

11-1-1967

Certificate of Reasonable Doubt

Lewis M. Steel '63

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18. The test in deciding whether or not to issue a certificate has been stated in various ways. It will be granted where the defendant raises an arguable issue worthy of review by an appellate court. People v. Sparber (Supreme Court N.Y. County, 1962) 35 Misc. 2d 985, 231 NYS 2d 665 (jury instructions). It is not necessary that the judge reviewing the application be satisfied that the judgment will be reversed, it is enough that he is satisfied a question of law is raised sufficient for consideration by an appellate tribunal. People v. Polisar, 224 NYS 2d 406 (legal search) (Supreme Court, Fulton County, 1962). The issue is not whether there was error, but whether in justice, the issue should be reviewed and decided by an appellate court. People v. Brod, (Sup. Court, N. Y. County, 1960) 203 NYS 2d 547 (excessive sentence). It is not even important for decision on the issuance of the certificate that it be decided the errors were important or that the defendant was in fact prejudiced, all that the defendant is required to show is that there exists a reasonable, arguable question for an appellate court. People v. Sobiera (Sup. Ct., On. County, 1958) 17 Misc. 2d 1051, 189 NYS 2d 9 (sufficiency of rape corroboration). People v. Von Cseh (Sup. Ct., N.Y. County, 1957) 9 Misc. 2d 718, 170 NYS 2d 357. In short, the test here is not whether the defendant will prevail on appeal (although he strongly contends he will), but whether there are reasonable and not frivolous grounds for taking the appeal.

7 ~~18~~ ^{Looking to} ~~Indeed, the Revised Code of Criminal Procedure, due~~ ^{which} ~~to become effective on September 1, 1971, does away with the~~ ~~"reasonable doubt" criteria for bail pending appeal, and simply~~ ^{will be determined} ~~provides for bail on appeal in the same language as bail is to~~ ^{by the same standards which} ~~be set for trial.~~ ^{to determine} ^{eligibility} ^{for} ^{bail} ^{prior} ^{to} ^{trial} ^{See, Criminal Procedure Law, Sec. 460.50 and} ^{530.10.}

8 ^{to why} ~~18.~~ The following grounds are asserted as ~~basis upon~~ ^{should} ~~which this Court can find that there is reasonable doubt~~ ^{the}

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 Thus a convicted defendant ^{who was} eligible for bail before conviction, as defendant in this case, will be eligible upon appeal, without necessity of showing that there is a reasonable doubt of affirmance.

NOTICE OF MOTION FOR CERTIFICATE OF REASONABLE DOUBT

SUPREME COURT OF THE STATE OF NEW YORK
~~PART 30,~~
NEW YORK COUNTY

PEOPLE OF THE STATE OF NEW YORK,
Plaintiff-Respondent,

-against-

WILLIAM A. MAYNARD, JR.,
Defendant-Appellant.

NOTICE OF MOTION *For*
Certificate of Reasonable Doubt
INDICTMENT NO. 3937/67

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Lewis M. Steel duly sworn on the *10th* day of January 1971, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a Special and Trial Term Part 30 thereof to be held at the Courthouse, 100 Centre Street, New York, New York, on the _____ day of January 1971, at 10:00A.M. or as soon thereafter as counsel can be heard, for an order granting defendant a certificate of reasonable doubt and admitting him to bail pursuant to the provisions of §§527/529 and 555 of the Code of Criminal Procedure, pending the determination of defendant's appeal from a judgment convicting him of violating § 1050 of the Penal Law, and for such other and further relief as to the Court may seem just and proper.

DATED: New York, N.Y.

[Signature]
1971

Yours, etc.
Lewis M. Steel
Daniel L. Meyers
di Suvero, Meyers, Oberman & Steel
350 Broadway
New York, N.Y.

TO: Frank S. Hogan
District Attorney
100 Centre Street
New York, N.Y.

Clerk, Part 30
Supreme Court
New York County

the conviction will be affirmed and ^{should} ~~can~~ determine that there are arguable and/or significant issues to be resolved by the Appellate Division:

I
The Verdict is Against
the Weight of the Evidence

~~The verdict is against the weight of the evidence. The~~
prosecution relied almost exclusively upon eyewitness testimony. The prosecution witnesses who gave eyewitness testimony all had given descriptions of the perpetrator to the police soon after the incident which differed sharply from the defendant's appearance, age and height.

There were three prosecution eyewitnesses produced at the trial. The first, Robert Crist, told the police that the perpetrator was 5'8" tall (Transcript ^{Character "T"} on page 894, ~~hereinafter "T"~~) and 17 to 20 years old. At the trial Crist described the perpetrator as being 5'10" to 5'11" tall and 18 to 21 years old (T 699). ^{who was 6' tall} The witness was positive that the perpetrator was smaller than he was (T846). The best description that Crist could give of the perpetrator was taht he looked like "the average looks of a person that you pass in the street," (T 854). Crist was the only witness directly involved in the incident.

Michael Febles, an alleged bystander, originally described the perpetrator as 5'10" to 6' tall, 18 to 20 years old (T 1828). Febles described the man he saw as having "a very dark complexion," (T 1832). About the perpetrator at trial, Febles testified that the skin color of the man was "not too dark, not too light" (T 1097) and that he had "no idea" (T 1126) how old he was.

The third eyewitness, Dennis Morris, who also claimed to have seen the incident, first told the police that the perpetrator was 5'8" to 5'9" and about 18 to 23 years old (T 1422). In addition he described the perpetrator as having features like Martin Luther King (T 1424). At trial, Morris said the perpetrator was 5'7" to 6' tall.

The testimony of all three "eyewitness" varies greatly

with the defendant's actual age and appearance. On April 3, 1967, Maynard was 31 years old and was 6'1 and 1/2" tall (Defendant's Exhibit K). The many pictures of Maynard in evidence indicate he looks nothing like Martin Luther King. ^{In short, the} ~~The~~ eyewitness testimony ^{also} reveals that ~~the~~ ^{all} ~~three eyewitnesses~~ all altered their original descriptions of the perpetrator to better conform with the appearance of Mr. Maynard who was sitting before them in Court.

Given ^{the serious weakness of the} ~~the~~ ^{of} eyewitness descriptions

there is a reasonable doubt that the conviction can stand, even assuming that the trial judge made no errors sufficient to require reversal. People v de Vito, 117 N.Y.S. 2d 883 (2nd Dept. 1953).

II

Untimely Revelation
 The Prosecution's ~~Fact~~ ~~that~~
 Only Exculpatory Evidence Is
Grounds for Reversal

Although the defendant had made a series of motions asking for the production of all exculpatory material in the possession of the prosecution, under the doctrine of Brady v. Maryland, 373 U.S. 83 (1963), the district attorney neglected to reveal, among other things, that certain eyewitnesses had identified persons other than the defendant as the perpetrator of the homicide. This information was recorded in official police memoranda in the custody of the District Attorney. This material was not received by the defense until at least three weeks into the trial, thus making it impossible for the defense to locate these witnesses.

These eyewitness identifications, adverse to the interest of the prosecution, are summarized in a motion to dismiss the indictment which was denied at the end of the prosecution case (T 1870-1881). The defense argued that by withholding this information, the prosecution had made it impossible for the defense to locate possible witnesses that would exculpate the defendant, and thus denied the defendant due process of law. Finally after the defendant's motion to dismiss the indictment on October 27, 1970, for failure to produce exculpatory material in time for it to be used, the district attorney revealed additional exculpatory eyewitness accounts (T 1885-1886) as well as the Connor confession. Again, a motion to dismiss was denied (T 1890), contrary to U.S. ex rel Mears v. Wilkins, 326 F.2d 135 (2d Cir. 1964); U.S. v. Spangelet, 258 F.2d 338 (2d Cir. 1958); U.S. ex rel Thompson v. Dye, 221 F.2d 763 (3d Cir. 1955).

The Defendant WAS Deprived
of A Fair Trial by the Court's
Improper Curtailment of the
EXAMINATION of WITNESSES

A. The defense called as a witness ^{one} of the
detectives who investigated the homicide and attempted to
examine him with reference to ^{recorded} eyewitness statements ~~he~~
of other eyewitnesses to the homicide ~~not~~ called by the prosecution. These statements
~~recorded~~ inconsistent with the defendant's guilt. Judge
Davidson prohibited this line of examination (T 1965-1969)

on the ground of hearsay. The defendant contends
that this ruling deprived him of a fair trial
because the prosecution had suppressed
the names of these witnesses for ^{more than} three ~~at~~
years to trial, thus making it impossible for
the defendant to locate these persons. It

is contended, Point II ~~to~~ supra, that this
untimely revelation of
~~failure to turn over~~ exculpatory evidence
requires a dismissal of the indictment. As

(to compound
the difficulty
of locating
witnesses
at such
a late date,
Judge Davidson
denied the
defendant's
~~request~~
request for
appointment
of an
investigator
based upon
indigence
Pre-trial
decision
pp 3-4).

⑦

a minimum, however, the defendant was entitled to alert the jury to the fact that the authorities had ~~knowledge~~ ~~of the~~ interviewed other eye witnesses whose statements were inconsistent with the defendant's guilt.

B. The trial judge

denied the defense the right to present the testimony of a lighting expert with regard to lighting conditions at the scene of the homicide and to rebut some of the calculations and opinions of the prosecution's lighting expert (T 2852-2858). The prosecution had presented expert testimony that the level of lighting on the sidewalks in question was ^{twice} the city average (T 428) as well as testimony that the light from a bank window near the scene of the homicide, "would aid in visual observation because you could see objects against the illuminated background," (T 429). On cross examination, the prosecution expert, who made his readings two years after the homicide, admitted that he determined certain lighting levels through the use of a mathematical formula rather than by light meter readings (T 462). He ^{said he} did this because there was not ~~even~~ enough light at the scene of the homicide to produce a reading on a ^{his} sensitive light meter. The defendant's lighting expert was prepared to testify, among other things, according to an offer of proof, that the mathematical formula was unreliable, and that the bank

lighting actually made it more, rather than less, difficult to identify persons at the scene of the homicide (T 2852-2853).

The prosecution's case hinged almost entirely on night time eyewitness identifications. Therefore, the Court's ruling prohibiting defense expert lighting testimony was highly prejudicial. This is especially so because the District Attorney in his opening referred to the scene as being "a well lighted area of this City," (T 336), then

relied on expert testimony to prove this claim.

C. Throughout the entire trial, the Court consistently limited the defendant's rights to cross examine and present evidence contrary to the rules of evidence.

This point may only be developed by a reading of the entire record. Among other things, ~~a reading would reveal that~~ the judge unduly restricted cross-examination of prosecution witnesses, ^{ed prosecution witnesses} protecting them from cross-examination based on prior inconsistent statements; consistently prohibited defense counsel from introducing documentary evidence to corroborate testimony of defense witnesses; and refused to allow any testimony by certain relevant defense witnesses.

By contrast, Judge Davidson relaxed the rules of evi-

dence when the prosecution sought to introduce evidence and allowed the prosecution free reign on cross-examination. For example, in the direct examination of Gino Gallina, a former prosecutor of the defendant who handled the first trial, the witness was allowed to (i) relate his conversations with persons who were not called to testify; (ii) was allowed to give his opinions about the motivations of various witnesses who did testify; (iii) was permitted to characterize defense witnesses as liars, prostitutes, and pimps; and (iv) was given free reign to generally give a summation of the prosecution case in the form of direct testimony (T 2979-3123).

The Court's evasive ruling left reasonable doubt that the conviction will be affirmed. People v TAURISANO, 47 NYS2d 208 (4th Dist, 1944); People v Adler, 274 App. Div 820, 80 NYS2d 210 (2d Dist 1948);

IV

The Conviction May Not Stand
Because the trial judge
was personally insulting to
Defense Counsel and Defense
Witnesses in the Presence of
the Jury.

11. The record reveals that Judge Davidson was personally insulting to defense counsel and defense witnesses in front of the jury. For example, throughout the entire cross-examination of a central defense alibi witness, Judge Davidson overtly indicated his disbelief of the testimony, threatened the same witness with a charge of perjury, and accused him of "putting on an act." Judge Davidson personally took over much of this cross-examination and badgered the witness throughout (T 2145-2271). By his conduct, Judge Davidson effectively weakened the credibility of this witness and undermined the testimony of all of the defendant's alibi witnesses.

he called
counsel

accused defense
counsel of
making "a show
(196) and
cross-
examination
out of
context (1106).

He also spoke "roughly" to another central defense witness (12310).

This conduct of ^{the} trial judge creates a
reasonable doubt that the conviction
will be affirmed. See People v. HANIAN,
245 NY 227 (1927); People v. Montano,
70 NY 520 537 (2nd Dept. 1947); People v. Adler,

80 N. Y. S2d 210 (2nd Dept. 1948); People
v Jordan, 277 App. Div 1041, 100 N. Y. S2d 440 (2nd Dept 1950). (11)

IV

The Court ~~ER~~ COMMITTED
Clear Reversible Error
By Refusing to Allow the
Defendant to Submit ~~the~~
~~Confession of a Person Other~~
~~Than the Defendant to the~~
~~Jury~~

↳ to Call As a Witness A
Person who Confessed to
the Homicide AND to
Submit his ^{WRITTEN} Confession to
the Jury in the Event the W. Tress
Asserted his Fifth Amendment
Rights

On November 10, 1970, the day the prosecution rested
its case, the Assistant District Attorney, ^{Stephen Sawyer} ~~Stephen Sawyer~~,
informed the Court, out of the presence of the jury, that
he had been aware since April, 1970, of the existence of
"an individual other than the defendant" who had made
"some sort of confession with respect to... the homicide"
in question (T 1887). Sawyer told the Court (T 1888) that
he felt the man had "nothing to offer"
on the basis of private conversations he had with this
individual, ^{whose name was} Adrian Connor.

Sawyer there-

upon turned over to the defense a copy of the confession which was made on two separate occasions to prison officials of the Attica Correctional Facilities.

Judge Davidson appointed legal counsel for Mr. Connor. Thereafter, at the request of Connor's counsel, Judge Davidson ordered a psychiatric report prepared to determine whether Connor was competent to testify. On November 18, 1970, a report was filed in which Connor was found competent (Court's Exhibit 13).

Thereafter, defense counsel did subpoena Adrian Connor as a defense witness. Judge Davidson, however, refused to allow the defense to call Connor as a witness. Instead Judge Davidson conducted a "hearing" outside the presence of the jury. At this hearing, Judge Davidson called Connor as a witness. When Connor invoked the Fifth Amendment in response to a question regarding his confession, the judge

(13)

quashed the defense subpoena, excused the witness, and ordered his return to Attica State Prison, ruling that he would not allow Connor to testify and invoke the Fifth Amendment in front of the jury (T 2483-2485).

This ruling directly conflicts with the law of this state as set forth by the Court of Appeals in People v. Brown, 26 NY2d 88 (1970). Brown makes clear that a witness can be called to testify before the jury regarding his own admissions if those be favorable to the defense. If he wishes to invoke the Fifth Amendment, he may of course do so. But he must invoke the Fifth Amendment in front of the jury.

Moreover, the Brown decision goes further. If a witness whose statements would be helpful to a defendant, invokes the Fifth Amendment, then under Brown, the defendant may present proof of the admission as an exception to the hearsay rule.

Consistent with the Brown decision and because Judge Davidson did not allow Connor to testify, defense counsel marked the Connor confession as Defendant's Exhibit AA for Identification (attached hereto as Exhibit ^C~~B~~), and moved its introduction into evidence (T 2490-2499). This motion was denied.

Judge Davidson attempted to buttress his ruling by referring to language in the psychiatric report questioning the reliability of the confession, notwithstanding the fact that defense counsel had objected to the use of this report in the absence of the right to cross-examine, and because its introduction was contrary to the rules of evidence. Psychiatric testimony would go merely to the weight, not the admissibility of the evidence (T 2486-2495). The

Court's ruling on ~~this~~ ^{the} issue ^{was} clearly reversible error; a certificate therefore ~~was~~ ^{should} issue.

VI

erroneously denied

The Defendant was ~~entitled~~
to a New TRIAL Based Upon
Newly Disclosed Evidence

after the verdict

On December 29, 1970, Adrian Connor confessed once
again to the homicide in question while ^{bring} ^{ed} returning to Attica.
This confession, recorded in the affidavit of Alfred Gary,

Correctional
Facility.

attached as Exhibit D, formed the basis for a motion for
a new trial. This motion was also based upon my affidavit
dated January 8, 1971, which contains summaries of my
interviews with the Attica prison officials to whom the
first confession was given. The recollections of the prison
officials with regard to the Connor confession points to
its reliability. In any case, the question of reliability
is one for a jury to decide under the People v. Brown doc-
trine, and the defendant ^{was erroneously denied the right} is ~~entitled~~ to have the jury
hear testimony of the second confession.