

New York Supreme Court
Appellate Term -- Second Department
9th and 10th Judicial Districts

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

--Against--

FRED SCHONFELD,

Appellant.

DOCKET # 2008-2287 RO CR

BRIEF FOR THE APPELLANT

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Dated: February 27, 2009

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QUESTIONS PRESENTED

- 1. Whether the Trial Judge improperly denied appellant's motion to dismiss for failure to provide a supporting deposition.**
- 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.**

PRELIMINARY STATEMENT AND PROCEDURAL HISTORY

Appellant was charged with Speeding 55 mph in a 30 mph zone in violation of NY Vehicle & Traffic Law § 1180, after a traffic stop occurring on July 28, 2008. On October 29, 2008, in Ramapo Justice Court, Appellant was found guilty after a bench trial over which the Hon. Rhoda F. Schoenberger, Ramapo Town Justice presided. Appellant was not represented by counsel at any stage of the proceedings in the lower court. The State's sole witness was a Ramapo Town Police officer who also acted as a 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 Rockland County District Attorney's Office, (even though the District Attorney was not present at any time during the trial of appellant.)

FIRST QUESTION PRESENTED

Whether the Trial Judge improperly denied appellant's motion to dismiss for failure to provide a supporting deposition.

STATEMENT OF FACTS

At all times in the matter in the court below, Appellant preceded Pro-Se. On August 15th 2008, the court received the appellant's request for a supporting deposition. On September 15th 2008, the appellant submitted in writing a request to dismiss the accusatory instrument for failure to provide a supporting deposition. On September 22nd, 2008, appellant appeared in court and made an oral motion to dismiss for failure to provide a supporting deposition. Justice Schoenberger requested that appellant's

motion be made in writing (although the Appellant had arguably done so already see exhibits "A" and "B"). The appellant subsequently made another motion to dismiss in writing in a timely basis.

On the next court date of October 29, 2009, Justice Schoenberger denied the motion to dismiss stating that the Appellant had in fact received the deposition. During Trial on October 29, 2009 (p.4 commencing line 12) the People's witness Officer Hannes testified that "It [the deposition] was returned to me." Furthermore, there is an evidence the envelope containing the supporting deposition, which is stamped "RETURN TO SENDER." (see exhibit "C"). Thus, it is uncontroverted from the record that the appellant did not receive the supporting deposition within the 30 days of his request of such.

ARGUMENT

Although service through by mail creates a presumption of receipt, in this case, that presumption was rebutted by the fact that the deposition was "returned to sender" and was not actually delivered to the recipient. Thus, the Appellant was not served the deposition on a timely basis. Therefore, pursuant to CPL § 170.30(1)(a), the summons should have been dismissed. Furthermore, pursuant to in People v. Rosenfeld 626 (N.Y.S.2d 352, 163 Misc.2d 982 (N.Y.Sup., 1994) the conviction should be reversed and the charges dismissed.

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). The trial commences with Justice Schoenberger stating: "Fred Schonfeld. We'll do the trial..." (page 2, line 2 of the Trial Transcript).

At the conclusion of the People's case, the Appellant asks: "My question is, can I come back with an attorney?" (page 6, line 3 of the Trial transcript). At which time the Town Justice denied Appellant's request.

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 § 1180, 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 fact, at no time did the Court inform the Appellant of these rights. The Appellant clearly expressed a desire to have legal representation, but he was not told of his right to an attorney and the results were that he was convicted. The denial of Appellants rights to an attorney prejudiced him in the 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

Nowhere does the record reflect that the officer testified to the element of jurisdiction. The officer does not present any testimony that the offense occurred within the jurisdiction of the Trial Court. The officer merely testifies that he “assigned to a radar detail on Rockland Lane.” (trial transcript p. 3, lines 14-15) The officer did not testify that this offense occurred in the Town of Ramapo. The Town of Ramapo Police,

the agency which employs the testifying officer, is responsible for patrolling many villages in the Town of Ramapo. Many of the villages where the Town or Ramapo patrols maintain their own Justice Courts. NY CPL § 100.55(4) provides that “An information, a simplified information, a prosecutor's information or a misdemeanor complaint may be filed with a town court of a particular town when an offense charged therein was allegedly committed anywhere in such town **other than in a village thereof having a village court.**” (emphasis added) Thus, it cannot be assumed that the officer was within the jurisdiction of the court when he allegedly witnessed the offense, because he patrols many separate jurisdictions, which maintain their own justice courts.

Nor does the Officer make a definite and convincing identification of the Appellant. The Trial judge asked the officer “And that’s the defendant?” (transcript p.4, line 4) Whereupon the Officer answered “I believe so, you honor.” (transcript p.4, lines 5-6)

ARGUMENT

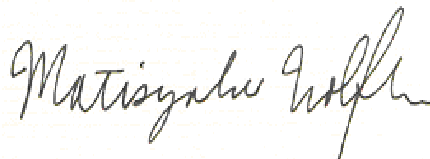
In order to sustain a conviction for any violation the People must prove the elements of the offense beyond a reasonable doubt. Two of the elements of speeding are Jurisdiction and Identification. Neither of these elements were satisfied beyond a reasonable doubt. Thus, the conviction was attained as the result of insufficient evidence.

Conclusion

The conviction must 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. Furthermore, the defendant conviction based on testimony that even it were reviewed in the light most favorably to the people, was legally insufficient. Additionally, in view of the foregoing, the judgment of conviction should be reversed for failure to provide a supporting deposition and charge should be dismissed as a matter of discretion in the interests of justice.

Respectfully submitted,

Dated: February 27, 2009



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