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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 141

THOMAS BARNES,

Appellant.

20 Eagle Street
Albany, New York 12207
September 16, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Let's go to 141,
2 People v. Barnes.

3 Counsel, you want any rebuttal time?

4 MS. BOYD: Yes, please. Two minutes.

5 CHIEF JUDGE LIPPMAN: Two minutes. Sure.
6 Go ahead.

7 MS. BOYD: May it please the court, my name
8 is Laura Boyd, counsel for appellant Thomas Barnes.
9 In 1992, the legislature correctly realized that then
10 existing trespass statutes were inapplicable to the
11 common areas of a public housing project.

12 JUDGE RIVERA: Legal Aid didn't take that
13 position at the time, right?

14 MS. BOYD: No, but apparently we were
15 wrong, because the legislator - - - legislature
16 rejected our specific - - -

17 CHIEF JUDGE LIPPMAN: Why can't it still be
18 a trespass 2 after - - - after that statute?

19 MS. BOYD: Well, it's actually the
20 deficiency is not actually within the trespass 2
21 statute. The deficiency is in the element of
22 unlawfulness, knowingly entering or remaining
23 unlawfully.

24 JUDGE ABDUS-SALAAM: In other words,
25 somebody who just wandered into a public housing

1 projects common area, there was no sign saying you
2 can't trespass, and - - -

3 MS. BOYD: Door was unlocked.

4 JUDGE ABDUS-SALAAM: - - - and the door
5 might have been unlocked or something like that, and
6 they don't know that they're trespassing. Is that
7 what you mean by the unlawfulness?

8 MS. BOYD: That's one of the three issue -
9 - - problems with the information in this case. You
10 have to knowingly - - - which Your Honor is touching
11 on - - - you have to have some notice that the
12 building is not open to the public, be it a locked
13 door or - - - or something like that. That would
14 apply to private property. It would not be
15 sufficient, however, to charge second degree in a
16 public housing project, and here's the reason why.
17 Both - - - in 1992 we're talking about, both the
18 third and second degree statutes prescribed
19 unlawfully entering or re - - - I'm sorry - - -
20 knowingly entering or remaining unlawfully in - - -
21 with respect to the third degree a building, the
22 second degree a dwelling. The legislature realized
23 that the public housing project is public property,
24 so in contrast to this court's ruling in Graves,
25 which explicitly states private property - - -

1 JUDGE STEIN: Well, let me ask you this.
2 Would - - - would - - - would it - - - would the
3 results be different if the door was locked; if there
4 was proof that the door was locked or that there were
5 clear and conspicuous signs posted or - - - or other
6 indicia that - - - that the public - - - that it was
7 not open to the public?

8 MS. BOYD: That might have a bearing on the
9 knowledge element, but that would not affect the
10 unlawful element which is also a problem here.
11 Because it is public property, like the school
12 setting which is also public property - - -

13 JUDGE RIVERA: Where - - - what case have
14 we said it's pri - - - that this kind of public
15 properties, residential public spaces, open to
16 everybody; where have we said that?

17 MS. BOYD: You haven't. Well, you haven't
18 addressed this.

19 JUDGE RIVERA: So do we have to say that
20 right now?

21 MS. BOYD: The legislature has said it.

22 JUDGE RIVERA: No, if we disagree with you,
23 what - - -

24 MS. BOYD: Where does it come from? The
25 legislature's saying this is public property, and I'm

1 not saying that it's open to everybody, but I'll get
2 to that. The legislature has said this is public
3 property; the legislature has equated this to school
4 property; the leg - - -

5 JUDGE ABDUS-SALAAM: Do we get to - - - do
6 we get to the legislature if we are looking at the
7 plain language of the statute? And you're - - - you
8 were pointing out whether the problems with the plain
9 language of trespass 2 versus trespass 3.

10 MS. BOYD: You do get - - -

11 JUDGE ABDUS-SALAAM: So we - - - we're
12 looking at trespass 2, right?

13 MS. BOYD: You - - - you do get to it, and
14 here's the reason why. The unlawf - - - entering or
15 remaining unlawfully has a separate statute which
16 defines it. One - - - Penal Law 140.05, and it
17 specifically sets out what - - - when somebody is
18 licensed and privileged to enter. It says, "A person
19 who enters or remains unlawfully in a premises when
20 he is not licensed or privileged." The statute then
21 goes to confer license and privilege on people to
22 enter properties that are open to the public, land
23 that's not sufficiently enclosed, but at the very end
24 where it's dealing with school property, which is
25 public property, it doesn't confer the license and

1 privilege, it withdraws the license and privilege.
2 And the problem the legislature recognized was that
3 statute did not withdraw the license and privilege
4 where - - -

5 JUDGE STEIN: Could - - - could the
6 legislature have been wrong?

7 MS. BOYD: They're the ones who interpret
8 their own statutes, and they are the ones who said
9 this is public property like school property, and
10 they're the ones who recognized - - -

11 JUDGE RIVERA: But are they saying we have
12 made - - - we make a legislative - - - we decide
13 legislatively that this is public property, or is it
14 oh, we believe the law indicates that this is public
15 property?

16 MS. BOYD: It's owned by the public; it's a
17 public housing; it's owned by the municipality just
18 like it - - -

19 JUDGE RIVERA: Is that - - - I'm sorry; is
20 that in the legislative history you're referring to?

21 MS. BOYD: They're saying it's public
22 property and - - -

23 JUDGE RIVERA: They're just - - -

24 MS. BOYD: - - - they're equating it to
25 school property, yes, in the legislative history.

1 JUDGE RIVERA: But I - - - again, but is
2 that based on the legislators own pronouncement or an
3 assumption about what they understand the law to be?

4 MS. BOYD: That's their pronouncement.
5 That's their - - - I - - - I'm not clear on your - -
6 -

7 JUDGE RIVERA: Where is that in the
8 legislative history you're asking me to look for?

9 MS. BOYD: Excuse me?

10 JUDGE RIVERA: Where is it in the
11 legislative history that they are pronouncing we
12 declare that these lobbies in a NYCHA residential
13 building are open to the public?

14 MS. BOYD: Okay, it says - - -

15 JUDGE RIVERA: Except for the provision
16 they didn't pass, right? You've got the no
17 trespassing sign you're put on notice.

18 MS. BOYD: Okay, the legislators said - - -
19 legislature said, "Presently, there's a loophole in
20 the law that does not allow housing police to issue
21 summons to persons on the premises of a public
22 housing" property - - - "project," rather, "if they
23 do not reside in the building and are not visiting a
24 resident of the building. The reason for this is
25 because the building is public property." Then they

1 say, "Just as it's illegal to remain on the premises
2 of a building being used as an elementary" - - -

3 JUDGE RIVERA: You're saying it's not - - -
4 the question is not open to us to say that is an
5 incorrect interpretation?

6 MS. BOYD: I would say the legislature's in
7 the best position to decide who owns that property,
8 yes.

9 JUDGE FAHEY: I guess there was - - -

10 JUDGE RIVERA: Not who owns, whether or not
11 it's open to the public. I'm not talking about
12 ownership.

13 MS. BOYD: Okay.

14 JUDGE FAHEY: Go ahead and answer the
15 Judge. I'm sorry. You go ahead.

16 MS. BOYD: There's - - - there's two
17 separate things. There's open to the public.

18 JUDGE RIVERA: Correct.

19 MS. BOYD: Okay.

20 JUDGE RIVERA: Yes.

21 MS. BOYD: And that applies equally to
22 public or private property, the rules applying to
23 that.

24 JUDGE RIVERA: Right.

25 MS. BOYD: If you have a property that's

1 open to the public you are licensed and privileged to
2 enter the portion that's open to the public. There's
3 a separate deter - - - there's a separate question
4 here; publicly owned versus privately owned property
5 and the property rights involved. The legislature is
6 saying where - - - and this court has said in Graves,
7 where it's private property you have to have the
8 consent of the owner to be licensed and privileged.
9 The legislature is saying - - - and in fact, they
10 didn't just say this in this case they said this when
11 they em - - - made the statute 140.05 regarding
12 school properties; they're saying this is public
13 property and we have to take away the license. They
14 didn't invent this concept for public housing
15 projects; they did this many years before with school
16 properties. They just didn't - - -

17 JUDGE RIVERA: There's a difference between
18 a - - - a premises where no one resides and a
19 premises where someone resides. So I - - - I'm back
20 to my question - - -

21 MS. BOYD: Okay, that is - - -

22 JUDGE RIVERA: - - - is this court unable
23 to render an opinion as to whether or not a lobby in
24 a residential building of NYCHA - - -

25 MS. BOYD: Um-hum.

1 JUDGE RIVERA: - - - is open or closed to
2 the public?

3 MS. BOYD: Open or closed as far as indicia
4 indicating the public is not wel - - -

5 JUDGE RIVERA: Inherently open or closed to
6 the public?

7 MS. BOYD: No, the - - - the - - - a public
8 housing project lobby can be closed to the public.
9 And in fact, the legislature enact - - -

10 JUDGE RIVERA: That's not my question. My
11 question is actually - - -

12 MS. BOYD: I'm - - - I'm not understanding.

13 JUDGE RIVERA: My question is actually is
14 it inherently not public space because it's
15 residential?

16 MS. BOYD: No, I wouldn't say that. In
17 fact, if Your Honors look - - -

18 JUDGE RIVERA: Well, where - - - where else
19 would I find that - - -

20 MS. BOYD: Okay.

21 JUDGE RIVERA: - - - the support - - -

22 MS. BOYD: Support for that proposition?

23 JUDGE RIVERA: - - - or are you not saying
24 that? Go ahead.

25 MS. BOYD: The legislature has talked about

1 public places in the context of public offenses,
2 Article 240 - - -

3 JUDGE RIVERA: Okay.

4 MS. BOYD: - - - subdivision 1, and they
5 say a public place means a place to which the public
6 or a substantial group of persons has access. And
7 they specifically say "lobbies and other" port - - -
8 "portions of apartment houses and hotels." So
9 they're distinguishing between the lobbies of a - - -
10 the common areas of a - - - of a building as
11 attracting public - - - members of the public, not
12 every member of the public but vast numbers.

13 JUDGE STEIN: So could - - - could - - -

14 MS. BOYD: Now - - -

15 JUDGE STEIN: Is it possible that - - -
16 that there might be a distinction there, though,
17 between common areas in which there were indicia that
18 the - - - the public wasn't allowed, such as locks
19 and signs, versus common areas where - - - where that
20 was not the case, where it was open?

21 MS. BOYD: Well, what the legislature did
22 when they made the third degree statute was they took
23 away the license and privilege to be in those common
24 areas, and in doing so they specified what was
25 required.

1 JUDGE STEIN: But why would they make it
2 less of a crime to trespass in a public housing
3 dwelling than in a - - - a private dwelling?

4 MS. BOYD: There's - - - I cannot speak for
5 the legislature, but I would suggest that Article - -
6 - Section 240 of the Penal Law may provide guidance
7 as to why there's a distinction. They may feel that
8 these areas are less private or more public, and that
9 may be the reason.

10 JUDGE ABDUS-SALAAM: Or is it - - -

11 JUDGE RIVERA: Yeah, but - - -

12 JUDGE RIVERA: Or is it what I said what I
13 suggested earlier, counsel, when you were talking
14 about unlawfulness, someone who didn't know that this
15 was a - - - that - - - that they were not supposed to
16 be there because it's public housing; they walk in,
17 there's no trespass sign or they don't see it, so
18 they're - - - and the door was open; it wasn't
19 locked, and so now they're in there and they don't
20 know they're not supposed to be there.

21 MS. BOYD: Right.

22 JUDGE ABDUS-SALAAM: So they're subject to
23 having that privilege to be there - - -

24 MS. BOYD: I certainly think that was a
25 consideration as well. That is why they said in

1 order to be held liable for trespasses in the common
2 areas of a public housing project you have to have
3 conspic - - - conspicuously posted rules and
4 regulations governing entry so that you can tell
5 people - - -

6 CHIEF JUDGE LIPPMAN: Okay, counsel.

7 MS. BOYD: - - - tell people what they can
8 and cannot do.

9 CHIEF JUDGE LIPPMAN: Fine. Thank you,
10 counsel. You'll have your rebuttal. Let's get to
11 your adversary.

12 Counsel.

13 MS. O'SHEA: May it please the court my
14 name is Sheila O'Shea, and I represent the respondent
15 on this appeal. The lobby of a public housing
16 project falls squarely within the four corners of the
17 second degree statute. Second degree - - -

18 JUDGE PIGOTT: I was struck by your - - -
19 in - - - in your summary of your argument in your
20 brief you said the "legislative history reflects a
21 mistaken belief that the second" depart - - - the
22 second "degree did not apply to public housing."

23 MS. O'SHEA: That's absolutely right, Your
24 Honor. I - - -

25 JUDGE PIGOTT: So are - - - are you

1 essentially saying the legislature made a mistake?

2 MS. O'SHEA: I am saying the legislature
3 made a mistake, and I think Judge Rivera touched upon
4 it. The - - - the underlying premise of the - - -
5 the third degree statute and of my adversary's
6 argument is that publicly owned equals open to the
7 public, and that's simply not the case.

8 JUDGE PIGOTT: If it's a mistake - - - I
9 mean, if you're in a public building and you trespass
10 you're - - - you're stuck with two - - - the second
11 degree and third degree, but if you're in a private
12 building it's only second?

13 MS. O'SHEA: That's right, and - - - and
14 the prosecutor would have discretion in the - - - in
15 the context of a lobby of a - - - a public housing
16 project to - - - to charge the second or the third
17 degree charge.

18 CHIEF JUDGE LIPPMAN: You're saying - - -

19 JUDGE FAHEY: That's - - - that's not
20 unusual. I mean you often have a - - -

21 MS. O'SHEA: It's not unusual.

22 JUDGE FAHEY: - - - a lower - - - a lower
23 consequence charge, you know, you - - - you meet the
24 elements of both crimes all the time.

25 MS. O'SHEA: That's absolutely right. In

1 fact, under Mattocks and Eboli the prosecutor does
2 have discretion unless the legislature specifically
3 says this is the exclusive remedy; the legislature
4 never said that here.

5 CHIEF JUDGE LIPPMAN: On what basis would
6 it be 2 or 3?

7 MS. O'SHEA: Well, again, the prosecutor
8 would have discretion. I think - - -

9 CHIEF JUDGE LIPPMAN: Yeah, but what - - -
10 what - - - how would they - - -

11 MS. O'SHEA: I think the factors the - - -
12 the prosecutor might consider would be the
13 defendant's criminal history, has - - -

14 JUDGE PIGOTT: Why - - - why is it a
15 mistaken belief then? I mean if you're saying
16 there's 2 and they're consistent and harm - - - and
17 in harmony, but you said they're - - - they're - - -
18 they made a mistake; that they didn't have - - -

19 MS. O'SHEA: They did make a mistake, and
20 I'm going to explain why, and I think Judge Rivera
21 touched upon it because - - -

22 JUDGE PIGOTT: They didn't have - - -

23 MS. O'SHEA: I'm sorry, Your Honor.

24 JUDGE PIGOTT: - - - have to pass the - - -
25 the third - - - the third - - - the - - - the - - -

1 the third degree, right?

2 MS. O'SHEA: Excuse me?

3 JUDGE PIGOTT: You're saying they didn't
4 have to pass that - - - that one. The - - -

5 MS. O'SHEA: That's right.

6 JUDGE PIGOTT: But - - - but you charged
7 both. I'm - - - I'm just wondering if it's a
8 mistake, and you say this is clearly a mistake, we
9 shouldn't be charging both because they're the same
10 statute.

11 MS. O'SHEA: Well, both - - - both are on -
12 - - both are on books, you know.

13 JUDGE PIGOTT: They're - - - they're the
14 same statute. You're saying 3 is 2.

15 MS. O'SHEA: No, no, there's - - - they're
16 - - - they're - - - they're overlapping but not
17 duplicative.

18 JUDGE PIGOTT: Then they're not a mistake.

19 MS. O'SHEA: Well, I just want to - - - if
20 I may come back to - - - I think this may answer your
21 question, which is to say that there's a qualitative
22 difference between a building where people reside.
23 There's the notion that where people live and lay
24 their heads at night is a sanct - - - kind of a
25 sanctuary from the public; you shouldn't be subjected

1 to the public being at your doorstep. There's a big
2 difference between a residence and the type of public
3 building like a courthouse or a public library or a
4 public - - -

5 JUDGE FAHEY: Or a school. But what - - -
6 what you're saying is if you flip it around the other
7 way, logically in - - - in a public building there's
8 - - - there's a presumption of a right to legal
9 presence there, but in a dwelling it - - - is - - -
10 while it may be publicly owned that doesn't it's
11 public housing.

12 MS. O'SHEA: That's exactly my point, Your
13 Honor.

14 JUDGE FAHEY: So you got to - - - you got
15 to flip it around the other way, though, and look at
16 the other way which is - - - actually, I think is
17 what your argument is is that there's no presumption
18 of a right to a legal presence but to put someone on
19 notice that they don't have a right to legal presence
20 there has to be the no trespassing sign. The
21 question is do you need to have the locked door? I
22 don't know that that's true or not.

23 MS. O'SHEA: You don't need the locked
24 door.

25 JUDGE FAHEY: Because people - - - how can

1 people come in or ring a buzzer? I mean the - - -
2 you have to - - - there has to be that able - - -
3 ability to access that much, so I'm not sure if you
4 do. But - - -

5 MS. O'SHEA: The locked door I think is one
6 - - - one circumstance that should suggest that the
7 property is not open to the public, but here we have
8 various circumstances. We had the fact that the
9 lobby was separated from the street by a vestibule.

10 JUDGE FAHEY: You know there's an - - -
11 there's another argument, too, and it's certainly not
12 to either of you as attorneys or - - - or as
13 advocates, but there's a fairness argument sometimes
14 I think that comes out in these things is that the
15 people that live in public housing we should endeavor
16 in our interpretation of the law to make them equal
17 to people that live in purely private housing, in
18 terms of some of these basic rights like being able
19 to walk up and down your stairwell, say.

20 MS. O'SHEA: That's absolutely right.

21 JUDGE FAHEY: And - - - and that - - -
22 that's the goal. That's - - - I think - - - and I
23 think that was a legislative goal in trying to
24 clarify this loophole. Contravening that is - - - is
25 the criminalization of very, very petty crimes

1 against a variety of young people that create
2 criminal records for them in cases where they
3 probably shouldn't be created. So that's I think
4 what we're confronted with.

5 MS. O'SHEA: Well, we don't know - - - I
6 don't know if this - - - this addresses your concern
7 but we don't know the circumstances of the stop in
8 this case, unlike, for example, Barksdale which was
9 argued last week where there was a suppression
10 hearing. So there may have been a legitimate basis
11 for stopping this defendant other than his mere
12 presence in the building.

13 JUDGE RIVERA: Help me - - - maybe you've
14 already answered so then I'm requesting it be a
15 little - - - slightly repetitive. Why is it a lesser
16 sanction? If - - - if as Judge Fahey states - - -
17 and I think some of the legislative history certainly
18 is along the same lines that the legislature is
19 interested in equal treatment to those who live in
20 publicly owned residences and privately owned
21 residences. Then why the difference in the penalty?

22 MS. O'SHEA: Because the legislature
23 erroneously believed that the second degree statute
24 did not, in fact, cover public housing projects.
25 When - - -

1 JUDGE STEIN: Why didn't they just amend
2 the - - - the trespass 2?

3 MS. O'SHEA: Well, I think I wouldn't be
4 standing here had they done that and that certainly
5 would have been nice. And that's why - - -

6 JUDGE RIVERA: No, but I - - - I get that
7 point. I understand your point that they made a
8 mistake, but that doesn't explain the sanction, as
9 Judge Stein mentioned before. That might explain
10 that you'd write - - - might explain that you'd try
11 and close the loophole, but if the attempt to close
12 the loophole is to get parity then why not have the
13 same sanction?

14 MS. O'SHEA: Well, id - - -

15 JUDGE RIVERA: Aren't they both - - -

16 MS. O'SHEA: Ideally that's what they would
17 have done but again, I think it was because the
18 legislature was operating under the error - - -

19 JUDGE RIVERA: But they could not?

20 MS. O'SHEA: Well, no, no. But under the
21 erroneous assumption that prior to 1992 criminal - -
22 - there was - - - the - - - the second degree statute
23 did not, in fact, apply to public housing projects,
24 and this was the attempt on the part of the
25 legislature to restore or establish parity. It's - -

1 - it was a - - - I would argue a failed attempt.

2 JUDGE RIVERA: But I'm - - - perhaps I'm
3 not being clear. I understand that they're trying to
4 establish parity to the extent that they're trying to
5 criminalize certain conduct that they - - - that you
6 argue they misunderstood and thought that under the -
7 - - the statute as it - - - as it existed at the time
8 did not cover that conduct - - -

9 MS. O'SHEA: Right.

10 JUDGE RIVERA: - - - right, so being in the
11 lobby of - - - of the NYCHA house - - -

12 MS. O'SHEA: Right.

13 JUDGE RIVERA: - - - you couldn't be
14 prosecuted and convicted for trespass.

15 MS. O'SHEA: Um-hum.

16 JUDGE RIVERA: Okay, so then they try to
17 deal with that loophole and they create a crime or -
18 - - or - - - or put that conduct into third degree,
19 the - - - the crime, but that doesn't explain again
20 why - - - and perhaps I'm just not understanding the
21 two of you, why the lower sanction?

22 MS. O'SHEA: Well, because the third degree
23 statute - - - perhaps this will add - - - answer to
24 your question - - - applies to a building used as a
25 public housing project whereas the second degree

1 statute refers to a dwelling. Buildings - - -
2 buildings comprise both dwellings and non-dwellings
3 so there are - - -

4 JUDGE RIVERA: Um-hum.

5 MS. O'SHEA: - - - types of buildings in a
6 NYCHA housing project that are not dwellings. For
7 example - - -

8 JUDGE RIVERA: Yeah.

9 MS. O'SHEA: - - - you know, senior
10 centers, community centers, basketball courts - - -
11 they're not buildings but it's an example - - -

12 JUDGE RIVERA: Right.

13 MS. O'SHEA: - - - of a non-dwelling.

14 JUDGE RIVERA: Yes.

15 MS. O'SHEA: So there should be a lesser
16 sanction - - -

17 JUDGE RIVERA: I see.

18 MS. O'SHEA: - - - for the non-dwell - - -
19 for trespassing in a non-dwelling.

20 JUDGE STEIN: Do - - - do you agree that
21 for second degree that you have to do a fact-specific
22 analysis of what the circumstances are, in other
23 words whether there is indicia that the public is not
24 - - - does not have a license to be there?

25 MS. O'SHEA: I - - - I - - - yes, I do.

1 But I think that that was satisfied by the
2 information here, because we have the - - - the
3 various factors of, first, the fact that the lobby is
4 separated from - - - from the street by the
5 vestibule; second, we've got the residential
6 character of the building which people - - - people
7 don't believe that they can simply walk into an
8 apartment building the way they can recline on a lawn
9 in Central Park, it's op - - - open to everyone. No
10 - - - no one - - - that's not - - - that's not
11 commonly understood. And thirdly, we did have the no
12 trespassing sign; it was posted. And the reasonable
13 inference from the fact that it was posted is that it
14 was conspicuously posted, because if a sign is posted
15 it's there so people can read it. There's a sign - -
16 - I can't read it with my eyesight - - - but there's
17 a sign posted in the courtroom here.

18 JUDGE PIGOTT: But the argument - - -

19 JUDGE RIVERA: There are common areas and
20 there are common areas, right. So if I walk into a
21 lobby - - -

22 MS. O'SHEA: Um-hum.

23 JUDGE RIVERA: - - - NYCHA, private,
24 doesn't matter, and it has the intercom section which
25 would be, I guess, in the way you both described it,

1 the outer vestibule of the common area - - - of the
2 lobby, the entrance, the common area.

3 MS. O'SHEA: Right.

4 JUDGE RIVERA: Right, that - - - that - - -

5 MS. O'SHEA: I think a - - -

6 JUDGE RIVERA: Despite what you just said
7 someone would understand that that means it's open to
8 the public because the whole point of the intercom
9 system is for someone who's not a tenant or otherwise
10 who has access, who can get in, to be able to gain
11 access.

12 MS. O'SHEA: Well, a buzzer system I think
13 would be imply that - - - that the area was not open
14 - - -

15 JUDGE RIVERA: That it's open, right.

16 MS. O'SHEA: - - - to the public, that - -
17 - that you had to be admitted by a resident.

18 JUDGE RIVERA: So that's - - - that's - - -
19 so what I'm saying is all parts of the building are
20 not necessarily - - - simply because it's a
21 residential building - - -

22 MS. O'SHEA: No, and - - - and - - - and I
23 con - - -

24 JUDGE RIVERA: - - - doesn't imply that
25 it's not open to the public.

1 MS. O'SHEA: I - - - I concede - - - I
2 concede that, Your Honor. I think in this case based
3 on the allegations and the information the vestibule
4 would probably not be considered closed to the
5 public.

6 JUDGE PIGOTT: Is - - - isn't that part of
7 the defendant's point that the "accusatory instrument
8 here fails to allege knowing unlawful entry into a
9 property that was not open to the public." In other
10 words, you - - - you got to - - - you got to - - -
11 you - - - you make the distinction between public and
12 dwelling, and I get that. But don't you have to
13 allege that it was a dwelling and not just public - -
14 - a public building?

15 MS. O'SHEA: Well, it did say - - - it did
16 in fact - - - the information did, in fact, say it
17 was a residential apartment building.

18 JUDGE PIGOTT: Well, yeah, but did - - - it
19 didn't say he was trespassing in the - - - in the
20 dwelling part.

21 MS. O'SHEA: Well, it said that he was - -
22 - he was observed beyond the no trespassing sign in
23 the lobby which is beyond the vestibule.

24 JUDGE PIGOTT: Right.

25 MS. O'SHEA: And again, those to me are

1 indicia that this was - - - area was off limits to
2 the public.

3 JUDGE PIGOTT: So you're saying that a
4 public building - - - that the - - - that the lobby
5 in a public building is off - - - is - - - is - - -
6 is off?

7 MS. O'SHEA: Yes, in the - - - given - - -
8 given the factors and the allegations in this
9 complaint I am - - -

10 JUDGE ABDUS-SALAAM: Counsel - - -

11 MS. O'SHEA: - - - saying that the lobby
12 was - - - was not open - - - was not open to the
13 public in - - -

14 JUDGE ABDUS-SALAAM: Counsel - - -

15 MS. O'SHEA: - - - given the circumstances
16 alleged in this information.

17 JUDGE ABDUS-SALAAM: Counsel, I got your
18 point about NYCHA buildings including dwellings and
19 non-dwellings, but the justification to the enactment
20 Pe - - - Penal Law, the third degree trespass statute
21 says this is - - - this was presently - - - "There is
22 presently a loophole in the law that does not allow
23 housing police to issue trespassing summons as to
24 persons on the premises of a public housing project
25 if they do not reside in the building" - - -

1 MS. O'SHEA: Um-hum.

2 JUDGE ABDUS-SALAAM: - - - "and are not
3 visiting a resident of the building." So that would
4 suggest that they're talking about the dwelling part
5 of the building, not something like a senior citizen
6 center or some other portion of a - - - a housing
7 project development that doesn't include dwelling.

8 MS. O'SHEA: Um-hum.

9 JUDGE ABDUS-SALAAM: So it - - - it seem
10 that you - - - your - - - I understand your point
11 that they're mistaken but they don't seem to be
12 making the distinction that you made regarding
13 trespass 3 and trespass 2.

14 MS. O'SHEA: I don't think that they were,
15 in fairness, but again what - - - what I - - - I do
16 believe they were mistaken, one of the reasons being
17 that they couldn't cite any precedent to the effect
18 that - - - that criminal trespass wasn't - - -
19 couldn't be prosecuted.

20 JUDGE ABDUS-SALAAM: Well, perhaps it was
21 criminal courts throwing out these trespass, you
22 know, convictions or indictments because they didn't
23 think that - - - that these were private dwellings,
24 that they were public buildings, and that's what the
25 legislature was addressing.

1 MS. O'SHEA: Well, my research has revealed
2 only two cases prior to 1992, Rodriguez and Sanders,
3 which are cited in my brief. Rodriguez in particular
4 suggested criminal trespass the second degree did, in
5 fact, apply to the stairwell of a public housing
6 project, which I would argue is analogous to a lobby
7 as a non-private area. In fact, that was the holding
8 - - - that was the basis for the court's reasoning
9 that there was probable cause, that this was a
10 nonpublic area. So again, I think it was a mistaken
11 presumption or assumption on the part of perhaps a
12 small number of legislators and - - - and here we all
13 stand as a result.

14 JUDGE ABDUS-SALAAM: Um-hum.

15 MS. O'SHEA: But I think the remedy is for
16 this court to find that the prosecutor has discretion
17 to charge either - - -

18 CHIEF JUDGE LIPPMAN: Okay, counsel.

19 MS. O'SHEA: Thank you, Your Honor.

20 CHIEF JUDGE LIPPMAN: Thanks.

21 Counsel.

22 MS. BOYD: It's not a mistake. The
23 legislature said this is public property like school
24 property, and as in where they took away the license
25 in Penal Law 140.05 from school property they tried

1 to do that with respect to public housing. The
2 commentary to that one - - - Penal Law 140.05
3 specifically states that the "Legislative intent in
4 the new statute would have been added by the
5 additional amendment to the definition of the term
6 enter and remain unlawfully indicating in effect that
7 a person who enters or remains in a public housing
8 building, except an open lobby, who is not an
9 employee, resident, invitee, or et cetera does so
10 without license or privilege." So - - -

11 JUDGE PIGOTT: You mentioned early on in
12 your argument that - - - that Legal Aid had - - - had
13 an opinion with respect to this bill at the time that
14 it passed. Is that germane to our discussion?

15 MS. BOYD: Excuse me?

16 JUDGE PIGOTT: Is that germane to our
17 discussion? I mean didn't you have an opinion - - -

18 MS. BOYD: No, we apparently were wrong
19 because the legislature took into account our input
20 and rejected it. But it's not that you cannot close
21 a lobby to a public housing project; it's that you
22 have to give notice. And it's also not a mistake
23 because the net effect of saying that the second
24 degree statute is app - - - applicable means that the
25 third degree as it existed in 1992 would also be

1 applicable. It was the identical statute.

2 JUDGE PIGOTT: Well, that's - - - that's
3 what I was getting at.

4 MS. BOYD: Right.

5 JUDGE PIGOTT: I thought that's what you
6 were pointing out at the time, and - - - and that - -
7 -

8 MS. BOYD: But - - - but the legislature
9 rejected that.

10 JUDGE PIGOTT: Right.

11 MS. BOYD: And in fact, they created a
12 situation where if you're convicted of the lesser
13 degree crime facing only ninety days in prison you
14 have to be given notice that you are entering a
15 building that you're not allowed to go into.

16 JUDGE PIGOTT: Well - - -

17 MS. BOYD: Yet, if you're going to be
18 facing a year in jail - - -

19 JUDGE STEIN: - - - interpret second degree
20 in the same way?

21 MS. BOYD: Excuse me?

22 JUDGE STEIN: Could we interpret second
23 degree trespass in the same way, to require some kind
24 of notice?

25 MS. BOYD: I - - - I think the legislature

1 Thanks.

2 MS. BOYD: May - - - may I just make one
3 more quick point?

4 CHIEF JUDGE LIPPMAN: One very, very, very
5 quick point.

6 MS. BOYD: We're talking about dwellings
7 and those - - - those are aggravating circumstances.
8 They don't bear on the unlawful element.

9 CHIEF JUDGE LIPPMAN: Okay.

10 MS. BOYD: Thank you.

11 CHIEF JUDGE LIPPMAN: Thanks, counsel.

12 Thank you both. Appreciate it.

13 (Court is adjourned)

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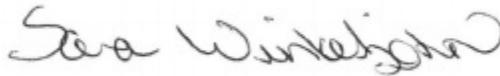
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Thomas Barnes, No. 141 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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