6-26-1973

Motion for Rehearing of Defendant's CPL 440.10 and 440.20 Motions or in the Alternative Clarification of the Order of June 11, 1973

Lewis M. Steel '63

Copy

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,	Indictment # 3937/67
-v-	MOTION FOR REHEARING OF DEFENDANT'S CPL440.10 AND 440.20 MOTIONS OR IN THE ALTERNATIVE FOR CLARIFICATION OF THE ORDER OF JUNE 11, 1973
WILLIAM A. MAYNARD, JR.,	
Defendant.	

SIRS:

PLEASE TAKE NOTICE, that upon all the prior proceedings had heretofore and the affidavit of Lewis M. Steel, sworn to the 26th day of June, 1973, the undersigned will move this Court, at 100 Centre Street, New York, N. Y., on June 29, 1973 in Part 46 before Justice Irving Lang, at 9:30 A.M. or as soon thereafter as Counsel may be heard for an order granting a rehearing of the Court's order of June 11, 1973, or in the alternative for a clarification of that order, and for such other relief as may be appropriate under the circumstances.

Yours, etc.

LEWIS M. STEEL
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Tel. [212] 966-9620

DANIEL L. MEYERS
Attorneys for the Defendant

TO: FRANK S. HOGAN
District Attorney
New York County
155 Leonard Street
New York, N. Y. 10013

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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PEOPLE OF THE STATE OF NEW YORK, :

Indictment # 3937/67

-v- :

AFFIDAVIT

WILLIAM A. MAYNARD, JR., :

Defendant. :

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

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

1. I am counsel to the defendant and submit this affidavit in support of the attached motion.

2. At the outset, it should be pointed out that the Court has adopted in its memorandum of June 11, 1973 some of the errors which first appeared in the District Attorney's memorandum in Opposition to the motion.

A. The Court finds on page 2 that "the People produced four witnesses placing the defendant at the scene." In fact, three witnesses at trial placed the defendant at the scene. A fourth witness testified that he had driven the defendant to Fifth Avenue and 10th Street, many blocks away from the scene, more than 12 hours earlier.

B. On page 5, the Court finds, once again following the District Attorney's suggestion, that Dietz stated he saw the killer running west on West 4th Street. Dietz did not so state; he said he saw 2 men--one black and one white (the black man being both shorter,

and in the opinion of Dietz, many years younger than Maynard) running north on 6th Avenue. Dietz did not see who fired the shot that killed Knoll any more than Edward Murphy did. In fact he was much further away from the shooting. Yet the Court chooses to find that Dietz saw the killer running, while Murphy did not. Moreover, the Court ignores the fact that the person Murphy saw was hiding something under his jacket--perhaps the missing shotgun--while none of the witnesses who saw the black and white man run away saw them carry or attempt to hide anything. Thus it is entirely possible that the man Murphy saw fleeing was in fact the killer, and that the black and white who were seen fleeing the area ran away out of fear.

C. As is true with the People's memorandum, the Court's opinion entirely ignores the fact that Murphy witnessed the argument on West 3rd Street which was the prelude to the shooting on West 4th. If Maynard did not participate in that argument, as is claimed by Murphy, then he was not part of the black-white combination seen fleeing on West 4th Street. To ignore this aspect of Murphy's sworn statements is to ignore half of what he had to say.

D. Again following the District Attorney's approach, the Court only selectively considered the Purcell letters, in determining that the manner in which Purcell was handled by the police and/or District Attorney's office was proof of nothing. As pages 18-31 of the minutes of the hearing before this Court on April 30, 1973 indicate, Defense Counsel pointed out that after full disclosure of all the Purcell papers were made, the thrust of the defense argument changed. The Court, in its opinion, however, preferred to continue beating a dead horse rather than to deal with a real life situation. Parenthetically, defense counsel never made reference to "the Dreyfus affair," or

M. Picquat" (other straw men) as the Court suggests on page 7 of its opinion. However, defense counsel did suggest, and the record supports him in this, that the drug dosage administered to Purcell in civil jail could by no stretch of the imagination be called "drug therapy" as the Court so easily, and without any basis in fact, finds on page 7. So, too, defense counsel did suggest as the Court itself commented in chambers on April 30, 1973 (see minutes, p. 20) that there was a way in which the District Attorney's office could have determined, and for this Court to now determine, the integrity of the District Attorney's office when it offered Purcell special consideration in return for his possible contributions to the Maynard prosecution. That method involved checking into whether "Mickey Hurley", "Alex Andrea", and "Jimmy Jordan"--mentioned by Purcell to the District Attorney as witnesses to his Maynard conversation--existed. Apparently, the District Attorney's office knows the answers to this question, and thus refused to supply the Court with that information. For the Court to ignore its own suggestion as to how the truth could be tested in favor of mechanical adoption of the District Attorney's position on the Purcell matter does not accord the defendant the full measure of justice which he seeks.

3. The defendant demands a rehearing based on the above obvious errors in the Court's findings of facts and in the Court's failure to allow counsel to fully develop the facts. By denying defendant a hearing on the Purcell issue, the Court avoided hearing evidence which would have enabled it to determine whether or not Purcell's "medications" and the manner in which they were prescribed (sight unseen--Court's Exhibit A) were "therapy" or were related to this case in a

more sinister manner; and whether the District Attorney's office in fact knew that Purcell was a liar (e.g. Hurley-Andrea-Jordan) before placing him in civil jail and vouching for him to both N.Y.U. and the Court where his assertions were utilized to the detriment of Maynard.

4. The Court in its June 11, 1973 order, page 5, found that "defendant's counsel never asked the court for a subpoena or body attachment to produce [Murphy]."

The facts are to the contrary. On May 7, 1973, when Murphy was supposed to appear in court for a hearing, defense counsel reported the fact that he could not be located for the purpose of being served with a subpoena, although an attempt was made. Murphy was found on May 25, 1973 and served with a subpoena requiring his presence in Court on May 30, 1973 when the case was next on the calendar. Murphy did not appear on that date and defense counsel filed with the Court a copy of the subpoena and an affidavit of service. At that point, having exhausted my own ability to bring Murphy before the Court, I asked the aid of the Court to bring him before it.

When these facts were recounted to the Court on June 11, 1973, after the Court's decision of that day was handed to counsel, the Court responded (minutes, page 13): "Perhaps you are right. I will keep the decision under reserve."

Counsel does not understand the meaning of this statement. Is the Court agreeing its decision on this aspect of the case was in error? Does the Court intend to alter its opinion? Will the Court order the authorities to seek out Murphy as requested by Counsel? In short, what is the status of the motion with regard to the Murphy material?

To make counsel's position clear on this matter (as it did on May 30, 1973 and June 11, 1973): The defense does request a hearing with regard to Murphy, and does request that the Court use its authority to have Murphy produced.

In absence of this, counsel at the least is entitled to a final order from which it may appeal. At the present, the Court's last words, "Perhaps you are right. I will keep the decision under reserve," leads counsel to believe that relief is still possible, but at some distant unspecified date. In the opinion of counsel, the defendant is entitled to better justice than this.

5. Counsel asks this Court to reconsider its decision referring the Purcell ex parte disclosure to the trial judge to whom the disclosure was made.

Contrary to the Court's misstatement on page 9 of its June 11, 1973 opinion, defense counsel never urged and does not now urge that Maynard was entitled to attend Purcell's sentencing. Counsel has always argued that ex parte disclosures between a district attorney and a judge of an evidentiary nature are constitutionally impermissable because the defendant and his counsel are denied the opportunity to respond to the communication. Apparently such communications are so self-evidently unfair, and therefore rarely, if ever, occur (or if one wishes to be cynical about the matter, because judges and district attorneys rarely get caught engaging in such a practice), there is literally no case exactly on point. In United v. Vaughan, 443 F. 2d 92 (2d Cir. 1971), however, a conviction was set aside when the disclosure to the trial judge was made by the defendant himself in the absence of counsel. And in People v. Peace, 18 N.Y. 2d 230, 236, 273 N.Y.S. 2d 64 (1966), the Court commented

in upholding the secrecy of a probation report that: "[It] is not prepared by an adversary." Here the communication was made by an adversary, and in a manner so that defense counsel had no way of knowing the communication had been made.

The Court's comment with regard to what "the better practice might have been" (June 11, 1973 opinion p. 10) is little solace to a defendant who was subjected to "the worst practice which was." Either a practice is proper or improper. This court should not duck the issue.

Worse still is this Court's decision to refer the issue of whether the trial judge and the trial assistant district attorney were guilty of impropriety back to the very trial judge whose conduct is under review.

As this Court is aware, this motion was made returnable originally in Part 30 where all motions must be made. For three months 3 different Part 30 judges kicked the case around, from judge to judge to judge. Apparently none wanted to sit on what Judge Davidson had done, but all realized that the case could not be referred to him--as would be the practice with all post trial motions. Then the Administrative Judge referred this motion in its entirety to Your Honor, Judge Lang. His decision as to who should hear the case was binding on the parties and the Court.

This Court's ruling of June 11, 1973 sending this aspect of the motion to Judge Davidson for decision not only violates the Administrative Judge's order which could have ordered the case (albeit improperly) to Judge Davidson, it violates a fundamental tenet of American Law.

Forgetting the issue as to whether judges are human

beings capable of being prejudiced as members of a jury may be (e.g. Parker v. Gladden, 385 U.S. 363), judges must abide by the rule that "justice must satisfy the appearance of justice." Offutt v. United States, 384 U.S. 11, 14.

The appearance of fairness doctrine views a trial and its procedures not only from the point of view of a defendant but from the point of view of the public. Thus, as the Court pointed out in United States v. Meyer 462 F. 2d 827, 839 (C.A.D.C. 1972), (a contempt case) even where a judge possesses "charitable instincts and in fact entertain[s] no personal feelings the public might reasonably suspect that such was not the case if he has any personal involvement. See also In re. Dellinger, 461 F. 2d 389 (7th Cir. 1972).

It is impossible that the public can view this Court's action in requiring counsel to make its motion before Judge Davidson as appearing to be fair. Judge Davidson's personal involvement in this case has been manifest since the outset. For example:

A. He refused the defendant permission to use the toilet (after court had been in session for hours) while the jury was being picked until the defendant was finally forced to make an outburst in front of the jury (voir dire [VD] minutes, 509-511). He then threatened the defendant with sanctions under Illinois v. Allen (binding and gagging) (VD 512-3) and told counsel who protested, "I am totally unimpressed with your beliefs and I don't care what you believe."

B. Throughout the trial as inspection of record will reveal, the trial judge insulted defense counsel repeatedly.

C. During the trial, Judge Davidson held defense counsel in summary contempt (2492) for attempting to mark for identification

and properly identify for the record the confession of another man to the Kroll homicide.

D. At sentencing, the trial judge reacted with open venom to the defendant's statements in his own behalf, sentencing him to the maximum in a case where, even if the defendant had been guilty, there were extenuating circumstances. (The man who was killed was in the process of attacking the killer on a dark street late at night after the alleged killer walked away from an argument.)

E. I am informed that around the time of sentencing, the trial judge in public made derogatory comments concerning both defense counsel and the defendant.

F. After trial, I am informed, while appearing in a case before Judge Davidson, that the Judge would not keep cases of mine before him except upon prearranged plea bargaining with the District Attorney.

This is hardly the judge who should review the question of the effect of ex parte disclosures to himself. Not only does this procedure fail to meet the appearance of fairness test, it is manifestly unfair in fact. The Administrative Judge realized this as should this Court.

This Court should decide the motion. Nor need it speculate as to whether the ex parte disclosures were prejudicial. By applying Offutt and its progeny, this Court can do justice by insuring that "justice must satisfy the appearance of justice."

LEWIS M. STEEL

Sworn to before me this

26th day of June, 1973

EMILY JANE GOODMAN
Notary Public, State of NEW YORK
No. 1[illegible]25
Qualified in New York County
Commission Expires March 30, 1973