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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

NO. 137

DORAN ALLEN,

Respondent.

20 Eagle Street
Albany, New York
November 14, 2018

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:

JUSTIN J. BRAUN, ESQ.
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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is number 137, the People of the State
3 of New York v. Doran Allen.

4 MR. BRAUN: Good afternoon, Your Honors, and may
5 it please the Court, Justin Braun on behalf of the People
6 of the State of New York. I would like to reserve three
7 minutes, please.

8 CHIEF JUDGE DIFIORE: You may, sir.

9 MR. BRAUN: Thank you. Your Honors, in this
10 particular case, the Appellate Division decision below
11 should be reversed for several reasons. There were four
12 primary errors that the Appellate Division made. Three of
13 those errors pertained to whether or not this particular
14 190.75 error should be found automatically per se
15 reversible. And the fourth error had to do with whether or
16 not - - - even if it was reversible, in this particular
17 case given that he was acquitted on that count at trial,
18 whether or not there was spillover prejudice.

19 In this case, the Appellate Division erred by
20 holding that the 190.75, a statutory error here, was in
21 fact, on constitutional grounds, the Appellate Division
22 ruled that it was a jurisdictional defect. They refused to
23 do any sort of prejudice analysis whatsoever as mandated
24 under this court's precedent in People v. Wilkins.

25 JUDGE STEIN: Well, you're not, not challenging



1 the conclusion that the murder indictment needed to be
2 dismissed?

3 MR. BRAUN: Under People v. Credle, that's
4 correct. Although I would point out that People v. Credle
5 came out after the prosecutor in this particular case took
6 the action that was taken in this case. So he didn't have
7 the guidance of that case in order to - - - in order to be
8 guided.

9 JUDGE FAHEY: But you do - - - you do say that it
10 was error at this point?

11 MR. BRAUN: It was. It was a statutory error
12 based on Credle of 190.75.

13 JUDGE STEIN: Well, what if - - - what if there -
14 - - it was shown that there was no prejudice for that error
15 as far as the murder conviction? Well, there was no murder
16 conviction. He was acquitted. So - - -

17 MR. BRAUN: Correct.

18 JUDGE STEIN: - - - would that be a basis under
19 the statute not to dismiss the indictment because it
20 doesn't go to the integrity of the process?

21 MR. BRAUN: I would say yes. Although, that's
22 not a question that necessarily needs to be answered under
23 the facts of this case. But based on our reading of
24 Wilkins, the penultimate paragraph in Wilkins clearly lays
25 out two parameters for measuring the prejudice of when



1 there's a 190.75 error in this case. And those parameters,
2 which are very clearly laid out, is would the grand jury
3 have possibly dismissed, or would the court have possibly
4 not granted permission to re-present. And this case, under
5 the unique facts of this case, we actually know the answers
6 to both of those. And the answers to both of those are we
7 had a grand jury that hung the first time around.

8 So we know that they wouldn't have dismissed.
9 And then as far as the permission to re-present, in
10 codefendant, Bevon Burgan's case, the court granted
11 permission to re-present on the exact same evidence, on the
12 exact same charges.

13 JUDGE STEIN: But the real question here that
14 we're looking at is how does that affect the manslaughter
15 conviction, right?

16 MR. BRAUN: Correct. In this particular case,
17 which is - - - which also goes to the spillover point. But
18 I wanted to start with this point.

19 JUDGE FAHEY: But don't we have before us right
20 now, cutting ahead a little bit, assuming that it was
21 error, you committed a statutory error, it should've been -
22 - - it should've been - - - you should've gone to the trial
23 judge. That didn't take place here. You didn't get
24 permission. So the question is, one of - - - it seems to
25 me we have two paths to follow. Either a per se reversal



1 path, which involves a constitutional analysis, or a
2 jurisdictional analysis. Or the spillover analysis, which
3 in essence looks at prejudice and whether or not there was
4 a reasonable possibility that that prejudice affected the
5 outcome of the trial. Would you agree with that, that we
6 have those two paths?

7 MR. BRAUN: I do agree with that. Yes.

8 JUDGE FAHEY: So then - - - then on the spillover
9 analysis, it seems to me that we have to look at the
10 evidence that was offered in the case. And is there any
11 evidence I guess that - - - and this is for both parties I
12 would ask this question eventually. Is there any evidence
13 - - - or any evidentiary distinction of the evidence that
14 was offered between a murder charge and a manslaughter
15 charge?

16 MR. BRAUN: There was absolutely no - - - no
17 distinction whatsoever.

18 JUDGE FAHEY: What about the cross-examinations
19 that were referred to in the brief by - - -

20 MR. BRAUN: Well, I think - - -

21 JUDGE FAHEY: - - - it begins with an H. I'm
22 drawing a blank. Is his name Hoke or Hokeland? Hoke?

23 MR. BRAUN: Hunt. Oh Pierre Hunt. Well, I mean,
24 basically, when you actually read the cross-examinations
25 and the summations in context, what counsel is doing here -



1 - - and I've quoted extensively the - - - the summations in
2 my brief. Counsel is saying that the defendant, who was
3 the getaway driver here, had no intent whatsoever. He was
4 there by mistake. Maybe it was his birthday. All these
5 different things. But there was no intent to participate
6 in any criminal activity. That was the thrust of the
7 defense. And that applies equally to the murder as well as
8 the manslaughter. And then layered on top of that,
9 counsel's defense was the fact that Pierre Hunt is this
10 liar that nobody can trust about anything.

11 That was the crux of the defense. And there's -
12 - - there's no evidence. Of course the counsel
13 occasionally used the word "murder" and occasionally
14 distinguished between killing, which by the way, also
15 applies to a manslaughter. But at no point did he offer
16 anything remotely in the neighborhood of a different
17 defense, as the Appellate Division speculated. And the
18 Appellate Division by the way, didn't give any factual
19 grounding. It gave a two-sentence opinion essentially
20 saying well, it must have been affected. Counsel's - - -
21 counsel's representation must have been affected here.

22 JUDGE FAHEY: Well, I think - - - the way I
23 understood that is to say that it defies common sense to
24 think that the compromised verdict was - - - now, I'm not
25 saying I agree with them, but the way I understood their



1 analysis was that the compromised verdict wasn't a product
2 of - - - a likely product of murder being charged here.

3 MR. BRAUN: Well, once again, even if you were to
4 have that particular notion, under the facts of this case,
5 that notion's dispelled because we have codefendant Burgan,
6 who was acquitted on the murder, the exact same count, and
7 convicted on the manslaughter, the exact same count as this
8 defendant.

9 So we have the exact same evidence on the exact
10 same counts, and the jury coming to the exact same result.
11 And as Justice Kahn in dissent in the Appellate Division
12 said, you would have to resort to speculation to say
13 anything that this jury did anything except parse the
14 evidence in front of it. And I would offer that this is a
15 very far cry from the modern spillover prejudice cases,
16 particularly Morales that was before this court, which came
17 from my office.

18 JUDGE FAHEY: Morales was the terrorism case?

19 MR. BRAUN: That was the terrorism case.

20 JUDGE FAHEY: Right.

21 MR. BRAUN: In that particular case, there was
22 legion evidence coming in that could possibly taint the
23 count of terrorism. So you had terrorism of the Mexican
24 community in prostitution, extortion, several murders,
25 beatings. All sorts of things. And then ultimately, this



1 court came to the determination all of that additional
2 evidence tainted the - - - the primary murder count, which
3 - - - which therefore it spilled over.

4 There was something for all of that evidence to
5 spill over onto. This case simply isn't that. It is the
6 exact same evidence, which is incidentally why also at the
7 grand jury, the exact same evidence would have been used,
8 and was used, in order to bring forth charges against both
9 Burgan and defendant, who essentially had almost identical
10 roles.

11 I mean, Burgan was a lookout, but he didn't fire
12 any shots. Doran Allen was the getaway driver, also didn't
13 fire any shots. The primary people who are the moving
14 parts of the execution in this triple shooting homicide
15 were Hunt and Alexander, who went out there.

16 This is also - - - well, I see that my time is
17 up. But I'd like to get more to the spillover point in
18 rebuttal. And to also say there's no evidence here
19 whatsoever of forum shopping on behalf of this prosecutor.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 Counsel?

22 MS. FRANCIS: May it please the court, my name is
23 Brittany Francis and I represent defendant/respondent,
24 Doran Allen. First, Your Honors, the prosecution
25 mischaracterizes this court's holding in Wilkins. First



1 and foremost, Wilkins unequivocally held that an
2 unauthorized re-presentation impairs the integrity of the
3 grand jury proceeding and renders the indictment defective.

4 Secondarily - - -

5 JUDGE STEIN: But here, we have a separate
6 indictment on the manslaughter. So if we get past the fact
7 that - - - that - - - that the murder - - - if we assume
8 that the murder charge had to be dismissed, the - - - we -
9 - - we have a valid indictment on manslaughter. Okay. So
10 - - - so how - - - how is - - - how is that relevant?

11 MS. FRANCIS: So Your Honor, the issue here is
12 that once Mr. Allen was forced to go to trial on these
13 consolidated indictments with a defective count, the
14 harmless error analysis also moves later in time to
15 evaluate how his trial would have been different had the
16 murder count not been present. It's no longer just a
17 concern - - -

18 JUDGE FAHEY: So you would agree though that
19 harmless error analysis should be applied here?

20 MS. FRANCIS: We would argue that Mayo type
21 remedial analysis should be applied. But that even - - -

22 JUDGE FAHEY: Mayo was substantially different
23 though. Mayo involved a double jeopardy claim. And double
24 jeopardy certainly is arguably a fundamental right,
25 constitutionally based. This seems to be a little bit



1 different. This is a statutory right with a different
2 history. In other words, under the old common law, a
3 prosecutor - - - the People were permitted to withdraw an
4 individual indictment and re-present it to a new grand
5 jury. And this statutory prohibition, was put in to
6 prevent that - - - that type of shopping around for a grand
7 jury that you would want.

8 That's not the kind of fundamental right we're
9 talking about when we're talking about double jeopardy,
10 which is clearly based on that. And so I think you have
11 something a little bit different here than that.

12 MS. FRANCIS: Well, Your Honor, respectfully,
13 we'd argue that it's actually quite similar to the - - -
14 the Mayo problem.

15 JUDGE FAHEY: Okay.

16 MS. FRANCIS: First, subsequent case law - - -
17 recent case law from this court makes clear that re-
18 presentment errors are jurisdictional. And in fact,
19 Wilkins itself, which - - -

20 JUDGE FAHEY: Oh the - - - the only case I know
21 that does that is McCoy, right, out of the First
22 Department?

23 MS. FRANCIS: No. Court - - - Court of Appeals
24 case law. So Wilkins itself in footnote seven,
25 acknowledges that there's the distinction between technical



1 evidentiary errors that don't survive guilty pleas, and
2 jurisdictional errors like the one in Wilkins, which do.
3 And in fact, there's - - -

4 JUDGE STEIN: Well, why isn't this a technical
5 evidentiary error, because obviously, again, getting past
6 the fact that there's a constitutional right to be charged
7 by indictment, so the murder - - - assuming the murder has
8 to be thrown out and that's a constitutional issue, then
9 the question is is did the - - - did the presentation of
10 evidence on that charge affect this. So why is that a
11 constitutional question?

12 MS. FRANCIS: So - - - so Your Honor, first I
13 would say that the case that's most on point with this
14 problem is Credle, which is recent 2011 case, where this
15 court did not conduct harmless error analysis and spoke
16 extensively about how this type of error erodes the very
17 essential role of the grand jury and acknowledges that the
18 grand jury is an institution designed to check the
19 accusatory power of the state. And so this very much is a
20 constitutional problem.

21 JUDGE GARCIA: Can I try? Isn't the problem
22 though, with the murder indictment? So if this was the
23 murder indictment, all that you say would have effect - - -

24 MS. FRANCIS: Right.

25 JUDGE GARCIA: - - - we have an acquittal, but we



1 have a separate grand jury indictment that on its face is
2 valid. There's no challenge to that grand jury proceeding.
3 So I think what we're trying to struggle with here is,
4 what's the standard we should apply in seeing if those
5 convictions under a valid indictment were infected by
6 what's let's say here was an inappropriate indictment or
7 re-presentment that violated that statute that may be
8 constitutional as to the murder indictment. So how do we
9 look at the convictions under what we all concede I think
10 was a valid separate indictment?

11 MS. FRANCIS: Right. So Your Honor, the issue is
12 that although the lower counts were on a valid indictment,
13 the invalid murder indictment infected the trial. And when
14 - - -

15 JUDGE STEIN: Well, how did it do that?

16 MS. FRANCIS: So the way it did that - - - in - -
17 - in a variety of ways. So - - -

18 JUDGE STEIN: And - - - and when you discuss
19 that, would you also address the question of if - - - if we
20 hold that because it's a higher charge - - - a higher grade
21 of - - - of the - - - of the, you know, the manslaughter
22 charge, are we - - - are we creating - - - are you asking
23 us to create a per se rule that there's always prejudice in
24 that sort of case? Go ahead.

25 MS. FRANCIS: So first, in this specific case, we



1 know that this count prejudiced Mr. Allen because defense
2 counsel's cross-examination of Hunt, the prosecution's star
3 witness was designed around establishing that the only plan
4 was a clipping. The only plan was to avenge this other
5 person who had been shot, and that the plan was not to kill
6 this person. And in designing his cross that way, he was
7 emphasizing that there was in fact a plan to hurt this
8 person, which emphasized and bolstered the lower
9 manslaughter count.

10 Next, defense counsel spent extensive time in his
11 motion for a trial order of dismissal, trying to knock out
12 the murder count. Where had that not been present, he
13 could have focused on the manslaughter count and the other
14 counts.

15 And finally, most significantly - - -

16 JUDGE STEIN: How would he have - - - how would
17 he have - - - how would he have focused differently from -
18 - - because as - - - as I understand the record, there was
19 little, if any different focus on the murder as opposed to
20 the manslaughter.

21 MS. FRANCIS: Well, when you look at - - -

22 JUDGE STEIN: It was talking about intent, right?

23 MS. FRANCIS: Right. Right. And when - - -

24 JUDGE STEIN: And he said he had no intent?

25 MS. FRANCIS: Well, when - - - when you actually



1 - - -

2 JUDGE STEIN: That he had no intent, right?

3 MS. FRANCIS: When you actually look at the - - -
4 the summation and the evidence in this case, it's clear the
5 defense counsel was in a catch-22 position where he was
6 telling the jury, credit Hunt insofar as he's saying that
7 there was no plan to kill this man, but reject his
8 testimony when it comes to everything else and the notion
9 that our client had any involvement - - - significant
10 involvement or knowledge of what was going on.

11 And - - - and he goes farther than that. And in
12 fact, a great example of what defense counsel did, on
13 summation he says, "Pierre Hunt is their spokesman, he's
14 the one who tells you what their intent was. So Pierre
15 Hunt told you that he would've achieved his goal if he shot
16 Charles Simms in the arm, if he shot him in the leg, if he
17 shot him in the buttocks. That would've been enough."

18 By crediting Hunt's testimony on that count, he
19 was ensuring that Mr. Allen would be convicted of
20 manslaughter in hopes that he would be able to knock out
21 the murder count. And that is tangible harm that wouldn't
22 have been present had the defective murder indictment not
23 been present in the case.

24 JUDGE FAHEY: Can I take you back one second? I
25 had asked counsel - - - your opposing counsel on the other



1 side, it seemed to me like there are two paths that we're
2 on here in terms of our analysis. And a lot of the
3 questions you've had go to the spillover analysis and to
4 the harmless error question. But it - - - it seems that -
5 - - that the First Department was talking about per se
6 reversal. And would you agree that really the only way
7 that your argument is successful is under a per se reversal
8 argument that the indictment itself was deficient, per se
9 that's it, no jurisdiction? That's the only way you really
10 effectively have a strong argument.

11 MS. FRANCIS: No, Your Honor. I believe that no
12 matter which remedial analysis is applied that - - -

13 JUDGE FAHEY: All right. Explain to me your
14 position on the per se.

15 MS. FRANCIS: Okay. So our position is that
16 remedial analysis needs to be attuned to the nature of the
17 error presented. We're asking for a standard that doesn't
18 require lower courts to bury their heads in the sand and
19 ignore the way - - - the many ways in which an error can
20 affect a trial, even outside of the nature of the evidence
21 or the quantum of the evidence.

22 JUDGE FAHEY: So you're saying no - - - no
23 harmless error analysis. Whether it's a constitutional
24 error or not, it doesn't matter. Once - - - once the error
25 was made - - - in this - - - in this particular 190.75,



1 once the error is made, that's it, you're out?

2 MS. FRANCIS: We believe that would be consistent
3 with this court's decision in Credle where no harmless
4 error analysis was conducted and the conviction was
5 reversed. But to the extent this court is interested in
6 moving away from Credle, we believe there's a long history
7 in other contexts, in Mayo, in Villani, Philip, Olsen, the
8 cases cited in our brief, recognizing that harmless error
9 analysis can't just be about the evidence presented. It
10 must acknowledge how defense counsel's strategy is impacted
11 and how a jury's deliberation is impacted. If there are no
12 further questions.

13 CHIEF JUDGE DIFIORE: Thank you, counsel.

14 MS. FRANCIS: Thank you.

15 CHIEF JUDGE DIFIORE: Counsel?

16 MR. BRAUN: Yes, Your Honor. I just want to
17 touch on a couple of points. As far as the attorney being
18 in a catch-22, with all due respect, that's - - - that's
19 simply my opponent's characterization. There's no evidence
20 of that. In fact, this is what he argued in summation.
21 "Based on what you've heard here, what motive would Doran
22 Allen have for taking part in any of this? There's no
23 evidence that Doran Allen is a close friend of Big Bro," et
24 cetera, et cetera.

25 "Of all the people Hunt met, he had the least



1 contact with Doran Allen." I mean, and - - - and more to
2 the point, defense counsel never once articulated in a
3 record stretching some 3,000 pages, that he was ever
4 arguing at cross purposes. So there's no - - - there's no
5 evidence for that at all. And more to the point, as far as
6 the - - - the - - - the trying to establish the clipping,
7 that was something that came out at trial. That was not
8 something that affected one way or the other because the
9 prosecutor went on to continue to argue murder in this
10 particular case.

11 JUDGE RIVERA: Respond to your adversary's point
12 at the end of her argument that - - - that Credle never
13 engaged in a harmless error analysis.

14 MR. BRAUN: That Credle never engaged?

15 JUDGE RIVERA: Credle. Credle.

16 MR. BRAUN: I'm sorry, my fault. Well, it's
17 interesting what Credle did talk about. They talked about
18 the fact that a re-presentation where there's no evidence
19 of forum shopping here, is normally given as a matter of
20 course. In - - - in the Credle analysis, they were faced
21 with a different set of facts here, a far different set of
22 facts than this particular case, where there was evidence
23 of obvious forum shopping.

24 In that, if I have my facts right, that Credle,
25 the prosecutor resubmitted on the very same day that it was



1 withdrawn from a grand jury panel. So that's far different
2 from here where years later someone comes forward and we
3 finally have a new quantum of evidence. So Credle actually
4 supports our position, I would argue, in many fundamental
5 ways. And by the way, Credle - - -

6 JUDGE RIVERA: But if that's what it turned on,
7 would it not have said that and said although harmless
8 error, we would normally engage in such an analysis, we
9 need not do so because of what you've just discussed?

10 MR. BRAUN: Well, I don't know if - - - if Credle
11 reached the same sort of - - - had the same set of facts as
12 far as the acquittal on the count that - - - that came
13 later. So I don't think that - - -

14 JUDGE FAHEY: I guess the question would be does
15 - - - does Credle establish a precedent for a per se
16 reversal in this situation?

17 MR. BRAUN: I don't believe it does. Especially
18 given the fact that it relies so heavily on Wilkins, which
19 lays out a prejudicial analysis that's very clear.

20 JUDGE WILSON: And what about - - - what about
21 our decision in Barr?

22 MR. BRAUN: As far as what portion?

23 JUDGE WILSON: Does that lay out a predicate for
24 a per se rule?

25 MR. BRAUN: Again though, Wilkins is what speaks



1 to this particular set of circumstances and this particular
2 190.75 error. So because it speaks so clearly, that's the
3 rule that I believe this court has laid out.

4 Interestingly, Credle also set forth - - - talks in terms
5 of a statutory violation, not a constitutional violation,
6 as does Wilkins over and over again. And I will say very
7 briefly, because I know my time is up, we also make the
8 argument that there was a waiver in this case because the
9 defendant knew there was a re-presentation and he testified
10 at the re-presentation. Only belatedly brought up the fact
11 that - - - made a motion to dismiss.

12 So even by Credle, even though there was a motion
13 to dismiss, it was so belated that he waived it. And the
14 Appellate Division never reached that.

15 JUDGE RIVERA: Well, the - - - the - - - did the
16 ADA inform him in any shape or form that - - -

17 MR. BRAUN: Sure - - - sure he did, because - - -

18 JUDGE RIVERA: - - - that sought a judicial order
19 or not?

20 MR. BRAUN: I'm sorry, say that - - -

21 JUDGE RIVERA: How was he to know that the ADA
22 didn't proceed based on authorization by the court?

23 MR. BRAUN: That he didn't proceed based on
24 authorization?

25 JUDGE RIVERA: Yes.



1 MR. BRAUN: Well, for one thing, the - - - both -
2 - - both attorneys were made aware of the fact, and
3 Burgan's attorney made a writ of prohibition. And the
4 attorneys in this whole case were very much in contact and
5 discussing strategy with each other. So there's - - -

6 JUDGE FAHEY: But that - - - that goes to the
7 nature of the error. I think your stronger point is the
8 Wilkins analysis connecting - - - establishing the basis
9 for the Credle analysis. But - - - and so I guess we have
10 to look as to whether or not that constitutes a per se
11 ruling or not.

12 MR. BRAUN: Yes, Your Honor. Thank you very
13 much.

14 CHIEF JUDGE DIFIORE: Counsel, why didn't the
15 People seek permission from the court to re-present?

16 MR. BRAUN: Well, again, this is a unique set of
17 circumstances here. This was even before McCoy too, when
18 all of this happened. And it was certainly before Credle.
19 So the prosecutor was operating under his understanding of
20 the law at that time.

21 This is clearly not a case that's going to be
22 repeated based on that, but as Judge Alvarado put it, and
23 in - - - which can't be - - - as a factual matter, can't be
24 reviewed by this court, there was absolutely no bad faith
25 on the part of the prosecutor.



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CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. BRAUN: Thank you.

(Court is adjourned)



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

I, Amber Minton, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Doran Allen, No. 137 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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