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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

NO. 123

CLEVELAND LAWSON, A/K/A EMANUEL,

Appellant.

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20 Eagle Street  
Albany, New York  
November 21, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

IVAN J. PANTOJA, ESQ.  
THE LEGAL AID SOCIETY  
Attorney for Appellant  
199 Water Street  
New York, NY 10038

JARED S. WOLKOWITZ, ADA  
MANHATTAN DISTRICT ATTORNEY'S OFFICE  
Attorney for Respondent  
1 Hogan Place  
New York, NY 10013

Chrishanda Sassman-Reynolds  
Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the calendar is  
2 People v. Lawson.

3 MR. PANTOJA: If I may? May it please the court.  
4 The Legal Aid Society by Ivan Pantoja for Mr.  
5 Marks. May I reserve two minutes, please?

6 CHIEF JUDGE WILSON: Yes.

7 MR. PANTOJA: Your Honors, this court's well-  
8 established precedent provides the prosecution one full and  
9 fair opportunity to litigate the dispositive issues at the  
10 hearing.

11 JUDGE GARCIA: Counsel - - - here. Sorry. One  
12 full and fair opportunity to litigate the hearing. You  
13 would - - - so let's say we agree with you in this  
14 particular case that - - - you know, a new theory was  
15 presented on this motion. What would the rule be that we  
16 could put forward that would leave some discretion with the  
17 trial judge?

18 MR. PANTOJA: I think - - -

19 JUDGE GARCIA: So just - - - or put it another  
20 way maybe. What discretion would be left to the trial  
21 judge if we rule in your favor here?

22 MR. PANTOJA: Well, I think the rule that I would  
23 propose is actually Your Honors' rule. Established first  
24 in Havelka and then in Kevin W. Re-argument, could be  
25 ordered by the trial court if the prosecution was not given

1 a full and fair opportunity to litigate the dispositive  
2 issues at the hearing.

3 JUDGE HALLIGAN: What if the trial court had  
4 second thoughts about the facts and legal theories that  
5 were already before it and wanted an opportunity to revisit  
6 it and perhaps reach a different conclusion? Without the  
7 interposition of some additional evidence or new legal  
8 theory.

9 MR. PANTOJA: Well, I think it would depend on  
10 the posture of the case. If the court issued a decision on  
11 the merits. I think that's critical because I think the  
12 principles of finality over - - -

13 JUDGE HALLIGAN: So if the court on one day,  
14 issues a ruling on whatever motion it might be, and in the  
15 way that I think we all do, goes home to think about it and  
16 concludes that perhaps the other side had the better of the  
17 argument - - - not something like we have here where there  
18 is a new legal theory offered. Your view is that the judge  
19 cannot revisit that the next day and reach a different  
20 conclusion? Shouldn't we want the court to - - - shouldn't  
21 we, in fact, encourage a court to take a step to correct  
22 what the court perceives to be a mistake in that instance?

23 MR. PANTOJA: Well, I think if it's doubts, I  
24 think that happens all the time. Right? After making a  
25 decision or after making oral argument.

1 JUDGE HALLIGAN: No. I mean a conclusion that  
2 you know, you got it wrong?

3 MR. PANTOJA: Well, I think if the court becomes  
4 aware of a legal error, I think that's different. I think  
5 if it's a legal error, then certainly the court has the  
6 power to correct that legal error.

7 JUDGE TROUTMAN: So is it a difference between  
8 the court making a legal error versus the people asking for  
9 a second bite at the apple, so to speak?

10 MR. PANTOJA: I think whether it's the court or  
11 the prosecution that creates the legal error, I think  
12 that's important. I think the presence of a clear legal  
13 error, certainly - - -

14 JUDGE TROUTMAN: So would you agree, if the - - -  
15 if it's the court that made an error and the court wants to  
16 correct its own error, that would, in fact, be permissible?

17 MR. PANTOJA: Yes.

18 JUDGE GARCIA: What if it was the court made an  
19 error, and the people notice it and pointed out to the  
20 court?

21 MR. PANTOJA: I think if it's a clear legal  
22 error, then yes, of course. I think the problem in this  
23 case is that the prosecution's framing of the legal error  
24 here isn't really a legal error. They seek to frame their  
25 legal error in two ways, or two reasons. First, they say

1 that the first error was their belated realization about  
2 the complexity associated with the vehicle and traffic laws  
3 associated with U-turns. And the second legal error being  
4 their belated realization that the suppression in this case  
5 would affect another case. Those are certainly not reasons  
6 to grant re-argument.

7 JUDGE HALLIGAN: What about the analysis under  
8 the business improvement district rubric? Isn't that in  
9 part - - - I thought that was part of the error that the  
10 people were - - - the so-called error the people were  
11 pointing to?

12 MR. PANTOJA: Yes. So the so-called error is  
13 that the court was under the misapprehension of the  
14 applicable laws, and that they felt that the applicable  
15 laws were this business district. But I think that's more  
16 appropriately categorized, quite bluntly, as a  
17 prosecutorial error. The prosecutors had the burden to  
18 establish, in the first instance, the legality of Ofc.  
19 Baksh's conduct. Associated with that burden is them  
20 marshaling facts and presenting a cogent legal theory as to  
21 why Ofc. Baksh's conduct was lawful.

22 JUDGE GARCIA: And what was their legal theory  
23 originally?

24 MR. PANTOJA: Well, there actually - - - from  
25 what I can glean, there really wasn't one. There was only

1 one question asked of Ofc. Baksh on direct examination. Is  
2 this an area where U-turns are permissible, and Ofc. Baksh  
3 said no.

4 JUDGE CANNATARO: What was the - - -

5 JUDGE SINGAS: Do you think the people did have a  
6 full opportunity at this hearing? Because the judge - - -  
7 at the time that there should have been argument, it  
8 appeared to me that the judge said, well, this is clearly a  
9 business district U-turn. And - - - you know, and then it  
10 continued from there and the people either weren't given  
11 the opportunity or didn't volunteer. But do you think it  
12 was a full and fair opportunity for the people to state  
13 their reasons on the record?

14 MR. PANTOJA: I do, for two reasons. First, the  
15 court asked Ofc. Baksh questions after the parties had  
16 rested. So after direct, cross-examination, the court  
17 offered the DA the opportunity to redirect; that was  
18 declined. And then, I think, perhaps realizing the  
19 deficiency of proof, perhaps not, the court decided to  
20 inquire of Ofc. Baksh, not only about the business  
21 district, but also perhaps was the - - - where was the  
22 turn? I think the court was trying to fill in the record  
23 to make a - - - perhaps, a more reasoned decision.

24 And the second reason is that nothing prevented  
25 the prosecution in the first instance from raising this

1 theory.

2 JUDGE HALLIGAN: Could the prosecution - - -  
3 suppose the ADA turned up that day, and for whatever reason  
4 - - - press of work, reassignment - - -appreciated that he  
5 or she was not prepared? Could the prosecutor have asked  
6 for a continuance and come back and put this theory on the  
7 table later? Next day? That afternoon, something like  
8 that?

9 MR. PANTOJA: Well, I think it's quite common for  
10 prosecutors and defense attorneys to appear on a scheduled  
11 hearing date and admittedly say they're not ready for  
12 hearings today, we'll request two days.

13 JUDGE HALLIGAN: So the prosecution could have  
14 done that?

15 MR. PANTOJA: Absolutely. Before the start of  
16 testimony. And perhaps, the prosecution should have. But  
17 they said they were ready. They proceeded.

18 JUDGE TROUTMAN: And likewise, could the  
19 prosecution have also requested, at the close of proof, an  
20 opportunity to submit further legal argument prior to the  
21 rendering of a decision?

22 MR. PANTOJA: Yes. And that's actually quite  
23 common for both parties to ask: your honors, can we please  
24 write on this issue? I have more to say.

25 JUDGE CANNATARO: So would it be fair to say that

1 where you draw the line is - - - in this situation?  
2 Whereas you sort of suggest the court raised a new theory  
3 regarding business improvement districts, that the  
4 prosecution either wasn't going to present or didn't think  
5 to present. Do you draw the line at leaving the courtroom  
6 and coming back on another day and saying, oh, wow, you  
7 know, the court's really interested in that, maybe I want  
8 to present more? That you can't do?

9 MR. PANTOJA: I think a good line of demarcation  
10 would be a decision on the merits.

11 JUDGE CANNATARO: No. But I'm saying, could the  
12 people have said at the conclusion of the hearing, judge,  
13 we'd like the opportunity to submit additional evidence on  
14 the legality of U-turns in BIDS?

15 MR. PANTOJA: Sure. The - - - I mean, the court  
16 - - - the DA could have also requested, Your Honor - - -

17 JUDGE CANNATARO: So is this an issue of timing?  
18 Is it just - - - you asked too late for that?

19 MR. PANTOJA: I think timing does play a role.  
20 In that, the prosecution could have called more than one  
21 witness in the first instance. The prosecution perhaps  
22 realizing after cross-examination, right? I haven't  
23 established the legality of the stop. Your Honor, may I  
24 please request that I call his partner, for example, or  
25 another officer, to establish the legality of the stop?



1           Certainly, the DA has that right to do that. And of  
2           course, the court could have allowed that to happen.

3                       But that didn't happen here. And I think what's  
4           problematic is just the - - - the lack of proof elicited at  
5           the hearing. There's simply - - - and this court has never  
6           accepted summary conclusion statements that something is  
7           unlawful. And I think problematic is that U-turns aren't  
8           always unlawful like other, perhaps, traffic violations.  
9           And we would expect the prosecution to be prepared at the  
10          hearing. And we would expect the prosecution, perhaps, to  
11          even provide more than one or two theories in support of  
12          their argument. But that just wasn't done here. They were  
13          given every opportunity to do so. They didn't. And it was  
14          simply improper to grant the prosecution re-argument.

15                      Secondarily, it was improper for the court upon  
16          re-argument to allow a completely different legal theory  
17          that wasn't even contemplated. And I think that  
18          distinguishes a lot of the cases cited by the prosecution.  
19          I think Lionel F., Frederick, these were instances where  
20          there was a decision by the court in favor of the  
21          prosecution, and as a result, the prosecution decided not  
22          to offer up an alternative theory. When that later  
23          decision came back to be wrong, of course, the prosecution  
24          should be entitled to present an alternative theory, if  
25          they were prepared to do so in the first place and were

1 prevented to doing so by the trial court.

2 Admittedly, here the prosecution was not prepared  
3 to even raise the alternative theory of a divided highway  
4 in the first instance, because, as they admitted, they were  
5 unaware of the complexity associated with these laws.

6 I think I can save the rest unless Your Honors  
7 have questions for rebuttal.

8 CHIEF JUDGE WILSON: Thank you.

9 MR. WOLKOWITZ: Good afternoon. May it please  
10 the court.

11 JUDGE SINGAS: Can we begin with that second  
12 point about raising a new theory? Because this is where  
13 I'm struggling with this case. Suppose this was a motion,  
14 a Mapp hearing, and the people came in with evidence and  
15 they were arguing that it was a consent. The search was  
16 subject to consent and the owner let the people in the  
17 house. And then the judge rules, you know what? I don't  
18 like that consent. I don't think you had consent. I don't  
19 think you proven consent.

20 So then the next day, the people say, you know  
21 what? That might have been exigent circumstances. And  
22 then they go back in, and they argue exigent circumstances.  
23 And the judge says, you know what? I like that one better,  
24 and I think that you're going to prevail on that theory.

25 MR. WOLKOWITZ: What I would say to that is,

1 first, that didn't happen in this particular case.

2 JUDGE SINGAS: What - - -

3 MR. WOLKOWITZ: In this.

4 JUDGE SINGAS: - - - but I don't think it's that  
5 distinguishable. Because here the people went in on a - -  
6 - I guess, on a - - - I don't know what they went in on.  
7 So again, that's another question about the unpreparedness  
8 of the prosecutor in conducting this hearing. It - - -  
9 presumably, it's a business district that they were going  
10 in on and then thought better of it and came in the next  
11 day and said, you know what? No, it's really a divided  
12 highway.

13 MR. WOLKOWITZ: I think the first thing I would  
14 look at is when you said consent versus exigent  
15 circumstances, the people here always maintained, and at  
16 the hearing they maintained that it was an illegal U-turn.  
17 You are right. You're - - -

18 CHIEF JUDGE WILSON: Yeah. But in Judge Singas'  
19 example, the people always thought it was a lawful search?

20 MR. WOLKOWITZ: I'm sorry.

21 CHIEF JUDGE WILSON: They always thought it was a  
22 lawful search. Right?

23 MR. WOLKOWITZ: But that's a different degree.  
24 And I - - - I understand that question. But the point  
25 being is, is that what happened here was that's a

1 completely legal theory under a different legal rubric and  
2 different circumstances - - -

3 JUDGE HALLIGAN: Counsel, my reading was that  
4 when the assistant came in, there was no explanation  
5 provided as to why it was illegal. And I guess, my  
6 question for you is, if things had ended at that juncture -  
7 - - I take it you're relying on a legal error argument  
8 here, right?

9 MR. WOLKOWITZ: Yes, Your Honor.

10 JUDGE HALLIGAN: Okay. So if things had ended at  
11 that juncture, is it your position that you would have been  
12 able to then come back a month later, which I think is how  
13 long it was, and then provide some basis for concluding  
14 that it was a U-turn, if the judge had not interjected with  
15 the business - - - with the BID theory?

16 MR. WOLKOWITZ: I think the judge in this state -  
17 - -

18 JUDGE HALLIGAN: No. I'm asking you if the  
19 hearing had ended at that point and the judge said,  
20 counsel, you have given me no basis to conclude that it was  
21 an unlawful U-turn and that's it. Could the assistant then  
22 have come back a month later and proffered this theory of  
23 the median?

24 MR. WOLKOWITZ: I think that is not what happened  
25 here.

1 JUDGE HALLIGAN: I understand that. But I'm  
2 asking you to address a hypothetical.

3 MR. WOLKOWITZ: I think there's never been, and  
4 this court has never said - - - only in one narrow  
5 exception, which was Havelka and Kevin W. - - - that a  
6 court cannot correct a legal error.

7 JUDGE HALLIGAN: That's not what I'm - - - what  
8 I'm asking, I don't think or maybe I'm not being clear.  
9 Let me try again. If the assistant had come in and the  
10 judge said, tell me why this is an illegal U-turn, and the  
11 prosecutor could not provide any basis, and the judge then  
12 ruled on the motion. Could the prosecutor then, come back  
13 a month later and say, well, I thought about it and the  
14 reason why is that - - - you know, he crossed the median?

15 MR. WOLKOWITZ: Again, Your Honor, the prosecutor  
16 could come back, and the judge could use its discretion to  
17 deny it.

18 JUDGE HALLIGAN: Without having requested a  
19 continuance or anything like that, the judge rules on the  
20 motion and the prosecutor could come back in a month later  
21 and say, I gave it some more thought, and now I have a  
22 basis for my position?

23 MR. WOLKOWITZ: Obviously, the judge in that - -  
24 - it's a more - - - much more difficult case in that  
25 scenario, and a case in which the judge could exercise its

1 discretion and not reopen. But there's no legal barrier.  
2 And I think that is the important point that I want to make  
3 out because - - -

4 CHIEF JUDGE WILSON: Well, is there ever a legal  
5 barrier?

6 MR. WOLKOWITZ: Yes.

7 CHIEF JUDGE WILSON: And when's that?

8 MR. WOLKOWITZ: There is a legal barrier when the  
9 people try to present additional evidence.

10 CHIEF JUDGE WILSON: So absent that. That if the  
11 people aren't trying to produce additional evidence, they  
12 can come back as many times as they like with different  
13 legal theories?

14 MR. WOLKOWITZ: They could come back subject - -  
15 - and I think Judge Garcia was talking about this with his  
16 first question of - - - would subject to the discretion of  
17 the court.

18 CHIEF JUDGE WILSON: No. That's why I asked  
19 legal barrier. A legal barrier was something that would  
20 stop the court from exercising its discretion, where we  
21 would say it would be an abuse.

22 MR. WOLKOWITZ: There would be, obviously, a  
23 point where it would be an abuse.

24 CHIEF JUDGE WILSON: Where is that point?

25 MR. WOLKOWITZ: The point? I can't specify - - -

1 CHIEF JUDGE WILSON: Okay.

2 MR. WOLKOWITZ: - - - that point now because  
3 you'd have to see it. But it's not in this particular case  
4 where the prosecutor came back one month later on the same  
5 U-turn. There was no bad faith here.

6 CHIEF JUDGE WILSON: Well, the problem is going  
7 to be the same U-turn, I would think. Right? That's what  
8 we're talking about.

9 MR. WOLKOWITZ: No. Because it could be a red  
10 light. What if - - - as Judge Singas' - - - what if the  
11 prosecutor went back and when he went to his office, saw  
12 the transcript and said, I see a red light here? Oh, my  
13 God, he went through a red light. That would be,  
14 obviously, different and more problematic.

15 Here it was the U-turn, and everybody was  
16 confused. The defense attorney was confused. Because as  
17 we - - -

18 JUDGE CANNATARO: But isn't it the burden - - -  
19 isn't the people's burden in this situation, not to be  
20 confused? What I think happened and tell me why I'm wrong  
21 - - - is they came back a month later with a refined  
22 argument, a better argument. Granted, I agree with you,  
23 it's the same legal issue - - - legal U-turn or not legal  
24 U-turn. But they came back with a much better theory of  
25 why it was an illegal U-turn. That should - - - I don't

1 understand why that couldn't have been presented at the  
2 first argument.

3 MR. WOLKOWITZ: I think, Your Honor, in terms of  
4 what you're saying, it could have been presented and maybe  
5 it should. But I think the court recognized, in this  
6 particular case, that this was a confusing area of the law.  
7 In Havelka - - - remember in Havelka - - -

8 JUDGE HALLIGAN: Well, how was it a confusing  
9 area of law? The prosecution comes back and says there's a  
10 median, and that seems fairly straightforward. I'm  
11 struggling to see how it was confusing as opposed to lack  
12 of preparation, to be honest with you.

13 MR. WOLKOWITZ: Well, I think there - - - I'm not  
14 going to sit here and say there was no lack of - - - there  
15 was - - - you know, perfect preparation. Obviously, there  
16 wasn't, because the - - -

17 JUDGE HALLIGAN: The assistant says that the  
18 assistant doesn't really know much about the area of law,  
19 if I recall the transcript - - - I don't have it in front  
20 of me.

21 MR. WOLKOWITZ: Right.

22 JUDGE HALLIGAN: And that doesn't to me, belie  
23 confusion. That suggests that perhaps the assistant didn't  
24 look at it on the frontend.

25 MR. WOLKOWITZ: I think what the assistant was



1 saying was that this was a complex area of the law because  
2 there's two areas. It's not like the De Bour, as we  
3 mentioned in Havelka K., and it's not like all those other  
4 cases in which criminal practitioners do this. This was a  
5 combination of - - -

6 JUDGE CANNATARO: What are - - - what are the  
7 two? You mean like VTL and DOT rules?

8 MR. WOLKOWITZ: Exactly. The local - - -

9 JUDGE TROUTMAN: Whose error - - -

10 MR. WOLKOWITZ: - - - ordinance is how they - - -

11 JUDGE TROUTMAN: - - - whose error was it? The  
12 court's or the ADA for not having the argument that they  
13 later - - -

14 MR. WOLKOWITZ: I think it was - - -

15 JUDGE TROUTMAN: - - - provided to the court?

16 MR. WOLKOWITZ: I think there was a shared  
17 misunderstanding here about these rules. I think everybody  
18 - - -

19 JUDGE SINGAS: Hold on a minute. I'd like to  
20 clarify what it is that you're calling error? What's the  
21 error?

22 MR. WOLKOWITZ: The error is, is that they did  
23 not identify the proper - - -

24 JUDGE SINGAS: No. They said you can't make a U-  
25 turn in a business district. That's true. That's not

1 error. Correct?

2 MR. WOLKOWITZ: That is true. But we had not  
3 established that it was a business district.

4 JUDGE HALLIGAN: And whose error is that, though?  
5 That - - - that's - - -

6 MR. WOLKOWITZ: That would be the prosecutor's  
7 error. But that was - - -

8 JUDGE TROUTMAN: So then why is it that the  
9 court gets to fix the prosecutor's error - - -

10 MR. WOLKOWITZ: Because - - -

11 JUDGE TROUTMAN: - - - at any time they want?

12 MR. WOLKOWITZ: - - - the existing record itself  
13 - - -

14 JUDGE GARCIA: Is that true, though? I mean,  
15 then you point to the existing record, and you say, oh, it  
16 supports it. But if you had had this theory when there was  
17 an opportunity to cross this witness, they would have asked  
18 about the median or a sign or a lack of a sign. And that  
19 never happened because you didn't have this theory at the  
20 time.

21 MR. WOLKOWITZ: Well, we would have no problem  
22 remanding it if they want to - - -

23 JUDGE GARCIA: But then you're reopening a  
24 hearing, and we've said you can't do that. So that's a way  
25 to get around the rule - - -

1 MR. WOLKOWITZ: But they never - - -

2 JUDGE GARCIA: - - - about reopening a hearing.

3 MR. WOLKOWITZ: Two things. One, the median is a  
4 median. And we in our re-argument motion, put out what - -  
5 -

6 JUDGE GARCIA: And a sign is a sign. But there's  
7 no testimony about what the median was, or whether there  
8 was a sign or whether there wasn't a sign, because nobody  
9 was focused on that.

10 MR. WOLKOWITZ: But they could have asked when we  
11 made the mark - - -

12 JUDGE TROUTMAN: But whose burden was it in the  
13 first instance? Was it the defense or the people?

14 MR. WOLKOWITZ: Well, it's the defense burden to  
15 show the illegality of the conduct. But it's the people's  
16 - - - the People should have come into the courtroom and  
17 they should have had the proper thing. They didn't here.  
18 The question is, is can a court correct a legal error?

19 JUDGE RIVERA: Okay. Can I ask - - -

20 MR. WOLKOWITZ: Sure.

21 JUDGE RIVERA: - - - you about something in the  
22 record? What do you take the court meant by, when it  
23 renders this decision, it then says, I'm going to give the  
24 prosecution an opportunity to run the case up the supply  
25 chain and the case hadn't been decided yet - - - hadn't

1           been dismissed yet?

2                   MR. WOLKOWITZ: I think that - - -

3                   JUDGE RIVERA: What does that mean? That - - -  
4           that there was not a final - - -

5                   MR. WOLKOWITZ: I - - - I - - -

6                   JUDGE RIVERA: - - - ruling?

7                   MR. WOLKOWITZ: - - - I would argue that that - - -  
8           - when they're talking about that there was a final  
9           dismissal or that there was something that - - - it left  
10          open the possibility that the people would come back.  
11          Whether it be with appeal up to supply chain or whether it  
12          be with a motion to re-argue. Because they - - - the judge  
13          asked - - -

14                   JUDGE TROUTMAN: With respect to the question of  
15          the people coming back, is it - - - is there a difference  
16          between deciding the motion itself, as opposed to granting  
17          a motion to dismiss the case itself?

18                   MR. WOLKOWITZ: I think it matters somewhat in  
19          terms of whether - - - you know, obviously, if you dismiss  
20          the case, there's that finality that we talked about - - -

21                   JUDGE TROUTMAN: Right. So is - - -

22                   MR. WOLKOWITZ: - - - in Havelka - - -

23                   JUDGE TROUTMAN: - - - is there - - -

24                   MR. WOLKOWITZ: - - - but they did not dismiss  
25          the case.

1 JUDGE TROUTMAN: - - - is there an - - - so isn't  
2 there an argument? The court decided the issue before it  
3 at the hearing. There was a decision. Simply didn't take  
4 the next step and make a decision, and dismiss the case?  
5 So the case was still pending, for whatever value that was.  
6 But the court had rendered a decision on the hearing issue;  
7 is that correct?

8 MR. WOLKOWITZ: The court had rendered a decision  
9 before the hearing issue. Yes, that is correct. But that  
10 doesn't mean a case is dismissed.

11 JUDGE TROUTMAN: No. That is the point.

12 MR. WOLKOWITZ: Yeah.

13 JUDGE TROUTMAN: The case wasn't dismissed, but  
14 the issue before the court had been decided.

15 MR. WOLKOWITZ: And I must - - - I'm sorry.

16 JUDGE TROUTMAN: That is - - - that is what I'm  
17 asking.

18 MR. WOLKOWITZ: Yes. And I'm not suggesting in  
19 any way - - -

20 JUDGE RIVERA: And all - - - all parties - - -

21 MR. WOLKOWITZ: - - - that there was not a  
22 decision.

23 JUDGE RIVERA: - - - and all parties agree the  
24 hearing had ended?

25 MR. WOLKOWITZ: The hearing had ended.

1 JUDGE RIVERA: Because the motion was to reopen  
2 the hearing, no?

3 MR. WOLKOWITZ: Well, you - - - what you want to  
4 do is permit re-argument. Reopening isn't - - -

5 JUDGE RIVERA: But I thought counsel first  
6 requested that the hearing be reopened, am I wrong about  
7 that?

8 MR. WOLKOWITZ: The attorney?

9 JUDGE RIVERA: Yes.

10 MR. WOLKOWITZ: The prosecutor asked to call back  
11 the officer to make out the business district. And because  
12 of precedents like - - -

13 JUDGE RIVERA: But that - - - that - - - but - -  
14 -

15 MR. WOLKOWITZ: Was denied.

16 JUDGE RIVERA: - - - but to that end, that would  
17 have required the hearing being reopened, correct?

18 MR. WOLKOWITZ: That would have required the  
19 hearing to be reopened. And the court - - -

20 JUDGE RIVERA: So everybody agrees that the  
21 hearing had ended?

22 MR. WOLKOWITZ: The court would not do it because  
23 it said - - -

24 JUDGE RIVERA: Yes.

25 MR. WOLKOWITZ: - - - as this court has said in



1 Havelka and Kevin W., that you've had your one full  
2 opportunity. But the one thing that I do want to say is  
3 the reason why - - - again, this is a discretionary  
4 decision; the judge never had to do it. But I think the  
5 judge understood because there was a shared understanding  
6 that he had. And I understand that - - -

7 JUDGE HALLIGAN: Counsel, I'm just - - - I'm  
8 struggling to understand that. Here's why. I won't go  
9 through - - - you know, every line. But repeatedly, when  
10 the judge asks the assistant - - - you know, "You're not  
11 allowed to make a U-turn based on what VTL? What section  
12 would that be? I don't know, sir, off the top of my head.  
13 Are you familiar with the law? No, The U-turn section,  
14 are you familiar? No."

15 How - - - it seems to me that the judge then  
16 attempts to find some basis. But if the judge had not done  
17 that, it seems clear that the motion would have been  
18 granted at that juncture. And so somehow, I take it,  
19 you're arguing that by trying to find some basis and to  
20 perhaps give the assistant some assistance, that that  
21 introduces an error?

22 MR. WOLKOWITZ: I think that what you're saying  
23 there is - - - and correct me if I'm wrong - - - but what I  
24 think what you're saying there is, is that we got lucky and  
25 the - - -

1 JUDGE HALLIGAN: No, I'm not. I'm asking a  
2 question, which is, the assistant clearly has no provision  
3 in the VTL that he or she can point to as the basis for why  
4 the U-turn is illegal, and the judge then suggests that  
5 there's one that the assistant might consider.

6 MR. WOLKOWITZ: Well, no. That - - - I disagree  
7 with that.

8 JUDGE HALLIGAN: Okay.

9 MR. WOLKOWITZ: - - - because I think that we  
10 never under - - - we never got - - - what we know is this.  
11 We never got what the assistant was going to argue, because  
12 what happened was - - -

13 JUDGE HALLIGAN: Well, wait. But when the judge  
14 asks, are you familiar with the law? And the assistant  
15 says, no, it's hard for me to understand how the assistant  
16 might then proffer a basis. Are you suggesting that the  
17 judge cut off the assistant's opportunity to make a case?

18 MR. WOLKOWITZ: I am saying that we never heard  
19 the assistant's case, whatever that case may be. I mean -  
20 - -

21 JUDGE HALLIGAN: You think this record suggests  
22 that, notwithstanding those answers, that the assistant had  
23 a case that he or she would have put on the table?

24 MR. WOLKOWITZ: I - - - what we know for a fact  
25 is that they did not have the divided highway.



1 CHIEF JUDGE WILSON: Can I just - - -

2 MR. WOLKOWITZ: We know that for a fact.

3 CHIEF JUDGE WILSON: Can I just ask you a  
4 question - - -

5 MR. WOLKOWITZ: Sure.

6 CHIEF JUDGE WILSON: - - - about - - - you  
7 weren't here yesterday, but Judge Cannataro indicated that  
8 he may have on one occasion violated a VTL provision. So  
9 I'm here to tell you, I've been pulled over a few times - -  
10 - not lately. And also have gotten parking tickets more  
11 than a few times. And every single time, even when the  
12 officers pulled me over to the side of the road, has  
13 written down the VTL number that I violated. So how is it  
14 that - - - I mean, how do you come on a suppression motion  
15 and not have the VTL provision?

16 MR. WOLKOWITZ: I think that's actually a very  
17 good question. And I think when you're reviewing the case,  
18 Your Honor, I think what happened was he probably had that  
19 section, but then he arrests the person for DWI and then  
20 that - - - writing it down and memorializing it at that  
21 particular time did not remain with him.

22 CHIEF JUDGE WILSON: I'm not asking why it's not  
23 written down. I'm asking - - - I assume he pulls people  
24 over for U-turns all the time, and that's what he pulled  
25 this person over. Why doesn't he know that?

1 MR. WOLKOWITZ: But this happened months later,  
2 and I think he may have forgotten.

3 JUDGE RIVERA: He's very confident, right? He -  
4 - - he says it's illegal. It's illegal to make a U-turn.  
5 He's very confident.

6 MR. WOLKOWITZ: Well, I mean, yes, he was  
7 confident, as you say.

8 JUDGE RIVERA: I can't point to anything that  
9 establishes that it's illegal, but I know it for sure.

10 MR. WOLKOWITZ: He testified to what - - - he  
11 testified to that, yes.

12 JUDGE CANNATARO: Counsel, can I just ask you  
13 before your light turns red? Do you think that the - - -  
14 at the end of the first hearing, do you think that the  
15 judge misapprehended the law? Or do you think that the  
16 judge hadn't yet been given sufficient information as to  
17 what the law was? Or is it something completely different  
18 than that?

19 MR. WOLKOWITZ: I think the judge did not know  
20 that a divided highway at that particular time, and the  
21 record supported that.

22 JUDGE CANNATARO: Why didn't the judge know that?

23 MR. WOLKOWITZ: Because if he would have - - - he  
24 eventually granted it, right? He said that we had made  
25 that out.

1 JUDGE CANNATARO: No, no. What was the source of  
2 the judge's lack of appropriate information?

3 MR. WOLKOWITZ: Obviously, nobody argued that to  
4 him at that particular time, if that's what you're getting  
5 at.

6 JUDGE RIVERA: But "nobody" is the prosecutor,  
7 right? Because it's your burden. But let me ask you a  
8 different kind of question.

9 MR. WOLKOWITZ: Sure.

10 JUDGE RIVERA: I know your red light is on. What  
11 - - - I'm having difficulty understanding what public  
12 policy is furthered by the rule that you're asking us to  
13 adopt, that would allow for what happened here? Because it  
14 seems to me it doesn't incentivize lawyers to be prepared  
15 when they appear at a hearing.

16 MR. WOLKOWITZ: Well, I'm glad you asked that  
17 question, because I do think that what it - - - what the  
18 rule would here be given, courts to get it right. And in  
19 criminal proceedings that is of paramount importance.

20 Now, obviously, as you well identify, there will  
21 be situations in which, as a matter of law, a judge cannot  
22 do that or will not do that because the discretion won't  
23 get him there. But we want judges to absolutely have the  
24 discretion to get legal decisions right. And sometimes  
25 they - - -

1 JUDGE GARCIA: But don't we want to give - - -  
2 don't we want to give the prosecutors an incentive to make  
3 sure the judge gets it right in the first instance?

4 MR. WOLKOWITZ: We do.

5 JUDGE GARCIA: And this would be - - - you know,  
6 well, try and you can always try again later.

7 MR. WOLKOWITZ: But the incentive is there  
8 because if you don't get it right, you run the risk of not  
9 having that reopened and losing. So why - - - you would  
10 never put that at - - -

11 JUDGE SINGAS: But this is a different situation.  
12 And try to explain it to me because I'm not seeing it. I  
13 think of a legal error, the people come in and say, you  
14 know what, judge? We handed you some case law that you  
15 relied on, but that case law has since been overturned, so  
16 please take a look at this case law, and that's a legal  
17 error. Or there's some piece of the evidence that the  
18 judge, in his or her decision, has - - - you know, relayed  
19 again incorrectly. That's an error. Here, I can't see the  
20 error. Because the judge provided a business district U-  
21 turn violation, that's not an error. First of all, it's  
22 not an error. It's still a VTL violation. And then the  
23 people coming in and saying out of nowhere, arguing a  
24 completely new theory.

25 I don't know how you're equating that to - - - I

1 don't think anybody on this bench would say that judges  
2 don't have the discretion to review their work and make  
3 sure there isn't legal error, and to reconsider it if it's  
4 properly in front of them. But this seems to me a  
5 completely different theory of liability. And that's what  
6 we're trying to zero in on. And I'm not appreciating how  
7 you're distinguishing that.

8 MR. WOLKOWITZ: I think, Your Honor, the  
9 prosecutor here obviously made a mistake. The question is,  
10 are we not going to get to the correct rule because of that  
11 mistake? I think that is what I'm asking the court to  
12 appreciate. And that it was one time on a very, very  
13 obscure part of the law and that the judge had the  
14 discretion to fix what was a - - - what it was an error by  
15 the prosecutor, but what was legally correct based on the  
16 record. That is what I think we're asking the court.

17 CHIEF JUDGE WILSON: That might be a good rule  
18 for us to adopt for ineffective assistance.

19 MR. WOLKOWITZ: I can't speak to that, Your  
20 Honor. I didn't brief that when I came here. What I can  
21 say is, is that - - - and what I would say is just because  
22 the rule they're asking for is essentially that a court  
23 would never have discretion if we had one opportunity, and  
24 we made a mistake. And the law, even if the prosecutor is  
25 dilatory - - - was not prepared, as you all pointed out to

1 me. Even if the prosecutor is not - - - not prepared,  
2 there is some discretion, especially in a case like this in  
3 which the law is esoteric, that the judge would allow the  
4 prosecutor to have a second chance at it.

5 CHIEF JUDGE WILSON: Thank you very much.

6 JUDGE HALLIGAN: Could I - - -

7 CHIEF JUDGE WILSON: Yes.

8 JUDGE HALLIGAN: I'm sorry. Could I ask one last  
9 question?

10 MR. WOLKOWITZ: Sure.

11 JUDGE HALLIGAN: Could we conclude, based on your  
12 closing comments. Could we conclude that it is appropriate  
13 to give the judge an opportunity to give the prosecutor  
14 another bite at the apple, even if we disagreed with you  
15 that there was legal error in the first hearing?

16 MR. WOLKOWITZ: You could - - - as long as it's  
17 not a factual question, the answer is yes.

18 JUDGE HALLIGAN: Okay. Thank you.

19 MR. WOLKOWITZ: Thank you. And I'm sorry. I  
20 just want to make - - - one point I want to point out is,  
21 as long as it's not a factual question on a legal issue  
22 that has already been decided.

23 JUDGE HALLIGAN: Thank you, Counsel.

24 MR. WOLKOWITZ: Thank you very much.

25 MR. PANTOJA: Your Honors, just briefly. From

1           what I can discern from the prosecution's argument, I can't  
2           find a definite legal standard for when re-argument could  
3           be granted. Their interpretation of a court's inherent  
4           authority is so broad that it would create confusion,  
5           uncertainty, and completely undermine the principles of  
6           finality. It would basically render any suppression  
7           decision meaningless.

8                       The prosecution's failure to understand the laws  
9           regarding U-turns or the consequences of suppression on a  
10          related matter, is just simply not a legal error and was  
11          not a proper reason for the court to grant re-argument and  
12          to allow the prosecution to present a completely new  
13          argument on an entirely different statute, to support an  
14          alternative legal theory eighty-seven days later to justify  
15          the stop of Mr. Marks' car. As a result, I would  
16          respectfully request that the court suppress all of the  
17          evidence and reverse the appellate terms order.

18                       Thank you, Your Honor.

19                       CHIEF JUDGE WILSON: Thank you.

20                       (Court is adjourned)

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Cleveland Lawson, A/K/A Emanuel Marks v. The People, No. 123 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 7227 North 16th Street  
Suite 207  
Phoenix, AZ 85020

Date: November 27, 2024

