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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 42

DIANE WELLS,

Appellant.

20 Eagle Street
Albany, New York 12207
September 11, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 42.

2 MR. FINE: Yes, Your Honor, I'd like two
3 minutes for rebuttal.

4 CHIEF JUDGE LIPPMAN: Two minutes. Go.
5 You're on.

6 MR. FINE: Andrew Fine for Diane Wells.
7 It's not disputed in this case - - - this is a 30.30
8 case - - - it's not disputed that the action begins,
9 for 30.30 purposes, following a reversal, at the time
10 that the reversal and an order granting a new trial
11 becomes final. In this case, that was when Judge
12 Smith denied leave from the prosecution's application
13 to overturn the reversal of the Appellate Term.

14 The Appellate Term, in this case, held that
15 any time you have a remand following a reversal, the
16 entire period of delay following the first
17 adjournment is automatically excludable, regardless
18 of whether it impacts upon the People's ability to
19 prepare for trial. That is antithetical to the way
20 that - - - the entire basis for 30.30, which is to
21 prod the People to be ready for trial, encourage them
22 to do that so that there can be quick movement in the
23 criminal jus - - -

24 JUDGE SMITH: Well, what do you say - - -

25 JUDGE GRAFFEO: What's the rule you want

1 us, then - - -

2 MR. FINE: The rule that I'd like in this
3 case is, they need to show an exclusion under
4 subdivision 4 that's justified. They cannot try to
5 erect - - - try to argue for any automatic exclusion,
6 since there is no period in the CPL, no subdivision
7 of subdivision 4, the exclusionary rules - - -

8 JUDGE GRAFFEO: Let me take you back a
9 minute. When are you saying the clock starts to run
10 again?

11 MR. FINE: The clock starts to run - - -
12 and the People do not dispute this - - - when Judge
13 Smith denied leave for the People's leave
14 application. 101 days later, a 30.30 motion was
15 filed by the defendant; even at that time, it appears
16 as though the Appellate DA was not even aware that
17 the 30 - - - that the leave application had been
18 denied. And he - - - the People never announced
19 ready. All that the People did was say, this is a
20 complicated case; we needed a reasonable period of
21 time to prepare.

22 But that begs the question in the first
23 place, how could they even have prepared for trial -
24 - -

25 JUDGE SMITH: Well, what do you say they

1 should have done?

2 MR. FINE: What should - - - what should
3 they have done? They should have, on the first
4 adjourn date possible, they should have asked the
5 court for an adjournment, if, in fact, they believed
6 that they needed a lengthy time to prepare for trial
7 - - -

8 JUDGE GRAFFEO: That's my - - - that's my
9 question. The court would have to grant a stay here
10 in order to stop the clock; otherwise, it keeps
11 running?

12 MR. FINE: If the court had granted an
13 adjournment on this basis, then - - - then there - -
14 - and in fact, there was a legitimate basis for
15 exceptional circumstances to demonstrate that the
16 People could not prepare for trial - - - then the - -
17 - then the clock would stop. But if the People
18 argued exceptional circumstances and, in fact, it was
19 shown, as is true in this case - - - that there was
20 no conceivable basis for such an argument, then - - -
21 then their option is to declare ready for trial.
22 They never did that. They needed to prepare within
23 ninety days of the leave denial; they never did that,
24 and in fact, in this case, which, to me, I find to be
25 very striking, as late as July 21st, which is sixty-

1 eight days into the period, a prosecutor, in response
2 to the defendant's motion to dismiss, Mr. Levy, said,
3 "Prior to July 21st, 2010, the People had no
4 knowledge of the whereabouts of this case, that is,
5 whether it had been returned to the criminal court or
6 remained at the Appellate Term or the Court of
7 Appeals."

8 In other words, the trial prosecutor did
9 not even know about the leave denial.

10 My adversary in this case actually told the
11 court clerk in criminal court, Judge Stephen's clerk,
12 that he would let her know when the People - - -
13 when, in fact, leave was denied. He never did. Not
14 only that, Mr. Levy, the trial prosecutor, did not
15 know; there's no indication he even knew about the
16 case being back in the Appellate Term permanently,
17 and leave having been denied, until the 30.30 papers
18 were actually filed on August 18th.

19 JUDGE GRAFFEO: What - - - I found it
20 curious that we haven't looked at this issue until
21 now, and yet we've been denying leave applications
22 for decades, right? What usually happens? Did
23 something unusual happen in this situation - - -

24 MR. FINE: I - - -

25 JUDGE GRAFFEO: - - - that we're eleven

1 days over the - - - the period?

2 MR. FINE: Well, the only thing that was
3 unusual, I guess, as my adversary would say, that at
4 one point, there was a - - - there was a June 21st
5 adjournment that was ordered, but an employee in the
6 clerk's office apparently lost track of the case, and
7 as a result, the case was never called on June 21st.
8 But, Your Honor - - -

9 JUDGE GRAFFEO: So what would - - - what
10 would usually happen? Because we're not seeing a lot
11 of these.

12 MR. FINE: What would usually happen would
13 be what happened at the beginning here. There was an
14 adjourn - - - there was an adjourn date called for
15 May 10th, which is four days before the leave denial,
16 and in fact, in that - - - in that - - - at that
17 time, the People, you know, did not know about the
18 leave denial, and no one actually was in the part who
19 was familiar with the case. The court postponed the
20 case until June 21st.

21 Then there would - - -

22 JUDGE GRAFFEO: So generally, a court does
23 something before the expiration of the time period?
24 Is that what you're - - -

25 MR. FINE: That's right.

1 JUDGE GRAFFEO: - - - telling us?

2 MR. FINE: If it - - - Judge Stephen's
3 clerk tried to find out what had happened to the - -
4 - to the leave application. She could not do that.
5 Therefore, on May 14th, when, in fact, the leave
6 application was denied, no one knew about it.

7 There would have been an ordinary course -
8 - - there should have been an adjournment ordered in
9 order - - - after the leave denial, to get the
10 People's position on - - - on record as to whether
11 they were ready, and if not, how much time they
12 needed to prepare. There was no such proceeding in
13 this case.

14 The People do not claim that they were not
15 aware of the leave denial - - -

16 JUDGE SMITH: So the short answer to what's
17 unusual is that because of a clerical error, the
18 first appearance went beyond the ninety days?

19 MR. FINE: That's right, and that is not
20 ground for exclusion of time. Before readiness, way
21 back in 1980, People v. Brothers held that the
22 unavailability of the court part is irrelevant under
23 30.30, because it doesn't prevent the People from
24 declaring ready for trial. Post readiness - - -

25 JUDGE SMITH: Are you saying they could

1 have served an off-calendar statement of readiness?

2 MR. FINE: Absolutely.

3 JUDGE SMITH: And if they couldn't do that,
4 they had to - - - they had to go find a judge and
5 say, give me - - - give me an adjournment for
6 exceptional circumstances.

7 MR. FINE: That's right. By the way, Your
8 Honor, I just want to point out, the People argued
9 exceptional circumstances in the lower courts; they
10 are not arguing it in this court. They dropped a
11 footnote on page 18 of their brief referring to it,
12 but they did not raise it. So that is currently out
13 of the case.

14 JUDGE GRAFFEO: What about the language in
15 the statute about a reasonable period of delay
16 resulting from appeals?

17 MR. FINE: Okay.

18 JUDGE GRAFFEO: Does that mean that the
19 legislature recognized that there ought to be a
20 little leeway here?

21 MR. FINE: Yes, and for example, there are
22 ample numbers of cases in which such a reasonable
23 period of time may be present. Let's say there is a
24 reversal in a new trial ordered because the Appellate
25 Court finds that evidence that was introduced against

1 the defendant shouldn't have come in. They order a
2 new trial. Under those circumstances, the People may
3 need to produce additional evidence in order to
4 compensate for the fact that the Appellate Court - -
5 -

6 JUDGE SMITH: But should - - - on your
7 theory, shouldn't they be using the extraordinary
8 circumstances section to do that?

9 MR. FINE: The extraordinary circumstances
10 section is difficult, because it - - - it puts - - -
11 it puts them under a significant burden to
12 demonstrate that.

13 JUDGE SMITH: So you - - - so you - - - so
14 you're conceding, then, that if this were a really
15 heavy case where - - - which had been transformed by
16 the result on appeal, that they would be entitled to
17 take more than the - - - more than the ninety days,
18 even without showing exceptional circumstances?

19 MR. FINE: If they were able to show that a
20 reasonable period of time to prepare is - - -
21 following the appeal included in this case - - - more
22 than just the ninety days, they could have made the
23 argument. They don't show that in this case. In - -
24 - in this case they say, well, this is a celebrated
25 case; there was a story about it in the New York

1 Times. The defendant was represented by a prominent
2 attorney, and there were four witnesses.

3 Well, they had the transcript of the first
4 trial. They had the testimony of all four witnesses.
5 The complainant died, which is unfortunate.

6 JUDGE SMITH: Does it really turn on this?
7 I mean, I would have thought you'd be arguing that
8 the - - - that they have the - - - that the reason
9 the - - - they had ninety days from the day it was
10 reversed, and if they wanted more, they had to go in
11 and show exceptional circumstances, and that's all
12 there is to it.

13 MR. FINE: That - - - the only problem with
14 that argument is it would render subdivision 4(a)
15 relatively a nullity. They - - - we can't say that
16 the subdivision 4(a) never creates a ground for an
17 exclusion. We just are arguing that it certainly
18 doesn't provide one in this case.

19 JUDGE SMITH: Although a reasonable time
20 resulting - - - that's the reasonable time resulting
21 from - - - from activities relating to the defendants
22 - - - to the defendant. Why doesn't that just mean
23 time to - - - time to get his motions decided, his
24 appeal decided, things like that?

25 MR. FINE: We would certainly not debate

1 that kind of interpretation of sub-4(a). All I'm
2 saying is that if sub-4(a) does permit an exclusion
3 for the People under these circumstances, they
4 certainly did not demonstrate its applicability in
5 this case.

6 CHIEF JUDGE LIPPMAN: Okay.

7 MR. FINE: Thank you very much.

8 CHIEF JUDGE LIPPMAN: Counsel? What's
9 reasonable delay in this circumstance, counsel?

10 MR. COHN: Chief Judge Lippman, David Cohn
11 for the People. So Your Honor - - -

12 CHIEF JUDGE LIPPMAN: What's reasonable?

13 MR. COHN: Your Honor, the first - - - a
14 first short adjournment to get the case back on the
15 calendar, in every case, is reasonable after a new
16 trial is ordered, after there's an appellate
17 reversal.

18 JUDGE SMITH: Is - - - why isn't that what
19 the ninety days are for?

20 MR. COHN: Your Honor, if the - - - the
21 legislature believed that that was the rule, they
22 would have written a different statute. The statute
23 says, any reasonable delay resulting from an appeal
24 is excludable. The statute does not say - - -

25 JUDGE SMITH: Well, I - - - I would have

1 taken that to mean that if there's some proceeding
2 which leaves the defendant to take an appeal, you can
3 put the case on hold.

4 MR. COHN: Your Honor, if the legislature
5 meant that only the dates during which the appeal was
6 technically pending were excludable, then it would
7 have said that. It says "reasonable delay".
8 Reasonable is a word that - - - that - - -

9 JUDGE SMITH: So you take it, any
10 reasonable delay caused by the appeal?

11 MR. COHN: Exactly, Your Honor. And there
12 are issues involved in getting a case back on the
13 calendar. For instance, this was a case where the
14 Appellate - - -

15 CHIEF JUDGE LIPPMAN: No, but you can't sit
16 on your hands; the whole purpose of these statutes,
17 right, are to not have a kind of bureaucratic delay -
18 - - I can't find the case, I didn't know where it was
19 - - - right? I mean, that - - - there is a purpose
20 behind all of this.

21 MR. COHN: Your Honor, that's why the
22 statute says, "reasonable".

23 JUDGE PIGOTT: Yeah, but you know what, it
24 strikes me that if the defendant was three days late
25 appearing for further proceedings after a bail

1 hearing, he'd be in jail. And - - - and to listen to
2 counsel, I mean, you guys just dropped the ball.

3 MR. COHN: Well - - -

4 JUDGE PIGOTT: And you want to say well, we
5 dropped the ball, but, you know - - -

6 MR. COHN: Your Honor, I disagree with that
7 interpretation. There've been statements made about
8 me which are untrue. There's no - - -

9 JUDGE PIGOTT: Oh, I didn't know it was you
10 personally.

11 MR. COHN: There's no record here for me to
12 defend myself on the record, and I don't want to
13 testify before this court, but - - -

14 JUDGE SMITH: Okay, but a ball obviously
15 did get dropped.

16 MR. COHN: Your Honor, I don't believe the
17 ball got dropped. I believe what happened - - -

18 JUDGE SMITH: I read testimony from a clerk
19 saying, I forgot to - - - I forgot to put this thing
20 in the computer.

21 MR. COHN: Well, the ball was dropped by
22 criminal court.

23 JUDGE SMITH: Okay, but - - - yeah.

24 MR. COHN: Okay.

25 JUDGE SMITH: Okay. But you're - - - but

1 you, even when the criminal court does that, the
2 People have an obligation to be ready.

3 MR. COHN: Your Honor, there - - -

4 JUDGE SMITH: Even - - - yeah.

5 MR. COHN: There is no precedent. This is
6 the first case ever where a defendant - - - in my
7 experience, in my knowledge - - - to my knowledge - -
8 - has asserted that the first relatively short
9 adjournment between a denial of leave or an order of
10 a new trial and when the case gets back on the
11 calendar, is not excludable under 30.30(4)(a) - - -

12 JUDGE PIGOTT: You add that - - - do you
13 add that to the ninety days, then?

14 MR. COHN: Exactly, and that's what had - -
15 -

16 JUDGE PIGOTT: That's not in the statute,
17 though.

18 MR. COHN: Well, Your Honor, that - - -
19 that is within the meaning of the word, "reasonable".
20 That is what the law - - - prevailing law was in the
21 First Department in every single case in this
22 context.

23 JUDGE PIGOTT: What's the ninety - - -
24 what's the ninety day - - - what's the ninety days
25 for?

1 MR. COHN: Your Honor, the ninety days is
2 for once the case gets in the trial posture.

3 JUDGE PIGOTT: So that - - - that can go on
4 forever. In other words, if you've got a reasonable
5 reason to delay this thing six months, yeah, you can
6 then say, and - - - and ninety days, Judge. I mean,
7 you know, we were looking for witnesses, you know, my
8 dog got sick, you know, I had trouble, but I got
9 ninety days after I'm finally telling you I'm ready.
10 And in the meantime, if the defendant does anything,
11 he's in - - - he's in jail. The whole idea is - - -
12 it seems to me, is to make everybody toe the mark.

13 MR. COHN: Well, Your Honor, first, I think
14 the - - - the defense raises the specter of
15 exceptional circumstances in this case. There could
16 be - - - have been exceptional circumstances; there
17 was absolutely no calendar call where a proffer could
18 have been made - - -

19 JUDGE PIGOTT: Mechanically - - -

20 MR. COHN: - - - to the trial judge here.

21 JUDGE PIGOTT: - - - when there's - - -
22 when there's a denial of leave, don't we serve both
23 parties?

24 MR. COHN: You serve both parties. And by
25 the way, one of the - - - and just one reason why

1 what my oppo - - -

2 JUDGE PIGOTT: So doesn't - - - doesn't the
3 DA's office get an envelope from the judge saying
4 we've denied leave, and now you know you've got
5 ninety days to bring the case?

6 MR. COHN: Your Honor, actually, that's not
7 what the prevailing law was. That was not what
8 anyone's understanding of the law was before the
9 defense filed the motion in this case.

10 JUDGE SMITH: But the statute says that the
11 ninety days starts to run from the date on which the
12 - - - an order occasioning a retrial becomes final.
13 You're saying that it in fact never starts to run on
14 that date; that you're entitled to a reasonable time?

15 MR. COHN: Your Honor, their - - - the
16 defense, in this case, is conflating two things.
17 There's the subdivision (5) requirement about when
18 the time starts to run, and then there's the
19 subdivision (4) language about what periods are
20 excludable.

21 JUDGE SMITH: So you're saying subdivision
22 (4) automatically suspends that ninety days that
23 subdivision (5) starts?

24 MR. COHN: As long as it's reasonable. And
25 if Your Honors will indulge me, I'd like to give one

1 little - - -

2 JUDGE SMITH: Are there no cases in which
3 it would be possible to do a retrial ninety days
4 after the - - - the - - - our court denies leave?
5 You know, you're not forbidden to work on the - - -
6 on your trial prep, even while the leave application
7 is pending.

8 MR. COHN: Your Honor, there is absolutely
9 no precedent for the proposition that the retrial
10 must commence exactly ninety days after the leave
11 denial. But - - -

12 JUDGE PIGOTT: No, but the speedy trial's
13 for the benefit of the defendant. I mean, it's not
14 for you - - -

15 MR. COHN: Exactly, Your - - -

16 JUDGE PIGOTT: - - - and it's not for the
17 DA and it's not for, you know, for - - - however good
18 the excuses are. Somebody says, I'm under - - - I'm
19 under indictment. I'm under - - - I'm under scrutiny
20 from the People. I have to tell my employer I, you
21 know, I'm charged; I've got a pending thing. It's
22 killing me. And so we say, you got to get it done.

23 MR. COHN: Your Honor - - -

24 JUDGE PIGOTT: You want to say, get it
25 done, comma.

1 MR. COHN: Your Honor, and I would like to
2 reiterate, that's why the statute says, "reasonable".
3 If I may - - - if I may, please, just say - - -

4 JUDGE PIGOTT: Go ahead. It's what you're
5 here for.

6 MR. COHN: - - - get in one thought. One
7 of the reasons why the rule that the defense proffers
8 can't be right is because the People do not receive
9 the leave denial immediately upon its issuance. It's
10 placed in the mail. It takes a few days to get to
11 wherever it's going. It takes a few more days,
12 perhaps, to get in the box of whoever it's been sent
13 to.

14 JUDGE SMITH: So you might get down to
15 eighty-seven days, but - - - but it's a tough life.
16 I mean, you - - - I mean, the statute - - - if you
17 make a - - - if the defendant makes a motion,
18 ordinarily, all the - - - all the time, all the - - -
19 while the motion is - - - the judge is thinking about
20 the motion is excludable, right? But then when the
21 judge decides the motion, the time starts running
22 again. You can't come in and say, oh, well, I - - -
23 you got to allow a day or two for me to pick up my
24 mail.

25 MR. COHN: Well, actually, Your Honor, that

1 is not the law in the Appellate Division and the
2 trial courts. In fact, there is - - - is case law in
3 all of the lower courts saying that after the
4 decision on the motion, a short adjournment, usually
5 two weeks to a month or so, is excludable, in order
6 to get everyone back in the posture.

7 JUDGE READ: So that's - - - that's what
8 usually happens, and the reason it didn't happen here
9 was because of a clerical error?

10 MR. COHN: That's what - - - well, what
11 usually happens - - - by the way, also, the - - -

12 JUDGE GRAFFEO: Could you have filed the
13 statement of readiness, and that way you would have
14 covered - - -

15 MR. COHN: Your Honor, we could have, but
16 we weren't required to, because the clock had not
17 expired.

18 By the way, there's another misstatement by
19 the defense in this case. This - - - the notion that
20 the People are required to ask for an adjourn - - -
21 give the reasons for why they want an adjournment
22 excluded before the fact. The law is - - - and
23 actually, this - - - this court has case law, binding
24 case law on this point. And it's People v. - - - v.
25 Berkowitz, I believe. Yeah, People v. Berkowitz, 50

1 N.Y.2d, 333.

2 The reasonableness of an adjournment is
3 decided after the fact, during the motion practice.
4 What the calendar judge decides at the time is not
5 binding. During the motion practice, that's when the
6 judge looks at everything that happens and decides
7 what was reasonable under the circumstances.

8 Judge Pigott and Chief Judge Lippman and
9 Judge Smith, you're raised very serious concerns
10 about the defendant's right to a speedy trial and
11 about the notion that maybe the People would take too
12 long to - - - to prepare - - -

13 JUDGE SMITH: See, but you - - - you say
14 you've got cases that say, essentially, even after
15 the denial of a motion, there's a - - - there's an
16 automatic exclusion?

17 MR. COHN: Absolutely. They're cited in
18 our brief.

19 JUDGE SMITH: Where are they?

20 MR. COHN: They're cited in our brief. I
21 believe it's pages 17 and 18 - - -

22 JUDGE SMITH: Okay, that's fine.

23 MR. COHN: - - - is the - - - of the brief.

24 Yes.

25 JUDGE SMITH: Okay.

1 MR. COHN: Pages 17 and 18 of the brief.
2 They're a bevy of lower court cases where - - - where
3 lower courts have consistently held - - - and in
4 fact, the First Department had decided, People v.
5 Vukel, which said the exact thing that the Appellate
6 Term said in this case, which was that if there was
7 an adjournment that was ordered while a leave
8 application was pending - - - and in Vukel, the leave
9 application was actually denied on the first day of
10 that adjournment - - - the rest of that adjournment,
11 which had already been ordered, was excluded, because
12 at that point, it was an adjournment for control
13 purposes while a leave application was pending, and
14 the idea was, this is just to allow the leave process
15 to go forward.

16 By the way, another - - - another - - -

17 JUDGE PIGOTT: That was - - - but see,
18 there's things going on forward. Once - - - once
19 this leave's denied here, where are you going?

20 MR. COHN: Well, Your Honor, these are busy
21 prosecutor's offices. These are busy courts.

22 JUDGE PIGOTT: If in Jefferson County, like
23 - - - because they were here earlier, they said, you
24 know, we only got two - - - two ADAs, and, you know,
25 to expect us to try these speeding tickets within a

1 year is crazy; we're not doing it, you know, so
2 Judge, you've got to give us three years to try these
3 speeding tickets.

4 MR. COHN: Well, Your Honor, obviously, the
5 legislature wouldn't agree - - - didn't agree with
6 that, and didn't write that scheme, and I would not
7 think that that was reasonable. In this case, we
8 have Manhattan Misdemeanor assistance, with 400 cases
9 each.

10 CHIEF JUDGE LIPPMAN: Yeah, yeah, but the
11 whole purpose of the speedy trial is to - - - is to
12 avoid those kind of situations where because of the -
13 - - again, bureaucratic delay, we don't get to
14 something, you know. So we don't want to do a rule
15 that would propagate - - -

16 MR. COHN: Right.

17 CHIEF JUDGE LIPPMAN: - - - you know, and
18 encourage this kind of delay. That's why we're
19 trying to find - - -

20 MR. COHN: Right, exactly, Your Honors.
21 And that's why I believe the legislature wrote the
22 statute as they did: reasonable delay resulting from
23 an appeal. It's up to the lower courts - - -

24 JUDGE RIVERA: What's the outer limit of
25 "reasonable delay", then?

1 MR. COHN: I think that would depend on the
2 circumstances of the particular case. Here where you
3 have an appellate process that went on for three-and-
4 a-half years; you had the complaining witness who
5 passed away; you had the trial defense attorney who
6 passed away, so Judge Stephen didn't even know
7 whether the defendant was represented by counsel.
8 You had an ADA who had left the office - - -

9 CHIEF JUDGE LIPPMAN: Okay. So your point
10 is, this isn't really bureaucratic delay.

11 MR. COHN: This is not bureaucratic delay.

12 CHIEF JUDGE LIPPMAN: Okay.

13 MR. COHN: This - - -

14 JUDGE SMITH: How - - - wait a minute. How
15 does not knowing who the defense lawyer is prevent
16 you from being ready?

17 MR. COHN: Well, what it could mean is that
18 you need - - - first, we're talking about an
19 adjournment that was ordered while the leave
20 application was still pending, and it's - - -

21 JUDGE SMITH: That doesn't sound like a
22 direct answer to my question.

23 MR. COHN: And Your Honor, to give a more
24 direct answer to your question, what it means is that
25 it explains why after this three-and-a-half year

1 appellate delay, which by the way, was caused largely
2 by the fact that the defendant took two years to
3 perfect the appeal, and the Appellate Term took a
4 year to decide the case, everybody has to reset;
5 everybody has to - - -

6 CHIEF JUDGE LIPPMAN: No, no, agreed; but
7 the point is, where do you draw the line that it - -
8 - the answer can't always be that, oh, we have 400
9 cases and it's tough. There's a certain minimal
10 level of readiness that's expected, and really, what
11 the statute's trying to address.

12 MR. COHN: Yes, Your Honor, and then what
13 this court's role is is to decide whether the lower
14 courts abused their discretion as a matter of law.

15 CHIEF JUDGE LIPPMAN: Okay.

16 JUDGE SMITH: When a brand-new case comes
17 into the office, you don't get an automatic extension
18 of your ninety days. You can get extensions for
19 whatever reason, and exclusions, but you get ninety -
20 - - you get ninety days from the time the case
21 originates. Why do you - - - why should it be
22 different when the Court of Appeals denies leave to
23 appeal in a case you've had for years?

24 MR. COHN: Actually, I'm glad you asked
25 that question, Your Honor, because they're very

1 different scenarios. When the People file a charge
2 in the first instance, they are in complete control
3 of the timing of when they file that charge. They
4 can make - - -

5 JUDGE SMITH: Oh, so you - - - you can just
6 sit on the file until you're ready, and then - - -

7 MR. COHN: Well, what you can do is prepare
8 your case. You interview your witnesses. You don't
9 bring your charge until you're ready to go, because
10 you know you have - - - you have ninety days.

11 JUDGE SMITH: Okay. You're saying you're
12 better prepared for a case on the day of indictment
13 then you are years later on the day when the Court of
14 Appeals denies leave to appeal?

15 MR. COHN: Absolutely yes, Your Honor,
16 because the police have been investigating the case,
17 the prosecutors have been investigating the case,
18 perhaps, if it's a - - - a bigger case - - -

19 JUDGE SMITH: Well, maybe they should make
20 notes of that investigation in case they have to use
21 it a few years later.

22 MR. COHN: Well, Your Honor, you might have
23 to find witnesses. You don't know how good their
24 recollection is. You might have the transcript of
25 their testimony, but it's a very different matter

1 trying a case to a jury on a cold transcript than
2 with a live witness. You might - - - there are
3 different considerations. You might have to think
4 about whether the jury would actually be receptive to
5 this transcript. You have to - - -

6 CHIEF JUDGE LIPPMAN: So it all depends on
7 what's reasonable.

8 MR. COHN: It all depends on what's
9 reasonable, and what - - - what we are saying here is
10 that the Appellate Term, they didn't make a blanket
11 ruling like my adversary suggests. They - - -

12 CHIEF JUDGE LIPPMAN: Right, we understand
13 your view.

14 MR. COHN: They looked at all the facts.

15 JUDGE PIGOTT: Right, but the - - - the
16 judge is the one that exercised the discretion,
17 right, and he decided he was not going to give you an
18 adjournment.

19 MR. COHN: Well, Your Honor, the Appellate
20 Term has fact-finding powers as well.

21 JUDGE PIGOTT: Right.

22 MR. COHN: And the Appellate Term - - -

23 CHIEF JUDGE LIPPMAN: The Appellate Term
24 didn't review what the - - - the judge found in terms
25 of that there was no reason for the delay?

1 MR. COHN: Well, Your Honor, the Appellate
2 Term held that this was a reasonable delay occasioned
3 by the pending leave application, and by the court
4 clerk's error, which is what caused it to - - -

5 JUDGE SMITH: I mean, the Appellate
6 Division seems to have adopted, if I read it right,
7 the rule of [Vu'-kel] or [Vu-kel'] or however you
8 pronounce it, that says essentially, you
9 automatically get until the next control date.

10 MR. COHN: And Your Honor, Vukel could be
11 read - - - that's how the defense reads it. I say
12 Vukel has to be read in the context of the statute,
13 which means that it has to be a reasonable delay. I
14 don't think that Vukel - - - the Vukel court meant to
15 say that if the trial judge put the case off for two
16 years at - - - pending a leave application, that all
17 that time would necessarily be excluded. And this
18 court might very well come back and say two years is
19 an abuse of discretion as a matter of law. But when
20 you look - - -

21 CHIEF JUDGE LIPPMAN: Okay.

22 MR. COHN: - - - at all the circumstances
23 here, six weeks, thirty-eight days; that's not an
24 abuse of discretion.

25 CHIEF JUDGE LIPPMAN: Okay, counsel,

1 thanks.

2 MR. COHN: Thank you.

3 CHIEF JUDGE LIPPMAN: Counsel, is Vukel a
4 good case?

5 MR. FINE: No, Your Honor. It basically
6 stands for the proposition that the People would
7 automatically get a leave - - - get an adjournment in
8 every single case following a remand for a new trial.
9 Basically, that's an argument that they should have a
10 "reasonable" period of time to prepare for trial.
11 The legislature has set that reasonable time as
12 ninety days. If they're going to cut into that
13 ninety days, they have to show that there's an
14 exception under subdivision 4.

15 The cases that Judge - - - that my
16 adversary was talking about with Judge Smith, the
17 first - - - are First Department cases. They have -
18 - - the First Department has - - - has said, a number
19 of times, the People are entitled to a reasonable
20 period of time to prepare for trial, and that, in and
21 of itself, is a ground for an exclusion. Those cases
22 are wrong and should not be followed. Thank you.

23 CHIEF JUDGE LIPPMAN: Okay. Thanks,
24 counsel. Thank you both.

25 (Court is adjourned)

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C E R T I F I C A T I O N

I, Janice Brea, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Diane Wells, No. 42 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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