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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 69

RONALD D. ROSSBOROUGH,

Appellant.

20 Eagle Street
Albany, New York 12207
April 26, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Counsel.

2 MS. SEPPELER: Good afternoon, Your Honors.

3 With the court's permission, I'd like to request
4 two minutes of rebuttal time.

5 CHIEF JUDGE DIFIORE: Yes.

6 Counsel, why is it that a defendant can waive
7 their right to be present based on their conduct or their
8 behavior, but they can't waive their right to be present
9 at sentence based upon a knowing, and intelligent, and
10 voluntary waiver given in open court in the presence of
11 counsel?

12 MS. SEPPELER: Well, there are two separate
13 analyses that are being presented in that scenario.
14 We have the forfeiture analysis, which occurs by
15 operation of law based upon a defendant's either,
16 misfeasance or a noncompliance with a certain
17 requirement. Then we have the - - - a distinction
18 with the waiver, which is a knowingly, voluntarily,
19 and intelligently made relinquishment of a known
20 right.

21 JUDGE PIGOTT: Would a lawyer be smart, if
22 we find your way, to say to his client, don't get out
23 of the cell. Don't get - - - when they try to put
24 you on that bus, because you're going to get - - -
25 you're going to get woken up at six in the morning,

1 you're going to get half a - - - half a breakfast,
2 you're going to be on the road for about four hours,
3 you're going to end up at Attica, you're going to sit
4 in Attica for eight hours, and then when you finally
5 get over to court, you're going to be one of sixteen
6 people, and you're going to sit there in a bullpen
7 until that's done, and in the meantime, you're then
8 going to get - - - taken back to Attica, put back on
9 the bus, and the next day you're going to go back.
10 So don't get on the bus.

11 Then, they're absent, and they win. But -
12 - - because we can't say, you can waive it.

13 MS. SEPPELER: Well, that doesn't
14 necessarily mean they win. What that means is that
15 the court that's pres - - - the sentencing court
16 would be making a determination whether that conduct
17 rises to the level of forfeiture.

18 JUDGE PIGOTT: And we would say it does,
19 and for some reason we have this weird thing, where
20 the best thing to do is to tell your client to be
21 obnoxious, obstreperous, and not comply with the
22 correction officers at the facility he is at, right?

23 MS. SEPPELER: Well, if they forfeit their
24 right to be sentenced, they can be sentenced in
25 absentia. It's the contrast of the waiver where it's

1 inappropriate for the court to completely disregard
2 what the legislator has mandated, that a defendant
3 must be present at the time a sentence is pronounced
4 for a felony.

5 JUDGE PIGOTT: Do you know why they did
6 that? You're right, it's pretty clear, I mean, it's
7 one sentence, you know, that says they must be there.
8 Why? As Judge DiFiore says, you don't have to. But
9 they say you do.

10 MS. SEPPELER: That's correct, and I - - -
11 I think when you look to the criminal procedure law
12 as a whole, the legislator has taken the time to
13 evaluate - - -

14 JUDGE PIGOTT: No, take that out, I mean,
15 we know the CPL, and we know that the legislature
16 works hard, and they make reasoned decisions. Why
17 this one? I mean, did they say, you know, we don't -
18 - - we don't like the fact that defendants may
19 abscond and not - - - and not be there for
20 sentencing? No, because we say that's okay. So why
21 do we say you have to be there?

22 MS. SEPPELER: There are certain policy
23 considerations that the legislator - - -

24 JUDGE PIGOTT: That's what I mean, what are
25 they?

1 MS. SEPPELER: - - - likely took into
2 consideration. Arguably, some of the most important
3 things that happen at sentencing require a defendant
4 to be present. One of the examples would be the
5 review of a pre-sentence investigation.

6 JUDGE PIGOTT: To review a pre-sentence?

7 MS. SEPPELER: The review of a pre-sentence
8 investigation and ensuring that there aren't any
9 errors, because that document will later be relied
10 upon by the Department of Corrections.

11 JUDGE RIVERA: That lends to the benefit of
12 the defendant, right? So if the defendant knowingly
13 waives - - -

14 MS. SEPPELER: Correct, but there are also
15 - - -

16 JUDGE RIVERA: - - - to the right to be
17 there and they're represented by counsel.

18 MS. SEPPELER: That is correct, and there
19 are also - - -

20 JUDGE RIVERA: Why aren't their interests
21 then protected in those kinds of cases?

22 MS. SEPPELER: There are certain societal
23 interest, in that a victim may have an opportunity to
24 confront the convicted person at that time - - -

25 JUDGE PIGOTT: Well, they can come. They

1 can be there.

2 MS. SEPPELER: Absolutely, but there is
3 certain historical significance in ensuring that a
4 defendant is present when a sentence is imposed.

5 JUDGE PIGOTT: No, no. You said - - - you
6 said the victims, they have to have an opportunity.
7 Well, they can they can come even if the defendant is
8 not there.

9 MS. SEPPELER: Well, there is certainly a
10 difference between a victim attending a court
11 proceeding with an absentee defendant, and a victim
12 having the opportunity to appear in court and face -
13 - -

14 JUDGE STEIN: But if the defendant waives
15 in writing, according to the statute, the victim
16 loses that opportunity, right?

17 MS. SEPPELER: Correct. And that would be
18 - - -

19 JUDGE STEIN: So - - - so obviously, that -
20 - - that isn't - - - that doesn't overcome the
21 defendant's right not to be present, if he or she
22 doesn't want to be.

23 MS. SEPPELER: That - - - that is correct,
24 and there is a distinction between the misdemeanor
25 and petty offenses, and the felony offenses. The

1 felony is being more serious than the lesser
2 offenses. And that's something that's a legislature
3 like - - - legislature likely took into consideration
4 when making the determination that it was necessary
5 for a defendant to be present at the time that the
6 sentence was imposed.

7 So I - - - but I agree with you, Your
8 Honor, that the statute is abundantly clear here, and
9 it just wasn't followed in this particular case.

10 JUDGE PIGOTT: But it strikes me that
11 either - - - either he knew that, I mean, this
12 defendant is in three counties, he's trying to bundle
13 three pleas into one sentence, all of which makes
14 eminent sense, you know, and everybody is being
15 cooperative.

16 His lawyer says, judge, we'd like not to be
17 here. The judge, very calm, says, absolutely, if
18 that's what you want, ask the defendant. The
19 defendant said, nope, I don't want to be here. And
20 now that all of this is done, he's the one that comes
21 up and says, I wasn't there and that's - - - and
22 therefore I'm entitled to be resentenced, and the
23 suspicion, at least one judge's mind, is that he is
24 hoping to renegotiate all three.

25 MS. SEPPELER: And that's certainly a

1 possibility, because if this court rules favorably
2 for Mr. Rossborough, and the matter was remanded to
3 the sentencing court, he would be restored to the
4 position of pre-sentence, and would be in the
5 position where he could make certain motions, under
6 330, in order to withdraw his plea. I don't know if
7 that would go anywhere potentially, but that is
8 certainly a consideration.

9 JUDGE STEIN: Do you agree that under the
10 circumstances here, notwithstanding the statute, that
11 the - - - that the waiver was knowing, intelligent,
12 and voluntary?

13 MS. SEPPELER: Yes. There was a colloquy -
14 - -

15 JUDGE STEIN: They concocted everything to
16 make sure that that was appropriate.

17 MS. SEPPELER: Correct. Aside from the not
18 following the proper procedure with respect to how a
19 waiver should be made, with respect to waiving the
20 right to be present for sentencing. But the
21 voluntary - - -

22 JUDGE RIVERA: And because it's not in
23 writing; is that what you mean?

24 MS. SEPPELER: Correct. And there was - -
25 -

1 JUDGE RIVERA: It's orally.

2 MS. SEPPELER: Yes, there were certain
3 provisions that the legislator required in terms of -
4 - - that the waiver be in writing, that it contains
5 certain information with respect to the maximum
6 sentence, and made upon motion to the court.

7 JUDGE ABDUS-SALAAM: Counsel - - -

8 JUDGE RIVERA: Just to circle back, perhaps
9 I didn't fully understand your response to the Chief
10 Judge's question. So if - - - if the statutory
11 mandatory language of 260.20 regarding presence at
12 trial, is similar to the language at issue here, and
13 again, the right to be present at trial is waivable,
14 why - - - why isn't that the case here?

15 MS. SEPPELER: Well, in the 260.20 language
16 that you referenced - - -

17 JUDGE RIVERA: Yes.

18 MS. SEPPELER: - - - there is no
19 distinction that's drawn between a misdemeanor and
20 felony-level offenses. Which is why it's
21 significant, and that the legislature obviously took
22 care to ensure that the defendant would be present at
23 the time of sentencing, but they did not draw that
24 distinction for other material stages of the criminal
25 proceeding.

1 JUDGE ABDUS-SALAAM: Counsel, do you agree
2 that the right to be present at trial is also
3 constitutional; it's not just a statutory right?

4 MS. SEPPELER: Absolutely.

5 JUDGE ABDUS-SALAAM: And if - - - if a
6 defendant can waive the constitutional right, are you
7 saying that the defendant cannot waive the statutory
8 right?

9 MS. SEPPELER: Correct. And there has been
10 numerous occasions where this court has found that a
11 defendant can waive a constitutional right, however,
12 that has - - - the court has never found that they
13 can do that when there is a statute that directly
14 opposes waiver of the right to be present.

15 This court has found that a defendant can
16 waive the right to be present for a Sandoval, a
17 Ventimiglia Hearing, a Wade Hearing, the presence
18 during jury selection. However, there aren't any
19 statutes that specifically require a defendant's
20 appearance; and that's the distinction in this case,
21 is - - -

22 JUDGE GARCIA: Counsel, yeah - - - there is
23 a case, Corley, 67 N.Y. 2d, it says, "Any right
24 defendant may have had to be present at sentencing
25 can be waived", one. "Or lost as a matter of public

1 policy when the evidence unambiguously indicates 'a
2 defiance of the processes'". Doesn't that seem to
3 indicate you can waive?

4 MS. SEPPELER: Well, this court, when
5 deciding Corley, merely referenced the issue of
6 waiver and in dicta. That case boiled down to
7 forfeiture. And what's interesting about that
8 particular case, is it was decided four years after
9 this court decided People v. Parker, which applied
10 the waiver analysis to a defendant's absence during
11 trial.

12 People v. Corley - - - and with very
13 similar conduct of the defendant in that particular
14 case, after the indictment was reinstated following
15 an appeal by the People, the defendant was placed on
16 notice by the court, by defense counsel, and
17 continued to fail to appear. The court indicated
18 that he had forfeited that right.

19 So it is interesting that People v. Parker
20 applied a waiver analysis to a defendant's failure to
21 appear at the time of trial, while four years later,
22 this court decided that the forfeiture analysis was
23 more appropriate. So although it did address waiver
24 in the decision, ultimately it was a forfeiture case,
25 and that waiver - - - waiver language was simply

1 dicta.

2 CHIEF JUDGE DIFIORE: Thank you, counsel.

3 Counsel.

4 MR. SCHIENER: May it please the court,

5 Eric Schiener from the Wyoming County District

6 Attorney's office for the respondent.

7 The People respectfully submit that the Fourth
8 Department's unanimous decision should be affirmed as it
9 correctly held, one, that the defendant's waiver of right
10 to appeal encompassed his 380.40 claims, and in any event,
11 the defendant's appellate claims are without merit.

12 CHIEF JUDGE DIFIORE: Counsel, is this a
13 common occurrence in your county?

14 MR. SCHIENER: It is, Your Honor. Wyoming
15 County has a maximum-security facility in - - - at
16 Attica. Crimes are committed by inmates at Attica,
17 and therefore they, almost on a monthly, sometimes
18 weekly basis, are brought to the Wyoming County
19 court.

20 Unfortunately, in the time between the
21 crimes are allegedly committed and the indictments,
22 DOCS usually moves the individual inmates all across
23 the state, scattered to the four corners of our
24 state. Therefore, they are then transported in those
25 blue vans that we see on the thruway, oftentimes

1 days, sometimes weeks in advance, having to travel in
2 shackles along the byways and highways of our - - -
3 of our state, and then spend time back at their
4 original facility where they then - - -

5 JUDGE ABDUS-SALAAM: Counsel, do you know -
6 - - do you know the rationale for why this
7 legislation, why there is a mandatory appearance by a
8 person who's committed a felony at sentencing; do you
9 know what the rationale is?

10 MR. SCHIENER: I could not glean that, Your
11 Honor, from the - - - from the legislative intent. I
12 know defense counsel, I mean, appellate counsel goes
13 into great length on the statutory construction
14 arguments. But I think it would come down, basically
15 to the same kind of analysis that this court did in
16 Epps on the right to be present at a jury trial.
17 It's so that things aren't happening in secret.

18 It's more of a - - - it's more of a
19 safeguard for the defendant that the court doesn't do
20 something in secret or - - - or, you know, impose a
21 sentence that they are unaware of, something of that
22 nature.

23 JUDGE PIGOTT: So you think it's aimed at
24 the court, saying he must be present, not aimed at
25 the defendant saying, you must be present.

1 MR. SCHIENER: Well, I think it has two - -
2 - I think it has two goals, but I think that
3 originally that it was more of a safeguard against
4 courts doing things without the accused's knowledge.
5 It certainly has a - - -

6 JUDGE RIVERA: So why wouldn't the - - -
7 the exception just be a general right to way - - - to
8 waive? Why - - - why is it written as written, which
9 is only about a particular category of offenses?

10 MR. SCHIENER: Again, it's not - - - it's
11 not abundantly clear, and especially when the code
12 changed in '67 and it still wasn't addressed. I
13 acknowledge that there was deprivation for
14 misdemeanor and petty offenses, and I can only
15 surmise that that was because of the volume of those
16 matters, and the necessity for judicial accounting.

17 JUDGE PIGOTT: But you know - - -

18 CHIEF JUDGE DIFIORE: Counsel, can a
19 voluntary waiver occur if the defendant didn't know
20 what the sentence to be imposed was?

21 MR. SCHIENER: I don't think that would be
22 appropriate at all. I think that if this is a case
23 where everything was going according to what that
24 defendant knew, he knew exactly what he was pleading
25 to, he knew what was happening in the other counties,

1 he'd already been sentenced in two out of the four
2 total counties. And so there was no surprises.

3 CHIEF JUDGE DIFIORE: Um-hum. Would it
4 make a difference if this were a sentencing that were
5 to take place after a trial had been conducted?

6 MR. SCHIENER: I certainly - - - I would
7 submit that is absolutely true. Or in a case where a
8 defendant was at liberty, either on bail or ROR, I
9 would have, you know, no idea of what the terms and
10 conditions of a community-based sentence may be, or
11 what the terms of their sentence may be. But in this
12 case, everything was known, it was going to be
13 concurrent, he was already in DOCS, and knew that he
14 was going to stay there for some time.

15 JUDGE RIVERA: Well, if - - -

16 JUDGE ABDUS-SALAAM: If we were to decide
17 in your favor, would the waiver on the record, as
18 opposed to a written waiver, be sufficient?

19 MR. SCHIENER: I would submit that the
20 waiver was knowingly, and intelligently, and
21 voluntarily given. He was advised of the
22 consequences, and Judge Griffith went to great
23 lengths to tell him that if there were any hiccups or
24 any changes, we would bring it back, and we would
25 address them.

1 JUDGE PIGOTT: Yeah, but he was - - - he
2 was in custody. Counsel on the other side, I assume,
3 could argue easily that if you are OR and want - - -
4 and don't want to - - - don't want to come back, are
5 we going to treat them differently, because they know
6 because you're OR, you must be back, as opposed to if
7 you were incarcerated?

8 MR. SCHIENER: I think there is a
9 distinction there, yes. And I think that - - - that
10 these cases - - - although Rossborough was not an
11 inmate case, so to speak, this does apply, as Chief
12 Judge indicated, on those types of inmate cases. But
13 if someone was on the least, the - - - certainly
14 their appearance at sentencing I think would be
15 mandated.

16 JUDGE RIVERA: Let's say we agree on the
17 waiver, we agree that this particular waiver that's
18 not in writing is also satisfactory, appropriate,
19 would that mean we're basically excising the
20 exception?

21 MR. SCHIENER: Well, as counsel indicated
22 for the appellant, that written waiver seems to apply
23 to that misdemeanor or petty offense - - -

24 JUDGE RIVERA: I understand, but does that
25 then mean that you get greater protection with petty

1 offenses and misdemeanors, than you do with the more
2 serious crime? I - - - this has to be in writing so
3 that you have some assurances that the person has
4 been properly informed but not with the - - -

5 MR. SCHIENER: I would certainly submit in
6 an ideal world, in an ideal setting, that a written
7 waiver would be - - - would have been preferable
8 here. But I think having it come at the request of
9 the defense, with assigned counsel, knowing that
10 there would be no surprises, and if there were
11 surprises, he would be coming back, that the oral
12 waiver was sufficient.

13 JUDGE ABDUS-SALAAM: Counsel, I'm just
14 curious, you say that these cases are kind of
15 numerous in your jurisdiction. And what about the
16 petty offenses and misdemeanors, is there a waiver
17 form that the court has, for example, like the waiver
18 form for an appeal, when you waive an appeal?

19 MR. SCHIENER: There are forms in the local
20 justice courts that would be handling most of the
21 misdemeanors and petty offenses. But the felonies
22 and the ones I referred to earlier, the inmate cases,
23 you know, the judges - - - when Judge Smith took this
24 case up to the Court of Appeals, have been reluctant.

25 Because those requests continue month after

1 month. The inmates do not want to travel, as some of
2 them have put, the I love New York tour back to
3 Attica. And it's for any number of reasons. They
4 lose services, they're not sure their property will
5 be guaranteed to be there when they get back to their
6 home facility.

7 So it's - - - it's - - - I know that the
8 appellant has made it a point of policy decisions
9 based upon, you know, that they wouldn't have
10 opportunity to - - - to input on their PSI, or so on
11 - - - remember, defense counsel was there at
12 sentencing. Defense counsel could still advocate on
13 behalf of the defendant.

14 JUDGE STEIN: But would - - - would defense
15 counsel be required to be there?

16 MR. SCHIENER: He was, and he indicated he
17 would during the process.

18 JUDGE STEIN: But - - - but in other cases,
19 if we were to say that - - - that a written waiver is
20 not required, and a defendant can waive the right to
21 appear - - - a felony defendant can waive the right
22 to appear at sentencing, do we then have to say also
23 as long as counsel is at sentencing?

24 MR. SCHIENER: I would think that would be
25 a great idea. I think that would be and - - - and

1 you know, this wasn't the first time this happened at
2 Wyoming County court, and - - - and that had been the
3 matter of course when these types of situations arose
4 at defense request, the defense attorney assured his
5 client that he would be there at sentencing and
6 advocate on his behalf if needed.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 MR. SCHIENER: Okay. Thank you.

9 CHIEF JUDGE DIFIORE: Counsel.

10 MS. SEPPELER: Just briefly, Your Honors.

11 The respondent has raised some policy
12 considerations with respect to some of the inconveniences
13 or cost effectiveness of transporting state prisoners to
14 and from different court proceedings. However, the
15 inconveniences and impracticalities certainly should not
16 permit a court to completely disregard the law.

17 JUDGE PIGOTT: It strikes me though that -
18 - - I think - - - I think this is a game on the part
19 of this particular defendant. I don't know a reason
20 in the world why he agreed to this, and then said,
21 you know, I'm going to appeal and hopefully, you
22 know, redo the whole thing.

23 And for that, there may be tens, hundreds,
24 perhaps thousands of inmates all over the state who,
25 if we were to agree with you, are going to end up,

1 you know, doing things they don't want to do, where
2 the correction system doesn't want to do it, in front
3 of a court that has no inclination to do it either.

4 So we're going to say. the courts, DOCS,
5 and all these inmates, are going to pay a price
6 because this particular person, after agreeing not to
7 be there, his lawyer is there, nevertheless appeals.
8 Does that make any sense to you? Hard question.

9 MS. SEPPELER: Those are valid policy
10 considerations, but they are best raised before the
11 state legislator, and it's not up to the court to
12 legislate when it's more convenient.

13 With respect to the waiver of appeal that -
14 - -

15 JUDGE RIVERA: Does that also mean that if
16 we determine that a defendant could waive presence at
17 sentencing, that we are also unable to say that that
18 waiver does not need to be in writing, because the
19 statute limits that to a particular category?

20 MS. SEPPELER: Well, in essence, yes.

21 JUDGE RIVERA: Would we be adding something
22 into the statute because we think it's - - - it's the
23 right thing, but not what the legislature chose?

24 MS. SEPPELER: That's essentially what we
25 would be doing if the court decided to uphold the

1 Fourth Department decision, it would be essentially
2 creating new law, creating a new provision that
3 specifically addresses the waiver of sentencing for a
4 felony appearance. So it would be - - - I believe
5 that that's best addressed before the legislator, and
6 not up to the court to decide.

7 With respect to the waiver of appeal issue
8 that the respondent did raise, this court's decisions
9 in People v. Dokes, People v. Antommarchi, are nearly
10 analogous to what happened here. Both in Dokes and
11 Antommarchi, the defendant failed to object to
12 particular - - - a trial proceedings being a Sandoval
13 Hearing for Dokes, and sidebar conferences in
14 Antommarchi.

15 And this court did hold that failure to
16 object was not fatal to the claim; that's exactly
17 what happened here. So I would submit that this
18 falls outside the scope of waiver of appeal, it does
19 constitute a mode of proceedings error, as that was
20 decided in Dokes and Antommarchi, which are the
21 controlling cases in this particular case. It does
22 fall outside the waiver of appeal, and is preserved
23 for this court to review.

24 And if the court doesn't have any further
25 questions, I do see that my time has expired.

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Thank you very much.

CHIEF JUDGE DIFIORE: Thank you, counsel.

(Court is adjourned)

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I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Ronald D. Rossborough, No. 69 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: April 27, 2016