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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 131

REECE RUDOLPH,

Appellant.

20 Eagle Street
Albany, New York 12207
May 29, 2013

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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1 CHIEF JUDGE LIPPMAN: 131.

2 MR. WEINER: I would like to reserve two
3 minutes for rebuttal.

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

6 MR. WEINER: May it please the court, my
7 name is Jack Weiner. I was appointed to represent
8 Mr. Rudolph.

9 The issue, really, here is the - - -

10 CHIEF JUDGE LIPPMAN: Counselor, talk - - -
11 talk to us about the policy of - - - of YOs, why it's
12 important if - - - which I know you think it is, that
13 the judge make a ruling on - - - on YO status.

14 MR. WEINER: I'm going to be very personal
15 here. I - - - I was appointed to this case - - -

16 CHIEF JUDGE LIPPMAN: Sure.

17 MR. WEINER: - - - and it looked like a
18 nothing case; nobody wanted it. And so they called
19 me up in Warren County to - - - would I take it? I
20 said, sure, I have nothing to do; I'm an old man. I
21 - - -

22 CHIEF JUDGE LIPPMAN: You look young to me.
23 Go ahead.

24 MR. WEINER: Thank you. I started to
25 examine it, and then I was - - - I was a bit aghast

1 at what I saw. The - - - and then I looked at the
2 statute for the very first time, and it said - - -
3 court said - - - it says "must".

4 CHIEF JUDGE LIPPMAN: Well, that's if you
5 literally look at the statute.

6 MR. WEINER: Well, and then I looked it up
7 and the - - - and certainly looked "must", and I know
8 the policy, and I was reading - - - I've been reading
9 the case in the U.S. Supreme Court, and I've been
10 reading that one is concerned about the youthful
11 offender and giving the opportunity to create a new
12 life. Well, this kid, Reece Rudolph - - -

13 CHIEF JUDGE LIPPMAN: This is all about his
14 record, right? In the - - -

15 MR. WEINER: That's his record, he - - -

16 CHIEF JUDGE LIPPMAN: In the end, this is
17 what this is about?

18 MR. WEINER: He couldn't get into the
19 marines. He couldn't get a job. This is outside of
20 the record, of course. He couldn't get into the UPS,
21 wouldn't hire him because he - - - he's a convicted
22 felon.

23 CHIEF JUDGE LIPPMAN: To agree with you, we
24 have to overrule McGowen?

25 MR. WEINER: I think you have to.

1 CHIEF JUDGE LIPPMAN: And why - - - why
2 should we do that? Why is McGowen wrong and - - -

3 MR. WEINER: I think McGowen is wrong
4 because it - - - it places a situation on the
5 attorney representing the youthful offender to make
6 this - - - make the request. And the youthful - - -
7 and many of these attorneys, unfortunately, they're
8 the - - - well, and as in this case, Mr. Rudolph's
9 grandparents hired a small-town lawyer, and again, I
10 don't mean to be pejorative, but a lawyer who didn't
11 pay attention to his - - -

12 JUDGE SMITH: Well, this is not - - -

13 MR. WEINER: - - - pardon?

14 JUDGE SMITH: In this - - - in this case,
15 as I read it, it's more - - - it goes further than
16 McGowen. I mean, McGowen says you have to preserve
17 it. Here, it looks to me as though it was
18 consciously waived. I mean, they actually - - -

19 MR. WEINER: No, it wasn't, Your Honor.
20 What - - - what I think really happened here - - -

21 JUDGE GRAFFEO: Well, he executed a waiver
22 of appeal, didn't he?

23 MR. WEINER: A waiver of appeal - - -

24 JUDGE GRAFFEO: Judge - - - judge did an
25 allocution - - -

1 MR. WEINER: - - - but that's earlier, with
2 due respect - - -

3 JUDGE GRAFFEO: - - - on the waiver of
4 appeal.

5 MR. WEINER: But as - - - this court has
6 recently handed down several decisions where the
7 waiver of appeal is construed - - - especially when
8 the sentence is open, as it was in this case. There
9 was a waiver of appeal with respect to the admission
10 of a commission of a crime, but I - - -

11 JUDGE SMITH: Well, I mean, I assume - - -
12 I assume you argue that the - - - the YO ruling is
13 itself not waivable.

14 MR. WEINER: That is correct.

15 JUDGE SMITH: And if it's not waivable,
16 then I suppose you would also argue then you can't
17 waive the right to appeal from it.

18 MR. WEINER: Are you - - - that's correct,
19 Your Honor.

20 JUDGE SMITH: Yeah, but I - - - I guess I'm
21 - - - I'm hung up on the first point. McGowen - - -
22 McGowen says it has to be preserved. You say
23 overrule that. I am suggesting, even if we overrule
24 that, we're still not done. We have to find it
25 nonwaivable, don't we?

1 MR. WEINER: Well, the waive - - -

2 JUDGE SMITH: There's a difference between
3 waiver and preservation.

4 MR. WEINER: The waivable aspect is the - -
5 - is as - - - I think it's the Jones case, the
6 Johnson - - - one of the recent cases out of this
7 court whereby they said a waiver is applicable only
8 to the crime but not to the - - - not to the penalty.
9 I think it's - - - hold on.

10 JUDGE SMITH: I don't remember the name
11 either, but I know the one you mean.

12 MR. WEINER: Pardon?

13 JUDGE SMITH: I think we're - - - well,
14 we'll figure it out. Don't worry about it.

15 MR. WEINER: It's - - - it's People v.
16 Johnson and Mar - - - the Maracle case and the
17 Johnson case which I cite in my reply brief.

18 JUDGE GRAFFEO: What's the ramification
19 beyond this particular young man?

20 MR. WEINER: The ramification - - -

21 JUDGE GRAFFEO: Is this going to mean that
22 - - - that everyone that had a - - - say, sentenced
23 as a predicate felon is going to be able to come back
24 in now and claim - - -

25 MR. WEINER: I think - - - I think we have

1 to - - -

2 JUDGE GRAFFEO: - - - claim that - - -

3 MR. WEINER: No, I think - - -

4 JUDGE GRAFFEO: - - - the court didn't

5 address my YO status - - -

6 MR. WEINER: I - - - I don't think so.

7 JUDGE GRAFFEO: - - - and we're going to

8 have to deal with all of those cases?

9 MR. WEINER: I think this has to be said in

10 clarification of the language, and I think the - - -

11 it should be going - - - going forward, the courts

12 have to make this kind of independent determination

13 and not accept - - -

14 JUDGE SMITH: What about - - - what about a

15 case - - - what about a case like yours in which they

16 did not do it, but the case is still on direct

17 appeal? What happens to that case?

18 MR. WEINER: I think - - - I think that the

19 court should make that determination.

20 JUDGE SMITH: You're - - - you're saying,

21 okay, so they go back and make a YO determination.

22 MR. WEINER: Yes.

23 JUDGE SMITH: You're not telling them how

24 to make it; it's not the end of the world.

25 MR. WEINER: That's correct.

1 CHIEF JUDGE LIPPMAN: But the repercussion
2 - - - but I gather your - - - your basic objective
3 here is really a policy one that's important, as in
4 this case, that the kid's life is not ruined because
5 the statute isn't followed and there's no
6 determination as to YO.

7 MR. WEINER: That - - - that's correct,
8 Your Honor.

9 CHIEF JUDGE LIPPMAN: YO status is
10 important for that reason?

11 MR. WEINER: It's critical for that reason
12 because this - - -

13 JUDGE GRAFFEO: Then what - - - what's the
14 remedy here? Does it go back to the judge to decide?

15 MR. WEINER: No. Unfortunate - - - the
16 court should make that - - - but in this specific
17 case, I would like this court to issue an order
18 directing the court below to give him youthful
19 offender status.

20 JUDGE GRAFFEO: Do we - - - do we do that?
21 Do you have any precedent for us doing that? Don't
22 we normally remit - - -

23 MR. WEINER: I do not - - -

24 JUDGE GRAFFEO: Don't we normally - - -

25 MR. WEINER: I do not normal - - - I do not

1 - - -

2 JUDGE GRAFFEO: - - - remit to the lower
3 court to exercise its judgment?

4 MR. WEINER: Yeah, but you may - - - you
5 may very well set forth your - - - in appropriate
6 language that the court will understand what you're
7 saying.

8 JUDGE SMITH: You - - - you want the most
9 you can get, but wouldn't it - - - yeah - - -

10 MR. WEINER: Of course.

11 JUDGE SMITH: But it is a possible result
12 that we would - - - even if we agree with you, we
13 would remit to the trial judge to consider de novo
14 whether this guy should get YO.

15 MR. WEINER: That's correct.

16 CHIEF JUDGE LIPPMAN: And you would be
17 happy if you got that?

18 MR. WEINER: I would be happy if he
19 received - - - because, again, I'm actually surprised
20 at how this - - - again, speaking of Mr. Rudolph, I'm
21 highly impressed by how he's create - - - turned his
22 life around. Even the - - - as you know from the
23 record, he was released from jail at a year and a
24 half - - -

25 CHIEF JUDGE LIPPMAN: Yeah.

1 JUDGE PIGOTT: He almost had to, though. I
2 mean, this is not - - - this is fairly routine. I
3 get the point that, you know, you got to somehow, I
4 guess, put it on the record. But the DA can quite
5 often say, you know, when you're charged with three
6 B's and two C's and you're a major drug dealer as far
7 as we're concerned, weren't you - - - if you want YO,
8 you're going to have to get a jury to give it to you.

9 MR. WEINER: Well, that - - - that's - - -
10 well, again, I - - - again, in earlier cases before
11 the - - - the courts have said you can't - - - the DA
12 can't tell you - - - tell the court what to do.

13 JUDGE PIGOTT: Right, but it can tell a
14 defendant.

15 MR. WEINER: The court - - - the court has
16 to make an independent determination. In fact, I
17 think there were - - - there are several cases out of
18 the Fourth Department to that effect.

19 JUDGE PIGOTT: Right, but they can tell a
20 defendant.

21 MR. WEINER: Hum?

22 JUDGE PIGOTT: The DA can tell the
23 defendant.

24 MR. WEINER: He can tell the defendant, but
25 then the defendant can say, okay, but - - - but in

1 this case, that didn't even happen. The - - - the
2 defendant was sitting in court, the lower - - - the
3 DA brought up the issue. He sat there, again, not
4 knowing what the ramifications were of being an
5 adult, treated as an adult versus the youthful
6 offender. And no one explained to him that by going
7 this way - - -

8 CHIEF JUDGE LIPPMAN: Well, that's what you
9 want, right?

10 MR. WEINER: Yeah.

11 JUDGE PIGOTT: What do you interpret in the
12 PSI where it says it's deferred, YO status, it said,
13 deferred.

14 MR. WEINER: Well, they defer it to the
15 judge's decision.

16 JUDGE PIGOTT: That what it stands for?

17 MR. WEINER: That's the way I read it.

18 CHIEF JUDGE LIPPMAN: Okay.

19 MR. WEINER: That's the way I read it.

20 Again, I would like - - -

21 CHIEF JUDGE LIPPMAN: Thank you, counsel.
22 Appreciate it. You'll have your rebuttal.

23 MS. DAVENPORT: May it please the court,
24 Emilee Davenport for the People, the respondent in
25 this case.

1 CHIEF JUDGE LIPPMAN: Counsel, what - - -
2 why the - - - why is not the consequence here on this
3 defendant so great that - - - that we shouldn't at
4 least have the judge make a ruling on this?

5 MS. DAVENPORT: Your Honor, he - - -

6 CHIEF JUDGE LIPPMAN: Why would that not be
7 a good policy approach? YO can be so important to
8 the individual kid, you know, even if he's someone
9 accused of - - - of a relatively serious offense?

10 MS. DAVENPORT: Even representing the
11 prosecution, Your Honor, we understand that YO status
12 is something that is very important to many youths.

13 CHIEF JUDGE LIPPMAN: So why shouldn't the
14 judge always rule on it? Why, just from a common
15 sense - - - put aside whether you read the statute
16 that way or not, why isn't it a good thing to let
17 judge rule on the YO status?

18 MS. DAVENPORT: Judge, for best practices,
19 I can't say that it wouldn't be a bad thing; however,
20 in this case, I think if you look at the record, the
21 judge did make a tantamount decision that the
22 interest of justice would not be served by granting
23 this particular individual that status. If we look
24 at the record - - -

25 JUDGE SMITH: So you - - - you're saying

1 that either there was no waiver or the waiver was
2 ignored?

3 MS. DAVENPORT: I apologize. Which waiver,
4 Your Honor?

5 JUDGE SMITH: Waiver - - - you're saying
6 that the - - - it was not part of - - - I thought it
7 was part of the plea deal. I thought the prosecutor
8 at least said, in the hearing of the defendant, YO is
9 not part of this plea deal, meaning he can't get it.

10 MS. DAVENPORT: That's correct, Your Honor.
11 It was an express condition of the plea agreement
12 which we - - -

13 JUDGE SMITH: Okay. What - - - what's the
14 - - - I think the real - - - my understanding of what
15 the chief was asking you is why would it be bad to
16 say you can't waive that; the judge always should
17 consider YO whether - - - even if the prosecutor
18 wants to insist, as part of a plea bargain, that he
19 can't. What - - - what would be bad about that rule?

20 MS. DAVENPORT: I think what would be bad
21 about that, Your Honor, is that it would - - - it
22 would have a chilling effect on the types of
23 negotiations that the prosecution is willing to
24 engage in with the defendant. And in this case, as
25 the record is very clear - - -

1 JUDGE SMITH: I mean, I see the point - - -
2 go - - - go ahead, go ahead.

3 MS. DAVENPORT: Sorry, Judge. This case is
4 not a situation like under 720.21(b) where youthful
5 discretion - - - or youthful offender status is
6 mandatory. This is all discretionary. It's not
7 taking away a right from - - -

8 JUDGE SMITH: I mean, I guess - - - I see
9 your point that maybe prosecutors will not be in such
10 a big hurry to offer pleas if they can't exclude YO,
11 but as a practical matter, is it - - - I mean, they
12 can all - - - the prosecutor can always urge the
13 judge not to give YO. The prosecutor can call to the
14 judge's attention all the facts that they think weigh
15 against youthful offender treatment. A prosecutor is
16 really going to say, I'm not going to offer a plea
17 because the judge might overrule me and make this guy
18 a youthful offender?

19 MS. DAVENPORT: I would like to think that
20 most prosecutors would not do that, Your Honor;
21 however - - -

22 JUDGE PIGOTT: I'm not so sure. I mean,
23 you - - - I guess you make the point in your brief
24 that this guy, in your view at least, is a major drug
25 dealer, and I would think that you'd say, I don't

1 want that hidden; I think this guy's a bad actor and
2 - - - and as he went on to do - - - I mean, he wanted
3 shock treatment, he wanted CASAT, whatever that
4 stands for, and - - - and I guess the DA - - - you
5 know, I don't know if he took a position on that, but
6 he knew what his options were and the idea that he
7 can - - - can be charged with three Bs and two Cs and
8 then have it buried so that no one else in the
9 world's going to find out about it, I would think,
10 would be a factor that the DA would want to take into
11 consideration at this time.

12 MS. DAVENPORT: Well, it certainly was in
13 this case. I'm just talking on a - - - in a general
14 sense as to what the judge asked me. I don't think
15 most prosecutors would go that harsh. But in this
16 specific case, Judge, the record's clear. He was a
17 big-time drug dealer. He was seventeen years old,
18 but he was a seventeen-year-old who had more than - -
19 - nearly 400 packets of - - -

20 JUDGE SMITH: Okay. But why can't the
21 judge figure all this out? Why - - - why do you have
22 to get a waiver of Y - - - of YO treatment as part of
23 the plea deal? Why can't you have the judge look at
24 the - - - the pre-sentence investigation and say,
25 hey, he's a major drug dealer; he's not getting YO.

1 MS. DAVENPORT: I think the judge certainly
2 can, Your Honor. I don't think there's anything
3 prohibiting him - - -

4 JUDGE SMITH: So why shouldn't we overrule
5 McGowen and go further and say that - - - that the -
6 - - that when the statute says "must", it means must?

7 MS. DAVENPORT: Well, Your Honor, if I may
8 address the language of the statute, and I think
9 McGowen was properly decided, because the court's not
10 taking away anything that a youthful - - - a young
11 person is entitled to. I think we would be in a
12 different situation if we were under 720.21(b).
13 Here, we're under 77 - - - 720.21(a), that
14 discretionary issue.

15 And I think the court, looking at the
16 language of that subsection 1, it says that the court
17 must pronounce - - - or make the determination when
18 pronouncing sentencing - - - for pronouncing
19 sentencing. It doesn't say that the court must
20 pronounce that the defendant is a YO or not. And if
21 you look at that language, the way I read it, Your
22 Honor, and I may be mistaken, but I'm reading it the
23 way it flows.

24 If we go to 720, I'd just like to read
25 directly from the language of 1. It says, "Upon a

1 conviction of an eligible youth, the court must order
2 a pre-sentence investigation of the defendant. After
3 the receipt of that written report of the
4 investigation and at the time of pronouncing sentence
5 - - - the court must determine whether or not someone
6 is a youthful offender. And it goes on to say that
7 it's in - - - with regards to these criteria, what I
8 keep referring to as (a) and (b).

9 JUDGE SMITH: Why - - - why isn't - - - why
10 is it inconsistent on its face with that language for
11 the DA to say, before there's been a pre-sentence
12 investigation, at the time of the plea, YO is off the
13 table?

14 MS. DAVENPORT: Why would it be
15 inconsistent, Your Honor?

16 JUDGE SMITH: Yeah. Why is that not a
17 violation of plain language of this statute?

18 MS. DAVENPORT: I think it's not
19 inconsistent in the context of a discretionary. I
20 think would be in the context of a mandatory youthful
21 offender.

22 JUDGE SMITH: But it's not - - - well, but
23 it's not discretionary for the judge; it's
24 discretionary, and the judge can do what he wants.

25 MS. DAVENPORT: Correct.

1 JUDGE SMITH: But the words "the court must
2 determine" and when he must determine, it doesn't
3 look discretionary.

4 MS. DAVENPORT: At the time of sentencing.

5 JUDGE SMITH: Yeah. And so here, it got
6 determined at the time of plea.

7 MS. DAVENPORT: Correct. It's made prior
8 to.

9 JUDGE SMITH: So why isn't that wrong?

10 MS. DAVENPORT: I think it's not wrong,
11 Your Honor, because it's happening pre-negotiations.
12 It's something the defendant's on notice of. It's
13 something, at least in my county, that the court's on
14 notice of. These type of negotiations take place
15 with the court, and we don't enter into these pleas -
16 - -

17 JUDGE SMITH: I mean, I can understand the
18 practical point that if the judge, knowing what he
19 knew about the case, thought this were a good case
20 for YO, he would have found out at the time of plea
21 and the deal never would have been made.

22 MS. DAVENPORT: Correct.

23 JUDGE SMITH: But as a matter of formal
24 compliance with the statute, why doesn't the judge
25 have to preserve until the time of sentencing and

1 wouldn't fight on policies or the way the court would
2 like to change the direction of its jurisprudence.
3 What I'm arguing is respect to the specific case.
4 And I would submit to the court respectfully that
5 even if you change your jurisprudence, if you
6 overrule McGowen - - -

7 CHIEF JUDGE LIPPMAN: Right.

8 MS. DAVENPORT: - - - that this defendant,
9 this case should not be disturbed. Now, policy is
10 changing all over the state, as we're well aware.
11 I'm aware that the legislature - - -

12 CHIEF JUDGE LIPPMAN: But it comes to us -
13 - -

14 MS. DAVENPORT: - - - is changing.

15 CHIEF JUDGE LIPPMAN: - - - in this case.

16 MS. DAVENPORT: Correct, it does.

17 CHIEF JUDGE LIPPMAN: That's the problem.

18 MS. DAVENPORT: And I think it - - - you
19 have the opportunity, Your Honor - - - if the court
20 would like to change its jurisprudence, you have it
21 in this case, but that does not require you to change
22 the result of this specific case, and in fact, it may
23 be an example to be set that when someone is
24 convicted of these types of crimes when they're so
25 severe - - -

1 CHIEF JUDGE LIPPMAN: Counselor, but you're
2 not seriously saying that we should say we're going
3 to change our jurisprudence going forward, but in
4 this case that came to us, no, no, no; this is a bad
5 kid and we're not going to do it, when the judge is
6 going to make the ultimate decision anyway.

7 MS. DAVENPORT: The judge will make the
8 decision.

9 CHIEF JUDGE LIPPMAN: So - - -

10 MS. DAVENPORT: I just think it gives you
11 the opportunity.

12 JUDGE READ: Let me ask you this. Assuming
13 that we - - - we make a change, are - - - what are
14 the practical implications, or are there any, beyond
15 this case?

16 MS. DAVENPORT: As a prosecutor who does
17 not do just appeals, I do trials and pleas and local
18 courts, I see there being very many practical
19 implications. The defendant is entitled to have a
20 fair offer. I think the People are also entitled to
21 have follow-through on that offer. So we're going to
22 have defendants coming back and saying, guess what,
23 the court complied with the Court of Appeals decision
24 in McGowen, but it's not enough now; I want
25 everything back.

1 JUDGE SMITH: But it's - - - but the
2 defendant - - - I can see the pro - - - I mean, maybe
3 some of us have Catu in the back of our minds. I can
4 see the problem - - -

5 MS. DAVENPORT: Pardon?

6 JUDGE GRAFFEO: PRS.

7 JUDGE SMITH: Yeah, post-release
8 supervision. I can see the problem if we're saying
9 that everybody who - - - who didn't get the benefit
10 of this decision we might hypothetically make in
11 People v. Rudolph, he gets his plea back, but all - -
12 - all we're saying is that - - - all we would be
13 saying is that the judge - - - in some number of
14 cases, the judge has to take a look and see whether
15 this is an appropriate case for YO. And if it is, it
16 isn't, and if it's - - - if it is, it is, and if it's
17 not, it isn't. Why is that so terrible?

18 MS. DAVENPORT: I would not argue to the
19 court that it is so terrible.

20 JUDGE PIGOTT: Well, it's more than that
21 because I think, it seems clear on this record, that
22 he did - - - or she did, I don't know who the judge
23 was - - - but it's not on the record. I mean, it
24 seemed to me from the very beginning everybody knew
25 this wasn't going to be a YO case, and - - - and

1 that's the way it was handled because 720 got
2 switched, you know, from pre-plea to post-plea. The
3 PSI said exactly what he was supposed to; it's up to
4 you, Judge. And the judge said, I'm not doing it,
5 it's not on the record.

6 MS. DAVENPORT: Correct. The only thing I
7 think that is arguably on the record that could be
8 construed as tantamount to that finding is when the
9 defendant says, I'd like to have a shock
10 recommendation, and the judge says, no way, not based
11 on the amount of money you had, not based on the
12 drugs and the activity alleged. That is what we
13 would argue as tantamount to a statement that the
14 interests of justice simply wouldn't be served by
15 granting you the protections of a YO status.

16 JUDGE SMITH: Does the - - -

17 CHIEF JUDGE LIPPMAN: Okay, counsel - - -
18 I'm sorry. Judge Smith.

19 JUDGE SMITH: But doesn't - - - doesn't the
20 - - - I mean, I understand your point, but doesn't
21 the statute require that the judge make that decision
22 formally at a specific time after he's read the pre-
23 sentence report?

24 MS. DAVENPORT: The statute does literally
25 state that.

1 JUDGE SMITH: And why - - - why shouldn't -
2 - - even though it might - - - might well not change
3 the result here, but why should we not require
4 literal compliance with the statute?

5 MS. DAVENPORT: In this case and at this
6 point, the way the legi - - - or excuse me - - - the
7 jurisprudence has operated, it hasn't been a
8 requirement of the courts.

9 JUDGE SMITH: I - - - yeah. Why should we
10 not change our law?

11 MS. DAVENPORT: I think there's always a
12 good reason to have best practices. So should the
13 court change it in the future? I can't say that I
14 have a straight-faced objection to that. Everyone is
15 entitled to the best practice. If the court changes
16 that, quite frankly, I would say, so be it. But I am
17 saying that I don't think it's - - - should be
18 applicable to this case.

19 CHIEF JUDGE LIPPMAN: Okay. Thanks,
20 counselor.

21 MR. WEINER: Thank you.

22 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

23 MR. WEINER: I do not think that the judge
24 below even considered the issue of a youthful
25 offender.

1 JUDGE PIGOTT: Well, look at it this way -
2 - -

3 MR. WEINER: He said this is part of the
4 deal.

5 JUDGE PIGOTT: You know, when we talked
6 about PRS, the - - - the argument from the defendants
7 are, gee, I didn't know that I was going to be
8 subject to post-release supervision. And we said,
9 okay, so we're going to resentence you. Now, if this
10 defendant wants to say, gee, I didn't know that I
11 could have gotten a YO out of this thing; therefore I
12 want to vacate my plea and I want to go to trial on
13 three B's and two C's, that's fine. But - - - but
14 I'm not sure that that's - - - these are the same
15 thing.

16 MR. WEINER: The position of a defendant is
17 basically in accordance with this court's opinion, he
18 - - - he waived any appeal with respect to the guilt,
19 but this issue of sentence - - -

20 JUDGE SMITH: Is he - - - is he asking for
21 his plea back?

22 MR. WEINER: No. He's - - - he's admitting
23 to his plea, but he wants youthful offender
24 sentencing.

25 JUDGE READ: Could he? Could he ask for

1 his plea back? He could, couldn't he?

2 MR. WEINER: I don't think so.

3 JUDGE READ: No?

4 MR. WEINER: I - - - I don't think so.

5 JUDGE SMITH: I mean, he knew - - - he took
6 the plea.

7 MR. WEINER: He took the plea.

8 JUDGE SMITH: He took the plea under an
9 assumption less - - -

10 MR. WEINER: And again he - - -

11 JUDGE SMITH: - - - under an assumption
12 less favorable to himself than the - - - if we
13 reverse here, he got a better plea than the one he
14 agreed to.

15 MR. WEINER: Oh, but again, at the time - -
16 - the sentencing was so open as part - - - part - - -
17 you know, was between one year - - - two years and
18 nine years as to - - - but they kept it - - - that he
19 didn't - - -

20 JUDGE PIGOTT: There's a cooperation
21 component, too, right?

22 MR. WEINER: There's a cop - - -
23 cooperation component. And I was - - - again,
24 completely within the discretion of the District
25 Attorney - - - of the District Attorney's office.

1 They had - - - they had everything in their hands and
2 they - - - we had a kid here who just wanted to get
3 rid of this and go on with his - - - start a - - -
4 start a new life, and he did. He went to jail and
5 got out of there faster than he should have because
6 he - - - was how hard he worked.

7 CHIEF JUDGE LIPPMAN: Okay, counselor.
8 Thanks.

9 MR. WEINER: Thank you.

10 CHIEF JUDGE LIPPMAN: Thank you both.
11 Appreciate it.

12 (Court is adjourned)

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I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Reece Rudolph, No. 131 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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