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ESSAY

HOW I GOT TO THE NEW YORK COURT OF APPEALS

Albert M. Rosenblatt*

With nervousness matched only by anticipation, I sat in the passenger's seat. My friend—and opponent on the appeal—Robert Ostertag drove us up from Poughkeepsie, where I was an assistant district attorney about to argue my first case in New York's highest court.

As appellant, I was there to reinstate a conviction for what I had persuaded myself was one of New York's most heinous crimes and an equally severe punishment: a $10.00 fine for violating section 1124 of New York's Vehicle and Traffic Law.

The facts were simple. The defendant was driving south on Route 9G and pulled out to pass a truck. Before getting back into his own lane, he almost collided with an oncoming car driven by . . . a state trooper. This set the stage for what became my epic battle over the constitutionality of section 1124.

The trial, conducted on August 30, 1963, could not have lasted more than five minutes, and the record consisted of the trooper's testimony, which amounted to barely two pages. The

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law was hardly more complicated, as Section 1124 provided that no vehicle may cross the dividing line to pass another vehicle on the left unless the left side is "clearly visible and free of oncoming traffic." The statute went on to say that the overtaking vehicle must return to its own lane within at least 100 feet of any vehicle coming from the opposite direction.

Plain enough: If you're going to pass another car, get back into your own lane in time to avoid a collision with an approaching car. On the spot, the Justice of the Peace found the defendant guilty. He appealed. In a concise six-sentence opinion, the intermediate appellate court declared the statute unconstitutional, as (mind you) void for vagueness. Thus, the court held, the People did not dispel a reasonable doubt, so the fine was remitted and the charge dismissed.

The District Attorney designated me to handle the next phase of the case, an appeal to New York's highest court, the Court of Appeals. We needed permission to appeal, and we were heartened when Judge Stanley H. Fuld issued a certification proclaiming that the case involved questions of law meriting review by the Court of Appeals.

Dutifully, I had researched the law and learned that section 1124 had identical counterparts in twenty-five states, and that four other states had enacted the same statute without the 100-foot provision. Only our intermediate appellate court (following a decision of the Wayne County Court[1]) had found the statute vague.

Armed with citations from North Dakota, across the fruited plains and through America's breadbasket to the Texas panhandle, the lighthouses of Maine, and other jurisdictions from sea to shining sea, I tried to remember each holding as I readied myself for oral argument. Would the court ask me about the facts in the Rhode Island case? Or point out that the Tenth Circuit Court of Appeals had dealt with New Mexico's identical statute in a civil, as opposed to criminal, case? No matter. I was ready.

As appellant, I went first, remembering from law school moot court that one must begin the argument by saying, "May it please the court." I got the words out passably and plunged into

1. *People v. East*, 206 N.Y.S.2d 963 (Cty. Ct. N.Y., Wayne Cty. 1960).

the argument. "This case . . . ," I began, but Judge Kenneth Keating leaned forward and stopped me. "Excuse me," he asked, "but how did you get here?"

With Kansas, Louisiana, and Oklahoma statutes swirling around in my head, I wondered why the judge seemed so interested in the local roads, or perhaps in train travel. As I paused and stammered, I recalled that Judge Keating had been a United States Senator and had, no doubt, traveled the state. Maybe he was checking to see if he had taken the best routes.

I glanced over at opposing counsel, but Bob Ostertag looked straight ahead, poker-faced. He knew, of course, that we had opted for the Taconic Parkway instead of the Thruway, but was not about to stand up and volunteer it. And for all my preparation, I was not even sure of the exit number and could not respond accurately, considering that Bob had driven and I was preoccupied with less relevant matters, like cases from Montana and Mississippi.

I sensed that some of the other judges seemed aroused by Judge Keating's question as they began flipping pages, and it occurred to me that maybe the question had something to do with procedure. Taking no chances, I answered as forcefully as I could: "I'm sorry, Your Honor, but I'm not sure I have the drift of your question." Judge Keating responded with a benevolent smile. "By what right are you appealing?" he asked.

Ah, the mist was clearing. "Judge Fuld," I replied, "granted us a certificate of leave to appeal." I looked to Judge Fuld. He said nothing.

"But can you appeal to this court from a reversal on the *facts*? Isn't that an acquittal?" Two or three of the judges, I thought, began to shift in their chairs, but I couldn't tell whose discomfort they were reflecting, theirs or mine.

"I'm sorry, Your Honor," I said, "but the case has been briefed entirely as one involving the constitutionality of section 1124. No one has ever raised the question of appealability." ("Not even Judge Fuld," I was about to say, but thought better of it.) "If you like," I continued, "I can submit something . . . ."

Judge Keating responded cordially: "That won't be necessary," he said. "Go on with your constitutional argument."

So I did. And about a month later, the Court held section 1124 valid and ordered a new trial.[2]

2. *People v. Klose*, 219 N.E.2d 180, 183 (N.Y. 1966).