

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

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

JUL 12 2007

JUNE 26, 2007 TERM
2006-1949 OR CR

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PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

Lower Court #
06070079

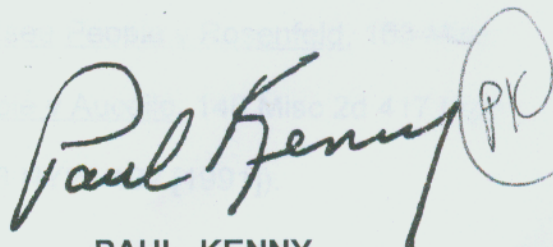
AVRAHAM BERGER,
Appellant.

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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.

MATISYAHU WOLFBERG, ESQ.
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ENTER:



DISTRICT ATTORNEY
ORANGE COUNTY
30 MATTHEWS STREET
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PAUL KENNY
CHIEF CLERK
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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NO. 2006-1949 OR CR

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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.