DOCKET# 2009-01286 ORCR

To be argued by:
Matisyahu Wolfberg, Esq.

New York Supreme Court

Appellate Term -- Second Department
9th and 10th Judicial Districts

THE PEOPLE OF THE STATE OF NEW YORK

***Respondent*,**

--Against--

YOSEF HIRSCH,

***Appellant*.**

DOCKET # 2009-01286 OR CR

BRIEF FOR THE APPELLANT

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Dated: March 23, 2010

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QUESTIONS PRESENTED

1. **The Trial Court erred acting like a prosecutor by directly examining the State Trooper and eliciting a substantial portion of the testimony**
2. **Whether the Trial Court denied the appellant's 6th Amendment right to counsel and acted in violation of CPL § 170.10(4)(a) by failing to inform him of his right to seek the advice and of, or to retain the services of counsel.**
3. **Whether the Trial Court erred by convicting the Appellant based on insufficient evidence.**
4. **Whether the Trial Court committed reversible error by not informing the appellant of his 5th Amendment right to remain silent.**

PRELIMINARY STATEMENT AND PROCEDURAL HISTORY

This matter commenced when Trooper Evan Rothbam of the New York State Police issued Appellant a summons for crossing over hazard markings in violation of Vehicle & Traffic Law § 1128(d), after a traffic stop occurring on September 11, 2008 in the Town of Monroe, Orange County. On May 5th 2009, Appellant was found guilty after a bench trial in Monroe Town Court. Appellant was not represented by counsel at any stage of the proceedings in the lower court. The State's sole witness was Trooper Evan Rothbaum who also acted as the prosecutor.

Appeal was commenced with the filing of a Notice of Appeal on the lower court and on the Appellate Term, along with the filing of a copy of the Notice of Appeal on the Orange County District Attorney's Office, (even though the District Attorney was not present at any time during the trial of appellant.)

FIRST QUESTION PRESENTED

The Trial Court erred acting like a prosecutor by directly examining the State Trooper and eliciting a substantial portion of the testimony

STATEMENT OF FACTS

As mentioned, there was no prosecutor present during the trial of this matter. The record clearly reflects that the Town Justice asked several questions of the Trooper who was prosecuting the case. The Justice's questions were not merely to clarify; rather the Justice's questions were posed to elicit elements of a prima facie case. For example, the Justice begins the trial by asking the Trooper, "How long have you been a

trooper?" (p.2 lines 19-20) And, "did you graduate from the Academy?" (p.2 lines 23-24) After these introductory questions, the Court states summarily that it is taking "judicial cognizance" (sic.) of the Trooper's expertise…" (p.3 lines 1-8)

ARGUMENT

Although a Judge is certainly permitted to ask questions of the witness, the Lower Court in the case at bar abused his authority. In fact, the Court acted in a prosecutorial fashion in that Court elicited testimony such as that establishing the Trooper's training and the foundation for his being an expert witness.

The Court held in People v. Arnold (98 N.Y.2d 63 (2002) 745 N.Y.S.2d 782, 772 N.E.2d 1140), that while "neither the nature of our adversary system nor the constitutional requirement of a fair trial preclude a trial court from assuming an active role in the truth-seeking process," the court's discretion is not unfettered (People v. Jamison, 47 N.Y.2d 882 (1979) at 883). The overarching principle restraining the court's discretion is that it is the function of the judge to protect the record at trial, not to make it. (People v. Yut Wai Tom, 53 N.Y.2d 44, 58 [1981]). Although the law will allow a certain degree of judicial intervention in the presentation of evidence, the line is crossed when the judge takes on either the function or appearance of an advocate at trial (see id. at 58; see also People v. DeJesus, 42 N.Y.2d 519 [1977]; People v. Mees 47 N.Y.2d 997 [1979]). A court may not, however, assume the advocacy role traditionally reserved for counsel (see e.g. Matter of Carroll v. Gammerman,193 A.D.2d 202 [1993]).

In the case at bar, the Court crossed the line in effect by taking on the function of the prosecutor and assuming the advocacy role traditionally reserved for counsel,

namely the prosecutor. By doing so, the court established the Trooper's credibility which is a substantial issue necessary for conviction.

SECOND QUESTION PRESENTED

Whether the Trial Court denied the appellant's 6th Amendment right to counsel and acted in violation of CPL § 170.10(4)(a) by failing to inform him of his right to seek the advice and of, or to retain the services of counsel.

STATEMENT OF FACTS

The is no evidence in the record that the Trial Court advised the appellant of his right to be represented by counsel or the right to an adjournment for the purposes of retaining counsel pursuant to CPL § 170.10(4)(a).

ARGUMENT

Notwithstanding that rule that a appellant charged with a traffic infraction is not entitled to assigned counsel, (CPL § 170.10(3)(c)), every appellant in any criminal prosecution is guaranteed the right to hire an attorney pursuant to the 6th Amendment. In light of these Constitutional requirements, CPL § 170.10(4)(a) provides that "Except as provided in subdivision five, the court must inform the appellant: (a) Of his rights as prescribed in subdivision three" namely, "The appellant has the right to the aid of counsel at the arraignment and at every subsequent stage of the action."

The Appellate Term has held in People v. Rios, (9 Misc.3d 1, 801 N.Y.S.2d 113 (2005)) that "Inasmuch as the appellant in the case at bar was charged with at least one traffic infraction subjecting him to the possibility of imprisonment if convicted (see Vehicle and Traffic Law § 1180 [h] [2]), the lower court was required to advise him prior

to trial of his right to counsel (see People v. Weinstock, 80 Misc 2d 510 [App Term, 9th & 10th Jud Dists 1974]) as well as his right, inter alia, to an adjournment to obtain counsel (CPL 170.10 [3], [4]; (citations omitted). In the case at bar, the appellant was charged with see Vehicle and Traffic Law § 1128(d), a conviction of which could subject him to 15 days in jail. Thus, the lower court was required to advise him prior to trial of his right to counsel.

In People v. Schonfeld (2009 NY Slip Op 29529) the court reversed a conviction in a traffic matter, when the motorist proceeded to trial pro-se and was not advised of his right to retain counsel. In reversing, the Appellate Term in Schonfeld held that the Lower Court had failed to give the defendant the required advisements of, among other things, his rights to counsel "at every . . . stage of the action" (CPL 170.10 [3]) and to an adjournment for the purpose of obtaining counsel (see CPL 170.10 [3] [a]; [4] [a]).”

In the present matter, Court failed inform the Appellant of the right to an attorney and the right to an adjournment to hire an attorney. The denial of Appellant’s right to an attorney prejudiced him at trial and thus, that denial constitutes reversible error.

THIRD QUESTION PRESENTED

Whether the Trial Court erred by convicting the Appellant based on insufficient evidence.

STATEMENT OF FACTS

Vehicle and Traffic Law § 1128(d) states: “When official markings are in place indicating those portions of any roadway where crossing such markings would be especially hazardous, no driver of a vehicle proceeding along such highway shall at any

time drive across such markings." The Trooper did not testify that the Appellant's crossing of the street markings was "especially hazardous."

ARGUMENT

Because the Trooper failed to testify that Appellant's crossing of the markings was "especially hazardous," he failed to make out a prima facie case. Merely testifying that the Appellant crossed the markings is insufficient. Thus, the conviction was attained as the result of insufficient evidence.

FOURTH QUESTION PRESENTED

Whether the Trial Court committed reversible error by not informing the appellant of his 5th Amendment right to remain silent.

STATEMENT OF FACTS

The record does not reflect that the Court advised Appellant of his 5th Amendment right to remain silent.

ARGUMENT

The Fifth Amendment to the United States Constitution provides in part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. Const. Amend. V. in Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), the Supreme Court held this privilege against self-incrimination applicable to the states through the Fourteenth Amendment. In the case at bar, the Court did not inform the appellant of his right to remain silent and not to testify. Appellant subsequently

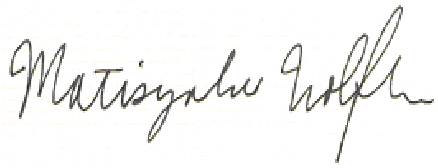
incriminated himself. Thus, the Court committed reversible error in failing to inform the appellant of his right to remain silent.

Conclusion

The conviction should be overturned and dismissed because the appellant did not receive a fair trial due to the violation of his constitutional rights on the part of the Trial Court, namely, he was denied his right to counsel and his right to remain silent. Furthermore, the defendant conviction based on testimony that even it were reviewed in the light most favorably to the people, was legally insufficient. In light of the foregoing, the judgment of conviction should be reversed and the charge should be dismissed. Furthermore, the judgment of conviction should be reversed and the charge should be dismissed as a matter of discretion in the interests of justice. A mere reversal would be a Pyrrhic victory and would not serve the interests of justice.

Respectfully submitted,

Dated: March 23, 2010



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