

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

(Papers Sealed)

-against-

No. 107

SIDNEY WISDOM,

Respondent.

20 Eagle Street
Albany, New York 12207
May 6, 2014

Before:

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

Appearances:

ANN BORDLEY, ADA
KINGS COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Appellant
Renaissance Plaza
350 Jay Street
Brooklyn, NY 11201

DE NICE POWELL, ESQ.
APPELLATE ADVOCATES
Attorneys for Respondent
2 Rector Street
10th Floor
New York, NY 10006

Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 107, People v.
2 Wisdom.

3 Counselor?

4 MS. BORDLEY: Good afternoon. My name is
5 Ann Bordley, and I'm representing the People of the
6 State of New York. I would like to request two
7 minutes for rebuttal.

8 CHIEF JUDGE LIPPMAN: Two minutes, sure,
9 you have it. Go ahead.

10 MS. BORDLEY: The Appellate Division's
11 reversal of defendant's conviction was erroneous for
12 three reasons. First, defendant's motion was
13 untimely. Criminal Procedure Law 255.20, subsection
14 (1), provides that all pre-trial motions must be made
15 prior to trial.

16 JUDGE PIGOTT: Was it really because
17 somebody didn't give you a tape?

18 MS. BORDLEY: Excuse me?

19 JUDGE PIGOTT: Wasn't it that somebody
20 didn't give you an - - - a videotape or something to
21 - - - to transcribe?

22 MS. BORDLEY: Well, I'm - - - I'm
23 representing the People of the State of New York, so
24 I think it's the def - - -

25 JUDGE PIGOTT: Yeah, but weren't you

1 arguing that they didn't give you a blank tape and -
2 - -

3 MS. BORDLEY: Oh, yes - - - I'm sorry, yes.
4 But we think that he could have made the motion even
5 without the videotape because he had the grand jury
6 minutes.

7 JUDGE SMITH: But aren't questions like
8 that really discretionary with the lower courts? I
9 mean, if Supreme Court refused to hear it, I'd see
10 your point. But Supreme Court considered it on the
11 merits; the Appellate Division considered it on the
12 merits. Why - - - why aren't we bound by that? It's
13 a discretionary call.

14 MS. BORDLEY: Your Honor, I - - - I don't
15 think it's at all clear that the Supreme Court did -
16 - - did not - - - did not consider this ground. When
17 defense attorney raised this motion during the charge
18 conference, the prosecutor was saying this is
19 untimely; you can't be raising this motion now.

20 JUDGE SMITH: But what the - - - but the
21 judge said - - - what the judge said, not what the
22 prosecutor said - - - the judge said, first of all,
23 Judge Minardo already decided this - - -

24 MS. BORDLEY: Yes.

25 JUDGE SMITH: - - - and secondly, I don't

1 see any merit to your position.

2 MS. BORDLEY: Well, he said he didn't find
3 any merit to the defense attorney's argument. Part
4 of the defense attorney's argument was that he had
5 the right to bring this motion at this time.

6 JUDGE PIGOTT: That was your - - -

7 MS. BORDLEY: So I think it's unclear
8 whether the court - - - no, I think the word "merits"
9 can be used very broadly. Sometimes - - -

10 JUDGE PIGOTT: But, you know, in my
11 experience, when you make a motion, you know, to
12 dismiss on grand jury grounds, you never get to see
13 the grand jury minutes. You know, the judge says I
14 looked at them and I - - - and they're fine, and
15 we're going to move on, and nobody thinks twice about
16 it. So it wasn't until quite sub - - - you know,
17 quite a bit of time afterwards, when all of this, you
18 know, popped up.

19 MS. BORDLEY: Yes, but defense counsel
20 could have made this motion based on the grand jury
21 minutes that he had prior to trial, because the
22 prosecutor said - - -

23 JUDGE SMITH: Actually, he did - - - he
24 made a motion before he saw the grand jury minutes,
25 and it was denied.

1 MS. BORDLEY: Yes, but then after he - - -

2 JUDGE SMITH: But perhaps erroneously.

3 MS. BORDLEY: Well, I don't think it was
4 erroneous, but then he made a more specific motion -
5 - -

6 JUDGE SMITH: If the first - - -

7 MS. BORDLEY: - - - which - - -

8 JUDGE SMITH: If the first one was
9 erroneous, what do we care about the others? Why
10 isn't that good enough? Why can't we review it?

11 MS. BORDLEY: Because it wasn't
12 specifically preserved for appellate review, and that
13 would be beyond the scope of this court's review - -
14 -

15 CHIEF JUDGE LIPPMAN: Counsel - - -

16 MS. BORDLEY: - - - because - - -

17 CHIEF JUDGE LIPPMAN: - - - why don't you
18 get to the merits? Let's - - - let's assume - - -

19 MS. BORDLEY: Can I say - - -

20 CHIEF JUDGE LIPPMAN: - - - that we're on
21 the merits; what - - - what's your case?

22 MS. BORDLEY: You don't want me to mention
23 210.30, subsection (6)?

24 CHIEF JUDGE LIPPMAN: Right.

25 MS. BORDLEY: Okay. On the merits - - -

1 okay, no, it's just that that would be, you know,
2 generally speaking - - -

3 JUDGE ABDUS-SALAAM: I would like to get to
4 that, but I think you should answer - - -

5 MS. BORDLEY: All right. Answer - - -

6 JUDGE ABDUS-SALAAM: - - - the Chief's
7 question.

8 MS. BORDLEY: - - - the merits first.

9 Okay. The belated administration of the oath did not
10 satisfy the very high standard that the defense must
11 meet in order to be entitled to a dismissal of the
12 indictment. After the People realized their mistake,
13 they conducted the second examination with Ms.
14 Donaldson, and Ms. Donaldson swore to the truth of
15 her prior testimony. So Ms. Donaldson did put
16 herself under the penalty of perjury for the
17 testimony that she had given during the first
18 examination.

19 JUDGE PIGOTT: Do you think this is a good
20 idea?

21 MS. BORDLEY: No, we don't think it's a
22 good idea, but the question before the court is
23 whether or not it entitled defendant to the dismissal
24 of the indictment.

25 JUDGE PIGOTT: But if we - - - I mean, if -

1 - - as Judge Lippman is saying, we're talking about
2 the merits now. If we - - - if we say this is okay,
3 where does it end? Where - - - where do you see an
4 end?

5 MS. BORDLEY: Oh, no, Your Honor, I don't
6 think that there's going to be a risk that people are
7 going to start fail - - - going around failing to
8 give oaths to witnesses. It - - -

9 CHIEF JUDGE LIPPMAN: Why not? We're
10 saying it's okay.

11 MS. BORDLEY: No, you're not saying it's
12 okay. You're saying it - - -

13 CHIEF JUDGE LIPPMAN: What would be saying
14 - - -

15 MS. BORDLEY: You would - - -

16 CHIEF JUDGE LIPPMAN: - - - about the grand
17 jury process if we allow this?

18 MS. BORDLEY: You would be saying what you
19 said in People v. Darby, that dismissals of
20 indictments are supposed to be rare and only when it
21 impairs the integrity of the proceeding or creates a
22 possibility that - - -

23 JUDGE PIGOTT: You could videotape a
24 prisoner, you know, a jailhouse snitch in his jail
25 cell, and - - - and say you swear to the truth of

1 everything you said, and - - - and give that to the
2 grand jury?

3 MS. BORDLEY: No, because we had to get
4 court permission to do this to - - - because of her -
5 - -

6 JUDGE PIGOTT: We're going to - - - if we
7 find for you, we're going to say it's okay.

8 MS. BORDLEY: No - - - no, absolutely not,
9 Your Honor. This was an examination pursuant to
10 190.32 - - -

11 JUDGE PIGOTT: How do you want us to write
12 the opinion then? How do you - - - do you want to
13 say in this rare instance where - - - or what?

14 MS. BORDLEY: I would say that - - - I
15 would repeat the language that you used in People v.
16 Darby, where you repeatedly said this is a very high
17 standard; this is not any kind of mere error - - -

18 JUDGE SMITH: You're not - - - you were
19 asked to argue the merits, but you're not literally
20 arguing that this was - - - that no error - - - that
21 - - - that the prosecutor did nothing wrong, that
22 everything was fine?

23 MS. BORDLEY: No, I'm not arguing that.

24 JUDGE SMITH: You're saying that there is
25 not the kind of error that - - - that taints the

1 grand jury proceeding. It's not - - -

2 MS. BORDLEY: Correct.

3 JUDGE SMITH: It's not the gross sort of
4 thing that we - - -

5 MS. BORDLEY: This court has held - - -

6 JUDGE SMITH: You - - - would you concede,
7 for the sake of the argument, that there was a
8 sufficiency problem in the grand jury?

9 MS. BORDLEY: No, because I believe that
10 the - - - by having her subsequently testify, that
11 that remedied that problem, that the testimony was
12 now sworn in under a trial proceeding.

13 JUDGE SMITH: Okay. But - - - well, maybe
14 that's why I said for the sake of argument.

15 MS. BORDLEY: Yeah, yeah.

16 JUDGE SMITH: I mean, if there was - - -
17 obviously, if there was a sufficiency problem,
18 there's not anymore, because there's a statute on
19 that point.

20 MS. BORDLEY: Yes, Your Honor, so that
21 would not be reviewable on appeal.

22 JUDGE PIGOTT: Would it have been a better
23 practice, at least - - - I think her original
24 testimony was, like, nine pages.

25 MS. BORDLEY: Yes.

1 JUDGE PIGOTT: I mean, couldn't - - -
2 couldn't - - - I mean, is that - - - is that too hard
3 to have her run through again?

4 MS. BORDLEY: No, no, but there's another
5 risk if you do that. Repeating testimony is thought
6 to be prejudicial to the defense. That's the reason
7 against the rule for prior - - - prior - - -

8 JUDGE PIGOTT: Well, when you say
9 "repeating", what are you talking about?

10 MS. BORDLEY: Well, if she - - - if she
11 would then make - - - if she repeat - - - if we redid
12 the examination and she retestified to everything,
13 and then we presented the tape again to the grand
14 jury, they would have - - - in fact, even if we told
15 them disregard what you heard before; now we're
16 giving you a new tape to watch, they would have heard
17 it twice. And generally speaking, that's considered
18 very prejudicial to the defense.

19 JUDGE PIGOTT: So it's better just to have
20 a notary public stamp her signature on the bottom and
21 say that's okay?

22 MS. BORDLEY: No, they - - - they want back
23 to her, and she was asked, and she says I swear, it's
24 true. And we have very good reason - - -

25 JUDGE ABDUS-SALAAM: On what basis did she

1 say that? Had those minutes been provided to her or
2 a transcript been provided to her beforehand?

3 MS. BORDLEY: That's - - - that's not
4 apparent on this record. I mean, because it was
5 brought - - -

6 CHIEF JUDGE LIPPMAN: It's enough if they
7 say do you remember what you said before?

8 MS. BORDLEY: Well, the prosecutor actually
9 did: Do you remember when you - - - the statement
10 that you gave - - -

11 CHIEF JUDGE LIPPMAN: Yeah.

12 MS. BORDLEY: - - - before.

13 CHIEF JUDGE LIPPMAN: And that's - - -
14 that's enough? And - - -

15 MS. BORDLEY: I think under the
16 circumstances of this case, yes, that was enough. It
17 was only - - -

18 CHIEF JUDGE LIPPMAN: So you don't think
19 there's a good argument that this whole thing just
20 taints the grand jury process?

21 MS. BORDLEY: I - - - I think a mistake was
22 made, but I do not think that the mistake was so
23 serious as to require the dismissal of the
24 indictment. And one of the fact - - - remember, it's
25 a twofold - - -

1 JUDGE RIVERA: Well, failing to administer
2 the oath to the only witness who inculcates the - - -

3 MS. BORDLEY: A belated - - -

4 JUDGE RIVERA: - - - then why is that not -
5 - -

6 MS. BORDLEY: A bel - - -

7 JUDGE RIVERA: - - - tainting the process?

8 MS. BORDLEY: A belated administration of
9 the oath to the main witness, who then swears this is
10 true.

11 JUDGE RIVERA: Look, you made the mistake
12 the first time. And to your credit, you recognized
13 it, and the People said we realize there's a problem,
14 we want to go back, we want to fix it. To your
15 credit you've done that. But isn't it easier just to
16 have the bright-line rule that if you don't
17 administer the oath at the time that the person's
18 actually going to give the testimony, that, despite
19 the best of intentions, you can't go back.

20 MS. BORDLEY: No, Your Honor, I don't think
21 that's necessary. This court has always held that
22 it's a very demanding standard for the dismissal of
23 the indictment.

24 JUDGE SMITH: But it's also - - - it's also
25 - - -

1 MS. BORDLEY: The state - - -

2 JUDGE SMITH: - - - not necessary, is it,
3 for you to resist that? You can have your bright-
4 line rule, and you can say it's a sufficiency rule -
5 - -

6 MS. BORDLEY: Well, if it's an error about
7 the sufficiency, I - - -

8 JUDGE SMITH: - - - and admissibility,
9 which - - - which plays into sufficiency in the grand
10 jury.

11 MS. BORDLEY: Well, if it's a sufficiency,
12 then it's something that you could get the indictment
13 dismissed prior to trial - - -

14 JUDGE SMITH: Yes.

15 MS. BORDLEY: - - - but not post-trial.

16 JUDGE SMITH: Yeah.

17 MS. BORDLEY: And that's very significant
18 in this case, where we're now post-trial.

19 JUDGE SMITH: I guess I'm - - - well, I'm
20 puzzled about why you're fighting so hard on - - -

21 MS. BORDLEY: Well - - -

22 JUDGE SMITH: - - - you know, what - - -
23 yeah, I mean, you say that you - - -

24 MS. BORDLEY: No, if I go back to 2 - - -
25 well, if you want me to go back to 210.30, subsection

1 (6), that provides that claims regarding the legal
2 sufficiency of the evidence in the grand jury cannot
3 be raised before an appellate court so long as the
4 evidence at trial was legally sufficient. And
5 competency claims are completely intertwined with
6 legal sufficiency claims. Legal sufficiency cl - - -
7 you know, is defined in terms of the competent
8 evidence that's introduced at trial.

9 And this court held, in People v. Avant,
10 that the introduction of inadmissible evidence does
11 not require a dismissal of the accusatory - - -

12 JUDGE SMITH: So on Judge Rivera's
13 question, it's - - - it would certainly be possible
14 for us to say there is a bright-line rule; this
15 testimony - - - this oath just isn't good enough and
16 the testimony was inadmissible, but it's precluded
17 from appeal under the statute.

18 MS. BORDLEY: Absolutely, Your Honor. And
19 I think that if you hold otherwise - - -

20 CHIEF JUDGE LIPPMAN: Unless the integrity
21 of the process was in question, right?

22 MS. BORDLEY: No, because they're treated
23 differently. There's a legal sufficiency claim and
24 then there's a - - -

25 JUDGE SMITH: Wait a minute, you're saying

1 no - - - you're saying no sufficiency claim can ever
2 rise to - - - to an integrity claim?

3 MS. BORDLEY: If there was a prosecutorial
4 misconduct claim, maybe.

5 JUDGE SMITH: Like Hus - - -

6 MS. BORDLEY: Right. Well - - -

7 JUDGE SMITH: In Huston - - - in Huston - -
8 -

9 MS. BORDLEY: In Huston or People v.
10 Pelchat, where it was a prosecutorial misconduct
11 claim. But we don't have that where anybody was
12 acting - - - we have an, you know, inadvertent
13 mistake.

14 JUDGE SMITH: But if the - - -

15 JUDGE PIGOTT: To use my example of the
16 jailhouse snitch getting videotaped - - -

17 MS. BORDLEY: Yeah.

18 JUDGE PIGOTT: - - - I mean, that's not bad
19 faith; it's not misconduct; it's they thought they
20 could do it. Wouldn't that impair the integrity of
21 the grand jury? You can't then say, well, you know,
22 he was convicted, you know, the grand jury - - - you
23 know, the - - -

24 MS. BORDLEY: I mean, he was indict - - - I
25 - - -

1 JUDGE PIGOTT: That he was tried and
2 convicted, and therefore whatever we did in front of
3 the grand jury is - - - is gone.

4 MS. BORDLEY: If it concerns legal
5 sufficiency, by statute, it is absolutely gone, no
6 matter how glaring or bad it is. If it's a
7 prosecutorial misconduct claim, no, it's in a
8 different category than - - -

9 JUDGE PIGOTT: Well, I guess I hate to call
10 it a mode of proceedings, because that seems like an
11 easy way out, but if things are just fundamentally
12 wrong with the way the grand jury was treated - - -

13 MS. BORDLEY: Yes - - -

14 JUDGE PIGOTT: - - - would there be - - -
15 do you see any - - - any room in there for - - - I
16 get your sufficiency - - -

17 MS. BORDLEY: I - - -

18 JUDGE PIGOTT: - - - and I - - - and I get
19 the misconduct.

20 MS. BORDLEY: Yeah.

21 JUDGE PIGOTT: But it seems to me that
22 there can be cases that are in the middle.

23 MS. BORDLEY: Whatever cases may be in the
24 middle, and I don't disagree that there may be cases
25 in the middle, I think this clearly falls on the

1 legal sufficiency side.

2 JUDGE PIGOTT: And just leave it at that.

3 MS. BORDLEY: And so therefore it is barred
4 from appellate review.

5 CHIEF JUDGE LIPPMAN: As long as - - - as
6 long as what you did was inadvertent in relation to
7 the oath?

8 MS. BORDLEY: Well, if there was deliberate
9 prosecutorial misconduct, then we're - - - then we're
10 in People v. Huston grounds.

11 CHIEF JUDGE LIPPMAN: Right, so you just -
12 - -

13 MS. BORDLEY: And so that would be
14 different.

15 CHIEF JUDGE LIPPMAN: Okay.

16 MS. BORDLEY: But there's no indication
17 that this - - -

18 CHIEF JUDGE LIPPMAN: Okay, counselor,
19 you'll have your rebuttal. Let's hear from your
20 adversary.

21 MS. POWELL: Good afternoon. My name is De
22 Nice Powell, and I'm here representing Sidney Wisdom.

23 What is at stake here is the grand jury as
24 an institution that protects not only Sidney Wisdom,
25 but all - - -

1 CHIEF JUDGE LIPPMAN: How was your client
2 prejudiced here?

3 MS. POWELL: He was clearly prejudiced in
4 this case.

5 CHIEF JUDGE LIPPMAN: Why? Tell us how.

6 MS. POWELL: Well, this is a case in which
7 the witness, who was not sworn in, was not a
8 peripheral witness. She was in fact not just an
9 important witness - - -

10 CHIEF JUDGE LIPPMAN: But after the fact,
11 why couldn't you view it that they cured the defect?

12 MS. POWELL: It wasn't cured because - - -

13 CHIEF JUDGE LIPPMAN: Why not?

14 MS. POWELL: - - - because they did too
15 little and just simply too late.

16 JUDGE PIGOTT: Well, they went to the court
17 each time, and - - - it wasn't - - - you know, they
18 went to the court to get the videotape in the first
19 place, right? And I think they went back when they
20 realized they had to go back. So it wasn't like they
21 were running around behind the courthouse doing this.
22 They - - - they asked for judicial imprimatur on it
23 and they got it twice.

24 MS. POWELL: Correct.

25 JUDGE PIGOTT: Right?

1 MS. POWELL: Correct.

2 JUDGE SMITH: You're not saying that the
3 prosecution did this in bad faith. They didn't say,
4 oh, here's a clever idea; we'll get unsworn
5 testimony.

6 MS. POWELL: Oh, no, no, no. I - - - I - -
7 - no, we're not attacking - - - you know, we're not
8 claiming that this is prosecutorial misconduct. What
9 we're saying - - -

10 JUDGE SMITH: Yeah, well, I guess, so maybe
11 really the question is don't you have to show - - -
12 the cases that show - - - that - - - that relate to
13 the integrity of the grand jury, aren't they almost
14 all, at least arguably, prosecutorial misconduct
15 cases?

16 MS. POWELL: No, Your Honor. This case is
17 - - - has - - - no, this case has to do with the
18 People's failure to conform to a - - - the framework
19 in which testimony must be presented to the grand
20 jury.

21 CHIEF JUDGE LIPPMAN: So it could be an
22 inadvertent mistake and still impair the integrity of
23 - - -

24 MS. POWELL: Absolutely.

25 CHIEF JUDGE LIPPMAN: - - - the grand jury

1 process?

2 MS. POWELL: If it - - -

3 CHIEF JUDGE LIPPMAN: With no real
4 prejudice? But you're saying the prejudice is what?

5 MS. POWELL: There is - - - well, I don't
6 have to show actual prejudice; the condition present
7 is - - - is possible pre - - - prejudice, and clearly
8 there was possible prejudice in this case where - - -

9 JUDGE GRAFFEO: Which was what?

10 MS. POWELL: - - - where the witness who
11 was not sworn in was Amy Donaldson, and she was the
12 sole witness who gave an account about the incident
13 and also identified the defendant.

14 JUDGE SMITH: What is the likelihood that
15 if they had remembered to give the oath before - - -
16 before she testified, her testimony would have been
17 so different that the grand jury would have said no
18 true bill.

19 MS. POWELL: Based on this record, there
20 was a likelihood. Remember, this is a case in which
21 she sustained very serious injuries. She was shot
22 multiple times, she was stabbed multiple times, and
23 as a result of those injuries, she was hospitalized
24 for almost two months.

25 JUDGE SMITH: But how does that mean she

1 would have testified differently if - - - I mean, I -
2 - - I understand that the oath is very important, but
3 this woman in this case, you really think that - - -
4 that if she had - - - that - - - yeah, that she would
5 have testified differently if they'd remembered to
6 swear her?

7 MS. POWELL: Judge, this is a case in which
8 she herself stated that as a result of her injuries
9 her memory was impaired. Testimony must be based on
10 your present recollect - - -

11 JUDGE ABDUS-SALAAM: Counsel, she testified
12 at trial, and it was essentially the same testimony
13 that she gave to the grand jury in the unsworn
14 version. So the trial took place a lot later than
15 the two weeks after she gave her first grand jury
16 testimony that was unsworn. So how does that - - -
17 how does the memory thing work for you here?

18 MS. POWELL: Because what the focus of the
19 analysis has to be is prejudice in the grand jury.
20 And this court - - - the - - - the argument that the
21 People had advanced on appeal, that you look at the
22 consistency, you know, did the witness say the same
23 thing before the grand jury testimony? Did she say
24 the same thing during it and after it? This court
25 soundly rejected that analysis in People v. Sayavong.

1 walk through the transcript again. Would you agree
2 with that?

3 MS. POWELL: They couldn't - - - I'm sorry?

4 JUDGE PIGOTT: Just walk her through the
5 testimony that she gave before.

6 MS. POWELL: I think that if they - - -
7 that's an alternative version. I think they - - -

8 CHIEF JUDGE LIPPMAN: She said that would
9 have been prejudicial to the defendant.

10 JUDGE GRAFFEO: Wouldn't you be standing
11 here arguing that they heard her story twice and that
12 was - - -

13 MS. POWELL: Well, see this is the thing.
14 You just - - -

15 JUDGE GRAFFEO: - - - clearly prejudicial?

16 MS. POWELL: - - - if it's transcribed,
17 then you read the paper. There's no reason to speak
18 what's on the paper. We would allow - - -

19 JUDGE RIVERA: So you're saying they could
20 have given her the transcript and then just asked the
21 question - - -

22 MS. POWELL: And just asked - - -

23 JUDGE RIVERA: - - - is everything you said
24 the last time, as shown in this transcript - - -

25 MS. POWELL: Is it true?

1 JUDGE RIVERA: - - - is it the truth?

2 MS. POWELL: Is it the truth?

3 JUDGE RIVERA: Was it the truth? Did you
4 say the truth at that time?

5 MS. POWELL: Of course - - -

6 JUDGE RIVERA: There was no need to re-read
7 it?

8 MS. POWELL: No, they just simply had to
9 reacquaint her with her prior examination.

10 CHIEF JUDGE LIPPMAN: So if they say do you
11 remember your prior testimony, that's not enough?

12 MS. POWELL: No.

13 JUDGE SMITH: Weren't you saying a minute
14 ago that it's a - - - that once somebody has been - -
15 - has given - - - that consistency among statements
16 is - - - doesn't justify the failure to give the oath
17 because, of course, once she said it the first time
18 she's going to say it the second time? Why doesn't
19 the same reasoning - - - why doesn't that make it
20 impossible for them to cure their error?

21 MS. POWELL: Because well, again, the focus
22 of the analysis has to be on the grand jury
23 proceeding. That's what we're talking about. Was
24 the grand jury proceeding impaired? Was the
25 integrity impaired? Now, once she - - - once you do

1 a do-over, at least at that point the - - - the man's
2 not indicted based on the strength or the weaknesses
3 of what you said. She has to have an opportunity - -
4 -

5 JUDGE SMITH: Well, wouldn't - - -

6 MS. POWELL: - - - to reflect.

7 JUDGE SMITH: - - - wouldn't you be
8 standing here - - - as Judge Graffeo said, you'd be
9 standing here saying, oh, yeah, she said it under
10 oath the second time, but that - - - that was after
11 they gave her a phony examination the first time.
12 What was she going to say?

13 MS. POWELL: But then - - - then basically
14 what Your Honor is saying is that the oath has no
15 meaning, has no function, has no purpose. And
16 clearly this court, in virtually every case that I've
17 read, understands that the oath has a function - - -

18 JUDGE SMITH: Well - - -

19 MS. POWELL: - - - as a - - -

20 JUDGE GRAFFEO: I think we're just trying
21 to figure out if we were to agree with you, what do
22 we recommend would be the cure, if there is a cure?

23 MS. POWELL: Well - - -

24 JUDGE GRAFFEO: And I can't say I'm
25 terribly comfortable with what you've suggested yet.

1 JUDGE PIGOTT: Different grand jury? A new
2 one?

3 MS. POWELL: Oh, I - - - that would have
4 been the option as well. I think that they should
5 have - - -

6 CHIEF JUDGE LIPPMAN: You think it's fatal,
7 is that what you're saying? This is a fatal mistake,
8 no way to really cure it and you need another grand
9 jury?

10 MS. POWELL: That would be - - - in the
11 ideal situation, that would be correct.

12 CHIEF JUDGE LIPPMAN: And right after that,
13 what would be the best way? Repeat again; I didn't
14 quite get - - -

15 MS. POWELL: Put her under oath, let her
16 reflect, and then re-examine her.

17 JUDGE RIVERA: Let's assume we say that the
18 alternative that you've suggested about either
19 letting her read the transcript or - - - or a full
20 do-over, let's assume for one moment we agreed with
21 that. What - - - what if on reading the transcript
22 she says I don't recall - - - I don't recall having
23 given this, or I don't recall the event, so I cannot
24 now say whether or not they're true or untrue. What
25 - - - where - - - where are the People left if she

1 says I just can't remember?

2 MS. POWELL: That's for the People to
3 decide how to proceed.

4 JUDGE SMITH: They're left without a case,
5 is your answer.

6 MS. POWELL: They might very well be
7 without a case, but that is what should happen and
8 should - - -

9 JUDGE SMITH: Just as they would if the
10 witness had died before the grand jury.

11 MS. POWELL: If she can't recall - - - if
12 she can't recall, based on her present recollection -
13 - - I mean, that's what testimony is.

14 JUDGE ABDUS-SALAAM: Well, then what
15 purpose would it have served to give her the
16 transcript of the previous testimony and have her
17 read it? Was there even any - - - any evidence in
18 the record that, given her injuries, she could read
19 it?

20 MS. POWELL: Could read? Well, I - - -

21 JUDGE ABDUS-SALAAM: Yeah. You said she
22 was terribly injured.

23 MS. POWELL: Well, there was nothing - - -
24 there was no - - -

25 JUDGE ABDUS-SALAAM: She was hit in the

1 head.

2 MS. POWELL: - - - mention of injury to her
3 eyesight.

4 JUDGE ABDUS-SALAAM: Okay.

5 MS. POWELL: What she said was that she was
6 injured, and as a result of those injuries that her
7 memory had been impaired. In fact, she said since -
8 - -

9 JUDGE RIVERA: Could they have played it
10 back for her?

11 MS. POWELL: Played the transcript?

12 JUDGE RIVERA: Could she have seen a tape
13 recording of it?

14 MS. POWELL: Of her own testimony?

15 JUDGE RIVERA: Yes, as opposed to read a
16 transcript of it.

17 JUDGE SMITH: If you can do one, you can do
18 the other, presumably.

19 MS. POWELL: I imagine - - - the point is
20 that she - - - they - - - at the very least, the
21 People had to reacquaint her with her testimony so
22 that - - - so that at least we know we can know,
23 based on the record, that in fact she was even
24 talking about the same statement. We don't even know
25 whether or not - - - you know, because the way that

1 the prosecutor - - -

2 CHIEF JUDGE LIPPMAN: So you're saying they
3 didn't cure, even if they had the capa - - - even if
4 you accept the fact they had the capacity to cure - -
5 -

6 MS. POWELL: They didn't do it in this
7 case.

8 CHIEF JUDGE LIPPMAN: - - - in this case
9 they did not.

10 MS. POWELL: Correct.

11 CHIEF JUDGE LIPPMAN: I see.

12 JUDGE PIGOTT: It's not past recollection
13 recorded?

14 MS. POWELL: I'm sorry?

15 JUDGE PIGOTT: It's not past recollection
16 recorded, which is an exception to the hearsay rule?
17 I mean, it - - - if she says that's what I said on
18 whatever the date was, and I don't have a present
19 recollection - - -

20 MS. POWELL: But she has to - - -

21 JUDGE PIGOTT: - - - but that's - - - I
22 remember being there.

23 MS. POWELL: It's not just her
24 recollection; it has - - - she has to be able to
25 state it under oath. That's the issue here.

1 JUDGE PIGOTT: No, I understand that, but I
2 mean, why - - - under oath she doesn't say that,
3 which is, I think, what she did.

4 MS. POWELL: No.

5 JUDGE PIGOTT: Yeah, that was me.

6 MS. POWELL: She's - - - no, the question
7 was asked - - - it was completely botched. The
8 prosecutor said do you remember giving a statement -
9 - - a statement. And we know from the record she
10 made multiple statements. And then he asked, you
11 know, do you swear - - - did you swear, which - - -
12 and then she says yes. And that - - - that, on its
13 face, shows that this witness could not remember what
14 happened - - -

15 JUDGE ABDUS-SALAAM: Ms. Powell - - -

16 MS. POWELL: - - - two weeks ago.

17 JUDGE ABDUS-SALAAM: - - - why isn't it
18 your challenge now, to this lack of an oath, a
19 challenge to the sufficiency of the evidence and
20 competency?

21 MS. POWELL: Now, the People make this
22 argument, and I - - - I can't emphasize it enough.
23 This has nothing to do with the quantum of evidence.
24 It has nothing to do with the sufficiency of the
25 evidence. That - - - that - - - you know, you can

1 look at that when you look at the prejudice prong,
2 but at - - - but when you look at whether or not the
3 integrity of the grand jury proceeding was impaired,
4 what - - - as - - - what is at issue is the prosec -
5 - -

6 JUDGE SMITH: Well, you're saying it was
7 impaired by their hearing evidence they shouldn't
8 have heard. Doesn't that have something to do with
9 the competency of the evidence?

10 MS. POWELL: No, it has to do with their
11 failure to follow the framework in which testimony
12 must be presented to the grand jury. It is mandated
13 by statute, it has to be done by oath, and it's a
14 requirement that fosters truthful and accurate
15 testimony before the grand jury. And this court has
16 repeatedly condemned any practice, any failure to
17 follow - - - follow a statutory provision that - - -
18 that is designed to protect or safeguard truthful
19 testimony.

20 And we can look just - - - you have to look
21 no farther than People v. Sayavong. In Sayavong, the
22 People violated the secrecy rule, and this court
23 acknowledged that the secrecy rules are designed to
24 foster truthful and accurate testimony before the
25 grand jury. And in that case, this court reversed

1 and dismissed the indictment after a jury verdict.

2 CHIEF JUDGE LIPPMAN: Okay. Thanks,
3 counsel.

4 Counselor, rebuttal?

5 MS. BORDLEY: Yes, just two small matters.
6 First, to the extent that defense counsel was
7 suggesting that this was some kind of structural
8 mistake, I would like to emphasize we did give an
9 oath. It wasn't that we were completely disregarding
10 it; we just gave it late. And - - -

11 CHIEF JUDGE LIPPMAN: Yeah, but that's
12 pretty much outside the - - - you would agree that
13 this is very much outside the norm.

14 MS. BORDLEY: Well, it's a very unusual
15 mistake to make, because it's not a mistake people
16 often make. I don't - - - I'm not aware of anybody
17 ever out - - - anyone else ever making the mistake.

18 CHIEF JUDGE LIPPMAN: Yeah, I mean, your
19 argument is almost it's so unusual, so we did the
20 best we could. But it is outside the structure of
21 how we do our business with a grand jury, no?

22 MS. BORDLEY: Well, it is true that imp - -
23 - oaths - - - oaths are very important, but I should
24 - - - I should also point out, we introduce a lot of
25 unsworn evidence in front of the grand jury and at

1 trial all the time. We - - -

2 CHIEF JUDGE LIPPMAN: Yeah, but this is the
3 principal witness; it's the only real witness.

4 MS. BORDLEY: We sometime - - - we put in
5 excited utterances when we don't have complainants
6 willing to testify in domestic violence cases, and
7 sometimes our case is mostly the excited utterance to
8 the police officer. We put in dying declarations
9 when we don't have the homicide victim to testify.
10 We put in medical records - - -

11 JUDGE PIGOTT: Yeah, but there's a hearsay
12 exception that allows - - -

13 MS. BORDLEY: Yes.

14 JUDGE PIGOTT: - - - that justifies the
15 truthfulness of what's said.

16 MS. BORDLEY: Yes.

17 JUDGE PIGOTT: And I think what we're
18 talking about here is, is there anything to justify
19 the truthfulness of what was said here.

20 MS. BORDLEY: Well, I think there's
21 evidence to show that it didn't - - - that the
22 introduc - - - that the belated administration of
23 this oath, where she does say I'm willing to say that
24 I'm going to put myself under the penalty of perjury
25 for this prior statement; I'm putting myself on the

1 hook and saying that this is true. I mean, she had a
2 chance to think about it. She could have said no,
3 don't come to my house a second time; I don't want to
4 - - - I gave you a statement; I'm not going to give
5 you anything else. But no, she didn't. She said - -
6 -

7 JUDGE RIVERA: Why aren't the alternatives
8 that she suggests, either let her see the transcript,
9 let her view the video - - - why don't those things
10 work?

11 MS. BORDLEY: They might have worked. They
12 might have been done here. Our only problem is the
13 record doesn't show whether those things were done.

14 JUDGE RIVERA: Well, you're not suggesting
15 they were done. Are you suggesting - - -

16 MS. BORDLEY: They could - - - they might
17 have been done.

18 JUDGE RIVERA: - - - they were done?

19 MS. BORDLEY: I'm assuming that the
20 prosecutor did not - - -

21 JUDGE RIVERA: Then we wouldn't have an
22 appeal.

23 MS. BORDLEY: - - - show out of nowhere and
24 suddenly say, okay, do you want to swear to something
25 today? I'm assuming, in fact, he did talk to her. I

1 - - - I would think it's - - - I can't say it
2 definitely happened; I certainly think it's possible
3 that he went over with what she said.

4 The other thing that's very important to
5 note with respect to this is a witness sort of - - -
6 a person knows whether they tell the truth. This
7 wasn't a very long statement, so she probably did
8 remember what she said.

9 CHIEF JUDGE LIPPMAN: Yeah, yeah, but
10 probably - - -

11 MS. BORDLEY: She also knows whether she
12 was deliberately lying.

13 CHIEF JUDGE LIPPMAN: But counsel, probably
14 is maybe not good enough.

15 MS. BORDLEY: No - - - no, Your Honor, but
16 I think it's very important - - -

17 CHIEF JUDGE LIPPMAN: She's got to be
18 certain that what she said - - - and that yeah,
19 that's what I said; it's the truth.

20 MS. BORDLEY: This is what she was willing
21 to say.

22 JUDGE RIVERA: And why not more clearly
23 ask?

24 MS. BORDLEY: What?

25 JUDGE RIVERA: But why not more clearly

1 ask? What about - - - let's say we assume that
2 you're right; you could go back and just ask her.
3 Let's - - - your adversary says, but you know what,
4 you really didn't make it very clear on the record,
5 so we're not really clear that she is indeed
6 confirming the truth and veracity of her prior
7 statement.

8 MS. BORDLEY: She unequivocally swore to
9 the truth of that statement that she made.

10 JUDGE GRAFFEO: Do we know if she - - -

11 MS. BORDLEY: And we know - - -

12 JUDGE GRAFFEO: Do we know if she had her
13 transcribed - - - if she had a transcription of what
14 - - -

15 MS. BORDLEY: No.

16 JUDGE GRAFFEO: - - - she previously said?

17 MS. BORDLEY: It does not appear in the
18 record.

19 JUDGE GRAFFEO: We can't show that, right?

20 MS. BORDLEY: It does not appear in the
21 record, but I do think we know - - -

22 JUDGE GRAFFEO: How much time - - -

23 MS. BORDLEY: - - - that she - - -

24 JUDGE GRAFFEO: How much time elapsed?

25 MS. BORDLEY: Fifteen days. But we - - -

1 but she would remember if she had been lying. And
2 she would have remembered, and she - - - and she was
3 capable of saying am I willing - - - am I willing to
4 put myself under oath for this. And she decided to
5 go and do it. She did it - - -

6 JUDGE RIVERA: Well, she might remember she
7 doesn't remember, but she might say to herself I'm
8 sure I must have told the truth. And I think that's
9 part of the conundrum that your adversary's
10 suggesting is embedded in the way the People tried to
11 resolve the initial error - - -

12 MS. BORDLEY: But if she remembers - - -

13 JUDGE RIVERA: - - - or address the error.

14 MS. BORDLEY: But if she recalls that she
15 was trying her best to answer the prosecutor's
16 questions honestly, then she's absolutely correct,
17 even if she cannot remember every comma, every
18 sentence.

19 CHIEF JUDGE LIPPMAN: You mean - - - let me
20 ask you, so if she doesn't remember exactly what she
21 said, but I guess there's no way - - - we certainly
22 don't know, on this record, you know, that she was
23 pointed out to what she said, and she says, yeah, I -
24 - - I know I was telling the truth. That "I do",
25 that's good enough?

1 MS. BORDLEY: I think it's good enough,
2 especially in this case where the moment - - -

3 CHIEF JUDGE LIPPMAN: Why especially in
4 this case?

5 MS. BORDLEY: Because the moments after the
6 crime, while defendant may still have been in the
7 victim's apartment, she said - - - she told the
8 police Sidney did it. And when she's put under oath
9 at trial, when she gives the oath the first thing,
10 she gives a detailed description of the crime with
11 such - - -

12 CHIEF JUDGE LIPPMAN: Yeah, but what if she
13 doesn't remember the detailed description of the
14 crime that she gave and just remembers that yeah, I
15 told him the truth that this guy did it. That's
16 enough?

17 MS. BORDLEY: But the fact that those
18 things are absolutely similar tends to show that she
19 was telling the truth - - -

20 CHIEF JUDGE LIPPMAN: Okay.

21 MS. BORDLEY: - - - and that she - - -

22 CHIEF JUDGE LIPPMAN: Okay.

23 MS. BORDLEY: - - - and that her story
24 wasn't going to change. She wasn't lying to us. Her
25 story wasn't going to change.

1 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
2 you both. Appreciate it.

3 (Court is adjourned)

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Sidney Wisdom, No. 107, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

AAERT Certified Electronic Transcriber (CET**D-492)

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: May 14, 2014