Supreme Court of the State of New York

Appellate Term: 9th and 10th Judicial Districts

THE PEOPLE OF THE STATE OF NEW YORK

***Respondent*,**

--Against--

MORDECHAI NEUHAUS,

***Appellant*.**

DOCKET # 2007-1399 OR CR

BRIEF FOR THE APPELLANT

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Dated: January 30, 2008

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PRELIMINARY STATEMENT AND PROCEDURAL HISTORY

The Appellant was charged with 5 counts of children not in safety restraints (NY VTL § 1229(C)(1) in Wallkill Town Court. A trial was held May 11, 2007 in front of Justice Shoemaker, there was no court reporter present. After the conclusion of trial, Justice Shoemaker reserved judgment, subsequently entering an order of conviction on all counts on May 22, 2007. Appellant appeared in court with counsel on August 3, 2007 for sentencing. Appellant commenced appeal with the filing of an Affidavit of Errors on August 21, 2007, which was within 30 days of the sentencing.

As of 56 days of the filing of the Affidavit of Errors, Appellant had not yet received the Justice's return. On October 16, 2007, 55 days after the filing of the affidavit of errors, the Town Justice sent appellant's counsel the Justice's proposed cover "minutes" of the case. In a cover letter which accompanied the proposed minutes, the justice wrote that if appellant's counsel had any objections to the proposed minutes, that counsel should contact the court in writing within 2 weeks of the Justice's letter.

Thus, on October 17, 2007 Appellant moved the Appellate Term to compel the lower court to file the return. Such motion was denied on December 24, 2007 as moot, in that the court had in meantime received the lower court's return.

On October 22, 2007, after receiving the Court's letter dated October 16, 2007, Appellant's counsel submitted in letter to the court which detailed numerous omissions and alleged inaccuracies in the Justice's proposed minutes.

The lower Court subsequently submitted his version of the minutes nevertheless, without any modification of the proposed minutes.

FIRST QUESTION PRESENTED

Whether Appellant is entitled to reversal as a matter of law because the trial Court failed to deny certain allegations alleged in the affidavit of errors.

STATEMENT OF FACTS

The Appellant's Affidavit of Errors alleges, inter alia:

"3. The Trial Court erred by not allowing a court reporter to be present during a portion of the proceedings, thus denying the Appellant a fair trial."

4. The Trial Court erred by shifting the burden of proof by directly examining the Appellant during trial by repeatedly asking the Appellant: "how could the State Trooper issue summonses for children not in seatbelts if the Trooper did not ask the ages of the children?"

5. The Trial Court erred acting like a prosecutor by directly examining the Appellant during trial by repeatedly asking the Appellant: "how could the State Trooper issue summonses for children not in seatbelts if the Trooper did not ask the ages of the children?"

6. The Trial Court erred by acting like a prosecutor in that the Court asked argumentative questions to the defense counsel at trial such as "how could the State Trooper issue summonses for children not in seatbelts if the Trooper did not ask the ages of the children?"

7. The Trial Court erred by convicting the Appellant based on legally insufficient evidence in that the Trooper did not testify to the ages of the children.

8. The Trial Court erred by convicting the Appellant based on legally insufficient evidence in that the Trooper did not testify that he witnessed the children not in seatbelts and/or restraint devices while the Appellant was actually operating the motor vehicle.

9. The Trial Court erred by ignoring contradictions in the Trooper's testimony regarding the number of occupants in the back section of the vehicle, namely, the Trooper testified that there were 8 persons in the back of the van, while he later testified that there were 5 persons, all children, for which he issued summonses.

10. The Trial Court erred by effectively denying the Appellant the right to a plea bargain by indicating that a plea to a lesser charge of one count of child not in seatbelt would result in a sentence of 2 weekends in jail, while VTL § 1229 does not allow for jail time.

12. The Trial Court erred by engaging in gross judicial misconduct by not allowing a court reporter to be present in the courtroom for sentencing, thus denying the Appellant his constitutional rights from having an open courtroom during all parts of the proceedings."

The Court does not respond to these alleged errors in its return.

ARGUMENT

Where the return fails to deny an allegation regarding judicial conduct made in the affidavit, the allegation is deemed admitted. See People v. McSpirit, 154 Misc.2d 784, 595 N.Y.S.2d 660 [App.Term 9th & 10th Jud.Dists., 1993]; cf., People v. Feldes, 73 N.Y.2d 661, 543 N.Y.S.2d 34, 541 N.E.2d 34 (1989). In this instance, the Court failed to deny several allegations, which if admitted, are grounds for reversal. Specifically, Paragraph #3, which alleges a violation of Appellant's constitutional right to a fair trial, is deemed admitted; Paragraph #4, which alleges that the Trial Court shifted the burden of proof, is deemed admitted; Paragraphs #5 and 6 which allege that the Court acted like a prosecutor are deemed admitted; Paragraphs #7 and 8 and 9 which allege that the Court convicted the Appellant based on legally insufficient evidence are also deemed admitted; Paragraph #10 which alleges that the Court effectively denied Appellant the right to plea bargain, is deemed admitted; Paragraph #12 which alleges that the Court engaged in gross judicial misconduct by not allowing a court reporter to be present in the courtroom for sentencing is deemed admitted.

Thus, the conviction must be reversed because these errors are deemed admitted.

SECOND QUESTION PRESENTED

Whether Appellant is entitled to reversal because the State's witness was allowed to testify in a narrative form.

STATEMENT OF FACTS

At the commencement of Trial, the prosecutor asked the State's sole witness to tell the court what happened on the date and time in question. The State Trooper began testifying in the narrative. Appellant's counsel objected to the narrative testimony. The trial Judge allowed the State's witness to continue to testify in the narrative form.

ARGUMENT

By allowing the Trooper to testify in narrative form, the Court violated the Appellant's right to confront his accuser, a right guaranteed to all criminal defendants by the 6th amendment of the US Constitution. Quintessential to a defendant's 6th Amendment right to confront his accuser, is the right have testimony presented in question and answer form, so that the defendant may object should objectionable testimony be solicited. By way of illustration, allowing a police officer witness to record his testimony prior to trial and then play a recording of his testimony at trial would be a clear violation of defendant's right

to confront his accuser. In that vein of reasoning, allowing a police officer witness to testify in pure narrative form denies a defendant his right to confront his accuser, because the defendant is denied any opportunity to object to the testimony before it is offered.

In addition, the court has held that "We think that when counsel objects to narration by a witness he has the right to have the testimony elicited by question and answer, in order that he may protect his client by objection rather than by a motion to strike out." *Altkrug v. Horowitz* (1906) 111 A.D. 420 [421-422]; 97 N.Y.S. 716 The remedy in *Altkrug* was reversal.

Therefore, because the Court violated Appellant's Due Process and 6th Amendment Rights, and in light of *Altkrug*, the conviction must be reversed.

THIRD QUESTION PRESENTED

Whether the Trial Court denied the appellant his 6th Amendment right to public trial by not allowing a court reporter to be present during a portion of the proceedings

STATEMENT OF FACTS

Appellant appeared for sentencing on August 3, 2007 with counsel. The proceedings in Wallkill Justice court were not at that time recorded by a court reporter. Defense counsel had procured the services of a private court reporter, who did indeed arrive to court on the date of sentencing. Appellant paid the court reporter her $100 non-refundable appearance fee.

The Trial Court did not allow the court reporter to set up her stenographic typing equipment in the courtroom. When defense counsel requested that the court reporter be allowed to set up her equipment, the Trial Court asked defense counsel if he had had permission to have a court reporter present to record the proceedings. Defense counsel responded to the extent that he told the court clerk on the phone that he was brining a court reporter. The Trial Court repeated the question as to whether defense counsel had explicit permission from the Trial Court. Defense counsel, dumbfounded by this turn of events remarked that he had permission from the Constitution of the State of New York. At which time, the Trial Court stated to the effect that the appellant had not requested permission to have the court reporter present, and thus we he was not allowing it. Furthermore, he told the court reporter to leave the courtroom.

ARGUMENT

One of the fundamental rights guaranteed by the 6th Amendment is the right to a public trial at all stages of the proceedings. Part of the right to a public trial is the right to have a court reporter present. By denying Appellant the right to have a court reporter present, the Trial Court effectively denied Appellant his right to a public trial. Where a trial is improvidently closed to the public without a factual showing that defendant's right to a public trial is not being sacrificed for less than compelling reasons, such error is reversible per se, requiring no showing of prejudice. (People v. Jones, 47 N.Y.2d 409, 391 N.E.2d 1335, 418 N.Y.S.2d 359, 5 Media L. Rep. 1262)

In addition, part of the right to a public trial is the right to have an open courtroom. By asking the court reporter to leave the courtroom, the Trial court denied the appellant his right to a public trial. Even assuming that the Trial Court had a right to deny the court reporter from recording the proceedings, the Trial Court had no right to ask the court reporter to leave. In doing so, the Trial Court effectively denied the Appellant his right to public trial. Such error is reversible per se. Thus, the conviction must be reversed on this ground alone.

Furthermore, the Court's denial of Appellant's seeking to have a court reporter present in fact prejudiced Appellant in his appeal. Had a court reporter been present, Appellant would have been able to preserve comments which the Court made which arguably revealed extreme judicial bias and judicial misconduct. Had the record been preserved, Appellant would have a more certain basis for reversal of the conviction.

In addition, in People v. Harrison (85 N.Y.2d 794, 652 N.E.2d 638 N.Y.,1995, the Court of Appeals reversed the conviction in holding that the Court's actions in denying Appellant's right to have a court reporter record portions of the proceedings affectively denied the Appellant his right to effective appellant review. Thus, the proper course of action in this Appeal is reversal.

FOURTH QUESTION PRESENTED

Whether the Trial Court erred by shifting the burden of proof.

STATEMENT OF FACTS

At one point during the trial, Appellant's counsel asked the Appellant on direct examination whether, at the time of the traffic stop, the State Trooper had asked the Appellant how old the occupants in the rear of his vehicle were [in order to determine whether they were under the age of 16]. The Appellant answered "No," that the State Trooper had not asked him the age of the passengers. At which point, the Court asked the appellant directly, several times: "how is it Mr. Neuhaus that he [the State Trooper] issued summonses for children not in seatbelts if the Trooper did not ask the ages of the children?" The Appellant did not know what to answer so he remained silent. At which point, the Court turned to Appellant's counsel and asked him the same question, "how is it Mr. Wolfberg that he [the State Trooper] issued summonses for children not in seatbelts if the Trooper did not ask the ages of the children?" Appellant's counsel answered the judge that he was not testifying and that the question was improperly being posed to him as the attorney for the defendant.

ARGUMENT

Although a Judge is certainly permitted to ask questions of the witness, the Court in the case at bar abused his authority. In fact, the Court acted in a prosecutorial fashion in that Court asked Appellant argumentative questions. Furthermore, the Court's questioning reveals the bias, which the Court had towards Appellant at trial.

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.

FIFTH QUESTION PRESENTED

Whether the Trial Court erred by convicting the Appellant based on insufficient evidence.

STATEMENT OF FACTS

In order to sustain a conviction for any violation the People must prove the elements of the offense beyond a reasonable doubt. In this case, the alleged violation was of NY VTL § 1229(c)(1) children not properly in seatbelts. That statute states:

> *"No person shall operate a motor vehicle in this state unless all back seat passengers of such vehicle under the age of four are restrained in a specially designed seat which meets the Federal Motor Vehicle Safety Standards set forth in 49 C.F.R. 571.213 and which is either permanently affixed or is affixed to such vehicle by a safety belt or in the case of any other passenger under the age of sixteen, he or she is restrained by a safety belt approved by the commissioner."*

At no time did the Trooper testify that he witnessed the Appellant operating the motor vehicle while children were not properly restrained. The Trooper testified that he observed the Appellant's vehicle traveling down the highway and that the, his attention was drawn to the vehicle by the fact that the vehicles head-lights were "wig-wagging" - meaning flashing on and off. The Trooper testified that he stopped the vehicle because the headlights were flashing in the manner which emergency vehicles operate, while Appellant's vehicle did not appear to be an emergency vehicle.

The Trooper further testified that he spent several minutes on the side of the road with the Appellant's stopped vehicle trying to help the Appellant figure out how to turn off the emergency lights. (Appellant was operating his brother-in-law's car. The Appellant is a volunteer emergency responder whose vehicle is equipped with emergency lights. Appellant conceded at trial that somehow the vehicles emergency flashing headlights had been accidentally engaged.) The Trooper then testified that he did not issue a summons for the emergency lights, but he did issue 5 summonses for children not being properly restrained. At no time did the Trooper testify that he witnessed the Appellant operating the motor vehicle while children were not properly restrained.

Appellant in-fact testified that while his vehicle was parked on the side of road and the motor was turned off for almost 15 minutes during the traffic stop, that only then did some of his children get out of their seatbelts to help their father turn off the emergency lights and to get a better look at the State Trooper.

ARGUMENT

The People must prove "operation," in that it is a fundamental element of the offense in question. The People did not offer any testimony that their witness saw the Appellant operating the motor vehicle with the children not properly restrained. Thus, the conviction was attained as the result of insufficient evidence.

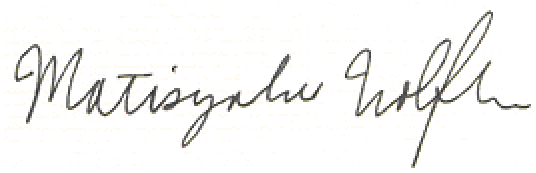
Conclusion

For the foregoing reasons the Appellant respectfully asks that conviction be reversed.

The Appellate Term should exercise its discretion in not only reversing this conviction but also dismissing the underlying charges, in the Interests of Justice, due to inherently unfair trial to which Appellant was subjected. The errors of the Court were of such a magnitude to warrant a dismissal in the Interests of Justice.

Respectfully submitted,

Dated: January 30, 2008



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JS

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

NOV 20 2008

HON. KENNETH W. RUDOLPH, P.J.
HON. EDWARD G. McCABE
HON. ALAN D. SCHEINKMAN, JJ.

OCTOBER 29, 2008 TERM
2007-1399 OR CR

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PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

MORDECHAI NEUHAUS,
Appellant.

---x

The above named appellant having appealed to this court from **JUDGMENTS OF CONVICTION** of the **JUSTICE COURT, TOWN OF WALLKILL, ORANGE COUNTY** rendered on **MAY 22, 2007** 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 hereby,

ORDERED AND ADJUDGED that the judgments of conviction are reversed on the law, the simplified traffic informations are dismissed, and fines, if paid, remitted.

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

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ENTER:

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PAUL KENNY
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APPELLATE TERM

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

----------x

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

----------x

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 2007-1399 OR CR

DECIDED NOV 20 2008

MORDECHAI NEUHAUS,

Appellant.

----------x

Appeal from five judgments of the Justice Court of the Town of Wallkill, Orange County (Ray Shoemaker, J.), rendered May 22, 2007. The judgments convicted defendant, after a nonjury trial, of five charges of permitting a passenger in his motor vehicle to be without seatbelts or car seats.

Judgments of conviction reversed on the law, simplified traffic informations dismissed, and fines, if paid, remitted.

Defendant was stopped by a state trooper while driving on Route 17 in the Town of Wallkill in a van with headlights flashing alternately. The trooper subsequently issued five tickets to defendant charging that five of his children in the rear of the van were not in seatbelts or car seats (Vehicle and Traffic Law § 1229-c).

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NO. 2007-1399 OR CR

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Stenographic minutes were not taken of the trial.

Viewing the evidence as presented in the justice's return in the light most favorable to the People (see People v Contes, 60 NY2d 620, 621 [1983]), we determine that the proof of guilt was legally insufficient, since no rational trier of fact could have deemed all of the elements of the offense established beyond a reasonable doubt (see Vehicle and Traffic Law § 1229-c; People v Danielson, 9 NY3d 342, 349 [2007]). The summary of the trooper's testimony in the return does not show how the trooper concluded that the children were outside of their seat belts or safety seats while defendant was operating the van. There is no indication that the trooper actually saw any of the children while the van was being operated or that anyone admitted that they were then unrestrained. Nor does it appear that defendant's testimony satisfied the deficiencies in the People's proof. Accordingly, the convictions are reversed and the five simplified traffic informations are dismissed.

In light of the foregoing, the other issues raised herein are rendered academic.

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