

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 57

ANTHONY N. PACHERILLE,

Appellant.

20 Eagle Street
Albany, New York 12207
March 23, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

FRANK POLICELLI, ESQ.
Attorneys for Appellant
10 Steuben Park
Utica, NY 13501

JOHN M. MUEHL, DA
OTSEGO COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
County Office Building
197 Main Street
Cooperstown, NY 13326

Karen Schiffmiller
Official Court Transcriber

CHIEF JUDGE LIPPMAN: Number 57, People v.

1 Anthony Pacherille.

2 MR. POLICELLI: Good afternoon, Your
3 Honors.

4 CHIEF JUDGE LIPPMAN: Counselor, do you
5 want rebuttal time?

6 MR. POLICELLI: One minute.

7 CHIEF JUDGE LIPPMAN: One minute, go ahead.
8 You're on.

9 MR. POLICELLI: Frank Policelli for Mr.
10 Pacherille. Your Honor, this case is before this
11 court as a result of the decision in People v.
12 Rudolph, where the court held that the status of
13 youthful offender must be decided by the sentencing
14 court and can't be - - -

15 JUDGE READ: But that happened here, didn't
16 it?

17 MR. POLICELLI: Pardon me?

18 JUDGE READ: That happened here, didn't it?

19 MR. POLICELLI: Well, it happened, but what
20 happened was that the sentencing court considered the
21 plea bargain as binding and limiting the court's
22 discretion - - -

23 CHIEF JUDGE LIPPMAN: Counsel, your
24 argument is that the - - - the - - - by virtue of the
25 plea agru - - - agreement, he could not get a YO

1 status?

2 MR. POLICELLI: That's right, because he
3 plea-bargained away the mitigating circumstances.

4 CHIEF JUDGE LIPPMAN: And constrained the -
5 - - the - - -

6 MR. POLICELLI: Absolutely.

7 CHIEF JUDGE LIPPMAN: - - - the court.

8 JUDGE RIVERA: But where - - - where does
9 it say that in the - - -

10 MR. POLICELLI: It's in the record. I
11 think it's page 5.

12 JUDGE RIVERA: But where - - -

13 MR. POLICELLI: When there was a plea
14 agreement made, the - - -

15 JUDGE RIVERA: No, I understand. Where
16 does it say that in his ruling? It sounds to me like
17 he said, you've requested that I consider the YO
18 status. I'm denying it; here are all my reasons. I
19 didn't read any reasons saying I am unable to
20 consider it because of a plea - - -

21 MR. POLICELLI: Yeah, he did. He said that
22 - - - he said you plea-bargained the plea to a hate
23 crime. I mean, the - - - the plea bargain was you
24 can plead guilty to a B violent attempted murder, not
25 as a hate crime, but you've got to admit that it was

1 a hate crime in your plea allocution, and say that
2 you shot the - - - shot the victim because of his
3 race, and you can't argue mitigating circumstances of
4 bullying and mental illness, which would go to the
5 mitigating circumstances under the youthful offender
6 statute.

7 JUDGE RIVERA: So - - - so you're not
8 saying he - - - he couldn't consider it. You're
9 saying because of the allocution - - - the plea
10 allocution - - -

11 MR. POLICELLI: No.

12 JUDGE RIVERA: - - - the statements the
13 defendant made, the judge could only rely on those
14 statements.

15 MR. POLICELLI: No, I'm not saying that at
16 all, Your Honor. I am saying that there was a
17 specific plea agreement that was in writing that said
18 this is the deal: you plead guilty - - - no,
19 youthful offender was never mentioned in the plea
20 agreement.

21 JUDGE RIVERA: I know that.

22 MR. POLICELLI: All that was mentioned was
23 you plead guilty to attempted murder in the second
24 degree, B violent, top count of the indictment. Same
25 sentence as if - - - as if he pled as a hate crime,

1 however, you must say that you pled - - - that you
2 shot him because of his race, which was used as an
3 aggravating circumstance to deny him the youthful
4 offender status.

5 CHIEF JUDGE LIPPMAN: So you're saying that
6 this conflicts with Rudolph. Is that your - - -

7 MR. POLICELLI: Yes.

8 JUDGE FAHEY: You know, I don't - - - I'm -
9 - - I'm having a hard time with that, because the way
10 I read Rudolph is, is that the court's required to
11 make a determination - - - shall make a
12 determination, just right out of the statute. But
13 here, the court did make a determination. The
14 question is, did the court make a determination
15 before the defendant gave up his right to appeal?

16 And it appears in the record he did, but no
17 one challenged the waiver of appeal, the way I read
18 that. Unless I'm wrong, which won't be the first
19 time, tell me, you know, because the way I read it
20 is, is that a determination was made and that the - -
21 - but the waiver of appeal had already taken place at
22 this - - - at the plea - - - at the time of the plea
23 colloquy, and the determination was made at
24 sentencing.

25 However, in - - - on both sides, nobody's -

1 - - everyone seems to seem - - - to assume that the
2 waiver of appeal was - - - was valid.

3 MR. POLICELLI: I don't think so. If - - -
4 if that was the case, nobody told the defense
5 counsel, because his whole argument - - - he - - -
6 his extensive sentencing memorandum focused solely on
7 the issue of youthful offender status, and the point
8 I'm trying to make is that that was specifically
9 agreed not to be raised by virtue - - - not
10 specifically those words - - - but by virtue of
11 saying, you can't raise bullying as an excuse or
12 mental illness.

13 As a matter of fact, if you look at the - -
14 - at the sentencing, the judge considered the mental
15 illness in deviating - - -

16 JUDGE FAHEY: So that would go to a - - -

17 MR. POLICELLI: - - - from the maximum
18 sentence.

19 JUDGE FAHEY: So that would go to an abuse
20 of discretion on his initial YO determination, right?

21 MR. POLICELLI: Yes.

22 JUDGE FAHEY: Right. So how do you get
23 that here, if he's waived his appeal on that issue?
24 You got your - - - let me finish. You got your
25 determination per Rudolph. So now you got to get it

1 up here. So how do you get it up here if he waived
2 the appeal?

3 MR. POLICELLI: I don't think you can waive
4 your appeal on youthful offender.

5 JUDGE FAHEY: So -- so, all right. So
6 you're saying - - - Rudolph does not say that. I
7 mean, that's not my reading of it anyway. I mean, we
8 could disagree about that. But the way I read
9 Rudolph, it says you're entitled to determination not
10 for - - - not that you can't waive the appeal on the
11 determination once it's made. They're two separate
12 things.

13 MR. POLICELLI: Well, Judge, how are you
14 going to be able to waive your appeal on youthful
15 offender determination before - - -

16 JUDGE FAHEY: It happens all the time.
17 There must be the Constitution - - -

18 MR. POLICELLI: - - - before the
19 sentencing.

20 JUDGE FAHEY: It happens all the time
21 unless there's a Consti - - - well, you got a good
22 point there. That would be an abuse of discretion.

23 MR. POLICELLI: Well, and that's the
24 argument that we also make in - - - in this appeal.

25 JUDGE FAHEY: Go ahead.

1 MR. POLICELLI: His - - - the whole - - -
2 Rudolph says you - - - you must make the
3 determination at sentencing. You have to have the
4 pre-sentence report, the sentencing memorandum, so -
5 - -

6 JUDGE RIVERA: It - - - it would - - - it
7 would be a quite a statute that grants a certain type
8 of potential relief to a defendant and says if the
9 judge somehow gets it wrong and makes an error, you
10 don't get an opportunity as a defendant to challenge
11 that.

12 MR. POLICELLI: Say that again?

13 JUDGE RIVERA: Well, I'm - - - I'm just
14 suggesting. Why would you have a statute that says
15 you shall consider YO, but you don't have to do it
16 right. Right? You're - - - you're basically saying
17 - - -

18 MR. POLICELLI: Well, that's the issue - -
19 -

20 JUDGE RIVERA: - - - the defendant never
21 has an opportunity to challenge an error. Why - - -
22 why would the legislature make such a - - - pass such
23 a statute?

24 MR. POLICELLI: Oh, I don't know. I can't
25 speak to why the legislature may pass a lot of

1 statutes, but I'm just saying in this particular
2 case, I don't think that the - - - that the - - -
3 that the court followed the statute, because I think
4 that by accepting the plea agreement of waiving the
5 mitigating circumstances that must be considered
6 under the youthful offender statute, when you have -
7 - -

8 CHIEF JUDGE LIPPMAN: You're saying you
9 can't bargain - - - bargain away your right to - - -
10 to consideration as a YO - - -

11 MR. POLICELLI: Correct.

12 CHIEF JUDGE LIPPMAN: - - - under Rudolph -
13 - -

14 MR. POLICELLI: Correct.

15 CHIEF JUDGE LIPPMAN: - - - the clear
16 implication of Rudolph.

17 JUDGE FAHEY: The pros - - - the prob - - -
18 the problem with that is, counselor, if that's your
19 argument, then the determination of YO now has become
20 a Constitutional right - - - it's similar to speedy
21 trial - - - that doesn't require preservation and you
22 can never waive that right. That's what you're
23 arguing for?

24 MR. POLICELLI: I think so.

25 JUDGE FAHEY: Okay.

1 MR. POLICELLI: I think I am. And - - -
2 and - - -

3 JUDGE FAHEY: But that would be a major
4 extension then of Rudolph - - -

5 MR. POLICELLI: Well - - -

6 JUDGE FAHEY: - - - as we understand it
7 now.

8 JUDGE READ: And did you - - - did you
9 argue that below?

10 MR. POLICELLI: I - - - I didn't - - -

11 JUDGE READ: Well, did - - - did counsel
12 argue that below?

13 MR. POLICELLI: I believe that counsel's
14 arguments at the trial court level preserved all the
15 arguments that I'm making here now.

16 JUDGE PIGOTT: Well, the Appellate Division
17 said "Defendant argues, among other things, that
18 county court abused its discretion in denying his
19 request to be sentenced as a youthful offender".

20 MR. POLICELLI: Yeah, but - - - but they -
21 - - they relied on the McGowan case that this court
22 overruled.

23 JUDGE PIGOTT: "That argument, however, is
24 foreclosed by its valid waiver of the right to
25 appeal, the enforceability of which he does not

1 contest".

2 MR. POLICELLI: Right, and they cited
3 McGowan, and you overruled McGowan.

4 JUDGE PIGOTT: No, he cited - - - he cited
5 to Griffin.

6 MR. POLICELLI: Pardon?

7 JUDGE PIGOTT: He cited to Griffin. It's a
8 - - - it was - - -

9 MR. POLICELLI: Or whatever.

10 JUDGE PIGOTT: Well, we're talking about he
11 doesn't - - - he doesn't contest his waiver of the
12 right to appeal. And if - - - if - - - if the - - -
13 if the plea agreement was, I'm not getting YO, but
14 I'm only getting eleven years, and then he wants to
15 say, well, you know, wait a minute, when, you know, I
16 was deprived of my YO, when you waived your right to
17 appeal, and - - - and you're not contesting that you
18 waived your right to appeal, I'm wondering what we're
19 doing to the Appellate Divisions and what we're doing
20 to the trial courts who negotiate or accept a
21 negotiated plea, and it was clearly negotiated. And
22 that - - - and then YO is considered at sentencing
23 and denied, and then it comes up to the Appellate
24 Division, and they said, you waived it.

25 MR. POLICELLI: I - - - I - - - I hear what

1 you're saying. My response is you can't waive it.
2 Certain rights you can't waive. Youthful offender is
3 one of them.

4 JUDGE PIGOTT: They didn't argue that.
5 They argued it was an abuse of discretion to deny it.

6 MR. POLICELLI: And he abused his
7 discretion in denying it, because he was under the
8 misconception that he was bound by the plea agreement
9 that the plea agreement took away the mitigating
10 circumstances that he would have had to have
11 considered for youthful offender.

12 JUDGE PIGOTT: But he negotiated that.
13 What - - - are you saying that - - - that a defense
14 counsel cannot negotiate away certain things in - - -
15 in an attempt to get a reduced sentence?

16 MR. POLICELLI: Well - - - well, sure, you
17 plea-bargain all the time. But what I'm saying here
18 is that - - - and - - - and I know what the - - -
19 what the prosecution is going to argue is that, well,
20 under People v. Farrar, if - - - I'll take the deal
21 off the table, which if there was an A felony, I
22 could understand that.

23 But when you got two B felonies as the top
24 count of the indictment and he pleads guilty to the
25 top count of the indictment, let's assume that. And

1 - - - and - - - and the - - - and the - - - excuse
2 me. And he says, okay, you go to trial on that. If
3 you go to trial on a B felony, you're convicted, the
4 judge still has the discretion to give youthful
5 offender status.

6 JUDGE PIGOTT: So you could go - - - you
7 could go to trial.

8 MR. POLICELLI: Yes. Or you could plead
9 guilty to the indictment.

10 JUDGE PIGOTT: So are you arguing
11 ineffective assistance of counsel?

12 MR. POLICELLI: No.

13 JUDGE PIGOTT: Okay.

14 MR. POLICELLI: Okay. Thank you, Your
15 Honor.

16 CHIEF JUDGE LIPPMAN: Okay, counselor,
17 thanks.

18 Counselor?

19 MR. MUEHL: Good afternoon, Your Honors,
20 John Muehl for the People, may it please the court.
21 I think that the - - - the issue here is even much
22 simpler than the one that - - - that counselor's
23 arguing. The bottom line in this case, and from the
24 beginning of this case and my prosecuting it, I was
25 under the opinion, and I still am of the opinion,

1 that the defendant was simply not entitled to
2 youthful offender status.

3 The CPL provides that youths between
4 eighteen and nineteen years old for a felony is
5 discretionary youthful offender status are eligible,
6 unless they're convicted of an armed felony. And in
7 this case the defendant was convicted of an armed
8 felony, attempted murder with a rifle, where he shot
9 his victim.

10 He was convicted of - - - of an armed
11 felony - - - felony under the criminal procedure law,
12 under the penal law, and in order for him to be
13 qualified for youthful offender status, the - - - the
14 sentencing court must have found mitigating
15 circumstances for him to qualify. It's not
16 automatic. You'd have to find mitigating
17 circumstances.

18 And in this case, the only two mitigating
19 circumstances that there are, that the defense points
20 to, are the defendant's mental disease or defect,
21 number one. Or number two, the fact that he was
22 allegedly bullied. Now, even if we were take them
23 and say that they were true, the bottom line is, no -
24 - - no - - - no medical professional found that he
25 had a valid defense - - - men - - - mental defense in

1 this case, and there was no evidence of bullying
2 other than the defendant's self-assertions - - -
3 self-serving - - -

4 JUDGE RIVERA: He's - - - he's arguing, I
5 thought, a slightly different point. Not - - - not
6 the merits of that. He's arguing that the judge
7 didn't even consider that because of the plea
8 agreement - - -

9 MR. MUEHL: See - - -

10 JUDGE RIVERA: - - - so that he had been
11 forced into already giving up the best arguments he
12 had for YO status - - -

13 MR. MUEHL: Well, Your Honor, I res - - -

14 JUDGE RIVERA: - - - to accept that plea.

15 MR. MUEHL: I respectfully disagree for - -
16 - for the following reasons. First of all, the
17 reason that that was - - -

18 JUDGE RIVERA: It's not my posi - - - I'm
19 saying this is what he's arguing.

20 MR. MUEHL: Yes, no, I understand.

21 JUDGE RIVERA: So I'm asking about - - -

22 MR. MUEHL: And to answer your question is,
23 is - - - is the court was aware of all of these
24 things. My - - - my position was, is that I didn't
25 want the defendant commencing that at sentencing

1 because I didn't want him blaming the victim for his
2 conduct. And that was my position.

3 The bottom line is all of the letters that
4 were submitted to the - - - to the sentencing judge
5 from defense attorney, from friends and family, all
6 of the medical evaluations that were done of the
7 defendant, the defendant's own statements about
8 bullying to the - - - to the probation department in
9 the pre-sentence investigation, they were all
10 reviewed by the judge. The judge had complete
11 knowledge of the defendant's allegations of bullying.
12 He also - - -

13 JUDGE PIGOTT: I missed - - - I missed the
14 point that that - - - and I think you made it more
15 than once - - - that he was forced to take a plea.
16 I've never known of a defendant who was forced to
17 take a plea - - -

18 MR. MUEHL: No, I don't believe he was.

19 JUDGE PIGOTT: - - - unless you're arguing
20 ineffective assistance of counsel - - -

21 MR. MUEHL: Right.

22 JUDGE PIGOTT: - - - and then it's - - -
23 you know, it's - - - that he was fooled or that there
24 were things withheld.

25 MR. MUEHL: I agree. And - - - and to get

1 back to ma - - - major point, that these two - - -
2 these two circumstances that the defense is trying to
3 say are mitigating circumstances, unless this court
4 finds - - -

5 CHIEF JUDGE LIPPMAN: Yeah, but - - - but
6 go back to Judge Rivera's point, his argument is that
7 Rudolph - - - it would be a conflict with Rudolph to
8 say that you can bargain away or plea away the right
9 to have YO consideration.

10 MR. MUEHL: He didn't.

11 CHIEF JUDGE LIPPMAN: That's the argument
12 he's making, before you get to - - - the judge can't
13 even consider it because of the framework of this - -
14 - this plea agreement, and that Rudolph will be
15 inconsistent to say you could - - - you could just
16 barter that. That - - - that - - - is it - - -
17 answer that argument.

18 MR. MUEHL: Okay, judge. The bottom line
19 is, is this court, Judge Burns in Otsego County Court
20 complied with Rudolph before Rudolph was decided. He
21 wasn't supposed to get youthful offender status. It
22 was not part of the agreement. It was brought up in
23 - - - in the defendant's sentencing memorandum. The
24 judge said although this wasn't part of sentencing -
25 - - it's in the record - - - he said, I have

1 noneththeless considered it.

2 CHIEF JUDGE LIPPMAN: Yeah, but his
3 argument is he couldn't consider it. That they
4 foreclosed by the nature of the plea agreement. It
5 was impossible and that's what the things that the
6 judge pointed to - - -

7 MR. MUEHL: He - - -

8 CHIEF JUDGE LIPPMAN: - - - in making his
9 decision, is the things that - - - again, if you
10 accept his argument - - - were - - - were bargained
11 away - - -

12 MR. MUEHL: I believe - - -

13 CHIEF JUDGE LIPPMAN: - - - the right to
14 have YO consideration. That within that stricture
15 the - - - the judge couldn't possibly, you know, give
16 him YO and consideration.

17 MR. MUEHL: Your Honor, I disagree. I
18 don't be - - - I believe this is belied - - -

19 CHIEF JUDGE LIPPMAN: I know, but I'm
20 saying that's his argument.

21 MR. MUEHL: Right. And I believe it's
22 belied by the record. I don't think the record
23 supports that argument. The record supports the
24 judge saying, even though this was not part of the
25 agreement, and - - - and it was not agreed to by the

1 People, I am considering it, and for the following
2 reasons I'm not granting it.

3 CHIEF JUDGE LIPPMAN: How could he consider
4 it when he points to the things in the plea agreement
5 - - -

6 MR. MUEHL: But then he po - - -

7 CHIEF JUDGE LIPPMAN: - - - and says that's
8 why I'm not giving it to him.

9 MR. MUEHL: He doesn't. He - - - what he
10 says is, I'm not giving it to him, because it was of
11 the extreme violence and the racial nature of the
12 act. That's what he says. He doesn't say anything
13 about the agreement. He says he's not giving it
14 because of the extreme violence that it was, the harm
15 to the victim - - -

16 JUDGE RIVERA: He doesn't say you admitted
17 that you chose the - - - the victim because of his
18 race?

19 MR. MUEHL: He does do that, because he
20 says, the - - - the racial motivation for the act is
21 one of the reasons that he's not giving YO, not the
22 plea bargain or the terms, but - - -

23 JUDGE RIVERA: And isn't that exactly what
24 he was trying to argue was not the motivation?

25 MR. MUEHL: The defense was trying to argue

1 that, but the court made a decision that that was the
2 motivation.

3 JUDGE RIVERA: It's hard to argue that when
4 you, in the plea colloquy, admit it.

5 MR. MUEHL: It is. He admitted under oath
6 that it was. And - - - and he didn't have to. I
7 wasn't asking him to lie.

8 JUDGE RIVERA: But again - - -

9 MR. MUEHL: Right.

10 JUDGE RIVERA: - - - for whatever you want
11 - - -

12 MR. MUEHL: Right.

13 JUDGE RIVERA: - - - to respond to it, as I
14 understand his argument, it's you can't negotiate the
15 - - - that part of the colloquy to require that for
16 him to get the benefit of the plea that he has to
17 sacrifice the potential arguments for YO
18 consideration.

19 MR. MUEHL: But those arguments were all
20 made to the judge. I - - - they were all made to the
21 judge from the beginning of the case.

22 JUDGE READ: You're - - - you're saying the
23 judge considered them anyway.

24 MR. MUEHL: He did, because he'd been
25 considering them from the beginning of the case.

1 They were always part of the case. I just didn't
2 want them said on the record in front of the victim
3 for the - - - for the defendant to blame the victim
4 for his own acts.

5 JUDGE RIVERA: But I understand your point,
6 but - - - but the judge also did say that he admitted
7 that he chose the victim for that purpose.

8 MR. MUEHL: Correct. He did say that.

9 JUDGE ABDUS-SALAAM: Could we take a step
10 back from the merits again, and get back to something
11 Judge Fahey asked earlier about the waiver of the
12 appeal. Is - - - is this properly before us after
13 there's been a waiver of appeal?

14 MR. MUEHL: I - - - I believe,
15 unfortunately - - - I would like to say no, but I
16 believe, based on the ruling in Rudolph, I believe it
17 is. But - - - but I still say that initially in this
18 case, this defendant, based on the fact that there's
19 no cir - - - mitigating circumstances, was not
20 entitled to YO adjudication in any event. So this
21 whole - - - this whole argument is moot.

22 If this court - - - the only way this court
23 could find that this defendant was - - - was entitled
24 to youthful offender status is if it found that his
25 mental - - - his mental condition and/or the bullying

1 qualified as mitigating circumstances and that would
2 require this court - - -

3 JUDGE RIVERA: Could I just go back to you
4 response of Judge Abdus-Salaam, where you say under
5 Rudolph, the waiver is not effective. Why - - -
6 because you didn't explain why you say - - - why - -
7 - what's the interpretation you're giving to Rudolph?

8 MR. MUEHL: In Rudolph, the defendant
9 waived his right to appeal, and the People argued
10 that he can't bring up the failure of the court to
11 address YO status. They said that's an unwaivable
12 right. And the court said we agree, because the le -
13 - - the statute says - - - this court said, we agree,
14 because the statute says it must be considered, and
15 in this case it was.

16 JUDGE RIVERA: That's what - - - I guess
17 the question then becomes, you can't waive the judge
18 having to consider it because that's mandated by
19 statute - - -

20 MR. MUEHL: Right.

21 JUDGE RIVERA: - - - but can you waive
22 whatever determination the judge comes up which is
23 obviously adverse to you.

24 MR. MUEHL: Well, I believe you can. I
25 believe you can waive that, and in this instance, I

1 wouldn't say that the defendant did actually waive
2 it, but he impliedly waived it. There was no - - -
3 there was no 440 motion. There was no - - -

4 JUDGE RIVERA: So you don't see Rudolph as
5 a bar?

6 MR. MUEHL: I don't see Ru - - -

7 JUDGE RIVERA: You're not arguing that it's
8 been waived.

9 MR. MUEHL: I don't see it as a bar. I - -
10 - I don't think that it's - - - it's a winning
11 argument, but I don't see it as a bar, because it's -
12 - - it's brand new law there, and I - - - I believe
13 that there's a good-faith basis to argue as the
14 defense is.

15 JUDGE FAHEY: It's hard to tell here
16 because of the time frame of when Rudolph came into
17 effect whether it actually applies, but it seems that
18 - - - that for our purposes, we have to distinguish
19 between abuse of discretion and that analysis, and
20 then the procedural argument, which is the waiver of
21 appeal argument, which neither of you preserved
22 below, and - - - or properly argued here. So that it
23 seems that that's kind of where we're at.

24 MR. MUEHL: Well, we argued - - - we argued
25 the waiver of appeal below, but not on that

1 positioning, but - - - but I'm still of the opinion
2 that - - - that he's not entitled to youthful
3 offender status anyway that - - -

4 JUDGE PIGOTT: Well, what do you - - - how
5 do you - - - how do you take a plea as a prosecutor
6 when you don't want, out the defendant to get YO
7 status? Do you make it conditional?

8 MR. MUEHL: I do now. Before Rudolph, I
9 didn't, because Rudolph - - - before Rudolph the law
10 was I didn't have to.

11 JUDGE PIGOTT: How do you make it
12 conditional? How do you - - -

13 MR. MUEHL: At this point in time, I say,
14 Your Honor, I - - - the People's position is that
15 this defendant should not receive youthful offender
16 status. And if he does - - - if this court is
17 inclined to , to ,to - - to grant him youthful
18 offender status, we reserve our white - - - right to
19 withdraw our, our offer, and - - - and preserve it
20 that way. I don't know if that's going to hold up on
21 appeal, Judge. But that's what we're doing. That's
22 how I'm - - - how I'm approaching it.

23 JUDGE READ: That's prob - - - is that
24 generally what prosecutors are doing?

25 MR. MUEHL: I think that's what we're doing

1 now since Rudolph came out, Your Honor, but I can
2 only speak for four or five other prosecutors that I
3 - - - I talk with all the time that I - - - I've
4 discussed this case with.

5 CHIEF JUDGE LIPPMAN: Okay, counsel.
6 Thanks.

7 MR. MUEHL: Thank you.

8 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

9 MR. POLICELLI: Very briefly.

10 CHIEF JUDGE LIPPMAN: Go ahead.

11 MR. POLICELLI: Withdraw the offer, if
12 there's a beneficial plea bargain, but when you're
13 pleading to the top count of the indictment, there's
14 no offer to withdraw, and there was no plea bargain
15 in this case where he received any benefit of any
16 plea bargain.

17 JUDGE PIGOTT: Why didn't you go to trial?

18 MR. POLICELLI: Pardon me?

19 JUDGE PIGOTT: Then why didn't you go to
20 trial?

21 MR. POLICELLI: Let's suppose he goes to
22 trial and gets convicted of the B felony, okay? The
23 judge could still sentence him as YO.

24 JUDGE PIGOTT: Right.

25 MR. POLICELLI: If he pleads guilty to the

1 indictment, or the top count of the indictment, he
2 could still plead him - - - he could still sentence
3 him as a YO.

4 JUDGE PIGOTT: Right.

5 MR. POLICELLI: So the argument that
6 counsel makes would not be applicable in this case.

7 JUDGE PIGOTT: I - - - I'm missing your
8 point, though. Wait, so - - - so - - -

9 MR. POLICELLI: In other words, if he pled
10 guilty to a D felony - - -

11 JUDGE PIGOTT: No, I understand everything
12 you're saying, but he did take the plea. I asked you
13 if you thought the counsel was ineffective, and you
14 said no. Counsel, negotiating with a prosecutor came
15 to court and said, this - - - we're willing to plead
16 to this. And then at sentencing said, you know, we'd
17 like you to consider YO. And the judge said, you
18 know, now that I've looked at all of this, I'm - - -
19 I'm going to grant him YO status; they would have
20 said, well, we'd like to withdraw the plea offer.
21 And the judge would say it's too late; and you'd have
22 gotten your YO, right?

23 MR. POLICELLI: Well, even if we withdrew
24 the plea offer, what good would it do him, because
25 he's - - -

1 JUDGE PIGOTT: My point is, the judge did
2 consider YO, and then - - -

3 MR. POLICELLI: He did, but he was under
4 the constraints that he couldn't apply the mitigating
5 circumstances in adjudicating YO under the statute,
6 because of the plea agreement that he acknowledged
7 the - - - the defendant was bound by.

8 JUDGE PIGOTT: That you say is fine. That
9 - - - that the lawyer did a good job. That he was
10 not ineffective in - - - in negotiating that plea.

11 MR. POLICELLI: Well, he basically had no -
12 - - basically he could plead him guilty, but still
13 argue YO.

14 JUDGE PIGOTT: And he did.

15 MR. POLICELLI: And he did. But the judge
16 did not give him the full consideration that he
17 should have given him in deciding the YO. He
18 shouldn't have - - - first of all, the judge should
19 have said, I'm going to consider YO, but I'm not
20 going to consider him abandoning his arguments of
21 being bullied - - -

22 CHIEF JUDGE LIPPMAN: Okay, okay.

23 MR. POLICELLI: - - - and his mental
24 illness as a mitigating circumstance.

25 CHIEF JUDGE LIPPMAN: Thank - - - thank you

1 both. Appreciate it.

2 MR. POLICELLI: Thank you.

3 MR. MUEHL: Thank you, Your Honors.

4 (Court is adjourned)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Anthony N. Pacherille, No. 57, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: March 30, 2015