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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

NO. 104

STEVEN BAISLEY,

Respondent.

20 Eagle Street
Albany, New York
September 13, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on the
2 calendar is appeal number 104, the People of the State of
3 New York v. Steven Baisley.

4 Counsel?

5 MR. HERZFELD: Good afternoon, Your Honors.
6 Richard Herzfeld for the appellant. If permissible, I'd
7 like to reserve two minutes for rebuttal.

8 CHIEF JUDGE DIFIORE: You may, sir.

9 MR. HERZFELD: Thank you. The appeal brings
10 before this court the question of whether the language in -
11 - -

12 JUDGE RIVERA: Counsel, did - - - did the
13 underlying support order originate in family court? Is it
14 a family court order, or is it a Supreme Court order?

15 MR. HERZFELD: It's a Supreme Court order. I was
16 mistaken about that, and I apologize.

17 JUDGE RIVERA: Okay. So then can you please
18 clarify how we're able to actually address your challenge
19 if your challenge is grounded on these orders out of the
20 family court and this is an order that comes out of the
21 Supreme Court?

22 MR. HERZFELD: There should be no difference in
23 the analysis. The Family Court Act provides for exclusive
24 jurisdiction concurrent with the Supreme Court. The best
25 analogy I can give you would be the older version of the



1 family offense act where it was exclusive to the family
2 court and then ultimately the legislature changed it to be
3 concurrent with the criminal court. Here - - -

4 JUDGE STEIN: But that doesn't limit Supreme
5 Court to family court's jurisdiction, right?

6 MR. HERZFELD: No, but it does - - -

7 JUDGE STEIN: In other words, Supreme Court
8 doesn't have exclusive original jurisdiction. It - - -

9 MR. HERZFELD: No, but what the statute - - -
10 what the Family Court Act says is that support matters come
11 to the family court as an exclusive matter, under Article
12 4, but it does not limit the Supreme Court in its
13 concurrent jurisdiction. So the Supreme Court had
14 jurisdiction to address and provide for this support order,
15 but that did not give the criminal court jurisdiction to
16 proceed on the enforcement of that order.

17 JUDGE WILSON: Can someone be prosecuted for
18 violation of 260.05 of the Penal Law if there's never been
19 a child support order?

20 MR. HERZFELD: Under 260?

21 JUDGE WILSON: 260.05, yep.

22 MR. HERZFELD: Yeah, I believe subsection (a)
23 allows for that, if I'm not mistaken. Subsection (b)
24 provides for nonpayment if there is a family court order,
25 and subsection (a) does not require an actual order.



1 JUDGE STEIN: So what's the purpose of subsection
2 (b)?

3 MR. HERZFELD: What's the purpose? I knew I was
4 going to be asked that question in terms of reconciling it
5 with my argument that - - -

6 JUDGE STEIN: Doesn't it render it completely
7 meaningless?

8 MR. HERZFELD: I - - - I don't have a good answer
9 for that, Your Honor, other than the language of the Family
10 Court Act speaks to exclusive jurisdiction.

11 JUDGE STEIN: Well, let's talk to the language of
12 the Family Court Act. Doesn't the language of the Family
13 Court Act say that the family court has exclusive
14 jurisdiction over support proceedings under Article 4?

15 MR. HERZFELD: Yes.

16 JUDGE STEIN: Okay. And Article 4, right, talks
17 about establishing an initial amount of support, right, and
18 it talks about modifying support orders, and it talks about
19 enforcing those orders to make sure that the payor
20 continues to make payments or resumes making payments.
21 Isn't that essentially what Article 4 - - - and there's
22 also Article 5B, but I don't think we talked about - - -

23 MR. HERZFELD: I'm not sure if you're driving at
24 it, but the enfor - - -

25 JUDGE STEIN: Well, what I'm driving at - - -



1 MR. HERZFELD: The - - -

2 JUDGE STEIN: - - - is that - - - that it's - - -
3 what is in Article 4 is not necessarily the same as what is
4 in the Criminal Procedure Law. The Criminal Procedure Law
5 has criminal liability, has different purposes, and
6 different remedies, and - - - and all sorts of things. So
7 why - - - why is one exclusive of the other?

8 MR. HERZFELD: Well, because - - - well, because
9 the legislature said so. Because the legislature said that
10 any matters of support under Article 4 is exclusive to the
11 family court with concurrent Supreme Court jurisdiction.

12 JUDGE STEIN: Right. So what they - - -

13 MR. HERZFELD: And what - - -

14 JUDGE STEIN: What the - - -

15 MR. HERZFELD: What it does is it provides for
16 enforcement of those orders under 454 and 455 or Domestic
17 Relations Law 245, but gives those courts a tremendous
18 amount of other remedies and - - - and as this court noted
19 in Columbia County v. - - -

20 JUDGE RIVERA: Isn't that all civil enforcement?

21 MR. HERZFELD: It is civil enforcement.

22 JUDGE RIVERA: And right; this is not, obviously,
23 a civil action, right? This is a criminal prosecution.

24 MR. HERZFELD: But - - - but again, the question
25 is whether the criminal prosecu - - - the criminal court



1 has jurisdiction. I mean, this is the same situation as
2 the court faced back when the family offense act was
3 exclusive to the family court. You still had criminal
4 prosecutions for those acts but not when they're family
5 offenses.

6 JUDGE FAHEY: How about this? Would, under your
7 theory, a local criminal court lack jurisdiction to handle
8 an order of protection that had been issued in family court
9 under the - - - in a family court proceeding under the
10 Family Court Act?

11 MR. HERZFELD: No, I - - - I don't believe they
12 would. But there you've got concurrent jurisdiction with
13 the criminal courts, and here you don't. So what you have
14 here is the legislature's recognition that the judges of
15 family court and the judges handling matrimonial matters in
16 Supreme Court have a lot more expertise dealing with
17 whether somebody should be thrown in jail for nonpayment or
18 there should be other - - - as a matter of fact, they can't
19 issue an order of contempt unless and until they find that
20 the other remedies are unavailable. So you - - -

21 CHIEF JUDGE DIFIORE: So how do you square your
22 argument with C.P.L. 10.30 and the fact that that's
23 grounded in the Constitution?

24 MR. HERZFELD: Only, again, the language - - - I
25 go back to the language of the Family Court Act that says



1 exclusive jurisdiction, and this court's, you know,
2 decision in People v. Johnson, again, dealing with the
3 family offense act when it was exclusive. Exclusive is
4 exclusive; it's given an expansive interpretation. There
5 are cases, such as Johnson or Oliver and Jones, cited in my
6 brief, where there are other issues related to those
7 exclusive areas, but all of them fall within the same
8 concept, the same reason for giving Family Court Act the -
9 - - the family court the first crack at this.

10 You know, if you look at - - - and what you're
11 looking at here is basically the fortuity of who decides to
12 go to which court, whether you have a fairly humane
13 approach to the issue and still a determination as to
14 whether or not they - - - they should be put in jail for
15 the six months authorized by these statutes or, in this
16 case, you've got twenty counts.

17 JUDGE STEIN: I'd like to go back for a minute to
18 the family court/Supreme Court distinction and - - - and
19 ask you this question. So my understanding, from what I
20 could piece together from the record, is that this
21 originated in family court, there was a temporary support
22 order, and then family court realized that there was a
23 contested matrimonial - - - or maybe the contested
24 matrimonial was commenced after it; that's not clear. And
25 so they sent the case to Supreme Court. Did family court



1 even have jurisdiction to issue the order that Supreme
2 Court ultimately issued in this case?

3 MR. HERZFELD: You --

4 JUDGE STEIN: So I'm not sure that this was ever
5 - - - so there was a temporary order, and then there was a
6 permanent order. And the permanent order was clearly an
7 order of the Supreme Court, I think, in a contested
8 matrimonial. That is something over which family court has
9 no jurisdiction at all under the Family Court Act.

10 So - - - so I'm sort of getting back to the fact
11 that it was a Supreme Court order, to me, seems like it
12 would make a difference as to whether we should be
13 addressing the family court exclusive jurisdiction at all.
14 Do you understand what I'm - - -

15 MR. HERZFELD: I understand what you're saying.
16 Your access to the record was more expansive than mine. I
17 only had the - - - the motion papers which really didn't
18 get into any of that. But assume - - - assume - - -

19 JUDGE STEIN: Well, the Supreme Court order - - -

20 MR. HERZFELD: Right, but the family court still
21 - - -

22 JUDGE STEIN: The Supreme Court order itself; I
23 assume you had access to - - -

24 MR. HERZFELD: Yes.

25 JUDGE STEIN: - - - the Supreme Court order.



1 MR. HERZFELD: Yes.

2 JUDGE STEIN: That's all I'm referring to - - -

3 MR. HERZFELD: Right.

4 JUDGE STEIN: - - - is - - - is that order.

5 MR. HERZFELD: But I believe family court still
6 has jurisdiction even to enforce nonpayment of a Supreme
7 Court order. So whoever decided to bring an action to hold
8 the obligor in contempt or - - - or to compel payment could
9 have brought a family court petition to do so based on that
10 Supreme Court order. I don't think family court lacked
11 jurisdiction in that respect.

12 JUDGE FAHEY: You know, in going through the
13 papers, it seemed to me that the People's strongest
14 argument was the C.P.L. sections that give local criminal
15 courts express jurisdiction over misdemeanor cases, and it
16 - - - it's not restricted in any way. I think it's 10.31 -
17 - - I marked it down, 1.20[24].

18 MR. HERZFELD: But again, even with the unlimited
19 jurisdiction, I - - - I still go back to, you know, the
20 case law we do have when family offenses were exclusive to
21 family court. And those were misdemeanors or possibly even
22 felonies, but the legislature said family court has to have
23 first crack, and that was upheld by this court.

24 JUDGE FAHEY: I see. Thank you.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.



1 Counsel?

2 MR. KASS: Good afternoon. May it please the
3 court. I'm Andrew Kass. I represent the People in this
4 matter.

5 The Appellate term order should be affirmed for
6 the reasons that were stated.

7 JUDGE STEIN: Why doesn't exclusive mean
8 exclusive?

9 MR. KASS: Because the - - - the exclusive part
10 there refers to what is a - - - a maintenance or a support
11 proceeding, a civil proceeding in family court. It makes
12 no reference and cannot make reference to the Criminal
13 Procedure Law and to the jurisdiction that's granted to
14 criminal courts under the Criminal Procedure Law.

15 JUDGE FAHEY: So does 4 - - - I don't remember
16 the language. Is Section 411 of the Family Court Act, in
17 the grant of exclusive jurisdiction, does it make reference
18 to support and maintenance proceedings in - - - in the
19 statute, if you remember? If you don't, it's all right.

20 MR. KASS: Right, but - - - but the thing - - - I
21 think it comes back to the fact that, plain and simple, as
22 - - - as the court is recognizing - - -

23 JUDGE FAHEY: Um-hum.

24 MR. KASS: - - - that the criminal prosecution is
25 not a support or maintenance proceeding.



1 JUDGE FAHEY: I understand that. And the statute
2 in 411 makes specific reference to that, doesn't it?

3 MR. KASS: And - - -

4 JUDGE FAHEY: I'm throwing you a softball here,
5 you know, and - - -

6 MR. KASS: Yes, because the other part of it is
7 this. The legislature - - - if - - - if we put aside the
8 question of criminal contempt, in the first place we start
9 with the nonsupport of a child, whether it's a misdemeanor
10 or a felony. In this case it was a misdemeanor. The
11 legislature - - - so we're not talking about a - - - a
12 county law; we're talking about the same legislature that
13 enacted the Family Court Act and so, by definition, by the
14 enactment of that statute, it's conferred criminal
15 jurisdiction. Otherwise you would have a statute that
16 would be rendered meaningless.

17 Also because - - - and I took a second look.
18 When we look at where there is concurrent jurisdiction for
19 the enumerated family offenses, neither nonsupport nor
20 criminal contempt are among the - - - the crimes that are
21 there.

22 JUDGE RIVERA: Counsel, let me ask you.

23 MR. KASS: Yes.

24 JUDGE RIVERA: Somewhere in the record there's a
25 reference to a Virginia Circuit Court order. Was that



1 error, or is there some Virginia Circuit Court order
2 lurking in this case somewhere?

3 MR. KASS: To be fair, Your Honor, I - - - I just
4 don't have any recollection of that. It - - - it - - - and
5 I - - - so I don't want to speculate. It's possible that
6 somewhere that, you know, in the family background maybe
7 there were things that occurred outside of New York State.
8 But I can't be sure, but what we do know is that at some
9 point the Supreme Court in Orange County had jurisdiction
10 and that's the - - -

11 JUDGE RIVERA: Okay. So now let me ask that.

12 MR. KASS: Yes.

13 JUDGE RIVERA: Go back to the first set of
14 questions I was asking. Counsel, how can we even address
15 this question if -- if the underlying support order comes
16 out of Supreme Court in a contested matrimonial proceeding,
17 as Judge Stein has already pointed out?

18 MR. KASS: I think there is a fair view that
19 ultimately, as to this case, that it would - - - it would
20 amount to an advisory opinion. And so I do apologize for
21 not having caught that at the leave conference. It was
22 asked. And both counsel were apparently mistaken,
23 including myself, on that.

24 So that - - - that question is there. Basically,
25 it's ultimately advisory because if this is a Supreme Court



1 order, you know, the Supreme Court is a court of general
2 jurisdiction, and we also know that because when they
3 created the domestic violence parts, as well as the court
4 merger, the court specifically noted that it was done in
5 Supreme Court to avoid jurisdictional issues that might
6 occur between a transfer of a criminal court case.

7 JUDGE STEIN: Well, what about the argument that,
8 at the very least, family court could still enforce that
9 Supreme Court order and therefore we're back to the - - -
10 the merits question?

11 MR. KASS: Assuming that to be the case, we're
12 not talking about an enforcement action. How do we know
13 that? The criminal court has no authority to modify or
14 alter the underlying support order, would have no authority
15 to demand a - - - or come up with a compliance schedule,
16 and also would have no ability look as far as a prospective
17 order on looking into the future, how far to extend the
18 order, whether it would be on a sliding scale modifying
19 payments over time. We're looking solely at past conduct
20 and - - - and so that we - - - we know it's not a
21 enforcement proceeding within the understanding of a
22 maintenance or support proceeding.

23 It also, even in the criminal contempt field,
24 serves a different purpose, in terms of a public concern,
25 in terms of deterrence and other things that are more



1 typically supported by the criminal - - - the Penal Law
2 system as opposed to family court.

3 JUDGE STEIN: And there's some of that in the
4 legislative history, right, as to the reasons for enacting,
5 for example, 260.05?

6 MR. KASS: Correct. Otherwise the legislature
7 would not have enacted that statute. It would have - - -
8 the legislature, in its wisdom, could have determined that
9 there was no need or there was no stronger public policy
10 interest for -- for such a statute.

11 JUDGE FEINMAN: Let me ask you this. If we were
12 to agree that the order should be affirmed, do we have to
13 remit back to the Town Justice Court to decide the branches
14 of the motion that it never decided in the first instance?

15 MR. KASS: That's what would occur here because
16 there were undecided questions.

17 JUDGE FEINMAN: Branches of the motions to
18 dismiss on the grounds.

19 MR. KASS: That would be a fair thing because
20 there's also questions of - - - for example, there was a
21 motion to dismiss for facial insufficiency, but it may be a
22 hearsay versus a jurisdictional defect. So the trial court
23 hasn't had an opportunity to - - -

24 JUDGE FEINMAN: Hasn't ruled on any of those.

25 MR. KASS: - - - to rule on that.



1 CHIEF JUDGE DIFIORE: Thank you, counsel.

2 MR. KASS: Thank you, Your Honors.

3 CHIEF JUDGE DIFIORE: Counsel?

4 MR. HERZFELD: Very briefly, respondent argues
5 that this is not enforcement, but as I argued before, the
6 exclusive jurisdiction section should be read expansively,
7 and the bottom line is this is a nonpayment of support;
8 that's what underlying all of these charges. And the
9 Family Court Act specifically says that for matters of
10 support under Article 4 -- and 454 and 455 deal with
11 nonpayment of support under Article 4 -- family court and
12 Supreme Court have exclusive jurisdiction.

13 This court, in Columbia County v. Risley, which
14 is cited in my brief, noted the family court's ability to
15 prevent lengthy incarceration for nonpayer obligors. And
16 look at what you're facing here. You've got twenty counts
17 - - -

18 JUDGE STEIN: But the legislature was certainly
19 aware of that when - - - when it enacted 260.05, right?

20 MR. HERZFELD: Yes - - - yes, they were. But
21 just to finish, you've got twenty counts. In theory, since
22 they're paired up, I suppose you could have ten consecutive
23 one-year sentences, so you're looking at - - -

24 JUDGE FEINMAN: You max out at two under the
25 Penal Law, but - - -



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MR. HERZFELD: I'm sorry?

JUDGE FEINMAN: You max out at two - - -

MR. HERZFELD: Okay. Thank you.

JUDGE FEINMAN: - - - under the Penal Law.

MR. HERZFELD: Okay. So two year - - -

JUDGE FEINMAN: That's okay.

MR. HERZFELD: Potentially a two-year sentence
for simply nonpayment of support. Thank you.

CHIEF JUDGE DIFIORE: Thank you, counsel.

(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. STEVEN BAISLEY, No. 104, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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