



to whom defendant's application was assigned (see *Fresh Del Monte Produce N.V. v Eastbrook Caribe A.V.V.*, 40 AD3d 415, 421 [2007] [directing that matter be reassigned to another Justice where party had "raise[d] a reasonable concern about the appearance of impartiality"]).

The following constitutes the relevant portion of the record on the date the resentencing application was to be heard:

"The Court: I was just told that [defendant] is in Elmhurst Hospital complaining of chest pains.

"So I don't have any - I've thought about this case considerably.

"I'm denying the application for altering his sentence. I don't know whether we're actually going to get him here in the courtroom. And so you folks can do with this situation as you choose.

"The application is denied. If the First Department tells me to do it again, that's fine. This case is finished. Okay. Have a nice day."

Nothing in the record warrants the conclusion that defendant was feigning chest pains, and Supreme Court made no such suggestion.

The mandate of the governing statute is unequivocal. It specifies that the court "shall offer an opportunity for a hearing and bring the applicant before it" (L 2004, ch 738, § 23). This Court's case law at the time of Supreme Court's oral ruling was no less unequivocal in construing "[t]he plain language of the statute" as mandating defendant's production

(*People v Figueroa*, 21 AD3d 337, 339 [2005], lv denied 6 NY3d 753 [2005]). After inexplicably denying defendant his statutory right, Supreme Court issued a written decision denying the application.

We need not discuss the substantive reasons articulated by Supreme Court in its subsequent written decision. It is enough to note that Supreme Court made numerous findings adverse to defendant's application. Defendant should not be required to overcome the hurdle of persuading the same Justice that he also erred in making these findings.

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: OCTOBER 9, 2008

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thereby implicitly waiving the principal argument raised on appeal (*cf. People v Ford*, 62 NY2d 275, 283 [1984][waiver of right to complain of improper submission of lesser included offense]).

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Andrias, J.P., Nardelli, McGuire, Moskowitz, Renwick, JJ.

4220 Roder Beltre,  
Plaintiff-Appellant,

Index 111734/05

-against-

The Heights Management Company, LLC, et al.,  
Defendants-Respondents.

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Siler & Ingber LLP, Garden City (Robert M. Brinen of counsel),  
for appellant.

Law Offices of Safranek, Cohen & Krolian, White Plains (Michael  
L. Safranek of counsel), for respondents.

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Order, Supreme Court, New York County (Leland G. DeGrasse,  
J.), entered August 10, 2007, which granted defendants' motion  
for summary judgment dismissing the complaint and denied  
plaintiff's cross motion for summary judgment, unanimously  
affirmed, without costs.

There is no support in the record for plaintiff's claim that  
the standing water in the bathtub resulting from the recurrently  
clogged drain caused the tub to become dangerously slippery and,  
in any event, plaintiff testified that he never complained to the  
building superintendent that the bathtub was inordinately  
slippery (*see Seaman v State of New York*, 45 AD3d 1126, 1127  
[2007]; *Walters v Northern Trust Co. of N.Y.*, 29 AD3d 325, 326-  
327 [2006]).

We have considered plaintiff's remaining arguments and find them unavailing.

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*People v Rivers*, 56 NY2d 476, 480 [1982]; *People v Frost*, 16 AD3d 351 [2005], *lv denied* 5 NY3d 762 [2005]; *compare People v Lanahan*, 55 NY2d 711 [1981]). In any event, any error in admitting the statement defendant thereafter made was harmless, as there was no reasonable possibility that it affected the verdict (see *People v Crimmins*, 36 NY2d 230, 237 [1975]).

Defendant's subsequent pre-*Miranda* statements in his cell were entirely spontaneous, and not the result of any police conduct.

Defendant's argument that his later, post-*Miranda* statements should have been suppressed as a continuous chain of events, tainted by the initial, improper "interrogation" is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. Regardless of whether there was any prior interrogation, the post-*Miranda* statements were sufficiently attenuated, since there was a pronounced break between the statements in question, and defendant had demonstrated an unqualified desire to speak to the detective (see *People v White*, 10 NY3d 286, 291 [2008]; *People v Paulman*, 5 NY3d 122, 130-131 [2005]).

Defendant's claim that his counsel provided ineffective assistance by failing to argue that the post-*Miranda* statements

should have been suppressed as part of a continuing chain of events is not properly before us (see *People v Love*, 57 NY2d 998 [1982]).

**M-4061      *People v Roberto Rodriguez***

Motion seeking leave to strike page 10 of defendant's reply brief granted.

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treatment would have been merely "palliative," the June 3, 2005 contemporaneous report recommended that plaintiff continue physical therapy three times a week. "[A] plaintiff who terminates therapeutic measures following the accident . . . must offer some reasonable explanation for having done so" (*Pommells v Perez*, 4 NY3d 566, 574 [2005]). Here, the explanation offered contradicts the earlier recommendation to continue physical therapy, and can not be accepted under the circumstances presented (see *Gonzalez v A.V. Managing, Inc.*, 37 AD3d 175 [2007]). In addition, there is no medical evidence substantiating plaintiff's claim that a prior injury to her left shoulder had resolved by the time of the accident (see *Brewster v FTM Servo, Corp.*, 44 AD3d 351, 352 [2007]), and no objective medical evidence whatsoever of a serious injury to plaintiff's right knee. Plaintiff's 90/180 day claim lacks medical substantiation of her claim that her injuries were such as to require her confinement to home for some four months following the accident (see *Nelson v Distant*, 308 AD2d 338, 340 [2003]).

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withdraw it (see *People v Frederick*, 45 NY2d 520 [1978]), and that counsel provided effective assistance (see *People v Ford*, 86 NY2d 397, 404 [1995]).

Defendant agreed to a disposition whereby he would plead guilty to the sole count of the indictment and receive a sentence of two and one-half years. The court also imposed other conditions, including a requirement that defendant surrender the tenancy of his apartment, which had been an instrumentality of the crime, and which, in any event, was already the subject of a civil eviction proceeding. The court also warned defendant that if he failed to acquiesce in his eviction prior to sentencing, the court could impose any sentence authorized by law, up to the maximum of five and one-half years.

Subsequently, defendant, represented by new counsel, moved unsuccessfully to withdraw his plea. Since defendant had failed to surrender his apartment (from which he was ultimately evicted), the court sentenced him to three years instead of two and one-half years.

In his plea withdrawal motion, and on appeal, defendant's principal argument is that his plea was rendered involuntary because the court misled him into believing that his only options were to accept the offered disposition or go to trial, whereas a third option was to plead guilty to the indictment "unconditionally," pursuant to CPL 220.10(2). He similarly

argues that his counsel provided ineffective assistance by failing to correct this misimpression. Even assuming that defendant was unaware of the third option, defendant has not shown how he was prejudiced by that lack of knowledge. While under an unconditional plea the court would not have been able to insist that defendant surrender his tenancy (which, as noted, defendant did not in fact surrender, and which he lost by way of Civil Court proceedings), such a plea would have permitted the court to impose any prison sentence up to the maximum permitted by law. There is no reason to believe that defendant was interested in a plea that did nothing to limit his sentencing exposure; rather, it was evident during the extended plea negotiations that defendant sought to significantly reduce his prison term. Likewise, there is no reason to believe that defendant would have been in any better position had he chosen to plead guilty unconditionally. We have considered and rejected defendant's remaining arguments concerning these matters.

Defendant's waiver of his right to appeal forecloses review

of his claims regarding the suppression proceedings and his procedural claims regarding his sentencing. As an alternative holding, we also reject them on the merits.

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Andrias, J.P., Nardelli, McGuire, Moskowitz, Renwick, JJ.

4230           In re Tayquan B.,  
  
                  A Dependent Child Under the  
                  Age of Eighteen Years, etc.,

                  Jamall F.,  
                                  Respondent-Appellant,

                  Harlem Dowling-Westside Center for  
                  Children and Family Services,  
                                  Petitioner-Respondent.

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Geoffrey P. Berman, Larchmont, for appellant.

Law Offices of James M. Abramson, PLLC, New York (James M. Abramson of counsel), for respondent.

George E. Reed, Jr., White Plains, Law Guardian.

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                  Order of disposition, Family Court, Bronx County (Carol A. Stokinger, J.), entered on or about September 25, 2007, which, insofar as appealed from, terminated respondent father's parental rights to the subject child upon a finding that he violated the terms of a suspended judgment, and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

                  A preponderance of the evidence supports the determination that, following the grant of a suspended judgment, respondent violated its terms and conditions (*see Matter of Lourdes O.*, 52 AD3d 203 [2008]). The record demonstrates that respondent missed a substantial number of scheduled visits with the child and

failed to undergo a psychiatric evaluation (*see id*; *Matter of Joshua Justin T.*, 208 AD2d 469 [1994]).

The agency established by a preponderance of the evidence that the best interests of the child would be served by terminating respondent's parental rights so as to facilitate the child's adoption by his foster family, where he has experienced stability and where his emotional, academic and social needs were met (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). Furthermore, the teenage child expressed a clear desire to remain with the foster family, and while respondent may have completed an anger management program and attended some individual counseling, the evidence shows that he continued to exhibit aggressive and abusive behavior towards the child, foster mother and agency employees.

We have considered respondent's remaining arguments and find them unavailing.

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Andrias, J.P., Nardelli, McGuire, Moskowitz, Renwick, JJ.

4233 Jennifer O'Connor, Index 6180/06  
Plaintiff-Appellant,

-against-

Consolidated Edison Company of New York, Inc.,  
Defendant-Respondent.

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Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of  
counsel), for appellant.

Richard W. Babinecz, New York (Helman R. Brook of counsel), for  
respondent.

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Order, Supreme Court, Bronx County (Mark Friedlander, J.),  
entered on or about October 30, 2007, which, in an action for  
personal injuries sustained in a slip and fall on an ice patch in  
a public roadway abutting a vacant lot owned by defendant,  
granted defendant's motion for summary judgment dismissing the  
complaint, unanimously affirmed, without costs.

No issue of fact exists as to whether the ice patch was  
created by defendant's structures on defendant's abutting lot  
that allegedly diverted the flow of rain water from the lot (see  
*Roark v Hunting*, 24 NY2d 470, 475 [1969]). Log structures on the  
lot intended as retaining walls to manage the flow of rain water  
down the sloping lot did not contain the water. It does not  
appear, however, from plaintiff's expert's affidavit or report  
that this failure resulted in anything more than the water taking  
the natural course it would have taken down the slope and onto

the street had the structures never been placed on the lot. Since defendant had no duty "to adopt measures to prevent the flowage of surface water from [its] premises" in the first place (see *Tremblay v Harmony Mills*, 171 NY 598, 601 [1902]), it cannot be held liable for having adopted measures that were merely ineffective. We have considered plaintiff's other arguments and find them unavailing.

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**THE FOLLOWING MOTION ORDERS**  
**WERE ENTERED AND FILED ON**  
**OCTOBER 9, 2008**

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Lippman, P.J., Tom, Mazzairelli, Andrias, Saxe, JJ.

M-4177      Wright v The City of New York - Vival  
                 Appeal deemed withdrawn, as indicated.

Lippman, P.J., Tom, Mazzairelli, Andrias, Saxe, JJ.

M-4195      Harris v City of New York Health & Hospitals  
                 Corporation  
                 Appeal deemed withdrawn.

Lippman, P.J., Tom, Mazzairelli, Andrias, Saxe, JJ.

M-4507X     Djeddah v Djeddah  
M-4526      People v Jameson, Fred, also known as Jenkins,  
                 Ronald, also known as Jenkins, Fred  
M-4527      People v Fernandez, Hector  
                 Appeals withdrawn.

Lippman, P.J., Gonzalez, Nardelli, Acosta, DeGrasse, JJ.

M-4272 People v Graham, Keith, also known as Kitt, Derrick  
Appeal deemed withdrawn.

Lippman, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-4558 In the Matter of W., Andrew - W., Thomasena, also known  
as W., Thomasina - Administration for Children's  
Services

Appeal, previously perfected for the September 2008  
Term, withdrawn.

Lippman, P.J., Gonzalez, Nardelli, Acosta, DeGrasse, JJ.

M-4373 People v Fernandez, Estaban  
Appeal dismissed.

Lippman, P.J., Andrias, Friedman, Renwick, DeGrasse, JJ.

M-3914 People v Douehi, Richard, also known as Doueihi,  
Richard, also known as Doueili, Richard,  
also known as Doueini, Richard

Reargument and vacatur of order of this Court entered  
on July 29, 2008 (M-2852) and related relief denied.

Lippman, P.J., Tom, Williams, McGuire, Freedman, JJ.

M-4071 In the Matter of C., Cherie Odessa Toni and  
M-4072 C., Carlo Orlando Jesus - Administration for  
Children's Services

Leave to prosecute appeals as a poor person granted,  
as indicated. (See M-4071A and M-4072A, decided simultaneously  
herewith.)

Williams, J.

M-4071A In the Matter of C., Cherie Odessa Toni and  
M-4072A C., Carlo Orlando Jesus - Administration for  
Children's Services

Stay denied. (See M-4071 and M-7072, decided  
simultaneously herewith.)

Lippman, P.J., Gonzalez, Nardelli, Acosta, DeGrasse, JJ.

M-4205 People v McCoy, Christopher

Leave to prosecute appeal as a poor person granted,  
as indicated.

Lippman, P.J., Andrias, Nardelli, Acosta, DeGrasse, JJ.

M-4051 Hon v Prince Development Company, LLC - Generation  
M-4158 Building Company, LLC

Time to perfect appeal and cross appeal enlarged to  
the February 2009 Term.

Lippman, P.J., Gonzalez, Nardelli, Acosta, DeGrasse, JJ.

M-4109 Tsao v Goldberg, Scudieri & Block, P.C.

Time to perfect appeal enlarged to the February 2009  
Term.

Lippman, P.J., Gonzalez, Nardelli, Acosta, DeGrasse, JJ.

M-4148 In the Matter of Hernandez v Department of Housing  
Preservation and Development

Time to perfect proceeding enlarged to the March 2009  
Term.

Lippman, P.J., Friedman, Williams, Acosta, JJ.

M-3264 Leyse v Domino's Pizza LLC

Leave to appeal to the Court of Appeals denied.

Tom, J.P., Mazzarelli, Friedman, Williams, Moskowitz, JJ.

M-4020 In the Matter of S., Errol, Jr., and S., Huntley -  
Administration for Children's Services

Leave to prosecute appeal as a poor person granted,  
as indicated.

Tom, J.P., Mazzarelli, Williams, McGuire, JJ.

M-3443 Acme Supply Co., Ltd. v City of New York

Leave to appeal to the Court of Appeals denied.

Tom, J.P., Buckley, Sweeny, Moskowitz, JJ.

M-4082 FCI Group, Inc. v The City of New York  
Reargument or other relief denied.

Tom, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

M-4060 Kenney v The City of New York - Excel Industries

M-4113 Santiago v The City of New York - Estate of Torres

M-4455 Axelrod, doing business as S. Axelrod Co. v Magna  
Carta Companies

M-4461 Howard B. Spivak Architect, P.C. v Zilberman

Time to perfect appeals enlarged to the January 2009  
Term.

Tom, J.P., Mazzarelli, Friedman, Williams, Moskowitz, JJ.

M-3950 AWL Industries, Inc. v QBE Insurance Corp.

Time to perfect appeal enlarged to the February 2009  
Term.

Mazzarelli, J.P., Andrias, Saxe, Friedman, Acosta, JJ.

M-3856 People v Torres, Francisco Diaz

Leave to prosecute appeal as a poor person granted,  
as indicated.

Mazzarelli, J.P., Buckley, Acosta, Renwick, DeGrasse, JJ.

M-3947      In the Matter of W., Precious, also known as  
                  W., Precious Ebony - Family Support Systems  
                  Unlimited, Inc.

                  Leave to prosecute appeal as a poor person granted,  
as indicated.

Mazzarelli, J.P., Buckley, Acosta, Renwick, DeGrasse, JJ.

M-4133      Fabrikant v Fabrikant

                  Time to perfect appeal enlarged to the February 2009  
Term, as indicated.

Saxe, J.P., Catterson, McGuire, Acosta, DeGrasse, JJ.

M-4459      In the Matter of P., Aaron Lawrence - Graham-Windham

                  Time to perfect appeal enlarged to the January 2009  
Term, as indicated.

Gonzalez, J.P., Buckley, Moskowitz, Renwick, DeGrasse, JJ.

M-3963      People v Larkin, Raymond

                  Leave to prosecute appeal as a poor person and related  
relief granted; Clerk of the Supreme Court shall expeditiously  
have made and filed with the criminal court two transcripts of  
the SORA hearing and other proceedings, as indicated.

Gonzalez, J.P., Buckley, Moskowitz, Renwick, DeGrasse, JJ.

M-3984 Vera v Montefiore Medical Center - Estate of Vera

Notice of appeal from order entered on April 18, 2007 deemed timely filed from judgment entered July 11, 2007; appeal taken from order entered on April 18, 2007 dismissed as subsumed within appeal from judgment entered on July 11, 2007.

Gonzalez, J.P., Buckley, Moskowitz, Renwick, DeGrasse, JJ.

M-4034 People v Herndon, Richard

Leave to prosecute appeal as a poor person denied.

Friedman, J.P., Williams, Catterson, Acosta, JJ.

M-4117 People v Diaz, Richard, also known as Diaz,  
Richard Aneuris

Leave to prosecute appeal as a poor person granted,  
as indicated.

Friedman, J.P., Williams, Catterson, Acosta, JJ.

M-3316 Farone v Hunter Mountain Ski Bowl, Inc.

Leave to appeal to the Court of Appeals denied.

Williams, J.

M-4244 People v Rogers, Derek

Leave to appeal to this Court denied.

Tom, J.P., Friedman, Nardelli, Buckley, Sweeny, JJ.

M-3039      In the Matter of Harvey B. Baum,  
                 a disbarred attorney:

                 Application for reinstatement denied, as indicated.  
No opinion. All concur.

Tom, J.P., Gonzalez, Nardelli, Williams, Buckley, JJ.

M-986            In the Matter of Anthony M. Mahoney,  
M-1851            (admitted as Anthony Michael Mahoney),  
                 a suspended attorney:

                 Respondent suspended from the practice of law in the  
State of New York for a period of three years, effective the date  
hereof, and until the further order of this Court. Cross motion  
denied. Opinion Per Curium. All concur.

**The following order was entered and filed on October 7, 2008:**

Mazzarelli, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

M-4670      Moyal v Moyal

                 CPLR 5704(a) relief denied.