether to give effect to the arrangement. Inasmuch as the prosecutor's decision to condition dismissal of the criminal charges against plaintiff upon relinquishment of his right to seek civil damages for defendant's alleged misconduct was unrelated to the merits of the people's case against plaintiff, there remain unresolved factual allegations not only regarding defendant's conduct, but also regarding the District Attorney's office, which stands accused of routinely demanding such waivers in order to protect a police officer whose misdeeds it knows. The record in this case demonstrates that the practice of requiring the release of civil claims in exchange for dismissal of charges simply to insulate a municipality or its employees from liability can engender at least an appearance of impropriety or conflict of interest. Thus, the integrity of the criminal justice system mandates that an agreement made in the circumstances presented not be enforced by the courts.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Malicious Prosecution, §§70.5, 163.

NY Jur 2d, False Imprisonment and Malicious Prosecution, §89.

ANNOTATION REFERENCES

***383** Termination of criminal proceedings as result of compromise or settlement of accused's civil liability as precluding malicious prosecution action. 26 ALR4th 565.

POINTS OF COUNSEL

Richard A. Insogna for appellant.
I. A motion for summary judgment may not be granted where it appears that there are issues of material fact to be resolved by trial. (*Friends of Animals v Associated Fur Mfrs.,* 46 NY2d 1065; *Nidds v Procidano,* 95 AD2d 912; *Stillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395; *Koblenz Jewelers v Insurance Co. of N. Am.,* 88 AD2d 688; *Glick & Dolleck v Tri-Pac Export Corp.,* 22 NY2d 439.) II. There were material issues of fact presented in the record which require resolution at trial. III. Duress, such as to render the delivery of the release something other than the free and voluntary act of plaintiff, is an issue in this action. *(Matter of Ryder,* 279 App Div 1131; *People v Blakley,* 34 NY2d 311; *Dziuma v Korvettes,* 61 AD2d 677; *People v Siragusa,* 81 Misc 2d

368; *Dunkin' Donuts v Rovegno,* 100 AD2d 532.) IV. Failure of consideration, sufficient to invalidate the release, is an issue in this action. (*Ripley v International Rys.,* 8 NY2d 430; *Schram v Cotton,* 281 NY 499; *Keller v American Chain Co.,* 255 NY 94; *People v Castelo,* 24 AD2d 827.)

V. The practice of extracting releases or covenants not to sue in exchange for having criminal charges dropped is against public policy and the instrument by which it is sought to be accomplished is void. (*Rumery v Town of Newton,* 778 F2d 66; *Newton v Rumery,* 480 US 386; *Matter of Doe v Coughlin,* 71 NY2d 48; *People v Alvarez,* 70 NY2d 375; *Matter of Patchogue-Medford Congress of Teachers v Board of Educ.,* 70 NY2d 57; *People v P. J. Video,* 68 NY2d 296; *People v Class,* 67 NY2d 431.) VI. The result achieved in the court below is founded upon an incorrect rationale, mistaken facts and inapplicable law and should be reversed. (*People v Blakley,* 34 NY2d 311; *Newton v Rumery,* 480 US 386.)

Edward B. Flink and *Kevin Laurilliard* for respondent.

I. Release-dismissal agreements are valid and enforceable when the parties voluntarily and knowingly enter into such agreements. (*Newton v Rumery,* 480 US 386; *People v Blakley,* 34 NY2d 311; *Dziuma v Korvettes,* 61 AD2d 677; *People v Siragusa,* 81 Misc 2d 368; *Brown Bros. Elec. Contrs. v Beam Constr. Corp.,* 41 NY2d 397.) II. Summary judgment was properly granted. (*Willig v Rapaport,* 81 AD2d 862; *Capelin* ***384** *Assocs. v Globe Mfg. Corp.,* 34 NY2d 338; *Ehrlich v American Moninger Greenhouse Mfg. Corp.,* 26 NY2d 255; *Bernstein v Freudman,* 102 AD2d 805; *Martin Delicatessen v Schumacher,* 52 NY2d 105; *First Natl. Stores v Yellowstone Shopping Center,* 21 NY2d 630; *Brown Bros. Elec. Contrs. v Beam Constr. Corp.,* 41 NY2d 397; *Finserv Computer Corp. v Bibliographic Retrieval Servs.,* 125 AD2d 765; *Rotuba Extruders v Ceppos,* 46 NY2d 223.) III. The New York State Constitution does not invalidate release-dismissal agreements. (*People v P. J. Video,* 68 NY2d 296; *Rivers v Katz,* 67 NY2d 485; *Bellanca v New York State Liq. Auth.,* 54 NY2d 228; *Sharrock v Dell Buick-Cadillac,* 45 NY2d 152; *People v Isaacson,* 44 NY2d 511; *People v Hobson,* 39 NY2d 479; *Newton v Rumery,* 480 US 386; *PruneYard Shopping Center v Robins,* 447 US 74; *Cooper v California,* 386 US 58; *People v Fuller,* 57 NY2d 152.) IV. Public policy mandates that the release-dismissal agreement be enforced. (*Matter of Abramovich v Board of Educ.,* 46 NY2d 450; *Fourth Ocean Putnam Corp. v Suburbia Fed. Sav. & Loan Assn.,* 124 AD2d 550; *Buys v County of Nassau,* 133 AD2d 94; *Newton v Rumery,* 480 US 386.)

OPINION OF THE COURT

Per Curiam

The issue before us is whether a release from civil liability of a municipality and two police officers, given by plaintiff as a condition of the District Attorney's consent to dismissal of criminal harassment charges, should be enforced. We conclude that the release should not be enforced, and therefore deny defendant's motion to dismiss the complaint.

On July 20, 1984, plaintiff and a companion were stopped in a car by two City of Amsterdam police officers--one of them the defendant in the present case. Plaintiff alleges that defendant arrested him without cause and beat him without provocation. Plaintiff was charged with two counts of harassment, a violation (Penal Law § 240.25 [1]). Several months after his arraignment, while the charges were pending, plaintiff filed a notice of claim for injuries sustained in the course of the incident.

Plaintiff's lawyer and the Assistant District Attorney assigned to the case discussed the possibility of a negotiated disposition of the charges but plaintiff, maintaining that the charges were baseless, refused to accept the offer of an adjournment in contemplation of dismissal. Then, on December ***385** 19, 1984, shortly before trial, the prosecutor in open court offered to dismiss the charges provided plaintiff agreed to release the City and the two arresting officers from all civil claims arising from the incident. After discussing the offer with his attorney plaintiff accepted it, stating that he did so reluctantly, as this was the only way the matter could be disposed of without trial. The prosecutor gave no reason for imposing the condition.

After executing the release, plaintiff commenced the present tort action against defendant for malicious prosecution, false arrest, assault and battery. Defendant moved to dismiss the complaint on the ground that plaintiff had previously released all claims against him. In opposition, plaintiff contended that the Assistant District Attorney was aware that defendant had

been involved in many similar assaultive incidents leading to civil suits, that the District Attorney's office made a practice of demanding releases in those cases, that the prosecutor had opined that there was no merit to the charges against plaintiff but had insisted on obtaining a release, and that plaintiff had agreed to that condition because the expense and risk of trial were unacceptable but had been advised by his lawyer that the agreement would prove unenforceable. Supreme Court summarily dismissed the complaint, but the Appellate Division reversed and remitted for further proceedings, concluding that summary judgment had been improperly granted (127 AD2d 325).

At the hearing that followed, plaintiff's attorney testified that from the beginning, the prosecutor had conveyed to him the view that the criminal charges were unfounded, and that the City had repeatedly been sued over defendant officer's conduct. The prosecutor, by contrast, testified that he had believed the criminal case against plaintiff to be a good one, based on his conversations with the three police officer eyewitnesses and their reports. The reason proffered by the prosecutor for his ultimate decision was that "constantly being faced with the specter of a [civil] lawsuit, rather than proceed any further, the People decided that the most expedient solution to this case, and one that would be satisfactory to both parties, would be a dismissal, our consideration in return for a release from Mr. Cowles, his consideration." The prosecutor also testified that an affidavit he had submitted in connection with defendant's motion to dismiss had been prepared for him by defendant's attorney. Supreme Court again dismissed the complaint, finding that plaintiff had voluntarily ***386** entered into the release-dismissal agreement. The Appellate Division affirmed, concluding that plaintiff was "fully apprised of the rights he was waiving and the benefit he was receiving in exchange therefor." (138 AD2d 877.) We now reverse and deny the motion to dismiss.

The prosecutor's decision to condition dismissal of the criminal charges against plaintiff upon relinquishment of his right to seek civil damages for defendant's alleged misconduct was unrelated to the merits of the People's case. Consequently, there remain unresolved factual allegations not only regarding defendant's conduct, but also regarding the District Attorney's office, which stands accused of routinely demanding such waivers in order to protect a police officer whose misdeeds it knows. The record in this case demonstrates that the practice of requiring the release of civil claims in exchange for dismissal of charges simply to insulate a municipality or its employees from liability can engender at least an appearance of impropriety or conflict of interest. The integrity of the criminal justice system mandates that an agreement made in the circumstances presented not be enforced by the courts.

Although the Appellate Division noted the danger of coercion presented by the choice offered plaintiff, it found that plaintiff had voluntarily agreed to execute the release. That finding, having support in the record, is not reviewable by us. We cannot agree with the Appellate Division, however, that voluntariness is the central consideration in determining whether to give effect to the arrangement. Nor do we agree that the release-dismissal agreement entered into here is fundamentally the same as a plea bargain *(see,* 127 AD2d, at 328; *but see, id.* [Kane, J., concurring]). In plea bargains, there is an admission of wrongdoing by the defendant and imposition of an agreed punishment; in return for forgoing conviction on the highest charges, the prosecution and defense are spared the burden and risk of trial. The process thus may be advantageous to both sides and to the public as well, not only because of economy, but also because a wrongdoer is punished with speed and certainty.

The same cannot be said of the agreement in this case. Insofar as the integrity of the criminal justice system was concerned--the paramount interest here--on this record there was no benefit, only a loss. Assuming plaintiff to have been guilty of the criminal charges leveled against him (as the prosecutor maintains) the People's interest in seeing a wrongdoer ***387** punished has not been vindicated. Assuming him to have been innocent (as he maintains), or the case against him to have been unprovable, the prosecutor was under an ethical obligation to drop the charges without exacting any price for doing so. In either case, as in a case where the prosecutor simply determines that charges are not worth pursuing, such an agreement leaves unanswered questions about defendant's conduct in making the arrest and about the motives of the District Attorney's office. There is no public interest to be advanced by enforcing the agreement here. Rather, the agreement may be viewed as undermining the legitimate interests of the criminal justice system solely to protect against the possibility of civil liability; it surely does not foster public confidence that the justice system operates evenhandedly.

Insulation from civil liability is not the duty of the prosecutor. The prosecutor's obligation is to represent the People and to that end, to exercise independent judgment in deciding to prosecute or refrain from prosecution. This obligation cannot

be fulfilled when the prosecutor undertakes also to represent a police officer for reasons divorced from any criminal justice concern. To enforce a release-dismissal agreement under these circumstances is simply to encourage violation of the prosecutor's obligation.

In reaching this conclusion, we are aware that a plurality of the United States Supreme Court recently upheld a release-dismissal agreement similar to the one at issue *(see, Newton v Rumery,* 480 US 386). To the extent that the decision was based on the fact that in *Rumery* the prosecutor had what was deemed "an independent, legitimate reason * * * directly related to [the County Attorney's] prosecutorial responsibilities" *(id.,* at 398), we agree that such a reason--if genuine, compelling and legitimately related to the prosecutorial function--might overcome the strong policy considerations disfavoring enforcement of such agreements. We emphasize, however, that absent such reasons, release-dismissal agreements present an unacceptable risk of impairing the integrity of the criminal justice process.

Accordingly, the order of the Appellate Division should be reversed, with costs, and defendant's motion to dismiss the complaint denied.

Titone, J.

(Concurring).

I concur in the majority's decision to reverse, but I cannot agree with the majority's case-specific analysis, which purportedly is premised on this record alone ***388** and resolves only the enforceability of the agreement at issue here. Like the majority, I conclude that the release is invalid and that the affirmed findings of "voluntariness" by the courts below are not dispositive. I would hold, however, that, as a general proposition, these agreements, in which criminal charges are dismissed in exchange for the defendant's execution of a release from civil liability, offend public policy and will not be enforced. Accordingly, I write separately to explain my reasons for reversal.

Release/dismissal agreements discharging public officials and government agencies from civil liability as a *quid pro quo* for the dismissal of pending criminal charges against the releasor have been the subject of considerable debate in recent years *(see generally,* Fielkow, *42 USC § 1983--Buying Justice: The Role of Release-Dismissal Agreements in the Criminal Justice System,* 78 J of Crim L & Criminology 1119). Although the lower courts of this State have focused principally upon the potentially coercive aspects of these agreements *(see, Dziuma v Korvettes,* 61 AD2d 677; *see also, Matter of City of Cohoes v Spizowski,* 72 AD2d 847, 848 [Greenblott, J., concurring]; *People v Siragusa,* 81 Misc 2d 368), courts of other jurisdictions have looked beyond the private concerns of the litigants and considered their public policy implications *(see, Boyd v Adams,* 513 F2d 83, 88; *MacDonald v Musick,* 425 F2d 373, *cert denied* 400 US 852; *Dixon v District of Columbia,* 394 F2d 966, 969; *Gray v City of Galesburg,* 71 Mich App 161, 247 NW2d 338). The leading exposition on the subject to date is *Newton v Rumery* (480 US 386), in which a closely divided Supreme Court declined to adopt a per se rule of invalidity and upheld the particular release/dismissal agreement before it on the ground that it was voluntary and supported by what the majority deemed "an independent, legitimate reason * * * directly related to [the County Attorney's] prosecutorial responsibilities" *(id.,* at 398). Significantly, despite the deep divisions within the *Rumery* court, all of the Justices agreed that, regardless of their voluntary or involuntary character, release/dismissal agreements carry a serious potential for public mischief *(id.,* at 394-395 [plurality opn per Powell, J.]; *id.,* at 400-401 [O'Connor, J., concurring]; *id.,* at 410-415 [Stevens, J., dissenting]).

First, as noted by the United States Court of Appeals and acknowledged by the Supreme Court majority in *Rumery,* such agreements " 'tempt prosecutors to trump up charges in reaction to a defendant's [civil] claims, suppress evidence of ***389** police misconduct, and leave unremedied deprivations of constitutional rights' " (480 US, at 394, *supra*, quoting 778 F2d 66, 69). Second, the availability of such agreements creates a troublesome conflict of interest for prosecutors, who are called upon to balance the private concerns of witnesses and public servants against the legitimate concerns of their primary client, the People of the State of New York, in the enforcement of the criminal laws *(see,* 480 US, at 412-414 [Stevens, J., dissenting]). Third, they give rise to a serious risk that the societal interest in the prosecution of meritorious criminal charges will be compromised in an effort to protect local law

enforcement personnel from the embarrassment and expense that attends civil litigation *(see, id., at 400* [O'Connor, J., concurring]). Finally, by providing potential private litigants with a powerful incentive to forgo arguably meritorious claims, these release/dismissal arrangements interfere with an important mechanism for vindicating individual rights and holding public servants accountable, much "to the detriment * * * of society as a whole" *(id.)*.

As is evident even from this very limited list of concerns, the reasons for objecting to release/dismissal agreements extend far beyond their potential for coercion.[1] In addition to their potential for impairing the integrity of criminal justice process, such agreements encourage prosecutors to violate ethical rules which forbid attorneys from pressing criminal charges "solely to obtain an advantage in a civil matter" (Code of Professional Responsibility DR 7-105) and caution against using the criminal process to force settlement of private claims (Code of Professional Responsibility EC 7-21).[2] Even more seriously, by permitting prosecutors to utilize their ***390** considerable discretion over the decision to prosecute in the service of goals unrelated to any legitimate law enforcement concerns, they breed cynicism and deprive the public of the independent, disinterested prosecutorial judgment to which it is entitled.

Weighed against this very real potential for harm, the reasons that are most often cited in support of permitting release/dismissal agreements are insubstantial. The benefits of insulating municipalities and law enforcement officers from the burdens of defending against civil claims, however frivolous or lacking in legal merit, are simply not, without more, proper factors for prosecutors to consider in exercising their discretion to prosecute or withhold prosecution of particular crimes. Moreover, while reducing court congestion and promoting judicial economy are generally worthy goals, they cannot justify judicial approval of a *quid pro quo* arrangement that undermines the fundamental integrity of the criminal justice system. As this court has recently observed, "[t]he first order of business of the criminal courts * * * is justice, not economy or convenience" *(People v Ricardo B., 73 NY2d 228, 235)*. Similarly, the "first order of business" of the State's prosecutors, who have been accorded considerable discretion within their own sphere of responsibility *(see, Matter of Schumer v Holtzman, 60* NY2d 46; *People v Zimmer,* 51 NY2d 390, 394; *People v Di Falco,* 44 NY2d 482, 486-487; *People v Mackell,* 47 AD2d 209, *affd* 40 NY2d 59), is not to contribute to the improvement of the court system as a whole, but rather to ensure that, within the practical limits of the State's resources, the people are zealously and ethically represented in the criminal courts.

To be sure, there are many instances in which a legitimate prosecutorial purpose might exist for dismissing seemingly meritorious criminal charges.[3] For example, dismissal might well be deemed an appropriate course where the District Attorney's resources are overtaxed, the crime is not a serious one, the defendant does not pose a serious ongoing threat to society or a witness wishes to avoid public exposure. In such cases, however, the prosecutor already has an independent ***391** motive for seeking dismissal, and the decision to exact a civil release in addition would therefore constitute prosecutorial overreaching. On the other hand, where these or similar considerations are not present, an agreement by the prosecutor to dismiss meritorious charges in exchange for a civil release would be difficult to justify.

For all of these reasons, I conclude that release/dismissal agreements are violative of public policy and should not be given judicial recognition. A promise is ordinarily deemed unenforceable when the interests favoring enforcement are "clearly outweighed in the circumstances" by strong public policies militating against enforcement *(see,* Restatement [Second] of Contracts § 178 [1]). The substantial potential for corruption of the system that is inherent in these agreements, coupled with the potential for misuse of prosecutorial authority and the dubious societal benefits they confer, counsels against the adoption of any rule that would sanction, or even merely encourage, their use.[4]

It is on this point that the majority and I part company. Although the majority Per Curiam opinion contains much dictum suggesting its disapproval of these release/dismissal agreements, the majority has pointedly stopped short of holding that release agreements obtained in exchange for dismissal of criminal charges should generally not be enforced. In fact, one must search the majority Per Curiam with great care in order to find a legal principle that has some application beyond "the circumstances presented" (majority opn, at 386). Apparently, and without acknowledging as much, the majority has opted for an approach similar to that adopted by both the plurality and the concurrer in *Newton v Rumery* (480 US, at 392 [plurality opn per Powell, J.],

399 [O'Connor, J., ***392** concurring], *supra),* which involves analyzing the validity of release/dismissal agreements on a case-by-case basis. I have several serious objections to this approach--both in principle and as the majority has applied it here.

First, although it has invoked "the record" and indicated that its finding of unenforceability is limited to the circumstances presented in this particular case, the majority has made factual assumptions that are not actually based on what was established below. The dispositive fact for the majority appears to be that the District Attorney entered into the challenged agreement "solely to protect against the possibility of civil liability" (majority opn, at 387). In fact, although plaintiff has made that claim at various points in this litigation, defendant has disputed it. Moreover, the Assistant District Attorney who actually obtained the release explained at the evidentiary hearing held on defendant's motion that he did so because it was his "understanding from dealing with [plaintiff's trial attorney] that he [the attorney] would always blame the police" and because he (the Assistant District Attorney) simply "got tired of fighting with [plaintiff's trial attorney]." Thus, it is far from established that the people's primary goal in trading a dismissal for a civil release was, in reality, to insulate the police or any other government officer from exposure to civil liability.

The majority's effort to wrestle the disputed facts presented here into manageable form points up some of the more fundamental difficulties with its insistence on a case-specific approach to determining the validity of these release/dismissal agreements.[5] Obviously, any inquiry into the motives of parties to a prior agreement is problematic, since it invites post hoc rationalizations and, in some instances, testimony that is tailored to the contours of the case law. Further, the case-by-case approach is unsatisfactory because it would require the courts to second-guess the soundness, legitimacy and probity of the prosecutor's expressed rationale, bringing the courts into direct conflict with the well-established rule that, as ***393** elected law enforcement officials, prosecutors have virtually unreviewable discretion to act within the proper sphere of their authority *(see, Matter of Schumer v Holtzman,supra; People v Zimmer,supra; People v Di Falco,supra; People v Mackell, supra).*

Finally, the majority's case-specific approach, which provides little guidance for District Attorneys, future criminal defendants and their attorneys, is unsound from the standpoint of judicial policy, because it will lead to uncertainty as to the enforceability of these agreements in other cases. Such uncertainty is a particularly undesirable result in this context, since it creates the risk that a prosecutor entering into a release/dismissal agreement will discharge his side of the bargain by dismissing the criminal charges, only to discover after litigation in a subsequent civil proceeding--to which he is not a party--that the defendant's side of the bargain, the release, is unenforceable. Manifestly, such a degree of unpredictability would not be tolerated in the law governing commercial contracts. I find it difficult to understand why the majority is willing to tolerate it in this specialized area of release/dismissal agreements, in which the public interest is so directly implicated.

I do not suggest that there could never be a set of facts in which both parties' reasons for entering into a particular release/dismissal agreement are so clear and compelling that they would outweigh the strong public policies that generally preclude enforcement of such agreements. However, in this case of first impression in our court, there is no need to speculate about the type of circumstances that might warrant creating an exception to a general rule against enforcement. The common-law process is sufficiently flexible to accommodate and account for special situations as they arise. Accordingly, unlike my colleagues in the majority, I have no reluctance to reach the conclusion that, as a general matter, these agreements violate public policy, while reserving the possibility that some novel fact pattern that is not now readily apparent might subsequently suggest itself as an exception.

In this case, it is sufficient to note that there are no special circumstances and no compelling reasons to give judicial recognition to the release/dismissal agreement that is proffered as a defense to plaintiff's claims. Accordingly, I agree ***394** that the release is invalid and that, consequently, the motion to dismiss the complaint should be denied.

Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Hancock, Jr., and Bellacosa concur in Per Curiam opinion; Judge Titone concurs in result in a separate opinion.

Order reversed, etc. ***395**

Footnotes

1 This is not to suggest that the coercive aspects of these agreements are insignificant. To the contrary, in most instances, the circumstances surrounding these agreements are inherently coercive, since they are made at a time when the civil claimant is facing the prospect of a criminal trial, with all of its accompanying risk, expense and embarrassment. Under such circumstances, even an intelligent and informed defendant, whether innocent or guilty of the charges, would be hard-pressed to resist an offer permitting him to walk away without further consequence in exchange for relinquishing a civil claim which might ultimately prove unsuccessful anyway.

2 It would be naive not to recognize that law enforcement personnel occasionally file preemptive disorderly conduct, obstructing governmental administration and harassment charges in order to obtain bargaining leverage when they anticipate that an unpleasant encounter between police and a private citizen will lead to a civil lawsuit. As was noted in *Boyd v Adams* (513 F2d 83, 89), " 'the danger of concocted charges is particularly great because complaints against the police usually arise in connection with arrests for extremely vague offenses such as disorderly conduct or resisting arrest.' "

3 I note that the majority's Per Curiam opinion does not seem to take this possibility into account.

4 To be distinguished are ordinary plea bargains in which the defendant relinquishes his right to a trial on pending criminal charges in exchange for more lenient penal treatment. In plea bargaining situations, the defendant admits his guilt and the societal interest in punishing wrongdoing is, at least in some measure, fulfilled *(see, Newton v Rumery,* 480 US 386, 393, n 3 [plurality opn]). In contrast, when criminal charges are disposed of through release/dismissal agreements, the only interest that is satisfied is that of those who wish to see the civil litigation finally resolved. Further, as Justice Stevens noted in his dissenting opinion in *Newton v Rumery (supra,* at 411), unlike plea bargains in which some penal sanction is imposed, these agreements "exact [ ] a price unrelated to the character of the defendant's own conduct." Thus, conventional plea bargains represent compromises that are consistent with the purposes of the governing penal statutes, while release/dismissal agreements do not.

5 At an earlier point in its Per Curiam opinion, the majority notes that "there remain unresolved factual allegations" and "unanswered questions" regarding defendant's conduct, the practices of the District Attorney's office in general and the motives of that office in entering into this particular agreement (majority opn, at 386, 387). These acknowledgements make it even more difficult to understand the basis for the majority's assumption that the purpose of the challenged agreement was to protect the police.

New York Official Reports

69 N.Y.2d 957, 509 N.E.2d 336, 516 N.Y.S.2d 641

In the Matter of Darvin M., Appellant,
v.
Thomas L. Jacobs, as Commissioner of the Office of Probation, et al., Respondents.

Court of Appeals of New York
111
Argued March 23, 1987;
decided May 5, 1987

CITE TITLE AS: Matter of Darvin M. v Jacobs

SUMMARY

Appeal, by permission of the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered January 7, 1986, as amended by a judgment entered January 13, 1986, in a proceeding pursuant to CPLR article 78, denying petitioner's application to prohibit respondents from allowing New York City Department of Probation attorneys to participate as counsel in a probation revocation proceeding brought against him, and dismissing the proceeding. ***958**

HEADNOTES

Proceeding Against Body or Officer
Prohibition
Participation of Probation Department Attorneys as Counsel in Probation Revocation Proceeding

(1) The Appellate Division properly denied petitioner's application to prohibit respondents from allowing New York City Department of Probation attorneys to participate as counsel in a probation revocation proceeding brought against him. It cannot be said that the Department of Probation is clearly acting in excess of its authorized powers in functioning as counsel in presenting probation violations at revocation hearings. While a District Attorney may present evidence of alleged violations at revocation hearings, the Department of Probation is not usurping authority vested exclusively in the District Attorney under County Law § 927 by participating as counsel. A violation of probation giving rise to revocation proceedings is not a "crime" or "offense" which, pursuant to the County Law, must be prosecuted by a District Attorney *(see,* County Law §§ 700, 927). Nor is a revocation proceeding a "criminal action" under the Criminal Procedure Law at which a "prosecutor" represents the People. A "criminal action" terminates upon sentencing while a probation revocation, in contrast, is a "criminal proceeding" brought after the completed "criminal action", the purpose of which is to determine if defendant's subsequent acts violate the conditions of the original sentence, not whether the acts constitute a crime.

APPEARANCES OF COUNSEL

Michele S. Maxian and *Caesar D. Cirigliano* for appellant.
Peter L. Zimroth, Corporation Counsel (Michael S. Adler and *Francis F. Caputo* of counsel), for Thomas L. Jacobs, as Commissioner of the Office of Probation and another, respondents.
Elizabeth Holtzman, District Attorney (Barbara D. Underwood and *Andrew J. Frisch* of counsel), respondent *pro se.*
Robert Abrams, Attorney-General (Abigail Peterson, O. Peter Sherwood and *Douglas D. Aronin* of counsel), for Francis X. Egitto, as Acting Justice of the Supreme Court, respondent.

OPINION OF THE COURT

The judgment of the Appellate Division should be affirmed, without costs.

Petitioner brought a proceeding pursuant to CPLR article 78 to prohibit respondents from allowing New York City Department of Probation attorneys to participate as counsel in a probation revocation proceeding brought against him. The Appellate Division properly denied the requested relief. It cannot be said that respondent New York City Department of Probation is clearly acting "in excess of its authorized powers" ***959** *(Matter of Jacobs v Altman,* 69 NY2d 733, 734; *see, Matter of State of New York v King,* 36 NY2d 59, 62) in functioning as counsel in presenting probation violations at revocation hearings *(see,* Executive Law §§ 243, 255 [3]; CPL 410.70; 9 NYCRR 352.1 [e]; 352.3 [b] [2]; 352.4 [a] [1]; 355.3 [b] [1]). While a District Attorney may present evidence of alleged violations at revocation hearings, the Department of Probation is not

usurping authority vested exclusively in the District Attorney under County Law § 927 by participating as counsel.

A violation of probation giving rise to revocation proceedings is not a "crime" or "offense" *(see,* Penal Law § 10.00 [1], [6]) which, pursuant to the County Law, must be prosecuted by a District Attorney *(see,* County Law §§ 700, 927). Nor is a revocation proceeding a "criminal action" (CPL 1.20 [16]) under the Criminal Procedure Law at which a "prosecutor" represents the People (CPL 1.20 [31]). A "criminal action" terminates upon sentencing *(see,* CPL 1.20 [16]; *cf., Matter of Schumer v Holtzman,* 60 NY2d 46). A probation revocation, in contrast, is a "criminal proceeding" brought after the completed "criminal action" *(see,* CPL 1.20 [18]). Its purpose is to determine if defendant's subsequent acts violate the conditions of the original sentence not whether the acts constitute a crime.

Titone, J.

(dissenting). In holding that probation violation charges may be "presented" to the court by either the Probation Department or the District Attorney, or both, the majority has overlooked the important distinctions between the roles and responsibilities of those two law enforcement agencies. In the process, the majority has redefined the responsibilities of the District Attorney's office in a manner that relieves it of the duty to represent the People's interest in the important area of securing appropriate punishment for recidivist probationers. Since the conclusion the majority has reached is neither compelled by the relevant statutes nor supported by sound policy, we must, respectfully, dissent.

We note at the outset that what is at stake here is not the unquestionable right of the Probation Department to appear, by counsel or otherwise, at probation revocation proceedings, but rather the right of that agency to perform the function of *prosecutor* at such hearings. Although the majority refers to the Probation Department's right to "participate as counsel" and some of the briefs submitted here and below suggest that the Department is merely seeking an enhancement of its ***960** traditional role as advisor to the court, it is clear from the Department's own submissions that it is asserting, quite forthrightly, a right to manage the prosecution, present and cross-examine witnesses and carry out all of the other functions that would otherwise be performed by a prosecutor. Indeed, the procedural history leaves little doubt about the nature of the activity at issue in this appeal. Petitioner had initially moved in the trial court for an order disqualifying the Probation Department attorney from appearing in a prosecutorial role and, upon denial of that motion, brought the present prohibition proceeding seeking the same specific, narrow relief. Thus, the issue squarely before us is whether, in the absence of the District Attorney, the Probation Department has the power to prosecute probation violations. On the merits of that issue, we would hold in petitioner's favor, both as a matter of statutory interpretation and as a matter of public policy.

It is clear that the Probation Department cannot enter the proceedings as prosecutor pursuant to an informal agreement if the duty to conduct those proceedings on the People's behalf is among the duties imposed on the District Attorney by County Law § 700 (1) and § 927 *(see, Matter of Schumer v Holtzman,* 60 NY2d 46).[1] However, the majority has concluded, based upon its construction of County Law § 700 (1) and § 927 in light of the definitional provisions of the Criminal Procedure and Penal Laws (CPL 1.20 [16], [18], [31]; Penal Law § 10.00 [1], [6]), that the District Attorney's obligations under the former do not include appearing at probation revocation hearings because such hearings are not "criminal actions" *(see,* CPL 1.20 [16], [31]) and, further, because "[a] violation of probation giving rise to revocation proceedings is not a 'crime' or 'offense' " within the meaning of Penal Law § 10.00 (1) and (6) (majority mem, at 959). Neither of these conclusions satisfactorily resolves the issue before us.

County Law § 700 (1) and § 927, which impose on the District Attorney "the duty * * * to conduct all prosecutions for crimes and offenses," make no reference to "criminal actions" (CPL 1.20 [16]) or "criminal proceedings" (CPL 1.20 [18]). Consequently, the classification of probation revocation ***961** proceedings as one or the other does not advance analysis.[2] Even more fundamentally, the majority's conclusion that "[a] violation of probation giving rise to revocation proceedings is not a 'crime' or 'offense' " within the meaning of County Law § 700 (1) and § 927 is unpersuasive. Probation revocation proceedings are conducted not to punish the offender for the charged violation, but rather to determine whether the

offender should be punished more severely for the crime of which he was previously convicted.[3] Although the probation violation may be the occasion for the proceeding, it is the prior conviction, and not the violation, that "gives rise to" the proceeding. A probation revocation proceeding is, in actuality, a continuation of the original felony prosecution that the District Attorney initiated, and the District Attorney's obligation to act as the People's representative in that phase of the prosecution is part of his or her statutory duty "to conduct all prosecutions for crimes and offenses" (County Law § 700 [1]; § 927).

In a somewhat different context, this court observed that "[a] prosecution for crime, within the meaning of [the identical predecessor provision of the County Law], includes accomplishing the imposition of the punishment. *All the means provided by law* to bring the conviction, sentence and the adjudged punishment to a criminal offender constitute the prosecution for the crime committed by him" *(Matter of Lewis v Carter,* 220 NY 8, 15 [emphasis supplied]). While the *Lewis* holding is not dispositive here, the court's analysis supports the conclusion that the prosecution of a crime includes not only pursuing the matter through trial or plea and imposition of a revocable probationary sentence, but also continued representation of society's interest in obtaining appropriate punishment and, more specifically, advocacy of incarceration if, in ***962** the District Attorney's judgment, the defendant's subsequent behavior demonstrates that probation was not an appropriate disposition.

This is not to suggest that because probation revocation matters fall within the District Attorney's exclusive statutory duties, the District Attorney must litigate or even physically appear at every hearing. As is true for every aspect of a criminal prosecution, the District Attorney has broad discretion to determine the extent to and manner in which a particular criminal act should be prosecuted *(see, e.g., People v Di Falco,* 44 NY2d 482). Thus, the District Attorney, cognizant of his or her office's limited resources, may determine that an individual probation violator does not pose a serious threat to society and that, as a consequence, vigorous prosecution of the violation is not warranted. In such a situation, the District Attorney may simply enter a formal written "appearance" but decline to participate or take an adversarial position. Alternatively, where the danger to society is deemed serious but the practical resources needed to prosecute are lacking, the District Attorney may, in accordance with law, deputize an attorney to prosecute the matter on the People's behalf *(see, Matter of Maisonet v Merola,* 69 NY2d 965 [where Probation Department attorney was formally deputized for the purpose of prosecuting probation violation]). What is forbidden by our statutes is not the District Attorney's exercise of discretion in favor of declining to physically appear or prosecute, but rather the informal delegation to another individual or agency of the exclusive prerogative to exercise such discretion *(Matter of Schumer v Holtzman, supra).* In other words, under County Law § 700 (1) and § 927, a District Attorney may or may not elect to prosecute, but no other arm of government may enter the proceeding or make that choice in his or her stead.[4]

The reasons for placing the responsibility exclusively in the District Attorney's hands are underscored by the very arguments that respondents have made in this case. Respondents have argued that since CPL 410.70, which prescribes the ***963** procedure for probation revocation hearings, does not specifically designate the District Attorney as the proper prosecuting party, the prosecution of a probation revocation charge may be conducted either by the District Attorney or the Department of Probation, whichever agency has the resources and an interest in pursuing the matter.[5] Indeed, the District Attorney here has asserted a right to "rely on the efforts of the Probation Department's attorneys" to "conserve her own resources," and the Probation Department has stated, quite candidly, that it has established an independent unit of attorneys to litigate violations on the Department's behalf "to fill th [e] gap" created by the "general practice of the district attorneys of the five counties of the City of New York not to appear to litigate such charges on behalf of the State."

However, to allow whichever agency has the better resources[6] or the most interest in the case to manage the prosecution is to open the door to precisely the type of inconsistent and conflicting policy determinations that undermine public confidence in the criminal justice system. Moreover, the suggestion implicit in the District Attorney's argument here--that because of limited resources it is preferable in most cases to rely on the energy and commitment of another agency--seems an unacceptable derogation of the trust reposed in that office by the voters.

The District Attorney is a constitutional, elected officer (NY Const, art XII, §13) charged by law with the responsibility to represent the People of the State of New York and to formulate

prosecutorial policy. Formulating such policy includes not ***964** only determining which crimes and offenders should be prosecuted *(see, People v Mackell,* 47 AD2d 209, 217-218, *affd* 40 NY2d 59), but also assessing, in light of available resources, the manner in and extent to which probationers, who remain within the trial court's continuing jurisdiction after sentence *(see,* CPL 410.50 [1]; Bellacosa, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL 410.20, at 255), should be punished in order to protect the public. In contrast, in our system, the role of the Probation Department, an unelected administrative agency, is to supervise probationers *(see,* CPL 410.50 [2]; Executive Law § 255 [2]), enforce the conditions of probation imposed by the sentencing court (9 NYCRR 352.3 [b] [1]), inform the court when a violation has occurred (9 NYCRR 352.3 [b] [2]) and provide information and assistance to the court charged with the ultimate duty of determining whether incarceration is necessary. The agency's role is, in short, to administer the probation system evenhandedly and fairly. It is simply not the business of that agency to represent the People of the State of New York or to seek justice on their behalf by entering the probation revocation process as a litigant.

Dissatisfied as it may be with the low priority the District Attorney admittedly places on pursuing probation violators, the Probation Department cannot take it upon itself to fill the vacuum it perceives. Under our State's system, it is the District Attorney's office which has been vested with the exclusive authority to represent the People, and its duties may not be assumed nor its choice of priorities second-guessed by an administrative agency charged with the entirely separate responsibility of supervising probationers and enforcing the orders of the court.

For all of these reasons, we cannot agree that the District Attorney's office and the Probation Department are entitled to shuffle the responsibility to prosecute probation violators between themselves simply as a discretionary matter "concerning the allocation of the resources of their respective offices," as the District Attorney here has argued. And, since the majority's conclusion is not required by the applicable statutes, we dissent and vote to reverse the Appellate Division order and grant the petition for an order prohibiting the Probation Department from acting as prosecutor in petitioner's probation revocation hearing.

Chief Judge Wachtler and Judges Simons, Kaye, Hancock, Jr., and Bellacosa concur; Judge Titone dissents and votes to reverse in an opinion in which Judge Alexander concurs.

Judgment affirmed, without costs, in a memorandum. ***965**

Footnotes

1 Section 927 of the County Law applies to District Attorneys within the five counties of New York City, while section 700 applies to the District Attorneys in the other counties. The provisions are identical with regard to the District Attorney's duty to prosecute crimes.

2 Certainly, the majority does not intend to suggest that the District Attorney's responsibilities terminate with the end of the "criminal action" as that term is defined in CPL 1.20 (16). That conclusion would lead to the unacceptable result that the District Attorney has no duty to represent the People in such postjudgment proceedings as appeals *(but see, People v Pitsley,* 37 AD2d 905; *People v Wright,* 22 AD2d 754, *affd without opn* 16 NY2d 736, *cert denied* 384 US 972) and motions to vacate brought under article 440 of the Criminal Procedure Law.

3 Indeed, the proceedings are conducted under the caption and indictment number assigned to the original criminal action, and the sentence imposed upon revocation must be one that is authorized for the original crime, not for the criminal acts underlying the violation charge *(see,* CPL 410.70 [5]; Penal Law § 60.01).

4 Even in *People v Van Sickle* (13 NY2d 61, 62-63), which involved the prosecution of a misdemeanor assault charge by a lay complaining witness, a majority of this court agreed that the County Law "does not necessarily mean that the District Attorney or his deputy must be physically present at every criminal hearing [; but] it [does mean] that * * * the District Attorney, as the elected representative of the people * * * must carry the responsibility [imposed by the statute] and must set up a system whereby he knows of all the criminal prosecutions in his county."

5 A more plausible interpretation would be that the Legislature did not contemplate the presence of a prosecuting attorney at all at these "summary" proceedings *(see,* CPL 410.70 [3], [4]). If that were the case, however, there would be even further reason to reject the Probation Department's present effort to appear in a prosecutorial role.

6 The District Attorney's brief refers to a "dramatic decline of the effectiveness of probation as a meaningful alternative to incarceration", due in large measure to staff reductions in the Probation Department and probation officers' "unmanageable" caseloads. The assertion that "thousands of probationers went virtually unsupervised and an astounding number of them continued to commit crimes" seems more than a little ironic, in view of the present claim that the Probation Department, and not the District Attorney, is pragmatically better equipped to prosecute violations. If, as the District Attorney suggests, the lack of adequate probation supervision is a major cause of recidivism, one can only hope that the Probation Department has taken steps to ensure that its supervisory staff is sufficient to perform that primary function before dedicating its resources to hiring attorneys for the purpose of prosecuting violators.

New York Official Reports

147 Misc.2d 513, 558 N.Y.S.2d 455

The People of the State of New York, Respondent,
v.
Duane Anthony Antis, Appellant.

County Court, Fulton County,
1595
June 11, 1990

CITE TITLE AS: People v Antis

HEADNOTES

Crimes
Adjournment in Contemplation of Dismissal
Restoration of Matter to Calendar by Judge Sua Sponte

(1) In accordance with separation of powers principles, a town court does not have the power *sua sponte* to restore to its calendar a case that had been adjourned in contemplation of dismissal pursuant to CPL 170.55 where defendant failed to perform a condition of the adjournment; the actions of the Town Justice in issuing a warrant for defendant's arrest and in accompanying the arresting officer to the defendant's residence were improper. Moreover, the sentence imposed on the 16-year-old defendant was harsh and excessive: a 60-day jail term and three years' probation for a defendant with no prior record who was charged with the theft of $15 worth of milk shocks the conscience of the court.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Criminal Law, §§ 513, 516.

CPL 170.55.

NY Jur 2d, Criminal Law, §§2198, 2790, 2841, 2842, 3018.

ANNOTATION REFERENCES

See Index to Annotations under Nolle Prosequi; Sentence and Punishment.

APPEARANCES OF COUNSEL

Robert A. Martin for appellant. *William H. Gritsavage, District Attorney,* for respondent.

OPINION OF THE COURT

Angelo D. Lomanto, J.

This matter comes before me on defendant's appeal from a conviction and sentence in the Town Court of the Town of Northampton.

FINDINGS OF FACT

The defendant, a 16-year-old boy, was charged with the larcenous taking of two cases of milk, having a total value of $14.82 from the Northville High School on November 14, ***514** 1989. On December 1, 1989 the defendant appeared with his mother before Town Justice Orloff, and on the motion of the Fulton County District Attorney, defendant was granted an adjournment in contemplation of dismissal (A.C.D.) pursuant to CPL 170.55.

This disposition was conditioned upon the defendant performing community service at the Northville High School for 12 hours. Evidently the defendant failed to complete this service. The defendant was instructed by the court to appear on February 2, 1990 in a written notice. The defendant appeared with his mother and the court, *sua sponte,* revoked the adjournment in contemplation of dismissal. This District Attorney was not present. Then the defendant pleaded guilty to the original charge. The court ordered a probation report, and the matter was adjourned without date.

On April 4, 1990 the defendant was arrested for unauthorized use of a motor vehicle in the third degree. On that same day Judge Orloff had a phone conversation with the defendant's mother. She evidently told him that the defendant was uncontrollable and she was afraid he would run away. There is no indication that the defendant failed to appear before the court in the interim as no appearance had been scheduled. Immediately thereafter the court issued a bench warrant for the defendant's arrest.

The report of the Deputy Sheriff who arrested the defendant indicates that Judge Orloff accompanied the arresting officer as he visited several locations in the village of Northville where the defendant was likely to be. Eventually the Judge

and the officer found the defendant at his home and he was arrested there. The defendant was put in jail and bail set at $2,500. The next day Judge Orloff sentenced the defendant to 60 days in jail and three years' probation.

CONCLUSIONS OF LAW

The first issue before me is whether the court may, on its own motion, restore a case to the calendar that has been adjourned in contemplation of dismissal pursuant to CPL 170.55. With the resources available to me I am unable to find a reported case in this State where that issue has been decided. The issue has been addressed by several courts in dicta, but the courts in question reached significantly different conclusions.

In *People v Pomerantz* (76 Misc 2d 766 [Crim Ct, NY County 1974]), the court denied the prosecutor's application ***515** to restore a case previously given A.C.D. treatment to the Criminal Calendar. The court then went on to state (at 768) "The statute does not in any manner prohibit the court from restoring the case to the calendar; it simply states under what conditions the court *must* restore the case. It does not purport, in any way, to prevent the court with jurisdiction over the original matter, in furtherance of justice, from restoring the case to the calendar should the court be of the judgment that there has been a change in the facts and circumstances under which the A.C.D. was granted or that, based upon additional facts presented, the motion to adjourn the proceeding in contemplation of dismissal should not have been granted in the first place." *(See, also, People v Hurt,* 78 Misc 2d 43 [Crim Ct, Bronx County 1974]; *People v Parr,* 89 Misc 2d 11 [Dist Ct, Nassau County 1976].)

Directly opposed is a case decided in the same court 10 years later. (*People v Clark,* 123 Misc 2d 674 [Crim Ct, NY County 1984].) There the District Attorney moved to restore an A.C.D. case to the calendar because the defendant had commenced civil action against the various complainants. The court clearly did not view this as a particularly good ground on which to revoke an A.C.D. but would not subject the prosecutor to a rigorous standard in review of his application. "In this court's view, prosecutors should be given great leeway with such applications. The District Attorney is, after all, the sole authority in determining who should or should not be prosecuted, and the judiciary should not interfere with the exercise of that authority" (*supra,* at 676).

I find the reasoning of the court in *People v Clark (supra)* convincing. Because of the actions of the court below after the case herein was restored to the calendar I find it necessary to review the theory of separation of powers and prosecutorial discretion at some length. A succinct and lucid statement of these principles is set forth in *Matter of Hassan v Magistrates' Ct.* (20 Misc 2d 509, 511 [Sup Ct, Queens County 1959]):

"In the field of criminal law, the boundaries of the respective spheres of the three branches of Government are clearly defined. The Legislature makes the law and defines the offense. The executive authority executes and enforces the law. Acting through a District Attorney or the Attorney-General, the charge of violation of law is formulated and the criminal proceeding initiated. It is then for the judiciary to interpret and apply the law in the particular case where the charge is made. ***516**

"Each function is separate and distinct. Each branch of Government is burdened with its own responsibility and the judicial branch under ordinary circumstances should not sit in judgment on the discretion lodged in the others."

Perhaps even more pertinent to the issues at hand is the reasoning of the court in *Matter of McDonald v Sobel* (272 App Div 455, 461 [2d Dept 1947]): "At common law no part of the power to accuse a person of crime or to prosecute a person for crime was vested in a court. These powers were vested elsewhere. The power to prosecute crime and control the prosecution, after formal accusation had been made, was reposed in a prosecuting officer, an Attorney-General or a District Attorney. When the Code of Criminal Procedure was enacted, declaratory for the most part of the common law, this allocation of power was continued."

In short, the decision of if and how a case is to be prosecuted in local criminal court rests with the office of the District Attorney of this county. The town court does not have the power to restore a case to its calendar that has been adjourned in contemplation of dismissal pursuant to CPL 170.55.

Further I find that the actions of the Town Justice in issuing a warrant for the arrest of the defendant and accompanying the arresting officer to the defendant's residence were improper. Finally, had all other proceedings in this case been regular I would strike the sentence of the defendant as harsh and excessive. A 60-day/three-year sentence for a 16-year-old defendant with no prior record who has been charged with the

theft of $15 worth of milk is of such a nature as to shock the conscience of this court.

The conviction herein is vacated and set aside. This matter is remanded to the Town Court of the Town of Northampton before another Judge of the said court, for further proceedings consistent herewith. ***517**

147 Misc.2d 513
County Court, Fulton County, New York.

The PEOPLE of the State of New York, Plaintiff
v.
Duane Anthony ANTIS, Defendant.

June 11, 1990.

Synopsis

Defendant was convicted of theft in the Town Court of the Town of Northampton, Orloff, J. On appeal, the County Court, Fulton County, Angelo D. Lomanto, J., held that town court does not have power to restore case to its calendar that has been adjourned in contemplation of dismissal.

Vacated and remanded.

West Headnotes (3)

[1] **Criminal Law** Reinstatement

Decision of if and how case is to be prosecuted in local criminal court rests with office of District Attorney of county; town court does not have power to restore case to its calendar that has been adjourned in contemplation of dismissal. McKinney's CPL § 170.55.

1 Case that cites this headnote

[2] **Arrest** Authority under warrant

Criminal Law Bench warrant or other process after indictment

Town justice's actions in issuing warrant for arrest of 16–year-old theft defendant, though defendant had not failed to appear before court, and in accompanying arresting officer to defendant's residence were improper.

[3] **Larceny** Nature and Extent of Punishment

Sentence of 60 days in jail with three years probation for a 16–year-old defendant with no prior record who had been charged with theft of $15 worth of milk would be stricken as harsh and excessive.

Attorneys and Law Firms

****455 *513** William H. Gritsavage, Johnstown, for plaintiff.

Duane A. Antis, Robert A. Martin, Johnstown, for defendant.

DECISION AND ORDER

ANGELO D. LOMANTO, County Judge.

This matter comes before me on defendant's appeal from a conviction and sentence in the Town Court of the Town of Northampton.

FINDINGS OF FACT

The defendant, a sixteen year old boy, was charged with the larcenous taking of two cases of milk, having a total value of $14.82 from the Northville High School on November 14, ***514** 1989. On December 1, 1989 the defendant appeared with his mother before Town Justice Orloff, and on the motion of the Fulton County District Attorney, defendant was granted an Adjournment in Contemplation of Dismissal pursuant to Criminal Procedure Law Section 170.55.

This disposition was conditioned upon the defendant performing community service at the Northville High School for 12 hours. Evidently the defendant failed to complete this service. The defendant was instructed by the Court to appear on February 2, 1990 in a written notice. The defendant appeared with his mother and the Court, sua sponte, revoked the Adjournment in Contemplation of Dismissal. The District Attorney was not present. Then the defendant pled guilty to the original charge. The Court ordered a probation report, and the matter was adjourned without date.

On April 4, 1990 the defendant was arrested for Unauthorized Use of a Motor Vehicle in the Third Degree. On that same day Judge Orloff had a phone conversation with the defendant's mother. She evidently told him that the defendant was uncontrollable and she was afraid he would run away. There

is no indication that the defendant failed to appear before the court in the interim as no appearance had been scheduled. Immediately thereafter the court issued a bench warrant for the defendant's arrest.

The report of the deputy sheriff who arrested the defendant indicates that Judge Orloff accompanied the arresting officer as **456 he visited several locations in the Village of Northville where the defendant was likely to be. Eventually the Judge and the officer found the defendant at his home and he was arrested there. The defendant was put in jail and bail set at $2,500. The next day Judge Orloff sentenced the defendant to sixty days in jail and three years probation.

CONCLUSIONS OF LAW

The first issue before me is whether the court may, on its own motion, restore a case to the calendar that has been adjourned in contemplation of dismissal pursuant to Criminal Procedure Law Section 170.55. With the resources available to me I am unable to find a reported case in this state where that issue has been decided. The issue has been addressed by several courts in dicta, but the courts in question reached significantly different conclusions. In *People v. Pomerantz,* 76 Misc.2d 766, 351 N.Y.S.2d 613 (New York County Criminal Court, 1974), the court denied the prosecutor's application *515 to restore a case previously given A.C.D. treatment to the criminal calendar. The court then went on to state "The statute does not in any manner prohibit the court from restoring the case to the calendar; it simply states under what conditions the court *must* restore the case. It does not purport, in any way, to prevent the court with jurisdiction over the original matter, in furtherance of justice, from restoring the case to the calendar should the court be of the judgment that there has been a change in the facts and circumstances under which the A.C.D. was granted or that, based upon additional facts presented, the motion to adjourn the proceeding in contemplation of dismissal should not have been granted in the first place." [at 768, 351 N.Y.S.2d 613] See also *People v. Hurt,* 78 Misc.2d 43, 355 N.Y.S.2d 728 (Bronx County Criminal Court, 1974), *People v. Paar,* 89 Misc.2d 11, 390 N.Y.S.2d 776 (Nassau County District Court, 1976).

Directly opposed is a case decided in the same court ten years later. *People v. Clark,* 123 Misc.2d 674, 474 N.Y.S.2d 409 (New York County Criminal Court, 1984). There the District Attorney moved to restore an A.C.D. case to the calendar because the defendant had commenced civil action against the various complainants. The court clearly did not view this as a particularly good ground on which to revoke an A.C.D. but would not subject the prosecutor to a rigorous standard in review of his application. "In this court's view, prosecutors should be given great leeway with such applications. The District Attorney is, after all, the sole authority in determining who should or who should not be prosecuted, and the judiciary should not interfere with the exercise of that authority. (cites omitted)" [at 676, 474 N.Y.S.2d 409]

I find the reasoning of the Court in *People v. Clark* convincing. Because of the actions of the Court below after the case herein was restored to the calendar I find it necessary to review the theory of separation of powers and prosecutorial discretion at some length. A succinct and lucid statement of these principles is set forth in *Matter of Hassan v. Magistrates' Court,* 20 Misc.2d 509, 191 N.Y.S.2d 238 (Supreme Court, Queens County, 1959).

"In the field of criminal law, the boundaries of the respective spheres of the three brances of Government are clearly defined. The Legislature makes the law and defines the offense. The executive authority executes and enforces the law. Acting through a District Attorney or the Attorney–General, the charge of violation of law is formulated and the criminal proceeding initiated. It is then for the judiciary to interpret and apply the law in the particular case where the charge is made.

*516 "Each function is separate and distinct. Each branch of Government is burdened with its own responsibiility and the judicial branch under ordinary circumstances should not sit in judgment on the discretion lodged in the others." [at 511, 191 N.Y.S.2d 238]

Perhaps even more pertinent to the issues at hand is the reasoning of the court in *McDonald v. Sobel,* 272 App.Div. 455, 72 N.Y.S.2d 4 (2nd Dept, 1947): "At common **457 law no part of the power to accuse a person of crime or to prosecute a person for crime was vested in a court. These powers were vested elsewhere. The power to prosecute crime and control the prosecution, after formal accusation had been made, was reposed in a prosecuting officer, an Attorney–General or a District Attorney. When the Code of Criminal Procedure was enacted, declaratory for the most part of the

common law, this allocation of power was continued." [at 461, 72 N.Y.S.2d 4]

[1] In short, the decision of if and how a case is to be prosecuted in local criminal court rests with the office of the District Attorney of this county. The Town Court does not have the power to restore a case to its calendar that has been adjourned in contemplation of dismissal pursuant to Section 170.55 of the Criminal Procedure Law.

[2] **[3]** Further I find that the actions of the Town Justice in issuing a warrant for the arrest of the defendant and accompanying the arresting officer to the defendant's residence were improper. Finally, had all other proceedings in this case been regular I would strike the sentence of the defendant as harsh and excessive. A sixty day/three year sentence for a sixteen year old defendant with no prior record who has been charged with the theft of fifteen dollars worth of milk is of such a nature as to shock the conscience of this court.

The conviction herein is vacated and set aside. This matter is remanded to the Town Court of the Town of Northampton before another judge of the said court, for further proceedings consistent herewith.

All Citations

147 Misc.2d 513, 558 N.Y.S.2d 455

New York Official Reports

277 A.D.2d 897, 716 N.Y.S.2d
210, 2000 N.Y. Slip Op. 09505

The People of the State of New York, Respondent,
v.
Michael Cangialosi, Appellant.

Supreme Court, Appellate Division,
Fourth Department, New York
1347, KA 99-5507
(November 13, 2000)

CITE TITLE AS: People v Cangialosi

HEADNOTES

CRIMES
SENTENCE
Probation -- Violation

(1) People did not sustain their burden of proving by preponderance of evidence that defendant violated condition of probation (see, CPL 410.70 [3]); only material evidence offered was transcript of prior testimony at underlying criminal trial; although transcript was admissible at probation violation hearing (see, CPL 410.70 [3]), it did not qualify as competent evidence under former testimony exception to hearsay rule, and thus People failed to meet their burden of proof.

CRIMES
SENTENCE
Probation -- Violation Hearing

(2) Delay of 15 months between filing of declaration of delinquency and probation violation hearing did not deny defendant right to prompt hearing (see, CPL 410.70 [1]); defendant requested postponement of violation hearing until such time as criminal charges were presented to Grand Jury and his suppression motions were decided; defendant also indicated that further adjournment was needed to enable him to obtain transcripts of suppression hearing and trial.

Judgment unanimously reversed on the law, declaration of delinquency vacated and sentence of probation reinstated.

The People did not sustain their burden of proving by a preponderance of the evidence that defendant violated a condition of probation (*see,* CPL 410.70 [3]). The only material evidence offered was the transcript of prior testimony at the underlying criminal trial.

Although the transcript was admissible at the probation violation hearing (*see,* CPL 410.70 [3]), it did not qualify as competent evidence under the former testimony exception to the hearsay rule (*see generally,* Prince, Richardson on Evidence § 8-513 [Farrell 11th ed]), and thus the People failed to meet their burden of proof (*see, People v Owens,* 258 AD2d 901, *lv denied* 93 NY2d 975; *People v Usher,* 80 AD2d 730).

Defendant further contends that the 15-month delay between the filing of the declaration of delinquency and the violation hearing denied him the right to a prompt hearing (*see,* CPL 410.70 [1]). We disagree. Defendant requested a postponement of the violation hearing until such time as the criminal charges were presented to the Grand Jury and his suppression motions were decided. Defendant also indicated that a further adjournment was needed to enable him to obtain the transcripts of the suppression hearing and trial. Under the circumstances, defendant was not denied his right to a prompt hearing. (Appeal from Judgment of Supreme Court, Monroe County, Mark, J.--Violation of Probation.)

Present--Green, J. P., Pine, Wisner, Kehoe and Balio, JJ.

101 A.D.2d 841, 475 N.Y.S.2d 504

The People of the State of New York, Respondent,
v.
Joseph Diaz, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
40 E
May 14, 1984

CITE TITLE AS: People v Diaz

HEADNOTE

CRIMES
SENTENCE

(1) Violation of probation --- Pursuant to subdivision 2 of section 65.15 of Penal Law, where defendant is charged with violation of conditions of his probation and is declared delinquent by court, such declaration interrupts period of sentence until adjudication of violation charge --- Accordingly, declaration of delinquency ordered on May 22, 1979 tolled running of probationary period prior to 1980 expiration date and Criminal Term had jurisdiction over defendant when it conducted hearing on April 7, 1982, prior to making final determination as to defendant's delinquency --- While, by itself, evidence that probationer has been arrested for new offense is not sufficient ‘reasonable cause‘ to support issuance of warrant or declaration of delinquency, where, as here, probationer absconds from facility he was to be associated with as condition of his probation, fails to report to his assigned probation officer and is arrested in another county based upon other charges, sufficient reasonable cause to believe that probationer has violated condition of his sentence is demonstrated, and based upon such conduct, revocation of probation and imposition of term of imprisonment is proper.

OPINION OF THE COURT

Titone, J. P., Rubin, Boyers and Eiber, JJ., concur.
Appeal by defendant from an amended judgment of the Supreme Court, Kings County (Mirabile, J.), rendered April 7, 1982, which, after a hearing, adjudicated him to be in violation of probation, and sentenced him to a term of imprisonment.

Amended judgment affirmed.

On July 14, 1975, defendant was convicted of robbery in the third degree, upon his plea of guilty,and ***842** sentenced to five years' probation on condition that he remain at a particular therapeutic facility. Probation was to have terminated on July 13, 1980. Defendant failed to remain at the facility; instead, he absconded and committed a series of offenses. Initially Criminal Term declined to declare defendant delinquent and directed that he continue on probation. On November 1, 1978, defendant failed to report to his probation officer. He also failed to appear before the Criminal Court, Kings County, on November 20, 1978, in connection with a May 19, 1978 arrest for burglary and possession of stolen property and a bench warrant was issued. Additionally, on December 28, 1978, defendant was arrested in White Plains for petit larceny. A violation warrant was issued on March 6, 1979. Further, defendant failed to appear in Manhattan Criminal Court on April 9, 1979, and a New York County bench warrant was issued. By supplemental violation of probation report, dated May 16, 1979, it was recommended that defendant be declared delinquent and on May 22, 1979 Criminal Term ”so ordered“ the recommendation and issued a bench warrant. Defendant's whereabouts remained unknown until December 23, 1981, when he was arrested in New York County for petit larceny and criminal possession of stolen property.

Thereafter, on April 7, 1982, a final revocation hearing was held before Justice Mirabile at which time certified copies of defendant's convictions upon his December, 1981 arrest in New York County for petit larceny and criminal possession of stolen property, and upon another February, 1979 arrest in New York County, were submitted to the court. Through his attorney, defendant admitted that he was currently serving two concurrent eight-month prison terms based upon these two convictions, that there was no doubt that he failed to report to his probation officer pursuant to the conditions of the court's sentence and that he was picked up on a warrant. Based upon the two subsequent convictions and defendant's failure to ”show any inclination to report to the probation officer

through the period that he was not in custody", Criminal Term adjudicated defendant to be in violation of his probation and sentenced him to a prison term of 1 to 3 years, to run concurrently with the two eight-month sentences defendant was then serving. This appeal ensued.

Defendant contends that reversal of the amended judgment is warranted because his term of probation, which was to have expired in July, 1980, was never tolled because no declaration of delinquency was filed, and accordingly, Criminal Term was without jurisdiction to proceed. Further, he urges, even if a written declaration had issued, the failure to bring him before Criminal Term for a final delinquency determination within the original probationary period warrants reversal. We disagree.

Clearly, pursuant to subdivision 2 of section 65.15 of the Penal Law, where a defendant is charged with violation of the conditions of his probation and is declared delinquent by the court, such declaration interrupts the period of the sentence until adjudication of the violation charge (*People v. Amaro*, 79 Misc 2d 499, 500). Indeed, the sole purpose for such a declaration is to extend the probationary period (*People v. Amaro*, supra.). Accordingly, the declaration of delinquency so ordered by Justice Mirabile on May 22, 1979 tolled the running of the probationary period prior to the 1980 expiration date and Criminal Term had jurisdiction over defendant when it conducted a hearing on April 7, 1982, prior to making a final determination as to defendant's delinquency (see Penal Law, § 65.15; *People v. Roesler*, 102 Misc 2d 858).

Further, we observe that while, by itself, evidence that a probationer has been arrested for a new offense is not sufficient "'reasonable cause'" to support issuance of a warrant or a declaration of delinquency (*People v. Amaro*, supra., p 500, quoting from CPL 410.30), where, as here, a probationer absconds from the facility he was to be associated with as a condition of his probation, fails to report to his assigned probation officer and is arrested in another county based upon other charges,sufficient ***843** reasonable cause to believe that the probationer has violated a condition of his sentence is demonstrated (see CPL 410.30), and based upon such conduct, revocation of probation and the imposition of a term of imprisonment is proper (see, e.g., *People v. King*, 55 AD2d 972).

Finally, although "the court must take prompt 'reasonable and appropriate action' to bring [a] defendant before it for [final] adjudication [of a delinquency declaration] and, where a warrant issues pursuant to CPL 410.40, the Department of Probation must use due diligence in [its execution] " (*People v. Roesler*, supra., p 859; see *People v. Cooper*, 54 Misc 2d 42; CPL 410.30, 410.40), at bar, any delay in the final adjudication of his delinquency was occasioned by defendant's own conduct. The record indicates that he failed to report to his probation officer, absented himself from the treatment facility, attendance at which was a condition of his probation, and left his Kings County home for parts unknown. He also failed to appear on scheduled court dates, and the subsequent arrests of defendant were effected outside of Kings County. Under such circumstances, any delay in holding a revocation hearing should not be attributed to the Department of Probation (cf. *People v. Cooper*, supra.). In any event, at the time of the revocation hearing, defense counsel acknowledged that the Department was in fact looking for her client, and no request was made for a hearing on the issue of due diligence. Accordingly, any objection on the ground that the Department was tardy in its efforts to locate defendant has not been preserved for our review as a matter of law (CPL 470.05, subd 2; *People v. Thomas*, 50 NY2d 467), and review in the interest of justice is unwarranted.

New York
Official Reports

94 N.Y.2d 807, 723 N.E.2d 54, 701
N.Y.S.2d 305, 1999 N.Y. Slip Op. 09674

The People of the State of New York, Respondent,
v.
Hugh Lawrence Douglas, Appellant.

Court of Appeals of New York
134
Argued October 14, 1999;
Decided November 18, 1999

CITE TITLE AS: People v Douglas

SUMMARY

Appeal, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered October 5, 1998, which affirmed an amended sentence of the Supreme Court (David Vaughan, J.), imposed in Kings County, revoking a sentence of probation previously imposed by said court (Michael Corriero, J.), upon a finding that defendant had violated a condition thereof, and imposing a term of imprisonment of 2 1/3 to 7 years upon his previous conviction of criminal possession of a weapon in the third degree.

People v Douglas, 254 AD2d 300, affirmed.

HEADNOTE

Crimes
Sentence
Probation--Tolling Expiration of Probation Sentence by Filing Declaration of Delinquency

The Appellate Division properly affirmed an amended sentence of Supreme Court revoking a sentence of probation previously imposed upon a finding that defendant had violated a condition thereof and imposing a term of imprisonment of 2 1/3 to 7 years upon his previous conviction of criminal possession of a weapon. The Appellate Division correctly concluded that the filing of the declaration of delinquency tolled the expiration of the probationary sentence (Penal Law § 65.15 [2]). At the violation of probation hearing, defendant did not raise his current claim that the hearing was untimely, and thus his argument is unpreserved for appellate review.

APPEARANCES OF COUNSEL

Elizabeth Sack Felber, New York City, and *M. Sue Wycoff* for appellant.
Michael D. Hess, Corporation Counsel of New York City (*Helen P. Brown* and *Kristin M. Helmers* of counsel), for respondent.

OPINION OF THE COURT

Memorandum.

The order of the Appellate Division should be affirmed. ***808**

In September 1987, defendant was convicted in Kings County on a charge of criminal possession of a weapon in the third degree. Supreme Court sentenced him to five years probation and community service. Three and a half years into his probationary term, defendant violated his probation, absconded to Nassau County and was arrested and charged with two separate crimes. Defendant pleaded guilty to robbery in the first degree and in 1992 was sentenced as a second felony offender to 9 to 18 years in prison. In November 1991, Supreme Court, Kings County, issued a declaration of delinquency, and subsequently issued a warrant. After a violation of probation hearing in 1996, the court revoked the 1987 sentence of probation and imposed a sentence of 2 1/3 to 7 years to run consecutively to the 9-to-18-year Nassau County sentence. The Appellate Division affirmed.

We agree with the Appellate Division that the filing of a declaration of delinquency in 1991 tolled the expiration of the probationary sentence (Penal Law § 65.15 [2]). At the violation of probation hearing, defendant did not raise his current claim that the hearing was untimely under CPL 410.30. Thus, defendant's argument is unpreserved for appellate review.

Chief Judge Kaye and Judges Bellacosa, Smith, Levine, Ciparick, Wesley and Rosenblatt concur.
Order affirmed in a memorandum.

723 N.E.2d 54, 701 N.Y.S.2d 305, 1999 N.Y. Slip Op. 09674

New York Official Reports

158 A.D.3d 539, 71 N.Y.S.3d
453, 2018 N.Y. Slip Op. 01154

**1 The People of the State of New York, Respondent,

v

Tamaz Hubel, Appellant.

Supreme Court, Appellate Division,
First Department, New York
1397/10, 5610, 5610A
February 20, 2018

CITE TITLE AS: People v Hubel

HEADNOTE

Crimes
Sentence
Probation—Probation Reinstated Since Violation was Based Solely on Hearsay

Robert S. Dean, Center for Appellate Litigation, New York (Siobhan C. Atkins of counsel), for appellant.
Zachary W. Carter, Corporation Counsel, New York (Barbara Graves-Poller of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County (James M. Burke, J.), rendered September 8, 2016, convicting defendant of violation of probation, revoking a prior sentence of 60 days and five years' probation imposed on June 7, 2011, and resentencing defendant to a term of 2⅓ to 7 years, unanimously reversed, on the law, the judgment vacated, and defendant's sentence of probation reinstated. Appeal from order, same court and Justice, entered on or about June 14, 2017, which denied defendant's CPL 440.10 motion (denominated a CPL 440.20 motion) alleging ineffective assistance of counsel at sentencing, unanimously dismissed, as academic.

A finding, by a preponderance of the evidence, that a defendant has violated a condition of probation (*see* CPL 410.70 [3]) may not be based on hearsay evidence alone (*see* *People v Pettway*, 286 AD2d 865 [4th Dept 2001], *lv denied* 97 NY2d 686 [2001]). Here, on several occasions during the probation revocation ***540** hearing, the court indicated that its determination that defendant had violated probation by traveling outside the jurisdiction without permission, and by failing to lead a law abiding life, was based solely on the grand jury minutes related to his 2012 indictment (which was dismissed for lack of jurisdiction and did not result in a conviction).[*] One of these statements, in which the court stated that "the government prevailed by the properly unsealed and complete [g]rand [j]ury minutes," occurred directly after defense counsel explicitly argued that the court could not base a finding of a violation solely on the grand jury minutes, which constituted hearsay.

Based on this record, regardless of whether there was other evidence in the record that might have satisfied the requirement for "a residuum of competent legal evidence" (**2 *People v Machia*, 96 AD2d 1113, 1114 [3d Dept 1983]), we are compelled to find that the court's determination was based on hearsay alone and therefore cannot stand. Concur—Richter, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

FOOTNOTES

Footnotes

* The Court made no mention of and there was no discussion of defendant's failure to make restitution, which also was a condition of his probation.

New York Official Reports

20 Misc.3d 1, 860 N.Y.S.2d 804, 2008 N.Y. Slip Op. 28161

**1 The People of the State of New York, Respondent
v
Charles Leo, Appellant.

Supreme Court, Appellate Term, Second Department
2006-912SCR
April 21, 2008

CITE TITLE AS: People v Leo

SUMMARY

Appeal from (1) a judgment of the Justice Court of the Town of Southampton, Suffolk County (Deborah Kooperstein, J.), rendered June 9, 2005, and (2) an amended judgment of that court, rendered April 19, 2006. The judgment convicted defendant, upon his plea of guilty, of violating Code of the Town of Southampton § 330-177 (A), and sentenced him to a four-month conditional discharge and a $500 fine. The amended judgment resentenced defendant to a $20,000 fine upon a finding that he violated a condition of his sentence of conditional discharge.

HEADNOTES

Crimes
Sentence
Conditional Discharge—Declaration of Delinquency

(1) An amended judgment resentencing defendant to a $20,000 fine based upon a finding that he failed to fulfill either condition of a four-month conditional discharge to which he was sentenced upon pleading guilty to a land use violation was reversed, since the declaration of delinquency upon which the resentencing was based was untimely. Under CPL 410.30, a declaration of delinquency may be brought only "during the period of a sentence of **2 . . . conditional discharge." Here, the application for a declaration of delinquency was filed several weeks after the four-month conditional discharge period expired. While Penal Law § 65.05 (3) (b) mandates a one-year period for a conditional discharge in the case of a violation, the period of the sentence as contained in the negotiated plea and sentencing agreement and as declared by the court was four months and the court was required to make a declaration of delinquency within that time period.

Crimes
Sentence
Illegal Sentence—Four-Month Conditional Discharge Period

(2) In a criminal prosecution wherein defendant pleaded guilty to a land use violation, the four-month conditional discharge sentence imposed upon him as part of the negotiated plea and sentencing agreement was vacated. Inasmuch as Penal Law § 65.05 (3) (b) mandates a one-year period for a conditional discharge in the case of a violation, the four-month conditional discharge period was not authorized. Accordingly, the matter was remanded for further proceedings to give defendant the opportunity to either accept an amended lawful sentence or to withdraw his guilty plea.

RESEARCH REFERENCES

Am Jur 2d, Criminal Law §§ 823, 904, 907, 925–928.

Carmody-Wait 2d, Criminal Procedure §§ 172:4089, 172:4090, 172:4104, 172:4107, 172:4110, 172:4118, 172:4125.

LaFave, et al., Criminal Procedure (3d ed) §§ 26.3, 26.6.

McKinney's, CPL 410.30; Penal Law § 65.05 (3) (b).

NY Jur 2d, Criminal Law §§ 2625, 2740, 2759, 2801, 2802, 2820.

ANNOTATION REFERENCE

See ALR Index under Parole, Probation, and Pardon; Sentence and Punishment.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: conditional /2 discharge /p declaration /3 delinquency & resentenc!

APPEARANCES OF COUNSEL

Michael G. Walsh, Water Mill, for appellant. *Garrett W. Swenson, Jr.*, *Town Attorney*, Southampton (*Kara L. Bak* of counsel), for respondent.

OPINION OF THE COURT

Memorandum.

***3** Amended judgment reversed on the law and resentence vacated.

Judgment of conviction modified on the law by vacating the sentence imposed and remitting the $500 fine, if paid; as so modified, judgment affirmed, and matter remanded to the court below for further proceedings in accordance with the decision herein.

Pursuant to a negotiated plea and sentencing agreement, defendant entered a guilty plea to a land use violation (Code of Town of Southampton § 330-177 [A]) and was sentenced to a four-month conditional discharge, the sole conditions thereof being that within that period he cure the use violation or obtain a certificate of occupancy for the new use. Defendant failed to fulfill either condition and upon the People's application, filed several weeks after the conditional discharge period expired, the court declared defendant delinquent (CPL 410.30). Although the record is unclear as to the subsequent events, upon defendant's plea to the declaration of delinquency, the Town Attorney demanded that a $1,000 fine be imposed for every week that elapsed following the expiration of the conditional discharge period, pursuant to section 330-186 (B) of the Code of the Town of Southampton, which provides that each week's violation shall constitute a separate, additional violation. The court resentenced defendant to a $20,000 fine. ****2**

(1) The record shows that the declaration of delinquency was untimely. Such a declaration may be brought only "during the period of a sentence of . . . conditional discharge" (CPL 410.30), here, within four months of sentencing. Although the People contend that the period of conditional discharge was for a year, as statutorily mandated (Penal Law § 65.05 [3] [b]), the court itself, in its order rejecting, as untimely, defendant's motion to modify the terms of the conditional discharge (*see* CPL 410.20), declared the period of sentence to be four months. A declaration of delinquency brought after a period of conditional sentence has expired is "invalid" (*People v Lee*, 2 AD3d 878, 879 [2003]) and the court was "powerless" to revoke the sentence on this basis (*People v Montgomery*, 115 AD2d 102, 103 [1985]). Moreover, an untimely declaration of delinquency is of nonwaivable jurisdictional dimensions, particularly in light of Penal Law § 65.15 (2), which only preserves the court's jurisdiction over a term of probation or conditional discharge upon the timely filing of a declaration of delinquency.

(2) ***4** As the People concede, a conditional discharge of four months is not an authorized sentence (Penal Law § 65.05 [3] [b]), and, as a general rule,

> "when [an] unlawful sentence is the product of a negotiated plea agreement, and the sentencing court is unable to fulfill its sentence promise due to the illegality of that sentence, the appropriate remedy is to give the defendant the opportunity to either accept an amended lawful sentence or withdraw his plea of guilty and be restored to pre-plea status" (*People v Hollis*, 309 AD2d 764, 765 [2003]; *see also People v Ingoglia*, 305 AD2d 1002, 1003 [2003]; *People v Martin*, 278 AD2d 743, 744 [2000]).

We note that where, as here, an ordinance provides that the continuance of a violation over given periods of time permits each period to be punished as a separate offense, it is necessary that the accusatory instrument charging the violation allege, as a separate count, every period of time the violation persisted if multiple punishments are to be imposed (*People v Fremd*, 41 NY2d 372 [1977]; *People v Melchner*, 4 Misc 3d 132[A], 2004 NY Slip Op 50727 [U] [App Term, 9th & 10th Jud Dists 2004]; *People v Otto*, 2003 NY Slip Op 51181[U] [App Term, 9th & 10th Jud Dists 2003]; *People v Simoneau*, 2003 NY Slip Op 51338[U] [App Term, 9th & 10th Jud Dists 2003]). Here, the accusatory instrument alleged a single violation of the ordinance, foreclosing sentencing for other than that conduct. Accordingly, should there be a resentencing, the maximum sentence that may be imposed is a $1,000 fine and six months' imprisonment.

We find defendant's remaining claims without merit (*People v Casey*, 95 NY2d 354, 360 [2000]; *People v Allen*, 92 NY2d 378, 385 [1998]; *People v Sylla*, 7 Misc 3d 8 [App Term, 2d & 11th Jud Dists 2005]), unpreserved for appellate review (*People v Douglas*, 94 NY2d 807, 808 [1999]; *People v Mills*, 45 AD3d 892, 894 [2007]; *People v Kyem*, 272 AD2d 136 [2000]), or academic in light of the foregoing.

McCabe, J.P., Tanenbaum and Scheinkman, JJ., concur.

New York Official Reports

96 A.D.2d 1113, 467 N.Y.S.2d 708

The People of the State of New York, Respondent,
v.
Robert Machia, Appellant

Supreme Court, Appellate Division,
Third Department, New York
42742
September 15, 1983

CITE TITLE AS: People v Machia

HEADNOTE

CRIMES
SENTENCE

(1) Probation --- Because People's case at probation revocation hearing rested entirely on hearsay, record does not sufficiently support County Court's finding that defendant violated probation; accordingly, judgment which revoked his probation is reversed, sentence of imprisonment is vacated, and probation is reinstated.

Appeal from a judgment of the County Court of Albany County ***1114** (Harris, J.), rendered August 25, 1981, which revoked defendant's probation and imposed a sentence of imprisonment.

After a probation revocation hearing, County Court found that defendant had violated the terms of his probation, revoked his probation and resentenced him to a term of incarceration. The People do not dispute that the only evidence they introduced at the hearing was hearsay, but rather argue that such evidence was admissible and, thus, sufficient to support County Court's finding of a probation violation. The People are correct in their contentions that the strict rules of evidence are not followed at a probation violation hearing and that any relevant evidence not legally privileged may be received (CPL 410.70, subd 3). A finding of a probation violation, however, must be based upon a preponderance of the evidence (*id.*), which requires a residuum of competent legal evidence in the record (see *People v Usher*, 80 AD2d 730; *People v Lynch*, 31 AD2d 753; see, also, Preiser, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL 410.70, p 153). Because the People's case rested entirely on hearsay, the record does not sufficiently support County Court's finding that defendant violated his probation.

Judgment reversed, on the law, sentence of imprisonment vacated, and probation reinstated.

Sweeney, J. P., Kane, Main, Casey and Mikoll, JJ., concur.

New York Official Reports

128 A.D.3d 1464, 8 N.Y.S.3d 794, 2015 N.Y. Slip Op. 03967

**1 The People of the State of New York, Respondent
v
Steven Robinson, Appellant.

Supreme Court, Appellate Division, Fourth Department, New York
14-00521, 406
May 8, 2015

CITE TITLE AS: People v Robinson

HEADNOTE

Crimes
Sentence
Probation—Error to Use Unconstitutionally Seized Evidence as Basis to Revoke Probation

Timothy P. Donaher, Public Defender, Rochester (David R. Juergens of counsel), for defendant-appellant.
Sandra Doorley, District Attorney, Rochester (Daniel Gross of counsel), for respondent.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered March 7, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ordered that the judgment so appealed from is unanimously modified on the law by vacating the sentence, and as modified the judgment is affirmed and the matter is remitted to Supreme Court, Monroe County, for resentencing in accordance with the following memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), and convicting him of violating the terms and conditions of his probation. After being placed on probation, defendant was arrested and subsequently arraigned on a new indictment charging him with, inter alia, criminal possession of a weapon in the second degree (§ 265.03 [3]), and criminal possession of marihuana in the fifth degree (§ 221.10 [2]). He was also arraigned on an information for delinquency alleging that he violated the terms of his probation. The information for delinquency alleged that he possessed a loaded weapon and marihuana in November 2013, and that he also violated the terms of his probation because he failed to report, failed to pay *1465 a fine and surcharge, and consumed alcoholic beverages and marihuana on several occasions while he was on probation.

Supreme Court conducted a combined *Mapp* and violation of probation hearing and then suppressed the marihuana, handgun and ammunition seized from defendant's house and person in November 2013. The court also concluded, however, that defendant violated the terms of his probation by possessing the contraband that the court suppressed, as well as by violating the other terms of his probation, as alleged in the information for delinquency. The court sentenced defendant to a determinate term of three years' incarceration plus three years of postrelease supervision.

We agree with defendant that the court erred in using the unconstitutionally seized evidence as a basis upon which to revoke defendant's probationary sentence. The Court of Appeals has "recognized . . . that a probationer loses some privacy expectations and some part of the protections of the Fourth Amendment, but not all of both" (*People v Hale*, 93 NY2d 454, 459 [1999]), and "that a person on parole, although legally in custody and subject to supervision, is nevertheless constitutionally entitled to protection against unreasonable searches and seizures. A person on probation, subject to similar restraints (*see* CPL 410.50, subds 1, 2) [,] should be similarly protected" (*People v Jackson*, 46 NY2d 171, 174 [1978]). Furthermore, with respect to evidence that was illegally seized from a person under a revocable disposition, "the Court of Appeals has applied the New York constitution to suppress such evidence at a parole revocation hearing . . . , and it would seem to follow a fortiori that such evidence would not be admissible at a probation violation hearing, which is even closer to a criminal action than a parole violation hearing" (Peter Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, **2 CPL 410.70 at 126). Here, the court concluded that the stop and search of defendant and his home were violative of defendant's rights under the Constitutions of New York and the United States. Consequently, the court erred in relying upon the evidence seized as a result of those improper searches to conclude that defendant violated a condition of his

probation (*see generally People v Newhirk*, 279 AD2d 535, 535-537 [2001]).

Nevertheless, defendant does not challenge on appeal the court's further findings that he engaged in other actions that violated his probation, including failing to appear for a probation appointment and consuming alcohol and marihuana, and we thus do not disturb the court's determination that he violated the terms of his probation based on those other ac ***1466** tions (*see People v Welch*, 55 AD3d 952, 953 [2008]). We therefore modify the judgment by vacating the sentence, and we remit the matter to Supreme Court for resentencing based only on those other actions (*see People v Hudson*, 263 AD2d 545, 546 [1999]; *People v Randolph*, 195 AD2d 699, 699-700 [1993]; *see generally People v Britton*, 158 AD2d 932, 933 [1990], *lv dismissed* 76 NY2d 785 [1990]). Present—Smith, J.P., Valentino, Whalen and DeJoseph, JJ.

24 N.Y.2d 732, 249 N.E.2d 882, 302 N.Y.S.2d 260

The People of the State of New York, Respondent,
v.
Ronald W. (Anonymous), Appellant.

Court of Appeals of New York
Argued April 24, 1969;
decided June 4, 1969.

CITE TITLE AS: People v Ronald W.

HEADNOTES

Crimes
probation
revocation--defendant who had been adjudged youthful offender was not entitled to warnings announced in Miranda v. Arizona (384 U. S. 436) before being questioned by probation officer prior to revocation of probation.

(1) While defendant, who had been adjudged a youthful offender, was on probation, he appeared at the probation department office in the company of another man and told his probation officer that his companion desired help with a narcotics problem. While defendant was standing in the hallway, his probation officer noticed needle marks on defendant's arm and requested him to step into an office. There, defendant was questioned by his probation officer about the needle marks in the presence of two other probation officers and his companion. Defendant eventually admitted that he had purchased and taken heroin. Subsequently, an information was filed charging defendant with violating his probation and his probation was revoked. He was not entitled to receive the warnings announced in *Miranda v. Arizona* (384 U. S. 436), prior to being questioned by the probation officer. The rule of that case was not aimed at this type of questioning of one on parole.

People v. Ronald W. (*Anonymous*), 31 A D 2d 163, affirmed.

SUMMARY

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Second Judicial Department, from a judgment of said court, entered December 16, 1968 affirming an adjudication of the Nassau County Court (Paul J. Kelly, J.) ***733** which, following a finding that defendant was guilty of a violation of probation, revoked his probation and imposed sentence. (See 21 N Y 2d 744.)

POINTS OF COUNSEL

Matthew Muraskin for appellant.
I. Appellant's constitutional right not to have to incriminate himself as well as his constitutional right to counsel were violated when he was interrogated without being advised of his rights as set forth in *Miranda v. Arizona*. (*People v. Rodney P. [Anonymous]*, 21 N Y 2d 1; *Miranda v. Arizona*, 384 U. S. 436; *People v. Hamilton*, 26 A D 2d 134; *People v. Oskroba*, 305 N. Y. 113; *People v. Turner*, 27 A D 2d 141; *Fishbein v. State of New York*, 282 App. Div. 600; *People v. Shivers*, 21 N Y 2d 118; *White v. United States*, 395 F. 2d 170.)
II. The People failed to establish that defendant associated with persons of disreputable or harmful character. (*People v. Pieri*, 269 N. Y. 315.)
William Cahn, District Attorney (*Henry P. De Vine* of counsel), for respondent. The judgment should be affirmed. (*People v. Stephen J. B.*, 23 N Y 2d 611; *Miranda v. Arizona*, 384 U. S. 436; *People v. R.N.*, 23 N Y 2d 963; *People v. Torres*, 21 N Y 2d 49; *People v. Phinney*, 22 N Y 2d 288; *People v. Rodney P. [Anyonymous]*, 21 N Y 2d 1; *United States v. Wade*, 388 U. S. 218; *Williams v. New York*, 337 U. S. 241; *People v. Peace*, 18 N Y 2d 230.)

OPINION OF THE COURT

Jasen, J.

On January 26, 1966 appellant was indicted for third-degree burglary and first-degree grand larceny in connection with a safe burglary. Following his plea of guilty, he was

adjudged a youthful offender and was placed on probation. The conditions of his probation required him to report to and remain in contact with his probation officer, to answer all reasonable inquiries of his probation officer, to abstain from the use of intoxicants and narcotics, to avoid persons of disreputable or harmful character, and to complete his education.

On July 19, 1967 (not his usual reporting day), appellant appeared at the Nassau County Probation Department office in the company of another man. He told his probation officer that his companion, Lawrence Miller, desired help with a narcotics problem. While appellant was standing in the hallway, his probation officer noticed needle marks on appellant's arm and requested him to step into an office. There, appellant was ***734** questioned by his probation officer about the needle marks in the presence of two other probation officers and his companion, Lawrence Miller. Appellant initially hesitated to answer any questions, but eventually admitted that he and Miller had purchased and taken heroin on July 17.

Subsequently, an information was filed charging appellant with violating his probation. Following a hearing at which he was represented by counsel, appellant was found to have violated the terms of his probation. His probation was revoked and he was committed to the Elmira Reception Center.

The principal question presented on this appeal is whether a probationer must receive the four-fold warnings announced in *Miranda v. Arizona* (384 U. S. 436), prior to being questioned by a probation officer.

It is conceded that the appellant was never given the *Miranda* warnings when questioned about the needle marks. Additionally, it may be assumed that appellant would have been restrained had he attempted to leave the room where he was being questioned.

Section 937 of the Code of Criminal Procedure authorizes a probation officer to "require such reports by probationers as are reasonable or necessary." Additionally, an express requirement of appellant's probation was that he answer all reasonable inquiries of his probation officer.

When the probation officer observed the needle marks on appellant's arm, he surmised that not only Miller needed help but the appellant as well. Accordingly, he proceeded to discharge his statutory duty "to aid and encourage [appellant] by friendly advice and admonitions; and by such other measures as may seem most suitable to bring about improvement in his conduct, condition and general attitude toward society." (Code Crim. Pro., § 936.)

Viewed in this perspective, it is apparent that the probation officers were not required to give appellant the *Miranda* warnings before they inquired about the needle marks on his arm. The questioning of the appellant was hardly the sort of incommunicado, police-dominated atmosphere of custodial interrogation and overbearing of the subject's will at which the *Miranda* rule was aimed. The clearly stated objectives of education and rehabilitation which are always paramount in the relationship ***735** between the probation officer and the probationer (Code Crim. Pro., § 936; *Williams v. New York*, 337 U. S. 241; *People v. Peace*, 18 N Y 2d 230) are totally foreign to the elements the Supreme Court addressed itself to in *Miranda*.

Here, the appellant had not been arrested and charged with a crime, but rather had freely come to the department seeking help for a friend. When questioned about the marks on his arm, he was not alone and incommunicado, but rather was in the company of his own probation officer and Lawrence Miller (the friend whom he had brought to the department for help). He was questioned not by policemen charged with the duty of apprehending and convicting criminals, but rather by probation officers whose aim is to help probationers rehabilitate themselves.

It is true that a probation officer is a "peace officer" (Code Crim. Pro., § 937), but, certainly, he is not a "law enforcement" officer within the spirit or meaning of *Miranda v. Arizona* (supra.;).

We have also considered the other points raised by the appellant and find them to be without merit.

Accordingly, the judgment should be affirmed.

Chief Judge Fuld and Judges Burke, Scileppi, Bergan and Breitel concur.
Judgment affirmed. ***737**

249 N.E.2d 882, 302 N.Y.S.2d 260

End of Document

New York Official Reports

12 A.D.3d 782, 784 N.Y.S.2d
226, 2004 N.Y. Slip Op. 08010

**1 The People of the State of New York, Respondent
v
Aswad D. Shabazz, Appellant.

Supreme Court, Appellate Division,
Third Department, New York
14657
November 10, 2004

CITE TITLE AS: People v Shabazz

HEADNOTE

Crimes
Sentence
Probation—Revocation

Claim that court erroneously found defendant guilty of violating probation because term of probation had already expired rejected—although period of probation was originally set to expire on May 2, 2002 and defendant was not found guilty of violating his probation until hearing on August 1, 2002, court issued declaration of delin *783 quency in 1997 after filing of violation of probation report, which effectively tolled running of probationary period; taking tolling period into account, court's determination was rendered when defendant had served less than year of his probation, not after it had expired.

Carpinello, J. Appeal from a judgment of the County Court of Broome County (Mathews, J.), rendered August 1, 2002, which revoked defendant's probation and imposed a sentence of imprisonment.

Defendant pleaded guilty to criminal possession of a controlled substance in the fifth degree and was sentenced on May 2, 1997 to a five-year period of probation. Among the conditions of his probation were that he report to his probation officer as directed and remain within the jurisdiction of the court unless granted permission to leave. In November 1997, after defendant's probation officer attempted unsuccessfully to locate him on a number of occasions and had gathered information leading him to believe that defendant had gone to Ohio, a violation of probation report was filed. Subsequently, a declaration of delinquency and a warrant for defendant's arrest was issued. In August 2002, after defendant was located, a violation of probation hearing was conducted which resulted in a finding by County Court that defendant violated the terms of his probation. Consequently, the court revoked his probation and sentenced him to 2 to 6 years in prison. He now appeals.

Initially, we reject defendant's claim that County Court erroneously found him guilty of violating his probation because his term of probation had already expired. Although the period of probation was originally set to expire on May 2, 2002 and defendant was not found guilty of **2 violating his probation until the hearing on August 1, 2002, County Court issued a declaration of delinquency in December 1997 after the filing of the violation of probation report, which effectively tolled the running of the probationary period (*see* Penal Law § 65.15 [2]; Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 410.30, at 331). Taking the tolling period into account, County Court's determination was rendered when defendant had served less than a year of his probation, not after it had expired. Contrary to defendant's assertion, the testimony of his probation officer, which was uncontroverted at the hearing, established by a preponderance of the evidence that defendant violated the terms of his probation by failing to report to his probation officer and leaving the court's jurisdiction without prior approval (*see* CPL 410.70 [3]; *People v Price*, 256 AD2d 596 [1998]). Therefore, we find no reason to disturb the judgment revoking defendant's probation.

Mercure, J.P., Spain, Lahtinen and Kane, JJ., concur. Ordered that the judgment is affirmed. *784