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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 178

MARK JURGINS,

Appellant.

20 Eagle Street
Albany, New York 12207
October 22, 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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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Jurgins,
2 number 178.

3 Counsel, you want any rebuttal time?

4 MS. PACKARD: Two minutes, Your Honor.

5 CHIEF JUDGE LIPPMAN: Go ahead.

6 MS. PACKARD: May it please the court, Lisa
7 Packard on behalf of Mark Jurgins. Your Honors, Mark
8 Jurgins' sentence is unlawful as revealed by a strict
9 equivalency analysis of the D.C. robbery statute. In
10 short, there is no way to charge robbery under the
11 D.C. statute without encompassing misdemeanor-level
12 conduct.

13 JUDGE PIGOTT: Is there - - -

14 CHIEF JUDGE LIPPMAN: Is that - - - go
15 ahead, I'm sorry.

16 JUDGE PIGOTT: I was going to - - - is
17 there no way or should there be a hearing as to
18 determine exactly the facts underlying his plea?

19 MS. PACKARD: There is no way when we look
20 at - - - at it on its face, and that's because the
21 operative act elements always encompass misdemeanor-
22 level conduct because - - -

23 JUDGE PIGOTT: Right, but could we have a
24 hearing and say did you pick the pocket or did you
25 put a knife to the guy's throat? I mean, could we -

1 - - you use - - -

2 MS. PACKARD: Under this - - - under this
3 court's strict equivalency test, it's irrelevant,
4 because we don't look to the underlying facts; we
5 look to whether or not the operative - - -

6 CHIEF JUDGE LIPPMAN: If it's evident on
7 its face, that's the end of the story?

8 MS. PACKARD: That's the end of the
9 analysis there, and that's exactly what we have going
10 on here. And actually, the strict equivalency test -
11 - -

12 CHIEF JUDGE LIPPMAN: How is it evident on
13 its face?

14 MS. PACKARD: Because neither of the
15 operative act elements listed in the statute require
16 force or the threatened use of immediate force and
17 therefore - - -

18 JUDGE PIGOTT: If - - - if the - - - if the
19 statute were turned around, if the - - - if the - - -
20 if the statute was a felony and - - - and not
21 necessarily your client but the next one said, sure,
22 it says felony, but I didn't - - - you know, all I
23 did was pick a pocket, I didn't use a knife, I didn't
24 use - - - did anything violent, would we be saying
25 we're really sorry, but you're a - - - you're a - - -

1 you're a felon just as if you did use a knife because
2 that's the - - - the - - - the strict app - - -
3 application of the statute? That wouldn't be fair,
4 it seems to me.

5 MS. PACKARD: I don't know how - - - I
6 don't know how a defendant would be convicted under a
7 foreign statute for pickpocketing unless that statute
8 did encompass non-felony level conduct in New York.
9 So - - - and that's exactly what's going on here.
10 The - - - the "whoever by force or violence" language
11 includes within it pickpocketing. That's grand
12 larceny in the fourth degree here in New York, the
13 attempt of which is a misdemeanor.

14 JUDGE RIVERA: So do we have - - - do we
15 have to look at D.C. case law, D.C. judicial
16 determinations, to figure out whether or not you're
17 correct when you say - - - because this is the
18 dispute with your adversary - - - when you say the
19 statute is strict - - - on strict equivalence, you
20 can just look at its face because, as you say, the
21 operative acts don't require force.

22 MS. PACKARD: That's right.

23 JUDGE RIVERA: Right, how do I know that
24 for - - - how do I know by reading the statute we're
25 talking about acts or the way you do something or

1 something else?

2 MS. PACKARD: So we looked to D - - - we do
3 look to the D.C. case law, and actually this court -
4 - -

5 JUDGE RIVERA: But I can't just look at the
6 statutes, correct?

7 MS. PACKARD: Right, so we look at the
8 statutes and sometimes - - - actually, you know,
9 sometime - - -

10 JUDGE RIVERA: No, in this case, can I just
11 look at that statute and know or do I have to go to
12 D.C. case law to figure this out?

13 MS. PACKARD: In this case, you have to go
14 to D.C. case law to figure out that force or violence
15 doesn't actually require force or violence. It's
16 sort of a counterintuitive statute, and the D.C. case
17 law is pretty clear showing us that D.C. expanded the
18 common law definition of robbery to include
19 pickpocketing which is punishable as an A misdemeanor
20 as jostling or the attempt of grand larceny in the
21 fourth degree.

22 JUDGE FAHEY: Yeah, that's the stealth or
23 sneakily taking or whatever, but what about the
24 putting in fear section?

25 MS. PACKARD: That also doesn't require

1 force or the - - - or the thre - - - or the
2 threatened immediate use of force. And so on its
3 face - - -

4 JUDGE FAHEY: You know what I'm wondering
5 about is - - - is it seems like Yusuf, which is a
6 Court of Appeals case - - - I'm not sure our court -
7 - - this Court of Appeals case - - - seems to provide
8 the basis for the exception that - - - for looking at
9 the foreign accusatory instrument, and I'm having a
10 difficult time seeing how you would distinguish the
11 court's application of that. Are you familiar with
12 it?

13 MS. PACKARD: With - - - with this - - -
14 with this court's - - -

15 JUDGE FAHEY: Yusuf.

16 MS. PACKARD: - - - case in Yusuf?

17 JUDGE FAHEY: With Yusuf, Y-U-S-E-F (sic),
18 okay. I hate tricking people, you know, and asking
19 them if they're familiar and - - -

20 MS. PACKARD: That involved a North
21 Carolina statute; is that right?

22 JUDGE FAHEY: I'm not sure about that, but
23 - - - but it seems to be on all fours with this case
24 in that it requires - - - it allows the court to
25 scrutinize the accusatory instrument of force

1 jurisdiction here that would be D.C. if the statute
2 renders not one act, but several acts, criminal; and
3 that's what - - - what I would say that if - - - if
4 that seems to be the case with the D.C. statute, I
5 think you're right about that. So why can't the
6 court look directly at the D.C. accusatory instrument
7 - - - forget about a hearing, but the accusatory
8 instrument?

9 MS. PACKARD: Okay, so I would actually
10 disagree that it's like Yusuf. It's actually
11 schematically more like Olah or Muniz where there's
12 an operative element that must be alleged in the
13 indictment, no matter what, in order to charge a
14 defendant that will always include possibly felony-
15 level conduct but also misdemeanor-level conduct.

16 JUDGE FAHEY: So how would you characterize
17 the D.C. statute? Is this a felony and a
18 misdemeanor?

19 MS. PACKARD: It encompasses both felony-
20 level conduct and misdemeanor-level conduct however
21 it's charged in D.C. Of course, we do have the
22 accusatory instrument here in this record by way of
23 the 440.20 motion, and it alleges the "whoever by
24 force or violence" language which includes
25 pickpocketing.

1 JUDGE PIGOTT: You don't think this is an
2 Olah exception?

3 MS. PACKARD: No. No, we do not think it's
4 an Olah exception because both of the operative act
5 elements, however you interpret the statute, include
6 both felony-level and misdemeanor-level conduct, so
7 the analysis ends there.

8 And actually, the exception is rarely
9 invoked. The strict equivalency test commands or
10 directs that usually the inquiry is limited to a
11 comparison of the operative elements as they're
12 defined in the - - - in the relevant statutes, and so
13 the analysis ends there and the preservation
14 requirement falls away. And we need no - - - we need
15 not go any further than that.

16 JUDGE ABDUS-SALAAM: Counsel, was the D.C.
17 - - - you - - - you said earlier that we don't
18 necessarily look to the statute alone, we have to - -
19 - we could look at or we need to look at D.C.
20 decisions, the law from D.C. So are there decisions
21 that interpret the statute differently or are they
22 consistent in interpreting the statute the way that
23 you claim the statute should be interpreted?

24 MS. PACKARD: They're largely consistent.
25 It's a bizarre statute in that the phrase "force or

1 violence" doesn't actually require force or violence.
2 The case that was recently provided by my adversary
3 to the court does contemplate that robberies - - - by
4 putting in fear might be a separate way of committing
5 robbery, but again, that kind of robbery does not
6 require force or the threatened use of force.

7 So under any iteration or interpretation of
8 the statute - - - and if we look to - - - to U.S. v.
9 Turner which is sort of the seminal case on the issue
10 in D.C., that interprets the statute as all of the
11 language coming after "whoever, force or violence",
12 modifying that language to include pickpocketing.

13 So it's fairly clear from the case law that
14 however the statute is written, pickpocketing,
15 stealthy seizures, or snatchings are always included,
16 and so for that reason on its face, it fails. And
17 Mr. Jurgins, having been sentenced on the basis of
18 this D.C. statute, his sentence is unlawful and it
19 must be vacated and there should be a remand so that
20 he can be resentenced - - -

21 JUDGE RIVERA: Could we talk about whether
22 or not - - -

23 MS. PACKARD: - - - lawfully.

24 JUDGE RIVERA: - - - you can bring this on
25 the 440.20?

1 MS. PACKARD: Pardon me?

2 JUDGE RIVERA: Can we talk about the 440.20
3 issue?

4 MS. PACKARD: Sure.

5 JUDGE RIVERA: Please.

6 MS. PACKARD: So - - -

7 JUDGE RIVERA: Can he raise this claim
8 through a 440.20?

9 MS. PACKARD: Absolutely, that's - - - it's
10 the appropriate mechanism for challenging an unlawful
11 sentence. He did so before the direct appeal. It
12 was consolidated with the direct appeal and brought
13 properly before this court, and in challenging his
14 sentence, he made the - - - the very same arguments
15 that he's making here. This court has contemplated
16 that 440.20 is the appropriate mechanism for
17 challenging unlawful predicates, namely in People - -
18 -

19 JUDGE RIVERA: In Samms?

20 MS. PACKARD: - - - People v. Loughlin;
21 Samms, I think, was just raised on direct appeal
22 because the chronology requirement was just apparent
23 from the face of the record. Loughlin sai - - -
24 Loughlin addressed a defendant who was trying to
25 challenge his second felony offender adjudication

1 from a previous case, and this court said that his
2 failure to do so on direct appeal or by post-
3 judgement motion - - - appropriate post-judgment
4 motion barred him from making that claim in that
5 subsequent proceeding. But - - -

6 JUDGE STEIN: So if - - - if we remand, can
7 - - - can - - - can the People file a new predicate
8 statement - - -

9 MS. PACKARD: Yes, they - - -

10 JUDGE STEIN: - - - based on another crime?

11 MS. PACKARD: - - - yes, they can, Your
12 Honor.

13 JUDGE STEIN: They can.

14 MS. PACKARD: If there are - - - if there
15 are proper predicates to be filed, they can submit a
16 statement with those predicates and at that time,
17 those issues can be litigated; they can swap in
18 whatever predicates exist at that time. That's
19 correct, Your Honor, and that would be - - - that
20 would be the appropriate procedure.

21 JUDGE PIGOTT: The Appellate Division
22 raised an issue of preservation. What did - - - what
23 did you think of that?

24 MS. PACKARD: Unlawful sentences are just
25 not subject to the preservation requirement. It's

1 rooted in a - - - in a policy rationale that is well
2 established and pronounced by this court. Unlawful
3 sentences cannot stand so long as the error is
4 readily discernible from the trial record.

5 And since the strict equivalency test,
6 generally speaking, does confine us to the trial
7 record, as it does here, there's simply no basis for
8 not reviewing this claim. And - - - and Samms
9 addresses this as well. So long as the error is
10 apparent to the court, preservation is - - - it's a
11 narrow exception to the preservation requirement.

12 JUDGE STEIN: Could we consider - - - if we
13 felt that preservation was required, could we
14 consider the 440 motion as - - - as preserving the
15 issue?

16 MS. PACKARD: Absolutely, and because of
17 this court's case in People v. Loughlin. Again,
18 because it addresses the fact that it's appropriately
19 brought on direct appeal or by post-judgment motion
20 in that case. So, you know - - - and being part of
21 the consolidated judgment which is now before this
22 court, it's a question of law regarding the legality
23 of the sentence which is a prop - - - is properly
24 before this court.

25 CHIEF JUDGE LIPPMAN: Okay, anything else,

1 counsel?

2 MS. PACKARD: Unless Your Honors have any
3 further questions.

4 CHIEF JUDGE LIPPMAN: Thank you, counsel.
5 Counsel.

6 MS. RENO: May it please the court,
7 Catherine Reno for the Office of the Bronx District
8 Attorney. Defendant here waived his claim that his
9 prior conviction - - -

10 CHIEF JUDGE LIPPMAN: Even if it's evident
11 on the face?

12 MS. RENO: It isn't evident on the face of
13 the record here.

14 CHIEF JUDGE LIPPMAN: Why isn't it evident
15 on the face?

16 MS. RENO: Well, to - - - first of all,
17 this is a very complex analysis, if only just by
18 looking at the briefs; it's - - - it's clear that
19 there are many steps that courts have to go through
20 in order to determine whether a predicate is the
21 equivalent of a New York felony.

22 JUDGE RIVERA: Or isn't it just you're
23 going to look at the - - - the statute and if you
24 need to look at the D.C. case law, you do so?

25 MS. RENO: Well - - -

1 JUDGE RIVERA: And it may be complex
2 analysis, but that's all you have to do, right?

3 MS. RENO: That is, but this - - - this
4 court in - - - has only found an exception to the
5 preservation requirement when the illegality is
6 readily discernible from the face of the record, such
7 as in Samms where there was an undisputed
8 sequentiality issue, or in Santiago where the court
9 didn't need to look at anything at all outside the
10 record. The parties agreed that the - - - the
11 equivalent New York statute was manslaughter in the
12 second degree, and the defendant's date of birth and
13 the date of his prior Pennsylvania conviction were
14 right there on the record in the pre-sentence report.

15 JUDGE RIVERA: Appellate Departments
16 usually look at - - - when necessary, at case law?

17 MS. RENO: I'm - - - I'm sorry, I didn't -
18 - -

19 JUDGE RIVERA: Do Appellate Departments
20 usually look at case law?

21 MS. RENO: It - - - it - - - it has been
22 done, but that only highlights why this isn't evident
23 from the face of the record, when this court has to
24 not only look at foreign statutes, potentially
25 foreign accusatory instruments, and then foreign case

1 law. This - - - the case Williams v. U.S., which the
2 D.C. Court of Appeals decided only six months ago,
3 makes clear that this could go on forever - - -

4 JUDGE RIVERA: If - - - if we agree with
5 you, does that mean that - - - let's assume for one
6 moment that it's not equivalent but let's assume
7 you're - - - you're correct that - - - that this is
8 waived, that - - - he's subject to an unlawful
9 sentence that he can never challenge?

10 MS. RENO: No, first of all, his sentence
11 is lawful. Eleven years is a completely legal
12 sentence and a lenient sentence for a first or second
13 felony offender. Beyond that, even though both
14 courts found that this claim was unpreserved and
15 waived, they both examined the merits in the
16 alternative, so it wasn't as if defendant was shut
17 out from his claim being heard. Both of these courts
18 looked into the claim.

19 JUDGE ABDUS-SALAAM: Counsel, I have a - -
20 - a practical question for you. You - - - you
21 indicated that the defendant had a long felony record
22 or an extensive one; why pick this particular felony
23 for the predicate? Why not - - - didn't he - - - did
24 he not have some New York felony that you could have
25 used for - - -

1 MS. RENO: He did not have any New York
2 felonies.

3 JUDGE ABDUS-SALAAM: No New York felonies.

4 MS. RENO: They were all in Washington
5 D.C., so he had committed this crime twice in
6 Washington D.C., but he didn't have any New York
7 felonies that could have been chosen.

8 JUDGE ABDUS-SALAAM: But he had a New - - -
9 did he have a D.C. felony that was clearly a felony?

10 MS. RENO: He had - - - he has escaped from
11 - - - escaped from prison, a felony cocaine
12 possession, and then these two.

13 JUDGE RIVERA: So if it gets sent back, you
14 have a felony you can swap in?

15 MS. RENO: Potentially; I - - - I can't say
16 for certain now, obviously more research would have
17 to be done, but potentially he - - - he does have a
18 myriad of other felonies that could be - - - could be
19 chosen.

20 JUDGE FAHEY: But the - - - this was
21 enhanced to twenty-five years, wasn't it?

22 MS. RENO: That's correct. And then the
23 Appellate Division, in the interest of justice,
24 reduced that to fifteen years, which again, is a
25 perfectly legal sentence for a first or second felony

1 offender.

2 JUDGE RIVERA: But his record will stay as
3 a - - - as a second felony offender, right?

4 MS. RENO: That's - - - that is correct.
5 If Your Honors have no further questions - - -

6 CHIEF JUDGE LIPPMAN: Thank - - - thank
7 you, counsel.

8 Counsel, rebuttal.

9 MS. PACKARD: Just a couple things, Your
10 Honor. There's no waiver of an unlawful sentence by
11 silence. That's addressed directly in Samms.

12 JUDGE STEIN: Well, but isn't fifteen years
13 a lawful sentence?

14 MS. PACKARD: Pardon me?

15 JUDGE STEIN: Isn't the fifteen years a
16 lawful sentence?

17 MS. PACKARD: It's - - - it's the predicate
18 adjudication that's unlawful, and so the violation of
19 the Penal Law scheme - - -

20 JUDGE RIVERA: It's the status?

21 MS. PACKARD: Right, exactly, the 70.06
22 Penal Law scheme, any violation of - - - any sentence
23 imposed in violation of those statutory mandates - -
24 -

25 JUDGE STEIN: Didn't - - - didn't we

1 require preservation in Smith where we were deal - -
2 - dealing with a federal - - - yeah.

3 MS. PACKARD: So Smith was - - - it - - -
4 it's unclear what's happening from that two-sentence
5 memorandum opinion exactly, but this court's
6 decisions in both Samms and Santiago limit and
7 explain what's really going on there. And the
8 concern that emerges from all of these cases is that
9 we're looking for a record that makes it readily
10 discernible that the sentence is unlawful.

11 So so long as the record reveals that - - -
12 I mean, Santiago disposes of the notion that there's
13 a blanket rule of preservation for foreign
14 predicates. And so long as the illegality is
15 apparent from the face of the record, then, you know,
16 there's no bar to preservation.

17 Waiver - - - just - - - just want to note,
18 too, waiver must be done by some knowing colloquy on
19 the record. There has to be some showing that the
20 defendant was aware that he was giving up his right
21 to be sentenced as provided by law.

22 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
23 you both. Appreciate it.

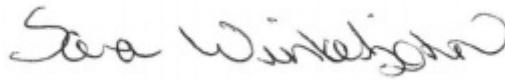
24 (Court is adjourned)

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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. Mark Jurgins, No. 178 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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