

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

M85977
E/sl

ROBERT A. SPOLZINO, J.P.
JOSEPH COVELLO
DANIEL D. ANGIOLILLO
THOMAS A. DICKERSON, JJ.

2007-02976

The People, etc., respondent,
v Thomas Smith, appellant.

DECISION & ORDER ON MOTION

(Ind. No. 02-03855)

Motion by the appellant for leave to prosecute an appeal from a resentence of the Supreme Court, Kings County, imposed March 12, 2007, as a poor person and for the assignment of counsel. By order to show cause dated March 25, 2009, the appellant was directed to show cause before this court why an order should or should not be entered dismissing the appeal on the ground of lack of prosecution (*see* 22 NYCRR 670.8[f]; CPL 470.60[1]), and the appellant's motion was held in abeyance in the interim.

Upon the order to show cause and the papers filed in response thereto, and upon the papers filed in support of the appellant's motion and the papers filed in opposition and in relation thereto, it is

ORDERED that the motion to dismiss the appeal on the ground of lack of prosecution is denied; and it is further,

ORDERED that the appeal, which was deemed abandoned pursuant to 22 NYCRR 670.8(f), is restored to active status; and it is further,

ORDERED that the appellant's motion is granted; and it is further,

ORDERED that the appeal will be heard on the original papers (including a certified transcript of the proceedings, if any) and on the appellant's and the respondent's briefs; the parties are directed to file nine copies of their respective briefs and to serve one copy on each other; and it is further,

May 29, 2009

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ORDERED that the stenographer of the trial court is directed promptly to make, certify, and file two transcripts of the proceedings of the imposition of resentence in this action, except for those minutes previously transcribed and certified (*see* 22 NYCRR 671.9); and it is further,

ORDERED that the Clerk of the trial court shall furnish one certified transcript of each of the proceedings set forth above to the appellant's counsel, without charge (*see* CPL 460.70); assigned counsel is directed to turn over those transcripts to the respondent when counsel serves the appellant's brief on the respondent; and it is further,

ORDERED that in the event the stenographer has already prepared a copy of any of the minutes for a codefendant, then the Clerk of the trial court is directed to reproduce a copy thereof for assigned counsel; and it is further,

ORDERED that upon service of a copy of this decision and order upon it, the Department of Probation is hereby authorized and directed to provide assigned counsel with a copy of the presentence report prepared in connection with the defendant's resentencing, including the recommendation sheet and any prior reports on the defendant which are incorporated or referred to in the report; and it is further,

ORDERED that in the event an issue as to the legality, propriety, or excessiveness of the resentence is raised on appeal, or if assigned counsel cites or relies upon the probation report in a brief or motion in any other way, counsel shall provide a complete copy of such report and any attachments to the court and the District Attorney's office prior to the filing of such brief or motion; and it is further,

ORDERED that pursuant to County Law § 722 the following named attorney is assigned as counsel to prosecute the appeal:

Lynn W.L. Fahey
Appellate Advocates
2 Rector Street, 10th Floor
New York, New York 10006

and it is further,


ORDERED that the appellant's time to perfect the appeal is enlarged; assigned counsel shall prosecute the appeal expeditiously in accordance with this court's rules (*see* 22 NYCRR 670.1, et seq.) and written directions; and it is further,

ORDERED that in the event the file has been sealed, it is hereby unsealed for the limited purpose of allowing assigned counsel or his representative access to the record for the purpose of preparing the appeal; such access shall include permission to copy the papers insofar as they pertain to the appellant; and it is further,

ORDERED that assigned counsel is directed to serve a copy of this order upon the Clerk of the court from which the appeal is taken.

SPOLZINO, J.P., COVELLO, ANGIOLILLO and DICKERSON, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court