

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,

Respondent,

-against-

No. 116

LEROY SAVAGE SMITH,

Appellant.

20 Eagle Street
Albany, New York
October 12, 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:

PHILIP ROTHSCHILD, ESQ.
HISCOCK LEGAL AID SOCIETY
Attorney for Appellant
351 South Warren Street
Syracuse, NY 13202

JAMES P. MAXWELL, ADA
ONONDAGA COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
505 South State Street, 4th Floor
Syracuse, NY 13202

Sara Winkeljohn
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal is number
2 116, the People of the State of New York v. Leroy Savage
3 Smith.

4 Good afternoon, counsel.

5 MR. ROTHSCHILD: Good afternoon, Your Honors.
6 May it please the court, Phil Rothschild from the Hiscock
7 Legal Aid Society on behalf of Mr. Smith. First, I'd like
8 to reserve two minutes for rebuttal?

9 CHIEF JUDGE DIFIORE: You may, sir.

10 MR. ROTHSCHILD: Okay. The Fourth Department
11 erred in finding that Mr. Smith did not proffer specific
12 allegations of the seemingly serious nature to - - -

13 CHIEF JUDGE DIFIORE: Is there a reasonable view
14 of this record that the defendant was only asking to
15 represent himself and not for substitution of assigned
16 counsel?

17 MR. ROTHSCHILD: I do not believe so, and I don't
18 believe that the Fourth Department found that, either,
19 inasmuch as they that they didn't find that. And the court
20 itself found that Mr. Smith was, in fact, asking for - - -
21 asking for new counsel, and it stated this twice in the
22 record. Mr. Smith said so I'm not getting a new attorney.
23 So I would submit that that argument has no merit. A
24 minimal inquiry was required here, and we would submit that
25 the Fourth Department's determination was contrary to the



1 facts, the law, and public policy. Mr. Smith was charged
2 with assault, and he raised an assault defense claim saying
3 that complainant pulled a knife on him. There were fifteen
4 to twenty-five people in the area, probably twenty-five,
5 and the area was under constant surveillance. Prior to
6 jury selection, he asked for new counsel and alleged,
7 essentially, ineffective assistance of counsel in that his
8 attorney never tried to contact any of the exculpatory
9 witnesses, never conducted any investigation, and most
10 importantly, told him there's no money to hire an
11 investigator to talk to these witnesses in North Carolina.
12 The trial court, without any inquiry, just told him he was
13 too late, but he did allow him to represent himself.

14 JUDGE FAHEY: So he had appeared in court on
15 eight other occasions; is that right?

16 MR. ROTHSCHILD: Yes, Your Honor.

17 JUDGE FAHEY: And when he was - - - was asking
18 for counsel to be discharged, this was - - - the jury was
19 just about to come in, as I understood the record; is that
20 right?

21 MR. ROTHSCHILD: That is correct, Your Honor.

22 JUDGE FAHEY: So it seems that he's arguing that
23 - - - that he has a justification defense, that - - - and
24 so wouldn't the court be entitled to look at the whole
25 record and everything that the court's heard so far, Mr.



1 Rothschild, in - - - in making this determination as to
2 whether or not you should make any inquiry? In other
3 words, could the court look at the whole record or does he
4 just have to look at what the defendant says in front of
5 him at that time? And if he looks at the whole record, do
6 we have to say it was unreasonable for the court to say
7 that, you know, you don't have a justification defense
8 here, you're going nowhere on this and this - - - this is a
9 waste of time and it's just a stalling tactic?

10 MR. ROTHSCHILD: Your Honor, in this case - - -

11 JUDGE FAHEY: It seems that that's - - - and I -
12 - - it seems that we have to measure was the court
13 exercising discretion to do that. Tell me - - - tell me
14 why that's wrong, Mr. Rothschild.

15 MR. ROTHSCHILD: Your Honor, I think the facts in
16 this case don't support that inasmuch as of the twenty-five
17 people there who were in line waiting to be paid, the
18 police spoke to seven of them, meaning that there's up to
19 eighteen possible witnesses who could corroborate - - -

20 JUDGE FAHEY: Right.

21 MR. ROTHSCHILD: - - - Mr. Smith's account.

22 JUDGE FAHEY: And there were - - - this is - - -
23 this is the case where the man's accused of hitting
24 somebody with a hammer over the head, right?

25 MR. ROTHSCHILD: Yes.



1 JUDGE FAHEY: And did six of those people testify
2 against him?

3 MR. ROTHSCHILD: Six of those people testified
4 against him.

5 JUDGE FAHEY: They all said he hit him?

6 MR. ROTHSCHILD: Yes. They all said he hit him.

7 JUDGE GARCIA: And there's an email follow up - -

8 -

9 MR. ROTHSCHILD: There was an - - -

10 JUDGE GARCIA: - - - where he says see what
11 happens when you don't give me my money.

12 MR. ROTHSCHILD: Yes.

13 JUDGE GARCIA: I think the proof is - - - is
14 tough, but to follow on with what Judge Fahey's saying so I
15 think your - - - the strongest point in the transcript is
16 he told me I didn't have funds to - - - access to funds to
17 - - - to hire an investigator. If the judge had said to
18 the attorney at that point do you believe you don't have
19 money and the attorney said no, that's not what I said,
20 would that be enough?

21 MR. ROTHSCHILD: I think that would be a good
22 start, and I think if he said yes, I think the next
23 question would be why did you tell him this.

24 JUDGE GARCIA: But what if he says no, I never
25 said that, that's crazy, of course I know I can apply for



1 funds anyway?

2 MR. ROTHSCHILD: Well, that - - - that's a
3 different situation than what we have here, but I mean
4 remember - - -

5 JUDGE STEIN: Well, you have to walk a fine line,
6 don't you, in terms of you don't want to display the
7 defense tactics necessarily in front of the People and - -
8 - and whoever else may be there. But - - - but it seems to
9 me that, you know, at least is that - - - was that your
10 belief, counsel - - -

11 JUDGE GARCIA: Right.

12 JUDGE STEIN: - - - as you say might be a good
13 start, right?

14 MR. ROTHSCHILD: And I would say inquiry was
15 warranted because in this case, as I said, there was
16 eighteen witnesses, and there's no indication in the record
17 that there were any defense witnesses, that defense counsel
18 contacted any of them, or any request for investigative
19 services which - - -

20 JUDGE GARCIA: But again, then I think you start
21 - - - as Judge Stein and I think Judge Fahey's saying, you
22 start to get into tactics and proof and defenses here in
23 the overall kind of what are you doing because the question
24 may be you didn't contact these other eighteen witnesses is
25 no because I - - - he told me he hit them over a head with



1 the hammer and they were going to say the same thing. He
2 told me he didn't have a knife. I mean I've had cases
3 where we had hearings why didn't you get a handwriting
4 expert. You call the defense lawyer, it's because he told
5 me he wrote the book. You don't want that coming out in
6 the middle of the courtroom.

7 MR. ROTHSCHILD: True. You don't want that
8 coming out but also you need to investigate when there are
9 seemingly serious requests, and I would submit that Porto
10 was fully distinguishable from this case.

11 JUDGE GARCIA: So then the inquiry into whether
12 you thought you were under the impression you didn't have
13 funds wouldn't be enough?

14 MR. ROTHSCHILD: I think - - -

15 JUDGE GARCIA: Because then you would have to get
16 into tactics?

17 MR. ROTHSCHILD: I don't think you necessarily
18 have to get into tactics because I think in this case it
19 was fairly clear that defense counsel, given the history in
20 Onondaga County, given the history of this case, there was
21 nothing to show that defense counsel had conducted any type
22 of investigation whatsoever. The failure to investigate is
23 ineffective assistance of counsel. Now - - -

24 JUDGE GARCIA: Right. And - - - and isn't that
25 more in line with a 440, though, because there are many



1 reasons why you wouldn't investigate including he told me
2 he wrote the book. So in a limited inquiry on this type of
3 a coming in right before the jury is walk- - - at least
4 the panel, I think is coming into the courtroom, would it
5 be enough for the judge to have said are you under the
6 impression that you don't have funds?

7 MR. ROTHSCHILD: I think it's a - - - as I said
8 before, I think it's a good start. I don't think it's
9 necessarily enough because I think more would be required,
10 especially when the allegations of failure to investigate
11 and the allegation of the ignorance of - - - failure to
12 investigate is ineffective. I mean this court has said so
13 time and time again. The way you can show - - - as the
14 defense attorney you can show that it's not is to show that
15 you used your professional judgment.

16 JUDGE GARCIA: Would you have a sealed hearing
17 then?

18 MR. ROTHSCHILD: Yes. I think that's a
19 possibility.

20 JUDGE GARCIA: And make the sealed hearing record
21 going into tactics available for appeal?

22 MR. ROTHSCHILD: That would be a possibility.
23 But I think it's also incumbent upon the court to conduct
24 an inquiry - - -

25 JUDGE RIVERA: But - - -



1 MR. ROTHSCHILD: - - - but also to make a record.

2 JUDGE RIVERA: But is - - - but is your point
3 that the court should have inquired whether or not counsel
4 had made a decision about the investigation as opposed to
5 asking what - - - what did you do to investigate?

6 MR. ROTHSCHILD: I think to start with he should
7 have asked the question did you tell him this? Because I
8 think that is - - - according to the Supreme Court in
9 Hinton v. Alabama, ignorance of the resources available to
10 defense counsel is the very hallmark of ineffective
11 assistance.

12 CHIEF JUDGE DIFIORE: What about the simple
13 question to counsel, counsel, are you available - - - are
14 you aware of the availability of funds for investigative
15 purposes?

16 MR. ROTHSCHILD: That would have been a good
17 start. But I submit that the public policy - - -
18 unfortunately - - - and - - - and I see that my time is
19 low, the public policy in Onondaga County is to
20 historically, according to the - - - the Spangenberg Report
21 as noted in Judge Kaye's Commission, to routinely
22 discourage assigned counsel from hiring investigators and
23 that was borne out by stat - - - pardon me, statistical
24 analysis of 14,000 cases showing that investigators were
25 hired not in thirty percent, not thirteen percent, or even



1 three percent, but three-tenths of one percent. That is a
2 shockingly low number. Now the Hurrell-Harring is - - -
3 hopefully will - - - will improve that but I think it's
4 still incumbent upon the court to do their part because
5 they must be solicitous of the rights of the accused to - -
6 -

7 JUDGE RIVERA: Isn't that a little bit different
8 sort of knowledge of the law and being discouraged from
9 acting on that knowledge?

10 MR. ROTHSCHILD: Well, I think that in this case
11 given that history the - - - the court should have
12 definitely taken more attention of that because it's not
13 entirely unreasonable to believe that an attorney would
14 believe that there are no resources or funds available.

15 JUDGE FAHEY: Judge, is it - - - would it be all
16 right if I just ask one more question?

17 CHIEF JUDGE DIFIORE: Yes. Of course.

18 JUDGE FAHEY: Mr. Rothschild, is there - - - is
19 there a difference in his request between saying I don't
20 want this attorney and - - - in other words I want to
21 represent myself, because it doesn't seem like there's an
22 explicit request for a different attorney. I was just
23 looking at the record again as I was sitting here, and I
24 didn't see that explicit language that - - -

25 MR. ROTHSCHILD: I think the danger is this



1 insofar as that he - - - he needed someone to do the
2 investigation. Under Barker v. Wingo he's in jail. He
3 can't do it himself. For him to represent himself is no
4 substitute to - - - to do the things which needed to be
5 done. He was waiting in jail - - -

6 JUDGE FAHEY: So - - - so you're saying that the
7 request for an invest- - - - to have an invest- - - - more
8 investigation done, that he didn't investigate properly, is
9 equivalent to a request for a different attorney?

10 MR. ROTHSCHILD: I think the nature of - - -
11 because he cannot do these things. He can't conduct the
12 investigation.

13 JUDGE FAHEY: But - - - but you would agree with
14 me that the record doesn't show that he actually asked for
15 a new attorney?

16 MR. ROTHSCHILD: I think it was understood by the
17 court to mean that. It was understood by the Fourth
18 Department to mean that. And I would submit that. Thank
19 you.

20 JUDGE FAHEY: Thank you.

21 CHIEF JUDGE DIFIORE: Thank you, sir.

22 Mr. Maxwell.

23 MR. MAXWELL: Good afternoon.

24 CHIEF JUDGE DIFIORE: Mr. Maxwell, what would the
25 harm have been for the judge to have asked a simple



1 question before they went out, counsel, are you aware of
2 the availability of funds designated for this specific
3 purpose?

4 MR. MAXWELL: The danger in addition to the
5 things that have already come up about exposing defense
6 tactics is that - - -

7 CHIEF JUDGE DIFIORE: Well - - - go ahead.

8 MR. MAXWELL: - - - is that you risk driving a
9 wedge between the defendant and the attorney. Well, and
10 now he's calling me a liar, Judge. Well, I can't go to
11 trial with this lawyer.

12 JUDGE RIVERA: Don't you already have the wedge
13 based on what he's already said in the open court?

14 MR. MAXWELL: Well, to his credit the defense
15 attorney didn't stand up and say, Judge, he's lying about
16 me. And I - - - I - - - this is outrageous.

17 JUDGE RIVERA: Yes. I understand that. But
18 certainly, despite whether or not he's specifically asking
19 for substitution of counsel, it's very clear he's
20 dissatisfied with his attorney, so you already have that on
21 the record. I mean I think what the Chief Judge is asking
22 if the judge's inquiry is just about counsel's knowledge of
23 the law, that doesn't reveal any tactics. At least I - - -

24 MR. MAXWELL: And - - -

25 JUDGE RIVERA: - - - can't see what tactics that



1 might reveal, but that might, at least - - - whether it's a
2 good start or not, at least resolve this question about the
3 - - - the attorney - - - excuse me, defendant's saying
4 something that suggests that the lawyer is uninformed or
5 ignorant of the law.

6 JUDGE STEIN: And under your theory the judge
7 could never ask any question at - - - at the risk of
8 driving a wedge. But - - - but that's the whole purpose of
9 the inquiry is to find out whether - - - whether there's a
10 problem.

11 MR. MAXWELL: Right. What - - - what I'm
12 suggesting is that the judge has a discretionary call to
13 make at every step of the way, and he did not abuse his
14 discretion as a matter of law in handling it the way he
15 did. And I contrast it with a case that's cited in the
16 amicus brief filed in this case by the - - - the New York
17 Civil Liberties Union, People v. Bryan where the court
18 diverted the discussion to whether he wanted to go pro se.
19 Now the defense would like to view the discussion that's in
20 the record for about sixteen pages from A-262 to 278 as - -
21 - as two separate things, and there is about two pages
22 where they don't talk about this. But I ask you to look at
23 it as a whole. He starts off with the word: "I want my
24 lawyer relieved." Not replaced. He later goes into: "I'm
25 at a disadvantage with the attorney." And from what we



1 know of his summation, we know exactly where he was going.

2 JUDGE STEIN: But - - - but the court says: "I'm
3 not at this stage going to assign another lawyer." I mean
4 - - -

5 MR. MAXWELL: Right.

6 JUDGE STEIN: - - - doesn't that indicate that
7 that's what the court understood he was asking for?

8 MR. MAXWELL: Well, he was trying to understand
9 what the defendant was saying, and he says if that's what
10 you're asking for, and the defendant doesn't say yes or no.
11 He says I just want to make a record. And then when it
12 comes up again, the judge says my understanding of what
13 you're asking for is to represent yourself, and again the
14 defendant doesn't dispute that. He says I want to ask the
15 questions. He got what he asked for.

16 JUDGE RIVERA: But isn't that - - - with - - - at
17 least to this extent with this defendant's knowledge that
18 the judge has already said I'm not going to assign you a
19 lawyer?

20 MR. MAXWELL: I don't read it that way. I - - -

21 JUDGE STEIN: Well, and - - - and defendant says:
22 "In other words, you're not going to grant me a new
23 attorney. I'm going to be my own attorney?" So - - -

24 MR. MAXWELL: Well, again, he's making a
25 statement. He's - - - he's recapping where they are in



1 this discussion. Nowhere in the discussion does - - -

2 JUDGE STEIN: But why would he say, "You're not
3 going to grant me a new attorney," if he wasn't asking for
4 a new attorney?

5 MR. MAXWELL: He didn't ask for a new attorney.
6 It's nowhere in there.

7 JUDGE STEIN: Well, he didn't use those words,
8 but what - - - what would be the point of saying that if he
9 didn't understand and the court didn't understand that
10 that's what they were talking about?

11 MR. MAXWELL: He was voicing where they were in
12 this discussion, and he was recapping it. And that's what
13 they - - - and he didn't say and, Judge, I think I need a
14 new lawyer. I want a new lawyer. And again, I want to
15 just point to the summation. The end of the summation he
16 says, you know, I've never been in much trouble at all with
17 the law or something like that. He killed a guy in North
18 Carolina. The attorney, while - - - before trial got a
19 very favorable Sandoval ruling to keep that out. The trial
20 prosecutor is figuratively beside herself because now he's
21 been allowed to tell the jury he's a good guy, never been
22 in trouble, and the judge won't let her put in that he
23 killed a guy. He would never have - - -

24 JUDGE STEIN: So what are you saying then?

25 MR. MAXWELL: I'm sorry. I don't mean to - - -



1 JUDGE STEIN: Okay. I know. I'm asking what the
2 point of that is?

3 MR. MAXWELL: The - - - the point is he would
4 never have had that opportunity to lie to the jury - - -

5 JUDGE STEIN: So you think that was a strategy
6 from the get go?

7 MR. MAXWELL: Yes.

8 JUDGE STEIN: He knew - - - he knew so much about
9 this that - - - that he was planning on - - - on doing
10 that?

11 MR. MAXWELL: Yes.

12 JUDGE STEIN: Okay.

13 MR. MAXWELL: He knew he couldn't testify.
14 Throughout the trial the way he questioned the witnesses,
15 well, wasn't there a Volkswagen over there and wasn't the -
16 - -

17 JUDGE RIVERA: But - - - but let's assume all of
18 that is strategy that - - - that occurs now after this
19 colloquy and there is no assignment of counsel. Are we
20 still left with the question what was the judge's duty and
21 obligation based on our case law - - -

22 MR. MAXWELL: Right.

23 JUDGE RIVERA: - - - when he - - - when the
24 defendant indicates dissatisfaction and that it appears
25 that counsel is ignorant of the law?



1 MR. MAXWELL: And under your case law the judge
2 has to only make the inquiry when there's a seemingly
3 significant req- - - the phrase is escaping me.
4 Seemingly is in there.

5 CHIEF JUDGE DIFIORE: Seemingly serious.

6 MR. MAXWELL: Seemingly serious request.

7 JUDGE RIVERA: So - - - so isn't ignorance of the
8 law about whether or not he can have funds to do a proper
9 investigation seemingly serious? What - - - what more
10 would one need to say? What more would a defendant have to
11 say?

12 MR. MAXWELL: I think from the judge's standpoint
13 is that's just not - - - doesn't make any sense. Our
14 lawyers know that that's not the law. This lawyer knows
15 that's not the law. It's a lawyer he's had in front of
16 him, lawyer who got an acquittal in a trial in front of him
17 shortly before that. That does not - - - as a matter of
18 his discretion, he does - - -

19 JUDGE RIVERA: Should he - - - should the judge
20 have said that on the record?

21 MR. MAXWELL: He could have.

22 JUDGE RIVERA: I find that statement to be
23 unbelievable and incredible.

24 MR. MAXWELL: What he did say on the record - - -
25 he could have said that. But what he did say on the record



1 is based on what you're hearing - - - what I - - - what I'm
2 hearing, it's a general thing. And again, he says he
3 didn't get exculpatory witnesses. He doesn't say there are
4 exculpatory witnesses. He doesn't say I gave him the names
5 of so-and-so, the phone numbers, the addresses. He just
6 says he didn't call exculpatory witnesses without saying
7 there are any. The judge viewed that as a general
8 statement. And then the discussion went the way it did to
9 the defendant saying all I want to do is ask the questions.
10 That's all I want to do. He got what he wanted to do. So
11 again, it - - - going back to - - - I mean it would make it
12 easier for you. It would make it easier for the Appellate
13 Division if the judges pounced on these and - - - and
14 interrogated everybody. But it would also grind their
15 trial system to a halt.

16 JUDGE RIVERA: I'm not really clear why it's an
17 interrogation just to ask - - - not - - - not about
18 tactics. Are - - - do you know the law, the Chief Judge's
19 formulation of that question.

20 MR. MAXWELL: Right. That is a very - - -

21 JUDGE RIVERA: Three seconds? I mean - - -

22 MR. MAXWELL: Three seconds leads to oh, Judge,
23 that's what he told me. Well, no. That's not what I told
24 you.

25 JUDGE RIVERA: Okay.



1 MR. MAXWELL: And on and on it goes.

2 JUDGE RIVERA: Well, there you're done now.

3 MR. MAXWELL: It - - - it - - - I'm not saying he

4 - - -

5 JUDGE RIVERA: And we don't have an appeal.

6 MR. MAXWELL: I'm not saying that he could - - -

7 it would have been okay for him to handle it that way.

8 CHIEF JUDGE DIFIORE: So, Mr. Maxwell, what is
9 the threshold to trigger the inquiry that's necessary for a
10 judge to make under these circumstances. What would it be?

11 MR. MAXWELL: Well, it's what your case law says
12 it is. It - - - the judge has to, in his discretion or her
13 discretion, find the seemingly serious matter here,
14 seemingly grave enough issue that he has to make that - - -
15 or he or she has to make that inquiry.

16 CHIEF JUDGE DIFIORE: So then I get back to the
17 question so in - - - is it your argument that in a case
18 that involves multiple witnesses, a serious, very serious,
19 assault case where the defendant is claiming that his
20 lawyer told him there's no money to investigate whether or
21 not any of those witnesses would come forward on your
22 behalf and support your story. That's not a seemingly
23 serious - - -

24 MR. MAXWELL: It - - -

25 CHIEF JUDGE DIFIORE: - - - allegation, that



1 failure to - - -

2 MR. MAXWELL: Again, looking at sitting in the
3 judge's seat with jurors on the first floor walking up to
4 the third floor to his courtroom.

5 CHIEF JUDGE DIFIORE: I get it.

6 MR. MAXWELL: Six witnesses brought up from North
7 Carolina. Trial scheduled for months.

8 JUDGE STEIN: But not - - - but we're not asking
9 him to make the determination that he should grant the
10 request. The only issue that we are addressing here is
11 whether he should have made that minimal inquiry, whether
12 it was enough to make a minimal inquiry. There may have
13 been all sorts of reasons or answers that - - - that the
14 judge would have received that said I'm denying this.

15 MR. MAXWELL: Right.

16 JUDGE STEIN: But that's not the question before
17 us.

18 MR. MAXWELL: Well, again, while I read what the
19 judge's - - - was saying was from what I've heard it's
20 general and I - - - you haven't given me specifics, and I -
21 - - and it's - - -

22 JUDGE STEIN: Again, that's - - - that's what
23 we're looking at.

24 MR. MAXWELL: Right.

25 JUDGE STEIN: Was it specific enough - - -



1 MR. MAXWELL: Right. But - - -

2 JUDGE STEIN: - - - to - - - to warrant that
3 inquiry.

4 JUDGE RIVERA: So you're not taking the position,
5 which I thought maybe was the position you were taking - -
6 - going to have to step away, that - - - that we can infer
7 that the judge made a determination that it was incredible
8 that the statement that the - - - or statements defendant
9 was making about the failings of his lawyer was incredible
10 based on, as you're saying, this - - - sort of this history
11 with respect to this case and - - - and this defendant and
12 - - - and this lawyer.

13 MR. MAXWELL: I don't know if he was finding it
14 incredible. I think he was looking at the entire situation
15 and finding the entire situation incredible. Every - - -

16 JUDGE RIVERA: So - - - so then shouldn't that be
17 on the record so then - - -

18 MR. MAXWELL: Well, let me - - -

19 JUDGE RIVERA: Go ahead.

20 MR. MAXWELL: What was on the record was him
21 saying that I think this is too general and then if it had
22 gone the way - - - it kind of - - -

23 JUDGE RIVERA: And if that's the case can't we
24 then infer that he wasn't making a determination that it's
25 incredible?



1 MR. MAXWELL: Well, he - - - I think he was
2 looking at it as you haven't identified that any
3 investigation would have gone anywhere and it then
4 progressed to where it went to all I want to do is ask the
5 questions. I want to represent myself. The judge didn't
6 force that on him. He made those decisions. He has to
7 live with that decision. So I'd ask you to affirm.

8 CHIEF JUDGE DIFIORE: Thank you, sir.

9 Mr. Rothschild.

10 MR. ROTHSCHILD: The court does have discretion
11 in making - - - determining whether there's good cause for
12 substitution but that discretion must be informed. The
13 three factors, the timing of the request, the status of the
14 case, and whether counsel is competent or not, there have
15 to be questions. Even if the judge suspects that it's
16 merely for the purpose of delay - - -

17 JUDGE GARCIA: That - - - that's what we're
18 looking at, right, as they're saying. So if we say that
19 what rose to the level of requiring an inquiry was the
20 statement he told me he didn't have resources, and the
21 question I think has been formulated here are you aware
22 that you have access to resources seems a very
23 straightforward back-and-forth without getting into
24 tactics, very clean, minimal. Any time a defendant raises
25 that, if we rule that way, any - - - and these scripts do



1 get around. So any time a defendant raises that point and
 2 a judge - - - it could be the jury - - - I think it was the
 3 panel that's coming in, not the actual jury in this case,
 4 right? But let's say the jury's walking into the room,
 5 we've had five days of jury selection, we've had months and
 6 months of pretrial motions, defendant stands up and says
 7 this guy told me I couldn't get a - - - don't have access
 8 to funds, judge says no way, sit down, we're going to
 9 trial, reversible error?

10 MR. ROTHSCHILD: Yes. Absolutely because the
 11 exercise of discretion requires information. Otherwise,
 12 it's merely - - -

13 JUDGE FAHEY: So - - - so you're saying it's - -
 14 - it's not a minimal inquiry. You must make an
 15 inquiry is what you're saying?

16 MR. ROTHSCHILD: It's - - - it's a - - - minimum
 17 - - the inquiry is like do you know County Law 722.

18 JUDGE FAHEY: Sure. No. I get it. But - - -
 19 but you're still saying there must be an inquiry.

20 JUDGE GARCIA: [Indecipherable]

21 MR. ROTHSCHILD: I believe there must be an
 22 inquiry especially when a case, prima facie ineffective
 23 assistance of counsel is alleged, the court can address it
 24 very simply. This is a de minimis burden upon the trial
 25 court. Secondly, regarding the Faretta inquiry that was



1 done in this case, that has been held not to be a
2 substitute for a side's inquiry because they're totally
3 different issues.

4 JUDGE RIVERA: So - - - so you're not arguing
5 that if defendant just got up and said he doesn't know the
6 law, my - - - my counsel doesn't know the law, that - - -
7 you wouldn't say that's not enough?

8 MR. ROTHSCHILD: That's not specific.

9 JUDGE RIVERA: It's not enough. It's that this
10 specific - - - excuse me. This specific assertion by
11 defendant about his trial counsel's ignorance, which has
12 already been found to ineffective assistance of counsel, is
13 enough to at least get you the inquiry?

14 MR. ROTHSCHILD: I believe so, Your Honor. And
15 as far as whether, you know, the court may have believed
16 this, I think that the reality in Onondaga County as shown
17 by the Spangenberg Report shows - - -

18 JUDGE RIVERA: So if we agree with you does that
19 require if a judge just doesn't believe it that they must
20 say on the record I don't believe you?

21 MR. ROTHSCHILD: I think the court has the
22 obligation, yes, to make a record.

23 JUDGE RIVERA: And if - - - and if the judge says
24 I don't believe you is that enough? Is there some other
25 claim now that nevertheless, the judge should have made



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

some inquiry even if the judge, given all the
circumstances, just doesn't believe this statement?

MR. ROTHSCHILD: Well, I'd like to say yes. But
I think the facts in this case are even stronger insofar as
what we have in front of us, seventeen witnesses who were
never contacted, the history of this failure to hire
investigators in Onondaga County, I think this is something
that had - - - that should have been at minimally inquired
about by the trial court, and I would ask this court to
reverse and remand for a new trial.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. ROTHSCHILD: Thank you.

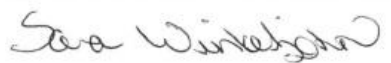
(Court is adjourned)



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. Leroy Savage Smith, No. 116 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: October 18, 2017

