DOCKET # 2010-00095 OR CR

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

THE PEOPLE OF THE STATE OF NEW YORK

***Respondent*,**

--Against--

ZVI MEISELS,

***Appellant*.**

DOCKET # 2010-00095 OR CR

BRIEF FOR THE APPELLANT

To be argued by:

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Dated: June 8, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Statutes and Legislative Material

QUESTIONS PRESENTED

1. **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.**
2. **Whether the Trial Court committed reversible error by not informing the appellant of his 5th Amendment right to remain silent.**
3. **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).**

PRELIMINARY STATEMENT AND PROCEDURAL HISTORY

Appellant was convicted of Following too Close in violation of Vehicle & Traffic Law § 1129(a) on December 2, 2009 in Goshen Village Court, Orange County, as the result of a bench trial over which the Hon. Thomas Cione, Goshen Village Justice presided. Appellant was not represented by counsel at any stage of the proceeding in the trial court.

Appeal was commenced on January 5, 2010, with the filing of a Notice of Appeal on the lower court.

FIRST 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 § 1129 [a]), 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.

SECOND 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: "THE COURT: Sustained. All right. Mr. Meisels, now is the time for you to give your side of the story, and if you'd raise your right hand. Do you affirm that the testimony you're about to give is the truth and the whole truth?" (transcript p.12 lines 2-6) 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 during cross examination by admitting that he was involved with the accident (transcript p. 18 commencing line 19). Thus, the Court committed reversible error in failing to inform the appellant of his right to remain silent.

THIRD 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 Following too close by way of being served with a simplified traffic information Summons # C3560056KH. The record reflects that the original simplified traffic information was dismissed. (transcript p. 4, line 12-15). Subsequently, the officer issued a "long form" and Trial proceeded on December 8, 2009 based on the "long form"

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 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." See also People v. Berger (16 Misc.3d 133(A) 2007).

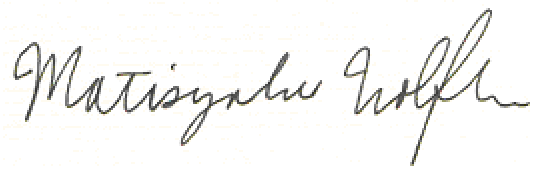
Thus, in consideration of the aforementioned, the officer's subsequent filing of the "long form" instrument for the following too close charge was improper and the charge should be dismissed with prejudice.

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, namely the violation of his 5th and 6th Amendment rights to remain silent and right to counsel. 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 based on the reissuing of the summons via the long form, which goes against the spirit of the CPL.

Respectfully submitted,

Dated: June 8, 2010



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