

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. 98

SCOTT BARDEN (REARGUMENT),

Appellant.

20 Eagle Street
Albany, New York 12207
April 27, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

RICHARD M. GREENBERG, ESQ.
OFFICE FOR THE APPELLATE DEFENDER
Attorneys for Appellant
11 Park Place
Suite 1601
New York, NY 10007

DAVID M. COHN, ADA
NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
One Hogan Place
New York, NY 10013

Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next on the calendar
2 is number 98, People v. Scott Barden (reargument).

3 MR. GREENBERG: Good afternoon, Your
4 Honors; Richard Greenberg, Office of the Appellate
5 Defender for Scott Barden. And, Your Honor, may I
6 reserve two minutes for rebuttal, please?

7 CHIEF JUDGE DIFIORE: Yes, you may.

8 MR. GREENBERG: Thank you. Now, Your
9 Honors, Scott Barden was denied a speedy trial in
10 this case. And in any event, the evidence was
11 insufficient to support conviction for possession of
12 stolen property and theft of services. Turning first
13 to the speedy trial issue, this action was commenced
14 in May of 2010 when Mr. Barden was arrested. The
15 People answered ready for trial for the very first
16 time in October of 2011, seventeen months later.
17 30.30 provides that the People must be ready within
18 six months.

19 JUDGE STEIN: It - - - it was never a - - -
20 a particularized specific analysis of which time was
21 chargeable - - - charged to the People and which was
22 charged to the defendant here, correct? I mean the
23 courts basically just said you went over it. That
24 there - - -

25 MR. GREENBERG: The - - - the judge - - -

1 JUDGE STEIN: - - - wasn't a problem.

2 MR. GREENBERG: Well, the judge analyzed
3 the speedy trial motion and said I find that there
4 are 179 days charged to the People, and in this case,
5 six months by the clerk of the calendar equals 184
6 days.

7 JUDGE STEIN: Well, we don't know exactly -
8 - -

9 MR. GREENBERG: So we were five days short.

10 JUDGE STEIN: - - - how they came up with
11 that 179 - - -

12 MR. GREENBERG: No, but the judge made that
13 finding and so that's essentially the law of the
14 case, and we're looking for five more days. And here
15 we have months and months and months in which the
16 People did not answer ready, and what they're trying
17 to do here is put the onus on the defense so when the
18 - - -

19 JUDGE STEIN: Do you concede - - - because
20 this seems to boil down to the language in Smith
21 about what is participation by the defendant, right?

22 MR. GREENBERG: Exactly.

23 JUDGE STEIN: Okay, so do - - - do you
24 agree that there was at least some participation?
25 There were some requests for more time because

1 counsel had obligations in other courts and so on and
2 so forth?

3 MR. GREENBERG: She participated. In fact,
4 she admitted, subsequently, on one of the record
5 dates, she said, Judge, I did participate but there
6 seems to be this crazy line of cases in the First
7 Department. I think what's happened is the First
8 Department alone, among the Departments, has taken
9 the word participate in Smith and taken it out of
10 context and turned it into something it was not
11 intended to be. And that is because if you look at
12 the context of Smith, what Smith said is when the
13 People have never answered ready, they get charged
14 with all the adjournments. They get charged with the
15 time even if it's extended because the defense
16 attorney is not available on the date the People are
17 requesting.

18 Or, let's say, there's court congestion, as
19 happened here also. On the March 2nd adjournment,
20 the People requested March 16th. Defense counsel
21 said well, that's a bad day, I'm going to be on
22 trial, can we have the 28th of March? And the judge
23 said no, it has to be after April 8th, we'll put it
24 on for April 13th. So from - - - for the very least,
25 from the 28th of March until April 13th, that was due

1 to court congestion.

2 JUDGE STEIN: So - - - but counsel said
3 fine or something like that, right?

4 MR. GREENBERG: Right, she said fine, and
5 if this court wants to hold that the word
6 participation in Smith means that counsel says a word
7 and that equals participation and therefore, that is
8 the equivalent, the functional equivalent, of consent
9 to adjournment - - -

10 JUDGE STEIN: So what's the - - - what's
11 the magic - - -

12 MR. GREENBERG: - - - then that turns the
13 world upside down.

14 JUDGE STEIN: What are the magic words?
15 What - - - what would show consent to an adjournment?

16 MR. GREENBERG: Well - - -

17 JUDGE STEIN: That's - - - that's really
18 the question.

19 MR. GREENBERG: If - - - if the lawyer says
20 I consent. Oftentimes, that's what happens. A judge
21 will say, counsel, do you consent to this adjournment
22 because both sides want the adjournment. You're
23 trying to - - -

24 JUDGE STEIN: But, counsel, if - - - if the
25 court doesn't ask counsel, does counsel have to say,

1 Your Honor, I - - - I don't consent to that? I
2 understand that that's the court's - - -

3 MR. GREENBERG: Well, this court has held
4 many times that a counsel who says nothing is not
5 consenting, that consent has to be explicit and on
6 the record.

7 JUDGE PIGOTT: That - - - that was your
8 argument last time. I think you said that the - - -
9 the best advice you'd give lawyers aft - - -
10 depending on how we go is to stand there and - - -

11 MR. GREENBERG: Well, I would.

12 JUDGE PIGOTT: - - - not - - - not say
13 anything.

14 MR. GREENBERG: Again, I think counsel
15 would be well advised, if that's the way this is
16 going to proceed, then when the People come in and
17 say we're not ready, we're requesting two weeks,
18 counsel can say that day is no good for me, I'm on
19 trial in another court. When the judge says what
20 date is good for you, counsel, counsel stands mute.
21 And when the judge says okay, I'll put it on for X
22 date, counsel doesn't say fine, thank you, or
23 anything else. I don't think that's what this is
24 meant.

25 If we go back to the - - - the core cases

1 here, and if you look at the language of this court
2 recently in Sibblies, this is a People-readiness
3 statute. It's not a game where you just total up
4 time either way. Sure, there are a few specified
5 exclusions like motion practice that's clearly
6 excluded, or where defense counsel clearly and
7 unequivocally consents on the record. We're trying
8 to work out a plea bargain or disposition, we're both
9 consenting to this adjournment basically saying to
10 the People you don't have to get ready for trial, I'm
11 agreeing to consent. But here the People were not
12 ready. They weren't ready in January, they weren't
13 ready in February, they weren't ready in March.

14 And keep in mind, when the court sets the
15 new date and if counsel says look, that's a bad day
16 for me, how about the following week and the judge
17 says fine, we'll put it on for the following week,
18 the People are not stuck with that. They can stop
19 the clock any time they want by filing a certificate
20 of readiness. That's what the statute contemplates,
21 and that's why in Smith, what you said is, "The
22 question before us is whether the People should be
23 charged with time beyond the dates to which they
24 requested adjournments and because the - - - the
25 defense attorney is not available on that date. And

1 the People contend that the adjournment is extended
2 because the defense rejects the original date
3 requested." This court said that argument is without
4 merit. This court said, "The People never stated
5 their readiness for trial in this case. They should
6 be charged with the entirety of the adjournment
7 period."

8 Now, again, there could be cases where the
9 People say we want two weeks and defense counsel says
10 in response that's a bad day for me, how about three
11 months. Obviously, in a situation like that, the
12 defense is extending the time and no one is saying
13 the People should be charged for that. Although,
14 even in that situation, the People can stop the clock
15 any time they want by filing a certificate. They
16 were not ready for seventeen months in this case. I
17 don't see how you get less than six months of
18 includable time charged against them except - - -

19 JUDGE ABDUS-SALAAM: So on - - - on the
20 issue of - - -

21 MR. GREENBERG: - - - by this kind of
22 nitpicky - - -

23 JUDGE ABDUS-SALAAM: Well, your - - - your
24 yellow light is on now, so maybe you should go to
25 your next issue because I was going to ask you

1 something on speedy trial. I can bring it up on
2 reply.

3 MR. GREENBERG: I'll stay as long as you
4 like, Judge, but turning quickly to the - - - to the
5 stolen property charge, the legislature in 2002
6 create - - - did a couple things. They amended the
7 General Business Law to change the definition of
8 credit card for purposes of the General Business Law,
9 not for purposes of the Penal Law. At the same time,
10 they created a whole new panoply of crimes in the
11 Penal Law under Article 190 for possession of
12 identifying information. So they said okay, this is
13 a problem, people are stealing identities, credit
14 card numbers, Social Security numbers, here's what
15 we're going to do. We're going to create a whole
16 bunch of new crimes under Article 190. They did not,
17 at that time, purport to change the law with respect
18 to traditional larceny and stolen property crimes,
19 which are in a different part of the Penal Law under
20 Article 155, 160, and 165.

21 And so what we have is we have somebody
22 charged with possession of stolen property when, A,
23 the Penal Law says possession requires that you
24 possess tangible property, not something like a
25 number, but you have to possess tangible property to

1 be convicted of stolen property possession. Number
2 two, there was no stolen property in this case. And
3 number three, Scott Barden had absolutely no dominion
4 or control over Joseph (sic) Catalfamo's credit card
5 number. Scott Barden didn't know the number. He
6 didn't charge anything to that number. He acquiesced
7 when the hotel said we'll put it on that credit card,
8 but he had no control. The credit card - - - the - -
9 - the hotel could have said no, we're not going to
10 charge that card, and Mr. Barden couldn't make them.
11 And he couldn't do anything else. He didn't have a
12 number. He couldn't go out and buy something at a
13 store with that credit card. He had no dominion or
14 control whatsoever.

15 CHIEF JUDGE DIFIORE: Back up a second,
16 counsel.

17 MR. GREENBERG: Yes, Judge.

18 CHIEF JUDGE DIFIORE: I'm still stuck on
19 the preservation issue.

20 MR. GREENBERG: On this issue?

21 CHIEF JUDGE DIFIORE: Yeah.

22 MR. GREENBERG: Well, counsel - - - counsel
23 argued - - - look, counsel could have done a little
24 better job, but she did argue on 437 of the record
25 she says, "Credit card does not mean credit card

1 number." She says, "I don't know, maybe for
2 commercial purposes it does, but in this case you
3 can't say that a credit card equals a credit card
4 number." She also, on 439, said, "Scott Barden
5 cannot be charged with constructive possession of the
6 card or the card number because the hotel had the
7 card number, not Scott Barden." And again, on 451 to
8 452 of the record she reiterates that that, "Scott
9 Barden did not knowingly possess stolen property."
10 She argued that there was no stolen property. She
11 said that if anything, the credit card number was in
12 the hands of the hotel, and Scott Barden couldn't be
13 constructively possessing something that he didn't
14 know about and didn't have anything to do with.

15 So I think it is sufficiently preserved.
16 Clearly, the court was on notice that counsel was
17 saying this law does not apply to this situation, but
18 even if it does, my client is not guilty of it. I
19 think that's fully preserved.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 MR. GREENBERG: Thank you.

22 CHIEF JUDGE DIFIORE: Counsel.

23 MR. COHN: Good afternoon, Chief Judge
24 DiFiore. May it please the court, David Cohn for the
25 People. I'll start with the - - - the speedy trial

1 issue, and there's a very clear rule that this court
2 adopted in People v. Smith which has been followed by
3 the lower courts since 1993 when this court decided
4 Smith. And that clear rule is that if the defendant
5 participates in setting the final adjourn date, then
6 the time is not charged to the People.

7 JUDGE ABDUS-SALAAM: But what does
8 participation mean, Mr. Cohn? Does it mean that
9 counsel says when the People propose another date
10 well, that's not a good date for me, I'm on trial,
11 and so I need the day after or a week after; is that
12 what you'd consider participation?

13 MR. COHN: Yes, Your Honor, and - - - and
14 that is how all the lower courts for the last twenty-
15 three years have read Smith.

16 JUDGE PIGOTT: The problem with it, though,
17 it seems to me, is it seems kind of ludicrous. I
18 mean you - - - you're just trying to - - - you're
19 acquiescing either in the court wanting an
20 adjournment or the People wanting an adjournment and
21 because you're being accommodating you're saying, you
22 know, some word of magic that all of a sudden you're
23 doing a disservice to your client, you know, who's
24 entitled to get his - - - you know, to get his trial
25 on.

1 MR. COHN: Right.

2 JUDGE PIGOTT: And the ironic part of it is
3 is that at arraignment, the People always say they're
4 ready, and they're not. They're not any more ready -
5 - - I mean they haven't - - - they haven't disclosed,
6 they haven't - - - they haven't done a bunch of
7 stuff, but we say, okay, they say they're ready, and
8 they done.

9 MR. COHN: Well, Your Honor, in Manhattan,
10 the prosecutors do not say they're ready at
11 arraignment. That might be a practice in other parts
12 of the state, but it's certainly not the practice in
13 Manhattan. And - - - and that's one of the reasons
14 why this case is before us because the People are
15 being absolutely honest about their readiness.
16 They're being absolutely - - -

17 JUDGE STEIN: But did they ever submit a -
18 - - a statement of readiness either in between court
19 appearances or - - - I - - - I mean what prevented
20 you at any one of those court appearances from
21 announcing your readiness?

22 MR. COHN: Your - - - Your Honor, there was
23 no state of - - - statement of readiness but that's
24 really aside. That's really not related to the issue
25 in this case. The CPL makes clear, and this court

1 make clear in Smith and in Worley, that in a pre - -
2 - pre-readiness context, when the trial court is
3 calculating the time that's chargeable to the People
4 in a pre-readiness context, you exclude all periods,
5 under 30.30(4)(b), which are at the request of or
6 with the consent of the defense attorney.

7 JUDGE PIGOTT: What - - - what do you think
8 of Mr. Greenberg's argument, though, that if - - - if
9 the defense lawyer just stands mute that somehow that
10 benefits her and her client?

11 MR. COHN: Well, Your Honor, that's - - -
12 all depends on what the client wants. If - - - if
13 the client - - -

14 JUDGE PIGOTT: No, no, no. I'm just - - -
15 I'm just saying exactly any of the scenarios in this,
16 if, instead of saying fine or instead of saying thank
17 you or instead of saying anything, she just said
18 nothing?

19 MR. COHN: Actually, Your Honor, that just
20 wastes the client's time and here's why - - -

21 JUDGE PIGOTT: Well, let's - - - let's not
22 worry about the client's time. Is - - - is that
23 participation?

24 MR. COHN: Is that participation by
25 standing mute?

1 JUDGE PIGOTT: Yeah.

2 MR. COHN: No, Your Honor. And that's what

3 - - -

4 JUDGE PIGOTT: So you - - -

5 MR. COHN: - - - Smith was about.

6 JUDGE PIGOTT: So you see the problem?

7 MR. COHN: Well - - -

8 JUDGE PIGOTT: I mean just to say thank
9 you, Judge, or to say, you know, okay, that somehow
10 you've - - - you've impaired your client's speedy
11 trial rights by who knows how much time? I mean I'm
12 - - - I'm - - -

13 MR. COHN: Your - - - Your Honor, I think
14 the fundamental confusion here is - - - is caused by
15 defense counsel's argument that by requesting more
16 time than the People requested that the defendant is
17 somehow participating in the People's request.
18 That's not what's going on. There are two requests
19 here, and the second part of it is being done solely
20 by the defense attorney for the benefit of the
21 defense attorney.

22 JUDGE STEIN: But the - - - the issue that
23 I have is when defense counsel says I'm ready on
24 March 28th and the court says well, I'm sorry, I
25 can't do it on March 28th, I can't do it until April

1 13th, why - - - why does that period get charged to
2 the defense?

3 MR. COHN: Right. And, Your Honor, I - - -
4 I think Worley answers that for us. And - - - and
5 here is why: in - - - in Worley this court said
6 where there is a - - - and this is a direct quote
7 from - - - from Worley, "Where there's a delay that's
8 been caused by the defendant for his own benefit and
9 with the court's permission" - - - and that was
10 between March 28 and April 13 in that adjournment
11 you're talking about. That was for the defendant's
12 own benefit because the defendant wanted more than -
13 - - more time than the March 16 that the People had
14 requested. They wanted until March 28th. The Court
15 says well, if - - - if you want that, it has to be at
16 least April 8 and they agree on April 13th.

17 JUDGE STEIN: The problem is is that the
18 defendant didn't want the adjournment in the first
19 place. The - - - the defendant was - - - didn't come
20 into court and say I need an adjournment. The People
21 came into court and said - - -

22 MR. COHN: Right, but - - -

23 JUDGE STEIN: - - - I need an adjournment.

24 MR. COHN: Well, Your Honor, again, I think
25 that's confusing the first part and the second part

1 of the request here. The court could have just
2 listened to the People. The People said March 28.
3 The court could have just said okay, we're on for
4 March 28, we'll show up. What's happening is that
5 instead of doing that, instead of making the defense
6 attorney show up on March 28, the court here is doing
7 the defense attorney a favor, doing something for the
8 defense attorney's convenience. The court - - - the
9 - - - the court is saying to the defense attorney is
10 March 28 a date that you want or do you now want this
11 to go further? And - - - and what the court - - -
12 this court said in Worley, "If there's a delay that's
13 been caused by the defendant for his own benefit and
14 with the court's permission under circumstances in
15 which the - - - both the defendant and the court have
16 determined that the adjournment is desirable" - - -
17 in that - - -

18 JUDGE PIGOTT: But that - - -

19 MR. COHN: - - - in that situation - - -

20 JUDGE PIGOTT: - - - that jumps the first
21 part. If - - - if the People are asking for an
22 adjournment and - - - and it turns out the date they
23 want is not good for the defendant and the defendant
24 says I want a different date, it all ends up on the
25 defendant. What the defendant should be saying when

1 you want your adjournment, say absolutely not, you're
2 not consenting to any adjournment by the People
3 period, Judge, we're going to oppose it.

4 MR. COHN: But - - - but, Your Honor,
5 that's not true.

6 JUDGE PIGOTT: That's not a good thing to
7 do.

8 MR. COHN: The time between - - - that - -
9 - that's not true, Your Honor, because the time
10 between March 2 and March 16, which is the
11 adjournment the People requested, that's charged to
12 the People.

13 JUDGE PIGOTT: I understand that. But - -
14 - but by trying to accommodate you, they need a new
15 date and we say, ah ha, you know.

16 MR. COHN: Well - - -

17 JUDGE PIGOTT: Now - - - now you've screwed
18 up your - - - your speedy trial not because you
19 wanted the extra two weeks but because the People
20 wanted two weeks and - - - and I'm giving it to them
21 - - -

22 MR. COHN: Your Honor, that's assuming that
23 the People wouldn't have been ready on March 16, and
24 we don't know that on this record. They might very
25 well have been ready on March 16. What happens then

1 if - - - if - - -

2 JUDGE PIGOTT: Were they ready when they
3 wanted the adjournment?

4 MR. COHN: They were not ready - - - they
5 were - - - it was March 2nd. They said - - -

6 JUDGE PIGOTT: That's my point.

7 MR. COHN: - - - not ready.

8 JUDGE PIGOTT: See, I'm going to move you
9 back a bit. I - - - I want to say when you're asking
10 for an adjournment, the - - - the defendant should
11 say no, we're - - - we're not. Judge, we - - - we
12 are - - - you know, we've got a speedy trial issue
13 here. We are not going to consent to that.

14 MR. COHN: Well - - -

15 JUDGE PIGOTT: Would that make - - - would
16 that make any sense?

17 MR. COHN: Your Honor, they have every
18 right to do that.

19 JUDGE PIGOTT: Right.

20 MR. COHN: And - - - and they have every
21 right to say we're going to show up on March 16 and
22 see what the People say. They have absolutely the
23 right to do that. But what's happening here is the
24 defense attorney's saying look, for my own
25 convenience and perhaps for my client's convenience,

1 for whatever reason, the defense attorney - - - in
2 this case, the defense attorney was on another trial
3 and said I've got to finish that trial or else I'm
4 going to kill myself, right. The defense attorney's
5 saying look, I don't want to do March 16. I - - - I
6 want to do March 28 at - - - at least, right. Now
7 the statute says - - - the statute has solved this
8 problem for us. The statute says, and this is in a
9 pre-readiness context, if there's an adjournment at
10 the request of or with the consent of the defendant,
11 then that time is not charged to the People. And
12 this court in Smith said that means participating,
13 and that makes sense.

14 JUDGE ABDUS-SALAAM: Mr. - - - Mr. Cohn,
15 why wouldn't the - - - just the amount of time that
16 defendant asked for, as opposed to the entire amount
17 of time that the court adjourned the matter to at the
18 court's convenience, why would that be charged to the
19 defense?

20 MR. COHN: Well, Your Honor, in - - - in
21 Worley, this court - - - and - - - and Worley is
22 really very instructive on this. In Worley, this
23 court said the statute is a People-readiness statute,
24 and that means that time that's caused by a defense
25 request is not supposed to be charged to the People.

1 Now that time between March 28 and April 13, if - - -
2 if court congestion had delayed the proceedings due
3 to a People's request, that is definitely charged to
4 the People and this court has said so in Smith.

5 On the other hand, if court congestion
6 delays a proceeding because of a defense request, the
7 Appellate Division has held in other cases, and in
8 this case - - - and - - - and the - - - the rule
9 logically follows from Worley that that is part of
10 the defense request and must be charged to the
11 defense. In - - - in Worley this court said where
12 the defendant has made this "express waiver of the
13 delay, the People are not required to causally trace
14 their lack of readiness to defendant's actions before
15 the court is warranted in excluding the periods".

16 The People don't have to prove that their
17 lack of readiness has something to do with the
18 defense actions when the delay is caused by the court
19 - - - when the delay is caused by the defense
20 request. Here, the delay is caused by the defense
21 request. The - - - if the defendant had agreed to
22 the March 16 date requested by the People or they had
23 showed up on the March 16 and then if the People had
24 answered not ready on March 16 and requested March 28
25 and the court had said it's got to be April 13th, of

1 course all that time gets charged to the - - -

2 JUDGE STEIN: What - - - what if the
3 defense said in - - - in this whole conversation the
4 People ask for an adjournment and the defense says
5 okay, and I can be available on March 28th and the
6 court says, well, I can't do it until such-and-such a
7 date. Well, then wouldn't it behoove defense counsel
8 to say well, then I - - - I revoke my consent to the
9 adjournment in the first place? Is that what should
10 happen?

11 MR. COHN: Well, they could. They - - -
12 they could say, look, the defense attorney has every
13 right to say well, sure, March 16, I'll show up on
14 March 16, forget about my request for March 28th.
15 Coun - - - defense counsel has every right to say
16 that.

17 JUDGE STEIN: No, no. I'm saying - - - no,
18 not a consent to the - - - the adjournment that the
19 People requested at all because they can't be there
20 on March 16th.

21 MR. COHN: Oh, well, I mean, the - - - the
22 defense attorney isn't consenting to that first part
23 of the adjournment. The - - - it was March 2nd. The
24 defense attorney was not consenting to the
25 adjournment from March 2nd to March 16. That's what

1 the People requested. That's what we admitted in the
2 trial court was chargeable to us.

3 JUDGE GARCIA: Can I ask, following up on
4 that, so you come in on March 2nd and we're not
5 ready, we want March 16th, right?

6 MR. COHN: Right.

7 JUDGE GARCIA: And you admit this is your
8 time, you're adjourning. You have time on the clock
9 now.

10 MR. COHN: Right.

11 JUDGE GARCIA: Let's say the defense lawyer
12 gets up and says no, I object. Does that end it? I
13 mean do you have a right to that adjournment? Is it
14 the judge's discretion, do you need consent to get
15 that adjournment? What are the rules for the People
16 getting adjournment in a time period where they still
17 have time left on the clock?

18 MR. COHN: Well, I don't think that the
19 statute says the judge could make us go to trial if
20 we haven't answered ready, so the - - - the statute
21 says the trial - - - the People have six months in
22 the felony case to answer.

23 JUDGE GARCIA: Right.

24 MR. COHN: So if - - - if less than six
25 months of chargeable time has elapsed and we answer

1 not ready, then I think under the statute the judge
2 has to adjourn the case.

3 JUDGE GARCIA: So you get to the 16th.

4 MR. COHN: We get to the 16th.

5 JUDGE GARCIA: The new trial date now is
6 16th, you have to be ready.

7 MR. COHN: We have to be ready and those
8 fourteen days count against us, absolutely.

9 JUDGE GARCIA: Okay.

10 MR. COHN: Absolutely.

11 CHIEF JUDGE DIFIORE: Thank you, counsel.

12 MR. COHN: All right, thank you.

13 CHIEF JUDGE DIFIORE: Mr. Greenburg.

14 MR. GREENBERG: And following up on that
15 last question and answer, yes, counsel concedes that
16 the People are charged from March 2nd to March 16th.
17 However, they weren't ready on March 16th. They said
18 they would be. That's the date they asked for. Did
19 they file a certificate of readiness on March 16th?
20 No. When they came back to court on - - - on April
21 13th were the People ready then? No. When they were
22 ready was in October, so - - - like six or seven
23 months later. So I find it incredibly troubling that
24 counsel will stand here and blame defense counsel and
25 say the defense is causing these adjournments because

1 defense counsel can't be ready on every single date -
2 - - can't - - - can't be in court on the date that
3 the People want their case adjourned to. The People
4 have to file an answer of readiness. They have to
5 either say in court we're ready or file a
6 certificate. That's what the statute is about. They
7 have six months. They have all the time in the world
8 to do that. There are very few recognized exclusions
9 such as defense files a motion and the People need to
10 respond to the motion and the court needs to decide
11 it. We all agree that's excludable.

12 JUDGE GARCIA: I guess so, but then other
13 than those - - - those items that are articulated as
14 these are excluded, wouldn't absent one of those
15 reasons then in six months they always have to file a
16 certificate of readiness?

17 MR. GREENBERG: Yes.

18 JUDGE GARCIA: Six months, that's it?

19 MR. GREENBERG: Absolutely.

20 JUDGE GARCIA: Other than the reasons that
21 are set, as you said - - -

22 MR. GREENBERG: Yes.

23 JUDGE GARCIA: - - - motion practice.

24 MR. GREENBERG: Yes, that's the law. Now,
25 as Judge Pigott said earlier, sometimes at

1 arraignments - - - and - - - and I practiced in
2 Manhattan and they do it sometimes in Manhattan as
3 well - - - the DAs will say at arraignments we're
4 ready for trial. I don't know if they are or they're
5 not. I've seen lawyers challenge that, and I've seen
6 clients get convicted in a week. But, you know, I
7 don't know that you want to call them on their bluff,
8 but if they say they're ready and if that is not an
9 illusory statement of readiness, then, of course,
10 that stops the clock and then adjournments are
11 treated differently after that.

12 But here for counsel to say that the
13 defense is causing the adjournment to April 13th, for
14 example, because defense counsel said I have a trial
15 on the date that they're asking for, March 16th, so
16 could we have a different date and the judge says,
17 well, I'm going to have to put it off until April, to
18 say that that's the defendant's fault is outrageous,
19 frankly. I mean that's just not the case. This was
20 precipitated by the People. If you look at the
21 language in Smith, the court said, "The adjournments
22 here were in the first instance precipitated by the
23 People's failure to be ready for trial. Other than
24 stating that certain dates were inconvenient, defense
25 counsel never consented to the adjournments and did

1 not participate." So we get back to what does that
2 word participate mean, and I don't think it can mean
3 by saying the word thank you, Judge, or that date is
4 okay, that that means all of a sudden the defense has
5 consented to all of this time. It's just not fair.

6 JUDGE GARCIA: So I guess the - - - the
7 argument would be, you know, they have six months
8 plus whatever the excludable time is under the rules
9 you - - - you mentioned, and what they're doing is
10 gaming that by moving the date out and then having
11 the defense have to say that date is no good for me.

12 MR. GREENBERG: Exactly.

13 JUDGE GARCIA: So you're building in extra
14 time - - -

15 MR. GREENBERG: Exactly. It doesn't really
16 matter what date the case gets adjourned to. The
17 People can just stop the clock any day they want by
18 filing the certificate saying now we're ready, and
19 they never did that here.

20 JUDGE RIVERA: Do they come - - - do they
21 come into court and just say I want that day? Do
22 they give the defendant's counsel a heads up that I'm
23 going to come in and ask for two or three weeks - - -

24 MR. GREENBERG: Can they - - -

25 JUDGE RIVERA: - - - before you come in?

1 No, no, do they as a regular course, I'm just asking.

2 MR. GREENBERG: Sometimes. Sometimes
3 you'll speak to your adversary in - - - in advance
4 and say we - - - are you going to be ready next week,
5 and they say, no, I'm going to ask for a couple
6 weeks, and I'll say fine. You know, I mean that - -
7 - that - - - you try to cooperate, by the way.

8 JUDGE RIVERA: Um-hum.

9 MR. GREENBERG: You try to say oh, that
10 date is no good. What's a good date that we can all
11 be here to do the trial? That's not the same as
12 saying I consent to delay my client's trial for
13 another seventeen months. That doesn't make any
14 sense.

15 CHIEF JUDGE DIFIORE: Thank you, counsel.

16 MR. GREENBERG: Thank you very much.

17 CHIEF JUDGE DIFIORE: Thank you.

18 (Court is adjourned)

19

20

21

22

23

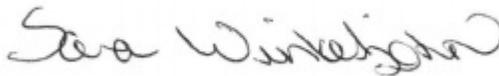
24

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, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Scott Barden (Reargument), No. 98 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: April 30, 2016