

APPEALS FROM THE SUMMONS PART

February 25, 2016

Program Agenda

- | | |
|-------------|---------------------------------------|
| 6:00 - 6:30 | • The Top Ten Myths About SAP Appeals |
| 6:30 - 6:50 | • Compliance Made Hard? |
| 6:50 - 7:10 | • Compliance Made Easy! |
| 7:10 - 7:40 | • Legal Issues - Yes! |

This program is appropriate for experienced and newly admitted attorneys.

Trainers - Robert S. Dean & Barbara Zolot

Materials:

Top Ten Outline - pages 1-2

18-B Rules - page 3

The Official Advisory Your Client Never Sees - pages 4-5

3-Second Compliance - pages 6-7

Sample SAP Part Transcript - pages 8- 12

The Well Meaning Runaround (Burn it)- pages 13-15

Plan B Paperwork - pages 16-18

Sample Cases - pages 19-51

Omnibus Advisory to Client, For Your Consideration - Last Page

TOP 10 MYTHS ABOUT 346 BROADWAY SAP PART APPEALS

1. THERE IS NO APPEAL FROM THE SAP PART.

In the SAP Part, whether your client was found guilty after trial or pleaded guilty, Supreme Court law, court rules, 18-B Rules, ABA Standards, and State Bar Standards all require defense counsel to advise their client of their right to appeal and to file a notice of appeal if requested.

CPL 450.10 authorizes an appeal as of right from a “judgment” in a “criminal action”, including summonses. CPL 1.20 (13-16).

In sum, your SAP Part coverage does include advice to the client about their appellate rights.

2. THERE IS NO APPEAL FROM A GUILTY PLEA OR NEGOTIATED DISPOSITION, OR IF THE CLIENT WAIVED THE RIGHT TO APPEAL.

See above.

Moreover, a valid appeal waiver does not forfeit your client’s right to appeal; it does not (and cannot) bar your client from filing a notice of appeal. It simply forecloses *some* issues from being raised on appeal. There are still plenty of issues that can be raised even if your client signed an appeal waiver. In addition, most appeal waivers, upon close scrutiny, are not even valid and can be assailed on appeal.

3. FILING A NOTICE OF APPEAL IS COMPLICATED.

Notices of appeal are filed in Room 206 at 346 Broadway. If the client goes there with the summons, the clerk will fill out the notice of appeal for the client, serve the DA, and file it. (This is true for all Criminal Court matters, Citywide.)

Even for an attorney, filing a NOA is a simple clerical task. The only important thing to remember is timing (within 30 days of the imposition of sentence).

4. FILING A NOTICE OF APPEAL WILL AUTOMATICALLY UNDO THE PLEA.

Filing a NOA simply preserves your client’s right to appeal, whether then or down the road — it doesn’t set anything in motion by itself. And an appellate lawyer will not seek to undo a client’s plea without their specific informed consent.

5. AN APPEAL WILL REVIVE THE SUMMONS.

- As noted, anything that would result in the undoing of the plea and the revival of the summons would never be pursued on appeal (even if available as an issue) without extensive dialogue with the client about possible risks.
- most SAP part appeals will never result in revival of the summons anyway; the relief is generally dismissal even if the argument is that the plea was unknowing because of a bad allocution, or that there should be a new trial. In most cases, a successful appeal means dismissal no matter what the issue.

6. THE APPEALS LAWYER IS YOUR ENEMY.

The common enemy here is the prosecutor and court. Even if you obtained a successful result for your client by way of a favorable plea deal, there is still a good possibility of a successful appeal. Appellate lawyers are really good at finding issues. And rarely is the defense lawyer's conduct called into question on appeal, especially from the SAP Part.

7. THERE WILL BE BLOOD.

Do not be concerned that by filing a notice of appeal you will incur the anger or wrath of the prosecutor or court, or erode carefully built relations. They will not know. In any event, the law requires you to file one if your client requests, regardless of the deal you negotiated or an appeal waiver. You are an instrument of your client here.

8. THERE IS NOTHING TO APPEAL IN A SAP PART CASE.

The contrary is true. If the summons is defective in any respect, the case will be dismissed, regardless of whether you raised the issue or the defendant took a plea.

Depending upon the JHO, many pleas do not meet constitutional muster and will result in dismissal of the case on appeal.

9. THERE IS NO RECORD CREATED IN THE SAP PART.

Everything is electronically recorded and a transcript will be created if there is an appeal. When the Appellate Term assigns a lawyer to the appeal, it also orders that the transcript be done up and given to the appeals lawyer along with the court file papers.

10. GETTING A LAWYER ASSIGNED TO THE APPEAL IS COMPLICATED.

If the client is motivated, it is not that complicated. The client simply takes the NOA that the clerk in Room 206 gives him, takes it to 60 Centre Street, Room 401 (the office of the clerk of the Appellate Term) and asks them to assign a lawyer. The clerk there will assist the client.

Appeals

Appeals are assigned by order of the Appellate Division, First Department.

Other Assignment Issues

Length of Assignment

An attorney assigned to represent a client shall continue to represent that client until the case concludes, unless relieved by the court or the Administrator's office. When a client requests that a matter be appealed, panel members are required to file a notice of appeal and perform other appellate preliminaries.

Clients with pending criminal matters

If an attorney represents a client at arraignments and that client has a pending criminal matter in the same county, the attorney must handle the case "for arraignment only". The case will then be transferred to the attorney who is handling the open case.

Clients With Reduced or Elevated Charge

Felony

A Felony Panel attorney who represents a client on a felony case that is later reduced to a misdemeanor will continue to represent the client until the case is concluded.

Misdemeanor

A Misdemeanor Panel attorney who represents a client on a misdemeanor case that is later elevated to a felony must withdraw from representation as soon as the District Attorney serves notice of intent to present the case to a Grand Jury, unless the attorney is also on the Felony Panel.

Clients with Out-of-County Cases

In general, attorneys may represent clients only in the county on which they have panel membership.

If a client has a pending case in another county of New York City, the attorney may apply for approval to represent the client in that county. Requests will be reviewed by the Administrator.

Payment

All panel members must use the online payment system 18B Web. Upon certification to the panel all members must attend a training class concerning the 18B Web system.

Upon completion of a case, a voucher must be submitted through the 18B Web system within 45 days to the judge presiding at the time of final disposition. Vouchers submitted to the 18B Web system after 45 days will be locked and require additional actions in order for members to receive payment.

Duration of Representation

Once assigned to a case, you remain the attorney of record for the duration of the case unless specifically relieved by the court. This means that even if a client returns on a warrant after an extended period of time, you remain the attorney of record. You are obligated to make every court appearance yourself unless you have submitted an affidavit of actual engagement conforming to the Court Rules. In rare circumstances, your partner or another panel member may appear on your behalf; however, neither you nor the other attorney may bill for that appearance.

On several occasions a client's criminal matter may result in a parole violation hearing. If this arises you are to contact the Administrator's office for possible assignment to the parole matter.

Services Other Than Counsel

The services of experts, investigators, interpreter, and others may be obtained by an ex parte application to the court. All experts must meet the Assigned Counsel Plan's eligibility requirements.

The Assigned Counsel Plan retains a roster of experts, investigators and interpreters which is available to all members. The Assigned Counsel Plan does not make any representations as to the quality of those on the roster but simply states that they have met the Plan's eligibility requirements. It is the responsibility of each attorney to assess the needs of their case and properly vet the experts they seek to retain.

Acceptance of Fees

You may not solicit or accept any fees paid by or on behalf of a client on account of your representation on an assigned case, either during or after the case has concluded. If during your representation information comes to your attention that the client or someone on his behalf is able to pay for all or part of the legal costs, you must inform the court. It is the court's responsibility to decide whether the client is entitled to further Panel representation. In no event may you be relieved as counsel and then accept a private retainer for the client.

If a client whom you represent as an 18-B attorney is subsequently arrested and charged with another offense and offers to retain you as a private counsel, you may not accept the case without approval from the court.

Responsibilities

All panel members are required to maintain a local New York City telephone number and an office within the Bronx or Manhattan where they can interview clients and witnesses. Your office space must be accessible to your clients. It is your responsibility to make sure that your clients can meet with you in a private office space. Exceptions may be made for attorneys who are only certified to the Appellate Panel and have offices in near by counties.

Pursuant to the Rules of Professional Conduct ([22 NYCRR 1200](#)), panel members are required to maintain files with contemporaneous time and billing records. Panel members must maintain all files and records from a case for a minimum period of seven years after the final disposition.

EXPERT SERVICES

The [Expert Roster of the Assigned Counsel Plan](#) of the City of New York consists of experts who provide auxiliary services to individuals charged with crimes who are financially unable to pay for these services.

If you wish to be considered for the Expert Roster, please complete the [Application for Expert Roster Certification](#).

[Affirmation for Expert Services](#)

[Order Authorizing Expert Services](#)



**NEW YORK CITY CRIMINAL COURT
INFORMATION REGARDING YOUR RIGHT TO APPEAL**

Immediately after the pronouncement of sentence, where there has been a conviction by plea, or after trial, this form is to be given to the defense attorney. The defense attorney should then give it to his client and state on the record that the defendant has been given written notice of his right to appeal.

TO THE DEFENDANT:

You have the right to appeal your conviction and/or sentence.

In order to exercise this right, you or your attorney must file a **NOTICE OF APPEAL** with the clerk of this court within thirty (30) days following the imposition of the sentence.

If you desire your present attorney to file a notice of appeal for you, you should complete the bottom section of this form and deliver or mail it to your attorney.

If you intend to file the notice of appeal yourself, you must send two (2) copies of the notice of appeal to the Clerk of the Criminal Court at the address indicated below. You also must send one copy to the District Attorney's Office. The address for the District Attorneys' Offices for each County is listed below. Be sure to choose the correct County.

If you have appeared pro se (without counsel) you may request the Clerk of the Court to file the notice of appeal on your behalf. To do so complete the bottom section of this form and deliver it to the Criminal Court Appeals Bureau at the address indicated below.

If you are without funds, after the notice of appeal has been filed, you must write to the Appellate Term requesting that counsel be assigned to you for the purpose of appeal. The letter must be notarized. Send this sworn letter to the Appellate Term for the appropriate County at the address listed below.

In your notarized letter, you should request that you be granted permission to appeal based on the transcript of the proceedings. You should indicate that you are without funds with which to retain counsel or to purchase a transcript of the proceedings. State fully your financial circumstances, explaining why you cannot afford to hire an attorney or purchase a transcript of the proceedings. You must write this letter yourself.

ADDRESS FOR THE NEW YORK CITY CRIMINAL COURT:

NYC Criminal Court
Appeals Bureau
346 Broadway
New York, New York 10013
(646) 386-4949

ADDRESS FOR THE DISTRICT ATTORNEY'S OFFICES:

BRONX
Bronx County District Attorney
Appeals Bureau
198 East 161st Street
Bronx, New York 10451

MANHATTAN
New York County District Attorney
Appeals Bureau
1 Hogan Place
New York, New York 10013

BROOKLYN
Kings County District Attorney
Appeals Bureau
350 Jay Street
Brooklyn, New York 11201

QUEENS
Queens County District Attorney
Appeals Bureau
125-011 Queens Boulevard
Kew Gardens, New York 11415

STATEN ISLAND
Richmond County District Attorney
Appeals Bureau
130 Stuyvesant Place
Staten Island, New York 10301

ADDRESS FOR APPELLATE TERMS:

BRONX AND MANHATTAN
Appellate Term, First Department
60 Centre Street
New York, New York 10007

BROOKLYN, QUEENS AND STATEN ISLAND
Appellate Term, Second Department
141 Livingston Street, 15th Floor
Brooklyn, NY 11201

TO MY ATTORNEY/ OR THE COURT CLERK:

I wish to appeal my conviction and/or sentence. Please file a timely notice of appeal on my behalf

Your Name _____ Date _____

Docket Number _____ Attorney Name _____



NEW YORK CITY CRIMINAL COURT

INFORMACIÓN SOBRE SU DERECHO A APELAR

AL ACUSADO:

Usted tiene el derecho de apelar el fallo condenatorio y/o la sentencia.

Para ejercer este derecho usted o su abogado deberán presentar una NOTIFICACIÓN DE APELACIÓN ante el secretario de este tribunal dentro de los treinta días (30) a partir del día en que se dictó sentencia.

Si usted desea que el abogado que lo representa actualmente presente una notificación de apelación en su nombre, deberá completar la parte inferior de este formulario y entregársela o enviarla por correo a su abogado.

Si es su intención presentar una notificación de apelación por sí mismo, deberá enviar dos (2) copias de la notificación de apelación al SECRETARIO DEL TRIBUNAL PENAL a la dirección que se indica a continuación. Deberá enviar una copia a la Oficina de la Fiscalía. La dirección de la Oficina de la Fiscalía para cada condado se encuentra a continuación. Asegúrese de elegir el condado adecuado.

Si usted ha comparecido pro se (sin la representación de un abogado) podrá solicitar al Secretario del Tribunal que presente la notificación en su nombre. Para llevarlo a cabo de esta manera complete la sección inferior de este formulario y envíelo al Buró de Apelaciones del Tribunal Penal a la dirección que se indica a continuación.

En caso de carecer de recursos financieros luego de haber presentado la notificación de apelación, deberá escribir a la División de Apelaciones para que se le asigne un abogado con el propósito de apelar. Dicha carta deberá notariarse. Envíe esta carta notariada a la División de Apelación al condado adecuado a la dirección que se encuentra a continuación.

Deberá solicitar en su carta notariada que se le otorgue permiso para apelar basado en la transcripción de los procedimientos. Deberá indicar que carece de recursos para contratar un abogado o comprar la transcripción de los procedimientos. Explique en detalle sus circunstancias financieras y el motivo por el cual no puede contratar un abogado o adquirir las transcripciones. Usted mismo deberá escribir dicha carta.

DIRECCIÓN DEL TRIBUNAL PENAL DE LA CIUDAD DE NUEVA YORK:

NYC Criminal Court
Appeals Bureau
346 Broadway
New York, New York 10013
(646) 386-4949

DIRECCIÓN DE LA OFICINA DE LA FISCALÍA:

BRONX Bronx County District Attorney Appeals Bureau 198 East 161 st Street Bronx, New York 10451	MANHATTAN New York County District Attorney Appeals Bureau 1 Hogan Place New York, New York 10013
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BROOKLYN Kings County District Attorney Appeals Bureau 350 Jay Street Brooklyn, New York 11201	QUEENS Queens County District Attorney Appeals Bureau 125-011 Queens Boulevard Kew Gardens, New York 11415	STATEN ISLAND Richmond County District Attorney Appeals Bureau 130 Stuyvesant Place Staten Island, New York 10301
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DIRECCIÓN DE LA DIVISIÓN DE APELACIÓN:

BRONX AND MANHATTAN
Appellate Term, First Department
60 Centre Street
New York, New York 10007

BROOKLYN, QUEENS AND STATEN ISLAND
Appellate Term, Second Department
141 Livingston Street, 15th Floor
Brooklyn, NY 11201

TO MY ATTORNEY/ OR THE COURT CLERK (A MI ABOGADO DEFENSOR Y/O SECRETARIO DEL TRIBUNAL):

I wish to appeal my conviction and/or sentence. Please file a timely notice of appeal on my behalf (Deseo apelar mi condena y /o sentencia. Presente por favor la notificación de apelación en mi nombre, dentro del término legal).

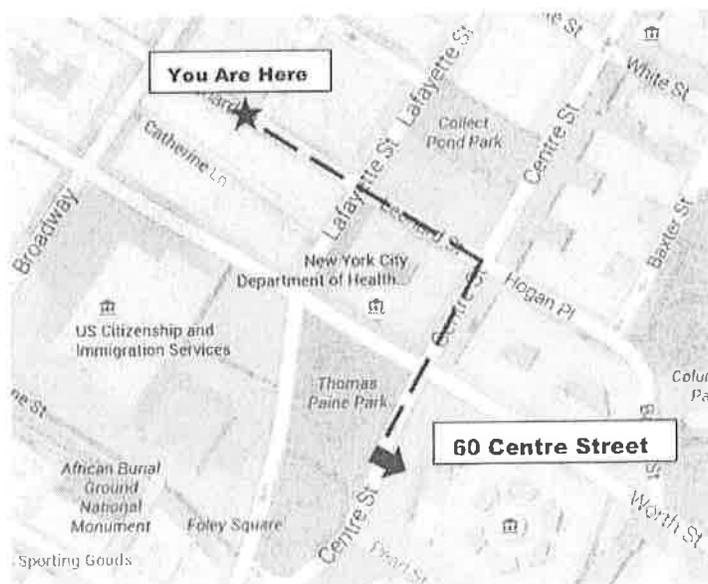
Your Name (Su nombre) _____ Date (Fecha) _____

Docket Number (Número de Expediente) _____

Attorney Name (Nombre del Abogado) _____

HOW TO TAKE AN APPEAL FROM A CONVICTION IN THE SUMMONS PART 346 BROADWAY, COURTROOM 1 (Manhattan)

1. You have a right to appeal your conviction to an appellate court, even if you pleaded guilty. An appellate court is a higher court that can review whether any mistakes were made by the summons court. To take an appeal, follow these instructions:
2. Take a copy of your summons to Room 206 upstairs. (If you are paying a fine today, first pay the fine, then go to Room 206).
3. Room 206 is the office of the Appeals Clerk. Ask them to file a **notice of appeal** on your behalf. The Clerk there will handle the notice of appeal and serve a copy on the DA's office. The clerk will also give you a copy of the notice of appeal.
4. If you do not have money to hire a lawyer, you will need to get the court to assign you an attorney to handle the appeal. To get a lawyer assigned, bring your copy of the notice of appeal to 60 Centre Street, Room 401. This is the office of the Appellate Term, First Department. It is a 5 minute walk (see map below).
5. In Room 401, show them the notice of appeal and ask for help in getting a lawyer assigned to your appeal. The Clerk there will help you.

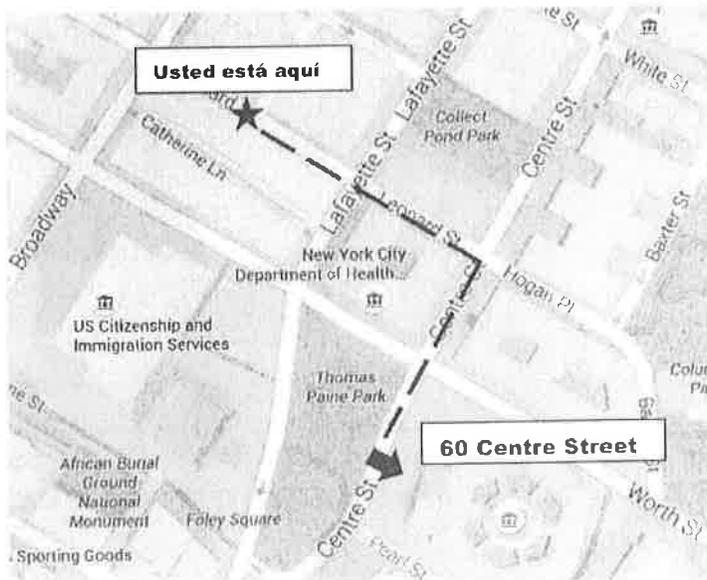


Directions to 60 Centre Street, Room 401: Go out of this building by the same entrance you came in. Once outside the building, you will be on Leonard Street. Go right and walk to Centre Street. Cross the street and go right (south) on Centre Street. 60 Centre Street is a short way on your left. Enter the building and go to Room 401 on the 4th Floor.

Para español, voltee la página.

CÓMO APELAR UNA CONDENA DE LA PARTE DE CITACIONES 346 BROADWAY, SALA 1 (Manhattan)

1. Usted tiene el derecho de apelar su condena en una corte de apelación, aunque se haya declarado culpable. Una corte de apelación es una instancia superior que puede averiguar si fueron cometidos errores por la parte de citación. Para apelar, siga estas instrucciones:
2. Traiga una copia de su citación a la sala 206 en el piso de arriba. (Si tiene que pagar una multa, páguela primero, luego vaya a la sala 206).
3. La sala 206 es la oficina de la Appeals Clerk (“secretaria de apelaciones”). Pídale que presenten un **notice of appeal** (“notificación de apelación”) en nombre suyo. La secretaria se hará cargo de la notificación de apelación y hará una entrega oficial a la oficina del fiscal. La secretaria también le dará una copia de la notificación de apelación.
4. Si no tiene dinero para contratar a un abogado, necesitará que la corte le asigne un abogado que se hará cargo de la apelación. Para que un abogado sea asignado, traiga su copia de la notificación de apelación a 60 Centre Street, sala 401. Esta es la oficina del Appellate Term, First Department. Queda a cinco minutos caminando (vea el mapa abajo).
5. En la sala 401, muéstreles la notificación de apelación y pida que le ayuden a conseguir un abogado para la apelación. La secretaria le ayudará.



Instrucciones para llegar al 60 Centre Street, sala 401:
Salga del edificio por la misma puerta que usó para entrar. Cuando esté afuera, estará en Leonard Street. Doble a la derecha hasta que esté en Centre Street. Cruce la calle y doble a la derecha (hacia el sur) en Centre Street. 60 Centre Street estará a su izquierda. Entre al edificio y vaya a la sala 401 en el 4º piso.

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

Docket Number:
2015/SN [REDACTED]

- against -

[REDACTED],
Defendant

June 15, 2015
100 Centre Street
New York, NY 10013

BEFORE: HONORABLE JOHN CATALDO
Judge

APPEARANCES:

[REDACTED]
Defendant

UNIDENTIFIED COUNSEL

TRANSCRIBER: Susan E. Colalella

MECHANICAL SECRETARY, INC.
MOLLY'S PROFESSIONAL TYPING SERVICE
108-16 72nd Avenue
Forest Hills, New York 11375
(718) - 268-7900

WITNESSES

DIRECT

CROSS

RE-DIRECT

RE-CROSS

No Witnesses Examined

E X H I B I T S

DESCRIPTION

I.D.

IN. EV.

No Documents Submitted/Received

1 [Audio CD start time 2:29:20 PM]

2 COURT OFFICER: [REDACTED], Docket 451,
3 Disorderly Conduct; and, 458, Failure to Comply with
4 an Officer, do you waive a reading?

5 UNIDENTIFIED COUNSEL: So waive. Move to
6 Dismiss, Your Honor, case is insufficient, it's
7 conclusory.

8 JUDGE CATALDO: Denied, fifty (\$50) dollar
9 fine, or come back for trial.

10 UNIDENTIFIED COUNSEL: This Judge is
11 (inaudible) a fifty dollar fine or come back for
12 trial.

13 MR. [REDACTED]: Say that again.

14 UNIDENTIFIED COUNSEL: Fifty dollar fine,
15 do you have time to pay, or you can come back for
16 trial?

17 MR. [REDACTED]: So if I come back to trial
18 again, what's the process?

19 UNIDENTIFIED COUNSEL: You have a chance to
20 argue your case with an attorney to represent you, or
21 you (inaudible).

22 MR. [REDACTED]: (Inaudible), okay, will you
23 be representing me if I go to trial?

24 UNIDENTIFIED COUNSEL: I'm not sure, anyone
25 of a number -- there are any number of attorneys that

1 could be here.

2 MR. [REDACTED]: Well, I mean, like I said, I
3 didn't resist arrest; I didn't assault them; I didn't
4 do'--

5 UNIDENTIFIED COUNSEL: All right, you can
6 come back for trial then.

7 MR. [REDACTED]: I think I want to come back.

8 UNIDENTIFIED COUNSEL: Not Guilty, Your
9 Honor.

10 JUDGE CATALDO: Notify the Officer.

11 [Off the Record]

12 [Audio CD end time 2:31:30 PM]

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C E R T I F I C A T E

I, Susan E. Colalella, certify that the foregoing transcript of proceedings in the Criminal Court of New York, County of New York, People of the State of New York v. [REDACTED], Docket Number 2015/SN [REDACTED], was prepared using the required equipment and is a true and accurate record of the proceedings.

Susan Colalella

Susan E. Colalella

Mechanical Secretary, Inc.
Molly's Prof. Typing Service
108-16 72nd Avenue
Forest Hills, NY 11375

Date: November 13, 2015

Criminal Court Appeals Bureau 1-646-386-4949
346 Broadway Room 206
New York, N.Y. 10013

1. An appeal from a judgement and/or sentence of the Criminal Court of the City of New York is to the Appellate Term of the Supreme Court. New York and Bronx Counties is to the Appellate Term - Supreme Court - First Department. In Kings, Queens and Richmond (Staten Island) Counties, the appeal is to the Appellate Term - Supreme Court - Second and Eleventh Districts of the Second Department.

2. For filing purposes the Clerk of the Appeals Bureau is the Clerk referred to in Section 460.10 (1a) of the Criminal Procedure Law (CPL).

3. An appeal by the defendant from a conviction and/or sentence of the Criminal Court of the City of New York is authorized as of right (Section 450.10 CPL) within thirty (30) days after sentence is imposed, the Defendant must file a written Notice of Appeal in duplicate. (Section 460.10 {1a,1b} CPL) The original should have Proof of Service of a copy upon the District Attorney (or other Prosecutor of the matter being appealed) within the county in which judgement was entered.

4. An appeal, by the defendant, from an order denying a Motion to Vacate a judgement (Sec. 440.10 CPL) or to set aside a sentence (Sec. 440,20 CPL) is authorized by permission (Sec. 450.15 CPL) An Application for a Certificate Granting Leave to Appeal, is made to the appropriate Appellate Term. The Application must be made within thirty (30) days after service upon the defendant of a copy of the Order from which the defendant seeks to appeal, and must be on reasonable notice to the people. The Application must be in writing, must set forth the questions of Law and/or fact to be reviewed and must contain a statement as to whether or not any such Application has been previously made. No more than one Application may be made. Upon issuance of the Certificate, the defendant must

within fifteen (15) days of such issuance, file the Certificate together with a written Notice of Appeal (In duplicate). The Notice should bear Proof of Service of a copy upon the Prosecutor concerned.

5. The Record on Appeal may be printed or typed.

6. The Record on Appeal to be filed, with the Clerk of the Appeals Bureau, within one hundred twenty (120) days after the imposition of sentence and shall consist of:

A. A Certified Copy of the Criminal Court Information, or Appearance Ticket with the various attachments and endorsements.

B. The original copy of stenographic transcript of the minutes of the Arraignment, Hearing, Trial or Plea and Sentence, and any other proceeding pertinent to the Appeal.

C. A stipulation endorsed by the adversaries waiving the reproduction of any transcripts noted in B. above, if the Appeal is to be limited to issues not encompassed by the waived minutes. The Record on Appeal must bear Proof of Service of a copy upon the prosecutor concerned.

DO NOT USE

7. Papers to be filed with the Appellate Term consist of:

A. Notice of Argument (First Department) or a Note of Issue (Second Department). An original plus four (4) copies of the brief (First Department) or an original plus three (3) copies of the brief (Second Department). In either case, an additional copy of the brief must be served upon the prosecutor concerned. The Appellate Term will provide you with information concerning the make-up and contents of these papers.

8. Application for the Right to Appeal as a Poor Person must be made to appropriate Appellate Term.

9. Application for an Order Staying Judgement or Sentence of the Criminal Court is made, upon reasonable notice to the people, to a Justice

of the Supreme Court of the Judicial District embracing the County in which judgement was entered. Not more than one (1) application may be made (Sec. 460.50[3] CPL).

10. Appellate Term - Supreme Court First Dept. 60 Center St.
New York, N.Y. 10007
646-386-3040

Appellate Term - Supreme Court Second & Eleventh Districts
141 Livingston St.
Brooklyn, N.Y. 11201
347-401-9580

DO NOT USE

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

-----X
THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- : Motion to Proceed as a Poor
Person Upon Appeal

_____, :

Defendant-Appellant. : Dkt. No. _____

-----X

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

_____, being duly sworn, deposes and says:

1. I am the petitioner in the above-captioned case. I wish for the Appellate Term to assign counsel to me for my appeal. I make this affidavit in support of the motion to proceed in forma pauperis.

2. I am unable because of my indigence to pay the costs, fees, and expenses necessary to prosecute this appeal. I am currently earning \$ _____ per week in income.

3. I own \$ _____ worth of real property.

4. I do / do not own a car.

5. I have \$ _____ in savings.

6. I do/ do not collect unemployment benefits.

7. I do/ do not collect alimony or support.

8. I do/ do not collect a pension.

9. I do/ do not have other sources of income.
10. I was represented by assigned counsel in the Criminal Court.
11. My mailing address is:

Wherefore, I respectfully ask for an order permitting me to prosecute this appeal as a poor person and that I be furnished with the stenographic transcript of this action without fee and that I be assigned an attorney to represent me on appeal and for such other and further relief as may be proper and equitable.

Defendant-Appellant

Sworn to before me
this ____ day of _____, _____

INSTRUCTIONS TO DEFENDANT:

1. Fill in the blanks
2. Get the form notarized
3. Go to 60 Centre Street, Room 401, NYC 10007. This is the Appellate Term Clerk's Office. Hand the completed and notarized form to the clerk along with your notice of appeal. Alternatively, you may simply mail this form and the notice of appeal to the Clerk.

55.10(2)(b); McKinney's Vehicle and Traffic Law §§ 1192(3), 1807(1).

Cases that cite this headnote

Attorneys and Law Firms

****156** Scott A. Rosenberg, The Legal Aid Society, New York City (Susan Epstein of counsel), for appellant.

Kenneth P. Thompson, District Attorney, Brooklyn (Leonard Joblove, Lori Glachman and Daniel Berman of counsel), for respondent.

PRESENT: WESTON, J.P., ALIOTTA and ELLIOT, JJ.

Opinion

Appeal from a judgment of the **Criminal Court** of the City of New York, Kings County (Herbert J. Adlerberg, J.H.O.), rendered January 7, 2013. The judgment convicted defendant, upon his plea of guilty, of common-law driving while intoxicated.

***48** ORDERED that the judgment is reversed, on the law, the guilty plea is vacated, the counts of the accusatory instrument that had been dismissed are reinstated, and the matter is remitted to the **Criminal Court** for all further proceedings.

Defendant was charged in a single accusatory instrument with driving while intoxicated (common law) (Vehicle and Traffic Law § 1192[3]), driving while impaired (Vehicle and Traffic Law § 1192[1]), uninspected motor vehicle (Vehicle and Traffic Law § 301), failure to have proof of financial security (Vehicle and Traffic Law § 319[1]), unregistered motor vehicle (Vehicle and Traffic Law § 401[1][a]), and displaying improper number plates (Vehicle and Traffic Law § 402[4]). The factual portion of the information alleged, among other things, that a police officer had observed defendant at the scene of an accident to be in an intoxicated condition in that defendant had "red watery ***49** eyes, slurred speech, [a] strong odor of alcoholic beverage" emanating from his breath, and "messed clothing," and he was "unsteady" and "stumbling." In addition, it was alleged that defendant admitted that he had been "drinking" and that his vehicle had been in a rear-end collision with another vehicle.

On January 7, 2013, defendant appeared with counsel before Judicial Hearing Officer (J.H.O.) Adlerberg for a

TASC (Treatment Alternatives for Safer Communities) evaluation. However, defendant instead entered into a negotiated plea agreement and pleaded guilty to the count of common-law driving while intoxicated (Vehicle and Traffic Law § 1192[3]) in satisfaction of the accusatory instrument. At the plea proceeding before J.H.O. Adlerberg, the court simply asked defendant if he waived "formal allocution" and proceeded to sentence defendant to a conditional discharge.

On appeal, defendant contends that the information is jurisdictionally defective on the ground that it fails to contain factual allegations of an evidentiary nature which establish, if true, every element of the offense charging him with common-law driving while intoxicated.

At the outset, we note that the argument concerning the accusatory instrument's facial sufficiency is jurisdictional (see *People v. Alejandro*, 70 N.Y.2d 133, 517 N.Y.S.2d 927, 511 N.E.2d 71 [1987]). Thus, defendant's claim is not forfeited upon his plea of guilty (see *People v. Dreyden*, 15 N.Y.3d 100, 103, 905 N.Y.S.2d 542, 931 N.E.2d 526 [2010]; *People v. Konieczny*, 2 N.Y.3d 569, 573, 780 N.Y.S.2d 546, 813 N.E.2d 626 [2004]) and must be reviewed despite his failure to raise it in the **Criminal Court** (see *Alejandro*, 70 N.Y.2d 133, 517 N.Y.S.2d 927, 511 N.E.2d 71). However, any hearsay defect in the accusatory instrument has been forfeited by his guilty plea (*People v. Keizer*, 100 N.Y.2d 114, 760 N.Y.S.2d 720, 790 N.E.2d 1149 [2003]).

[1] [2] As is relevant to this appeal, to be facially sufficient, the information had ****157** to contain factual allegations of an evidentiary nature which establish, if true, every element of the offense of common-law driving while intoxicated and provide reasonable cause to believe that defendant committed the offense (CPL 100.15[3]; 100.40[1]; see *People v. Casey*, 95 N.Y.2d 354, 360, 717 N.Y.S.2d 88, 740 N.E.2d 233 [2000]; *Alejandro*, 70 N.Y.2d at 135-136, 517 N.Y.S.2d 927, 511 N.E.2d 71; *People v. Dumas*, 68 N.Y.2d 729, 731, 506 N.Y.S.2d 319, 497 N.E.2d 686 [1986]). "So long as the factual allegations of an information give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading" (*Casey*, 95 N.Y.2d at 360, 717 N.Y.S.2d 88, 740 N.E.2d 233). At the pleading stage, "the prima facie case requirement is not the same as the burden of proof ***50** beyond a reasonable doubt required at trial" (*People v. Henderson*, 92 N.Y.2d 677, 680, 685 N.Y.S.2d 409, 708 N.E.2d 165 [1999]).

[3] Applying the above standards, we find that the count

charging defendant with driving while intoxicated was properly supported in the information since it set forth facts alleging defendant's physical manifestations of intoxication, i.e., "red watery eyes, slurred speech [and a] strong odor of alcoholic beverage" emanating from his breath (see e.g. *People v. Lopez*, 170 Misc.2d 278, 648 N.Y.S.2d 231 [Crim.Ct., Kings County 1996]), and that he had admitted to "drinking" (see e.g. *People v. Bowers*, 201 A.D.2d 830, 608 N.Y.S.2d 347 [1994]) and to having been involved in a rear-end automobile accident. As these allegations support the conclusion that defendant was incapable of operating a motor vehicle in a reasonable and prudent manner by reason of intoxication (see *People v. Cruz*, 48 N.Y.2d 419, 428, 423 N.Y.S.2d 625, 399 N.E.2d 513 [1979]), the information was jurisdictionally sufficient to allege a violation of Vehicle and Traffic Law § 1192(3).

¹⁴¹ Next, defendant contends, in effect, that the judicial hearing officer was not authorized to accept the guilty plea. Although the issue was not raised by defendant in the **Criminal Court**, the assignment of a criminal case to a **J.H.O.** "affects the organization of the court or the mode of proceedings prescribed by law" (*People v. Holt*, 182 Misc.2d 919, 920, 705 N.Y.S.2d 164 [App.Term, 1st Dept.1999] [internal quotation marks and citations omitted]), and defendant's failure to raise the issue in the **Criminal Court** does not preclude him from raising the

issue on appeal (*id.*). Since the information charges defendant with driving while intoxicated (Vehicle and Law § 1192 [3]), a class A misdemeanor (see Vehicle and Law § 1193[1][b][i]; Penal Law § 55.10[2][b]), the case could not be assigned to a **J.H.O.** for purposes of the entry of a guilty plea, which is the functional equivalent of a trial (see CPL 350.20[4]; Vehicle and Traffic Law § 1807[1]; *People v. Jones*, 44 N.Y.2d 76, 404 N.Y.S.2d 85, 375 N.E.2d 41 [1978]; *People v. Riser*, 22 Misc.3d 88, 90, 875 N.Y.S.2d 740 [App.Term, 2d, 11th & 13th Jud.Dists.2009]). Accordingly, the judgment convicting defendant of driving while intoxicated is reversed, the guilty plea is vacated, the counts of the accusatory instrument that had been dismissed are reinstated, and the matter is remitted to the **Criminal Court** for all further proceedings.

In view of the foregoing, we do not reach defendant's other contention regarding the propriety of the plea allocation.

All Citations

49 Misc.3d 47, 19 N.Y.S.3d 155, 2015 N.Y. Slip Op. 25330

49 Misc.3d 47
Supreme Court, Appellate Term,
Second Dept., 2, 11 & 13 Judicial Dist.

The **PEOPLE** of the State of **New York**,
Respondent,
v.
Jose L. GARCIA, Appellant.

Sept. 17, 2015.

Synopsis

Background: Following a guilty plea, defendant was convicted in the **Criminal Court** of the City of **New York**, Kings County, Herbert J. Adlerberg, **J.H.O.**, of common-law driving while intoxicated (DWI). Defendant appealed.

Holdings: The Supreme Court, Appellate Term, held that:

^[1] information was jurisdictionally sufficient to allege common-law DWI, and

^[2] case with information charging defendant with DWI could not be assigned to judicial hearing officer for purposes of entry of guilty plea.

Reversed and remitted.

West Headnotes (4)

- ^[1] **Indictment and Information**
↔Enabling accused to prepare for trial
Indictment and Information
↔Protection against subsequent prosecution

So long as the factual allegations of an information give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading.

Cases that cite this headnote

- ^[2] **Indictment and Information**
↔Degree of proof

At the pleading stage, the prima facie case requirement is not the same as the burden of proof beyond a reasonable doubt required at trial.

Cases that cite this headnote

- ^[3] **Automobiles**
↔Charging Instrument; Summons or Ticket

Allegations in information supported conclusion that defendant was incapable of operating motor vehicle in reasonable and prudent manner by reason of intoxication, and thus information was jurisdictionally sufficient to allege common-law driving while intoxicated (DWI), since it set forth facts alleging defendant's physical manifestations of intoxication including allegations that defendant had red watery eyes, slurred speech, and strong odor of alcoholic beverage emanating from his breath, and that he had admitted to police officer he had been drinking. McKinney's Vehicle and Traffic Law § 1192(3).

Cases that cite this headnote

- ^[4] **Criminal Law**
↔Remand for Determination or Reconsideration of Particular Matters

Case with information that charged defendant with common-law driving while intoxicated (DWI) could not be assigned to judicial hearing officer (J.H.O.) for purposes of entry of guilty plea, which is functional equivalent of trial, and thus reversal of defendant's conviction, and vacatur of defendant's guilty plea, were warranted. McKinney's Penal Law §

45 Misc.3d 126(A)
Unreported Disposition
(The decision is referenced in the **New York**
Supplement.)

Supreme Court, Appellate Term, First Department,
New York.

The **PEOPLE** of the State of **New York**,
Respondent,

v.
Thomas RICHARDSON, Defendant–Appellant.

No. 570944/12.

|
Oct. 1, 2014.

Defendant appeals from a judgment of the **Criminal Court** of the City of **New York**, **New York County** (John Cataldo, **J.H.O.**), rendered September 5, 2012, convicting him, upon a plea of guilty, of violating **New York City Administrative Code** § 20–465, and imposing sentence.

Present SHULMAN, J.P., HUNTER, JR.,
LING–COHAN, JJ.

Opinion

PER CURIAM.

*1 Judgment of conviction (John Cataldo, **J.H.O.**), rendered September 5, 2012, reversed, on the law, accusatory instrument dismissed, and surcharge, if paid, remitted.

As the People now concede, defendant's conviction must be reversed because the missing stenographic record of the underlying plea colloquy cannot be reconstructed (*see People v. Harrison*, 85 N.Y.2d 794, 798 [1995]; *People v. Fleming*, 221 A.D.2d 287, 287–288 [1995]). Given the minor nature of the Administrative Code violation here involved, we dismiss the accusatory instrument in lieu of ordering a new trial, a disposition unopposed by the People.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE COURT.

I concur.

All Citations

45 Misc.3d 126(A), 998 N.Y.S.2d 307 (Table), 2014 WL 4917640, 2014 N.Y. Slip Op. 51439(U)

49 Misc.3d 141(A)

Unreported Disposition

NOTE: THIS OPINION WILL NOT APPEAR IN A
PRINTED VOLUME. THE DISPOSITION WILL
APPEAR IN THE REPORTER.

Supreme Court, Appellate Term, First Department,
New York.

The **PEOPLE** of the State of **New York**,
Respondent,

v.

Joy GERTNER, Defendant–Appellant.

No. 570140/11.

Nov. 10, 2015.

Defendant appeals from a judgment of the **Criminal Court** of the City of **New York**, **New York County** (John Cataldo, **J.H.O.**), rendered February 23, 2011, after a nonjury trial, convicting her of violating Public Health Law § 229, and imposing sentence.

Present: SCHOENFELD, J.P., SHULMAN, HUNTER,
JR., JJ.

Opinion

PER CURIAM.

*1 Judgment of conviction (John Cataldo, **J.H.O.**), rendered February 23, 2011, reversed, on the law and the facts, accusatory instrument dismissed, and fine, if paid, remitted.

As the People now concede, defendant's conviction must be vacated since the trial court failed to make any inquiry whatsoever to determine whether defendant's absence from the trial proceedings was deliberate (*see People v. Brooks*, 75 N.Y.2d 898, 899 [1990]). Since it does not appear that further proceedings on the charge here involved would serve any useful penological purpose (*see People v. Burwell*, 53 N.Y.2d 849, 851 [1981]), we dismiss the accusatory instrument, a disposition unopposed by the People.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE COURT.

I concur.

All Citations

Slip Copy, 49 Misc.3d 141(A), 2015 WL 6967683
(Table), 2015 N.Y. Slip Op. 51610(U)

42 Misc.3d 135(A)
Unreported Disposition
(The decision of the Court is referenced in a table in
the **New York Supplement**.)
Supreme Court, Appellate Term, First Department,
New York.

The **PEOPLE** of the State of **New York**,
Respondent,
v.
Romelus Jean JONAS, Defendant-Appellant.

No. 570574/11.
|
Jan. 31, 2014.

Defendant appeals from a judgment of the **Criminal Court** of the City of **New York**, **New York County** (John Cataldo, **J.H.O.**), rendered June 22, 2011, convicting him, upon a plea of guilty, of violating Vehicle and Traffic Law section 319(2), and imposing sentence.

Present: LOWE, III, P.J., SCHOENFELD, SHULMAN, JJ.

Opinion

PER CURIAM.

*1 Judgment of conviction (John Cataldo, **J.H.O.**),

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rendered June 22, 2011, reversed, on the law, accusatory instrument dismissed, and fine remitted.

The plea colloquy underlying defendant's Summons Part conviction is disjointed and largely unintelligible, with substantial portions devolving into a free-for-all marked by the court, defense counsel and defendant interrupting and speaking over one another. We find, and the People concede, that the resultant conviction must be vacated since the unsatisfactory record developed below lacks the requisite "affirmative showing" that defendant understood and waived his *Boykin* rights (see *Boykin v. Alabama*, 395 U.S. 238 [1969]; *People v. Tyrell*, 22 NY3d 359, 2013 N.Y. Slip Op 08288[2013]).

Given the relatively minor nature of the Vehicle and Traffic Law infraction here charged, we dismiss the accusatory instrument in lieu of ordering a new trial, a disposition unopposed by the People. In light of this disposition, we need not and do not address defendant's remaining points.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

All Citations

42 Misc.3d 135(A), 986 N.Y.S.2d 867 (Table), 2014 WL 349611, 2014 N.Y. Slip Op. 50090(U)

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48 Misc.3d 143(A)
Unreported Disposition
(The decision is referenced in the **New York**
Supplement.)
Supreme Court, Appellate Term, First Department,
New York.

The **PEOPLE** of the State of **New York**,
Respondent,
v.
Roman KRAVCHENKO, Defendant–Appellant.

No. 570202/13.
|
Sept. 17, 2015.

Defendant appeals from a judgment of the **Criminal Court** of the City of **New York, New York County** (Eileen N. Nadelson, **J.H.O.**), rendered September 13, 2012, after a nonjury trial, convicting him of violating **New York City Administrative Code § 10–125(b)**, and imposing sentence.

Present: SHULMAN, J.P., HUNTER, JR.,
LING–COHAN, JJ.

Opinion

PER CURIAM.

*1 Judgment of conviction (Eileen N. Nadelson, **J.H.O.**), rendered September 13, 2012, reversed, on the law,

End of Document

accusatory instrument dismissed and fine, if paid, remitted.

As the People concede, in the absence of any indication in the record that the adjudication of this criminal prosecution by a Judicial Hearing Officer (**J.H.O.**) was accompanied by the requisite statutory consent or “agreement of the parties” (CPL 350.20[1]), the conviction obtained below lacked an “essential jurisdictional predicate” “ (*People v. Holt*, 182 Misc.2d 919, 920 [1999], quoting *Batista v. Delbaum, Inc.*, 234 A.D.2d 45, 46 [1996]) and must be vacated (*Holt* at 920, 705 N.Y.S.2d 164).

Since it does not appear that further proceedings on the single Administrative Code charge here involved would serve any useful penological purpose (*see People v. Burwell*, 53 N.Y.2d 849, 851 [1981]), we dismiss the accusatory instrument, a disposition unopposed by the People. In view of the foregoing, we need not consider defendant’s remaining arguments on appeal.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

I concur.

All Citations

48 Misc.3d 143(A), 20 N.Y.S.3d 293 (Table), 2015 WL 5457953, 2015 N.Y. Slip Op. 51333(U)

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41 Misc.3d 127(A)
Unreported Disposition
(The decision of the Court is referenced in a table in
the **New York Supplement**.)
Supreme Court, Appellate Term, First Department,
New York.

The **PEOPLE** of the State of **New York**,
Respondent,
v.
Sean MEEHAN, Defendant–Appellant.

No. 570603/10.
|
Oct. 7, 2013.

Defendant appeals from a judgment of the **Criminal Court** of the City of **New York**, **New York County** (Robert Straus, **J.H.O.**), rendered May 25, 2010, after a nonjury trial, convicting him of violating **New York City Administrative Code § 19–176(b)**, and imposing sentence.

Present: LOWE, III, P.J., SHULMAN, HUNTER, Jr., JJ.

Opinion

PER CURIAM.

*1 Judgment of conviction (Robert Straus, **J.H.O.**), rendered May 25, 2010, reversed, on the law, accusatory instrument dismissed, and surcharge, if paid, remitted.

In the absence of any record indicating that the

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adjudication of this criminal prosecution by a Judicial Hearing Officer (**J.H.O.**) was accompanied by the requisite statutory consent or “agreement of the parties” (CPL 350.20[1]), the conviction obtained below lacked an “essential jurisdictional predicate” “ (*People v. Holt*, 182 Misc.2d 919, 920 [1999], quoting *Batista v. Delbaum, Inc.*, 234 A.D.2d 45, 46 [1996]) and must be vacated (*Holt* at 920). Nor, on this record, can defendant’s mere participation in the trial proceedings without formal objection be equated with the requisite “agreement” to a **J.H.O.** trial specified by CPL 350.20 (*cf. People v. Davis*, 13 NY3d 17, 30–31 [2009][where “defense counsel participated fully in a trial held before a **J.H.O.** without objection and the **Criminal Court** file contains a **J.H.O.** consent form signed by defendant”]).

Since it does not appear that further proceedings on the single Administrative Code charge here involved would serve any useful penological purpose (*see People v. Burwell*, 53 N.Y.2d 849 [1981]), we dismiss the accusatory instrument.

We have considered and rejected defendant’s jurisdictional argument.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

All Citations

41 Misc.3d 127(A), 980 N.Y.S.2d 277 (Table), 2013 WL 5614785, 2013 N.Y. Slip Op. 51651(U)

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[* 1]

People v Rivas (Angel)
2015 NY Slip Op 50474(U) [47 Misc 3d 133(A)]
Decided on April 7, 2015
Appellate Term, First Department
Published by <u>New York State Law Reporting Bureau</u> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on April 7, 2015
 SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT
 PRESENT: Schoenfeld, J.P., Hunter, Jr., Ling-Cohan, JJ.
 570446/11

The People of the State of New York, Respondent,

against

Angel Rivas, Defendant-Appellant.

Defendant appeals from a judgment of the Criminal Court of the City of New York, Bronx County (Megan Tallmer, J.), rendered January 29, 2011, convicting him, upon his plea of guilty, of criminal trespass in the second degree, and imposing sentence.

Per Curiam.

Judgment of conviction (Megan Tallmer, J.), rendered January 29, 2011, reversed, on the law, accusatory instrument dismissed and surcharge, if paid, remitted.

By misdemeanor complaint dated January 28, 2011, defendant was charged with criminal trespass in the second degree (*see* Penal Law § 140.15[1]), criminal trespass in the third degree (*see* Penal Law § 140.10[a]) and trespass (*see* Penal Law § 140.05). At arraignment the following day, defendant pled guilty to the charged offense of second degree criminal trespass and was thereupon sentenced, as agreed, to a conditional discharge. The two-page plea colloquy reflects that defendant, through counsel, accepted the People's plea offer; that defendant pled guilty to the charge; and that the court accepted defendant's plea without informing him of any of his constitutional rights under *Boylkin v Alabama* (395 US 238 [1969]).

Defendant's *Boylkin* claims, reviewable on direct appeal in the circumstances presented (*see People v Tyrell*, 22 NY3d 359 [2013]), are meritorious and mandate reversal, since the plea record, such as there is, does not affirmatively demonstrate defendant's understanding or waiver of his fundamental constitutional rights. As was true in *Tyrell*, the record here shows "a complete absence of discussion of any of the pertinent constitutional rights; none are addressed by the court, defense counsel or defendant. Nor is there any indication that defendant spoke with his attorney regarding the constitutional consequences of taking a plea — in fact, th[is] case[] [was] ... resolved during

arraignment within [one] day[] of arrest."

Inasmuch as defendant has served his sentence, we dismiss the accusatory instrument in lieu of ordering a new trial (*see People v Moore*, 24 NY3d 1030 [2014]).

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

I concur I concur I concur

Decision Date: April 07, 2015

[Return to Decision List](#)

42 Misc.3d 135(A)
Unreported Disposition
(The decision of the Court is referenced in a table in
the New York Supplement.)
Supreme Court, Appellate Term, First Department,
New York.

The PEOPLE of the State of New York,
Respondent,
v.
Romelus Jean JONAS, Defendant–Appellant.

No. 570574/11. | Jan. 31, 2014.

Defendant appeals from a judgment of the **Criminal Court** of the City of New York, New York County (John Cataldo, J.H.O.), rendered June 22, 2011, convicting him, upon a plea of guilty, of violating Vehicle and Traffic Law section 319(2), and imposing sentence.

Present: LOWE, III, P.J., SCHOENFELD, SHULMAN, JJ.

Opinion

PER CURIAM.

*1 Judgment of conviction (John Cataldo, J.H.O.), rendered June 22, 2011, reversed, on the law, accusatory

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instrument dismissed, and fine remitted.

The plea colloquy underlying defendant’s Summons Part conviction is disjointed and largely unintelligible, with substantial portions devolving into a free-for-all marked by the court, defense counsel and defendant interrupting and speaking over one another. We find, and the People concede, that the resultant conviction must be vacated since the unsatisfactory record developed below lacks the requisite “affirmative showing” that defendant understood and waived his *Boykin* rights (see *Boykin v. Alabama*, 395 U.S. 238 [1969]; *People v. Tyrell*, 22 NY3d 359, 2013 N.Y. Slip Op 08288[2013]).

Given the relatively minor nature of the Vehicle and Traffic Law infraction here charged, we dismiss the accusatory instrument in lieu of ordering a new trial, a disposition unopposed by the People. In light of this disposition, we need not and do not address defendant’s remaining points.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

All Citations

42 Misc.3d 135(A), 986 N.Y.S.2d 867 (Table), 2014 WL 349611, 2014 N.Y. Slip Op. 50090(U)

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43 Misc.3d 141(A)
Unreported Disposition
(The decision is referenced in the New York
Supplement.)
Supreme Court, Appellate Term, First Department,
New York.

The PEOPLE of the State of New York,
Respondent,
v.
Christopher POTTS, Defendant--Appellant.

No. 570295/12. | May 30, 2014.

Defendant appeals from a judgment of the **Criminal Court** of the City of New York, New York County (Herbert J. Adlerberg, **J.H.O.**), rendered February 22, 2012, convicting him, upon a plea of guilty, of trespass, and imposing sentence.

Present: SCHOENFELD, J.P., SHULMAN,
LING-COHAN, JJ.

Opinion

PER CURIAM.

***1 Judgment of conviction (Herbert J. Adlerberg, J.H.O.),**

End of Document

rendered February 22, 2012, reversed, on the law, accusatory instrument dismissed, and surcharge, if paid, remitted.

As the People now concede, defendant's conviction for trespass must be vacated since the plea record—which shows that the court did not directly address defendant and that defendant stood silent throughout—lacks the requisite “affirming showing” that defendant understood and waived his *Boykin* rights (see *Boykin v. Alabama*, 395 U.S. 238 [1969]; *People v. Tyrell*, 22 NY3d 359 [2013]). Inasmuch as defendant has served his sentence, we dismiss the accusatory instrument in lieu of ordering a new trial, a disposition not opposed by the People.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE COURT.

I concur.

All Citations

43 Misc.3d 141(A), 993 N.Y.S.2d 645 (Table), 2014 WL 2462951, 2014 N.Y. Slip Op. 50846(U)

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44 Misc.3d 131(A)
Unreported Disposition
(The decision is referenced in the New York
Supplement.)
Supreme Court, Appellate Term, First Department,
New York.

The PEOPLE of the State of New York,
Respondent,
v.
Gary CANTRELL, Defendant–Appellant.

No. 570311/12. | July 16, 2014.

Defendant appeals from a judgment of the **Criminal Court** of the City of New York, New York County (Robert H. Straus, J.H.O.), rendered March 6, 2012, convicting him, upon a plea of guilty, of disorderly conduct, and imposing sentence.

Present: SHULMAN, J.P., HUNTER, JR.,
LING–COHAN, JJ.

Opinion

PER CURIAM.

*1 Judgment of conviction (Robert H. Straus, J.H.O.), rendered March 6, 2012, reversed, on the law, accusatory instrument dismissed, and surcharge, if paid, remitted.

As the People now concede, defendant’s conviction must be vacated since the plea record lacks the requisite “affirming showing” that defendant understood and waived his *Boykin* rights (see *Boykin v. Alabama*, 395 U.S. 238 [1969]; *People v. Tyrell*, 22 N.Y.3d 359 [2013]). Inasmuch as defendant has served his sentence, we dismiss the accusatory instrument in lieu of ordering a new trial, a disposition unopposed by the People.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE COURT.

I concur

All Citations

44 Misc.3d 131(A), 997 N.Y.S.2d 669 (Table), 2014 WL 3557322, 2014 N.Y. Slip Op. 51079(U)

1 Misc.3d 126(A)
Unreported Disposition
(The decision of the Court is referenced in a table in
the New York Supplement.)
Supreme Court, Appellate Term, New York,
First Department.

The PEOPLE of the State of New York,
Respondent,
v.
Pedro TORRES, Defendant–Appellant.

No. 570070/00. | Dec. 11, 2003.

Synopsis

Background: Defendant was convicted in the Criminal Court, New York County, Harvey Glasser, J., for public consumption of alcohol. Defendant appealed.

Holding: The Supreme Court, Appellate Division, held that indictment was facially insufficient.

Affirmed, as modified.

West Headnotes (1)

[1] Disorderly Conduct

↔ Indictment, Information, and Complaint

Indictment charging public consumption of alcohol was facially insufficient, absent allegation that either defendant drank or consumed an alcoholic beverage or that he possessed an open container containing an alcoholic beverage. New York City Administrative Code, § 10-125.

Cases that cite this headnote

Defendant appeals from a judgment of the Criminal Court, New York County, rendered November 6, 2000 after a nonjury trial (Harvey Glasser, J.H.O.) convicting him of two counts of public consumption of alcohol (Administrative Code of City of NY, § 10–125), and imposing sentence.

Present: Hon. WILLIAM J. DAVIS, J.P., Hon. PHYLLIS GANGEL–JACOB and Hon. MARTIN SCHOENFELD, Justices.

Opinion

PER CURIAM.

*1 Judgment of conviction rendered November 6, 2000 (Harvey Glasser, J.H.O.) modified, on the law, to vacate defendant's conviction under docket number 2000SN091344 and to dismiss the accusatory instrument relating thereto and, as modified, judgment affirmed.

The accusatory instrument charging defendant with public consumption of alcohol under the above-cited docket number was jurisdictionally defective, since it failed to allege either that defendant drank or consumed an alcoholic beverage or possessed, "with intent to drink or consume," an open container containing an alcoholic beverage (Administrative Code of City of NY, § 10–125; *see generally, People v. Tarka*, 75 N.Y.2d 996, 557 N.Y.S.2d 266, 556 N.E.2d 1073).

The verdict under the remaining docket was based on legally sufficient evidence and was not against the weight of the evidence.

We have considered and rejected the defendant's remaining arguments.

This constitutes the decision and order of the court.

All Citations

1 Misc.3d 126(A), 781 N.Y.S.2d 627 (Table), 2003 WL 23100935, 2003 N.Y. Slip Op. 51521(U)

42 Misc.3d 143(A)
Unreported Disposition
(The decision of the Court is referenced in a table in
the New York Supplement.)
Supreme Court, Appellate Term, First Department,
New York.

The PEOPLE of the State of New York,
Respondent,
v.
Calvin NESBITT, Defendant–Appellant.

No. 11–448. | Feb. 27, 2014.

Defendant appeals from a judgment of the **Criminal Court** of the City of New York, New York County (Herbert J. Adlerberg, **J.H.O.**), rendered August 3, 2011, convicting him, upon a plea of guilty, of theft of services, and imposing sentence.

Present: LOWE, III, P.J., SCHOENFELD, HUNTER, JR., JJ.

Opinion

PER CURIAM.

End of Document

*1 Judgment of conviction (Herbert J. Adlerberg, J.H.O.), rendered August 3, 2011, reversed, on the law, and the accusatory instrument dismissed.

As the People now concede, defendant’s theft of services conviction must be vacated since the plea record lacks the requisite “affirming showing” that defendant understood and waived his *Boykin* rights (see *Boykin v. Alabama*, 395 U.S. 238 [1969]; *People v. Tyrell*, 22 NY3d 359, 2013 N.Y. Slip Op 08288 [2013]). Inasmuch as defendant has served his sentence, we dismiss the accusatory instrument in lieu of ordering a new trial, a disposition consented to by the People.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

All Citations

42 Misc.3d 143(A), 988 N.Y.S.2d 524 (Table), 2014 WL 783412, 2014 N.Y. Slip Op. 50259(U)

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18 Misc.3d 141(A)

Unreported Disposition

NOTE: THIS OPINION WILL NOT BE PUBLISHED
IN A PRINTED VOLUME. THE DISPOSITION
WILL APPEAR IN A REPORTER TABLE.
Supreme Court, Appellate Term, New York,
First Department.

The PEOPLE of the State of New York,
Respondent,

v.

Carl JIMINEZ, Defendant–Appellant.

No. 570016/06. | March 6, 2008.

Defendant appeals from a judgment of the Criminal
Court of the City of New York, New York County
(Frederic Berman, J.H.O.), rendered December 6, 2005,
after a nonjury trial, convicting him of trespass, and
imposing sentence.

Present: DAVIS, J.P., SCHOENFELD, HEITLER, JJ.

Opinion

PER CURIAM.

*1 Judgment of conviction (Frederic Berman, J.H.O.),
rendered December 6, 2005, reversed, on the law,
accusatory instrument dismissed, and fine remitted.

As the People commendably concede, reversal of the
judgment of conviction and dismissal of the accusatory
instrument are required because the underlying summons
failed to contain nonhearsay factual allegations
establishing, if true, every element of the offense charged
(see *People v. Jones*, 9 NY3d 259, 261–262 [2007];
People v. Alejandro, 70 N.Y.2d 133, 137–138 [1987]).
We reach no other issue.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE COURT.

All Citations

18 Misc.3d 141(A), 859 N.Y.S.2d 897 (Table), 2008 WL
612752, 2008 N.Y. Slip Op. 50427(U)

46 Misc.3d 132(A)
Unreported Disposition
(The decision is referenced in the New York
Supplement.)
Supreme Court, Appellate Term, First Department,
New York.

The PEOPLE of the State of New York,
Respondent,
v.
Enrique MISIEGO, Defendant–Appellant.

No. 570718/12. | Dec. 30, 2014.

Defendant appeals from a judgment of the **Criminal Court** of the City of New York, New York County (Robert H. Straus, J.H.O.), rendered June 19, 2012, convicting him, upon a plea of guilty, of criminal trespass in the third degree, and imposing sentence.

Present: LOWE, III, P.J., SCHOENFELD, HUNTER, JR., JJ.

Opinion

PER CURIAM.

*1 Judgment of conviction (Robert H. Straus, J.H.O.), rendered June 19, 2012, reversed, on the law, accusatory instrument dismissed, and surcharge, if paid, remitted.

As the People now concede, defendant's conviction must be vacated since the plea record lacks the requisite "affirming showing" that defendant understood and waived his *Boykin* rights (*see Boykin v. Alabama*, 395 U.S. 238 [1969]; *People v. Tyrell*, 22 NY3d 359 [2013]). Inasmuch as defendant has served his sentence, we dismiss the accusatory instrument in lieu of ordering a new trial, a disposition unopposed by the People.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

I concur I concur I concur

All Citations

46 Misc.3d 132(A), 7 N.Y.S.3d 244 (Table), 2014 WL 7391723, 2014 N.Y. Slip Op. 51848(U)

45 Misc.3d 126(A)
Unreported Disposition
(The decision is referenced in the New York
Supplement.)

Supreme Court, Appellate Term, First Department,
New York.

The PEOPLE of the State of New York,
Respondent,

v.
Thomas RICHARDSON, Defendant–Appellant.

No. 570944/12. | Oct. 1, 2014.

Defendant appeals from a judgment of the **Criminal Court** of the City of New York, New York County (John Cataldo, J.H.O.), rendered September 5, 2012, convicting him, upon a plea of guilty, of violating New York City Administrative Code § 20–465, and imposing sentence.

Present SHULMAN, J.P., HUNTER, JR.,
LING–COHAN, JJ.

Opinion

PER CURIAM.

*1 Judgment of conviction (John Cataldo, J.H.O.), rendered September 5, 2012, reversed, on the law, accusatory instrument dismissed, and surcharge, if paid, remitted.

As the People now concede, defendant’s conviction must be reversed because the missing stenographic record of the underlying plea colloquy cannot be reconstructed (*see People v. Harrison*, 85 N.Y.2d 794, 798 [1995]; *People v. Fleming*, 221 A.D.2d 287, 287–288 [1995]). Given the minor nature of the Administrative Code violation here involved, we dismiss the accusatory instrument in lieu of ordering a new trial, a disposition unopposed by the People.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE COURT.

I concur.

All Citations

45 Misc.3d 126(A), 998 N.Y.S.2d 307 (Table), 2014 WL 4917640, 2014 N.Y. Slip Op. 51439(U)

49 Misc.3d 130(A)

Unreported Disposition

NOTE: THIS OPINION WILL NOT APPEAR IN A
PRINTED VOLUME. THE DISPOSITION WILL
APPEAR IN THE REPORTER.

Supreme Court, Appellate Term,
Second Dept.,
2, 11 & 13 Judicial Dist.

The PEOPLE of the State of New York,
Respondent,

v.

Daniel BARRICELLA, Appellant.

No. 2012-2539 K CR. | Sept. 17, 2015.

Appeal from a judgment of the **Criminal Court** of the City of New York, Kings County (John DeLury, **J.H.O.**), rendered October 11, 2012. The judgment convicted defendant, upon his plea of guilty, of exposure of a person.

Present: PESCE, P.J., ALIOTTA and ELLIOT, JJ.

Opinion

*1 ORDERED that the judgment of conviction is reversed, on the law, defendant's guilty plea is vacated, and, as a matter of discretion in the interest of justice, the accusatory instrument is dismissed.

Defendant, while represented by counsel, pleaded guilty to exposure of a person (Penal Law § 245.01), a violation, in satisfaction of all of the counts of the accusatory instrument and he was sentenced to a conditional discharge in the same proceeding. On appeal, defendant contends that his plea was insufficient since the court failed to advise him of his constitutional rights as required by *Boykin v. Alabama* (395 U.S. 238 [1969]). The People concede that the guilty plea should be vacated and the accusatory instrument dismissed in the interest of justice.

Defendant's *Boykin* claim is reviewable on direct appeal (see *People v. Tyrell*, 22 NY3d 359, 364 [2013]; *People v. Louree*, 8 NY3d 541, 546 [2007]), and his conviction must be reversed, as defendant's plea allocution contained no discussion whatsoever of any of the constitutional

rights he was purportedly waiving by pleading guilty. The Court of Appeals has held that "[p]resuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused intelligently and understandingly rejected his constitutional rights. Anything less is not waiver" (*People v. Harris*, 61 N.Y.2d 9, 17 [1983]; see also *People v. Tyrell*, 22 NY3d at 366). There is no indication that defendant had spoken with his attorney, before entering the plea, regarding the constitutional consequences of taking the plea or that he was otherwise aware of these consequences (see *Tyrell*, 22 NY3d at 366; *People v. Miller*, 113 AD3d 573 [2014]; *People v. Barnes*, 46 Misc.3d 137[A], 2015 N.Y. Slip Op 50034[U] [App Term, 2d, 11th & 13th Jud Dists 2015]; but see *People v. Perez*, 116 AD3d 511, 511 [2014] [affirming the conviction of a defendant who had pleaded guilty to a violation where "the record establishe[d] defendant's understanding and waiver of his constitutional rights ..., even though there was no discussion on the record of defendant's [*Boykin*] rights"], lv granted 24 NY3d 1004 [2014]). In fact, here, as in *People v. Moore* (24 NY3d 1030 [2014]), the court did not address defendant whatsoever.

Furthermore, as a matter of discretion in the interest of justice, and as requested by the People, we dismiss the accusatory instrument (see *People v. Flynn*, 79 N.Y.2d 879, 882 [1992]; *People v. Barnes*, 46 Misc.3d 137[A], 2015 N.Y. Slip Op 50034[U]; *People v. Facey*, 30 Misc.3d 138[A], 2011 N.Y. Slip Op 50224[U] [App Term, 2d, 11th & 13th Jud Dists 2011]).

Accordingly, the judgment of conviction is reversed, defendant's guilty plea is vacated, and the accusatory instrument is dismissed.

PESCE, P.J., ALIOTTA and ELLIOT, JJ., concur.

All Citations

Slip Copy, 49 Misc.3d 130(A), 2015 WL 5751800 (Table), 2015 N.Y. Slip Op. 51418(U)

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[*1]

People v Kravchenko (Roman)
2015 NY Slip Op 51333(U) [48 Misc 3d 143(A)]
Decided on September 17, 2015
Appellate Term, First Department
Published by <u>New York State Law Reporting Bureau</u> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on September 17, 2015
SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT
PRESENT: Shulman, J.P., Hunter, Jr., Ling-Cohan, J.
570202/13

The People of the State of New York, Respondent,

against

Roman Kravchenko, Defendant-Appellant.

Defendant appeals from a judgment of the Criminal Court of the City of New York, New York County (Eileen N. Nadelson, J.H.O.), rendered September 13, 2012, after a nonjury trial, convicting him of violating New York City Administrative Code § 10-125 (b), and imposing sentence.

Per Curiam.

Judgment of conviction (Eileen N. Nadelson, J.H.O.), rendered September 13, 2012, reversed, on the law, accusatory instrument dismissed and fine, if paid, remitted.

As the People concede, in the absence of any indication in the record that the adjudication of this criminal prosecution by a Judicial Hearing Officer (J.H.O.) was accompanied by the requisite statutory consent or "agreement of the parties" (CPL 350.20

[1]), the conviction obtained below lacked an "essential jurisdictional predicate" (*People v Holt*, 182 Misc 2d 919, 920 [1999], quoting *Batista v Delbaum, Inc.*, 234 AD2d 45, 46 [1996]) and must be vacated (*Holt* at 920).

Since it does not appear that further proceedings on the single Administrative Code charge here involved would serve any useful penological purpose (*see People v Burwell*, 53 NY2d 849, 851 [1981]), we dismiss the accusatory instrument, a disposition unopposed by the People. In view of the foregoing, we need not consider defendant's remaining arguments on appeal.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

I concur I concur I concur

Decision Date: September 17, 2015

[Return to Decision List](#)

[*1]

People v Sutton (Sean)
2015 NY Slip Op 50901(U) [47 Misc 3d 156(A)]
Decided on June 17, 2015
Appellate Term, First Department
Published by <u>New York State Law Reporting Bureau</u> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on June 17, 2015
 SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT
 PRESENT: Lowe, III, P.J., Schoenfeld, Shulman, JJ.
 570546/09

The People of the State of New York, Respondent,
against
Sean Sutton, Defendant-Appellant,

In consolidated criminal actions, defendant appeals from a judgment of the Criminal Court of the City of New York, New York County (John J. Delury, J.H.O.), rendered June 18, 2009, after a nonjury trial, convicting him of causing unreasonable noise, operating a circulation device in excess of 42 decibels, and failing to comply with a police officer's order, and imposing sentence.

Per Curiam.

Judgment of conviction (John J. Delury, J.H.O.), rendered June 18, 2009, modified, on the law and the facts, to the extent of vacating defendant's convictions of causing unreasonable noise and operating a circulation device in excess of 42 decibels, and dismissing the accusatory instruments relating thereto; as modified, judgment affirmed.

Defendant was charged with, inter alia, causing unreasonable noise (*see* Administrative Code of City of NY § 24-218) and operating a circulation device in excess of 42 decibels (*see* Administrative Code § 24-227). At the truncated Summons Part trial, the testimony of the Police Officer who issued the summonses was brief and conclusory, consisting of less than one page of testimony. The officer stated only that an "altered muffler" on defendant's Toyota vehicle "created an unreasonable amount of noise and a loud rumbling." This testimony was, at best, ambiguous as to the volume of the noise emanating from defendant's vehicle and, upon our independent review of the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]), we find it to be insufficient to establish beyond a reasonable doubt that defendant was guilty of causing "unreasonable noise" as that term is defined in the Code, namely, "any excessive or unusually loud sound that disturbs the peace, comfort or repose of a reasonable person of normal sensitivities, injures or endangers the health or safety of a reasonable person of normal sensitivities or which causes injury to plant or animal life, or damage to property or business" (Administrative Code § 24-203[62]; *see* Administrative Code § 24-218[b]; 530 W. 28th St. LP v New York State Liq. Auth., 55 AD3d 436 [2008]; *see also People v Bakolas*, 59 NY2d 51 [1983]).

As the People concede, the accusatory instrument charging defendant with operating a circulation device in excess of 42 decibels (*see* Administrative Code § 24-227) was [*2] jurisdictionally defective because the muffler on defendant's automobile was not a "circulation device" (*see* Administrative Code §§ 24-203[17], [39]) and, in any event, the accusatory instrument did not allege that the muffler created a sound "in excess of 42 [decibels]" (*see* Administrative Code § 24-227[a]).

We have considered defendant's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

I concur I concur I concur

Decision Date: June 17, 2015

[* 1]

People v Cerpa (David)
2015 NY Slip Op 50875(U) [47 Misc 3d 154(A)]
Decided on June 10, 2015
Appellate Term, First Department
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Decided on June 10, 2015
 SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT
 PRESENT: Lowe, III, P.J., Schoenfeld, Shulman, JJ.
 570195/13

**The People of the State of New York, Respondent, -
 against
 David Cerpa, Defendant-Appellant.**

Defendant appeals from a judgment of the Criminal Court of the City of New York, New York County (Melissa A. Crane, J.), rendered February 4, 2013, convicting him, upon a plea of guilty, of theft of services, and imposing sentence.

Per Curiam.

Judgment of conviction (Melissa A. Crane, J.), rendered February 4, 2013, reversed, on the law, accusatory instrument dismissed, and surcharge, if paid, remitted.

As the People now concede, defendant's conviction must be vacated since the plea record lacks the requisite "affirming showing" that defendant understood and waived his *Boykin* rights (*see Boykin v Alabama*, 395 US 238 [1969]; *People v Tyrell*, 22 NY3d 359

[2013]). Inasmuch as defendant has served his sentence, we dismiss the accusatory instrument in lieu of ordering a new trial, a disposition unopposed by the People.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

I concur I concur I concur

Decision Date: June 10, 2015

[Return to Decision List](#)

[*1]

People v Miller (Shariff)
2015 NY Slip Op 50877(U) [47 Misc 3d 155(A)]
Decided on June 10, 2015
Appellate Term, First Department
Published by <u>New York State Law Reporting Bureau</u> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on June 10, 2015
 SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT
 PRESENT: Lowe, III, P.J., Schoenfeld, Shulman, JJ.
 570809/11

**The People of the State of New York, Respondent, -
 against
 Shariff Miller, Defendant-Appellant.**

Defendant appeals from a judgment of the Criminal Court of the City of New York, New York County (John Cataldo, J.H.O.), rendered October 6, 2011, after a nonjury trial, convicting him of disorderly conduct, and imposing sentence. Per Curiam.

Judgment of conviction (John Cataldo, J.H.O.), rendered October 6, 2011, reversed, on the law and on the facts, accusatory instrument dismissed, and fine, if paid, remitted.

As the People now concede, defendant's conviction must be vacated since the trial court failed to make any inquiry whatsoever to determine whether defendant's absence from the trial proceedings was deliberate (*see People v Brooks*, 75 NY2d 898, 899 [1990]; *People v Carroll*, 196 AD2d 546 [1993], *lv denied* 82 NY2d 848 [1993]). Since it does not appear that further proceedings on the disorderly conduct charge here involved would

serve any useful penological purpose (*see People v Burwell*, 53 NY2d 849, 851 [1981]), we dismiss the accusatory instrument, a disposition unopposed by the People.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

I concur I concur I concur

Decision Date: June 10, 2015

[Return to Decision List](#)

[*1]

People v Battiste (Walter)
2015 NY Slip Op 50881(U) [47 Misc 3d 155(A)]
Decided on June 12, 2015
Appellate Term, First Department
Published by <u>New York State Law Reporting Bureau</u> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on June 12, 2015
 SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT
 PRESENT: Lowe, III, P.J., Schoenfeld, Shulman, JJ.
 570080/12

The People of the State of New York, Respondent,
against
Walter Battiste, Defendant-Appellant.

Defendant appeals from a judgment of the Criminal Court of the City of New York, New York County (John Cataldo,

J.H.O.), rendered January 11, 2012, after a nonjury trial, convicting him of violating New York City Parks and Recreation Department Rules (56 RCNY) § 1-05(s)(1), by being in an exclusive children playground, and imposing sentence.

Per Curiam.

Judgment of conviction (John Cataldo, J.H.O.), rendered January 11, 2012, reversed, on the law and the facts, accusatory instrument dismissed, and fine, if paid, remitted.

The underlying accusatory instrument charged defendant with violating New York City Parks and Recreation Department Rules (56 RCNY) § 1-05(s)(1), by being in an exclusive children playground unaccompanied by a child under the age of twelve. The police testimony elicited at the Summons Part trial showed that defendant was observed for a brief duration "playing chess" on a chess table in the West 92nd Street, City park at issue. The officer, while testifying that defendant was on the "backside of the jungle gym," in an exclusive children playground portion of the park, also testified that the chess table was "some distance away" from the playground. This testimony was, at best, equivocal and ambiguous as to area of the park that was restricted to the use of children and whether defendant was in such area (unaccompanied by a child), and upon our independent review of the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]), we find it to be insufficient to establish beyond a reasonable doubt that defendant was guilty of the underlying misdemeanor offense.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

I concur I concur I concur

Decision Date: June 12, 2015

[Return to Decision List](#)

182 Misc.2d 919
Supreme Court, Appellate Term, New York,
First Department.

The PEOPLE of the State of New York,
Respondent,
v.
Wilbur E. HOLT, Also Known as Wilbert E. Holt,
Appellant.

Nov. 15, 1999.

Defendant was convicted in the **Criminal Court**, New York County, Vincent Vitale, **J.H.O.**, of consuming alcohol in a public place, and was resented in the **Criminal Court**, New York County, Millard L. Midonick, **J.H.O.**, and he appealed. The Supreme Court, Appellate Term, held that: (1) absent any indication that defendant consented to a trial before a Judicial Hearing Officer, conviction lacked essential jurisdictional predicate, and (2) further proceedings on the single Administrative Code charge would not have served any useful penological purposes, warranting dismissal of the accusatory instrument.

Reversed.

West Headnotes (3)

[1] **Criminal Law**
☞Jurisdiction of Justices of the Peace, Police Justices, and Other Officers

Absent any indication that defendant consented to a trial before a Judicial Hearing Officer, conviction for consuming alcohol in a public place lacked an essential jurisdictional predicate and would be vacated. McKinney's CPL § 350.20.

6 Cases that cite this headnote

[2] **Criminal Law**
☞Proceedings at Trial in General

Assignment of a criminal case to a Judicial Hearing Officer for trial, absent the requisite statutory consent, affected the organization of the court or the mode of proceedings prescribed by law and, thus, defendant's failure to raise the issue at the trial level did not preclude Appellate Term from considering it on appeal. McKinney's CPL § 350.20.

3 Cases that cite this headnote

[3] **Criminal Law**
☞Decision in General

Appellate Term would dismiss accusatory instrument charging defendant with single count of consuming alcohol in a public place, as further proceedings would not have served any useful penological purposes.

2 Cases that cite this headnote

Attorneys and Law Firms

****164 *919** Legal Aid Society, New York City (Daniel L. Greenberg and Bertrand J. Kahn of counsel), for appellant.

Robert M. Morgenthau, District Attorney of New York County, New York City (Donald J. Siewert of counsel), for respondent.

Present: HON. STANLEY PARNES, P.J., HON. HELEN E. FREEDMAN and HON. WILLIAM J. DAVIS, JJ.

Opinion

PER CURIAM.

Judgment of conviction rendered September 17, 1997 (Vincent Vitale, J.H.O. at trial and sentence; Millard L. Midonick, J.H.O. at resentence) reversed, on the law, and the information is dismissed.

¹¹¹ ¹²¹ *920 Absent any indication that defendant consented to a trial before a Judicial Hearing Officer, the conviction obtained below lacked an “essential jurisdictional predicate” (*Batista v. Delbaum, Inc.*, 234 A.D.2d 45, 46, 650 N.Y.S.2d 219) and must be vacated (*see*, CPL 350.20; *People v. Theodore*, N.Y.L.J., July 19, 1991, at 27 col. 5 [App. Term, 2d Dept.]). The assignment of a criminal case to a Judicial Hearing Officer for trial in the absence of the requisite statutory consent affects “the organization of the court or the mode of proceedings prescribed by law” (*People v. Ahmed*, 66 N.Y.2d 307, 310, 496 N.Y.S.2d 984, 487 N.E.2d 894), and thus defendant’s failure to raise the issue at the trial level does not preclude us from considering it on appeal. (*Id.*) In any event, even were normal preservation requirements applicable, we would find this an appropriate case for the exercise of this court’s discretion to take corrective action

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in the interest of justice (CPL 470.15[3][c]).

****165** ¹³¹ Since it does not appear that further proceedings on the single Administrative Code of the City of New York charge here involved would serve any useful penological purposes (*see, People v. Burwell*, 53 N.Y.2d 849, 440 N.Y.S.2d 177, 422 N.E.2d 822; *cf., People v. Allen*, 39 N.Y.2d 916, 386 N.Y.S.2d 404, 352 N.E.2d 591), we dismiss the accusatory instrument, a disposition unopposed by the People.

All Citations

182 Misc.2d 919, 705 N.Y.S.2d 164

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[* 1]

People v Holland (Byron)
2015 NY Slip Op 51727(U)
Decided on November 30, 2015
Appellate Term, First Department
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This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on November 30, 2015

SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT

PRESENT: Schoenfeld, J.P., Shulman, Hunter, Jr., JJ.

570606/10

The People of the State of New York, Respondent,

against

Byron Holland, Defendant-Appellant.

Defendant appeals from a judgment of the Criminal Court of the City of New York, Bronx County, (Eileen Koretz, J.H.O.), rendered May 25, 2010, after a nonjury trial, convicting him of disorderly conduct, and imposing sentence.

Per Curiam.

Judgment of conviction (Eileen Koretz, J.H.O.), rendered May 25, 2010, reversed, on the law, and accusatory instrument dismissed.

Defendant was charged in a misdemeanor information with resisting arrest, criminal trespass in the third degree, trespass and disorderly conduct. The factual portion of the information alleges that defendant was observed inside a "clean halls" apartment building that was marked with "no trespassing" signs; when questioned by police, defendant

responded "my family lives in the building . . . I don't know what apartment"; and that while police were attempting to arrest defendant for these actions, defendant "flailed his arms, twisted his body, and kicked his legs in an attempt to prevent handcuffing." The resisting arrest, criminal trespass in the third degree and trespass charges were dismissed and, after a subsequent nonjury trial, defendant was convicted of disorderly conduct.

We agree with defendant that the information charging him with disorderly conduct is jurisdictionally defective because it fails to provide factual allegations that his conduct was intended to or recklessly created a substantial risk of "a potential or immediate public problem" (*People v Munafo*, 50 NY2d 326, 331 [1980]). Absent any allegation that there were any bystanders or spectators who witnessed the incident prior to the arrest, the allegations failed to describe a "situation[]" that carried beyond the concern of individual disputants to a point where they had become a potential or immediate public problem" (*id.*; *see People v Jackson*, 18 Misc 3d 134[A], 2008 NY Slip Op 50169[U] [App Term, 1st Dept 2008], *lv denied* 10 NY3d 841 [2008]; *People v Moreno*, 47 Misc 3d 138[A], 2015 NY Slip Op 50587[U] [App Term, 2d, 11th and 13th Jud Dists 2015, *lv denied* 25 NY3d 1168 [2015]).

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

I concur I concur I concur

Decision Date: November 30, 2015

[Return to Decision List](#)

You are in the **Summons Part of the Criminal Court** of New York City because you are charged with breaking the law.

You have rights you should know about:

- You have the right to have a lawyer help you. If you can't pay for a lawyer, you will be given a lawyer free of charge.
- You have the right to know what the summons says you did that broke the law. Your lawyer will read you the charges and answer your questions.
- You have the right to a trial in court if you want one. At the trial you will see the person accusing you. You will hear them tell what they saw and heard. You or your lawyer can ask the witness questions and you can present your own evidence. You can tell the court your side if you want or you can say nothing.
- You do not have to say anything to the judge. The judge cannot use the fact that you did not say anything to decide if you are guilty or not. At the end of the trial the judge will say if the evidence shows you are guilty or not. In order to be found guilty the judge must find you broke the law beyond a reasonable doubt. If not, you will be found "not guilty."
- If you are found "not guilty" the record of the charges will be closed.
- You have the right to say you are guilty. This may mean you get a conviction for something less serious than what you are charge with and a lower fine that what you might be given if you have a trial and are found guilty. This is the same as being found guilty after a trial.

Before you make a decision about what you want to do, you should talk to your lawyer. You should know that a record of being guilty of a crime can be very serious. It will be even more serious if you are not a U.S. citizen. If you get government benefits like housing or student loans, if you were not born in the United States, if you need a license for your job, or if you are applying for a new job, let your lawyer know so he can tell you what can happen to these benefits if you are convicted.

If you decide to say you are guilty, you are giving up all the rights you have to go to trial, to ask the witnesses question, to tell your side, and to have the judge decide if you are guilty. You are also giving up your right to stay silent and are saying you broke the law.

You may be offered an "A.C.D.", which means your case is set for a date six months or 12 months later when it will be dismissed if you did not get into trouble during that time. This is usually a good result, but you must know that for the time until the case is dismissed, the charges will be open and any search of your record will show the charges. If you are applying for a job, want to join the army, get a loan, or think this might hurt you, let your lawyer know.

If the judge finds you guilty, or if you say you are guilty, you have the right to appeal. Ask your lawyer about how to take an appeal.