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ORDER OF THE NEW YORK COURT OF APPEALS DENYING APPLICATION FOR LEAVE TO APPEAL (DECEMBER 28, 2022)

STATE OF NEW YORK
COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

LINDSAY L. LEE,

Appellant.

Before: Hon. Jenny RIVERA, Associate Judge.

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

* Description of Order: Order of the Appellate Term for the 9th & 10th Judicial Districts, dated October 20, 2022, affirming a judgment of the District Court of Nassau County, First District, rendered April 29, 2019.

/s/ Jenny Rivera
Associate Judge

Dated: December 28, 2022

DECISION AND ORDER OF THE NEW YORK APPELLATE DIVISION, SECOND DEPARTMENT, 9TH AND 10TH JUDICIAL DISTRICTS (OCTOBER 20, 2022)

APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE 9TH & 10TH JUDICIAL DISTRICTS

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

LINDSAY L. LEE,

Appellant.

Appellate Term Docket No. 2019-956 N CR

Lower Court # CR-018330-16NA

Before: Jerry GARGUILO, P.J., Elizabeth H. EMERSON, Timothy S. DRISCOLL, JJ.

Appeal from a judgment of the District Court of Nassau County, First District (Douglas J. Lerose, J.), rendered April 29, 2019. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated per se, common-law driving while intoxicated and failure to signal, and imposed sentence.

ORDERED that the judgment of conviction is affirmed.

Defendant was charged with, among other things, driving while intoxicated per se (Vehicle and Traffic Law § 1192 [2]), common-law driving while intoxicated (Vehicle and Traffic Law § 1192 [3]) and failure to signal (Vehicle and Traffic Law § 1163 [d]). Over the course of a jury trial, which commenced in February 2018, defendant repeatedly failed to appear promptly. Defendant chose to testify on her own behalf, but the day after the completion of her direct testimony, she declined to take the stand for cross-examination. Following a next-day adjournment to resolve the issue, defendant appeared timely, but left the courtroom and was missing for approximately 45 minutes. Once she was found and returned to the courtroom, she continued to refuse to undergo cross-examination. After three bench conferences and an on-the-record colloquy, a mistrial was declared by the court. Defense counsel did not expressly object. A retrial was subsequently held in January 2019, after which the jury convicted defendant of driving while intoxicated per se, common-law driving while intoxicated, and failure to signal. On appeal, defendant contends, among other things, that the declaration of the mistrial was unwarranted and barred her convictions upon her subsequent trial for the same offenses.

The double jeopardy clauses of the New York State and United States Constitutions protect a defendant from twice being put in jeopardy of criminal prosecution for the same offense (*see* U.S. Const. 5th Amend.; N.Y. Const., art. I, § 6; *Matter of Davis v. Brown*, 87 N.Y.2d 626, 629-630 [1996]; *People v. Baptiste*, 72 N.Y.2d 356 [1988]; *Matter of Morris v. Livote*, 105

A.D.3d 43, 47 [2013]). The double jeopardy clauses do not ordinarily bar a second trial "where the defendant either requests a mistrial or consents to its declaration" (*People v. Ferguson*, 67 N.Y.2d 383, 388 [1986]). "While express consent to a mistrial is preferable, defendant's consent may in some cases be implied from the circumstances leading up to the dismissal of the jury" (*id.*).

Here, defense counsel impliedly consented to the mistrial by, among other things, actively participating in three different bench conferences at which the parties discussed a variety of options, including declaring a mistrial, and warning defendant that her failure to submit to cross-examination could lead to a mistrial (*see People v. Alman*, 185 A.D.3d 714 [2020]; *Matter of Matthews v. Nicandri*, 252 A.D.2d 657 [1998]; *People v. Hawkins*, 228 A.D.2d 450 [1996]). In any event, there was a manifest necessity for a mistrial, as there was no acceptable alternative under the circumstances (*see Alman*, 185 A.D.3d at 716; *Matter of Taylor v. Dowling*, 108 A.D.3d 566 [2013]).

Defendant's remaining contentions are without merit.

Accordingly, the judgment of conviction is affirmed.

GARGUILO, P.J., EMERSON and DRISCOLL, JJ., concur.

ENTER:

/s/ Paul Kenny
Chief Clerk

October 20, 2022

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU, DENYING WRIT OF PROHIBITION FOR DOUBLE JEOPARDY PROSECUTION (SEPTEMBER 25, 2018)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU—IAS/TRIAL PART 22

In the Matter of the Application of
LINDSAY L. LEE,

Petitioner,

For an order pursuant to CPLR Article 78
Prohibiting the respondents from further
Prosecuting the petitioner as barred by
Double jeopardy,

- against -

HON. MADELINE SINGAS and THE JUDGES OF
THE DISTRICT COURT, COUNTY OF NASSAU,

Respondents.

Index No. 477/18

Before: Hon. Sharon M.J. GIANELLI,
Justice of the Supreme Court.

DECISION AND ORDER

HISTORY

Petitioner, Lindsay L. Lee (hereinafter "Petitioner"), moved by Order to Show Cause in Lieu of Notice of Petition, dated April 23, 2018, for an Order pursuant to the New York Civil Practice Law and Rules (hereinafter "CPLR") Article 78:

1. Permanently prohibiting Respondents from prosecuting Petitioner after a prior mistrial, on the ground that it is barred by double jeopardy; and
2. For such other and further relief which is just, equitable, and proper.

Respondent HON. MADELINE SINGAS (hereinafter "Respondent") opposed the relief sought. On June 13, 2018, the Court presided over oral argument on the matter, which was supplemented by the submission of Memoranda of Law by Petitioner, Respondent, as well as the New York State Attorney General on behalf of the Judges of the District Court, County of Nassau.

By Decision dated June 27, 2018, the Court ruled that there were triable issues of fact, pursuant to CPLR § 7804 (h), and directed that a non-jury trial of this matter be held. The Court presided over the trial of this matter on August 7, 9, and 10, 2018. A total of two (2) witnesses testified at trial. Additionally, the District Court trial record, along with affidavits of four (4) Assistant District Attorneys (ADAs), as well as one (1) Court Officer, were considered.

BACKGROUND

Petitioner is a defendant in the Nassau County District Court facing criminal misdemeanor charges, which include Driving While Intoxicated (DWI). Her District Court trial commenced in February 2018. During the course of trial, Petitioner repeatedly failed to appear promptly. Further, though under no legal obligation to do so, Petitioner elected to testify on her own behalf. Following the completion of her direct testimony, Petitioner stated that she would not take the stand for cross examination. Following a next-day adjournment to resolve the issue, a chambers conference, as well as an on-the-record colloquy occurred, ultimately resulting in a mistrial declaration by the Court. Petitioner's counsel did not expressly object. Following the mistrial declaration, bail was set and as Petitioner was being led away she stated that she would testify. After she was led out of the courtroom, Petitioner's counsel requested an opportunity to speak to the jury. A retrial was subsequently scheduled. Prior to the commencement of the retrial, Petitioner's new trial counsel brought this action seeking an Order of Prohibition barring the retrial on the grounds of double jeopardy, asserting that defendant did not consent to the mistrial, and no manifest necessity was evident warranting the mistrial declaration. Respondents opposed, asserting that retrial is appropriate as Petitioner's trial counsel consented to the mistrial declaration; that alternatively, Petitioner's actions gave rise to the mistrial on the basis of manifest necessity; and that prohibiting Petitioner's retrial would defeat the ends of justice. The sum and substance of the trial testimony is set forth below.

TESTIMONY

Peter Brill

Peter Brill testified that he is a lawyer admitted to practice in the state of New York in February 1998. The overwhelming majority of his practice has been in criminal law, having begun his legal career as a Nassau County Assistant District. Attorney, then moving on to head his own criminal defense practice. Mr. Brill testified that he is one of two (2) attorneys certified by the National Board of Trial Advocacy in criminal trial law. He testified that the certification requires a demonstration of proficiency in the field, peer and judicial recommendations, participation in one hundred (100) contested matters, significant trial experience, significant research and continuing legal education (CLE) experience, and that it demonstrates a deep commitment to criminal law. It is in his capacity as a criminal defense lawyer that he served as Petitioner's District Court trial counsel. Petitioner's criminal trial included a misdemeanor DWI charge and commenced on or about February 26, 2018. Mr. Brill further testified that during the course of discussions preceding the commencement of the trial, he sought and received permission from the Judge to permit Petitioner to stand and stretch as necessary as she had been involved in two (2) prior accidents.

As the trial proceeded, Mr. Brill acknowledged that Petitioner arrived late to court multiple times for which the Court admonished her. The attendant delays resulted in the jury expressing frustration as the Court had communicated to them a shorter time frame for the completion of the trial than had been

unfolding. After the People rested, Petitioner chose to put on a case.

In furtherance thereof, on March 14, 2018, Petitioner elected to testify. Following several hours of testimony, Petitioner completed direct examination (on same date), during which she testified to a set of facts which contradicted the People's factual presentation, including allegations of police misconduct. When the time came to commence her cross examination, Petitioner advised her counsel, Mr. Brill, that she was feeling unwell and would not testify. The Court granted a next-day adjournment to March 15 at 2:00 p.m. for her to complete her testimony. However, on March 15, Petitioner arrived in court after 3:30 p.m. The Court, having released the jury during Petitioner's absence, admonished Petitioner, adjourned the matter to the following day (March 16), and instructed her to arrive at 9:30 a.m. When Mr. Brill arrived at 10:15 a.m. on March 16 as he was instructed, Petitioner was not present. Mr. Brill became aware that Petitioner had been present then absented herself from the courtroom before he arrived, without any communication concerning her whereabouts. A search ensued throughout the courthouse, in order to locate Petitioner and resume the trial. Court officers were also dispatched in aid of locating Petitioner.

Eventually, Petitioner contacted her father by telephone. Thereafter, her family "intercepted" her as she was walking away from the courtroom and brought her into the courtroom. At nearly 11:00 a.m. Mr. Brill had discussions with Petitioner who communicated to him that either she was not able to or that she would not testify. He testified that he advised the Court accordingly. Mr. Brill testified that her

assertion of feeling unwell was accompanied by burping and gagging as though she would imminently throw up. Mr. Brill communicated with the Court, after which Petitioner was permitted to sit in the back of the courtroom with a trash can nearby.

The prospect of Petitioner foregoing cross examination spurred three (3) bench conferences. In addition, Mr. Brill testified that he was contemporaneously engaging in multiple conversations with Petitioner's family, her friend, the assistant district attorneys, and perhaps court officers as well. These conversations were outside the presence of the jury.

On examination, Mr. Brill was asked, "Just so that the record is clear, during all three bench conferences the possibility of declaring a mistrial came up, correct?" Mr. Brill answered, "Yes". He was asked, "And at no time during these three bench conferences did you expressly object to the possibility of a mistrial being declared, correct?" Mr. Brill answered, "I never used the words 'I object' or words to that effect, correct." (TT p. 121, lines 11-22). Mr. Brill testified that he was surprised, not that a mistrial was declared, but that the People were immediately seeking that remedy when lesser remedies could have been imposed or requested. (TT p. 123).

On further examination, Mr. Brill was asked the following:

> Q. Now, Mr. Brill, also when you testified earlier on direct examination with regards to your client's refusal to testify, at one point you asked the judge for additional instruction to question your client further as to whether

or not she was explicitly or clearly refusing to testify, correct?"

A. Yes.

Q. And at the time that she put on the record that she was refusing to testify, was it clear to you at that time that the judge could have declared a mistrial?

A. I think that that was within his power to do, yes.

Q. In fact, you thought that the judge was going to declare a mistrial, correct?

A. I didn't know what the judge was going to do. I thought he was leaning in that direction.

Q. You thought he was leaning in that direction. And in fact, it didn't surprise you at that time that the court declared the mistrial, correct?

(TT p. 124, lines 8-25)

A. It did not surprise me.

Q. And when the Court declared the mistrial, you did not expressly object to the Court declaring a mistrial at that time, correct?

A. Correct

Q. At that time you informed the Court that you wanted to make a motion to withdraw as counsel at that time, correct?

A. Out of context, but yes.

(TT p. 125, lines 3-10)

Q. And just so that I am clear, Mr. Brill, so that the record is clear, at no time during the

three bench conferences or prior to or up to the time that the court declared the mistrial did you object, expressly object to a mistrial being declared? (TT p. 125, lines 15-18)

A. I did the opposite; I expressed my preference for the other options. But you're right, I never objected to the mistrial. (TT p. 126, lines 2-4)

Mr. Brill testified concerning the bench conferences as follows:

Bench Conference No. 1

Present at the first bench conference were Judge Hohauser, Mr. Brill, and Assistant District Attorneys Greubel and Vitagliano. A discussion ensued aimed at resolving the issue of Petitioner's not testifying on cross examination following her full direct examination. At the time of the first bench conference, Mr. Brill testified that Petitioner's parents were present in the courtroom and appeared increasingly upset. According to Mr. Brill, at the bench conference, the Court expressed concern and frustration, and sought a collaborative remedy. The Court presented the following options: waiving Petitioner's cross examination, striking Petitioner's testimony on direct, or declaring a mistrial. Mr. Brill testified that ADA Greubel indicated that discussions with his supervisor would lead him to request a mistrial if the issue did not resolve. When asked whether he took a position at that time, Mr. Brill answered "no" as ADA Greubel had to further confer with his supervisor prior to taking any other action. According to Mr. Brill, following the first bench conference, he had multiple conversations with Petitioner and her family.

Bench Conference No. 2

Present were Judge Hohauser, Mr. Brill, and ADAs Greubel, Vitagliano and Nickerson. According to Mr. Brill, Petitioner's family was becoming increasingly upset and with raised voices told her that she needed to testify, as court officers were instructing them to be quiet.

According to Mr. Brill, the same options described above, *i.e.* waiving Petitioner's cross examination, striking Petitioner's direct testimony or declaring a mistrial, were discussed again, and ADA Nickerson quickly objected to the waiver, which Mr. Brill testified left the two (2) remaining options. He testified that of the two options, ADA Nickerson expressed a preference for a mistrial.

When asked whether he objected to a mistrial declaration at that time, he answered, "I never specifically used the words, "I object". As I stated, I said something along the lines of, really, you really want to do that, or something like that." (TT, p. 91, lines 18-21). Mr. Brill testified that he suggested that the other alternatives were better, and that he spoke with Petitioner and her family following the second bench conference and conveyed the remedies discussed at the bench.

Bench Conference No. 3

Present were Judge Hohauser, Mr. Brill, ADAs Acquafredda, Nickerson, Greubel and Vitagliano. According to Mr. Brill, at the third bench conference, the Court continued its efforts to effectuate a change of heart on the part of Petitioner to testify. Mr. Brill testified that all involved wanted to avoid the mistrial

declaration, the People continued to express their preference for a mistrial.

When asked whether he objected to a possible mistrial declaration, Mr. Brill answered, "Again, I never said the words I object". (TT p. 93, lines 7-9). When asked whether the Court indicated a course of action, Mr. Brill answered, "The Court was clearly listening to the People's suggestions but did not specifically say what he was going to do." (TT, p. 93, lines 10-13).

The following questions were also asked of and answered by Mr. Brill:

Q. "So when the bench conference ended, the Court had not indicated what its next step was going to be?

A. No. I think that it was becoming clear, but I don't think that he specifically told us I am going to declare a mistrial if she doesn't testify.

Q. Was there a time during that third bench conference that you sought to be relieved or indicted that you would seek to be relieved?

A. I was very frustrated at this point, so I am sure in frustration I said, well, if we're going to do another trial, I will just ask to be relieved because I can't do another trial. But it was an in-the-future statement, not an I want to be relieved right now.

Q. Do you recall if the Court responded to that statement?

A. Something like you can make your motion at the appropriate time, something—you know, nothing. We weren't at odds. It was just a conversation." (TT, p. 93, lines. 14-25; p. 94, lines 1-6)

The following exchange occurred next consisting also of questions to and answers by Mr. Brill:

Q. Did there come a time when the Court went back on the record?

A. Yes.

Q. Did the People indicate that they were ready to proceed?

A. Yes.

Q. Did the Court then give you an opportunity to speak?

A. Yes.

Q. And what if anything did you say?

A. I asked the Court to make clear with Ms. Lee whether it was her intent not to testify because simply saying that she didn't feel well wasn't a sufficient basis to do anything.

Q. And did the Court conduct an inquiry?

A. Yes.

Q. And what if anything did the Court say specifically?

A. He asked Ms. Lee on more than one occasion what her intention was and whether she was going to testify, and ultimately she said that she would not.

(TT, p. 94, lines 24-25, and p.95, lines 1-17).

Additional questions of and answers from Mr. Brill followed.

Q. Do you recall asking the Court to inquire further? (TT p. 96, line 25)

A. I think I felt that the answers the Court was getting were not sufficient, so I just wanted a clear statement on the record of Ms. Lee's intent. (TT p. 97, lines 1-3)

Further questions of and answers from Mr. Brill:

Q. And did the Petitioner ultimately indicate a position that she would testify?

A. That she would not.

Q. And what if anything did the court do in response?

A. Told her he had no choice but to declare a mistrial. He set bail and she was placed in custody.

Q. And did you object at that time to the Court's action?

A. I did not.

Q. You stated on direct that Petitioner said she would testify. Where was she when she said that?

A. Halfway between the defense table and the bench.

Q. So she was being led out of the courtroom?

(TT p. 97, lines 14-25)

A. Yes.

Q. And it was after the Court declared the mistrial?

A. Yes.

Q. As Petitioner was being led out did you object for any reason?

A. I don't believe I said anything after that.

Q. And do you recall if there was any response from Petitioner's family and friends to the mistrial?

A. They were crying. The mother was hysterical.

Q. Did there come a time when the court released the jury?

A. Yes.

Q. And what if anything did the Court say to the jury?

A. Standard stuff the Court says to juries: You are released with the thanks of the Court.

Q. And did you object at that time?

A. No.

Q. Did you say anything in response to the Court releasing the jury?

A. No.

Q. And did there come a time when you actually did seek to be relieved?

A. A few days later.

(TT p. 98, lines 1-25)

Q. And what was the basis for your motion?

A. The fact that Ms. Lee and I had not seen eye to eye on how to proceed.

(TT p. 99, lines 1-3)

Q. And were you relieved?

A. Yes.

(TT p. 99, lines 6-7)

Q. Did Petitioner ever tell you she suffered from anxiety?

A. Yes, almost immediately after the—well, no. I received a letter from a doctor through her family indicating that she had a long-term anxiety issue. (TT p. 99, lines 18-22). He testified that the letter was received after the mistrial was declared.

William Hohauser

William Hohauser is the judge who presided over Petitioner's criminal matter and declared the mistrial following Petitioner's refusal to testify on cross examination following her testimony on direct examination. Judge Hohauser testified that the trial commenced on February 28, 2018; that the parties were instructed to arrive each day at 2:00 p.m. in order to commence at 2:15 p.m.; and that Petitioner was almost always late by more than half an hour, and usually without explanation. He testified that this led to several warnings to Petitioner, as well as instructions to the jury that they were not to draw any negative inference against either side concerning the trial delays. The witness testified that Petitioner's counsel never communicated to the court that Petitioner suffered from any physical limitations. The witness

testified that Petitioner chose to testify and commenced and completed her direct examination on March 14. Following the completion of her direct examination, the Court granted Petitioner's counsel's request to adjourn Petitioner's cross examination to the following day, March 15. He testified that Petitioner appeared but did not testify as Petitioner had once again arrived late, resulting in the Court's releasing the jury for the day without having heard any testimony. The witness further testified that the jurors expressed frustration with the delays. "Well, they testified that they were livid at the fact that they were coming for half days, and we didn't seem to be making much headway as far as trials because of the delays; that they had their lives and jobs to get back to, and they wanted to proceed with the case and they didn't understand why it wasn't happening" (TT p. 164, lines 10-15). Following an admonition by the judge, Petitioner was instructed to return the next day, March 16 at 9:30 a.m. for cross-examination. He testified that she initially appeared in the courtroom as instructed, but soon after disappeared without word or warning to the Court. Judge Hohauser testified that court personnel were directed to search the courthouse in an effort to locate Petitioner. Her parents also joined in the search. The witness testified that Petitioner eventually reappeared in the courtroom significantly later and without offering any explanation. According to the witness, he communicated to Petitioner and her counsel that Petitioner had once again failed to appear as instructed. Then, when asked whether she was prepared to testify, Petitioner's counsel communicated to the Court that Petitioner was unwell and would not testify. According to Judge Hohauser, he did not observe any symptoms of physical illness,

and Petitioner's family and friends were urging her to testify. Three bench conferences were then held.

The judge testified that Petitioner was not responsive to the Court's orders, and added, "This was a level of disrespect to the Court that I had not seen before." (TT p. 171, lines 20-22).

The witness testified that Petitioner was late quite often without explanation. When asked whether her counsel had offered any explanation for her lateness he answered, "No, because I don't think he knew." (TT p. 186, line 15). He was further asked, whether he could have taken her into custody or held her in contempt for her habitual lateness, to which he answered, "Sure." (TT p. 186, line 23). The witness went on to testify that Petitioner's direct examination lasted the entire court session for that day. He was asked, whether Petitioner or her counsel requested any breaks during Petitioner's direct examination. He answered, "No" (TT p. 187, line 6). Further, he testified that she made no complaints of illness or inability to sit still during her direct examination and appeared "physically fine". (TT p. 187, line 15).

A series of questions of and answers by Judge Hohauser followed:

Q. On March 15 did Petitioner arrive to the Court as directed?

A. That was the day she was supposed to testify. She certainly did not.

Q. Do you recall what time she arrived to the courthouse?

A. She was more than an hour late. Approximately 3:15 or so.

(TT p. 187, lines 18-25)

Q. And when she arrived, what if anything did she say with regards to her failure to appear?

A. Nothing. She gave no excuse.

Q. And what if any explanation did her counsel offer?

A. None. I don't think he had any.

Q. Now, did you speak with her regarding her failure to appear on time on March 15?

A. Yes.

Q. And what did you say to her?

A. I told her it was inexcusable.

Q. And what else did you say?

A. I said—I asked her to give me a reason why she shouldn't be held overnight. I said she had disobeyed my instructions flagrantly on a number of occasions; she was showing disrespect for the Court. This was virtually unprecedented for a Defendant to behave in this fashion.

Q. On that day did you decide to take her into custody?

A. I did not. I gave her yet another accommodation as I had throughout this trial.

Q. And when you say accommodation, you gave her a break?

A. Yes, as I had when there were requests from her side to adjourn the day early because she didn't want to begin her testimony at a

certain time or the day before she didn't want to begin cross-examination. I gave defendant accommodation after accommodation after accommodation here.

(TT p. 188, lines 1-25, p. 189, lines 1-2)

Q. Now, I think you testified on cross-examination that you released the jury that day prior to her arrival, is that correct?

A. Yes.

Q. How long had the jury been waiting for her to arrive that day?

A. About an hour. The jury actually came on time.

Q. You addressed the jury that day prior to releasing them, correct?

A. Yes.

Q. Did you mention Petitioner's absence to the jury at all?

A. No.

Q. And I think you testified on cross that you gave them an instruction. What instruction did you give the jury that day?

A. I said they were to take no inference from anybody's absence. They were not to hold anything against any party.

(TT p. 189, lines 3-25)

The witness was thereafter questioned concerning March 16. He testified that following Petitioner's initial appearance, then disappearance, followed by a

court-ordered search of the courthouse to locate her she finally reappeared at which time he went on the record.

Q. And you asked the parties whether they were ready to proceed?

A. I did.

Q. And how did the People answer?

A. They were ready.

Q. And how did Petitioner answer?

A. They were ready but not—they were technically ready but not ready, if I remember correctly.

Q. And why weren't they ready?

(TT p. 190, lines 17-25)

A. Because defendant refused to testify.

Q. Did she appear to be ill to you that day?

A. No, she did not appear unwell then or at any time.

Q. Did you notice any belching; was she doing any belching that day?

A. Not to my knowledge.

Q. Was she doing any gagging that day?

A. Not to my knowledge.

(TT p. 191, lines 1-16)

When questioned further concerning the bench conferences, the witness testified that alternatives were discussed at the first bench conference, during which ADA Greubel opined that striking Petitioner's

direct examination testimony was insufficient as "you couldn't unring that bell". (TT p. 192, lines 1-3). Further, ADA Greubel was also not in favor of a curative instruction or waiving cross examination but was without the requisite authority to make the decision. The witness further testified that a mistrial declaration was discussed, and though ADA Greubel thought that may be an appropriate remedy, he again had no authority to request one, and the ADA instead sought supervisory counsel. The judge was thereafter asked,

Q. Okay. And during this first initial bench conference did you give Petitioner's counsel, Mr. Peter Brill, an opportunity to speak with regards to the alternatives that were being proposed?

A. Absolutely, and he did not make a choice then or at any time among any of the alternatives nor did he object to any of the alternatives at any time.

Q. Did he say anything at all during that initial bench conference?

A. Yes. He was hopeful that Ms. Lee eventually—or he could persuade Ms. Lee to testify.

Q. Did you ask Mr. Brill to speak to his client with regards to testifying?

(TT p. 192, lines 13-25)

A. I did.

(TT p. 192, line 1)

The judge went on to testify that based on his conversations with Mr. Brill, Mr. Brill had discussed the matter with Petitioner. The witness expressed confidence in Mr. Brill's abilities and cited that his confidence is based on Mr. Brill's having had approximately four (4) trials before the judge.

He testified that a second bench conference was held where the same alternatives were discussed, and where the people expressed uncertainty as to whether the non-mistrial alternatives would be sufficient in light of the fact that Petitioner had testified voluntarily on direct then refused to testify on cross examination. The People requested an opportunity to confer with their Appeals Bureau.

A third bench conference was held, where the DA supervisor was present, and a third discussion of the same alternatives resulted in the People voicing their preference for a mistrial. The judge reiterated that at every turn Mr. Brill was afforded an opportunity to speak or to be heard concerning the potential remedies, and that Mr. Brill "He had no objection to any of the remedies being pursued—not being pursued, being offered and then pursued." (TT p. 197, lines 6-7).

Judge Hohauser testified that by the end of the third bench conference, together with Petitioner's persistent refusal to testify, and accompanied by her affirmative refusal on the record, as well as his having elicited from her on the record her understanding of the consequences of her decision, the judge made a decision to declare a mistrial.

The judge testified that Mr. Brill at no time objected on or off the record to the mistrial declaration. Specifically, Judge Hohauser was asked,

Q. And when you asked her if she understood the consequences of her decision, did you get a response from her?

A. I believe that I did.

Q. And what did she say?

A. That she understood.

Q. Now, when you went back on the record, did Mr. Brill at any time object to the declaration of a mistrial?

A. He never did.

Q. And after you declared the mistrial that day, did Mr. Brill object?

A. Never.

(TT p. 198, lines 5-15)

The judge was further asked:

Q. To your knowledge did Mr. Brill assent to the declaration of a mistrial?

A. Yes.

Q. And did the People also assent to the declaration of a mistrial?

A. Yes. Both parties did, I thought.

(TT p. 199, lines 1-6)

ANALYSIS/RULING

The relief being sought herein is a Writ of Prohibition against retrial on the grounds of double jeopardy. The Fifth Amendment to the United States Constitution, as well as Article 1 of the New York State Constitution, dictate protections of the individual

against double jeopardy. Additionally, the circumstances under which the Court must declare a mistrial and order a retrial is codified in New York State Criminal Procedure Law (CPL) § 280.10, and when the Court acts *sua sponte*, as here, CPL § 280.10 (3), is specifically invoked. CPL 280.10 (3) states: At any time during the trial, the court must declare a mistrial and order a new trial of the indictment under the following circumstances, (3) Upon motion of either party or upon the court's own motion, when it is physically impossible to proceed with the trial in conformity with law. In addition to constitutional and statutory mandates, caselaw also guides and instructs us that on the issue of the declaration of a mistrial consent is paramount.

A leading case in this regard is *People v. Ferguson*, 67 N.Y.2d 383 (1986). In *Ferguson* (*id.*), a juror seated on a homicide trial became ill and required hospital treatment. The Court never obtained information regarding the extent of the juror's injuries nor the expected length of confinement. Nonetheless, the presiding judge held an off-the-record conference in chambers where she discussed with the lawyers that she was considering a mistrial as there were no available alternate jurors to replace the hospitalized juror, thereby rendering continuation of the trial impossible. The judge stated to the lawyers that the court was going "to inform the jury what has happened" and asked attorneys if that was agreeable with them. The prosecution said "yes". The defense said the judge must do what she feels must be done and otherwise said nothing. Following the chambers discussion, the judge went on the record and informed the jury of what had occurred then declared a mistrial. Defendant's

counsel voiced no objection, opting instead to remain silent. The *Ferguson* (*supra*) court in granting a retrial held that absent the defendant's consent, manifest necessity is required for a *sua sponte* judicial mistrial declaration; however, the consent of defense counsel, express or implied, is binding on the defendant, and found implied consent based on a totality of the circumstances.

Similarly, a retrial was granted following a mistrial declaration in *People v. Hawkins*, 228 A.D. 2d 450 (2d Dept. 1996). There, the Court declared a mistrial in the case of a deadlocked jury and held that while Defendant did not expressly consent to the mistrial, his consent was implied from surrounding circumstances, namely, the fact defense counsel did not oppose the mistrial, nor actively participate in the colloquy concerning the jury's inability to reach a verdict.

For the facts presented here, no prior case is entirely on point; however, the caselaw provides a wealth of guidance. The seminal question which must be answered is whether Petitioner's counsel consented to the mistrial. An affirmative answer to that question ends the inquiry permitting Petitioner's retrial.

It is undisputed that Petitioner's counsel is an experienced criminal trial lawyer. It is undisputed that Petitioner elected to and underwent a full direct examination during her DWI jury trial. It is undisputed that Petitioner thereafter explicitly stated that she would not testify on cross examination, stating simply that she felt unwell. It is undisputed that the trial judge, Petitioner's trial counsel, along with the ADAs, held three (3) bench conferences in an effort to determine how to proceed in light of this development. It is

undisputed that at each bench conference, alternatives were discussed, *i.e.* waiving Petitioner's cross examination, striking Petitioner's direct examination testimony, issuing a curative instruction, and declaring a mistrial. It is undisputed that each bench conference afforded all participants, including Petitioner's counsel, repeated opportunities to be heard in a collaborative effort to reach a resolution. It is undisputed that Petitioner's counsel discussed the alternatives with Petitioner and her family who were present in the courtroom. It is undisputed that during each of the three bench conferences, Petitioner's counsel did not expressly object to the alternative of declaring a mistrial. It is undisputed that once the proceedings returned to the record following the three bench conferences, Petitioner's counsel did not object on the record to the impending mistrial declaration. It is undisputed that prior to the judge's on-the-record mistrial declaration, Petitioner's counsel made an on-the-record request that the judge seek a definitive answer from Petitioner as to whether she would testify, as he believed that simply stating that she was unwell was by itself insufficient to justify her refusal. It is undisputed that the judge granted Petitioner's counsel's request, which resulted in Petitioner's answering "no" to the question of whether she would testify. It is undisputed that Petitioner's counsel did not object on the record or off the record following Judge Hohauser's mistrial declaration. Upon review, it is abundantly clear that Petitioner's counsel did not expressly object to the mistrial declaration, and it is equally clear that Petitioner's counsel conceded that he did not expressly object to the mistrial declaration.

Consideration next turns to whether Petitioner's actions constituted implied consent. It is as to this analysis that comparison to *Ferguson* (*supra*) is all the more warranted. Both involve the unexpected emergence of an issue that threatened to derail the continuation of trial. In *Ferguson* (*supra*), it was hospitalization of a juror. Here, it was Petitioner's refusal to undergo cross examination after having elected to testify on direct. In both cases, the presiding judge conferred with the lawyers off the record in efforts to reach a resolution during which all involved were afforded the opportunity to provide input and to object, and in fact provided input but did not expressly object to the mistrial declaration. *Ferguson* (*supra*) counsel's failure to object during the chambers conference to the judge's expressed intent to declare a mistrial, compounded thereafter by his off-the-record statement that the judge had to do what she had to do, likens it to the matter before this Court. Here, Petitioner's counsel could have but did not expressly object during bench conferences. In fact, instead of using his opportunities to be heard for the purpose of objecting, he instead inquired about an application to be relieved if a mistrial were to be declared (as he did not intend to serve as trial counsel at Petitioner's retrial). He further used opportunities to be heard to request on the record that Judge Hohauser confirm Petitioner's refusal to testify prior to the judge's mistrial declaration, and thereafter voiced no objection following the mistrial declaration. The Court also notes that it was only after the matter had been resolved, the mistrial determination declared on the record, and Petitioner was apprised that she would be taken into custody, that Petitioner stated that she would testify as she was being led away. Her belated

statement following the mistrial declaration and following the dismissal of the jury was the culmination of her antics throughout the trial, where evidence of her own unfounded assertions of illness and her own overall dilatory conduct led to the declaration of the mistrial. The *Ferguson* facts led to a finding of implied consent. This Court likewise finds implied consent from the totality of the facts herein.

Notwithstanding the Court's finding of implied consent herein, it is important to note that caselaw also provides guidance in the absence of consent. The mistrial declared herein was also warranted under *U.S. v. Perez*, 22 U.S. 579 (1824) for a "very plain and obvious cause". This is evidenced by a totality of the circumstances created by Petitioner's own actions, *i.e.* her repeated lateness resulting in juror frustration and trial delays; Petitioner's testifying on direct with claims of police misconduct then refusing to testify on cross examination to the substantial detriment of the People; Petitioner's claiming illness then belatedly offering to testify following the mistrial declaration; as well as Petitioner's counsel's failure at every opportunity to object. In *Perez* (*id.*), the jury deadlocked on a capital murder case. A mistrial was declared by the Court. In deciding whether retrial was permissible, the Court held that in the absence of Defendant's consent, the law invests courts with the authority to declare a mistrial on any verdict whenever the court finds upon consideration of all circumstances that, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. The *Perez* (*id.*) court, however, cautioned that the Court's exercise of sound discretion in employing this remedy is a fundamental requirement, and went on to note

that as it is impossible to define all of the circumstances under which it would be proper to declare a mistrial absent Defendant's consent, it is necessary that the court's power be used with caution and for "very plain and obvious causes".

The *Perez* (*supra*) holding was tested and withstood scrutiny in *Hall v. Potoker*, 49 N.Y. 2d 501 (1980). There, in a trial involving a charge of criminal sale of a controlled substance, an undercover police officer was unexpectedly hospitalized rendering him unable to testify as a crucial prosecution witness. A hearing conducted to determine the extent of the officer's illness resulted in a two-week trial delay, after which a request for a second continuance was made and opposed by the defense. Upon denying the request for the second continuance, the court declared a mistrial over defense objection. The defendant brought an Article 78 proceeding in the nature of prohibition seeking to bar his retrial. In ruling to permit the retrial, the court held that retrial is not barred where there is a showing of manifest necessity, or where the ends of public justice would otherwise be defeated. The Court of Appeals went on to emphasize that such a decision is in the first instance within the trial court's discretion as it may properly declare a mistrial on such grounds where the judge has properly explored the alternatives and there is a sufficient basis in the record to support a mistrial. Further, in as much as the law empowers the court to act with sound discretion in declaring a non-consensual mistrial, however, it equally checks and balances this power by rendering judicial actions that do not engage a proper consideration of alternatives prior to the

declaration of a mistrial impermissible. *U.S. v. Jorn*, 400 U.S. 470 (1971).

The record herein is clear that alternatives were considered. The alternatives: striking Petitioner's direct testimony, waiving cross-examination, together with issuing a curative instruction, were all considered and discussed at each of the three (3) bench conferences. Petitioner's counsel also discussed the alternatives with Petitioner and her family. However, upon due consideration, each non-mistrial alternative fell short as each was insufficient to remedy the clear, obvious, and substantial prejudice to the People since employing any or either of them could not serve to "unring the bell" of the jury's having already heard only Defendant's full direct examination which included serious allegations of police misconduct. Petitioner testified at length for an entire afternoon that she was targeted by the police, roughly handled, and taken into custody for no apparent reason. Prosecutors had no opportunity to challenge these serious and material assertions of misconduct, which remained unchallenged and would have remained so had the testimony merely been stricken or had the People simply waived cross examination, accompanied by a curative instruction to the jury. And, while the interest of the defendant in a criminal case is paramount, appropriate consideration must be afforded the People under these circumstances. Here, a criminal defendant elected to testify fully on direct examination then elected to decline to undergo cross-examination, leaving a limited number of alternatives upon which the court could reasonably rely to continue the trial.

The Court exercised sound discretion in declaring a mistrial after considering the alternatives.

The totality of the circumstances herein leading to the Court's very real and difficult quandary were of Petitioner's own making. The record is clear that alternatives were considered, and a decision to pursue either of the non-mistrial alternatives would have resulted in an outcome of substantial and unjust prejudice to the People, together with substantial unwarranted benefit to Petitioner, thereby providing criminal defendants a viable means by which to avoid the potential detrimental consequences of a jury trial (*i.e.* conviction and/or incarceration). Such an outcome under these circumstances would undoubtedly serve to defeat of the ends of public justice.

Accordingly, Petitioner's application for an Order pursuant to CPLR Article 78, permanently prohibiting Respondents from prosecuting Petitioner after a prior mistrial on the ground that it is barred by double jeopardy, and for such other and further relief, is DENIED.

This is the Decision and Order of the Court.

/s/ Hon. Sharon M.J. Gianelli
Justice of the Supreme Court

ENTER: September 25, 2018
Mineola, New York

TRANSCRIPT OF TRIAL JUDGE PRESSURING A GUILTY PLEA (MARCH 20, 2018)

DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT: PART 1

THE PEOPLE OF THE STATE OF NEW YORK

against

LINDSAY LEE,

Defendant.

Docket #: CR-018330-16na

Before: Hon. William HOHAUSER,
District Court Judge.

-PROCEEDINGS-

COURT CLERK: For the record, 18330 of '16, Lindsay Lee.

MR. GREUBEL: Michael Gruebel, G-R-U-E-B-E-L. Good afternoon.

MR. VITAGLIANO: For the People, Assistant District Attorney John Vitagliano.

MR. BRILL: Peter Brill for the defendant, Miss Lee.

THE COURT: You're ready?

MR. GREUBEL: Yes, Your Honor.

MR. BRILL: May I have a moment before we go on the record?

THE COURT: Yes, you may.

MR. BRILL: Ready to proceed, Your Honor.

THE COURT: All right. People, do you have anything to say before I—

MR. GREUBEL: Yes, I would like to put something on the record.

Your Honor, for today's purposes, the People will be willing to extend an offer of just the 1192.2, driving while intoxicated, per se, to the charge, in satisfaction of all the charges pending, again, the defendant with a sentencing recommendation of 10 days incarceration followed by three years probation.

I would note that if my math is correct, the defendant has 6 out of 10 days required for that period of incarceration.

However, if the defendant were to choose not to plead today, People will be withdrawing that and all offers on this case and recommending a sentence recommendation of 90 days incarceration followed by three years probation, given everything that transpired in this case and the facts of the underlying case as well. I wanted to place that on the record at this time.

THE COURT: Thank you. Mr. Brill, do you have anything to say before I make inquiry of your client?

MR. BRILL: I will have something to say afterwards. No, not at the moment.

THE COURT: Miss Lee, do you understand why you are here?

THE DEFENDANT: Not exactly.

THE COURT: Did you understand what the People said?

THE DEFENDANT: Not really.

THE COURT: Okay. They offered you a choice that if you plead today to just what is the DUI charge, that they're recommending a sentence of 10 days in jail, which since you've been incarcerated for a period of days, you will have served the entirety of that time. Do you understand what that means?

THE DEFENDANT: Yes.

THE COURT: Okay.

THE DEFENDANT: I understand.

THE COURT: You think so? All right. What don't you understand about that?

THE DEFENDANT: Can you tell me again, please?

THE COURT: Sure. That the offer if you take the plea today, that you will be—they're recommending a sentence of 10 days in jail plus probation for three years. And since you served the minimum time under that sentence, their recommendation will include no additional jail time. Do you understand that?

THE DEFENDANT: Okay.

THE COURT: Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You have to answer me, ma'am.

THE DEFENDANT: Yes.

THE COURT: I can't hear you.

THE DEFENDANT: Yes.

THE COURT: Are you able to speak in a normal tone right now?

THE DEFENDANT: Yeah.

THE COURT: Now, if you do not accept the recommendation or this plea today, you will go back on trial at a date to be determined and at that point, they will no longer continue that offer and if you're found guilty, they will recommend a harsher sentence. Do you understand that? Do you understand what I am saying?

THE DEFENDANT: I think so.

THE COURT: Well, do you need me to repeat it?

THE DEFENDANT: No.

THE COURT: Do you understand it?

THE DEFENDANT: Yes.

THE COURT: Do you remember last week when you were brought passed me after bail was set, do you remember what you said to me when you said that you could testify right then? Do you remember that?

THE DEFENDANT: Yeah.

THE COURT: Okay. So, I think you do understand what is transpiring here. Now, what is your wish, do you wish to plead, take this plea offer now or not?

THE DEFENDANT: I'm not guilty.

THE COURT: Do you wish to take this plea right now because the offer will not be extended again?

I'm going to give you another courtesy right now. Your mother is in this courtroom. Do you see her? Do you wish a moment to speak with your attorney and your mother? Do you wish—I can't bring your mother—do it right here. Do you wish to talk to your turn for another moment now?

THE DEFENDANT: Yes.

THE COURT: Use this time well and wisely, ma'am.

MR. GREUBEL: If you would like, we can step outside so she can speak out loud to her mother. I would be okay with that.

THE COURT: Why don't you do that.

Miss Lee, you can come up to the bar where the Sergeant is. You can stand up if you want to and talk to your daughter. You can't go—proceed any closer. You are given a very unusual opportunity right now. I will also leave.

(PAUSE IN PROCEEDINGS.)

COURT CLERK: Back on the record.

THE COURT: Mr. Brill.

MR. BRILL: I've represented Miss Lee for approximately two years. Through that time, she and I have seen eye-to-eye up until obviously what happened last week. I had a conversation with her over the phone. I had a conversation with her here in court and downstairs.

The matter is beyond me at this point and I don't do this lightly, but I will do it in writing. I'm telling the Court that Miss Lee's communication with me has broken down and I will be moving to be relieved as Counsel.

THE COURT: I understand. You obviously are accurate. This has to be put in writing and submitted to me.

Miss Lee, do you understand what Mr. Brill just said?

THE DEFENDANT: Yes.

THE COURT: He no longer wishes to act as your attorney. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you understand why he said that?

THE DEFENDANT: Partially.

THE COURT: All right. So, it is your decision not to take this plea agreement?

THE DEFENDANT: Yes.

THE COURT: Do you wish to go on trial again?

THE DEFENDANT: I wish to plead not guilty.

THE COURT: Ma'am, Miss Lee, I'm going to give you another chance. You understand the potential impact this may have. The D.A's recommendation will be that you have essentially completed all the incarceration time that you would serve. You would not have to spend any more time in prison in all likelihood and yet, you would risk additional jail time with another jury?

THE DEFENDANT: I can't plead guilty to something I didn't do.

THE COURT: You're not listening to me. You understand the risk? You also understand that what transpired last beak resulted in a waste of time to the Court, to the jurors, to the witnesses, to your parents, to everyone who was involved and you also understand—do you understand what I just said?

THE DEFENDANT: Yes.

THE COURT: You also understand that you acted with extreme disrespect for the Court last week? Do you understand that as well?

THE DEFENDANT: Yes.

THE COURT: And with all the factors coming in, this is a very generous offer that the People have given to you. They don't have to do that especially with the behavior you exhibited last week. Do you understand this?

THE DEFENDANT: It hasn't been the same offer since the beginning.

THE COURT: This is the offer they have now. That's even despite your behavior last week, which to put it mildly, was highly disrespectful.

THE DEFENDANT: I apologize.

THE COURT: We're passed that now. You had your chance to do it last week and earlier today and you still have not done that. So I'm going to ask you again, this will be the final time. Do you wish to accept this offer because otherwise, I have no choice but to set this matter back for trial and

there will be bail set on you. Do you understand what I am telling you?

THE DEFENDANT: I can't plead guilty to something I didn't do.

THE COURT: There are times when you can and you heard all the testimony that was given at the hearing and the jury may not believe you, ma'am.

MR. BRILL: Just for the record, as I told Miss Lee, Mr. Gruebel and I spoke to our jury at the end of the mistrial and two men or two women and everyone we spoke to, I don't know if we spoke to all six, I'm pretty sure we did, said they would have convicted on the DWI.

THE COURT: Do you understand what your Counsel is saying? That every—this is what your Counsel said. That every juror that he spoke to would have voted to convict you. Everyone that was before you were cross-examined. Do you understand that? That this doesn't bode well for you at the next trial. Do you understand this, ma'am?

THE DEFENDANT: Yes.

THE COURT: And I know I said this the last time, I will give you one last opportunity, do you wish to take this plea and in all likelihood avoid any further time incarcerated?

THE DEFENDANT: Your Honor, I cannot plead guilty to something I did not do.

THE COURT: All right.

MR. BRILL: Your Honor, I ask the Court to set what I term more reasonable bail, given the current

circumstances, bail that she has the potential of making.

MR. GREUBEL: Your Honor, given the defendant's repeated effort to avoid cross-examination, to avoid continuing testimony, showing up late, almost not showing up at all, $25,000 People request bail set at.

THE COURT: Bail in the amount of $250,000 is hereby reduced. The new bail is set $10,000 over $6,000. This matter will be set for, reset for trial.

MR. BRILL: I'll have an order to show cause depending on the—whether I will have Order to Show Cause for you tomorrow.

MR. GREUBEL: I am set to become engaged in a new trial this upcoming Monday out of Part 268. Mr. Vitagliano is currently on trial before Judge McAndrews. You tell us the date. We'll make every effort to be ready.

THE COURT: Do you think it likely or unlikely bail will be posted?

MR. BRILL: Can I have a moment? Not for sure, but probably. The in date, the sooner.

THE COURT: The difficulty we have right now is Mr. Gruebel and Mr. Vitagliano.

MR. BRILL: That's understandable.

THE COURT: The other thing you have to consider is if I grant Mr. Brill's motion, which I don't know if I'm going to, you may need Counsel to prepare for this matter and at the risk of repeating myself, I will give you one final chance, which is about the eighth time I've given this to you today.

THE DEFENDANT: I don't understand. I can't have my conscience plead guilty to something I did not do.

THE COURT: Okay then. $10,000 over $6,000. I'll give a date right now.

THE COURT: This is in case I grant Mr. Brill's motion to withdraw.

THE COURT: Off the record.

(Whereupon, an off the record discussion took place.)

THE COURT: We're setting this matter down for trial and this will be set for trial. Mr. Gruebel and Mr. Vitagliano, I set this for trial on April 2.

MR. GREUBEL: Can we set it for April 3rd.

THE COURT: This matter is hereby set for retrial, April 3rd. Defendant is held now on $10,000 over $6,000. We're adjourned.

Certified to be a true and
accurate transcript of the proceedings.

/s/ Catherine P. Murphy
Official Court Reporter

TRANSCRIPT OF DECLARATION OF MISTRIAL (MARCH 16, 2018)

DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT: PART C-1

THE PEOPLE OF THE STATE OF NEW YORK

against

LINDSAY LEE,

Defendant.

Index CR-018330-16NA
Jury Trial

Before: Hon. William HOHAUSER,
District Court Judge.

Proceedings

THE CLERK: For the record, People of the State of New York versus Lindsay Lee.

MR. GREUBEL: For the People, Assistant District Attorney, Michael Greubel.

MR. VITAGLIANO: Assistant District Attorney, John Vitagliano.

MR. GREUBEL: The People are ready to proceed.

MR. BRILL: Peter Brill for Miss Lee.

Miss Lee indicates that she is very sick and unable to testify.

THE COURT: Counsel, step up.

(Sidebar conference off the record)

MR. BRILL: Judge, I am just going to step out.

THE COURT: Officer.

(Brief pause in proceeding)

THE COURT: Back on the record.

THE CLERK: For the record, People versus Lindsay Lee.

MR. GREUBEL: People, are ready to proceed, your Honor.

THE COURT: Mr. Brill?

MR. BRILL: Your Honor, I honestly don't know if we are ready to proceed. I am asking the Court to conduct an inquiry.

THE COURT: Miss Lee, are you prepared to testify? If you say something again, ma'am, I will have you removed.

Are you prepared to testify today?

THE DEFENDANT: (Indicating)

I am not feeling well, your Honor.

THE COURT: So, the answer is no.

Do you understand the consequences of your decision? This is after you did not appear the first day, with some excuse. You showed up late yesterday by more than an hour and a half after having been given explicit warnings. And now today you showed up on time and then you left and forced the Court to have the court house search for you.

Do you understand this?

THE DEFENDANT: I'm not feeling well.

MR. BRILL: Judge, I ask that you have a firm answer. I am not feeling well is not sufficient.

THE COURT: That is why I'm conducting this inquiry.

Are you prepared to testify, beginning now, yes or no? I'm sorry. I want to hear this.

THE DEFENDANT: No.

THE COURT: I have no choice but to declare a mis-trial in this matter. Bail is now set on the defendant 250,000 dollars over 200,000 dollars. The file is marked for medical attention. The case is marked for trial on Tuesday.

MR. BRILL: She said she will testify.

THE COURT: March 20th, at 2 p.m. Mark the file medical attention and suicide watch, protective custody. Please bring in the Jury.

(Jury present)

THE COURT: Please be seated.

Ladies and Gentlemen of the Jury, it is with my profound regret that I have to inform you that there is a mistrial in this matter. With again my apologizes, the apologies of the parties I thank you for your service. You will be discharged. I will take you back to the jury room at which point I will come and speak to you about this experience.

MR. BRILL: Your Honor, once you are done if anybody wants to talk I will be downstairs if you have

any questions for me or Mr. Greubel. We will be downstairs.

THE COURT: I will speak to you at length and I will answer any and all questions that I can. Again, it is with my profound regret. With that the Jury is discharged. I thank you. You will get your slips, but I will be with you momentarily in the other room.

(Jury not present)

MR. GREUBEL: Tuesday you said?

THE COURT: Tuesday.

* * * * * *

Certified to be a true and accurate record of the within proceedings.

/s/ Andrea Raso
Official Court Reporter

DOCTOR'S NOTE
(MARCH 16, 2018)

MOUNT SINAI DOCTORS
94 East 1st Street
New York, NY 10009
T 212-677-2137

To Whom it May Concern,

My patient Lindsay Lee has a long history of suffering from anxiety & panic attacks for which she is prescribed medic ation. When she has a panic attack, which could happen at any time, her mind freezes up & she cannot perform. Medication does help but she does not always carry it on hand with her so when this happens to her there isn't anything she can do to stop it until the panic attack passes on its own. What happened today in court is a result of a preexisting long term medical condition so this needs to be taken into serious consideration. Thank you.

/s/ Andrew Petelin, MD

Mount Sinai Doctors
94 East 1st Street
New York, NY 10009

CERTIFICATE OF WORD COUNT

No. TBD

Lindsay Lee,

Petitioner,

v.

People of the State of New York,

Respondent.

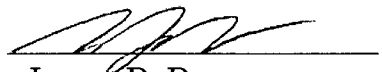
STATE OF MASSACHUSETTS)
COUNTY OF NORFOLK) SS.:

Being duly sworn, I depose and say:

1. That I am over the age of 18 years and am not a party to this action. I am an employee of the Supreme Court Press, the preparer of the document, with mailing address at 1089 Commonwealth Avenue, Suite 283, Boston, MA 02215.

2. That, as required by Supreme Court Rule 33.1(h), I certify that the LINDSAY LEE PETITION FOR WRIT OF CERTIORARI contains 6720 words, including the parts of the brief that are required or exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.



Lucas DeDeus

May 30, 2023