
STATE OF NEW YORK

COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

JUWANNA WROTTEN,

Defendant-Respondent.

BRIEF OF THE
NEW YORK STATE ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS, *Amicus Curiae*

Richard D. Willstatter
Chair, Amicus Committee
New York State Association
of Criminal Defense Lawyers
475 Park Avenue South
Suite 3300
New York, New York 10016
(212) 532-4434
(212) 532-4668 *facsimile*
(Murray E. Singer, *Of Counsel*)

October 9, 2009

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TABLE OF AUTHORITIES

Judiciary Law §2-b(3)

C.P.L. Art. 65

C.P.L. §65.10

C.P.L. Art. 660

C.P.L. Art. 680

QUESTION PRESENTED

Whether the trial court lacked the authority to permit the complainant to testify from another state by means of a live, two-way television transmission.

INTEREST OF AMICI

The New York State Association of Criminal Defense Lawyers (NYSACDL) is a non-profit membership organization of more than 850 attorneys who practice criminal defense law in the State of New York. Founded in 1986, its purpose is to assist, educate and provide support to the criminal defense bar to enable its members to better serve the interest of their clients and to enhance their professional abilities.

The NYSACDL has appeared numerous times before this Court as *amici curiae* in cases affecting the criminal law and administration of justice.

This case raises important questions about the power of the courts to fashion new rules governing the introduction of evidence in the absence of direct statutory authority. The NYSACDL has a long history of interest and advocacy concerning these questions, in this Court and others. Since the disposition of the case will have impact far beyond this case, we have sought permission to appear as *Amicus Curiae* on behalf of the Respondent.

STATEMENT OF FACTS

By Bronx County Indictment Number 3209/2003, respondent Juwana Wrotten was charged with Assault in the First Degree (P.L. §120.10) and two counts of Robbery in the First Degree (P.L. §160.15). The charges arose out of an incident alleged to have occurred on June 29, 2003 in the home of the complainant, David Liebowitz. Mr. Liebowitz was the only prosecution witness as to what happened in his home on June 29, 2003. Shortly after the incident, however, Mr. Liebowitz moved to California.

In early 2004, the prosecution moved before Justice Steven Barrett for permission to examine Mr. Liebowitz on commission pursuant to C.P.L. Art. 680. That motion was denied on the ground that examination on commission under C.P.L. Art. 680 was available only upon application of the defense. The prosecution also moved for permission to conduct a conditional examination of Mr. Liebowitz pursuant to C.P.L. §660, but advised Justice Barrett that a conditional examination under C.P.L. Art. 660 had to be conducted in New York and Mr. Liebowitz was unable to travel from California. The prosecution thereafter sought permission to conduct a conditional examination of Mr. Liebowitz by means of a live, two-way video transmission from California. Justice Barrett denied the application to conduct

a conditional examination, but ruled that he would permit Mr. Liebowitz to testify live at trial by means of “real time video transmission.” Justice Barrett predicated the court’s authority for use of this procedure on Judiciary Law §2-b(3).

The matter was transferred to Justice Harold Silverman for trial. Respondent Juwana Wrotten renewed her opposition to the procedure by which Mr. Liebowitz would testify at trial by means of real time video transmission. Justice Silverman determined that he was not bound by Justice Barrett’s ruling, but agreed to permit Mr. Liebowitz to testify at trial from California by means of a live, two-way video transmission. Justice Silverman, too, found his authority for this procedure in Judiciary Law §2-b(3).

Mr. Liebowitz did in fact testify at trial from California by means of a live, two-way video transmission. The jury acquitted Ms. Wrotten of Assault in the First Degree but convicted her of the lesser included offense of Assault in the Second Degree. The jury also acquitted Ms. Wrotten of Robbery in the First Degree, and was unable to reach a unanimous verdict on a charge of Robbery in the Second Degree. Ms. Wrotten was ultimately acquitted of Robbery in the Second Degree at a subsequent trial.

The Appellate Division, First Department reversed Ms. Wrotten’s conviction for Assault in the Second Degree, finding that the trial court lacked the authority to

permit Mr. Liebowitz to testify from California by means of a live, two-way video transmission. Two Justices at the Appellate Division dissented, one of whom granted leave to appeal to this Court.

ARGUMENT

THE TRIAL COURT LACKED THE AUTHORITY TO PERMIT THE COMPLAINANT TO TESTIFY FROM ANOTHER STATE BY MEANS OF A LIVE, TWO-WAY TELEVISION TRANSMISSION.

Appellant asks this Court to find that the taking of testimony by live, two-way television is authorized by Judiciary Law §2-b(3), because it is “necessary to carry into effect the powers and jurisdiction” of the court. However, the Legislature has authorized the taking of testimony by live two-way television only under the limited circumstances set forth in C.P.L. Art. 65. We urge this Court to uphold the finding of the Appellate Division, that neither the Judiciary Law nor any other provision of law authorized the trial court to allow the prosecution witness to testify by means of live two-way television.

Our concern is that the expansive reading of Judiciary Law §2-b(3) proposed by appellant has no principled limit absent a specific constitutional violation. It necessarily opens the door to individual trial courts making public policy choices that

should be made by the Legislature, and then creating ad hoc new procedures to give effect to those policy choices. Appellant proposes that the trial courts employ “the Judiciary Law §2-b(3) power to permit two-way live televised testimony upon a showing, by clear and convincing evidence, that it will further the strong public policy of protecting the health and lives of our senior citizens.” (Appellant’s Brief, pp. 61-62). This summary statement, at the end of appellant’s argument concerning the Judiciary Law, poses a number of significant problems. For instance, absent a clear statement by the Legislature, how is a trial judge to determine what is the public policy of New York State in any given area? Is each individual trial judge empowered to make that determination on her own? If so, how so?

Appellant suggests that each individual trial judge should glean that public policy from analysis of various statutory formulations. That is what appellant has done here, looking for legislative intent and policy choices from an examination of Judiciary Law §2-b(3), C.P.L. Art. 65 (Closed-Circuit Television for Certain Child Witnesses), C.P.L. Art. 660 (Examination of Witnesses Conditionally), and C.P.L. Art. 680 (Examination of Witnesses on Commission), none of which addressed the issue before the Wrotten trial court. But what happens when two or more trial courts come to differing, and perhaps conflicting, conclusions about what the public policy of New York State is on any given subject? It is the Legislature’s role to define

public policy through the enactment of specific rules and procedures designed to govern the conduct of criminal cases; it has done so through passage of the Penal Law and Criminal Procedure Law. Is this Court now to be put in the position of deciding not what the law is, but which public policy formulation, cobbled together from different statutory schemes, correctly expresses the public policy of New York State absent any expression of legislative will or intent?

Moreover, on what basis does appellant conclude that the courts may use the power to create new procedures it believes is conferred by the Judiciary Law only upon a “clear and convincing” showing that the public policy of New York State is thereby being given effect (“permit two-way live televised testimony upon a showing, by clear and convincing evidence, that it will further the strong public policy of protecting the health and lives of our senior citizens.”)? If the power sought for the trial courts by appellant exists, then no such showing would be required, for there is nothing in Judiciary Law §2-b(3) that conditions the use of that power on “clear and convincing” evidence. In fact, the clear and convincing standard is the standard set forth by the Legislature in Art. 65 for the taking of testimony by live two-way television in the case of a vulnerable child witness. However, that standard is not simply that the evidence will further a public policy of protecting the well-being of children. It requires a specific showing, by clear and convincing evidence, “that it is

likely that such child witness will suffer serious mental or emotional harm if required to testify at a criminal proceeding without the use of live, two-way closed-circuit television and that the use of such live, two-way closed-circuit television will diminish the likelihood or extent of, such harm.” C.P.L. §65.10(1). Appellant here seeks only a requirement of clear and convincing evidence that televised testimony will “further the strong public policy of protecting the health and lives of our senior citizens.” In fact, appellant merely hopes to cushion the effect of the ruling it seeks by asking this Court first, to create a new procedure not otherwise approved by the Legislature, and then using the Legislature’s considered judgment in another statute (C.P.L. Art. 65) to craft a limitation on the powers sought but absent from the statute relied on by them in the first place. In short, appellant, and the Wrotten trial court, have created a new procedure and then cloaked it in a standard that the Legislature adopted in an entirely different context for entirely different reasons.

There is an additional concern we ask this Court to consider. If indeed the power sought by appellant for the trial courts under the Judiciary Law exists, how far does that power extend? May a trial court permit, under Judiciary Law §2-b(3), the introduction of testimony procured through the use of hypnosis, if the court first determines that the prosecution cannot successfully go forward without such testimony, and therefore such testimony is “necessary to carry into effect the powers

and jurisdiction possessed by it”? May a trial court permit the introduction of expert testimony that does not meet the Frye standard for admissibility, if the court first determines that the prosecution cannot successfully go forward without such testimony, and therefore such testimony is “necessary to carry into effect the powers and jurisdiction possessed by it”? May a trial court permit the introduction of testimony by live, two-way television from another country, if the court first determines that the prosecution cannot successfully go forward without such testimony, and therefore such testimony is “necessary to carry into effect the powers and jurisdiction possessed by it”? How would the court enforce a contempt order under such circumstances (or even under the circumstances presented in the Wrotten trial, where testimony was taken from another state)? How would the court address the issue of perjury?

Ultimately, we ask this Court to consider the implications and broad-reaching effect of appellant’s expansive reading of the powers conferred by Judiciary Law §2-b(3). If a trial court of this State has the broad authority sought by appellant under Judiciary Law §2-b(3) to determine what is the public policy of New York State, and thereafter to craft any procedure that court deems “necessary” to fulfill that policy, what, other than a constitutional rule, limits this power?

It is not the role of the courts to devise any rule or allow any procedure simply to ensure that a prosecution can proceed. Sometimes the rules permit prosecutions to go forward and sometimes they do not. It is the Constitutions of the United States and New York State, and the laws enacted through the legislative process, that provide the rules by which criminal proceedings are to be conducted. Sometimes they work to the benefit of the prosecution and sometimes they work to the benefit of the defense. This Court should not sanction the practice of creating new procedures, absent statutory authorization, simply to provide one side the opportunity to make out its case. Doing so will eviscerate the Legislature's role by allowing critical issues in a wide variety of circumstances implicating a myriad of public policy choices to be determined on a case by case basis by trial courts throughout the state.

Respondent has fully set forth the argument that the decision whether to permit testimony by live two-way television is a matter of public policy to be determined only by the Legislature. Amicus is in full agreement with this position, as was the Appellate Division, and we will not repeat the argument here.

We therefore urge this Court to affirm the Order of the Appellate Division, and hold that the trial court lacked the authority to permit the complainant in this case to testify from California by means of a live, two-way television transmission.

CONCLUSION

FOR THE REASONS STATED ABOVE,
THE ORDER OF THE APPELLATE
DIVISION SHOULD BE AFFIRMED.

Respectfully submitted,

Richard D. Willstatter
Chair, Amicus Committee
New York State Association
of Criminal Defense Lawyers
475 Park Avenue South
Suite 3300
New York, New York 10016
(212) 532-4434
(212) 532-4668 *facsimile*

Murray E. Singer, *Of Counsel*
241 East Shore Road
Suite 201
Great Neck, New York 11023
(516) 869-4207
(516) 869-4219 *facsimile*

October 9, 2009

AFFIDAVIT OF SERVICE

I, MURRAY E. SINGER, ESQ., being duly sworn, deposes and says that on October 9, 2009, I personally served the enclosed motion and brief on (1) Hon. Robert Johnson, District Attorney, Bronx County, at 198 East 161st Street, Bronx, New York 10451, and (2) Richard M. Greenberg, Office of the Appellate Defender, 11 Park Place, Suite 1601, New York, New York 10007.

Murray E. Singer