

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,

-against-

No. 123

DWIGHT SMITH,

Respondent.

20 Eagle Street
Albany, New York
November 14, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

RAMANDEEP SINGH, ADA
BRONX COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Appellant
198 E. 161st Street
Bronx, NY 10451

MATTHEW BOVA, ESQ.
CENTER FOR APPELLATE LITIGATION
Attorney for Respondent
120 Wall Street, 28th Floor
New York, NY 10005

Sara Winkeljohn
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next case on the
2 calendar is appeal number 123, the People of the State of
3 New York v. Dwight Smith.

4 MR. SINGH: Good afternoon, Your Honor; Ramandeep
5 Singh for the People of Bronx County. May I reserve two
6 minutes for rebuttal?

7 CHIEF JUDGE DIFIORE: You may, sir.

8 MR. SINGH: Your Honors, the Appellate Division
9 here committed reversible error by finding a right to
10 counsel violation after defendant was subject to a buccal
11 swab based on the consent of his attorney. Defendant's
12 appearance before the court - - -

13 CHIEF JUDGE DIFIORE: How did the court arrive at
14 the conclusion that defendant had consented?

15 MR. SINGH: The consent - - - it was - - - it was
16 - - - the consent of defense counsel, Your Honor.

17 CHIEF JUDGE DIFIORE: Um-hmm.

18 MR. SINGH: This motion was served on defense - -
19 - on defendant and defense counsel on March 12th in court.
20 The court asked defense attorney whether he would consent
21 to this motion. Defense counsel stated that he would speak
22 to his - - - his client, and the court asked defense
23 counsel to put the opposition in writing if - - - if they
24 were to oppose this motion.

25 JUDGE FEINMAN: And then he was relieved, wasn't



1 he?

2 MR. SINGH: Well, so that was on March 12th. On
3 April 30th defense counsel appeared before the court and
4 yes, he did ask to be relieved. But the court did sign the
5 order on that day - - -

6 JUDGE FEINMAN: Right. But isn't there an
7 affirmed finding by the Appellate Division that in the
8 interim there basically had been no conversation, there had
9 been no discussion?

10 MR. SINGH: Well, it was - - - I believe it's
11 error - - - it's error on the part of the Appellate
12 Division.

13 JUDGE FEINMAN: But that's an - - - a finding of
14 fact that they've made, and how would we have jurisdiction
15 to change that finding of fact?

16 JUDGE GARCIA: How is it a finding of fact if the
17 Supreme Court never found it? Could that be an affirmed
18 finding of fact by the Appellate Division then?

19 MR. SINGH: Exactly. There - - - there was no
20 basis for the Appellate Division's finding that - that
21 defense counsel basically had abandoned his client without
22 - - - without any - - - any facts on the record.

23 JUDGE GARCIA: I have a more basic question to
24 something you said earlier which was that the defendant is
25 present at the proceeding where the motion is served.



1 According to the transcript, it says that the defendant was
2 produced but not brought down. But then in your brief, it
3 says that he's - - - the court - - - the People served on
4 defense counsel with defendant present a courtesy copy of
5 the motion. So there seems to be a conflict between your
6 representation and what the transcript says. The
7 transcript is on page A-124.

8 MR. SINGH: Your Honor, later on in that - - - in
9 that proceeding, it says that defendant is now brought
10 forth and present at that same proceeding.

11 JUDGE GARCIA: Where is that?

12 MR. SINGH: If I may have one moment? One A-124
13 it says, "Now Mr. Dwight Smith did appear." That - - -
14 that's line 15.

15 JUDGE GARCIA: Ah, thank you.

16 CHIEF JUDGE DIFIORE: So, counsel, get back to my
17 question, please.

18 MR. SINGH: I'm sorry?

19 CHIEF JUDGE DIFIORE: On - - - on the consent how
20 did the court arrive at that finding that - - -

21 MR. SINGH: Sure.

22 CHIEF JUDGE DIFIORE: - - - the defendant had
23 consented to the buccal?

24 MR. SINGH: So, Your Honor, defense counsel
25 basically had a period of approximately a month-and-a-half



1 in which to put in opposition papers. In that time period,
2 co-defendant Toby Fair's attorney put in opposition papers.
3 Defense counsel did not put in opposition papers. Even at
4 that proceeding where - - -

5 CHIEF JUDGE DIFIORE: Was this an implied consent
6 because - - - based on the attorney's failure to put in the
7 opposition papers or did he represent that to the court? I
8 - - - I'm not seeing that.

9 MR. SINGH: Well, at that proceeding there was a
10 conference at the - - - at the bench. We - - - but the - -
11 - from the record it does seem to be an implied consent
12 based on the fact - - -

13 CHIEF JUDGE DIFIORE: Does that undermine - - -
14 is that then undermined by when the defendant is produced
15 in front of the judge he says things like I haven't spoken
16 to my lawyer. I didn't know about the motion. I didn't
17 consent to this, Judge.

18 MR. SINGH: Well, Your Honor, again, the order
19 was based on defense counsel's consent, and at that
20 proceeding when defense counsel asked to be excused from
21 the case, the - - - the People said that we are - - - we
22 are holding the card for defendant to get swabbed. So
23 clearly defense counsel at that point was aware that the
24 buccal swab would be taking place, did not - - - did not
25 say anything to contrary.



1 CHIEF JUDGE DIFIORE: Do we know when the motion
2 was signed?

3 MR. SINGH: We - - - we don't know the exact
4 time.

5 CHIEF JUDGE DIFIORE: The order I mean. The
6 order was signed.

7 MR. SINGH: We - - - we don't know the exact time
8 that the order was signed. It seems to be either at that
9 proceeding or earlier that day based on what the court says
10 that this morning I signed an order for the - - - for the
11 buccal swab. But the - - - but the important thing is that
12 the court had been considering this motion, had been
13 waiting for opposition papers for over a month, so this is
14 not a case where the motion was proposed that day and the
15 court signed it that day.

16 JUDGE RIVERA: But - - - but if counsel is saying
17 I - - - I want to withdraw because I'm not going to get
18 paid, we don't know at what point that relationship breaks
19 down due to these financial concerns. So it may very well
20 be that again counsel and client have had no conversation
21 about this. They've been busy talking about how to get
22 paid.

23 MR. SINGH: Your Honor, defense counsel is - - -
24 he's - - - he's - - - there's nothing on the record beside
25 defendant's self-serving statement saying I haven't spoken



1 to defense attorney - - -

2 JUDGE FAHEY: But - - - but you would admit that
3 he - - - that the defendant in the absence of consent has a
4 colorable argument that the OCME - - - I can't tell by
5 looking at the record what day they found the DNA. The - -
6 - the forty-five-day rule here appears to be clearly
7 violated. There may be good cause, but that would - - -
8 you would rely on OCME then and you don't - - - and there's
9 no data in the record so we can't really tell if you had
10 good cause or not or when it would arise or how so if it
11 even would arise. So in - - - in that situation, the
12 People appeared to clearly fail the forty-five-day rule
13 under 240-whatever the subsection is. So how - - - how
14 would he not have an argument to make?

15 MR. SINGH: Well, first of all, I would say that
16 the People were never given an opportunity to present the
17 good cause argument, and it - - - and I submit - - -

18 JUDGE FAHEY: So - - - so you're really relying
19 solely on whether or not this is a critical stage of the
20 proceeding. Your position is this has already been
21 decided. That this - - - the court's already signed the
22 order. This is done, and now the only question is whether
23 or not he can object to a buccal swab after consent - - -
24 or after the order's been signed, right?

25 MR. SINGH: Yes, correct. This was - - - this



1 was a not a critical stage of the proceedings. The - - -
2 the motion practice that preceded this - - - this
3 proceeding - - -

4 JUDGE FAHEY: But the language does appear to be
5 very problematic here in - - - in this interchange,
6 particularly in the context of what seems to be a
7 relatively strong argument on the forty-five-day rule.

8 MR. SINGH: Well - - -

9 JUDGE FAHEY: And the consequences for the
10 defendant seem very serious.

11 MR. SINGH: Well, again, Your Honor, the
12 defendant's claim that he hadn't spoken to his attorney in
13 - - - in over two months or - - - and that he didn't know
14 anything about the motion, those are classic claims that
15 should be addressed via a 440 motion. It's not fair to
16 defense attorney to presume that he abandoned his client
17 and that he hadn't spoken to him in two months. So we
18 don't - - - we don't know when their relationship - - - or
19 the - - - the payments stopped and their relationship
20 became troublesome but - - - but that's not fair to suppose
21 from this record here. The - - - it's important to
22 remember that the only thing that occurred when defendant
23 appeared before the court at that proceeding was the actual
24 swab. The motion was not decided at that point.

25 JUDGE RIVERA: So - - - so let me ask you this.



1 Let's say the amount of time that elapsed here had not been
2 the time that had elapsed. Let's say it the next day that
3 counsel comes back and says I need to withdraw.

4 MR. SINGH: Yes, Your Honor.

5 JUDGE RIVERA: Right. So would - - - would
6 defense at that - - - would the defendant at that point be
7 able to proceed as he has here appearing before the judge
8 and arguing I - - - well, I haven't discussed it. I'm - -
9 - I need a lawyer, I object to it, no, I don't want to
10 consent to this buccal swab?

11 MR. SINGH: I think he would have a slightly
12 better - - - he would have a slightly better - - -

13 JUDGE RIVERA: Why is it only slightly?

14 MR. SINGH: Because - - - because here defense
15 attorney had over a month in which to file opposition
16 papers. It's reasonable for the court when the court did
17 not receive opposition to conclude that there - - - there
18 won't be opposition.

19 JUDGE RIVERA: Why would it be reasonable if the
20 defendant is saying not discussed it, I object to it, I
21 don't want to do this, I need a lawyer?

22 MR. SINGH: Because there is - - -

23 JUDGE RIVERA: When - - - when the lawyer has
24 said - - - the counsel has said I want to withdraw because
25 I'm not going to get paid?



1 MR. SINGH: But he still - - - he still has
2 obligations while he's on the case to his client. And
3 without - - - without facts that - - - that are not present
4 here, we can't - - - we can't suppose that he abandoned his
5 client.

6 JUDGE RIVERA: And if counsel doesn't know that
7 the motion's been decided?

8 MR. SINGH: I mean it - - - it's clear from - - -

9 JUDGE RIVERA: Say counsel has no idea the
10 motion's been decided. Does that make a difference?

11 MR. SINGH: If - - - if the counsel - - - if he
12 doesn't know that the motion - - - well, from the - - -

13 JUDGE RIVERA: Right.

14 MR. SINGH: From the - - -

15 JUDGE RIVERA: Go with what your argument is that
16 - - - that counsel still has responsibilities. But as far
17 as counsel knows the motion's not been decided and the
18 court is going to appoint another lawyer or the defendant
19 will retain a lawyer, whatever.

20 MR. SINGH: Well, the prosecutor is standing
21 there saying we're going to take the - - - basically saying
22 we're going to take the DNA swab. I think - - - I think
23 it's reasonable - - -

24 JUDGE RIVERA: Is that before or after the
25 withdrawal is granted?



1 MR. SINGH: That - - - it - - - it's before the
2 proceeding is concluded but after defense counsel has
3 stated that I want to be excused from this case.

4 JUDGE RIVERA: I'm sorry. I just don't remember
5 from the record. Is that before or after the court grants
6 the request?

7 MR. SINGH: It's before, Your Honor.

8 JUDGE RIVERA: Okay.

9 MR. SINGH: It's before.

10 CHIEF JUDGE DIFIORE: Counsel, is defendant's
11 right to counsel honored when given the opposite - - -
12 opposite views of consent? Defendant says I didn't
13 consent. The court says your lawyer consented. Is his
14 right to counsel honored when the - - - the court engages
15 him in that colloquy about the buccal and actually talks
16 him into taking the - - - submitting to the buccal?

17 MR. SINGH: I - - - I believe it is, Your Honor,
18 because again the - - - as the court mentioned the - - -
19 the buccal swab could have been taken off the record in the
20 - - - in the presence of Department of Corrections. It was
21 - - - it seems to be a courtesy that the - - - the court
22 wanted to have the swab done in court, and the court
23 mentioned something about the defendant's arm being injured
24 and wanting to avoid any sort of situation where there's a
25 - - - you know, some use of force maybe to take the swab.



1 So it seems to be a courtesy that defendant is before the
2 court and - - - and the court - - - I believe the court
3 could have worded its - - - its statement to the defendant
4 saying will you consent to this - - - I - - - I believe,
5 you know, the court could have better - - - done a better
6 job there because it's not really based on defendant's
7 consent. The order had already been signed, and the - - -
8 and the expressed language in the order says it can be
9 carried out even if the defendant tries to resist.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 MR. SINGH: Thank you.

12 CHIEF JUDGE DIFIORE: Counsel.

13 JUDGE STEIN: Counsel, assume for the moment - -
14 - and I - - - I don't know how any of us feels about this,
15 but that - - - that we conclude that this was not a
16 critical stage of the proceedings because the order had
17 already been made and - - - and - - and the - the physical
18 taking of the swab is not a critical stage. Just assume
19 that for the moment. Are - - - are you - - - is it part of
20 your argument here that it was nevertheless an abuse of
21 discretion for the trial court to refuse defendant's
22 request to - - - maybe he didn't use these words to grant
23 him an adjournment to have time to speak with a lawyer
24 before he went forward with this? Is that part of your
25 argument?

1 MR. BOVA: Yes, that would be part of our
2 argument, Your Honor. May I just introduce myself. My
3 name is Matthew Bova for Mr. Smith. So yes, Your Honor.
4 Even if this were not a critical stage, you still have the
5 statute 210.15(2) which clearly says that the right to
6 counsel applies at every stage of the action.

7 JUDGE STEIN: Okay. But this is - - - my
8 question is different and - - - and, you know, we may have
9 a debate about whether that statute applies to this
10 particular proceeding. But aside from the right to
11 counsel, the request for an adjournment. I mean the court
12 said I'm getting you a lawyer, right, and - - - and the
13 lawyer will be here at the next time. So the request just
14 to wait until that next time before the swab was taken,
15 that - - - that's my question.

16 MR. BOVA: Yes, Your Honor. I think that really
17 gets in many ways to the heart of the matter. I mean
18 whether you view it as an abuse of discretion the way that
19 the court dealt with this expresse request for counsel or -
20 - - or a critical stage - - the bottom line is we have a
21 defendant here who's appearing before Supreme Court after
22 his attorney has been relieved for non-payment, and he
23 tells the judge, Your Honor, I need a lawyer. I don't know
24 what's going on. My lawyer hasn't spoken to me. We have
25 not had communication. You're telling me now that he has



1 consented. I want to oppose.

2 JUDGE GARCIA: Did you make - - -

3 MR. BOVA: And at that point - - -

4 JUDGE GARCIA: I'm sorry, counsel. Did you make
5 either of those arguments below, either the abuse of
6 discretion argument or the statutory argument?

7 MR. BOVA: No, Your Honor. The argument made
8 below was that it was a critical stage which we absolutely
9 press here because there was a lot of work counsel could
10 have done. Under CPLR 470.35(2)(b), though, Your Honor, it
11 doesn't matter that a claim was not raised below. When
12 respondent is here before this court can press any question
13 of law that justifies affirmance as long as it does not
14 lead to the granting of affirmative relief, which we are
15 not seeking here as this court just - - - just established
16 and confirmed a long-standing rule in Warrington. So what
17 we have here is a court is looking a defendant in the eye,
18 listening to a request, a plea for an attorney because he
19 says I want to put in a motion. And at that point - - -
20 and as far as I can tell the prosecution does not contest
21 this. At that point, it is undisputed before this court
22 counsel could have done work. Counsel could have entered
23 the case. Counsel could have said, Your Honor, I want to
24 put in an opposition under 240.90.

25 JUDGE STEIN: What - - - what of the fact that



1 when he - - - when he - when counsel, new counsel, came
2 along that was never - - - that never happened?

3 MR. BOVA: Your Honor, that's - - - that's
4 irrelevant because the critical - - -

5 JUDGE STEIN: Why?

6 MR. BOVA: Because the critical inquiry before
7 this court is what happened at that April 30th proceeding.
8 When a right to counsel violation occurs outside the
9 presence of counsel as here, as this court recently
10 confirmed in People v. Gray, preservation is not required.
11 It is not required for a defense counsel after the fact to
12 drudge up a transcript - - -

13 JUDGE STEIN: I'm not talking about preservation.
14 I'm just asking whether it - - - the fact that counsel - -
15 - the new counsel could - - - I guess in a way maybe it
16 goes to harmless error. I'm not sure. But the fact that -
17 - - that there was plenty of time for counsel to say whoa,
18 whoa, whoa, my - - - my client tells me that he never
19 consented to this, that it was never discussed with him,
20 and so I want to move to reargue or I want to move to
21 suppress or whatever style - - - whatever the counsel
22 wanted to style it as. But that never happened. There
23 were - - - and there was a fairly long period of time from
24 the time new counsel came in until the end of the case. So
25 does that tell us anything? Is that meaningful in any way?



1 That - - - that's really my question.

2 MR. BOVA: It's not - - - it's not meaningful
3 because the only way you could really have a cure of this
4 kind of fundamental violation of the right to counsel is if
5 the prosecutor or the court told counsel and made a record,
6 counsel, on April 30th, 2009, there was a proceeding that
7 was conducted. Your client was insisting on a 240.90(1)
8 motion, and I did not allow for that and I made him go
9 forward. Counsel, what is your position on this? Would
10 you like to assert a violation? Would you like to reopen
11 the proceeding? That kind of cure would be permissible but
12 that never happened here. The prosecutor was there at the
13 April 30th, 2009, proceeding. The State had a lawyer. Mr.
14 Smith did not. If the prosecutor wanted to effect the cure
15 that Your Honor is talking about the prosecutor could have
16 said on May 21st, 2009, when new counsel was appointed,
17 Your Honor, I'm not - - - I have problems with what
18 happened on April 30th. I just want to clarify the record,
19 and I want to make sure that we give the defendant an
20 opportunity to cure.

21 JUDGE STEIN: But why would the burden be the
22 prosecutor to do that?

23 MR. BOVA: Well, my - - - my point is simply that
24 the - - - the defendant doesn't have a lawyer there but the
25 prosecutor does. If the - - -



1 JUDGE FAHEY: Well - - -

2 MR. BOVA: - - - State wants to effect a cure of
3 the violation then that's something that can be done. The
4 court can also do it. I mean whether it be the prosecutor
5 or the court the bottom line is there needs to be a record
6 confirming that kind of cure and that's not what we have
7 here.

8 JUDGE FAHEY: So - - - so our - - - would we if
9 we agreed with you be making a rule that every time the
10 State performs a particular test, there's a right to
11 counsel? I mean would you have a right to counsel at every
12 taking of any kind of blood test and just any test
13 involving the defendant for now, say, he had a fingerprint
14 test, a blood test, a swab test? Is there a right to
15 counsel now on all those proceedings?

16 MR. BOVA: No, Your Honor. As - - - as to the
17 actual observation of the administration of the test - - -

18 JUDGE FAHEY: Well, not the observation, the
19 taking of the test itself. Do you have a right to counsel
20 then?

21 MR. BOVA: No, Your Honor. The right to counsel
22 - - -

23 JUDGE FAHEY: Was the purpose of this proceeding
24 anything other than the taking of the test?

25 MR. BOVA: Well, Your Honor, the context matters



1 and the record matters. And really what we're talking - -
2 -

3 JUDGE FAHEY: No. I agree with it does, but I -
4 - - I'm just - - - I'm just - - - I guess what I - - - what
5 I'm searching for here is why this isn't a 440 as opposed
6 to a right to counsel issue.

7 MR. BOVA: Because this is a violation of the
8 right to counsel in that Mr. Smith's right to counsel - - -
9 his right to counsel at a critical stage was violated.
10 And, Your Honor, the difference between this case and the
11 mere observation, we're not saying that counsel had to be
12 there to look at the insertion of the swab into Mr. Smith's
13 mouth. That's absolutely not our argument. Our point is
14 that when an unrepresented defendant - - -

15 JUDGE FAHEY: Let me just stop you one second.
16 The only time he becomes an unrepresented person if we buy
17 the analysis that - - - that counsel had left already and
18 the only - - - and something else happened other than the
19 taking of the swab, some other decision was made other than
20 that and that's the analysis we have to buy for that - - -
21 that sequence to hold true I think. That's my difficulty
22 with it.

23 MR. BOVA: Well, I - - - the rule would be
24 simple. When a defendant appears in front of - - - in
25 front of the court without a lawyer, whether it be the



1 lawyer has been - - - whether it be that the lawyer has
2 already left him and been relieved or he is represented and
3 there is no lawyer by his side, when the defendant asks the
4 court and says, Your Honor, I need a lawyer because I want
5 to oppose a test that apparently my lawyer has previously
6 consented to the proceedings stop, the court does something
7 very simple. Says we'll give you - - - we'll give you a
8 day, we'll bring the lawyer on, we'll allow you to consult.
9 There was no need to rush. This is - - - time was
10 absolutely not of the essence. Instead, what the court did
11 was it heard a request for counsel, heard a desire to
12 oppose a critical crucial discovery application that
13 totally changed the tenure and totally changed the scope of
14 this entire the case - - -

15 JUDGE RIVERA: There's more going on there, isn't
16 there, because didn't - - - didn't the judge try to
17 persuade the defendant that seeking to challenge or object
18 was futile because the law was against him?

19 MR. BOVA: Yes, Your Honor. That - - - so not
20 only - - - not only did the court ignore a request but the
21 court provided erroneous legal advice. The court told him
22 you have no argument, and he absolutely had an argument.
23 He had an argument for preclusion as Your Honor referenced
24 before he had an argument for preclusion under 240.90(1).
25 Now counsel could have come in and said I want to - - - I



1 want to open this issue up. Before this discovery
2 application occurs I want to open this issue up and that
3 did not happen here.

4 JUDGE FEINMAN: So assuming for a moment that
5 you're correct that an error has occurred why is the remedy
6 dismissal of the indictment? Why is that the appropriate
7 corrective action?

8 MR. BOVA: So several things on that, Your Honor.
9 First, it's - - - it's important to recognize the Appellate
10 Division's scope of - - - the Appellate Division's power to
11 impose corrective action. It has very broad discretion.
12 Under 470.20 that discretion is very broad and this court -
13 - -

14 CHIEF JUDGE DIFIORE: Has to be necessary and
15 appropriate to protect the identified injustice, correct?

16 MR. BOVA: Yes, Your Honor. And - - -

17 CHIEF JUDGE DIFIORE: And so is it your position
18 that dismissal of the indictment that took place a year-
19 and-a-half, or whatever it was before this whole Sixth
20 Amendment issue arose is the correct responsive action?

21 MR. BOVA: Yes. The Appellate Division
22 rationally exercised its discretionary power to look at the
23 - - - look at this case, to discern an egregious violation
24 of the right to counsel, and to say that under these
25 circumstances - - - and at A-9 of the majority the court -



1 - - the court uses the phrase under these circumstances the
2 correct remedy is not dismissal with prejudice, it's
3 dismissal, start over again, and allow this case to move
4 forward. The prosecution can seek - - -

5 JUDGE FEINMAN: Well, why wouldn't it be
6 appropriate to just say you know what, I'm - - - I'm going
7 to give you a new lawyer, I'm going to let you put in your
8 opposition to this motion, and, you know, let you move to
9 suppress or preclude, you know, the results of the swab?

10 MR. BOVA: Two things on that, Your Honor.
11 First, I just - - - I just want to emphasize and it's
12 important - - - and I want to get to Your Honor's question
13 but it's important as a jurisdictional matter that all
14 these questions regarding the corrective action are moot
15 because the prosecution has successfully secured a new
16 indictment. Everything the prosecution is complaining
17 about, everything that it's claiming it lost it's gotten
18 back. There is no live controversy - - -

19 JUDGE STEIN: Well, before the People had a plea.
20 That's a little bit different place than - - - than where
21 it would be starting from now, right?

22 MR. BOVA: Right, Your Honor. But the - - - but
23 the prosecution's appeal to this court, they're challenging
24 the corrective action, they're claiming that the Appellate
25 Division - - -



1 JUDGE STEIN: No, I understand. But I'm just - -
2 - I'm just questioning your - - - you know, your argument
3 that it's moot because they can start all over again. That
4 - - - that's not where they ended, though.

5 MR. BOVA: Well, Your Honor, it's - - - it's moot
6 because after the Appellate Division decision and after the
7 prosecution filed its brief before this court they went
8 before the grand jury and they got a new indictment. So
9 that's why it's moot because they're saying that they were
10 harmed and they want this to correct - - - they want this
11 court to correct the dismissal of the indictment with lead
12 to represent.

13 JUDGE RIVERA: Well, what - - - what would be the
14 argument that it's not necessary and appropriate to rectify
15 the injustice to let them withdraw the plea? I mean I'm a
16 little confused there.

17 MR. BOVA: Well, Your - - -

18 JUDGE RIVERA: Because I think what part of this
19 line of questioning is about but maybe I misunderstood.

20 MR. BOVA: Your Honor, that - - - that would have
21 been an appropriate corrective action also. But the
22 Appellate Division has broad remedial power and broad
23 corrective action power. And what the Appellate Division
24 said was under these circumstances looking at this
25 violation, looking at how egregious it was that they



1 determined that a deterrent sanction was more appropriate
2 which is exactly what Wardlaw recognized, the 2006 decision
3 from this court. Special cases call for special remedies,
4 and this court expressly contemplated that the Appellate
5 Division and this court have the power in order to deter
6 egregious abuse to send a message and say - - -

7 JUDGE STEIN: Well, Wardlaw was based on
8 Hilliard, though, which took place in - in - - - and the
9 violation took place at arraignment and the court
10 specifically found that there was nothing that could be
11 done to rectify the violation that early in the proceedings
12 besides dismissing the indictment. So isn't that a little
13 bit different?

14 MR. BOVA: Well, Your Honor, I mean that - - -
15 that is a different scenario but the - - - but the rule
16 from Wardlaw is that in order to deter future abuse the
17 Appellate Division has the power to impose punitive
18 sanctions, and that's what this - - - and that's what the
19 Appellate Division did. And it was a modest punitive
20 sanction. All they did was say you're not - - - you're not
21 going to lose this case forever. Go back before a grand
22 jury, re-present the case. That was also in the
23 prosecution's interest because it allowed for them to
24 restart the clock. It allowed for them to start the forty-
25 five-day deadline over, and therefore actually what the - -



1 - what the Appellate Division doing - - - was doing was in
2 many ways giving the prosecution a benefit because it
3 allows for them instead of having evidence secured in the
4 right - - - in violation of the right to counsel they now
5 have the ability to start the clock over again and
6 therefore the Appellate Division rationally exercised its
7 discretion under 470.20 to deter egregious abuse and also
8 to ensure that this would not happen again.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MR. BOVA: Thank you.

11 CHIEF JUDGE DIFIORE: Mr. Singh.

12 MR. SINGH: Let me - - - let me address the
13 remedy first, Your Honors. The most optimistic party in
14 these proceedings, the defendant, even he did not think
15 that dismissal of the indictment was the proper remedy.
16 That was never requested below.

17 JUDGE RIVERA: But what about this point that it
18 lets the clock start - - - start again which puts you in a
19 good position or puts the People in a good position?

20 MR. SINGH: The People were happy with the plea
21 deal we had, Your Honor. And - - -

22 JUDGE RIVERA: Well, you're not arguing that - -
23 - let me just clarify here. Is your position that it - - -
24 the Appellate Department panel would have exceeded or
25 violated or abused its discretion if it had allowed him to



1 vacate his plea?

2 MR. SINGH: No, Your Honor. We believe - - -

3 JUDGE RIVERA: So - - - so he could have done
4 that. The panel could have done that.

5 MR. SINGH: The panel could have granted - - -

6 JUDGE RIVERA: You're not arguing that exceeds
7 their authority?

8 MR. SINGH: No. No. They could have vacated the
9 pleas here.

10 JUDGE RIVERA: All right. So then my point is if
11 indeed it's - - - I'm asking you for your response to this
12 argument from your adversary that the reality is that the
13 clock starts again so you don't even have to deal with a
14 good excuse - - - good cause problem that you had before.

15 MR. SINGH: Well, the remedy of dismissal, Your
16 Honor, in this case, it's problematic for - - - for a
17 number of reasons. First and foremost like I mentioned, it
18 was never briefed below. It was never requested. Second,
19 the People were able to secure a new indictment in this
20 case. That won't always be possible. This - - - this case
21 is now ten years old.

22 JUDGE FEINMAN: Right. But they've cabined this
23 to the particular circumstances of this particular case.
24 They're - - - they're not making it a generic rule.

25 MR. SINGH: I - - -



1 JUDGE RIVERA: One would hope this is not
2 repeated in courtrooms every day, correct?

3 MR. SINGH: Well, I - - - again, Your Honor, I
4 think - - - I think the way that the decision is phrased I
5 think it creates a precedent for - - - for other cases, and
6 I think this court needs to correct that action because it
7 was - - - it has no - - - it has no relation to the alleged
8 harm here. There is no claim that defendant was not
9 represented at arraignments. The indictment was secured
10 almost a year before the alleged error. There is
11 absolutely no relation between the remedy provided and the
12 harm that was alleged.

13 CHIEF JUDGE DIFIORE: If we were to reinstate the
14 indictment what happens to that second indictment? Where
15 are we?

16 MR. SINGH: The People intend to continue with
17 the original indictment so I believe the - - - the new
18 indictment would be dismissed, Your Honor.

19 CHIEF JUDGE DIFIORE: On the People's motion?

20 MR. SINGH: Yes, Your Honor.

21 JUDGE FAHEY: There's a difference in the
22 charges?

23 MR. SINGH: Yes. There are - - - there are
24 different charges, Your Honor, but the People - - - again
25 we were - - - we were happy with the plea deal - - -



1 JUDGE FAHEY: It was Manslaughter 1 on the second
2 but not on the first?

3 MR. SINGH: That is correct, Your Honor.

4 JUDGE FAHEY: I see. Okay.

5 MR. SINGH: But again, the People intend to
6 continue with the original indictment. Of course, we are
7 saying there was no error in this case. The defendant's
8 appearance before the court again was for the sole purpose
9 of obtaining a buccal swab. Motion practice at that point
10 had concluded and any claim that defense counsel abandoned
11 his client and failed to make this argument for one reason
12 or another, those are claims that should be addressed via a
13 440 motion, Your Honor.

14 CHIEF JUDGE DIFIORE: Thank you, counsel.

15 MR. SINGH: Thank you.

16 (Court is adjourned)

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, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Dwight Smith, No. 123 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001
Date: November 21, 2017

