

People v Dean

2022 NY Slip Op 32288(U)

May 2, 2022

County Court, Wayne County

Docket Number: Ind. No. 18-108A

Judge: Daniel G. Barrett

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At a Term of the County Court Held in and for the County of Wayne at the Hall of Justice in the Town of Lyons, New York on the 11th day of March, 2022.

PRESENT: Honorable Daniel G. Barrett
County Court Judge

STATE OF NEW YORK
COUNTY COURT COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

TIMOTHY PAUL DEAN,

DECISION ON MOTION
TO SETTLE THE RECORD
ON APPEAL
Ind. No. 18-108A

Defendant

Appearances - People - Joseph Plukas, Esq.
Defendant - James Hobbs, Esq.

The District Attorney's Office has moved the Court for an Order Settling the Record. The attorneys cannot agree on the record for the Appeal. Eventually after a conference with the attorneys on at least two different occasions and receiving information and/or Affidavits from the attorneys, the Court did schedule a Reconstruction Hearing which was heard on the date set forth above.

The jury selection for the trial of the Defendant took place on May 15, 2019. Mr. Dean was convicted and sentenced. Eventually a transcript for the Appeal was requested from court reporter, Laura Farmer. Ms. Farmer initially certifying that transcript, Ms. Farmer was contacted by attorney Joseph R. Plukas, questioning a particular page and line of the transcript, specifically page 158, line 11. After reviewing the same Ms. Farmer determined she had in fact made an error. The original certified transcript provides that at page 158, line 11 "Mr. Dunbar - number 6". Ms. Farmer in her Affidavit of November

12, 2020 notes that the properly transcribed record should reflect on page 158, line 11, "Mr. Dunbar - number 16". She notes the error in the originally certified transcript is a technical error.

However thereafter Ms. Farmer was contacted by her supervisor Catherine Pietak, Principal Court Reporter, that the review of Ms. Farmer's stenographic notes, specifically page 158, line 11 discovered an error in the originally filed certified transcript as well as the subsequently filed certified transcript, regarding the same page and line number, page 158, line 11.

Ms. Farmer in her Affidavit of December 18, 2020 provides that the true and accurate transcription of her stenographic notes for page 158, line 11 should read: "prospective juror number 16 raises hand." In addition at page 158, line 12 and 13 the transcript should read: "THE COURT: I'll have the attorneys follow up with you."

At the hearing Ms. Farmer basically testified regarding said Affidavits. Exhibit 1 is the Affidavit of December 18, 2020, Exhibit 2 are the stenographic notes and Exhibit 3 is the actual corrected page of the transcript.

Ms. Farmer testified that she does make notes with her stenographic machine during the trial and that she also makes handwritten notes during the trial on such things as jury list or caption on the calendar of court that day. Those handwritten notes are during the trial. She testifies she did not keep those notes. She indicates those handwritten notes also indicated juror number 16 not 6.

She testifies that the first time she reviewed the transcript for errors as reflected in Defendant's Exhibit A that she looked at the transcript only and not her steno notes. She indicates on cross-examination she now is not sure if she looked at her handwritten notes but she definitely looked at the transcript at the first review. However, she testifies that after speaking with Supervisor Catherine Pietak, that she and Ms. Pietak reviewed her steno notes and that the steno notes accurately reflected how the transcript should read, as

set forth in Exhibit 1. She also reiterates that when she first reviewed the transcript on or about November 12, 2020 after speaking with Mr. Plukas, that she only looked at the transcript and not her steno notes or handwritten notes.

The Court allowed both attorneys to submit anything they deemed appropriate after trial. They were received from both counsel. However the Court will note that both counsel submitted Affirmations and/or Affidavits about additional matters that should be added to the record. Mr. Plukas basically submitted an Affirmation testifying about his contact with attorney Mary Davison, who represented Mr. Dean at the time. Mr. Hobbs has an Affidavit indicating that he spoke with Mary Davison and he related what she had to say. Firstly both the Affidavit and Affirmation from counsel are not considered part of the record and could not be made part of the record and secondly, both are clearly hearsay. Therefore the Court did not consider them in any way. Both refer to Mary Davison, who could have certainly called as a witness by either attorney.

Mr. Plukas in his submission to the Court based upon the admitted Exhibits 1-3, the only conclusion is that the Affidavit of Exhibit 1 provides the proper transcription of what actually occurred in court during jury selection on May 15, 2019. Mr. Hobbs argues in his submission that Ms. Farmer's recollection and/or testimony are not credible.

Ms. Farmer corrected her testimony later during cross-examination, it became clear after she had time to reflect that she was able to accurately provide the chronology of events that lead to the certification of the record as set forth in Exhibit 1. Exhibit 1 was not dependent solely upon Ms. Farmer but on a review with Ms. Farmer and her Supervisor, Catherine Pietak, who both reviewed the steno notes together and that Exhibit 1 is the correct transcript based upon the review of the steno notes.

Mr. Hobbs also makes an issue of Ms. Farmer not keeping her handwritten notes. However, Ms. Farmer testified in her review of the transcript as set forth in Exhibit A, that she reviewed the transcript only and not her steno notes or handwritten notes. That her review of the transcript with Catherine Pietak resulted in the Affidavit in Exhibit 1, that only steno notes were reviewed and not handwritten notes. Therefore handwritten notes were not relied on in the modification of the certification of the trial transcript. Therefore, the Court rejects defense counsel's argument set forth in his submission regarding the handwritten notes.

The Court also after having reviewed the file and presiding over the hearing, does actually have refreshed recollection with regard to this issue. The Court now does recall that a juror did raise a hand when the Court asked if there was any reason why the jurors could not or should not sit on the jury. After seeing the juror raise their hand the Court followed up with a statement "I'll have the attorneys follow up with you." The Court cannot recall the number of the juror but the Court does recall a juror raising a hand, and that Ms. Callanan did follow up with that juror. The Court does recall a scheduling problem for that juror and that juror was then excused.

The Court notes it is the practice of the Court when conducting voir dire as with a particular question by directing the jurors to raise their hands if they are answering in the affirmative or even if the answer is maybe. It is then the Court's practice if the juror raises their hand to note on the record that the attorneys will follow up with that particular juror. It is also the practice of the Court that if the attorneys do not follow up the Court will follow up with a juror.

Where a transcript may be inaccurate or disputed, it is the trial court that determines, based on a preponderance of the evidence, what actually occurred before him, People v Vethune, 29 N.Y. 3d 539. The Court does find that the District Attorney's Office has met its burden by proving by a preponderance of the evidence that the transcript is correctly set forth in Exhibit 1.

Therefore the Court finds that the record on appeal should reflect that a true and accurate transcription of the proceedings, for page 158, line 11, should read as follows: “prospective juror number 16 raises hand;” and that page 158, line 12 and 13 should read: “THE COURT: I’ll have the attorneys follow up with you.”

The Court is signing an Order consistent with the Decision herein.

Dated: May 2, 2022
Lyons, New York

A handwritten signature in black ink, appearing to read "Daniel G. Barrett", written over a horizontal line.

Daniel G. Barrett
County Court Judge