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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

-against-

No. 20

GUNTHER J. FLINN

Appellant.

20 Eagle Street
Albany, New York 12207
January 14, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Gunther
2 Flinn.

3 Do you want any rebuttal time?

4 MR. MCCARTHY: Yes, Your Honor, two
5 minutes, please.

6 CHIEF JUDGE LIPPMAN: Two minutes, sure.

7 MR. MCCARTHY: Thank you, Your Honor.

8 Martin McCarthy for Gunther Flinn.

9 The issue here is Antommarchi. At issue is
10 the fact that defendant's right to be present - - -

11 CHIEF JUDGE LIPPMAN: Is that your
12 strongest argument, your Antommarchi?

13 MR. MCCARTHY: Yes.

14 JUDGE GRAFFEO: What's the rule or - - -

15 MR. MCCARTHY: Well - - -

16 JUDGE GRAFFEO: - - - what is it that you
17 want us to enunciate about Antommarchi - - -

18 MR. MCCARTHY: I don't know if we have to -
19 - -

20 JUDGE GRAFFEO: - - - after all the
21 Antommarchi cases we've done? What's - - - what's
22 different about this one?

23 MR. MCCARTHY: Well, what's different about
24 this one is it's sort of - - - there are various
25 signposts for Antommarchi. For example, an attorney

1 can waive a defendant's Antommarchi rights in his
2 presence; that we learned in People v. Keen. We also
3 learned that a defendant can have his Antommarchi
4 rights waived by an attorney who approaches the
5 bench, just as long as that's put - - - put on the
6 record, and that was explicitly required in
7 Velasquez.

8 CHIEF JUDGE LIPPMAN: Yeah, but what
9 conclusion do you reach here when the judge says in
10 open court, you know, he can be a part of these
11 discussions - - -

12 MR. MCCARTHY: You - - -

13 CHIEF JUDGE LIPPMAN: - - - and then the
14 lawyer attests to the fact that, yeah, yeah, he
15 doesn't - - - he doesn't want to be there, and he - -
16 - and obviously he isn't there. Why do you need
17 more? What more would you put on the record?

18 MR. MCCARTHY: Well, here you're talking
19 about two different forms of waiver, you know,
20 whether you had an implied waiver at the beginning
21 and whether you had an express waiver at the bench.
22 Let's start with the implied waiver.

23 CHIEF JUDGE LIPPMAN: Sure, go ahead.

24 MR. MCCARTHY: The words were not ever
25 expressed in terms of right. They were - - - we may

1 feel - - -

2 JUDGE READ: He had to say that word? He
3 had to say "right", the judge did?

4 MR. MCCARTHY: I think it's very important
5 that you say "right", as opposed to, you may come up,
6 as a general invitation. You know, you invited me to
7 come up to this podium, as a general invitation. I
8 don't know if I have the right to be here.

9 CHIEF JUDGE LIPPMAN: But when that's
10 supported by the counsel, it's still no good?

11 MR. MCCARTHY: Well, let me - - - let me
12 get to that in a second.

13 CHIEF JUDGE LIPPMAN: Okay, go ahead. I'm
14 sorry.

15 MR. MCCARTHY: You know, in that sense, the
16 word "right" was never - - - there's never a
17 discussion about this important right. It's not just
18 a right, but it's an important right to be present in
19 all material proceedings of his trial.

20 JUDGE ABDUS-SALAAM: Does the judge have to
21 say it, or is it all right for the defendant's lawyer
22 to tell him that you have the right to be at certain
23 stages of - - - of the voir dire?

24 MR. MCCARTHY: There's been - - -
25 throughout the years, there's been a moving away from

1 a catechistic requirement that the judge say, you
2 know, you have the - - - it has to be the judge that
3 says you have the right. For example, in Spotford,
4 it was neither the defense attorney nor the judge; it
5 was the prosecutor that brought up the fact that the
6 defendant had the right to be present at a
7 Ventimiglia hearing.

8 JUDGE GRAFFEO: So what do you think the
9 judge should have said here?

10 MR. MCCARTHY: You have the right. If the
11 judge said you have a right to be here - - -

12 JUDGE GRAFFEO: Exactly - - - if you could
13 just tell us what should the judge have announced?

14 MR. MCCARTHY: If he had said you have the
15 right to be present at all - - - well, let me
16 rephrase that. If the judge had said you have the
17 right to be present in all bench conferences, he
18 would have articulated a right greater than
19 Antommarchi.

20 JUDGE SMITH: But if he says you can come
21 up to any bench conference you want, that doesn't do
22 it?

23 MR. MCCARTHY: If he had the - - - if the
24 judge expressed it in terms of right, then I wouldn't
25 - - - I don't - - -

1 JUDGE SMITH: And so - - -

2 MR. MCCARTHY: - - - I don't believe I
3 would be here arguing.

4 JUDGE SMITH: - - - you really are
5 insisting on the word?

6 MR. MCCARTHY: A general invitation versus
7 a right; those are two very different things.

8 JUDGE READ: You know, it seems to me that
9 the general invitation is more inviting. You know,
10 it's - - -

11 MR. MCCARTHY: But - - -

12 JUDGE READ: - - - it's - - - the judge
13 says you can come up here. You know? That - - -

14 MR. MCCARTHY: But then - - -

15 JUDGE READ: That seems to me to be - - -

16 MR. MCCARTHY: Look at - - -

17 JUDGE READ: - - - more encouraging or more
18 inviting than just to say you have a right.

19 MR. MCCARTHY: I'm sorry, I keep wanting to
20 interrupt you; I apologize.

21 Then look what happens down the line.

22 Every - - - every single conference that happens
23 after that, that invitation was never re-extended to
24 the defendant. It was only extended to the
25 attorneys, similar to what happened in People v.

1 Morin where the judge was inviting just the attorneys
2 up to those bench conferences. Here it was counsel,
3 approach the bench, not the parties, approach the
4 bench.

5 JUDGE READ: Does the judge have to - - -

6 MR. MCCARTHY: Sitting there - - -

7 JUDGE READ: - - - repeat it? Does the
8 judge then have to repeat, you have a right?

9 MR. MCCARTHY: I thought this court felt it
10 was very important in Williams that the judge did
11 repeat it over and over again. You - - - you know,
12 you can come up, you have this absolute right. There
13 you - - -

14 JUDGE READ: So going back to what Judge
15 Graffeo asked, what - - - what should have happened
16 here?

17 MR. MCCARTHY: Well, the judge - - -

18 JUDGE READ: Should have said you have a
19 right - - -

20 MR. MCCARTHY: You have the right to come
21 up. Because you talk about - - - you know, when you
22 talk about rights, they should be expressed as
23 rights, because in order to waive a right, you have
24 to know you have a right in the first place.

25 JUDGE RIVERA: But I take it, in part,

1 you're arguing that if it sounds - - - if the words
2 of invitation are used, that also carries with it the
3 words of a potential rescission of the invitation,
4 whereas a right is absolute and sacrosanct.

5 MR. MCCARTHY: Absolutely. Absolutely,
6 because my privilege to speak here only lasts for ten
7 minutes. When my light goes on, I have to sit down.
8 But if - - - if you guys said you have the right to
9 speak until your argument's done, I would ignore my
10 red light and I would continue.

11 JUDGE SMITH: But if we said - - -

12 JUDGE READ: There are a few more than
13 "guys" up here.

14 JUDGE SMITH: - - - you're welcome to come
15 up and speak at the podium and you didn't show up and
16 you - - - you remained in your seat, couldn't we
17 infer from that that maybe you didn't want to come
18 up?

19 MR. MCCARTHY: Absolutely.

20 JUDGE SMITH: And if he doesn't want to
21 participate in these bench conferences, what are we
22 doing here talking about it?

23 MR. MCCARTHY: Except for the fact it was
24 never expressed in terms of a right. Now, the - - -
25 we - - - this court's never held that when an - - -

1 when a right is expressed - - - for example, in the
2 Parker warning scenario - - - you have the right to
3 be here at your trial; it's kind of important that
4 you are - - - if that person, that defendant
5 voluntarily absents himself, then he's waived that
6 right, but at least the right was articulated.

7 JUDGE GRAFFEO: And if the judge - - -

8 JUDGE RIVERA: If he's sitting down and the
9 judge is only calling up the lawyers, he may very
10 well believe that the invitation was rescinded?

11 MR. MCCARTHY: Yeah.

12 JUDGE RIVERA: It doesn't extend to that
13 particular sidebar.

14 MR. MCCARTHY: Absolutely, because - - -

15 CHIEF JUDGE LIPPMAN: But does the
16 situation help that the lawyer says to the judge
17 that, yeah, he - - - he knows he can - - - he can be
18 here?

19 MR. MCCARTHY: Well, let's move on to what
20 the lawyer said. We're stuck with what the lawyer
21 said. If the lawyer had said - - -

22 CHIEF JUDGE LIPPMAN: Yeah, but it's in
23 combination, what I'm saying.

24 MR. MCCARTHY: Except for the fact - - -

25 CHIEF JUDGE LIPPMAN: The judge says you're

1 invited, he doesn't come up, and the lawyer says,
2 yeah, yeah, he knows - - - and he says to the judge,
3 and listen, if he changes his mind it's okay, right?

4 MR. MCCARTHY: Yeah.

5 CHIEF JUDGE LIPPMAN: And the judge says
6 sure.

7 MR. MCCARTHY: Yeah.

8 JUDGE GRAFFEO: And so - - -

9 CHIEF JUDGE LIPPMAN: So all of that in
10 totality is enough - - -

11 JUDGE GRAFFEO: - - - the judge can't
12 presume that the attorney has advised his client that
13 he has a right to come up?

14 MR. MCCARTHY: Well, there's - - - I want
15 to answer - - -

16 JUDGE GRAFFEO: He has to eliminate
17 whatever it is the lawyer says?

18 MR. MCCARTHY: Yeah, I want to answer that
19 in two parts, if you don't mind.

20 CHIEF JUDGE LIPPMAN: Go ahead.

21 MR. MCCARTHY: I want to start with the - -
22 - I think it was two questions before - - -

23 CHIEF JUDGE LIPPMAN: Go ahead.

24 MR. MCCARTHY: We're stuck with what the -
25 - - what the lawyer said. The lawyer said I

1 discussed with his (sic) right to attend these
2 conferences. Now, if the - - - if the lawyer had
3 said I discussed with him his right to attend all
4 conferences, or I discussed with him his Antommarchi
5 rights, there would be no ambiguity as to what the
6 lawyer was referring to. But "these conferences",
7 what "these conferences" were were bench conferences
8 that the defendant had no right to attend in the
9 first place. They were medical excuse conferences,
10 not bias conferences.

11 JUDGE SMITH: So you say if he had said I
12 discussed with him his Antommarchi rights, it doesn't
13 have to be in open court?

14 MR. MCCARTHY: Well, that's what happened
15 in Velasquez, and I think that court said that better
16 practice would be, after that occurs at the bench, to
17 put that waiver on the record so at least a defendant
18 can point to a moment in time where something
19 happened, i.e., he said my Antommarchi rights were
20 waived; I know something was waived. You know, at
21 least he'd know at that point. Here that never
22 happened. They never stepped back from the bench.
23 That waiver was never put on the record. In
24 Velasquez, it was two words, "Antommarchi waived".
25 We don't even have those two words.

1 JUDGE SMITH: Yeah, well, I guess that was
2 going to be my question. "Antommarchi waived" is
3 really incomprehensible to a lay defendant, right?

4 MR. MCCARTHY: But at least it was an
5 articulation of a waiver, and I think - - -

6 JUDGE SMITH: Why is it better to
7 articulate something in language no one can
8 understand than not to articulate it at all?

9 MR. MCCARTHY: I actually think that
10 Velasquez probably went too far, and I - - - I - - -
11 it would be, I think, prudent to overrule Velasquez.

12 JUDGE RIVERA: Although if it's something
13 in open court that the defendant doesn't understand,
14 at least the defendant can turn to the lawyer and
15 say, what did that mean.

16 MR. MCCARTHY: And ask later, yes. My red
17 light's on.

18 CHIEF JUDGE LIPPMAN: Yeah, you'll have
19 rebuttal.

20 MR. MCCARTHY: Thank you.

21 MS. DZIUBA: Good afternoon, Your Honors.
22 I disagree with counsel. This particular invitation
23 by this court specifically stated that the defendant
24 was welcome to attend any conferences at the bench.
25 As such, the defendant was on notice; he was aware he

1 can come up for any of these conferences, even though
2 he didn't have a legal right to some of them. And
3 that invitation was never revoked.

4 Does the court have to remind this
5 particular defendant of that over and over? I submit
6 no. Here this defendant was made aware of his right,
7 and it was later waived by his counsel at the bench.
8 Although it was not put on the record, I submit it's
9 of no consequence here, because not only do we have
10 counsel saying my client and I have discussed the
11 right, he's going to waive it, he's going to remain
12 at counsel table, but we also have the appellant here
13 doing exactly that. He never objects.

14 JUDGE PIGOTT: How many bench - - -

15 MS. DZIUBA: He never approaches - - -

16 JUDGE PIGOTT: How many conferences did he
17 miss, if he - - -

18 MS. DZIUBA: Your Honor, I'm not certain of
19 the number, and I wouldn't want to guess. But I
20 would tell you there were numerous conferences - - -

21 JUDGE ABDUS-SALAAM: Well, what about - - -

22 MS. DZIUBA: - - - where we stood in the
23 bench - - -

24 JUDGE ABDUS-SALAAM: What about the timing
25 of the alleged waiver by the - - - the lawyer? It

1 was at a bench conference, not - - - I mean, could
2 the defendant hear what the lawyer was saying at that
3 point, or was that lawyer just speaking to the judge
4 and the - - - and the prosecutor?

5 MS. DZIUBA: Your Honor, to clarify, the
6 defendant was in the courtroom; he was seated at
7 counsel table. We were at the bench. The courtroom
8 is approximately the same size as this one, and the
9 bench conferences were over here at the far left, to
10 my left, and the defense - - - defense counsel's
11 table would have been to the right. I can't tell you
12 that he would have heard what his - - - what his
13 attorney was saying. I can tell you that even if his
14 attorney hadn't waived this, it would be an implied
15 waiver. The fact that he remained at counsel table,
16 didn't approach, didn't exercise that right, and was
17 fully on notice he could - - -

18 CHIEF JUDGE LIPPMAN: So if the attorney
19 never said anything, you're saying still okay under -
20 - -

21 MS. DZIUBA: Absolutely, Your Honor.

22 CHIEF JUDGE LIPPMAN: - - - the Velasquez -
23 - -

24 JUDGE SMITH: Didn't you just overrule
25 Antommarchi?

1 MS. DZIUBA: No, Your Honor. What I'm
2 saying is under Williams. If this defendant had been
3 put on notice of the right, which he was - - -

4 JUDGE SMITH: Oh, I mean, you're relying on
5 the "you're always welcome"?

6 MS. DZIUBA: Yes, absolutely. If that - -
7 - if that's - - - pardon me - - - sufficient, and I
8 believe here that it was, and the defendant doesn't
9 get up, that is an implied waiver under Williams, and
10 I believe that that is sufficient, even if this court
11 were to say, all right, this isn't express, we want
12 it on the record. And I don't believe that there is
13 any reason to overturn this conviction based on that.

14 Your Honors, this is - - - implied waivers
15 are the rule right now in the Fourth Department. The
16 - - -

17 CHIEF JUDGE LIPPMAN: Well, the question
18 is, is that right? Should that be the - - - what is
19 the rule?

20 MS. DZIUBA: That is - - -

21 CHIEF JUDGE LIPPMAN: Implied waivers are
22 okay?

23 MS. DZIUBA: Yes.

24 CHIEF JUDGE LIPPMAN: All the judge has to
25 say is you can come up here, done, finished?

1 MS. DZIUBA: Yes, Your Honor. If - - - if
2 the defendant is made to - - -

3 CHIEF JUDGE LIPPMAN: Is that what
4 Velasquez says?

5 MS. DZIUBA: Not necessarily, Your Honor,
6 but Velasquez didn't have the same facts. It's
7 differentiated based on - - - on certain things.

8 JUDGE SMITH: Well, does Williams say,
9 essentially, that implied waivers work?

10 MS. DZIUBA: What Williams says, Your
11 Honor, is where the - - - the defendant was made
12 aware of the right, and he did not exercise it and
13 did not object, that that was a valid waiver.

14 JUDGE SMITH: So how - - - and your
15 argument, obviously, is that's totally
16 indistinguishable from this case?

17 MS. DZIUBA: I believe they're very
18 synonymous.

19 JUDGE SMITH: And I guess his argument is
20 there's a difference between saying "right" and
21 saying "welcome".

22 MS. DZIUBA: Correct.

23 JUDGE SMITH: So why don't you comment on
24 that?

25 MS. DZIUBA: I don't believe there's a

1 difference here, Your Honor. As one of the justices
2 pointed out, this was an overinclusive welcome. This
3 defendant was told he could come up for any
4 conferences at the bench, which isn't truly his
5 right, but this judge was - - -

6 CHIEF JUDGE LIPPMAN: But isn't - - -

7 MS. DZIUBA: - - - was making it - - -

8 CHIEF JUDGE LIPPMAN: Isn't "welcome"
9 different than "right"? Even if it is broader,
10 "right" has a meaning that everyone understands?

11 MS. DZIUBA: Yes, Your Honor, but there's
12 no law right now that requires those words. And in
13 fact, under People v. Inskeep, which the Appellate
14 Division relied on, the use of the words "You're free
15 to come up and listen, if you would like to" are very
16 synonymous with the words "You're welcome to attend".
17 And I submit that that does not give this court any
18 reason to draw a different rule, and it doesn't give
19 this court any reason to overturn this conviction.

20 Your Honors, further, the fact that you do
21 have all of these in totality of the circumstances
22 factors to consider: you don't just have the court
23 making the defendant aware; you don't just have the
24 defendant not approaching or exercising the right;
25 you do have an actual waiver by defense counsel.

1 He's an officer of the court. And I believe the
2 court should be able to rely upon his manifestations
3 of the right and what he's discussed with his client
4 and that his client is waiving it.

5 So I would argue this still would qualify
6 under an express waiver, but if this court finds it
7 doesn't, it's certainly an implied waiver.

8 CHIEF JUDGE LIPPMAN: Okay. Thanks,
9 counsel.

10 Counselor, rebuttal?

11 MR. MCCARTHY: Yes, really quickly. The
12 answer to the question, there were sixteen total
13 juror bias conferences. Of those sixteen juror bias
14 conferences, six of those jurors were either
15 preempted by defense counsel or were seated jurors.

16 JUDGE PIGOTT: But was there anything after
17 that, I mean, during the course of the trial?

18 MR. MCCARTHY: No, I mean, what's at issue
19 in this appeal, no; it's what happened at voir dire.

20 With respect to whether it's - - - the
21 court - - - if the court's going to say that
22 "welcome" equals "right", this isn't just going to
23 apply in Antommarchi; it's going to apply to Parker
24 warnings, it's going to apply to the right to appear
25 for juror notes under 310.30 - - -

1 JUDGE SMITH: Well, wait a minute, how do
2 you a Parker warning using the word "welcome"?

3 MR. MCCARTHY: Well - - -

4 JUDGE SMITH: You're not welcome to stay
5 away? You're not welcome to skip your trial?

6 MR. MCCARTHY: You're welcome - - - you're
7 welcome - - - you're welcome to come to trial, if you
8 want - - -

9 JUDGE SMITH: Well, is that - - -

10 MR. MCCARTHY: - - - or we're going to do
11 it without you.

12 JUDGE SMITH: Is that really - - - is that
13 really comparable to what was said here?

14 MR. MCCARTHY: Yeah, it would be, because
15 what's the difference? Because the right's the same,
16 the right to be present. The right to be present;
17 how are they different?

18 JUDGE SMITH: I thought Parker was telling
19 him of his obligation to show up.

20 MR. MCCARTHY: Yes, but he has a right to
21 be here, you need to be here, and if you're not here,
22 we're going to proceed without you, similar to the
23 juror note; you have the right to be here during a
24 juror note. Now - - -

25 JUDGE ABDUS-SALAAM: But you're saying if

1 the judge says, you know, you're welcome to come to
2 your own trial, that suggests that if you don't come,
3 that's okay?

4 MR. MCCARTHY: Yeah.

5 JUDGE ABDUS-SALAAM: That's your point.

6 MR. MCCARTHY: Well, I mean, what I'm
7 saying is that "welcome" isn't the same as "right".
8 And if the court's going to say - - -

9 CHIEF JUDGE LIPPMAN: You're saying "right"
10 is a magic word?

11 MR. MCCARTHY: Yes, because how do you know
12 you have a right if you're not being told you have a
13 right? It's important to know what your rights are,
14 and in terms of waiver analysis, you have to know you
15 have a right in the first place.

16 CHIEF JUDGE LIPPMAN: As opposed to just a
17 friendly atmosphere?

18 MR. MCCARTHY: Absolutely.

19 JUDGE RIVERA: And "welcome" - - -

20 MR. MCCARTHY: Those are different things.

21 JUDGE RIVERA: And again, "welcome"
22 suggests that that can be rescinded at any time.
23 You're welcome to come to my home, but when you show
24 up I say, you know, I've changed my mind; I'm closing
25 the door on you. Whereas a right is not merely - - -

1 MR. MCCARTHY: And - - -

2 JUDGE RIVERA: It presents an opportunity
3 for rescission by the judge.

4 MR. MCCARTHY: And in this - - - in this
5 particular case where the judge's invitations
6 afterwards were never extended to the defendant. He
7 never said, everyone come up. He never said
8 defendant come up with your attorneys. He just said
9 - - -

10 JUDGE PIGOTT: Once the lawyer said that he
11 was not coming, was the court okay to - - - to rely
12 on the representation of the counsel?

13 MR. MCCARTHY: Well, there's been some
14 tension last year in this court between whether it's
15 - - - what's the obligations of the court versus
16 what's the obligations of the attorney. And one such
17 example was People v. Peck where this court said - -
18 - or at least some of you said that we shouldn't
19 presume that counsel is going to do what he says he
20 does. And in this case, we shouldn't necessarily - -
21 - it's the court's obligation to secure that waiver.
22 It can be done in any number of flexible ways: trial
23 counsel can say it, as the court held in Keen. The
24 prosecutor could say it, as you held in Spotswood.
25 The Court could say it, as you held in Antommarchi.

1 None of them said it in this case.

2 CHIEF JUDGE LIPPMAN: Okay, counselor.

3 MR. MCCARTHY: Thank you.

4 CHIEF JUDGE LIPPMAN: Thank you both.

5 Appreciate it.

6 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of The State of New York v. Gunther J. Flinn, No. 20 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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