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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

(Papers sealed)

-against-

No. 227

SEAN HAWKINS,

Appellant.

20 Eagle Street
Albany, New York 12207
November 19, 2014

Before:

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

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 227, People v.
2 Hawkins.

3 Counsel, you want any rebuttal time?

4 MR. WARREN: I would respectfully request
5 two minutes, Your Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes, sure.
7 Go ahead, you're on.

8 MR. WARREN: May it please the court, my
9 name is Michael Warren, and I represent the appellant
10 Shawn Hawkins.

11 There is clearly a fundamental right issue
12 here, and that is the right of a - - - fundamental
13 right to a free tri - - - to a - - -

14 JUDGE PIGOTT: We're going to get into - -
15 -

16 MR. WARREN: - - - public trial.

17 JUDGE PIGOTT: We're going to get into 330
18 and 440 again, right?

19 MR. WARREN: Yeah, right.

20 JUDGE READ: That's right.

21 MR. WARREN: We - - - we - - - we are. We
22 are.

23 CHIEF JUDGE LIPPMAN: What is - - - what is
24 the abuse of discretion, counsel?

25 MR. WARREN: The abuse of discretion - - -

1 CHIEF JUDGE LIPPMAN: In this case to - - -
2 to not treat it as a 440?

3 MR. WARREN: To not treat it as a 440, Your
4 Honor, is - - - is that this - - - you have to look
5 at the facts of this particular case.

6 CHIEF JUDGE LIPPMAN: Yes, in this
7 particular case.

8 MR. WARREN: And the facts in this
9 particular case - - -

10 CHIEF JUDGE LIPPMAN: Where is the abuse?

11 MR. WARREN: The abuse of discretion would
12 be based on the unique set of circumstances. In this
13 particular case, the - - - note, the judge - - -
14 neither the judge, neither the defense attorney,
15 neither the prosecutor knew about the public trial
16 violation. That - - - that became known at a - - -
17 in fact, after the summation that became known by
18 virtue of the different - - -

19 CHIEF JUDGE LIPPMAN: So therefore it had
20 to be procedurally improper, right?

21 MR. WARREN: Yes, it - - - it - - - yes,
22 exactly and that - - - and then it came - - - became
23 known after - - -

24 CHIEF JUDGE LIPPMAN: So we have - - - so
25 apropos what we're just discussing, impossible to

1 know beforehand, therefore, we can - - - or the judge
2 could have made it better?

3 MR. WARREN: Absolutely, the judge had - -
4 - only one alternative and that was to set aside the
5 verdict and grant a new trial. And as Your Honors
6 know, the purpose in - - - in the - - - in the - - -
7 in - - - in the 330.30 subdivision 1 requirement of -
8 - - of raising the objection - - -

9 CHIEF JUDGE LIPPMAN: Right.

10 MR. WARREN: - - - and a lot of these have
11 occurred in - - - in jury trials - - - of raising the
12 objection is so that a judge can make a - - - fashion
13 a - - - a reasonable remedy based on that objection.

14 JUDGE SMITH: Well, was - - - wasn't there
15 some dispute about the facts here? I mean the - - -
16 the - - - the People were - - - were questioning
17 whether the courthouse was - - - court - - -
18 courtroom was closed at all.

19 MR. WARREN: I'm sorry, Judge?

20 JUDGE SMITH: Wasn't there a dispute about
21 the facts here? Weren't the People questioning
22 whether the courtroom was closed at all?

23 MR. WARREN: Well, the - - - the People
24 were questioning whether the courtroom was closed at
25 - - - at all but that was based on pure speculation.

1 JUDGE SMITH: Well, I mean, if it's - - -

2 MR. WARREN: What we have - - - what we

3 have, Your Honor - - -

4 JUDGE SMITH: Shouldn't - - - shouldn't

5 they have had an opportunity to have a hearing which

6 you would have under a 4 - - - on a - - - in a - - -

7 in a regular 440?

8 MR. WARREN: Well, Your Honor, this - - -

9 this application was made under Section 330.30

10 subdivision 1.

11 JUDGE SMITH: Yeah, but it's got it a

12 problem - - -

13 MR. WARREN: And - - - and - - -

14 JUDGE SMITH: - - - under 330 because it's

15 not on facts appearing in the record, right?

16 MR. WARREN: Yes, and - - - and under - - -

17 under 440, they would have a right to a hearing.

18 CHIEF JUDGE LIPPMAN: Yeah, but there's the

19 sign. I guess it was saying does the sign

20 automatically mean that it wasn't a public trial?

21 MR. WARREN: Your Honor, what happened here

22 - - -

23 CHIEF JUDGE LIPPMAN: You know what I'm

24 saying? And - - - and - - -

25 MR. WARREN: Yeah, oh, I understand

1 clearly. I understand - - -

2 CHIEF JUDGE LIPPMAN: - - - what Judge
3 Smith is saying - - -

4 MR. WARREN: Sure.

5 JUDGE SMITH: - - - do we need a hearing to
6 figure out exactly what happened or do we know what
7 happened?

8 MR. WARREN: We know what happened. We
9 know that there were - - - not only one sign, but
10 there were two signs that are - - - that were put up
11 - - -

12 CHIEF JUDGE LIPPMAN: So your position - -
13 -

14 MR. WARREN: There - - - there was a sign
15 put up by - - - that was observed by two separate
16 attorneys.

17 CHIEF JUDGE LIPPMAN: Yeah, but - - - but
18 your position we see the signs, no public trial, end
19 of story, no hearing necessary?

20 MR. WARREN: That's correct because under
21 this - - - in this situation, you cannot fashion a
22 remedy under these unique set of facts.

23 JUDGE SMITH: So what - - - well, how - - -
24 do we know from the record when the - - - the closure
25 came to the defense counsel's attention?

1 MR. WARREN: Your Honor, we know that - - -
2 that - - - in terms of one attorney, one attorney
3 advised the - - - the defense counsel approximately
4 one week after summations that - - - that - - - that
5 he observed a sign on the door.

6 JUDGE SMITH: Well, what - - -

7 MR. WARREN: The other - - - the second
8 attorney advised defense counsel that he observed a
9 sign on the door approximately two weeks after
10 summation.

11 JUDGE SMITH: Now - - -

12 MR. WARREN: And - - - and - - - and a - -
13 - and so there was a short time - - - distance of
14 time from that point to the time that the judge
15 rendered her verdict.

16 JUDGE SMITH: I mean, I guess - - - I guess
17 I'm - - - to me there's something a little weird
18 here.

19 MR. WARREN: Sure.

20 JUDGE SMITH: The - - - I mean they didn't
21 just meet in a - - - happened to meet over lunch a
22 week or two weeks after verdict and say hey, you
23 know, that was funny; I saw that sign on the door
24 where you were trying that case. Doesn't it - - -
25 the - - - the People suspect that the - - - that the

1 defense counsel knew it all along and went out - - -
2 went out looking for witnesses to prove it with. If
3 he knew it all along - - - if he knew it before
4 verdict, you've got a preservation problem, don't
5 you?

6 MR. WARREN: If he knew it before verdict,
7 you have a pres - - - a preservation problem, but - -
8 - but - - -

9 JUDGE SMITH: That's something that - - -

10 MR. WARREN: But - - -

11 JUDGE SMITH: Isn't that something that
12 should be investigated at a 440?

13 MR. WARREN: Well, that'd certainly
14 something that can be investigated in a 440.

15 JUDGE PIGOTT: You were the trial lawyer,
16 right?

17 MR. WARREN: Probably should be
18 investigated in a 440, but in this particular case
19 what you have is a unique set of circumstances in
20 which the judge, based on what was available to her,
21 made her own inquiry.

22 JUDGE PIGOTT: Let me ask you about that.

23 MR. WARREN: And - - - and as a result of
24 that she set aside the verdict.

25 JUDGE PIGOTT: I want - - - I want to - - -

1 I want to - - - in your brief - - -

2 MR. WARREN: Yes.

3 JUDGE PIGOTT: - - - you say at page 4,
4 "After conducting an independent investigation, the
5 court" - - - did what - - - what she did.

6 MR. WARREN: Correct.

7 JUDGE PIGOTT: But she says in her - - - in
8 the record, she says, "I do want to correct one - - -
9 address one brief thing briefly" - - -

10 MR. WARREN: She - - - yeah, I know, she
11 was going to say that - - - she didn't conduct an
12 investigation.

13 JUDGE PIGOTT: Where - - - where he alludes
14 to his argument and in a footnote to the court,
15 independent investigation of when the sign had been
16 put on the courtroom. "So we are clear, the words
17 'independent investigation' suggest - - - I think
18 they suggest some conduct by the court that did not
19 take place. We'll put it this way. There was no
20 independent investigation. An independent
21 investigation and my ruling setting aside the verdict
22 was based upon evidence presented at the court."

23 MR. WARREN: Right.

24 JUDGE PIGOTT: So your statement in your
25 brief that says that she conducted an - - - an

1 independent investigation is incorrect, I assume?

2 MR. WARREN: That was - - - that was an
3 oversight, yes, but - - - but - - -

4 JUDGE READ: What did the sign say, by the
5 way, that - - -

6 MR. WARREN: The sign said the - - - there
7 were - - - the sign said the - - - the courtroom is
8 closed. Do not enter, and I - - - I can't remember
9 the exact words, but it was do not enter the
10 courtroom. It's closed. Come back at a later - - -

11 CHIEF JUDGE LIPPMAN: But it was - - - it
12 was really - - - in practice, it was meant to address
13 the calendar situation of the judge, apparently?

14 MR. WARREN: I don't think it was meant to
15 address the calendar situation of the judge. That is
16 - - -

17 CHIEF JUDGE LIPPMAN: Well, what - - -
18 wasn't it - - -

19 MR. WARREN: That is not re - - -

20 CHIEF JUDGE LIPPMAN: - - - just a bar to
21 the courtroom, period?

22 MR. WARREN: The - - - the courtroom, there
23 was just a bar to the courtroom, period, and that's
24 what makes - - - and that's what makes this
25 particular case scream out for - - -

1 CHIEF JUDGE LIPPMAN: The judge did have
2 these calendars before or after, whatever it was?

3 MR. WARREN: She had calendars before or
4 after, but the judge - - - the judge did - - - did -
5 - - was unaware of the fact that the courtroom was
6 closed. The - - - the court officers were unaware of
7 the fact the courtroom is closed. And as Your Honor
8 knows, court officers are the ones who - - - who put
9 these signs up based on the judge's admonition - - -
10 or instructions they be put up based on what is going
11 on, whether there's a - - -

12 JUDGE ABDUS-SALAAM: Counsel - - -

13 MR. WARREN: - - - whether there is a - - -
14 a - - - an undercover or whatever.

15 JUDGE ABDUS-SALAAM: Mr. Warren, so what -
16 - -

17 CHIEF JUDGE LIPPMAN: Judge - - - Judge
18 Abdus-Salaam.

19 JUDGE ABDUS-SALAAM: - - - what - - - what
20 - - - what makes this - - - this situation so unique?
21 If - - - if the - - - if the judge usually directs
22 court officers to put the signs up and the court
23 officers didn't know about it and the judge didn't
24 know about it, the clerk didn't know about it, how -
25 - - what makes it unique?

1 MR. WARREN: What makes it unique is - - -
2 is that - - - and - - - and when I say unique, I'm -
3 - - I'm saying that - - - that in the classic
4 situation involving preservation, you have a jury,
5 and - - - and the case is tried before jury such as -
6 - - as in Antommarchi, such as in Alvarez (ph.),
7 which you all are familiar with.

8 And - - - and if, in fact, a defense
9 attorney does not raise an objection to an error
10 during the course of that jury trial, then it's not
11 preserved. Now - - - but in this particular case,
12 the defense attorney did not have the - - - the
13 opportunity during the - - - during the period of the
14 trial to - - - to - -to -to - to-to make a - - - an
15 objection simply because neither the defense
16 attorney, neither the trial judge, neither - - - even
17 the prosecutor was unaware.

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

21 MR. WARREN: Thank you.

22 MR. TWERSKY: Your Honor, my name is Sholom
23 Twersky, and I represent the respondent. Let's - - -

24 CHIEF JUDGE LIPPMAN: Counsel, why isn't
25 this open and shut that this is a lack of a public

1 trial; we know that means.

2 MR. TWERSKY: Well, well, first of all - -

3 -

4 CHIEF JUDGE LIPPMAN: Why - - - why in this
5 unique circumstance that your adversary talks about,
6 why isn't that the end of the story?

7 MR. TWERSKY: Well, the first thing my ad -

8 - -

9 CHIEF JUDGE LIPPMAN: Or is it not so
10 unique in your view?

11 MR. TWERSKY: It's - - - it's not so
12 unique.

13 CHIEF JUDGE LIPPMAN: Why?

14 MR. TWERSKY: The - - - the first thing
15 that my adversary said that if the defense counsel
16 knew about it before the verdict, there's a
17 preservation problem. Well, then I guess there's a
18 preservation problem, because he knew it before the
19 verdict. That is undisputed.

20 JUDGE PIGOTT: This was - - - this was a
21 non-jury trial, right?

22 MR. TWERSKY: This is a non-jury trial.

23 About one to two weeks after - - - the - - - the two
24 Legal Aid attorneys allegedly saw a sign on two
25 respective days of the trial. They then informed the

1 defense attorney. The - - - there was no verdict
2 yet. This was sev - - - at least several days before
3 February 23rd, which was the verdict.

4 JUDGE PIGOTT: But testimony was over.

5 MR. TWERSKY: Testimony was over, but there
6 were two other adjourn dates before the verdict.

7 JUDGE PIGOTT: Right.

8 MR. TWERSKY: He could have advanced the
9 calendar. He just found out that - - - that there
10 was a - - - allegedly, a public trial violation. He
11 should want a new trial, right? He - - -

12 JUDGE SMITH: Well, your - - - your - - -
13 your point is he wanted to decide - - - wanted to see
14 how the verdict came out before he said - - -

15 MR. TWERSKY: Well, I don't know how - - -
16 if there's any other way to look at it, Your Honor,
17 because - - -

18 JUDGE PIGOTT: What's wrong with that?

19 MR. TWERSKY: - - - right before the
20 verdict - - -

21 JUDGE PIGOTT: What's wrong with that? I
22 mean if - - - if you think the trial went well - - -

23 MR. TWERSKY: Your Honor, the - - -

24 JUDGE PIGOTT: Well, if you think the trial
25 went well and you - - - and - - - and you got a shot

1 at an acquittal, wouldn't it be malpractice to say
2 oh, I'm going to - - - I'm going to clear this trial
3 because I think the - - - the sign's wrong?

4 MR. TWERSKY: Your Honor, this - - - this
5 court and many courts have said over and over and
6 over again that that kind of gamesmanship where you
7 hold back on a potential reversible error to first
8 see if you get an acquittal or not, that is absolute
9 - - - should not be sanctioned in any way, shape, or
10 form, and that's - - - it's the only way you can look
11 at this record. Right before the verdict the - - -

12 JUDGE PIGOTT: Well, one of the arguments
13 that you make, I think, is that it - - - that the - -
14 - the closing was de minimis, right?

15 MR. TWERSKY: Your Honor - - -

16 JUDGE PIGOTT: So it wasn't an open-and-
17 shut. It wasn't like he said, you know, I'm - - -
18 all I got to do is tell - - - is - - - is bring this
19 up and I'm going to get a mistrial and I - - - and I
20 get a new trial. It's - - - it's an argument that's
21 going to be made at some point, and why don't - - -
22 why don't I wait and see. If there's - - - if
23 there's an acquittal, I don't have to make the
24 argument. If I get convicted, I can make it.

25 MR. TWERSKY: Your Honor, the proof of the

1 pudding was right before the verdict, the - - - Judge
2 Cyrulnik asked them anyone have any issues to bring
3 up?

4 JUDGE PIGOTT: Yeah.

5 MR. TWERSKY: He says nothing.

6 JUDGE PIGOTT: Right.

7 MR. TWERSKY: Then as soon as he finds out
8 he's con - - - that he's convicted and not acquitted,
9 he immediately moves for a mistrial.

10 JUDGE PIGOTT: Right.

11 MR. TWERSKY: The whole - - - no, but the
12 point is that mistrials are - - - have broad
13 discretion. As soon as you cross over into - - -
14 from pre-verdict to post-verdict, you're into the
15 very heavily circumscribed - - -

16 JUDGE PIGOTT: Well, let's assume this.

17 MR. TWERSKY: - - - where it has to appear
18 on the record.

19 JUDGE PIGOTT: Let's assume this. Let's
20 assume he brings it up just before she announces the
21 verdict and you say well, it's de minimis, Judge. I
22 - - - you know, I don't think it's any big deal and
23 she says that's - - - that's true and I'm going to
24 deny it.

25 MR. TWERSKY: Well, Your Honor, the - - -

1 the fact of the matter is, this was ripe for an
2 evidentiary hearing, because you had two attorneys
3 who two - - - one to two weeks earlier thought they
4 had seen a sign that said do not enter, trial in
5 progress.

6 JUDGE SMITH: Well, let's ass - - - assume
7 you're right that you - - - you - - - you're entitled
8 to a - - - to - - - to the kind of procedural
9 advantages you might have in a 440, the right to - -
10 - you - - - you look at the evidence. You - - - you
11 get to rebut it. The - - - the judge has a hearing
12 if there are material disputed facts. Then if he
13 wants to appeal, he has leave to appeal. Any reason
14 that he - - - he should have to wait until after
15 sentence to - - - to - - - to do this?

16 MR. TWERSKY: Your Honor, the - - - the
17 statute says he does. Particularly, it says cannot
18 grant until after judgment. That's for 44 - - -
19 that's for 440. So, in other words - - - and if you
20 need a hearing - - - if you - - - if facts are not
21 appearing on the record - - - because the fact is we
22 would have had a right to argue that under
23 440.10(3)(a), this defendant should have made these
24 facts appear on the record so it could be decided on
25 direct appeal and failed to do so.

1 JUDGE PIGOTT: Well - - -

2 MR. TWERSKY: There is no other case that
3 sort of screams out for that applicability of that
4 procedural bar - - -

5 JUDGE PIGOTT: So - - -

6 MR. TWERSKY: - - - like this one.

7 JUDGE PIGOTT: So you want a 440. You
8 think a 440 would have done it?

9 MR. TWERSKY: That's right.

10 JUDGE PIGOTT: All right.

11 MR. TWERSKY: I think this court should
12 remand it.

13 JUDGE PIGOTT: Well, let me ask you - - -

14 MR. TWERSKY: Let the defendant be
15 sentenced.

16 JUDGE PIGOTT: Well, wait - - - wait - - -

17 MR. TWERSKY: And let him bring a 440.

18 JUDGE PIGOTT: - - - wait - - - wait - - -
19 wait, one of the things that the Appellate Division
20 said that, "Even if the motion had been treated as a
21 440.10, it's not properly before us because the
22 defendant did not seek leave."

23 MR. TWERSKY: The Appellate Term was a
24 little confused about that.

25 JUDGE PIGOTT: Yeah, because he - - -

1 MR. TWERSKY: Because we were the one
2 appealing.

3 JUDGE PIGOTT: Because he - - - well, wait
4 a minute, because he won, so he doesn't have to ask
5 for permission to appeal. He - - - not at all.

6 MR. TWERSKY: Correct, but - - - but what
7 this - - - what this demonstrates is when you're
8 talking about if you don't put a fine wall between
9 330.30 and 440.40, you're asking for confusion.

10 JUDGE PIGOTT: Let's - - - let's - - -
11 well, they got confused, but the fact of the matter
12 is if he'd brought the 440, it would have been
13 granted, because she said - - - she said at the time,
14 when you're arguing it shouldn't have been a 330,
15 you're right. The - - - it was closed, and I'm going
16 to vacate the verdict.

17 MR. TWERSKY: Your Honor, we do not know
18 that she would have done that. Number one, we didn't
19 get a chance - - -

20 JUDGE PIGOTT: Well, wait a minute. Wait a
21 minute. Did she - - - did she do that? Didn't she
22 say I'm vacating it?

23 MR. TWERSKY: But we didn't get a chance to
24 argue the procedural bar under 3(a) and - - -

25 JUDGE PIGOTT: I - - - wait a minute. I'm

1 just - - - I'm just getting you to the fact. The
2 fact of the matter is she said, you know, I'm
3 vacating this verdict because the courtroom was
4 closed. You then appealed it. What's - - - what's
5 wrong with that? And - - - and frankly, you won on
6 the appeal.

7 MR. TWERSKY: But the - - - the fact is,
8 Your Honor, that under the - - - she had no statutory
9 authority to do what she did, and the fact is that we
10 were - - - we were precluded from bringing up the
11 procedural bar. And even on the merits, the fact is
12 there has been - - - there's nothing in those
13 affirmations that say what was going on in the
14 courtroom at the time that the sign was up.

15 CHIEF JUDGE LIPPMAN: Aside from the fact
16 that, really, your answer's the same as in the other
17 case, the judge can't do it. It's - - - the statute
18 says you can't do. That's really the only - - - the
19 only process argument, the only fairness argument.
20 It's really just that the statute says the judge
21 doesn't have any discretion, when we know, in certain
22 cases, the judge does treat it, in effect, as a 440.

23 MR. TWERSKY: Your Honor, I think this case
24 actually highlights it even more than perhaps the
25 other case, because in this case you be - - - just

1 like 330.30 and 440.10(3)(a), they both have this
2 policy consideration that you don't want defendants
3 holding back on claims of error during the trial and
4 then waiting to see and playing that kind of
5 strategic maneuvering to see what kind of verdict
6 they get before they bring it to the trial court's
7 attention.

8 JUDGE SMITH: Well, there - - - there - - -
9 and there - - - there are a couple of issues. I
10 mean, I - - - I understand your point that there are
11 certain procedures on a 440 that would have
12 benefitted you and you didn't get them and that's not
13 fair. But - - - but I - - - when I asked you before,
14 the hypothetical question, if you did have those
15 protections and - - - and well, he - - - he served
16 papers that said 440 right at the top but he complied
17 with every word of 440 except the one that says
18 you've got to wait until sentencing, what's the
19 problem with that? You - - - really, your only
20 answer to that is well, the statute says you can't do
21 it.

22 MR. TWERSKY: Right, the best I would say
23 is even under Wolf, Wolf doesn't seem to - - - to say
24 that there's actual - - - a holding from the court
25 regarding - - - they first say it's procedurally

1 defaulted. Then they also happen to mention that
2 also under - - - as a 440, as a de facto 440, it
3 wouldn't work. If the court wants to sort of off - -
4 - offer guidance - - - listen; don't bother bringing
5 up 440, because I'm going to deny it - - - that would
6 be - - - that would be fine, but to comply with the
7 dictates of the statute there - - - you - - - you
8 cannot do it any other way other than putting this
9 wall between the two.

10 JUDGE PIGOTT: You didn't - - - listen, you
11 didn't raise that in front of the judge.

12 MR. TWERSKY: I'm sorry?

13 JUDGE PIGOTT: You didn't raise that in
14 front of the judge. You - - - you actually address
15 the 330. The - - - the People filed an - - - an
16 affidavit in opposition to the motion that was made
17 at that time. And - - - and in the course of it,
18 your office talked to all the - - - you said I
19 informed by court officer this one that she didn't do
20 it. I was informed by court officer this one that -
21 - - that she didn't put the sign; I was informed by
22 this one. So - - - so she had on the merits your
23 arguments against the defense's arguments that the
24 signs had been posted.

25 MR. TWERSKY: Well, but Your Honor, I mean

1 those - - - those attorneys weren't subject to cross-
2 examination, could - - -

3 JUDGE PIGOTT: Well, you - - - wait, you
4 didn't arg - - - what I'm saying is you didn't
5 preserve your argument that you're making now.

6 MR. TWERSKY: Well, we did - - - we did
7 argue for an evidentiary hearing.

8 JUDGE PIGOTT: You - - -

9 MR. TWERSKY: That was - - - that was - - -
10 that's on the last line of the conclusion page of our
11 papers was and in any - - - in any event, in the
12 alternative, we need a hearing. Because, of course,
13 this is - - - this is right for hearing because we -
14 - - those attorneys weren't subject to cross-
15 examination. You have three court officers and one
16 court clerk who completely contradict what they say.
17 You have a rationale as to what the signs could have
18 been, having more to do with the calendar calls and
19 the way the judge was - - - was trying this - - - was
20 conducting this trial in between calendar calls.

21 So there may have been a very good
22 explanation, and again, I - - - I need to reiterate,
23 we don't know. The attorneys said to the ADA, I
24 don't know what - - - I don't remember what was going
25 on in the courtroom at the time. So if a - - - if a

1 sign was up that said do not enter and everybody
2 inside was taking a break, where's the public trial
3 violation?

4 That has to be - - - that has to be
5 examined at an evidentiary hearing. You could only
6 do that if you remand the case, allow the defendant
7 to be sentenced, and then allow a 440 to be brought,
8 where either the court could summarily deny it under
9 440.10(3)(a), or if not, then let them hold a
10 hearing.

11 CHIEF JUDGE LIPPMAN: Okay, counsel.

12 Thanks.

13 MR. TWERSKY: Thank you.

14 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

15 MR. WARREN: Very brief rebuttal. Your
16 Honor, even under the case of - - - of - - - that
17 came out of this court, People v. Alfaro, although
18 the decision went against the - - - the defendant in
19 that particular case, in a bench trial the - - - the
20 judge in a bench trial, because the judge is - - - he
21 or she is a trier of the fact and the law, the
22 applications can be made at a much later stage, and
23 that came out of Alfaro. Also, I thought that the -
24 - - the - - - the dissenting decision by - - - by
25 Justice Watson (ph.) in the Appellate Term was

1 certainly quite impressive in terms of the whole
2 issue of judicial fairness under judiciary law
3 Section 2 - - -

4 JUDGE ABDUS-SALAAM: So Mr. Warren?

5 MR. WARREN: Yes.

6 JUDGE ABDUS-SALAAM: Are you suggesting
7 that we have a different rule for bench trials than
8 for jury trials? If - - - if the judge is the trier
9 of fact, we should have one rule for 330 as opposed
10 to - - -

11 MR. WARREN: No, I'm not - - - I'm not - -
12 - I'm not suggesting that there are different rules.
13 But I'm - - - I'm - - - I'm suggesting that in a
14 bench trial, a judge has somewhat lighter - - - wider
15 latitude, because going back to the - - - the case
16 before a jury, when the - - - and that's why the
17 objection has to be made right away when the - - -
18 when the - - - when the error occurs so the judge can
19 timely fashion a remedy before the jury on the record
20 at that time. That's what I think.

21 JUDGE PIGOTT: But - - - but isn't Mr.
22 Twersky right in the - - - in the sense that - - -
23 that you - - - the - - - the claim is made that the
24 sign was there, and there's two lawyers that say that
25 it was there.

1 MR. WARREN: That's correct, affidavits.

2 JUDGE PIGOTT: This - - - this judge
3 apparently was trying this thing piecemeal, so to
4 speak. In other words, she was handling things in
5 between, and he wants to make the argument - - - or
6 has made the argument, that maybe the sign was only
7 there when some - - - something was being done, let's
8 say with custody or something like that, and it
9 didn't affect the public trial. So wouldn't a - - -
10 wouldn't a hearing have been in order, or is your
11 argument that she - - - she, of all people, would
12 have known that and made her decision to vacate?

13 MR. WARREN: That - - - that is my
14 argument. That is my argument.

15 JUDGE SMITH: That means, I guess, a - - -
16 I'm just - - - may - - - maybe I'm just - - -

17 MR. WARREN: Sure.

18 JUDGE SMITH: - - - repeating Judge
19 Pigott's question, but I'm going to ask it more
20 broadly. What exactly is your answer to the question
21 why was no hearing appropriate here?

22 MR. WARREN: I - - - I believe the hearing
23 was - - - was not appropriate but - - - and not - - -
24 and not - - - the question is necessary, because the
25 judge - - -

1 JUDGE SMITH: Sorry, I'll - - - I'll - - -

2 MR. WARREN: Yeah, the - - - the judge - -

3 -

4 JUDGE SMITH: You're right.

5 MR. WARREN: The judge made a determination
6 after - - - after it was brought to her decision, she
7 made a determination as a trier of the fact and as a
8 trier of the law under People v. Alfaro, and - - -
9 and based on that determination, she decided, within
10 her discretionary authority, to set aside the
11 verdict.

12 CHIEF JUDGE LIPPMAN: Okay, counsel.

13 Thank you both, appreciate it.

14 MR. WARREN: Thank you very much.

15 (Court is adjourned)

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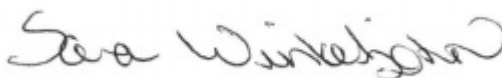
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Sean Hawkins, No. 227 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: November 24, 2014