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## Due Process

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## SUPREME COURT, APPELLATE DIVISION

### FOURTH DEPARTMENT

People v. Bigda<sup>128</sup>  
(decided June 5, 1992)

Defendant appealed his conviction of endangering the welfare of a child,<sup>129</sup> asserting that the verdict was rendered against the weight of the evidence, and that the sentence was excessive.<sup>130</sup> After rejecting defendant's contentions, the appellate division nonetheless reversed his conviction because it found that the defendant was deprived of his right to be tried of the crimes alleged in the indictment<sup>131</sup> in violation of the New York State Constitution.<sup>132</sup> Thus, the court held that the defendant was prejudiced because of the variance between the proof at trial and the indictment.<sup>133</sup>

Defendant was convicted of endangering the welfare of a child; which the indictment alleged occurred at the end of June or beginning of July, 1988. At trial however, the prosecution proved that the crime took place a year earlier.<sup>134</sup> Thus, the court noted that the "[d]efendant was unduly prejudiced as a result of the variance."<sup>135</sup>

The court began its analysis of the constitutional claim by noting that there were two important reasons why proof at trial

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128. 184 A.D.2d 993, 584 N.Y.S.2d 238 (4th Dep't 1992).

129. *Id.* at 993, 584 N.Y.S.2d at 239.

130. *Id.*

131. *Id.* at 994, 584 N.Y.S.2d at 239.

132. N.Y. CONST. art. I, § 6. The provision states, in pertinent part: "[N]o person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury." *Id.*

133. *Bigda*, 184 A.D.2d at 994, 584 N.Y.S.2d at 239.

134. *Id.*

135. *Id.*

should not vary from the indictment.<sup>136</sup> First, the indictment provides the defendant with fair notice of the charges pending against him so he may prepare a defense. Second, adherence to the indictment ensures that the prosecution does not take away the power of the grand jury to determine the charges proffered against the accused.<sup>137</sup> The court held that the one year variance between proof at trial and the dates in the indictment deprived the defendant of his constitutional right to a “fair notice of the charges and of his rights to have those charges determined by the Grand Jury.”<sup>138</sup>

Defendant asserted that he was prepared to present his defense of the crime he was accused of committing in 1988. He argued that he could not have committed that crime because during that time he was recovering from heart surgery.<sup>139</sup> That defense, however, was rendered ineffective when the prosecution established that the crime actually occurred a year earlier.<sup>140</sup> Thus, his right to have adequate notice of the accusation against him in order to prepare a defense was violated, in addition to his right to have the charges against him determined by the grand jury.<sup>141</sup>

The court cited to previous cases holding that although variance in time would not be normally dispositive of the issue of notice, it might be “where time is a material ingredient.”<sup>142</sup> The *Bigda*

136. *Id.*

137. *Id.*; see *People v. Grega*, 72 N.Y.2d 489, 496, 531 N.E.2d 279, 282, 534 N.Y.S.2d 647, 650 (1988) (stating that “[p]roof at trial that varies from the indictment potentially compromises two of the functions of the indictment — notice to the accused and the exclusive power of the Grand Jury to determine the charges”).

138. *Bigda*, 184 A.D.2d at 994, 584 N.Y.S.2d at 239.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* (citing *People v. Marce*, 3 N.Y.2d 452, 144 N.E.2d 420, 165 N.Y.S.2d 753 (1957) (the prosecution is not constrained by the time stated in the indictment but may prove that the crime took place at a different date as long as it does not constitute a material variance)); see also *People v. Jackson*, 111 N.Y. 362, 19 N.E. 54 (1888) (the court found no material time variance when the prosecution presented proof that crime occurred on 29th while the indictment charged that the crime was committed on 30th of that month); *People v. Krank*, 110 N.Y. 488, 18 N.E. 242 (1888) (proof at trial that a sale

court noted that the time variance in those cases was not material;<sup>143</sup> but here the prosecution proved that the crime took place a year earlier than was alleged in the indictment.<sup>144</sup> This time variance, the court held, was material so as to violate the defendant's right to fair notice and Grand Jury indictment.<sup>145</sup>

In *United States v. Nersesian*,<sup>146</sup> the Second Circuit Court of Appeals held that in order for a time variance to warrant reversal there must be a showing that the "variance caused substantial prejudice to the appellant."<sup>147</sup> The prosecution, in *Nersesian*, presented evidence that an illegal drug transaction occurred between July and August of 1984, almost a two month variance from what was charged in the indictment.<sup>148</sup> After examining the testimonial evidence presented in the lower court, the Second Circuit concluded that the defendant was not surprised by the date introduced at trial since the defense cross-examined prosecution witnesses as to events at the time the prosecution alleged the crime occurred.<sup>149</sup> Defendant was therefore prepared to address the period of time during the summer of 1984 and was not prejudiced by this two month time variance.<sup>150</sup>

Although New York state courts use the language "prejudice" in contrast to "substantial prejudice" used by the Second Circuit, other lower courts require only a showing of simple prejudice.<sup>151</sup> It is unclear, however, if an actual difference exists between

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of liquor on Sunday without a license did not materially differ from indictment charging sale of liquor on Saturday without a license because time was immaterial since defendant had no license).

143. *Bigda*, 184 A.D.2d at 994, 584 N.Y.S.2d at 239.

144. *Id.*

145. *Id.*

146. 824 F.2d 1294 (2d Cir. 1987).

147. *Id.* at 1323. The court noted that the "on or about June 1984" language used in the indictment need not be proven exactly if time is not an essential element of the crime. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *See, e.g., United States v. Duke*, 940 F.2d 1113, 1120 (8th Cir. 1991) (variance is not fatal unless defendant is prejudiced) (quoting *United States v. Collins*, 690 F.2d 670, 673 (8th Cir. 1982)).

“substantial prejudice” and “prejudice” as both inquire into whether the defendant was caught off guard in preparing his defense.

**Intrastate Trucking Corporation v. White<sup>152</sup>**  
(decided July 14, 1992)

The plaintiff, Intrastate Trucking Corporation, claimed that Vehicle and Traffic Law (VTL) section 385(15),<sup>153</sup> violated the due process clause and the equal protection clause of both the state<sup>154</sup> and federal<sup>155</sup> constitutions. Additionally, Intrastate asserted that the aforementioned regulation placed an undue burden on interstate commerce.<sup>156</sup> In a unanimous decision, the court held that VTL section 385(15) conformed with both the due process and equal protection clauses of the state and federal constitutions, as well as complying with interstate commerce.<sup>157</sup>

Vehicle and Traffic Law section 385(15) governs the issuance of vehicle permits for divisible overweight loads.<sup>158</sup> The regulation of the weight of vehicles was designed to ensure highway safety, in addition to protecting highways and bridges.<sup>159</sup> Equally important, section 385(15) provides that permits are issued to vehicles which are registered before January 1, 1986, and to eli-

152. 185 A.D.2d 697, 586 N.Y.S.2d 65 (4th Dep't 1992).

153. N.Y. VEH. & TRAF. LAW § 385(15) (McKinney Supp. 1992) (permits can be issued to operate or move vehicles which exceed limitations regarding size and weight of such vehicles).

154. N.Y. CONST. art. I, § 6 (“No person shall be deprived of life, liberty or property without due process of law.”) *Id.* N.Y. CONST. art. I, § 11. (“No person shall be denied the equal protection of the laws of this state or any subdivision thereof.”) *Id.*

155. U.S. CONST. amend. XIV, § 1. Section 1 provides in pertinent part: “Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” *Id.*

156. *Intrastate Trucking Corp.*, 185 A.D.2d at 697, 586 N.Y.S.2d at 66.

157. *Id.*

158. *Id.* (divisible overweight loads occur when the size and weight of vehicles exceed limitations).

159. *Id.*