COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 129

DRU ALLARD,

Respondent.

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20 Eagle Street
Albany, New York 12207
September 09, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Sara Winkeljohn
Official Court Transcriber

CHIEF JUDGE DIFIORE: Next, number 129, People v. Dru Allard.

Counsel.

MR. ROSS: I wish to reserve three minutes for rebuttal, please.

Okay. May it please the court, my name is Thomas Ross. I represent the appellant in this case. The Appellate Division's holding that the defendant preserved his 30.30 speedy trial claim for appellate review was error. It was error because in the trial court, when the People asserted their 30.30(4)(g) exclusion for exceptional circumstances, the defendant did not do what was required under - - -

JUDGE GARCIA: But, counsel, just to help you, is that really what the Appellate Division said, that first decision? I read that as the Appellate Division saying you didn't - - - you preserved your claim for - - - you asked for a hearing, which they did. And they sent it back because they said under the CPL you actually established enough to get a hearing, and that was preserved. And what troubles me here is the conflation of that issue with the substantive 30.30 argument. Now if they had lost on the hearing issue, then their arguments on what should have and should not have been excluded might

have been unpreserved, as you say. But they did ask for a hearing, and under the statute the Appellate Division said you get a hearing, and that's what they sent it back for.

MR. ROSS: Well, I disagree that it's preserved on the hearing issue because the defendant asked for a hearing in his original motion papers, and it was just a general broad request for a hearing. When we came back with the 30.30(4)(g) exclusion, he was supposed to contest that on the facts in order to get a hearing. You don't get a hearing just for the asking.

JUDGE GARCIA: You never made that argument, that I see in your papers, about the hearing not being preserved. Your argument, to me, always seems to go to you didn't preserve your arguments as against what the People were asserting are excusable delays. I haven't seen this argument. Is it in your papers?

MR. ROSS: The argument about - - -

JUDGE GARCIA: About preserving the hearing request.

MR. ROSS: No. We - - - our - - - we didn't read the Appellate Division's decision as preserving the hearing, as a request for a hearing.

We saw it as preserving the 30.30 claim itself on - - - on the substantive issue. As far as the preservation for the hearing that you're bringing up, it was not preserved because in the defendant's original motion papers, he only asserted just a six-month delay and then said, oh, if you don't summarily grant this then we request a hearing. Once we came back with asserting our exclusions, for him to obtain a hearing he had to contest - - -

JUDGE GARCIA: But we never said that.

MR. LEVINE: - - - our exclusions on the facts.

JUDGE GARCIA: This court has never said in Luperon or all the other cases that in order to get a hearing you have to file a reply. What we've said is in order to preserve your arguments as to excludability you have to file a reply, which are two very different things. And the Appellate Division, it seems to me, citing the CPL provisions and sending it back for a hearing is saying you met your burden and you asked for a hearing, so you get one. And this defendant, wisely enough, only chose to - - - chose to go on that, not on the substantive 30.30 grounds here. So that's what's here as preserved or unpreserved, and I don't see the argument anywhere in

your papers that he didn't preserve the request for a hearing.

MR. ROSS: That's because, like I say, we didn't read the Appellate Division's orders as a request for a hearing. The Appellate Division said quote - - -

JUDGE GARCIA: The Appellate Division said "In opposition, The People failed to conclusively demonstrate with unquestionable documentary proof", which is the language from the CPL about hearings, "that they satisfied the requirement. Accordingly, the matter must be remitted for a hearing." So they never ruled on whether or not the substantive claims were raised or not in this decision. They just ruled on whether or not he was entitled to a hearing which is what he was arguing.

MR. ROSS: Even as - - -

JUDGE GARCIA: And had argued below.

MR. ROSS: Even as far as he wasn't entitled to a hearing because he never contested factually our assertion of the 30.30(4)(g). He never contested - - -

JUDGE GARCIA: But where is that? That's not in the statute and it's not in our decisions. You know, usually in a hearing on a suppression

motion, which is the same statute, I think, you file something saying it's coerced or whatever it is, the People come back, and you have a hearing.

MR. ROSS: Well, and under - - -

JUDGE GARCIA: Is that going to be the rule for suppression motions of statements too?

MR. ROSS: No. Under 210.45, ordinarily, when you make a motion to dismiss, this - - - not just for 30.30 but for any grounds, the defendant makes the motion and asserts any factual support for the - - - for the contentions. Then the People, in order to get a hearing, have to contest those facts to show that there's a dispute over the facts, and we can avoid a hearing by showing that there's, like they say, unquestionable documentary proof. But this was different here because the defendant here was not making the initial allegation of facts. We were. The defendant only alleged that there was more than six months of time which would - - -

JUDGE GARCIA: That's enough initially.

MR. ROSS: - - - that we, in the first instance, raised the - - - an allegation of facts by saying that the complainant was out of the country for - - - for one month. Then it was up to the defendant to then contest our allegation of fact.

JUDGE PIGOTT: I couldn't get too excited about that because you weren't even right about that.

MR. ROSS: About the defendant being - - -

JUDGE PIGOTT: Yeah, the fifth or six ADA, whoever was now on that case, said he was in Egypt. He was in Yemen, and I'm not even - - - and I'm not even sure then that that's a good excuse. I mean you can tell him to stay around or he's going to lose his case, right?

MR. ROSS: Well, but our contention is that it's - - - that it's unpreserved for appellate review because - - -

JUDGE PIGOTT: I guess - - -

MR. ROSS: - - - he didn't cont - - - he didn't challenge that - - - he didn't say that an overseas vacation cannot be an exceptional circumstance, nor did they argue that - - -

JUDGE PIGOTT: I - - -

MR. ROSS: - - - failed to show due diligence.

JUDGE PIGOTT: Why wouldn't - - - I mean you have to say that? You say the complainant - - - the complainant's on vacation. He's up in Martha's Vineyard. That's an exceptional circumstance and therefore his speedy trial claim goes - - -

MR. ROSS: But we're not here to determine the merits of the speedy trial issue - - -

JUDGE PIGOTT: Right.

MR. ROSS: - - - only to determine whether it was properly preserved or not. I mean so it may seem entirely meritless, but did he preserve it? No, he didn't under the - - - the Beasley-Goode-Luperon rule because, I mean, what happened here was the exact same thing that happened in Beasley, Goode, and Luperon.

JUDGE PIGOTT: Can you dissemble like that? I guess I'm - - - I'm showing a little bias toward the defendant, but you went in and told an untruth to the court. You said he was going to Egypt. Now I - - - I get that you - - - you got the wrong country. But for God's sakes, can somebody pay some attention to the case and say, you know, we called our - - - our complaining witness and he's - - - he's going to Yemen for, you know, a valid reason? Or - - - instead of just somebody saying he's going to Egypt and it's not true?

MR. ROSS: Well, like I say, it - - - we're not here to determine whether that was a valid reason or not.

JUDGE PIGOTT: I know that. But I'm - - -

what I'm saying is that you're saying it's not preserved. We can lie to the court, we can dissemble, we can make things up, but if they don't preserve it, we're okay.

MR. ROSS: Well, we - - -

JUDGE PIGOTT: I guess that's interest of justice in the Appellate Division. We shouldn't be looking at that.

MR. ROSS: Well, that's what we're hoping that they do consider this in the interest of justice, because if they do consider the interest of justice, you show the entire record, not just the (4)(g) exclusion, but the (4)(b) exclusion when we had an - - - an affirmation of actual engagement in which the defense counsel clearly requested an adjournment for this same thirty-two day period. It would show that there is no 30.30 violation, and that's what we're really looking for is to get this back into the - - - into the Appellate Division to see if they will choose to consider the merits of this claim in the interest of justice, like I say. I'm just talking about the merits here just as a matter of context. That's not what we're here to decide. We only decide whether the actual claim itself, not just the - - - whether there was a

hearing - - - whether he preserved his claim for a hearing or not, but whether he actually preserved the 30.30 claim itself, and that he did not do.

JUDGE PIGOTT: Okay.

JUDGE STEIN: So we have this interplay between 2010.45 (sic) and - - - and our jurisprudence on preservation, right.

MR. ROSS: Yes.

JUDGE STEIN: Two - - - two different things.

MR. ROSS: Yes.

JUDGE STEIN: Right. And - - - but you do you agree that the People didn't meet their burden on this speedy trial motion in - - - under 210.45?

MR. ROSS: No, we did. Because under 210.45, like I'm saying, ordinarily under 210, when the defendant makes the motion it's the defendant that in the first instance makes an allegation of fact. But that's not - - -

JUDGE STEIN: Well, the defendant did make an allegation of fact - - -

MR. ROSS: The only alleg - - -

JUDGE STEIN: - - - that you were beyond your - - - your time. And then your response, as I understand 210.45, is you have to come forward with -

- - in - - - in order to avoid a hearing, you have to come forward with - - - with dispositive evidence showing that you exercised due diligence to get your - - - your complainant there and that you - - - you weren't able to do that, right?

MR. ROSS: We didn't have to dispositively prove it at that point. We just had to assert it. We asserted the fact that the complainant was out of our control for that one month. Then it was up to the defendant, under step three of the Beasley rule, to then - - -

JUDGE STEIN: But that's the Beasley rule.

MR. ROSS: - - - raise an allegation of fact.

JUDGE STEIN: I'm talking about 210.45 in the first instance.

MR. ROSS: Yes. But like I say, 210.45 doesn't really coordinate - - -

JUDGE STEIN: Does not - - -

MR. ROSS: - - - with the Beasley rule because after all - - -

JUDGE STEIN: Well - - -

MR. ROSS: - - - under the Beasley rule, we do have the ultimate burden of showing that an exclusion applies, whereas in 210.45 - - -

JUDGE STEIN: Why can't - - - excuse me, why can't 210.45 apply in the trial court when you're - - - when there's a question of whether the defendant is entitled to a hearing or not but then when it's a question of whether you can appeal to this court or under what circumstances to the Appellate Division can decide it, then we look at the Beasley factors?

MR. ROSS: Well, when we look at the Beas - - - like I say, the Beasley factors is only, you know, whether he preserved the merits of the 30.30 claim, not whether he preserved whether he was entitled to a hearing. But even as far as whether he was entitled to a hearing, under 210.45, as it is sort of illuminated by the Beasley rule, he didn't preserve his - - - his claim for a hearing because his request for a hearing was just in his initial motion papers - - -

JUDGE STEIN: But how can we consider that when you didn't raise that?

MR. ROSS: Because he didn't - - - we didn't - - - he didn't argue that in - - - in the court below. He only argued that he had preserved the merits of the claim. He never talked about a hearing on appeal until the Appellate Division

actually remitted it for the hearing. He only - - - in fact, he didn't even argue that the 30.30 claim on the merits was preserved or his request for a hearing was preserved. He only said that if you told the Appellate Division that if you find that this 30.30 claim is unpreserved for appellate review, then it's ineffective assistance of counsel. That's all he argued as far as preservation in the - - - in the Appellate Division. Oh, okay.

CHIEF JUDGE DIFIORE: Thank you, counsel.

JUDGE GARCIA: Counsel, could you address that preservation point?

MR. LEVINE: I beg your pardon. I - - - I am so sorry. Can you ask that question again, please?

JUDGE GARCIA: The preservation point that your co - - - counsel was just making on you didn't raise this in the Appellate Division in terms of you were entitled to a hearing?

MR. LEVINE: Everything that my colleague just argued is utterly moot, including the preservation question. And I would like to go back, Judge Garcia, and quote you from about ten minutes ago. You asked my colleague, Bill Kastin, a question and you said what exactly are we being asked to

review here? This court is being asked to review a nonfinal intermediate interlocutory order. It is not appealable.

JUDGE STEIN: So there would never be an avenue of appeal from that? How could that ever - - - ever be appealed then?

MR. LEVINE: Sometimes there is no avenue of appeal - - -

JUDGE STEIN: How - - -

MR. LEVINE: - - - from - - -

JUDGE STEIN: Well, how about the - - - how about the - - - the possibility that when the Appellate Division the second time around made a decision?

MR. LEVINE: Yes. That is a final order.

JUDGE STEIN: Okay. Well, it implicitly, then, found preservation, did it not? It didn't say it was answering the question in the interest of justice.

MR. LEVINE: It found preservation, but the preservation it found was what I argued after the hearing. That's what on the law was in the final order.

JUDGE STEIN: But how - - - are bound by - - - in other words, how - - - isn't the issue of

preservation jurisdictional for us?

MR. LEVINE: No, it isn't. You are bound by CPL 450.90. Only by statute are the People granted a right to appeal, and they have no right to appeal from the order directing the hearing any more than if this court - - - and forgive me, it's usually judges not the lawyers who give hypotheticals, but if the court below had granted a hearing instead of deciding without a hearing and the People thought that was wrong, no appeal would have - - - would lay from that. And if no - - - if there's no appeal from that, there's no appeal from the court's - - - the Appellate Division's order remanding for a hearing.

The People's - - - so the People's entire argument is moot. They do not argue, they do not assert, that what I argued after the hearing was not the same as what I argued to the Appellate Division after the hearing. They do not argue that the Judge Chun's, the hearing court's ruling, was incorrect. They're arguing something like objection overrules, a belated objection overruled, we're giving the defendant a hearing. It's not appealable, and yes, this court is limited.

JUDGE GARCIA: Assume - - - that's a good argument, but assume it doesn't fly. Is this

argument preserved in terms of the right to a hearing at the Appellate Division? Is that what you argued?

MR. LEVINE: Defendant, in his papers, as the People concede, met his initial burden with sworn allegations of fact.

JUDGE GARCIA: At the Appellate Division the first time around, did you argue that the error here was that he didn't get a hearing or did you argue that it was wrong on the merits?

MR. LEVINE: No, I argued that it was wrong. I didn't say he didn't get a hearing, and I did argue ineffective assistance. That's not at issue here. The Appellate Division's jurisdiction, though, I see - - - and fortunately, not one of my cases, but they - - - I've seen them say well, defense counsel missed an argument and - - - but we see it and we're reversing on that. The defend - - - the Appellate Division is not limited to arguments made on appeal, and even though I did not explicitly ask for a hearing, in my initial brief to the Appellate Division that did not foreclose the relief that the Appellate Division granted.

JUDGE ABDUS-SALAAM: So you're saying that it was based on their interest of justice jurisdiction?

MR. LEVINE: No, not at all. It was on the law because - - -

JUDGE ABDUS-SALAAM: It was on the law.

MR. LEVINE: Yes, because defense counsel below, in his motion, said the People have exceeded their statutory speedy trial time, dismiss the indictment. In the alternative, let's have a hearing to determine the facts. So it's based on that and that is on the law, regardless of what I stated to the Appellate Division. That didn't render it unpreserved. Preserved is based on what happens in the lower court, not based on what happens in the Appellate Division. This was fully preserved.

And this case is not about, Your Honors, moving on to merits, although I don't think this court should even address the merits. As a matter of fact, I'll go to - - - I'll go to this in a few seconds, but I submit that this court's decision in this case should begin and end on this procedural hurdle that the People are attempting to make an end run around. They cannot get over that hurdle. They are not permitted to make this argument that they are making.

Now this case is not about Prado, it is not about Hampton, it is not about Beasley and Luperon

and Goode. This case is about CPL 210.45. And the pronouncements in CPL 210.45 are crystal clear. As the People concede, my client made - - - met his initial burden. The court may conduct a hearing if an allegation of fact is conclusively refuted by unquestionable documentary proof. The People, tacitly, at least, concede that they did not do that. They make no assertion that they have done so. And not having done - - - done so, in subdivision 6, if the court doesn't dismiss the 30.30 motion pursuant to that, it must conduct a hearing, and we all know what the word must mean, it's required. And so that's where the preservation as to the right to a hearing begins and ends - - -

JUDGE GARCIA: The only way - - -

MR. LEVINE: - - - in CPL 210.45.

JUDGE GARCIA: - - - I could see reading an argument, I think, into the statute that you need to have a reply is Section 3, right, which says "After all the papers of both parties have been filed and after all documentary evidence, if any, has been submitted, the court must consider the same for purposes of determining whether the motion is determinable without a hearing."

MR. LEVINE: Sure, Your Honor.

JUDGE GARCIA: That's all - - -

MR. LEVINE: And you know, I - - - I threw in due diligence in my initial brief to the Appellate Division. I could have left that out, and the defendant still would have been entitled to that hearing. The Appellate Division didn't reach that. The Appellate Division just said the initial papers were enough, this is preserved, we're having a hearing. The Appellate Division didn't address any argument about due diligence. Those arguments I only made after we had the hearing on remittal.

Now, secondly, also procedurally, once there's a hearing, the rightness of the decision, the correctness of the decision to order that hearing becomes moot. That's also unappealable. The People came back with nothing. There is, of course, no case law that says, well, the Appellate Division can just ignore what happened at the hearing because, you know, we really shouldn't have had a hearing and so we will completely ignore all the facts adduced at that hearing. That's never the - - - been the law in this state. I anticipate it will not be the law after this court hands down a decision.

I will - - - my time's up. I ask this court to either affirm the decision of the Appellate

Division or even better, I think, to dismiss the People's appeal on procedural - - - procedural grounds.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. LEVINE: Thank you very much.

CHIEF JUDGE DIFIORE: Mr. Ross.

MR. ROSS: The defendant alleges that we're appealing from the initial order not the final order, but we are appealing from the final order. The final order the Appellate Division denied on the law the merit - - - the merits of the 30.30 claim which shows that the Appellate Division did, you know, find it unpreserved. And there's no question - - -

JUDGE PIGOTT: Are you saying that they didn't have the right to - - - to - - -

MR. ROSS: Right.

JUDGE PIGOTT: - - - on their own to say we want a hearing on this? Because, frankly, when I - - - when I looked at the record, it's kind of a mess. I was being facetious, but I think you got three or four ADAs. It seemed like every time this case was coming in there was another excuse, not necessarily all by the - - - by the People, but the case - - - you know, and I'm looking at it now. I mean it's - - - it's ten years this Saturday that this crime

happened, and - - - and, you know, we're arguing this appeal. No one seemed to care about this case. And I - - - I just thought maybe the Appellate Division said there's just too much going in this case for us to make a determination. We're going to send it back for a hearing.

MR. ROSS: Well, they had the right to send it back for a hearing if they choose. They have that discretion, and we're not contesting the fact that, you know, it was sort of error for them to - - - to do so. But we're contesting the defendant's argument that because it was sent back for the hearing, that somehow this unpreserved claim on the merits somehow became preserved. The - - -

JUDGE PIGOTT: Well, what would the - - - what could the hearing have been about, in your view?

MR. ROSS: The hearing was to allow us to develop the facts of - - - of the - - - of our 40 - - - 30.30(4)(g) exclusion, which we did. We showed that, obviously, he didn't go to Egypt but went to Yemen with the - - - coming back via a couple of southern states, and it also developed, you know, what - - - what contacts we had before he left.

But otherwise, the defendant never challenged us on the facts, never said that, well,

the - - - the complainant was never, he was out of the country, he was always in town and available, never contested that on the facts or contested the fact that the - - - that the prosecutor reached out to him. He only challenged it on the law which is what he did in his initial brief in the Appellate Division and which he failed to do and was perfectly in position to do in the trial court. And therefore, like I say, under the Beasley-Goode-Luperon rule, he failed to preserve the merits of his 30.30 claim.

JUDGE PIGOTT: It's - - - it's not the facts in this case, and don't take offense, but let's assume in the hearing the judge found that there was prosecutorial misconduct, that - - - that the People had misrepresented the facts with respect to why this case is - - - is there. You would still be making the argument, even though there was prosecutorial misconduct, even though there was a finding by the court on that, we can't consider that because there never should have been a hearing?

MR. ROSS: No.

JUDGE PIGOTT: No, that it was unpreserved within the context of the - - -

MR. ROSS: Well, we're not arguing that there sort of never been a hearing because, as - - -

as we say, the Appellate Division has the direction, if it wants to, to send it back, and they exercised that discretion here. We're saying that you cannot preserve a claim in a - - - in a hearing on remittal that you didn't preserve before. I mean the - - - if there could have been a new matter that might have been a different case, but there were no new matters brought up. All we did was show the facts that - - - that we had alleged originally in the trial court and the defendant made his - - - again, didn't contest those facts but just made the legal arguments that he raised for the first time on - - - on appeal.

If I just may point out - - - just, it's just too late in this kind of hearing to preserve. If you look at, for example, CPL Section 330.30(1), that allows a trial court to reverse on a claim, which after the verdict but before the sentence, on any kind of a claim that would, as a matter of law, require reversal on appeal. In other words, it can reverse on a claim that would be preserved.

Well, the - - - this court has held over and over again that if you raise a claim for the first time in a 330.30 motion, it's too late. Now if it's too late to raise a claim for the first time in a 330.30 motion, it's certainly too late to raise it

for the first time on a hearing when a - - - on remittal after a case is already on appeal. So the defendant here did not suddenly preserve his claim just because it was sent back for a hearing.

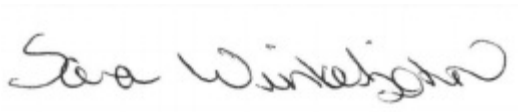
Oh, if there are no further questions, I ask that you reverse it and you send it back to the Appellate Division so they can choose to consider it in the interest of justice. Thank you.

CHIEF JUDGE DIFIORE: Thank you, sir.

(Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Dru Allard, No. 129 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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