

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed
by the Court of Appeals Clerk's Office

August 7, 2015 through August 13, 2015

Each week the Clerk's Office prepares a list of recently-filed appeals, indicating short title, jurisdictional predicate, subject matter and key issues. Some of these appeals may not reach decision on the merits because of dismissal, on motion or sua sponte, or because the parties stipulate to withdrawal. Some appeals may be selected for review pursuant to the alternative procedure of Rule 500.11. For those appeals that proceed to briefing in the normal course, the briefing schedule generally will be: appellant's brief to be filed within 60 days after the appeal was taken; respondent's brief to be filed within 45 days after the due date for the filing of appellant's brief; and a reply brief, if any, to be filed within 15 days after the due date for the filing of respondent's brief.

The Court welcomes motions for amicus curiae participation from those qualified and interested in the subject matter of these newly filed appeals. Please refer to Rule 500.23 and direct any questions to the Clerk's Office.

AVILES (JOSE), PEOPLE v:

App. Term, 1st Dept. order of 3/23/15; reversal; leave to appeal granted by Pigott, J., 7/29/15;

CONSTITUTIONAL LAW - EQUAL PROTECTION OF LAWS - WHETHER THE FAILURE OF POLICE TO ADMINISTER A PHYSICAL COORDINATION TEST TO A NON-ENGLISH SPEAKING DRIVING WHILE INTOXICATED SUSPECT VIOLATES EQUAL PROTECTION OR DUE PROCESS WHERE SUCH TESTS ARE ROUTINELY ADMINISTERED TO ENGLISH-SPEAKING SUSPECTS;

Criminal Court of the City of New York, Bronx County, granted defendant's motion to dismiss the accusatory instrument pursuant to CPL 170.30(1)(f); App. Term reversed, denied defendant's motion, reinstated the accusatory instrument, and remanded the matter for further proceedings.

CANGRO v REITANO:

1ST Dept. App. Div. order of 7/9/15; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; JUDGMENTS - RES JUDICATA - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT PLAINTIFF'S CLAIMS WERE BARRED UNDER THE DOCTRINE OF RES JUDICATA; CLAIMED CONSTITUTIONAL VIOLATIONS; Supreme Court, New York County, dismissed the complaint, granted defendant a protective order, and awarded a \$500 sanction against plaintiff; App. Div. affirmed.

CRUZ v BRONX LEBANON HOSPITAL CENTER:

1ST Dept. App. Div. order of 6/30/15; modification with a two-Justice dissent; Rule 500.11 review pending; NEGLIGENCE - MAINTENANCE OF PREMISES - SUFFICIENCY OF THE EVIDENCE OF DEFECTIVE CONDITION AND DEFENDANT'S CONSTRUCTIVE NOTICE OF DEFECTIVE CONDITION; REMARKS BY PLAINTIFF'S COUNSEL IN SUMMATION - WHETHER THE COURTS BELOW ERRED IN DETERMINING THAT LIMITED NUMBER OF INFLAMMATORY REMARKS, ALONG WITH THE COURT'S CURATIVE INSTRUCTIONS, DO NOT ESTABLISH THAT DEFENDANT WAS DENIED A FAIR TRIAL; Supreme Court, Bronx County, awarded plaintiff damages for past and future pain and suffering in the amounts of \$140,000 and \$60,000, respectively, as reduced by prior order of Supreme Court entered 5/16/13; App. Div. modified to the extent of restoring the amounts awarded by the jury for past and future pain and suffering, \$300,000 and \$270,000, respectively, and otherwise affirmed.

GUERRERO (LERIO), PEOPLE v:

1ST Dept. App. Div. order of 3/24/15; affirmance; leave to appeal granted by Lippman, Ch.J., 7/24/15; CRIMES - INDICTMENT - IDENTIFICATION OF DEFENDANT BY DNA PROFILE - VALIDITY OF DNA INDICTMENT AND ITS AMENDMENT TO ADD THE NAME OF DEFENDANT ONCE HE WAS IDENTIFIED AS THE SOURCE OF THE DNA; PLEA OF GUILTY - WHETHER DEFENDANT FORFEITED THE RIGHT TO CHALLENGE THE INDICTMENT BY PLEADING GUILTY; Supreme Court, New York County, convicted defendant, upon his guilty plea, of rape in the first degree, two counts of sodomy in the first degree, two counts of burglary in the first degree, two counts of robbery in the first degree, and attempted robbery in the first degree, and sentenced him to an aggregate term of 15 years; App. Div. affirmed.

PRICE (CHRIS), PEOPLE v:

2ND Dept. App. Div. order of 4/15/15; affirmance; leave to appeal granted by Fahey, J., 7/28/15;

CRIMES - EVIDENCE - PHOTOGRAPH OF DEFENDANT HOLDING GUN - WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE A PHOTOGRAPH POSTED ON DEFENDANT'S WEBSITE WHERE DEFENSE COUNSEL OBJECTED ON THE GROUND THAT THE PEOPLE FAILED TO LAY A PROPER FOUNDATION BECAUSE THEY DID NOT ESTABLISH THAT THE PHOTOGRAPH WAS GENUINE AND THE COMPLAINANT DID NOT CONFIRM THAT THE GUN IN THE PHOTOGRAPH WAS THE SAME AS THAT USED IN THE ROBBERY; SUFFICIENCY OF THE EVIDENCE ESTABLISHING DEFENDANT'S IDENTITY AS THE MAN WHO ROBBED THE VICTIM AT GUNPOINT;

Supreme Court, Queens County, convicted defendant, upon a jury verdict, of robbery in the first degree and robbery in the second degree, and imposed sentence; App. Div. affirmed.

XIU JIAN SUN v STATE OF NEW YORK DEPARTMENT OF MOTOR VEHICLES:

2ND Dept. App. Div. order of 7/20/15; dismissal; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right or whether any other basis exists to support an appeal as of right;

APPEAL - CHALLENGE TO APPELLATE DIVISION ORDER DISMISSING APPEAL ON THE GROUND THAT NO APPEAL LIES FROM AN ORDER ENTERED UPON THE APPELLANT'S DEFAULT;

Supreme Court, Queens County, granted, without opposition, defendant's motion to dismiss the complaint for want of personal jurisdiction and for failing to state a cause of action; App. Div. dismissed plaintiff's appeal on the court's own motion on the ground that no appeal lies from an order entered upon the appellant's default.

TARDI (WILSON J.), PEOPLE v:

4TH Dept. App. Div. order of 11/14/14; affirmance; leave to appeal granted by Abdus-Salaam, J., 7/28/15;

CRIMES - SUPPRESSION HEARING - EVIDENCE SEIZED FROM VEHICLE WHICH WAS IMPOUNDED AFTER DEFENDANT'S ARREST AND SUBJECTED TO INVENTORY SEARCH PURSUANT TO POLICE DEPARTMENT'S WRITTEN POLICY; CLAIMED UNCONSTITUTIONALITY OF SEARCH AND POLICE POLICY;

County Court, Erie County, convicted defendant, upon his guilty plea of guilty, of criminal possession of a weapon in the second degree and petit larceny; App. Div. affirmed.

THEN (RAFAEL), PEOPLE v:

2ND Dept. App. Div. order of 5/13/15; affirmance; leave to appeal granted by Fahey, J., 7/29/15;

CRIMES - FAIR TRIAL - WHETHER DEFENDANT WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL WHEN HE APPEARED WEARING ORANGE PRISON PANTS DURING JURY SELECTION; WHETHER SUPREME COURT ERRED IN ADMITTING TESTIMONY THAT DEFENDANT POSSESSED A GUN DURING THE MONTH OF THE CRIME; WHETHER THE PROSECUTOR'S SUMMATION DEPRIVED DEFENDANT OF A FAIR TRIAL;

Supreme Court, Queens County, convicted defendant, upon a jury verdict, of robbery in the first degree and robbery in the second degree, and imposed sentence; App. Div. affirmed.

TUNG, et al., MATTER OF v CHINA BUDDHIST ASSOCIATION, et al.:

1st Dept. App. Div. order of 11/13/14; reversal; leave to appeal granted by App. Div., 7/28/15; Rule 500.11 review pending;

RELIGIOUS CORPORATIONS AND ASSOCIATIONS - MEETINGS - WHETHER THE APPELLATE DIVISION CORRECTLY DETERMINED THAT THE ISSUES RAISED BY PETITIONERS ARE RELIGIOUS IN NATURE AND CANNOT BE DECIDED THROUGH THE APPLICATION OF NEUTRAL PRINCIPLES OF LAW; CLAIMED FIRST AMENDMENT AND FOURTEENTH AMENDMENT VIOLATIONS;

Supreme Court, New York County, granted the petition to the extent of invalidating the China Buddhist Association's May 2011 meeting and directed that another general meeting be held with petitioners included; App. Div. reversed, vacated the order and dismissed the petition.