Supreme Court of the State of New York
Second Department
Appellate Term 9th and 10th Judicial Districts
Appellate Term

THE PEOPLE OF THE STATE OF NEW YORK

***Respondent*,**

--Against--

ERIC ROSENBAUM,

***Appellant*.**

DOCKET # 2005-1727 D CR

BRIEF FOR THE APPELLANT

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Dated: November 6, 2006

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PRELIMINARY STATEMENT AND PROCEDURAL HISTORY

On October 11, 2005, a decision and order of conviction was filed by Justice Spiegel (presently retired) convicting Appellant of VTL § 1180(d), (Speeding 74 in a 55 zone) in a bench trial heard July 12, 2005, in the 4:00 pm session of the Lagrange Justice Court. The District Attorney was absent at trial. New York State Trooper Cogan served as prosecutor and the People's sole witness.

Notice of Appeal and affidavit of errors dated November 2, 2005 were timely filed to the Lagrange Town Court, commenced the within appeal. As required, the Dutchess County District Attorney and the State Trooper were served with notice of the appeal on November 2, 2005.

On February 13, 2006, Lagrange Town Court filed an "ANSWER TO DEFENDANT'S AFFIDAVIT OF ERRORS" which stated only "STEPHEN L. GRELLER, being duly sworn, deposes and says: The Decision stand (sic) as Answer to Affidavit of Errors." Said notarized Answer, is signed by Justice Greller. Appellant was not served with said answer within 10 days of filing the affidavit of errors.

On May 26, 2006, this Honorable court granted Appellant's motion to compel Lagrange Town Court to answer according to the requirements of NY CPL § 460.10(3) to file a proper return.

On June 19, 2006 defendant served said order to compel Lagrange Town Court to answer. Lagrange Town Court still has not filed an answer in compliance with the requirements of NY CPL § 460.10(3).

On October 12, 2006, the Appellate Term denied Appellant's motion for Summary Reversal. However, on the Court's own motion, the allegations in the affidavit of errors were deemed to be admitted for purposed of the appeal per *People v Feldes* (1989) 73 NY2d 661).

FIRST QUESTION PRESENTED

Whether Appellant is entitled to Reversal because, being that the allegations in the affidavit of errors are deemed to be admitted for purposes of the appeal, the Appellant was denied his constitutional rights.

STATEMENT OF FACTS

In the Appellant's Affidavit of Errors, Dated November 2, 2005, Appellant alleged that "The Trial Court erred in finding the defendant guilty in that the defendant was denied his right to a fair trial and to due process including a denial of defendant's 6th and 14th Amendments right to confront his accuser." On this Court's own motion, the allegations in the affidavit of errors have been deemed to be admitted for purposes of the appeal as per *Feldes*, (Ibid.) It is established as a matter of law that the defendant was denied his right to a fair trial and to due process including a denial of defendant's 6th and 14th Amendments right to confront his accuser.

ARGUMENT

Due Process rights under the US Constitution as well as the 6th amendment right to confront one's accuser (applied to the states through the 14th Amendment (see *Douglas V. Alabama* (1965) 380 U.S. 415)) are fundamental rights guaranteed to all defendants in criminal matters in every jurisdiction in the United States of America.

Regarding the right to confront one's accuser, the US Supreme Court held in *Delaware v. Van Arsdall* (475 U.S. 673 (1986)): "While the trial court's denial of respondent's opportunity to impeach the prosecution witness for bias violated respondent's rights under the Confrontation Clause, such ruling is subject to harmless-error analysis under *Chapman v. California* (386 U.S. 18 (1967)). The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a number of factors, including the importance of the witness' testimony, whether the testimony was cumulative, the presence or absence of corroborating or contradictory testimony on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case." (*Delaware v. Van Arsdall* p.681-684). In order to find that the errors of the Trial Court were "harmless" errors, this reviewing court must say that the error was harmless beyond a reasonable doubt

In the case at bar, because a proper answer and a return was never filed by the Trial Court and nor was a proper record of the minutes of the trial ever compiled, is it is impossible for the "reviewing court [to] say that the error was harmless beyond a reasonable doubt…" (Ibid.). In other words, because the

reviewing court (the Appellate Term) in this case does not have the minutes or record to be able to establish that the error was harmless beyond a reasonable doubt, there is in fact a reasonable doubt of harmless error and thus it must be reversible error.

It is therefore established that Appellant was denied his Due Process rights under the US Constitution as well as his right to confront his accuser under the 6th amendment - applied to the states through the 14th Amendment. Thus, the Court is mandated to reverse the Appellant's conviction.

SECOND QUESTION PRESENTED

Whether Appellant is entitled to automatic Reversal upon a showing that an adequate record for review is not available.

STATEMENT OF FACTS

The Trial court has never filed a proper answer or return in this case, nor has a record in this case has never been established.

ARGUMENT

It has been held that "It is the duty of the Justice presiding in a local criminal court to set forth or summarize evidence, facts or occurrences in or adduced at the proceedings resulting in judgment, sentence, or order, which constitute the factual foundation for the contentions alleged in the affidavit of

errors. (CPL 460.10 [3][d].)" *(People v. Dewitt* 171 Misc.2d 622 (1996)) Justice Spiegel did not do so, even when mandated by statute to do so and when ordered by this Court to do so on May 26, 2006.

It has also been clearly held that "…upon a showing that an adequate record for review is not available that a defendant is entitled to automatic reversal" (*Feldes*, at 665 citing *People v Glass* (1977) 43 N.Y.2d 283, 285 in the dissenting opinion). In the case at bar, the record is clearly unavailable and the Appellant has used all due diligence to avail himself of the record.. Lagrange Town Justice Spiegel who heard the case has left the bench and is no longer a Town Justice in Lagrange. Justice Spiegel never filed any return or answer in this matter. Any attempt in filing a return and answer was made by Justice Spiegel's successor Justice Greller, who did not hear the case and cannot possibly assist in assembling the minutes of the case.

In this case, any meaningful reconstruction of the minutes of the trial would require participation of the Town Justice who presided over the trial. The District Attorney present; due to the fact that their offices have opted out of prosecution of traffic matters. On October 25, 2006, in a last ditch effort to compile the record, Appellant's counsel sent letters to not only Justice Spiegel, but also to the court and to the prosecutor Trooper Cogan, asking for their assistance in compiling the minutes of the trial. (see exhibits "A", "B" and "C") As of the date of this brief, Appellant has not received any response from the aforementioned parties.

Thus, Appellant is entitled to automatic reversal because an adequate record for review is not available.

THIRD QUESTION PRESENTED

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

STATEMENT OF FACTS

As noted, the District Attorney was not present at this trial. Thus, State Trooper Cogan served as the prosecutor and sole witness for the People. At the commencement of the People's case, defense counsel objected to the form of testimony as being narrative. Nonetheless, the Trial Court judge allowed Trooper Cogan to proceed to testify in narrative form.

ARGUMENT

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. *Altkrug* therefore mandates reversal.

Conclusion

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

Respectfully submitted,

Dated: November 6, 2006

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