

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

THE PEOPLE,

Respondent,

-against-

NO. 61

JAMAR BETHUNE,

Appellant.

111 Dr. Martin Luther King Jr Blvd
White Plains, New York
April 27, 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

Appearances:

RYAN BLANCH, ESQ.
THE BLANCH LAW FIRM, P.C.
Attorney for Appellant
261 Madison Avenue, 12th Floor
New York, NY 10016

JODI L. MANDEL, ADA
KINGS COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
Renaissance Plaza
350 Jay Street, 19th Floor
Brooklyn, NY 11201-2908

Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 61, The People of the
3 State of New York v. Jamar Bethune.

4 Good afternoon, counsel.

5 MR. BLANCH: Good afternoon, Your Honors. May it
6 please the court, my name is Ryan Blanch, and I represent
7 the appellant, Jamar Bethune, in this matter. I would like
8 - - - I would request to reserve three minutes for
9 rebuttal.

10 CHIEF JUDGE DIFIORE: You may have three minutes,
11 sir.

12 MR. BLANCH: Thank you.

13 As this court is aware, Jamar Bethune was
14 convicted of murder and sentenced to twenty-five years to
15 life, in a trial in which his only defense was that the gun
16 had discharged accidentally or unintentionally. According
17 to the certified transcript that we requested for review on
18 appeal, the trial judge instructed the jury at certain
19 portions that they could issue a guilty verdict in the
20 event that they found that the shooting was unintentional.

21 JUDGE GARCIA: Counsel, what standard would you
22 have us apply for when a reconstruction hearing is
23 required?

24 MR. BLANCH: I think that an - - - an error of
25 this type would satisfy just about any standard, whether

1 we're talking about abuse of discretion or clearly
2 erroneous. If this court were to find that the trial court
3 judge was clearly erroneous - - -

4 JUDGE GARCIA: Well, that's our review standard,
5 but what facts and circumstances would give rise to the
6 need for a hearing?

7 MR. BLANCH: For a need for a hearing for
8 resettle - - - to settle the record? Well, the
9 circumstances giving rise to the need to settle the record
10 are that we received a certified transcript, in which the
11 trial court judge gave a jury charge that was - - -

12 JUDGE GARCIA: Understood. And then you came
13 before the judge and you had a proceeding, and there was a
14 transcript put in, there was a letter, and materials from
15 the People, and my understanding is now you're saying that
16 wasn't enough.

17 MR. BLANCH: That's absolutely correct.

18 JUDGE GARCIA: So what standard do we apply to
19 say what is enough?

20 MR. BLANCH: Well, what the courts have held, if
21 I may quote in both Santorelli and Jones and Mitchelek
22 (ph.), regardless of what case we look at, they talk about
23 independent recollection. And in some cases, the court
24 talk about a definite recollection, and in other cases,
25 it's a vivid recollection. If I may quote from the

1 transcript - - -

2 JUDGE STEIN: So what - - - what - - - what is
3 the - - - what does the record show here about the judge's
4 recollection? As I read it, the - - - the judge in - - -
5 in making his determination here, referred to his
6 recollection.

7 MR. BLANCH: I would respectfully disagree, Your
8 Honor. I believe the judge refers to Santorelli, when - -
9 - one of the factors Santorelli cites is that if there's
10 recollection, the court may find - - - however, in the
11 transcript, the judge swiftly departs from that and says
12 "It just doesn't make any sense that the court should say
13 unintentionally, and then in the same context say
14 intentional".

15 JUDGE STEIN: Well, couldn't - - - couldn't - - -

16 MR. BLANCH: "It just doesn't make any sense."

17 JUDGE STEIN: Couldn't that also - - - I mean, I
18 think we're looking at context here, and - - - and would
19 you agree that context is a fair consideration, as well?

20 MR. BLANCH: Yes, Your Honor - - -

21 JUDGE STEIN: Okay.

22 MR. BLANCH: - - - I would say it's one
23 consideration, but I think it's - - -

24 JUDGE STEIN: Okay.

25 MR. BLANCH: - - - not all we rely upon.

1 JUDGE STEIN: Well, no, no, no. I - - - we may
2 or may not. That's not what I'm suggesting. What I'm - -
3 - what I'm saying is, is that the court never said I don't
4 recall, but let's look at the context. So - - - so those
5 comments may - - - could have been additional, basically
6 saying - - - looking at Santorelli, saying, if - - - if
7 there's independent recollection, then we don't need a
8 hearing. That says to me that he's indicating that there
9 was some independent recollection, and by the way, it
10 doesn't make any sense in the context. Is - - - isn't that
11 a perfectly legitimate reading of the - - - of the record?

12 MR. BLANCH: Respectfully, I believe it might be
13 a legitimate or a fair reading, but it's also a strained
14 analysis of the record, because here we have a judge that's
15 clearly pointing out - - - because I believe prior to the
16 judge pointing that out, the prosecutor starts by saying,
17 according to Santorelli, as long as the court recalls what
18 happens that that's enough. So the judge almost has to
19 echo that, because that is what Santorelli relies upon.

20 JUDGE STEIN: But - - -

21 JUDGE FAHEY: I mean, aren't you saying - - - in
22 - - - in this case, I think that the words - - - the phrase
23 is "vivid recollection" that's being used, and - - - and he
24 didn't have any notes, the judge, right?

25 MR. BLANCH: That's correct.

1 JUDGE FAHEY: Okay.

2 MR. BLANCH: There was no reference to notes.

3 JUDGE FAHEY: And - - - and it's - - - it's
4 tough. I - - - I agree with Judge Stein. It's kind of
5 tough to read this transcript and decide exactly where the
6 judge is coming down on. The whole question of what his
7 recollection is. I suppose your point is, is that the - -
8 - his - - - his recollection of what he normally does, not
9 what he did in this particular circumstance is - - - is
10 that what you're arguing to us?

11 MR. BLANCH: I would - - - I would view it a
12 little bit differently. I think that - - -

13 JUDGE FAHEY: Go ahead.

14 MR. BLANCH: - - - the reason why the judge
15 cannot refer to a specific vivid or independent
16 recollection of whether he said "unintentionally" or
17 "intentionally", is that in the event he said
18 "unintentionally" accidentally instead of "intentionally",
19 it didn't go noticed at the time.

20 JUDGE STEIN: What about the fact that - - -

21 MR. BLANCH: So - - - so it's impossible to
22 recall something that goes unnoticed. It seems - - -

23 JUDGE WILSON: Excuse me, counsel - - -

24 JUDGE STEIN: But what - - - what about the fact
25 that counsel also said the same thing twice, according to

1 the - - - to the original transcript?

2 MR. BLANCH: Yeah, I - - - yes, Your Honor.

3 JUDGE STEIN: How - - - how you - - - how can you
4 poss - - - I mean, I guess the question I'm asking is, if
5 the context makes it really strong that there's - - - that
6 there is a consistent typographical error, can't that
7 override the judge's specific recollection in terms of
8 whether there needs to be a hearing or not? Isn't that
9 something that could go into the judge's discretion?

10 MR. BLANCH: I don't think so, Your Honor, no.
11 Because that would be an attempt to replace recollection
12 with supposition, because that's the prosecution's
13 argument, is that if we look at everything, it's more
14 likely than not, this was an innocent mistake, but we could
15 argue the other side as well. It's just as likely that
16 there is a consistent mistake by a court reporter - - -

17 JUDGE FAHEY: Well, the problem is is you had the
18 definition of intent that was given, and rather than
19 intentional, it said conscious objective or purpose. And
20 in - - - in the same paragraph in - - - or during the
21 mistaken - - - they used the mistaken word. And - - - and
22 that - - - that would seem to directly - - - be directly
23 contrary to your argument, if you look at the whole context
24 or on top of - - - because the way I understand it, the
25 word "unintentional" is used five separate times in - - -

1 in - - - out of maybe 300 words that they were given at
2 that particular point.

3 MR. BLANCH: If I'm understanding Your Honor, I -
4 - - I believe the point that you're making is that because
5 there's other instances in the supplemental instruction in
6 which that mistake is not made, that it becomes clear that
7 that wasn't - - -

8 JUDGE FAHEY: Well, no, what I'm saying is, is
9 that it - - - it - - - intent obviously is a question in
10 this case. I think that that's a fair argument on your
11 part. And that in the consciousness of intent of a
12 conscious objective or purpose was clearly charged to the
13 jury. So the court was not charging them on un - - -
14 saying that intent was unintentional. That was what - - -
15 he wasn't doing it. That was a mistake. Let's assume - -
16 -

17 MR. BLANCH: Correct.

18 JUDGE FAHEY: - - - that that was given. And
19 that was a mistake, and the rest of the charge clarified
20 that and it seemed to make it clear that intent required a
21 conscious objective or purpose. That's quoting from the
22 charge. That's what he gave. So doesn't that solve the
23 problem or is a mistake dispositive?

24 MR. BLANCH: I believe in this situation, a
25 mistake is dispositive, because - - - especially where you

1 have a jury that is already expressing confusion about the
2 intent element prior to the mistake being made.

3 JUDGE WILSON: Counsel - - -

4 JUDGE RIVERA: Counsel, you're running out of - -
5 -

6 CHIEF JUDGE DIFIORE: Counsel, I'm having a
7 little difficulty envisioning from a practical point of
8 view what the - - - what would be the purpose of the
9 hearing?

10 MR. BLANCH: So we - - - the purpose - - -

11 CHIEF JUDGE DIFIORE: To contradict the - - - the
12 stenographer? Challenge the judge's recollection? What -
13 - - what would be the purpose?

14 MR. BLANCH: Here we have two certified
15 transcripts by the same stenographer. And interestingly -
16 - - importantly, I would add - - - that no one who was at
17 this hearing to settle the record, other than the judge,
18 had participated in the trial. Our client wasn't permitted
19 to be there, the trial prosecution was not there, defense
20 counsel at the trial was not there, and the - - -

21 JUDGE RIVERA: So what's going to happen at the
22 hearing? You wanted the stenographer to be called and say,
23 yes, the second set is the correct set?

24 MR. BLANCH: I think what we want to understand
25 is how is it that five years later we have this - - - two

1 very different transcripts. When we ordered our
2 transcript, we just asked for a certified transcript. The
3 second transcript was produced under a very different
4 request that we should be able to inquire about. The
5 prosecution called ex parte the stenogra - - - which, maybe
6 by itself is not an ethical question - - -

7 JUDGE RIVERA: If - - - if the people had
8 submitted an affidavit from the stenographer explaining
9 that, do you still need a hearing?

10 MR. BLANCH: I think it would depend on what the
11 affidavit said, yes.

12 JUDGE RIVERA: Well, let's say it says exactly
13 what the - - - the ADA said?

14 MR. BLANCH: Well, the ADA said in footnote that
15 - - -

16 JUDGE RIVERA: I had this conversation, the
17 stenographer went back, looked at it, realized it's a
18 mistake, and has now reissued a corrected version. And if
19 that's what the stenographer says, do you still need a
20 hearing?

21 MR. BLANCH: We - - - we, for sure, need a
22 hearing in that - - - in that situation.

23 JUDGE RIVERA: Why?

24 MR. BLANCH: Because if - - - this is a murder
25 case; it's very important. And you're a stenographer who's

1 receiving a phone call from a prosecutor in a murder case,
2 saying I think - - - in a very leading way - - - I think
3 there are mistakes in the transcript. So this isn't a
4 request to fix the whole transcript and check it. The
5 mistakes are pointed out. The prosecution admits that in
6 their footnotes, that there's five mistakes, we think that
7 they're mistakes, take a look - - -

8 JUDGE STEIN: But what we do - - - what we do
9 have here is the affidavit of the prosecutor saying that
10 she checked her notes, and that it was improperly
11 transcribed. So it's not just - - - we - - - we have that
12 additional fact. It's not just, well, yeah, the prosecutor
13 called and suggested that maybe there was an error here and
14 I agree - - -

15 MR. BLANCH: Right.

16 JUDGE STEIN: - - - you know, he or she was
17 probably correct, so why isn't that enough? Or - - - or if
18 that's what the steno said, would that be enough, in an
19 affidavit?

20 MR. BLANCH: Well, for - - - for one, I would
21 argue, Your Honor, that to properly recertify a - - - an
22 entire transcript, you have to go through the honest
23 process as a stenographer to certify the entire transcript.
24 So when a prosecutor calls and says, these are five
25 problematic errors - - - these are mistakes - - - and other

1 mistakes remain - - -

2 JUDGE STEIN: Well, did defense counsel ever
3 object and say, I - - - I - - - I want to, you know,
4 inquire about other errors? I mean, there were obviously
5 some other errors, as I read it.

6 MR. BLANCH: Correct.

7 JUDGE STEIN: Clearly. But - - - but were - - -
8 were those material errors? Did - - - did the pr - - - or
9 did the defense ever say, well, wait a minute; I want to
10 ask about these errors?

11 MR. BLANCH: And that's a great point. We won't
12 know whether or not that was a - - - an error made by the
13 judge, or that's another typographical - - -

14 JUDGE STEIN: Well, I know, but this is sort of a
15 - - - in a way, a preservation question.

16 MR. BLANCH: Right.

17 JUDGE STEIN: You know.

18 CHIEF JUDGE DIFIORE: Did you make any effort to
19 contact trial counsel?

20 MR. BLANCH: We did make effort - - - my office
21 made effort, not me individually. Trial counsel, I
22 believe, no longer works at that office.

23 JUDGE WILSON: Counsel, you started out by saying
24 that this is important because the judge incorrectly
25 instructed the jury. He said "unintentional". Is that

1 right?

2 MR. BLANCH: Correct.

3 JUDGE WILSON: Okay. Was there an objection at
4 trial by trial counsel when the court instructed the jury
5 with the word "unintentional"?

6 MR. BLANCH: I don't believe there was an
7 objection.

8 JUDGE WILSON: So three times there's no
9 objection.

10 MR. BLANCH: I believe that's correct, Your
11 Honor.

12 JUDGE WILSON: Okay, so is that at least
13 something that we can take into account in deciding no
14 hearing is necessary, because counsel would have objected
15 if the word "unintentional" had been said three times in
16 instruction?

17 MR. BLANCH: I understand Your Honor's point, and
18 it's an important point, but I would submit that in a
19 murder case, involving the defendant's only defense and his
20 due process rights, that the fact that counsel was not
21 attentive to an issue such as - - - such as this, would not
22 - - -

23 JUDGE WILSON: So do we have to view it through
24 an ineffective assistance lens? Is the - - - is the actual
25 error preserved if there's no objection?

1 MR. BLANCH: I believe it's per se ineffective
2 assistance, if - - - if that error is made and there's no
3 objection made.

4 CHIEF JUDGE DIFIORE: Thank you, counsel.
5 Counsel?

6 MS. MANDEL: Good afternoon, Your Honors.

7 CHIEF JUDGE DIFIORE: Good afternoon.

8 MS. MANDEL: Jodi Mandel for the Office of the
9 Kings County District Attorney. The standard to be applied
10 here is whether the Supreme Court properly exercised its
11 discretion in determining that there had been a
12 mistranscription, rather than misspeakings when the word
13 "unintentional" appeared five times, spoken by two
14 different people in place of the word "intentional" in the
15 supplemental charge.

16 JUDGE STEIN: Did we say Santorelli that - - -
17 that a vivid recollection, or any kind of recollection, was
18 - - - was an absolute requirement, or - - - or did we point
19 to the fact that in - - - that that existed in that case?

20 MS. MANDEL: The court did not say a vivid
21 recollection was required in Santorelli. The court in
22 Santorelli happened to have had a vivid recollection, and
23 there, the court also did not have any notes by a court
24 reporter, so then - - -

25 JUDGE GARCIA: And what if the judge was no

1 longer available and you could never have a vivid
2 recollection, and you could never resettle a transcript?

3 MS. MANDEL: That's correct, Your Honor. And
4 that - - - and the court here - - - the court here had many
5 other things before it, and you know, the proceeding in
6 Santorelli was whether the defendant had waived his
7 Antommarchi rights. So it was - - - it was a crucial part
8 at the beginning of a trial, that a court might be expected
9 to remember, but five years later, and - - - and just as an
10 aside, the five years that keeps getting mentioned here,
11 the foreperson order granting the defendant the minutes in
12 this case was in 2009. The defendant didn't file his brief
13 until 2014. So the five years was the delay on the
14 defense, not on anyone else's part. And so you wouldn't
15 expect a court to have a vivid recollection of a - - - of
16 what could have been a misspeaking - - -

17 JUDGE RIVERA: Is it a bet - - - is it a better
18 practice for the People to have submitted an affidavit from
19 the stenographer explaining that she had reviewed the notes
20 and did, indeed, recognize that it was an error, and that -
21 - - and then attaching to that, the - - - the certification
22 for the new pages as corrected?

23 MS. MANDEL: That - - - that could have happened
24 in this case, and in fact, at the proceeding before Judge
25 Tomei, I offered to bring in an affidavit from the court

1 reporter, but the judge deemed that it wasn't necessary.
2 And the fact is better practice is not the issue before the
3 court. The - - - the issue before the court is did the
4 court abuse its discretion here?

5 CHIEF JUDGE DIFIORE: What's the force and effect
6 of the certification that the stenographer executes?

7 MS. MANDEL: Well, stenographers are officers of
8 the court. They take a Constitutional oath of office and
9 they are required by the judiciary law to certify
10 transcripts as true and correct. And so to say that we
11 wanted to explore why there's one transcript that's
12 certified, and another transcript that's certified, well,
13 the first transcript was done all at once, pursuant to the
14 - - - to the court's foreperson order in this case. And
15 the fact is, we all know that here are mistranscriptions in
16 transcripts. And in fact, in this case there - - - there
17 were other mistranscriptions. A couple of times the
18 shoebox, where the gun and the bullets were kept, is called
19 a "showbox", but the fact is, many times, trans - - -
20 mistranscriptions don't impact the case.

21 JUDGE RIVERA: If there was only one time, and it
22 was only the judge, should there have been a hearing?

23 MS. MANDEL: That - - -

24 JUDGE RIVERA: Does that change the whole
25 context?

1 MS. MANDEL: It - - - it might. It might weigh
2 in favor, but the fact is here - - -

3 JUDGE RIVERA: And at the hearing, who's - - -
4 who's going to appear or what evidence is going to be
5 submitted to the judge to - - - to trigger a memory if a
6 judge sees the one word, and says, you know, I can't
7 immediately recollect?

8 MS. MANDEL: Yeah, I'm not sure how - - - what -
9 - - what form that hearing would take, because if the judge
10 doesn't remember misspeaking, it's highly unlikely that the
11 prosecutor or the defense attorney would remember that.

12 JUDGE FAHEY: Let me ask this.

13 MS. MANDEL: The fact - - -

14 JUDGE FAHEY: Let's - - - let's assume that the
15 word "unintentional" was said, all right. I understand
16 your argument; it wasn't. But let's just assume for a
17 moment that it was said and the transcript that showed that
18 was correct, that that charge was given. What would you
19 say then to defendant's argument that the - - - the court
20 charge, in essence, eliminated the People's burden of
21 proof?

22 MS. MANDEL: Okay. I'd say a couple of things.

23 JUDGE FAHEY: Go ahead.

24 MS. MANDEL: First, I'd say that that issue is
25 entirely unpreserved, so it's outside the scope of review

1 of this court, because there was no objection. Second, I
2 would say that this was the supplemental charge. The final
3 charge to the jury, the - - - the lengthy final charge to
4 the jury in this case was flawless, and the defendant has
5 never made any claim about that charge. So - - - and - - -
6 and any confusion that the jury had at the end of the case,
7 was actually after the final charge and before this
8 supplemental charge. The - - -

9 JUDGE GARCIA: And was it after they had already
10 found him guilty on Count I?

11 MS. MANDEL: Yes, yes. And they had - - -

12 JUDGE FAHEY: So - - -

13 MS. MANDEL: - - - and - - -

14 JUDGE FAHEY: So you're saying that that charge -
15 - - I'm asking a straightforward question. Would it change
16 the people's burden of proof if that was the charge that
17 was given?

18 MS. MANDEL: No, because this court has held - -
19 -

20 JUDGE FAHEY: You're saying if you use the word
21 "unintentional" instead of "intentional", that doesn't
22 change the burden of proof for the People?

23 MS. MANDEL: As - - - as long as the charge as a
24 whole conveys the correct legal standards, it doesn't
25 convict - - - change the burden the proof. And

1 particularly here, one misspeaking of a word - - -

2 JUDGE FAHEY: No, I don't understand that
3 argument.

4 MS. MANDEL: - - - which I'm not conceding - - -

5 JUDGE FAHEY: That's a reasonable argument you're
6 making. I - - - I totally understand that point. What I'm
7 asking you, though, if the wrong charge was given, is it a
8 change in the burden of proof, and you're telling me, no,
9 it's not.

10 MS. MANDEL: No, because the court was clear on
11 the charge on who had the burden of proof here, and it was
12 clear on what the elements of murder were in its final
13 charge.

14 JUDGE FAHEY: I see.

15 MS. MANDEL: And - - - and, in fact, even if this
16 was a misspeaking, the court went on to give an expanded
17 intent charge and repeated the fact that intent is
18 required; intent is required. So - - - so there - - -
19 there was no error in the charge as a whole here, and - - -
20 and the court - - - I just want to go back through the - - -
21 - there are five reasons why the court exercised its
22 discretion properly in not holding a hearing.

23 JUDGE RIVERA: Let me just ask you. If - - - if
24 you had gone - - - gone to the stenographer and the
25 stenographer says, no, I don't remember, but no, that's

1 what I put in my notes. You're right; it doesn't look
2 right, but that's what I put in my notes.

3 MS. MANDEL: That would have been a much harder
4 question - - -

5 JUDGE RIVERA: Right.

6 MS. MANDEL: - - - for the court.

7 JUDGE RIVERA: But - - - but let's say you then
8 went to the judge and you made the arguments about the
9 context. And the judge says I don't have a recollection,
10 but it makes no sense in this context. What do you do?

11 MS. MANDEL: It's still ultimately the judge is
12 the final arbiter of the record. And we have to rely on
13 the judge's ability and his responsibility to submit a
14 correct record to the Appellate Court. So - - - so it
15 would have been a harder question than the one we have
16 here.

17 JUDGE RIVERA: Even with the stenographer saying,
18 yes, that - - - my notes indicate that that's exactly what
19 I wrote and the original version is the version that I
20 still certify?

21 MS. MANDEL: Yes. I mean, it's not fair - - -
22 you know, in the Alomar case - - - there's another case
23 decided, Morales, within that case - - - in that case, the
24 court did have a hearing, and the court reporter just said
25 that it - - - it was a mistake in the transcript.

1 JUDGE STEIN: Well, when would a hearing be
2 required?

3 MS. MANDEL: That's within the court's
4 discretion.

5 JUDGE STEIN: Well, but - - - but - - - so
6 whatever the - - - I mean, there - - - there is an abuse of
7 discretion standard, so - - -

8 MS. MANDEL: Yes.

9 JUDGE STEIN: - - - when - - - I guess my
10 question is, when would it be an abuse of discretion for
11 the - - - for the court not to hold a hearing?

12 MS. MANDEL: Well, let's say - - - I mean, there
13 are - - - there are reconstruction hearings, when an entire
14 voir dire is - - - the notes for an entire voir dire are
15 missing, or a suppression hearing like in some of the cases
16 cited in - - -

17 JUDGE STEIN: So only when - - - when - - -

18 MS. MANDEL: - - - both of our briefs.

19 JUDGE STEIN: - - - when the notes - - - when
20 it's missing completely?

21 MS. MANDEL: No, there may - - - there may be
22 situations where - - - let's say the court reporter is - -
23 - is ambivalent about what her notes said or what they
24 didn't say. Or in - - - in one the cases, the defense
25 attorney submitted an affidavit. The trial attorney said,

1 I absolutely did not say those things and the defendant
2 submits an affidavit, I didn't say those things. And then
3 the prosecutor is saying the opposite.

4 JUDGE GARCIA: But counsel, isn't - - -

5 MS. MANDEL: There are situations - - -

6 JUDGE GARCIA: - - - isn't it the standard, it
7 seems to me, if you look at Santorelli, and you put aside,
8 do you need a vivid recollection or all the other things,
9 this - - - the bottom line on Santorelli, it seems to me,
10 is, is the record adequate for the judge to reconstruct
11 what occurred? And the abuse of discretion, seems to me,
12 not having a hearing, would be without a hearing, the
13 record is inadequate for the judge to reconstruct. Isn't
14 that a simple reading of Santorelli?

15 MS. MANDEL: Yes, I would agree with that, Your
16 Honor. And - - - and so here, there was - - - there was
17 more than adequate ground for the court to decide that
18 these were mistranscriptions and not misspeakings. It was
19 entirely implausible that it happened five times with two
20 different people. There were no objections made. The
21 original notes of the court reporter supported the fact
22 that she had made a mistranscription. The court had some
23 recollection of the proceedings, and the context of these
24 errors was - - - did not support at all that they were
25 misspeakings.

1 And - - - and I would just like to say that the
2 remedy suggested by my adversary is not the proper remedy
3 here. Even if this court were to think that a hearing
4 should have been more full, then the court would send the
5 case back to have a hearing, not decide the appeal on the
6 erroneous transcript.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 MS. MANDEL: Thank you.

9 CHIEF JUDGE DIFIORE: Mr. Blanch?

10 MR. BLANCH: Santorelli makes it very clear that
11 they're relying upon "a very definite recollection by the
12 trial court judge of what transpired".

13 JUDGE GARCIA: In that case, though. And it
14 can't be the standard where you could have a judge who's no
15 longer available, that you can never resettle a transcript
16 again.

17 MR. BLANCH: I don't think that's the - - -

18 JUDGE GARCIA: And I think Santorelli to me
19 stands for, it seems, that the record needs to be adequate
20 for the trial - - - trial judge to reconstruct what
21 happened. And vivid recollection gets you, you know, a
22 certain way. An affidavit from the court reporter may get
23 you a certain distance in that. But what we're looking at
24 is the overall record in front of the trial judge
25 resettling the transcript to determine if it was adequate

1 to make the determination.

2 MR. BLANCH: I would agree with that. Every case
3 that I have looked at talks about some form of vivid or
4 independent recollection - - -

5 JUDGE GARCIA: Is there a Court of Appeals case
6 that makes that a re - - - requirement?

7 MR. BLANCH: All the decisions seem to hinge on
8 it. Now is it possible we could have a different case
9 where there is no recollection, but the record is
10 substantial enough, that it could be made without that?
11 Sure, but this is not that case. In this case, the only
12 thing we have in the record is an - - - is - - - is an
13 effort in hindsight to apply a logic to a situation to
14 guess of what probably happened. It is just as likely that
15 that same court reporter heard the judge say
16 "unintentional" once and he did say it perhaps, and then
17 assigned that same mistake to the defense attorney at a
18 different time.

19 The point is, we'll never know. And the - - -
20 this is not something that's about - - -

21 JUDGE RIVERA: So if we'll never know, what's the
22 point of the hearing? Aren't you then really saying you
23 got to have a new trial?

24 MR. BLANCH: The only way, Your Honor, that we
25 could have known would be, at the time, to talk to the

1 stenographer and ask how that conversation went, what her
2 process was in correcting this already certified record.

3 The reason why I say - - -

4 JUDGE STEIN: Well, couldn't that still lead to
5 more questions and - - - and a credibility determination
6 then? It's - - - it's pretty rare in - - - in courts for
7 there to be something so absolutely definitive that there's
8 no question at all about it. I mean, that's kind of what
9 courts are about.

10 MR. BLANCH: That's true, but then we - - - we'd
11 be back to Judge Tomei looking at the record that's
12 produced after the questions, and then we'd be having a
13 different argument about whether or not, in light of the
14 testimony or in light of the affidavit - - - if there were
15 an affidavit, I submit it would not be enough to merely
16 recount the language that she checked her notes and this is
17 correct. We would need some more.

18 JUDGE STEIN: I guess my question is, is what - -
19 - what could she have said to have turned this around?

20 MR. BLANCH: I think there would have been a lot
21 of back and forth about her process, because she certified
22 it first and presumably she went through that same process
23 the first time. The second time - - -

24 JUDGE STEIN: So - - - so what you're saying is,
25 is that maybe the testimony would have shown that she

1 wasn't as careful about it, or that she made some
2 assumptions?

3 MR. BLANCH: Perhaps the testimony would have
4 shown that she went through the same analysis, given some
5 ambiguity in her notes, that the trial court judge and the
6 prosecutor are applying now.

7 JUDGE STEIN: And if that's - - -

8 MR. BLANCH: Which doesn't make sense in the
9 process - - -

10 JUDGE RIVERA: So since the ADA didn't put in - -
11 -

12 JUDGE STEIN: Exactly.

13 JUDGE RIVERA: - - - an affidavit from her, could
14 defense counsel could have gone to her and put in an
15 affidavit from her?

16 MR. BLANCH: What we requested to speak to her at
17 the - - - at the hearing - - -

18 JUDGE RIVERA: Yes.

19 MR. BLANCH: - - - not ex parte - - -

20 JUDGE RIVERA: No, I understand that. But I'm
21 saying is there anything that foreclosed you, prohibited
22 you, made it impossible for you - - -

23 MR. BLANCH: To - - -

24 JUDGE RIVERA: - - - to get an affidavit from
25 her?

1 MR. BLANCH: I think, given the fact that the
2 prosecution had already stated that she's corrected the
3 record, I think she would be a somewhat less-than-friendly
4 witness at that time. I think it would require a lot of
5 hard questioning where the prosecutor should be there as
6 well.

7 JUDGE RIVERA: Thank you.

8 CHIEF JUDGE DIFIORE: Thank you, counsel.

9 MR. BLANCH: Thank you.

10 (Court is adjourned)

11

12

13

14

15

16

17

18

19

20

21

22

23

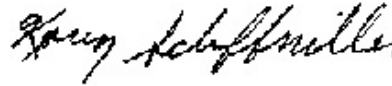
24

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, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Jamar Bethune, No. 61 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: April 30, 2017