

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

COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

STEVEN LASHWAY,

No. 94
(papers sealed)

Appellant.

20 Eagle Street
Albany, New York 12207
May 7, 2015

Before:

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

Appearances:

MARCY I. FLORES, ESQ.
Attorneys for Appellant
PO Box 373
Warrensburg, NY 12885

NICHOLAS J. EVANOVICH, ADA
CLINTON COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
Clinton County Government Center
137 Margaret Street - Suite 201
Plattsburgh, NY 12901

Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 94, People v.
2 Lashway.

3 Counselor, do you want any rebuttal time?

4 MS. FLORES: Yes, please, thank you very
5 much. Two minutes if that's possible?

6 CHIEF JUDGE LIPPMAN: Two minutes?

7 MS. FLORES: If that's possible, thank you.

8 CHIEF JUDGE LIPPMAN: Yeah, go ahead,
9 counsel.

10 MS. FLORES: Mar - - -

11 CHIEF JUDGE LIPPMAN: Sure.

12 MS. FLORES: May it please the court, my
13 name is Marcy Flores, and I represent Steven Lashway
14 in this matter.

15 I think that Mr. Evanovich and I agree that
16 there are only two documents that are missing that
17 was not provided to my client for discovery, and it
18 was the - - - from the Department of Parole and from
19 the Attorney General's Office. All the other
20 documents were received. It is our contention that
21 my client should have been granted an adjournment so
22 that he could get those documents.

23 JUDGE ABDUS-SALAAM: But didn't know that
24 those documents were not in the file before you got
25 to the hearing?

1 MS. FLORES: In terms of whatever the
2 documents that the prior attorney had - - - she had -
3 - - I was not given them from her, or she did not
4 give them to me. I only have what was in the record.
5 So, yes, it's possible that she would've - - - not
6 have known about it. But she did request, through an
7 order to show cause, to get all the documents. And
8 as soon as the letter came in, which was July 27th,
9 indicating the documents are not there, that's - - -
10 you know, she realized they weren't there, and it
11 indicated it would take a few weeks to get those
12 documents. They were in storage.

13 So therefore, she - - - legitimately, in my
14 opinion - - - requested an adjournment on the day of
15 the hearing, so that she could get the missing
16 documents, because it is - - - the burden of proof is
17 on the defendant, as opposed to what my client said
18 in the record, we all understand that the burden of
19 proof is on - - - on the attorney - - - my client's
20 attorney to go forward with - - - with the
21 modification.

22 CHIEF JUDGE LIPPMAN: Counsel, what's the -
23 - - the practical consequence? Your - - - your
24 client is not out on the street.

25 MS. FLORES: I understand that.

1 CHIEF JUDGE LIPPMAN: What - - - what's the
2 consequence of the - - -

3 MS. FLORES: I believe that - - -

4 CHIEF JUDGE LIPPMAN: - - - lowering the -
5 - - the SORA rating?

6 MS. FLORES: I believe that my client will
7 continue to litigate everything possible so that he
8 can try to get out from underneath the commitment
9 that he is in. I know that he has several notices of
10 claims pending against people in the Department of
11 Corrections. He has nothing pending, but has filed
12 notice of claims.

13 But I also think this issue is important
14 for any defendant who is facing a - - - the
15 reclassification - - -

16 CHIEF JUDGE LIPPMAN: Yeah, but why does
17 your client have a right to the procedural
18 protections in - - - in this circumstance? It has -
19 - -

20 MS. FLORES: Because he feels - - -

21 CHIEF JUDGE LIPPMAN: - - - the same
22 importance as to any other - - -

23 MS. FLORES: I think so, because while he's
24 in Department of Corrections, he maintains that he is
25 being adversely affected by people in Department of

1 Corrections based on his SORA level. And if his
2 level was lower, that would give him a different
3 position in Department of Corrections, who has access
4 to his information and how he is treated.

5 JUDGE ABDUS-SALAAM: His SORA level of
6 Level 3 was because of his prior felony conviction
7 for a sex crime, correct?

8 MS. FLORES: Correct.

9 JUDGE ABDUS-SALAAM: And so he would have
10 been a presumptive Level 3 in any event?

11 MS. FLORES: Correct.

12 JUDGE ABDUS-SALAAM: And so I'm - - - I'm
13 just getting back to the two documents that you say
14 are missing, and I'm trying to understand how those
15 two documents would make a difference to his modifica
16 - - - or to his level - - -

17 MS. FLORES: No one has - - -

18 JUDGE ABDUS-SALAAM: - - - that they would
19 require a reduction of his level based upon his
20 background and what he's in - - - and he's also been
21 declared someone in need of supervision. He's
22 confined - - -

23 MS. FLORES: Yes.

24 JUDGE ABDUS-SALAAM: - - - under SUMPTA
25 (ph.), so I'm - - - I'm just a little confused about

1 how these two documents would help that.

2 MS. FLORES: Because we have no idea what's
3 in those documents. It indicates in her letter that
4 she reviewed them. She is not an attorney, so I
5 don't know if she reviewed and relied upon them, but
6 she indicates she reviewed them. We have no idea
7 what's in it. It may be something that would be
8 helpful to my client to defend his position, because
9 in the modification we have the burden of proof, and
10 there may be something in there that was part of the
11 basis for the board's decision. I understand his
12 prior history and I can't change what that is, but
13 there may be something in those documents that he may
14 - - -

15 JUDGE ABDUS-SALAAM: Well, I'm - - - I'm
16 suggesting, counsel, that whatever's in those
17 documents, would those whatever it is - - - would it
18 overcome his presumptive Level 3 rating, because he
19 has prior felony convictions for sex offenses, and he
20 is a convict - - - he's in confinement, and beyond
21 that, while he was confined, he's had a few instances
22 of, you know, problems. So I - - - I'm not sure what
23 could possibly be in those documents - - -

24 MS. FLORES: And until we see what are in -
25 - - what the documents are, I - - - it makes it hard

1 for me to tell you how I would be able to apply those
2 documents to his case, but there may be something in
3 there that we could use because we have the burden of
4 proof.

5 I also feel that the case, as I indicated
6 before, is important for any defendant doing a
7 reclassification, because it's our burden of proof.
8 And therefore if there's documents that are missing
9 that the board relied on or reviewed, and then we
10 don't know what they are - - -

11 JUDGE ABDUS-SALAAM: But the court didn't
12 rely on them, did - - -

13 MS. FLORES: The court did not - - -

14 JUDGE ABDUS-SALAAM: - - - the court never
15 relied on them.

16 MS. FLORES: The court did not indicate it
17 relied on it, but it is my - - -

18 JUDGE RIVERA: Well, you satisfied your
19 initial burden, because the court ordered them.

20 MS. FLORES: Correct, Your Honor.

21 JUDGE RIVERA: Right? So the court - - -

22 MS. FLORES: Yes.

23 JUDGE RIVERA: The court granted you access
24 to them - - -

25 MS. FLORES: Yes, and - - -

1 JUDGE RIVERA: - - - and - - - and it's not
2 like the State opposed it.

3 MS. FLORES: No, there was no opposition
4 whatsoever.

5 JUDGE RIVERA: It's just they were delayed
6 because of the location of the documents.

7 MS. FLORES: Right, because it was in a
8 remote storage location.

9 JUDGE RIVERA: The question boils down to
10 this adjournment request.

11 MS. FLORES: Yeah. In terms of - - - one
12 of the issues in terms of when you're talking about
13 an adjournment request, you have to look at the
14 court's control of its schedule and calendar. I
15 understand that. A lot of the cases that are cited
16 deal when it's a jury trial. You don't - - - there's
17 too many people involved, too much expense, too much
18 going on.

19 In terms of a SORA classification to - - -
20 reclassification to adjourn it, it is the transport
21 of the client back and forth from the Department of
22 Corrections or whatever location he is at. That is
23 not a huge expense, or a government expense, in terms
24 of this matter, versus on a jury trial when the - - -
25 when there's cases where someone wants an adjournment

1 to go over some paperwork or - - - or a newspaper
2 article, as the cases that have been cited.

3 So I feel that it is not a huge burden on
4 the government, and it's not a huge burden on the
5 court to adjourn it for a future date.

6 JUDGE RIVERA: But your client would access
7 to it on the next request, yes?

8 MS. FLORES: Right.

9 JUDGE RIVERA: You could demand it again?

10 MS. FLORES: Right, I believe that his
11 attorney was providing him with everything as she
12 received it in terms of there's no indication - - -

13 JUDGE RIVERA: But I'm saying a request for
14 another reconsideration - - -

15 MS. FLORES: Yes, he can always request
16 another modification, but I guess my position would
17 be that we requested the documents; they weren't
18 provided; it isn't a huge burden to have it adjourned
19 for two weeks or so.

20 JUDGE ABDUS-SALAAM: But that - - - did you
21 make that specific request for two weeks, or did you
22 make the request for whatever amount of time it would
23 take to get the documents?

24 MS. FLORES: The request specifically was
25 for the amount of time to get the documents. But in

1 the letter from Department of Corrections, it
2 indicated it would take approximately two weeks, so
3 that was where I got the time frame from.

4 CHIEF JUDGE LIPPMAN: Okay, counsel, you
5 have your rebuttal time.

6 MS. FLORES: And that's all, yeah.

7 CHIEF JUDGE LIPPMAN: Thanks.

8 MR. EVANOVICH: Thank you, Your Honors.
9 Good afternoon, and may it please the court.

10 CHIEF JUDGE LIPPMAN: Counsel, what's so
11 difficult of giving them the documents that they're
12 entitled to?

13 MR. EVANOVICH: Well, nobody had the
14 documents, Your Honor. The judge did not have them.
15 The People did not have them, and defense did not
16 have them.

17 CHIEF JUDGE LIPPMAN: So why shouldn't they
18 have them?

19 MR. EVANOVICH: Well, it's not - - - two -
20 - - two responses to that.

21 CHIEF JUDGE LIPPMAN: Why shouldn't - - -
22 well, if it takes a couple of weeks, it takes a
23 couple of weeks.

24 MR. EVANOVICH: It - - - that's a compound
25 question, Your Honor, in that - - -

1 CHIEF JUDGE LIPPMAN: Go ahead.

2 MR. EVANOVICH: Okay, in that, one, should
3 they have had them, and two, what about their - - -

4 CHIEF JUDGE LIPPMAN: Well, they're
5 entitled to them, aren't they?

6 MR. EVANOVICH: I would hesitate to say
7 automatically, Judge.

8 CHIEF JUDGE LIPPMAN: What does the - - -
9 what does the law say?

10 MR. EVANOVICH: Well, it's different than
11 what the dissent said, because it doesn't apply - - -
12 the discovery within 168-o - - - and this is a
13 reclassification; that's where the reclassification
14 is - - - is not as broad as at the initial
15 classification of 168-n, which - - -

16 JUDGE RIVERA: Well, the question is
17 whether or not due process requires more than what
18 the statute - - - the statute may be in violation of
19 due process. Isn't that what we've got to decide?

20 MR. EVANOVICH: No, Your Honor, that was
21 not brought up before this court, whether or not due
22 process was - - -

23 JUDGE FAHEY: But - - - but it was material
24 relied on by the board, isn't that the - - - the crux
25 here? Can you follow up a little bit on that?

1 MR. EVANOVICH: No, Your Honor, and - - -

2 JUDGE FAHEY: No?

3 MR. EVANOVICH: No, because the judge - - -
4 the board - - -

5 JUDGE RIVERA: But you reviewed it.

6 JUDGE FAHEY: So that's what the dis - - -
7 the - - - so you say the dis - - - dissent is
8 incorrect on that then?

9 MR. EVANOVICH: Certainly, Judge, and part
10 of it is, is the discovery of them, but the board - -
11 - and I - - - and I don't mean to mince words, so I
12 don't think this reviewed versus relied is even
13 necessary, because as the Judge pointed out in the
14 initial questions, this is a presumptive override
15 Level 3.

16 So even if we pretend those documents
17 contain positive information, it would not defeat the
18 presumptive override because of the two convictions.
19 So there's no prejudice to whether the board
20 reviewed, relied, whatever language we'd like to use.
21 There's nothing in those documents that could defeat
22 a presumptive override.

23 Now, do we want to - - -

24 JUDGE RIVERA: Why did you review them?

25 MR. EVANOVICH: Well - - -

1 JUDGE RIVERA: You reviewed them, did - - -

2 MR. EVANOVICH: - - - whether the board - -

3 - well, the board's review of that is, as the court
4 sees, through the letters in 2010 from Don Amsler
5 (ph.), and the letter in 2012 from Mr. Webber (ph.)
6 at A-1, the court sees that. A lot of this important
7 information goes beyond just the assessment itself.
8 There's this nice information certainly about this
9 defendant's background since he made his modification
10 petition.

11 So I think that they review - - - I think
12 the record supports - - - that they review this
13 information to place in their letter, but not as she
14 actually was - - -

15 JUDGE PIGOTT: The concern - - - the
16 concern, at least from my point of view, and it's
17 been argued before, is that these things get treated
18 really, really summarily. And maybe they should and
19 maybe they shouldn't. But if the law provides that
20 you're entitled to put this stuff before the court,
21 then, as Judge Lippman said, well, what's the big - -
22 - I mean, he's in. He's not going anywhere.

23 MR. EVANOVICH: Sure.

24 JUDGE PIGOTT: And if - - - if it took you
25 six months, get it in and get - - - and get the

1 record tight, so that you can justify what's going
2 on, because he's going to be back; you know he is.

3 MR. EVANOVICH: Certainly, Judge, and under
4 168-o, he could have been back the day after - - -

5 JUDGE PIGOTT: I know that, but you haven't
6 answered my question. What's the big deal? Why - -
7 - I mean, I don't understand why the judge wouldn't
8 say, call me when you get the records, and I'll
9 reschedule this hearing.

10 MR. EVANOVICH: The standard is not whether
11 another judge may have also grant - - - one judge
12 would grant an adjournment, one wouldn't. It's
13 whether this judge's decision was an abuse of
14 discretion.

15 JUDGE PIGOTT: Well, we're talking about
16 due process. I mean, we're talking - - - I mean,
17 suppose the - - - the e-mail is, regardless of what
18 happens, we noticed this guy really didn't do the
19 original crime, but we want to cover that up, so
20 whatever you do, don't bring up the fact that he's
21 innocent of the original charge.

22 Now, I don't think that's what it says, but
23 if it did, I would think it'd be material. And - - -
24 and those things you get a little worried about
25 sometimes.

1 MR. EVANOVICH: I'm certainly not arguing
2 that that information could have been material to
3 defendant's argument. My - - - our point here is ,
4 at the 168-o reclassification where the proponent - -
5 - the defendant in this case has the burden of proof
6 - - - 168-o is not like under the initial assessment
7 - - -

8 JUDGE PIGOTT: Let's assume for a minute
9 that the Department of Corrections is part of the
10 State of New York, which is the opponent to this
11 person. So are they going to say, oh, my goodness,
12 we better get this over there really, really quickly
13 because we want to help this person, who we're
14 arguing against, and who we hope stays with us for a
15 very long time. The - - - the evidence is in the
16 wrong hands. I'm surprised you even opposed this. I
17 would have thought you - - - the DA would have said,
18 let 'em.

19 MR. EVANOVICH: I think at this - - - I
20 think it's clear from the record, and the record
21 supports, that we were just attempting to, after two
22 years, we were back for this hearing. Mr. Lashway
23 had his rights under 168 to have the hearing, and we
24 were prepared to go forward. And in fact, as Your
25 Honor sees at - - - and as all Your Honors would see

1 at that hearing - - - defendant was able to make all
2 his arguments. And in fact, not just make the
3 arguments within his modification petition, but was
4 even allowed to go further and talk about his health,
5 which was not contained within - - - within his
6 initial motion.

7 JUDGE PIGOTT: If the - - - if the shoe was
8 on the other foot, and your whole file was missing,
9 and so he - - - he's making his pitch and you don't
10 even - - - you can't even remember what he got
11 arrested for, and you ask for an adjournment to get
12 the file from docs, would - - - would the judge being
13 say, hey, far as I'm concerned, he's not even
14 incarcerated, so I'm - - - I'm reducing it and I'm
15 dismissing the SORA. You'd think that would be a
16 denial of your due process.

17 MR. EVANOVICH: We would certainly file
18 under 168-o - - -

19 JUDGE PIGOTT: In an appeal.

20 MR. EVANOVICH: - - - which we have a right
21 to do as well, and - - - and go forward at that time
22 with - - - with the burden of clear and convincing
23 evidence again, just as we had at the initial
24 classification.

25 And again, because it's important to - - -

1 to notice that there could be information anywhere in
2 the atmosphere or - - - or Department of Corrections
3 or anything that might be material or relevant to Mr.
4 Lashway. The purpose of 168-o is not to reengage,
5 relitigate, and to make the board and the People
6 continue yearly - - -

7 JUDGE RIVERA: That - - - that's true, but
8 all he wants is access to what - - - what you
9 yourselves looked at. And the court had ordered
10 access to it, so again, we're back to sort of the
11 circle as boiling down to not granting the
12 adjournment, so that the defend - - - they can have
13 access to materials that you reviewed. Whether or
14 not you discounted the - - - the value of these for
15 your own decision is different from what the
16 defendant may find in it. That's her point.

17 MR. EVANOVICH: And again, I understand
18 that through the state - - - the People represent the
19 state - - - but to be clear the record, the People,
20 at least at the hearing, did not have those e-mails.
21 And the court did not have those e-mails. But I
22 under - - -

23 JUDGE FAHEY: But you got a response the
24 day before, right?

25 JUDGE RIVERA: I understand the court - - -

1 JUDGE FAHEY: You got a response the day
2 before. May 7th, was the date that you got the
3 response. It was a day before hearing?

4 MR. EVANOVICH: I believe the - - - I
5 believe it was sent May 3rd. The response was given
6 to the judge May 2nd from the board. May 3rd it was
7 sent to the parties, both parties are within very
8 close proximity.

9 JUDGE RIVERA: So just to clarify th - - -
10 you never reviewed them?

11 MR. EVANOVICH: No - - - no, Judge.

12 JUDGE RIVERA: And you never said you
13 reviewed them?

14 MR. EVANOVICH: No, we've - - - those e-
15 mails? No - - -

16 JUDGE RIVERA: Correct. Correct.

17 MR. EVANOVICH: We've - - - I - - - I've
18 never seen those - - -

19 JUDGE RIVERA: So the dissent saying they
20 were reviewed or that - - - that is of no matter;
21 that is incorrect, factually incorrect?

22 MR. EVANOVICH: Yes, Judge. The record is
23 - - - is completely - - - there's no information.
24 The People never had them and the judge never had
25 them. If we had them in our hands, we would have

1 given them and the record does support later on ADA
2 Padula, who was handling the matter, discusses with
3 the court that everything that we did have that day,
4 which was the RIA, R-A-I, assessment, the presumptive
5 override, and the PSI, we made a copy of that and
6 provided it to defense. If we had those e-mails, we
7 would have handed them over.

8 JUDGE READ: So it just boils down to
9 whether it was an abuse not to grant the adjournment?

10 MR. EVANOVICH: Absolutely, Your Honor.
11 And while I - - - I - - - I won't stand here and say
12 that reasonable minds might disagree, it certainly -
13 - - it would require this court - - - a reversal
14 would require this court to find as a matter of law
15 that this was an abuse of discretion. And this
16 record and these facts simply do not support that.

17 CHIEF JUDGE LIPPMAN: Okay, counsel.

18 MR. EVANOVICH: Thank you, Your Honors.

19 CHIEF JUDGE LIPPMAN: Thanks, counsel.

20 Rebuttal, counsel?

21 MS. FLORES: Thank you. I would
22 respectfully request that the court overturn the
23 decision and return the case back. Thank you very
24 much.

25 CHIEF JUDGE LIPPMAN: Okay, thank you both,

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

appreciate it.

(Court is adjourned)

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

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Steven Lashway, No. 94, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

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

Date: May 14, 2015