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

THE PEOPLE OF THE STATE OF NEW YORK

***Respondent*,**

--Against--

AVROHOM BERGER,

***Appellant*.**

DOCKET # 20061949 OR CR

BRIEF FOR THE APPELLANT

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Dated: December 10, 2006

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3. **Whether the Trial Court committed reversible error by not informing the appellant of his 5th Amendment right to remain silent.**
4. **Was it error for the Trial Court to order the subsequent prosecution of the appellant on a "Long Form" accusatory instrument, after the initial accusatory instrument - a simplified traffic information was dismissed for failure to provide a supporting deposition, pursuant to CPL § 170.35(1)(a).**
5. **Whether the Court erred by convicting the appellant based on testimony, which lacked the weight and sufficiency to sustain a conviction.**

PRELIMINARY STATEMENT AND PROCEDURAL HISTORY

Appellant was convicted of Speeding 68 mph in a 55 mph zone, in violation of Vehicle & Traffic Law § 1180(b) on October 31, 2006 in Tuxedo Town Court, Orange County, as the result of a bench trial over which the Hon. Loretta K. Davis, Tuxedo Town Justice presided. Appellant was not represented by counsel at any stage of the proceeding in the lower court.

Appeal was commenced on November 21, 2006, 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

Whether the Trial Judge exhibited judicial bias in her questioning of the appellant, to the extent that the Trial Judge acted as prosecutor and the Appellant was thus denied a fair trial.

STATEMENT OF FACTS

There was no prosecutor present at trial. Almost all, if not all of the People's testimony was elicited through the direct questioning of the Court. There are five elements for Prima Facie case in a speeding prosecution. They are:

1. **Identification**
2. **Operation**
3. **Vehicle**
4. **Jurisdiction**
5. **Specific Speed**

The People are required to prove all of the above elements by proof beyond a reasonable doubt. People v. Baker, 2 Misc. 2d 600, 153 N.Y.S.2d 339 (1956).

What follows is a summary of how the Court's direct questioning elicited the necessary elements of the violation in the case at bar.

- **The Court inquired as to the training and qualifications of the witness, which elicited testimony necessary to establish element #5 – Specific Speed:**
    - The People's case-in-chief begins with the Court asking the People's sole witness Tuxedo Town Police Officer D'Elia "Can you tell us about your qualifications and tell us what happened on June 26, 2006?" (Transcript p. 3, lines 20-22)
    - The Court: "You were trained in radar and Lidar?" (p.4, lines 6-7)
    - The Court: "How long have you been a police officer in the Town of Tuxedo?" (p.4, lines 8-9)
- **In an effort to allow the officer an opportunity to correct his contradictory testimony as to the date of the occurrence, the Court inquired as to the exact date of and time of the violation, which elicited testimony necessary to establish elements #1 – Identification and #2 – Operation:**
    - The Court: "That's why I asked you if the it was June 20th or 26th? You have alleged [in the "long form" accusatory instrument] the date was June 20th, but it was the 26th?" (p.4, lines 16-18)

- The Court: "And about what time was this?" To this question the officer answered: "it was one – excuse me nine o'clock in the morning." (p. 5, lines 4-6)
- The Court: "It was that in the morning?" (p.5, line 7) To which the officer answers: "Yes" (p. 5 line 8)

- **The Court inquired as to the location of the offense, which elicited testimony necessary to establish element #4 – Jurisdiction and element #3 – Vehicle:**
  - The Court: "You were going northbound?" (p.5, line 9)
  - The Court: "When you saw him, the defendant, going northbound, what were the driving conditions?" (p.5, line 23)
  - The Court: "And that [where you witnessed the offense] was here in Tuxedo?" (p.6, line 24)
  - The Court: "In Orange County?" (p.7, line 2)
- **The Court inquired as to the identification of the Appellant, which elicited testimony necessary to establish element #1 – Identification**
  - The Court: "Was it [the driver of the vehicle you stopped] the appellant who is seated here today, Mr. Berger?" (p. 6, lines 21-22)

When it came time for the appellant to testify, the Court began questioning the appellant by asking: "Can you tell me what happened on the evening of June 26th, 2006, when you got stopped?" (p. 9, lines 17-19) The appellant's answer to the Court's question was damaging to the appellant's case. Later, the Court asks the appellant a

highly incriminating question: “Okay, so you were traveling and you didn’t realize you were traveling at such a high speed. Did you know you were speeding?” (p.10 line 25 through p.11 lines 2-4)

ARGUMENT

Although a Judge is certainly permitted to ask questions of the witness, the Court in the case at bar abused her authority. In fact, the Court acted in a prosecutorial fashion in that Court conducted the entire direct questioning of the People’s witness, eliciting all the necessary testimony to establish the elements of the accused offense. It appears that the People’s case was entirely the product of the Court’s direct examination of the People’s 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.

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 record does not reflect that the 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. If he appears upon such arraignment without counsel, he has the following rights: (a) To an adjournment for the purpose of obtaining counsel; and (b) To communicate, free of

charge, by letter or by telephone, for the purposes of obtaining counsel and informing a relative or friend that he has been charged with an offense…"

The Appellate Term has held in People v. Rios, (9 Misc.3d 1 (2005) 801 N.Y.S.2d 113) 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(b), 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. Thus, the Court acted in error.

THIRD 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

At the conclusion of the People's case, the Court turned to the appellant and said: "Now I'm going to ask for your testimony. So I'm going to have you tell me what happened, okay, Mr. Berger." (p.9 lines 9-11) At no time, did the Court did inform the appellant of his right to remain silent and not to testify.

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

FOURTH QUESTION PRESENTED

Was it error for the Trial Court to order the subsequent prosecution of the appellant on a "Long Form" accusatory instrument, after the initial accusatory instrument - a simplified traffic information was dismissed for failure to provide a supporting deposition, pursuant to CPL § 170.35(1)(a).

STATEMENT OF FACTS

Appellant had initially been charged of the offense of Speeding by way of being served with a simplified traffic information Summons # LV 2795984. Trial was set for October 31, 2006 at 9:00 am. Prior to trial, Justice Davis dismissed said summons for the issuing officer's failure to provide a supporting deposition. (see Trial Transcript p.2., lines 22-24 wherein Justice Davis states: "What that means is because you requested a supporting deposition – there was a case today, I dismissed it.") Appellant was then served and subsequently convicted based on the "long form" accusatory instrument, which, as the record reflects, the Court served on Appellant moments before trial.

ARGUMENT

Notwithstanding the general rule that a dismissal for a failure to provide a supporting deposition is a dismissal without prejudice, the subsequent refilling of charges by way of a "long form" information, in fact causes an abrogation of at least "the spirit", if not the "the letter" of Criminal Procedure law, and is thus improper.

In the seminal case on the issue People v. Aucello, (146 Misc.2d 417 (1990), 558 N.Y.S.2d 436) the appellant had requested a supporting deposition and none was timely provided. Defense counsel subsequently made a motion to dismiss, which was later granted. Subsequently, the trial court directed the officer to re-serve the untimely deposition together with a copy of the original traffic ticket bearing an amended trial date. The Court in Aucello held that, absent special circumstances, a trial court "abused its discretion when it permitted appellant to be tried based upon the new simplified information and supporting deposition."

Under a fact pattern similar to the case at bar, the court in People v. Rosenfeld 626 (N.Y.S.2d 352, 163 Misc.2d 982 (N.Y.Sup., 1994) ruled that "Such actions, [i.e., allowing the officer to reissue a previously dismissed traffic information] in this court's opinion, defeat the very purpose of the CPL, disregard the interests of judicial economy and, often times, render the defense of traffic matters impracticable."

Thus, in consideration of the aforementioned, the officer's subsequent filing of the "long form" instrument for the speeding charge was improper and the speeding charge should be dismissed with prejudice.

FIFTH QUESTION PRESENTED

Whether the Court erred by convicting the appellant based on testimony, which lacked the weight and sufficiency to sustain a conviction.

STATEMENT OF FACTS

Upon direct examination by the Court, Officer D'Elia testified that the violation occurred on June 26, 2006, while he initially indicated on the "long form" accusatory instrument that the offense occurred on June 20, 2006. The Court asks: "That's why I asked you if the it was June 20th or 26th? You have alleged [in the "long form" accusatory instrument] the date was June 20th, but it was the 26th?" (p.4, lines 16-18)

In addition, the Officer clearly contradicts himself as to the time of the offense. Upon direct examination the Court asks the Officer: "And about what time was this?" Officer D'Elia answers: "it was one – excuse me nine o'clock in the morning." (p. 5, lines 4-6) The Court then asks the Officer: "It was the in the morning?" (p.5, line 7) To which the officer answers: "Yes" (p. 5 line 8) Later, during her direct examination of the appellant, the Court asks the appellant: "Can you tell me what happened on the **evening** of June 26th, 2006, when you got stopped?" (p. 9, lines 17-19) (emphasis added. Such a question by the Court indicates that the Court itself believed the violation to have occurred in the evening, not as the officer had testified earlier, when the Court asked the Officer: "It was the in the morning?" (p.5, line 7) To which the officer answered: "Yes" (p. 5 line 8)

The Officer's contradiction also becomes apparent during the appellant's cross-examination of the Officer. The exchange is as follows:

- Mr. Berger (appellant): "And what time was it?"
- Officer D'Elia: "It was 9:02. I believe we went over that."

- Mr. Berger: “In the morning?”
- Officer D’Elia: “Nine at night, I’m sorry.”
- Mr. Berger: “You told the judge it was morning.”
- Officer D’Elia: If I did it was an accident.”

ARGUMENT

The Court, in its zealous approach in prosecuting the appellant ignored blatant contradictions in the appellant's testimony; thus, the evidence presented against the appellant at trial lacked both weight and sufficiency to sustain a guilty plea.

Conclusion

The conviction must be overturned and dismissed because the appellant did not receive a fair trial due to several violations of his constitutional rights on the part of the Trial court. Alternatively, in view of the foregoing, the judgment of conviction should be reversed and the charge dismissed as a matter of discretion in the interest of justice

Respectfully submitted,

Dated: December 12, 2006

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At a term of the Appellate Term of the Supreme Court
of the State of New York for the 9th & 10th Judicial Districts

JUL 12 2007

HON. KENNETH W. RUDOLPH, P.J.
HON. EDWARD G. McCABE
HON. MELVYN TANENBAUM, JJ.

JUNE 26, 2007 TERM
2006-1949 OR CR

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PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

Lower Court #
06070079

AVRAHAM BERGER,
Appellant.

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The above named appellant having appealed to this court from a **JUDGMENT OF CONVICTION** of the **JUSTICE COURT, TOWN OF TUXEDO, ORANGE COUNTY** rendered on **OCTOBER 31, 2006** and the said appeal having been **argued** by **MATISYAHU WOLFBERG, ESQ.,** counsel for the appellant and no brief having been submitted for the respondent and due deliberation having been had thereon; it is,

ORDERED AND ADJUDGED that the judgment of conviction is reversed as a matter of discretion in the interest of justice, fine, if paid, remitted and information dismissed.

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

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APPELLATE TERM

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM : 9th and 10th JUDICIAL DISTRICTS

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PRESENT : RUDOLPH, P.J., McCABE and TANENBAUM, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 2006-1949 OR CR

DECIDED

AVRAHAM BERGER,

Appellant.

----------x

Appeal from a judgment of the Justice Court of the Town of Tuxedo, Orange County (Loretta Davis, J.), rendered October 31, 2006. The judgment convicted defendant, after a nonjury trial, of speeding.

Judgment of conviction reversed as a matter of discretion in the interest of justice, fine, if paid, remitted and information dismissed.

Under the circumstances presented, we are of the view that defendant should not have been tried on the new information following the dismissal of the simplified traffic information on the court's own motion on the day of trial (see People v Rosenfeld, 163 Misc 2d 982, 983 [App Term, 9th & 10th Jud Dists 1994]; People v Aucello, 146 Misc 2d 417 [App Term, 9th & 10th Jud Dists 1990]; cf. People v Nuccio, 78 NY2d 102 [1991]).

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Were we not inclined to reverse the conviction and dismiss the information as a matter of discretion in the interest of justice, we would still find it necessary to reverse the conviction on the law, and order a new trial, in view of, inter alia, the omission to inform defendant of his rights to counsel and an adjournment to obtain counsel (CPL 170.10 [3], [4]; People v Rios, 9 Misc 3d 1 [App Term, 9th & 10th Jud Dists 2005]). Moreover, the pro se defendant should have been informed that he had an option to testify or not. Instead, he was told by the court at the start of the trial that after the officer's testimony, ". . . you can ask questions of him and then you will give your testimony under oath . . . ." The court subsequently stated, "Now I'm going to ask for your testimony. So I'm going to have you tell me what happened, okay, Mr. Berger." This error proved to be prejudicial, since defendant admitted upon the witness stand that he had been speeding and since the court expressly took note of said admission in finding him guilty.

Accordingly, the judgment of conviction is reversed and the information dismissed.

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