

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

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THE PEOPLE OF THE STATE OF NEW YORK

*Respondent,*

--Against--

AVROHOM BERGER,

*Appellant.*

DOCKET # 20061949 OR CR

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BRIEF FOR THE APPELLANT

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## **QUESTIONS PRESENTED**

- 1. 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.**
- 2. Whether the Trial Court denied the appellant's 6<sup>th</sup> 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 committed reversible error by not informing the appellant of his 5<sup>th</sup> 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 trial 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 People's witness by 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.

**I. The Court's questioning of the People's witness**

• **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 20<sup>th</sup> or 26<sup>th</sup>? You have alleged [in the "long form" accusatory instrument] the date was June 20<sup>th</sup>, but it was the 26<sup>th</sup>?" (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 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)

## **2. The Court’s questioning of the Defendant**

When it came time for the appellant to testify, the Court began questioning the appellant but did not advise the appellant of his right to remain silent. The Court merely

directed the defendant to take the witness stand, swore in the defendant and began by asking: "Can you tell me what happened on the evening of June 26<sup>th</sup>, 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 6<sup>th</sup> 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 6<sup>th</sup> 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 5<sup>th</sup> 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 refiling 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 this 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 20<sup>th</sup> or 26<sup>th</sup>? You have alleged [in the "long form" accusatory instrument] the date was June 20<sup>th</sup>, but it was the 26<sup>th</sup>?" (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: "evening of June 26<sup>th</sup>, 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 the charge 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: January 2, 2007

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