2-5-1973

Application in Opposition for Bail

Lewis M. Steel '63

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE
OF NEW YORK

against

WILLIAM A. MAYNARD,

Defendant-Appellant.

AFFIRMATION IN OPPOSITION TO APPLICATION FOR BAIL

FRANK S. HOGAN
District Attorney

155 Leonard Street
Borough of Manhattan
New York City

(212) 732 7300

AGW:hp

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FIRST DEPARTMENT

- -

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, : AFFIRMATION IN OPPOSITION TO APPLICATION FOR BAIL

-against- :

WILLIAM A. MAYNARD, :

Defendant-Appellant. :

- -

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ARTHUR G. WEINSTEIN, an attorney duly admitted to the practice of law, hereby affirms, under penalty of perjury, that:

1. I am an Assistant District Attorney in and for the County of New York, assigned to the Appeals Bureau of the District Attorney's Office of New York County and am familiar with the facts and proceedings in the above-entitled action. This affidavit is submitted in opposition to appellant's motion seeking to have bail set pending the determination of his appeal. The contents herein are based upon prior papers and proceedings, and upon other information and belief.

(a) William A. Maynard, Jr., the defendant-appellant herein, was convicted in the Supreme Court, New York County, on February 4, 1971, after trial (DAVIDSON, J. and a jury) of the crime of manslaughter in the first degree, based upon the testimony of witnesses who saw Maynard kill a marine sergeant by shooting him in the face with a shotgun.

(b) Maynard was sentenced to a term of imprisonment for a minimum of 10 and a maximum of 20 years. The conviction was affirmed by the Appellate Division, First Department (MURPHY, J., dissenting and granting leave to appeal).

(c) Maynard is presently confined to Clinton State Prison, Dannemora, New York.

2. Maynard's past character and conduct indicates that if he is released pending appeal, he will flee the jurisdiction.

(a) Maynard has twice been convicted for having failed to appear in the courts of New York when required: on March 21, 1966 (attempted bail jumping) and on March 1, 1971 (bail jumping).

(b) He has previously been convicted, on December 17, 1963, of assault in the third degree for kicking and pushing a police officer during a demonstration; on November 15, 1965, and again on April 16, 1966, he was convicted of unlawful possession of a weapon; on October 21, 1964, he was convicted of a gambling offense.

3. Maynard has consistently shown, during this case, that his desire is for escape rather than vindication.

(a) In August, 1968, when Maynard was informed by Lieutenant Stone, the officer in charge of the homicide investigation in this case, that the police sought his appearance in the station house, Maynard fled the jurisdiction thereby avoiding arrest. He fled to Germany where he resided at the home of his former girl friend, and the police were unable to learn his whereabouts until October, 1968. In October, 1968, Maynard applied in Hamburg, Germany for a new passport, giving his residence in Germany, and the residence of his sister, whose last name was not the same as his, as his residence in the United States. Of necessity, the application was made out in his own name which was recognized and the New York authorities were thereby able to locate him. In March, 1969, he was extradited to New York.

(b) By his flight, he also forfeited $5,000 bail posted in another, then-pending, charge of stealing an automobile.

(c) Petitioner's allegation that Maynard was offered "time served" by the District Attorney is unsupported: petitioner fails to state when, where, or by whom this offer was conveyed. I have contacted every present and former assistant district attorney likely to have made or known of such an offer, and each denies it. John Keenan, Esq.,

Assistant District Attorney in charge of the Homicide Bureau, states affirmatively that no such offer was ever made during his tenure (January 1970 to present).

4. Maynard's status pending appeal indicates that the granting of bail will not insure against his again fleeing the jurisdiction.

He is presently indigent and without substantial ties to New York or to the United States. In addition to having resided in Germany when sought in this case (and when he knew he was due in court for auto theft) he has also been convicted of crimes committed while he was in Morocco and California. Petitioner concedes that Maynard is indigent and that the bail fund was raised by many other persons.

Maynard has shown that he has a propensity to flee the jurisdiction rather than face arrest, and to forfeit bail even on comparatively minor charges.

WHEREFORE, bail ought to be denied.

Dated: New York, New York
February 5, 1973

Arthur G. Weinstein

January 29, 1973

Clerk
Supreme Court of the State of New York
Appellate Division: First Department
27 Madison Ave
New York, N.Y. 10010

Dear Sir:

Re: People v. William A Maynard, Jr.

I enclose the original of the defendant's application for bail pending appeal. As the application is brought pursuant to §460.60 of the CPL, it has been made returnable before Mr. Justice Murphy.

Prior to filing the application, I contacted Mr. Justice Murphy's chambers and the return date of February 7, 1973 at 10:30 a.m. was set by his Law Secretary.

AS indicated by the stamp on the blueback, a copy of this application has been served upon the District Attorney.

Yours truly,

Lewis M. Steel

Served 1/29/73

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

- -X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

WILLIAM A. MAYNARD, JR.,

Defendant-Appellant.

APPLICATION FOR BAIL PENDING APPEAL

- -X

S I R S:

PLEASE TAKE NOTICE that the undersigned, upon the affidavit of Lewis M. Steel, sworn to the 25th day of January, 1973 and all the proceedings had heretofore will move this Court, before the Hon. Francis Murphy, Jr., on the 7th day of February, 1973 at 10:30 O'clock in the forenoon or as soon thereafter as Counsel may be heard, for an order pursuant to § 460.60 of the CPL setting reasonable bail pending appeal.

Dated: New York, New York
January 25, 1973

Yours, etc.,

LEWIS M. STEEL,
DANIEL L. MEYERS
351 Broadway
New York, N. Y. 10013
966-7110
Atty. for Defendant-
Appellant

To: Frank S. Hogan
District Attorney
New York County

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

- -X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

WILLIAM A. MAYNARD, JR.,

Defendant-Appellant.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR BAIL PENDING APPEAL.

- -X

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

LEWIS M. STEEL, being duly sworn, deposes and says:

1. I am one of the attorneys for the defendant-appellant, having been his trial counsel and his attroney on appeal.

2. The defendant has been in custody since November, 1967, when he was arrested in Germany on a charge of murder in the 1st degree. His first trial in May and June, 1969, ended in a hung jury. After a mistrial in 1970, he was retried in the fall of 1970, and convicted of the lesser included charge of manslaughter in the 1st degree under the old penal law. He was sentenced to a term of 10-20 years imprisonment on February 4, 1971 by Mr. Justice Irwin Davidson.

3. The Appellate Division, First Department affirmed his conviction on November 9, 1972, Stevens, P.J. and Murphy, J, dissenting in a memorandum by Murphy, J. Permission to appeal to the Court of Appeals was granted by the Hon. Francis T. Murphy, Jr., on November 17, 1972. Notice of Appeal to the Court of Appeals was filed on November 22, 1972. On December 28, 1972,

the Court of Appeals appointed Lewis M. Steel and Daniel L. Meyers to represent Maynard on appeal.

4. The defendant is presently incarcerated in Clinton Prison, in Dannemora, New York, after having previously been confined in Ossining Prison, Attica Prison and Greenhaven Prison.

5. Prior to the trial in which he was convicted, and while charged with murder in the first degree, bail was set at $50,000. The defendant, who is indigent as a result of being incarcerated, was unable to make bail.

6. On June 29, 1972, Mr. Justice Sutton set bail at $50,000 pending appeal to the Appellate Division. On September 11, 1972, bail was posted for the defendant by Stuyvesant Insurance Co. as surety. On September 14, 1972, after initially seeking to challenge the sufficiency of the bond (but ultimately conceding this fact) before Mr. Justice Burns in Part 30 of the New York Supreme Court, the District Attorney reargued the bail application before Mr. Justice Sutton. After reargument, Judge Sutton ordered that Maynard be produced before him on September 19, 1972, so that he could establish travel restrictions. On September 15, 1972, the District Attorney filed an Article 78 against Mr. Justice Sutton in this Court, and obtained a stay of his release. This action, Scotti v. Sutton, was dismissed as moot on November 9, 1972.

7. The bail fund in the amount of cash and securities totalling $50,000 is still available in the event this Court fixes bail. The fund has been raised from many persons, including distinguished members of the New York bar.

8. This application is directed to Mr. Justice Murphy under CPL 460.60 as he granted the defendant permission to appeal.

9. With regard to the criteria set forth in CPL 510.30 with regard to bail on appeal, counsel sets forth the following facts:

(i) Mental condition, character and reputation: Counsel has visited the defendant many times since his incarceration, and has always found him to be an exceptional person with great strength of character, insight and integrity. He appears to have deeply suffered from his incarceration, but has maintained his dignity and composure throughout.

On the issue of his character and reputation, I attach hereto 3 letters from persons who have known the defendant over the years.

The first is from the distinguished writer, William Styron: He says:

> I am writing you in behalf of William A. Maynard, hoping that you might find it reasonable and appropriate to grant him bail. I appeared as a character witness at his trial, believing him then as now innocent of the crime of which he was accused, and further convinced that his conviction was a miscarriage of justice.
>
> I first became acquainted with Maynard ten years ago when he was introduced to me by another writer and mutual friend, James Baldwin. I got to know Maynard well and came to regard him as a young man of exceptional intelligence, poise and decency. Such was my respect for his gentleness and integrity that I found it (and still find it) inconceivable that he should be accused of committing the ruthless and brutal crime for which he was ultimatley sent to prison.
>
> It is my understanding that Maynard has been dreadfully brutalized during his time in prison so far, and has suffered perhaps more than the ordinairy anguish that attends incarceration. Knowing the nature of Maynard's sensibility,

I cannot help but feel that further time behind walls might totally mutilate or even destroy the personality of a man who I know from first-hand evidence has much still to contribute to society. Inhis struggle toward vindication -- a vindication I somehow am convinced he will eventually win -- the granting of bail would be a crucial first step toward allowing him to regain his equilibrium. Those of us who have a stake in his future have shown our faith in Maynard by unhesitatingly responding to secure his bond. I think I am speaking for all of us, when, I say that your favorable decision might be instrumental in saving the very life of a valuable, decent man whose spirit must otherwise be crushed and ruined.

The second letter is from Arthur L. Liman, former General Counsel of the Mc Kay Commission, who describes his contacts with Maynard in the aftermath of the Attica uprising. In his letter, Mr. Liman indicates that Maynard was a reluctant bystander to the Attica events (the defendant received two gunshot wounds in the recapture of the prison and a manuscript he was working on was destroyed by the take-over force). Mr Liman* assesses Maynard as follows:

> I found Mr. Maynard to be intelligent, cooperative and candid. He is by nature extremely sensitive and almost obsessed with a concern for privacy. Obviously, the communal aspects of prison life and regimentation had a corrosive effect upon him. When I met him he was in segregation because he preferred solitude, where he could write, to the din of normal cell life.

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*

Mr. Liman suggests that his letter be sealed as Maynard may be endangered by other prisoners because he talked to representatives of the Mc Kay Commission. It was common knowledge, however, in the prison that Maynard did this. Nor, from what I've been able to gather from attorneys who have been working in behalf of the Attica prisoners charged with crimes as a result of the uprising, was there any resentment. As Maynard was in segregation when the uprising began and was only released after the take-over was completed, he knew nothing about its origins. Being a solitary

The third letter is from Mrs. Gitta Bauer, the assistant bureau chief of the Springer Foreign News Service of West Germany. Mrs. Bauer won the Theodore Wolff Prize in 1970 (the German equivalent of the Pulitzer Prize) for her reporting from the United States and served as President fo the Foreign Press Association in 1971. Mrs. Bauer says:

> I have known Mr. William A. Maynard, Jr., since his third trial in fall 1970, which I covered as a reporter. I was shocked by the verdict, since the proceedings had raised serious doubts in my mind, the same kind of doubts that are reflected in your and Justice Harold Stevens' dissenting opinion. Since then I have sought the acquaintance of Mr. Maynard and have seen him several times at the Correctional Facility of Green Haven and at the Bronx House of Detention.
>
> Mr. Maynard appeared to me to be a man of great discipline and as one having the ability of selfmastering and self-restraint. I was amazed by his serenity of mind, the sanity of his judgement and the strength with which he is bearing his fate. Putting myself in his shoes I seriously doubt whether I could have maintained his confidence, that justice will ultimately prevail. I am absolutely sure, that Mr. Maynard, if set free on bail, would continue to comport himself in the same manner, and that he would in no way be a threat to society, but rather an example in fortitude.
>
> I am saying this not lightly, Sir. Being a skeptic by education, profession and the experience of life I am not

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individual, he was associated with no groups in prison. Thus, he talked to the Mc Kay personel only about prison conditions generally and the brutality of the prison's recapture. By so doing, he did a service to his fellow prisoners and to the public generally. Far from causing him problems with other prisoners, his cooperation placed him in jeopardy from only one segment of the prison population he comes in daily contact with -- the guards. Counsel therefore is content to have the Liman letter appear openly on the record, as the guards already know that Maynard spoke to the McKay investigators.

easily taken in by pleasant manners or appearances. Rather I would say that my assignments as a foreign correspondent all over the world - including the Nuremberg trials, the trial of Adolf Eichmann in Jerusalem and lately the Angela Davis trial - and the opportunity to meet people from all walks of life have taught me to see through surface varnish and recognize the working of people's minds.

Please accept my statement as an objective reflection of what I concluded from careful observation.

(ii) The defendant's ability to support himself: Prior to his incarceration in this case, Maynard had been a principal in a small personally held business corporation. Through this corporation, he acted as an agent for well-known jazz musicians in Europe, where he made regular trips. Maynard also was in partnership whith his brother-in-law in a clothing business in New York City prior to his arrest. Additionally, the appellant was attempting to develop a career as an actor. Some two months before the homicide for which he now stands convicted, Maynard was offered a leading role in a motion picture which was to be filmed in New York. This acting assignment was announced in the trade newspaper, Variety, and I personally verified this fact directly with the film's producer.

(iii) Family ties: The defendant's family ties in New York City are excellent. His sister, Valerie Maynard, is a well-known sculptor in New York City, and works with the Studio Museum in Harlem. Another sister, Barbara Fraser, has lived in Richmond Hills, Queens for many years. Mrs. Fraser's husband is a public employee and works for the City of New York. Maynard has lived in New York City most of his adult life. He was raised as a child by his grandmother, Dr. Irene Pratt, in Florida, and has visited her on a regular basis all his adult life (Appellant's Brief, p. 22).

(iv) Prior record: Prior to his conviction for manslaughter, the applellant, who is 36 years old, had been convicted of the following:

a. Assault in the 3rd degree; 12/17/63; New York City, $50/10 days, Malzhin, J.

The defendant testified at trial that this conviction resulted from his participation in a civil rights demonstration involving discrimination in the building trades unions.

b. Section 975 Policy; 7/23/64; New York City; sentence 10/21/64; $100/10 days; Rao and Babock, J. (sentence).

c. Attempted Bail Jumping; 3/21/66; New York City; sentence time served.

The sentencing minutes on this matter, Indictment No. 3226, 1964, March 21, 1966 Special and Trial Term, Part 38, Schweitzer, J., reveal that the appellant voluntarily surrended after returning from a trip to Egypt to face another charge.

d. Possession of a weapon, November 15, 1965; Tangiers, Morocco; sentence: 1 year suspended.

e. Possession of a weapon (misdemeanor); 4/19/66; San Diego, California; sentence - 1 year probation.

After being sentenced in the instant case, the appellant was sentenced on the following two charges:

f. Bail jumping as a misdemeanor, March 1, 1971, Supreme Court, New York County, Birns, J., 1 year concurrent with manslaughter sentence.

This charge of bail jumping arose when the defendant stayed in Europe on a business trip, and did not appear on a motor vehicle charge. The record reveals, however, that before going to Europe, the appellant did attend court when required (Appellant's

Brief, p. 112(4)). The appellant thereafter travelled to Europe on business using a valid passpart, which he replaced in Germany because it was dirty. When the applellant sought a new passport, which he did not have to do as the old passport had not yet expired, and was clearly readable, he gave the American Embassy his correct European and American addresses (see, Appellant's Brief, p. 120).

g. Unauthorized use of a motor vehicle as a misdemeanor, March 1, 1971. Supreme Court, New York County, Birns, J., 1 year concurrent with the manslaughter and bail jumping sentence.

(v) As indicated, the appellant does have two convictions relating to missed court appearances. However, in the first case, the applellant voluntarily surrended himself upon returning from overseas. In the second matter, the appellant was travelling openly in Europe on business, and actually made his whereabouts known to American authorities. This is hardly the conduct of a man who did not intend to return and dispose of outstanding charges. Moreover, the testimony in the record, given by a police officer, was that the appellant's lawyer told the authorities that the applellant had gone to Europe, (Appellant's Brief, p. 11), again indicating the applellant's intent to resolve his problems with the law rather than flee.

In further consideration of this application, counsel calls the Court's attention to the following facts:

Appellant's prior counsel, Gussie Kleinman, Esq., informed me when I undertook Mr. Maynard's defense, that he had been offered time served by the district attorney's office if he would plead guilty to a lesser crime under the indictment. She further

informed me that Mr. Maynard refused to accept the offer on the basis that he was innocent of the crime, and looked forward to being vindicated at the conclusion of his trial.

Recently another of Maynard's former attorneys, Selig Ianefsky, Esq., verified to me that this offer had been made. The author, James Baldwin, who attended many court sessions in behalf of the defendant has also verified that he was present when this offer was made.

Additionally, Mr. Maynard has for the entire period of his incarceration sought a lie detector test and/or a sodium pentothal test in order to establish his innocence. I personally requested that the district attorney administer such tests when I became counsel. The district attorney refused. As with the refusal to accept time served, these requests of the appellant are consistent with the conduct of a person seeking vindication through the judicial process.

10. The Likelyhood of Reversal: This Court is aware of the majority and minority opinions which have been filed in this case, and which are attached hereto and made a part hereof. I can only add that I know of few cases which have ever had greater number of serious issues to be decided by an Appellate Court.

11. The defendant has not previously sought the relief requested herein from any other court.

12. In conclusion, counsel calls to the attention of this Court the fact that the defendant has already been incarcerated since he was arrested in Germany in November, 1967, that he has been wounded through no fault of his own while in custody, that

he has served a significant part of his sentence -- years which cannot be given back to him if he is eventually vindicated, that he would have already been free if he would have only accepted a plea bargaining deal, that 2 judges, having all the facts before them, have set bail at $50,000.00, and that the issues on appeal are substantial.

WHEREFORE, this Court should set reasonable, but in no event in an amount more than $50,000, bail.

LEWIS M. STEEL

Sworn to before me this 25th
day of January, 1973.

NOTARY PUBLIC

EUGENE G. FISHER
Notary Public, State of New York
No. 31-0167250
Qualified in New York County
Commission Expires March 30, 1974

WILLIAM STYRON
ROXBURY, CONNECTICUT 06783

December 4, 1972

Hon. Francis T. Murphy, Jr.
Justice of the Appellate Division
New York, N.Y.

Dear Justice Murphy:

I am writing you in behalf of William A. Maynard, hoping that you might find it reasonable and appropriate to grant him bail. I appeared as a character witness at his trial, believing him then as now innocent of the crime of which he was accused, and further convinced that his conviction was a miscarriage of justice.

I first became acquainted with Maynard ten years ago when he was introduced to me by another writer and mutual friend, James Baldwin. I got to know Maynard well and came to regard him as a young man of exceptional intelligence, poise and decency. Such was my respect for his gentleness and integrity that I found it (and still find it) inconceivable that he should be accused of committing the ruthless and brutal crime for which he was ultimately sent to prison.

It is my understanding that Maynard has been dreadfully brutalized during his time in prison so far, and has suffered perhaps more than the ordinary anguish that attends incarceration. Knowing the nature of Maynard's sensibility, I cannot help but feel that further time behind walls might totally mutilate or even destroy the personality of a man who I know from first-hand evidence has much still to contribute to society. In his struggle toward vindication -- a vindication I somehow am convinced he will eventually win -- the granting of bail would be a crucial first step toward allowing him to regain his equilibrium. Those of us who have a stake in his future have shown our faith in Maynard by unhesitatingly responding to secure his bond. I think I am speaking for all of us when, in respectfully appealing to you to free him on bail, I say that your favorable decision might be instrumental in ~~in~~ saving the very life of a valuable, decent man whose spirit must otherwise be crushed and ruined.

Very sincerely yours,

William Styron

ARTHUR L. LIMAN

32nd Floor
345 Park Avenue
New York, N.Y. 10022

November 28, 1972

Lewis M. Steel, Esq.
diSuvero, Meyers, Oberman, Steel
351 Broadway
New York, N.Y. 10013

People v. William A. Maynard, Jr.

Dear Mr. Steel:

You have asked me to describe my contact, as general counsel of the New York State Special Commission on Attica, (the "McKay Commission") with William Maynard.

I and members of my staff met with Mr. Maynard on several occasions in the course of our investigation, and questioned him about conditions at Attica, and the events preceding, during and after the uprising in which Mr. Maynard was a reluctant bystander.

I found Mr. Maynard to be intelligent, cooperative and candid. He is by nature extremely sensitive and almost obsessed with a concern for privacy. Obviously, the communal aspects of prison life and regimentation had had a corrosive effect upon him. When I met him he was in segregation because he preferred solitude, where he could write, to the din of normal cell life.

At all times he was courteous, and I thought insightful. While I am not familiar with the facts relating to his conviction, and it would be inappropriate for me to make recommendations on his bail application, I have no objection to your reporting to the court the fact of his full cooperation with the Commission (including exhibiting a copy of this letter to the court). I suggest that, to avoid the possibility of inmate reprisals for cooperation, the letter and the fact of his cooperation be sealed.

Sincerely yours,

Arthur L. Liman

AXEL SPRINGER PUBLISHING HOUSE
HAMBURG-BERLIN

NEW YORK OFFICE:
50 ROCKEFELLER PLAZA · ROOM 803 · NEW YORK, N. Y. 10020 · TELEPHONE (212) 582—4170

SPRINGER FOREIGN NEWS SERVICE

Gitta Bauer

November 27, 1972

Justice Francis Murphy
c/o Mr. Lewis Steel
Attorney at Law
351 Broadway
New York, N.Y. 10013

Dear Judge Murphy:

I Have known Mr. William A. Maynard, Jr. since his third trial in fall 1970, which I covered as a reporter. I was shocked by the verdict, since the proceedings had raised serious doubts in my mind, the same kind of doubts that are reflected in your and Justice Harold Stevens' dissenting opinion. Since then I have sought the acquaintance of Mr. Maynard and have seen him several times at the Correctional Facility of Green Haven and at the Bronx House of Detention.

Mr. Maynard appeared to me to be a man of great discipline and as one having the ability of selfmastering and self-restraint. I was amazed by his serenity of mind, the sanity of his judgement und the strength with which he is bearing his fate. Putting myself in his shoes I seriously doubt whether I could have maintained his confidence, that justice will ultimately prevail. I am absolutely sure, that Mr. Maynard, if set free on bail, would continue to comport himself in the same manner, and that he would in no way be a threat to society, but rather an example in fortitude.

I am saying this not lightly, Sir. Being a skeptic by education, profession and the experience of life I am not easily taken in by pleasant manners or appearances. Rather I would say that my assignments as a foreign correspondent all over the world - including the Nuremberg trials, the trial of Adolf Eichmann in Jerusalem and lately the Angela-Davis-trial - and the opportunity to meet people from all walks of life have taught me to see through surface varnish and recognize the working of people's minds.

over

Please accept my statement as an objective reflection of what I concluded from careful observation.

I remain, Sir,

Sincerely,

(Gitta Bauer)
Asst. Chief of Bureau

Stevens, P.J., Kupferman, Murphy, McNally, Tilzer, JJ.

5776 The People of the State of New York,
Respondent, S.H.Landau

-against-

William A. Maynard, Jr.,
Defendant-Appellant. G.W.Oberman

277 Bway Nw/13

Judgment of Supreme Court, New York County, rendered February 4, 1971, convicting defendant, after trial before Davidson, J. and a jury, of manslaughter in the first degree [former Penal Law §1050] and sentencing him to imprisonment of not less than 10 nor more than 20 years, affirmed.

This is the third trial of this case, the first two having ended respectively in a disagreement and a mistrial.

Two eyewitnesses saw the defendant shoot and kill Marine Sergeant Kross and a third eyewitness, who had been watching Maynard during an earlier confrontation, saw Maynard in immediate flight from the scene of the shooting. The record shows that Maynard's guilt was established beyond a reasonable doubt.

It was not error to reject the testimony of one Levy with reference to street lights. The People's witness Weinstein, Deputy Director in charge of the Engineering Division of the New York City Bureau of Gas and Electricity, had been called as a witness by the People to establish the existence of light fixtures. He was not called as an expert to give opinions on lighting effects. The so-called expert testimony that he gave was testimony elicited for the first time during defendant's cross-examination of Weinstein. Counsel by its cross-examination had made Weinstein his own witness on these subjects, and the trial court's ruling that defendant may not call Levy as an expert witness to contradict expert testimony elicited by him was within the bounds of its discretion.

As is said in Bender's New York Evidence, Vol. 1, § 27.03 :

> "Normally, strict order of proof requires that when a party desires to examine an adversary's witness on matters outside the scope of cross-examination, he must call that witness as his own for direct examination. In actual practice, this rule is usually relaxed when a cross-examiner brings up new matter. However, when that occurs, the witness then becomes the witness of the adverse party who is bound by the answers. Such witness, when questioned on new matter, may not be contradicted by other evidence."

We have examined the other assignments of error and found them to be without merit.

All concur except Stevens, P.J., and Murphy, J., who dissent in the following memorandum by Murphy, J.:

We cannot vote to affirm this conviction because of the numerous errors committed at the trial; some of which are discussed below.

The defendant was convicted of manslaughter in the first degree and sentenced to imprisonment for an indeterminate term of not less than 10 nor more than 20 years. A sailor, Robert Crist, testified he was accosted by James Barnhardt in Greenwich Village and that he thereafter chased and struck him. A police officer separated these two antagonists and walked the purported homosexual away from the altercation. Defendant Maynard, together with a male companion, then berated Crist for striking the older and smaller man. An argument developed among these three persons which lasted from 2 to 5 minutes and terminated when Sgt. Kroll arrived on the scene; and Maynard and his male companion departed. Kroll and Crist decided to continue the argument and drove, in Kroll's car, after Maynard and his companion, catching up with them on West 4th Street between Sixth Avenue and McDougal Street. Two witnesses, Crist and Dennis Morris, testified they saw defendant shoot the decedent Kroll in the face with a sawed-off shotgun. Michael Febles also identified the defendant as the person he saw arguing with Crist and, although he did not see the actual shooting, he testified that he heard the shotgun blast, saw Maynard and his accomplice run away and observed the accomplice throw an object to the ground. Howard Fox, a cab driver, testified that at 1:10 in the afternoon of the day before the shooting, he drove Maynard and another

person to Greenwich Village and that Maynard's companion had a camera bag over his shoulder.

Defendant Maynard claimed he was not in Greenwich Village, but at his wife's family's home in Queens; and that although he was separated from his wife he was still friendly with her brother, Michael Quinn. At the first trial the Quinn family testified they did not know defendant's whereabouts on April 2-3, 1967, although they had previously executed affidavits averring that he was in the Quinn household during that critical evening. However, at this trial they supported Maynard's alibi and claimed they were coerced into giving false statements at the first trial by Assistant District Attorney Gallina.

The prosecution's case relied principally on the identification testimony of Robert Crist, Dennis Morris and Michael Febles. The street lighting, the opportunity of the witnesses to observe the killer, the police identification procedures, and whether the alibi witnesses were telling the truth at the first trial or at this trial were among the contested issues at the trial.

The prosecution called, as its second witness, Irving Weinstein, an expert in street lighting. His testimony dealt with the lighting conditions on the streets where the crime was committed, as well as the area where the identification witnesses had seen the defendant. Weinstein testified to the kind of lighting as well as its amount. From tests he took in May of 1969, he concluded that the average light in the area was 1.5 foot-candle and that this meant that one with 20-20 vision could read small print of a newspaper, albeit with difficulty. He conceded that the

needle of a light meter barely moved and that his conclusions were arrived at mathematically. He testified that he had a reasonable degree of professional certainty that the mathematical formula he used to calculate the amount of foot-candles was reliable, and that the lighting in this area was twice the standard set as the proper standard for the City of New York. He also gave his opinion that if the windows in the bank on the southeast corner of West Fourth Street and Sixth Avenue were lit, visual observation would be aided because objects would be seen against the illuminated background, and that "silhouette lighting" made it easier to see faces and features. On its case, the defense attempted to call Charles Levy, a lighting consultant, to give expert testimony on the same subject matter as that testified to by Weinstein. The Court sustained the prosecutor's objection to this witness. We believe this was error of such a nature as to deprive defendant of a fair trial and, alone, mandates a reversal. The issue of the lighting is an integral part of the identification evidence on the night of the crime. The People, in an effort to make the identifications more believable to the jury, paint a picture of streets lit twice the standard for New York City. It defies reason to deny the defense the right to meet this issue, especially since the offer of proof makes clear that Levy would have rebutted Weinstein's principal points as well as the lay witnesses who were permitted to give opinions on lighting. (Cf. People v. Dewey, 23 A D 2d 960; People v. Jackson, 10 N Y 2d 510.) The District Attorney's summation refers to Weinstein's testimony to establish that the identifications were made on a "well-lighted street"; and the Court's charge that in determining the accuracy of the identifications the jury

should consider ". . . the lighting conditions", merely magnify the gravity of the preclusion.

It was also error to receive in evidence, as the Court stated, "as an admission by conduct" the testimony of Howard Fox that when he, Fox, came into the room where defendant was being held in police custody, the defendant looked at Fox, Fox looked at the defendant, and the defendant then turned his head to the left. The District Attorney's argument that defendant "in effect recognized him and turned away" is not borne out by the testimony since Fox stated he did not know why defendant turned his head. Nevertheless, the District Attorney in his summation said that this was another piece of evidence tying this defendant to the murder: ". . . not only did Mr. Fox identify the defendant, the defendant identified Mr. Fox, recognized Mr. Fox, that this was the guy in the cab. He turns his head." Both the Court's ruling and the summation were improper and error, prejudicial to defendant. (Cf. People v. Mezzapella, 19 A D 2d 729.)

We further believe that it was error to have admitted into evidence People's Exhibits 21 and 40, a tan plastic bag and its contents. These exhibits were not sufficiently connected to the defendant or the crime. The cab driver, Fox, testified he saw a bag "something like" this bag in possession of the defendant 15 hours before the crime and one of the eyewitnesses, Febles, testified he saw an "object" thrown into the street by the defendant's accomplice; but it "could have been anything". There is no evidence that People's Exhibit 21 was the object thrown down or that this bag, which was found on the steps leading to the basement of a building one block north of where Kroll was killed, was the same

"something like" the object the cab driver saw 15 hours earlier. Without a proper foundation, its receipt into evidence was error. (See; McCormick on Evidence, § 179.)

The identification witnesses, Crist, Morris and Febles, gave descriptions which do not match defendant. Crist had been drinking since 9 P.M. and conceded he was probably intoxicated. He remembers virtually nothing concerning that night, not even the people he spoke to, including the police. After he had seen the defendant on May 17, 1967, at the Sixth Squad, he was shown photographs of the defendant on three or four occasions; and before the Grand Jury in October, 1967, when shown defendant's photo, he said he can't be sure if it's the same man. At the trial he identified the defendant. Dennis Morris picked defendant out of a lineup a few days before the first trial in 1969. On August 2 and 3, 1967, he was not sure defendant was the assailant even though two pictures of defendant were placed with seven other pictures. The suggestive re-showing of the pictures resulted in a positive identification from photographs before the Grand Jury although he did not see defendant in person. Febles' observations (like Morris') were extremely limited. "By chance" he was taken to court by Lt. Stone and was told he was going to see the defendant in the case and then identified the defendant at the courthouse; not in a lineup.

At the Huntley hearing, held prior to the first trial, Lt. Stone and Detectives Hanast and O'Brien testified that on May 17, 1967 the defendant was advised of his "Miranda" rights and waived them, signing a form to that effect. Defendant testified that it was not his signature nor his

handwriting and that he did not sign the form. He produced samples of his handwriting. At a recess the prosecutor, unable to find the original of the form, withdrew the carbon copy that had been received in evidence. The issue not having been litigated, defense counsel at the beginning of this trial, in support of a motion for a new Huntley hearing, offered to prove that Russel Osborne, a handwriting expert, "has preliminarily concluded that the defendant did not sign (the form) but in fact some other person did." The Court denied the application without reference to the forgery issue. During the trial the issue was again raised on cross-examination of Lt. Stone by defense counsel's attempt to question the witness as to the signature on the form. The objection was sustained as academic since the People did "not intend to introduce it in evidence." We believe inquiry should have been permitted of those officers at the pre-trial hearings and at the trial, since their credibility has been seriously challenged. If the defense was able to show that the defendant's signature or any variation of it was not on that form, the integrity and reliability of the entire investigation is undermined. (See, Wigmore on Evidence, 3rd Edition, Vol. II, § 277.) The identification procedures were established by the police by photos, showup and lineups as well as the oral statements of defendant. If, then, defendant could sustain a charge of police fabrication, it would weigh heavily against the prosecution before the jury on those issues and it does not seem reasonable to allow a conviction to stand in light of such a serious allegation. It also seems that with this issue not before the Jury, the prosecutor felt free in summation to discuss, as he did, the integrity, honesty and truthfulness

of the police. He may have been correct in his estimate of the police who testified, but no one will know until it is properly tested. A new hearing and a new trial is mandated on this issue.

Michael Quinn was the first alibi witness called by the defense. His direct testimony materially contradicted the two statements he gave to Assistant District Attorney Gallina and the testimony he gave at the first trial. He testified that the evidence he gave at the first trial was false and that he had been "forced to lie" by Gallina and that his testimony had been rehearsed by Gallina. After completing his testimony, the courtroom was cleared and the Court directed that the proceedings be presented to the Grand Jury and that the District Attorney's office determine whether there had been perjury or a conspiracy to obstruct justice. It is our opinion that the atmosphere created by the Court's action denied defendant an impartial trial in that it affected the remaining alibi witnesses, several of whom were related to this witness. It seems to us that the threat of arrest and indictment could only result in intimidating the other defense witnesses and was calculated to have a chilling effect on their attitudes and testimony. (Cf. People v. Frasco, 187 App. Div. 299; People v. Davison, 3 A D 2d 724.) These investigations could have awaited the end of the trial and been conducted in a calm, non-coercive atmosphere.

Three of the alibi witnesses testified at this trial that they had been coerced into giving false statements and false testimony at the first trial. Before the first

trial Michael Quinn was held as a material witness after having been brought to Assistant District Attorney Gallina's office, where he made the statement he gave at this trial. He was committed to jail on $100,000 bond. Giselle Quinn, who was not then Michael's wife, testified that, at the same time, she had a conversation with Mr. Gallina and was committed to civil jail on $75,000 bond. Michael had seven interviews with Mr. Gallina. On May 8th, he testified, he changed his story because Mr. Gallina told him that Giselle (a German national) would be deported and that he would be kept in jail until Christmas. After he changed his statement Mr. Gallina also promised to take care of an auto larceny charge which had been pending for three years. Giselle testified that she was questioned every day by Mr. Gallina during her two weeks' commitment, and also conversed with an immigration officer. When Michael changed his statement, they were both released. Assistant District Attorney Gallina testified that he always expected to call Michael as a rebuttal witness, not as a prosecution witness, and that he only wanted to determine the truth of the alibi. We believe the conduct of Mr. Gallina to be contrary to law and to his authority, and that a court process was used as a tool wrongfully to detain and interrogate defense witnesses. (Cf. People ex rel. Van Der Beek v. McCloskey, 18 A D 2d 205.) Since the witnesses were released as soon as Michael's statement was changed, the motives of Mr. Gallina become suspect. Additionally in this regard, the Court's refusal, upon timely request, to properly instruct the jury on its options, where an assertion is made that a witness' prior statements and testimony were made under duress, was error, as a matter of law.

The scope and content of Assistant District Attorney Gallina's testimony was prejudicial and denied defendant a fair trial. He testified as to his motives for arresting the witnesses, to clearly hearsay material, and to his opinions of the case. He stated that his investigation showed defendant was a violent man, that he had witnesses who identified defendant as the killer, that he believed defendant guilty of the crime, and that the evidence left no doubt defendant was the killer. Mr. Gallina stated his conclusions while allegedly retelling his conversations with Michael Quinn. Further, in summation, the trial assistant, over objection, improperly vouched for Mr. Gallina's testimony and equated him with the tradition and integrity of the office of District Attorney. It is thus apparent that Mr. Gallina was improperly permitted to bolster the People's case and to add the prestige of his office thereto. (Cf. People v. Colascione, 22 N Y 2d 65.)

Finally, we note that it was error to prevent the defense from rehabilitating its witnesses after impeachment and to prohibit impeachment of prosecution witnesses. (People v. Buchalter, 289 N.Y. 181; Urbina v. McLain, 4 A D 2d 589; Ryan v. Dwyer, 33 A D 2d 878; People v. Sorge, 301 N.Y. 198.)

For the aforementioned reasons, and all of them collectively, we would reverse the judgment of conviction and remand for a new trial.

Stevens, P.J. concurs

Order filed.

THE NEW YORK TIMES, SATURDAY, NOVEMBER 18, 1972

P41

Culkin Dismisses Two Perjury Charges

By LACEY FOSBURGH

State Supreme Court Justice Gerald P. Culkin has dismissed perjury charges against two former detectives indicted in connection with an investigation by the Manhattan District Attorney's office into murder and possible corruption by officials.

Seven times in the past Justice Culkin has dismissed indictments and vacated convictions involving either corruption by officials, organized crime, or murder. In each instance, District Attorney Frank S. Hogan has appealed those decisions, and the Appellate Division has reversed the judge's actions.

Bribery Alleged

Mr. Hogan called a news conference to criticize Justice Culkin the last time the judge dismissed an indictment—against a police lieutenant in February, 1971—and was subsequently criticized himself by the Appellate Division for speaking out against a judge.

Although Mr. Hogan refused yesterday to make any comment on the case, high-ranking officials in his office, privately expressed vehement criticism of the judge's action. Mr. Hogan is expected to announce early next week whether he will appeal the dismissals.

The case itself is a complicated one, extending back more than two years to the night in August, 1970, when a garment worker named Desiderio Caban was murdered on a Harlem street corner.

Since then, Arnold Squitieri, described by officials as a powerful underworld figure, has been charged with the murder and three patrolmen have been indicted on charges of accepting a $2,000 bribe from him to conceal his alleged role in the murder.

The prosecutor's office has begun an investigation into the possibility that Gino E. Gallina, a former assistant district attorney in Manhattan and now an attorney for the murder suspect, attempted to interfere with Squitieri's prosecution by tampering with an eyewitness's testimony.

Viewed as 'Confused'

The present perjury case, however, involves two former detectives who, after they retired from the Police Department, worked for Mr. Gallina in his law firm as private investigators. Their job, court records state, was to find a young boy who had witnessed the 1970 Caban murder.

The youthful witness had at first identified Squitieri to the police as the murderer. Later, after meeting with the two detectives and Mr. Gallina in his law office, according to court papers, the boy "repudiated" the identification.

The two detectives, who are being represented by members of Mr. Gallina's law firm, were indicted on charges of lying to the grand jury investigating the circumstances surrounding the murder. This investigation was not handled by the homicide bureau in Mr. Hogan's office, but by his rackets bureau.

Justice Culkin granted a defense motion to dismiss the detectives' indictments because, as he explained it, they were not lying, as charged, but "confused."

In the two decisions, he also noted "in passing" that the defendants' confusion was "quite justifiable," considering that they had been asked "thousands of questions" in the grand jury room by two prosecutors who often interrupted them, he said, and became "accusatory."

Justice Culkin filed his decision with the State Supreme Court on Nov. 2. He did not send it to The New York Law Journal for publication—the customary procedure for making a decision public—until this week, his law secretary said yesterday.

Lawyer Criticized

The District Attorney's office learned of the ruling indirectly, from a court clerk, on Nov. 8.

The two former detectives are Andrew Dunleavy, now the Police Commissioner for Saltaire Village, on Fire Island, and Martin Zincand, now chief of security at Roosevelt Hospital.

Mr. Gallina's conduct as a lawyer was singled out several days ago for severe criticism by Harold A. Stevens, presiding justice of the Appellate Division, First Department, and Justice Francis Murphy.

In lengthy opinions that they wrote dissenting from the majority decision upholding the manslaughter conviction of William A. Maynard, they accused Mr. Gallina—then the prosecutor in the Maynard case—of acting "contrary to law," and stated at one point that "the motives of Mr. Gallina [in his handling of witnesses] become suspect."

Justice Culkin's name has recently been raised in connection with a study conducted by the Joint State Legislative Committee on Crime, which has said that his rate of dismissals and acquittals for racketeers was five times that of other defendants.

November 14, 1972

Arthur Liman, Esq.
345 Park Ave
New York, N.Y.

Dear Arthur:

Re: People v William A Maynard Jr.

As you asked, I am writing you to put on paper the matters which I think would be helpful to Maynard if you would include them in an affidavit to be submitted to the Appellate Division on the issue of bail pending appeal to the Court of Appeals. I intend, ofcourse, to submit other papers to the court which will cover traditional bail issues.

The matters which I would like you to write about stem from my recollection of your remarks after you saw Maynard in Attica.

You indicated to me that Maynard was cooperative in describing the events after the take over of the prison by the authorities, and that you found him to be sensitive and intelligent. I remember a discussion with you in which you also stated your opinion that a prison such as Attica could be destructive to Maynard, given his total commitment to maintaining his individuality. My recollection is that you felt quite strongly about the inappropriateness of prison for Maynard.

I think that an affidavit from you on these matters would be extremely important.

Please let me know at your earliest convenience whether you will submit an affidavit on Maynard's behalf along these lines.

Sincerely,

Lewis M. Steel

bc Wechsler

di SUVERO, MEYERS, OBERMAN, STEEL / ATTORNEYS AT LAW
351 BROADWAY, NEW YORK CITY 10013

November 21, 1972

Mr. Arthur Liman
Paul, Weiss, Rifkind, Wharton
and Garrison
345 Park Avenue
New York, New York

Dear Arthur Liman:

Lewis Steel sent me a copy of his letter to you asking for a statement in connection with his projected bail application for William Maynard. I hope you will not regard it as an intrusion if I add my own views to his request.

I say Maynard just before the Appellate Division rejected his appeal by a 3-2 vote. I must say that I thought the dissent was devastating and the so-called majority opinion pretty awful; I attach copies of two columns I wrote on the subject last week.

When I saw Maynard he was pinning a great deal of hope on the Appellate Court. Indeed I think that hope did much to sustain him through this fifth year of his imprionment. I gather from Steel that he is understandably rather shattered by the narrow defeat; I am honestly apprehensive that a man in whose innocence I believe and for whom I have come to have great regard could be really destroyed in the long interim confronting him before the case is heard by the Court of Appeals. I think it would be especially tragic if he were to finally fall apart psychologically after having endured so much and then win a vindication that comes too late.

I am sure I don't have to labor this point, and I hope you will feel it is proper to give Steel a statement. It becomes very timely now because he has just been given leave by Judge Murphy to take the case to the Court of Appeals. I hope to devote a column to the bail issue, but I am sure your statement would be more important than any rhetorical comment I can offer.

Best regards.

Sincerely,

James Wechsler

TW/a

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SPRINGER FOREIGN NEWS SERVICE

Gitta Bauer

11-27, 1972

Mr. Lewis Steel
Attorney at Law
351 Broadway
New York, N.Y. 10013

Dear Lewis:

Enclosed please find my letter to Judge Murphy. I do hope I found the right way and approach to impress the judge, that I am a mature person of cool judgement.

If you introduce the writers of these affidavits I would like you to say the things, that I could not very well tell in my letter, i.e. the fact, that I am a respected foreign correspondent, having been President of the Foreign Press Association in 1971 - the first woman in the 52 ~~xix~~ year history of this oldest of journalistic associations -, and that I won the German equivalent of the Pulitzer prize for my reporting from the United States. Theodore Wolff Prize in 1970

Please keep in touch.

Sincerely Yours,

Gitta Bauer