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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

RAYMOND CRESPO,

Respondent.

NO. 27

20 Eagle Street
Albany, New York
February 8, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The next case on this
2 afternoon's calendar is number 27, The People of the State
3 of New York v. Raymond Crespo.

4 Good afternoon, counsel.

5 MR. KRESS: Good afternoon, Your Honor. Stephen
6 Kress on behalf of the People. I'd like to request two
7 minutes for rebuttal.

8 CHIEF JUDGE DIFIORE: You may, sir.

9 MR. KRESS: Thank you. A request to proceed pro
10 se at trial is timely only if it comes before the trial
11 commences. Under the Criminal Procedure Law, a jury trial
12 commences with the selection of the jury.

13 In this case, the defendant asked to represent
14 himself at trial after eleven jurors had been selected and
15 sworn. His request was therefore untimely, and there were
16 no compelling cir - - -

17 JUDGE RIVERA: What's the rule post-McIntyre?
18 When - - - when does a trial begin under McIntyre?

19 MR. KRESS: The rule is that trials - - - oh,
20 when does trial begin? McIntyre held that in that case the
21 trial commenced with the People's opening statement.

22 JUDGE RIVERA: Um-hum. So why - - - why should
23 we, decades later, not apply our usual rules of stare
24 decisis and follow that same rule?

25 MR. KRESS: So Your Honor, let me make a - - -



1 let me clarify. The rule in McIntyre was that a request to
2 proceed pro se has to come before trial commences. And
3 McIntyre held that in that case the trial started with the
4 opening statements. What was - - -

5 JUDGE RIVERA: And hasn't - - - hasn't every case
6 after that said the same?

7 MR. KRESS: There have been four cases, I
8 believe, that have - - -

9 JUDGE WILSON: What was special about those cases
10 that made trial start at a different point than other
11 cases?

12 MR. KRESS: In the four cases post-McIntyre,
13 you're referring to?

14 JUDGE WILSON: Or McIntyre itself?

15 MR. KRESS: Well, McIntyre, the trial actually
16 occurred in 1971. At that time, the Code of Criminal
17 Procedure was in place.

18 CHIEF JUDGE DIFIORE: So is your argument one of
19 - - - based on statute - - - the current statutory scheme?

20 MR. KRESS: Correct.

21 CHIEF JUDGE DIFIORE: Um-hum.

22 MR. KRESS: The current statutory scheme, the
23 C.P.L., says that a jury trial commences with the selection
24 of the jury. That's different than what was in place under
25 the Code of Criminal Procedure, which was in effect in - -



1 -

2 JUDGE RIVERA: Then - - - then why was McIntyre
3 citing the C.P.L.?

4 MR. KRESS: It's unclear why McIntyre cited the
5 C.P.L. I will say this, that even if you assume McIntyre
6 read the - - -

7 JUDGE RIVERA: So why is it any more clear that
8 the case is about the original Code?

9 MR. KRESS: That was the very first thing that
10 the - - - that McIntyre cited to - - -

11 JUDGE RIVERA: That's the order in which it's
12 cited?

13 MR. KRESS: It's not just the order, Your Honor.
14 I don't think McIntyre was pulling opening statements out
15 of thin air. That's when the Code of Criminal Procedure
16 said trial began. And in fact - - -

17 JUDGE FAHEY: Wasn't it - - - wasn't it right on
18 the cusp, kind of? It was '71 and it - - - didn't the
19 trial start under the - - - under the old criminal code,
20 and then the appeal was under the new C.P.L. Is - - -
21 isn't that the way it - - - because the way Judge Wachtler
22 wrote it, it was - - - like all of his writings - - - very
23 intelligent. But it seemed to clearly not resolve that
24 problem. It made reference to it, but didn't resolve it.

25 But Judge Rivera refers to - - - to, I think, an



1 important point, which is it seems like every court in the
2 state, every jury trial I was on, it's always when the
3 jury's sworn. That's what courts seem to have followed,
4 that rule. It's when the - - - when they're sworn. And
5 certainly when the opening statements start, that's when
6 the trial begins.

7 It was - - - I don't recall it - - - it's been a
8 while since I did criminal work - - - where it began with
9 selection.

10 MR. KRESS: Well, Your Honor, we do cite cases in
11 our brief where courts have said that the trial commenced
12 with the start of jury selection. And in fact, we even
13 point out to - - - a statement from this court in People v.
14 Hughes, where the court said that the defendant - - -

15 JUDGE FAHEY: So - - - so where do you practice?
16 What county?

17 MR. KRESS: We practice in New York County.

18 JUDGE FAHEY: In New York County. And so when
19 does trial start, then?

20 MR. KRESS: Trial starts with jury selection.
21 Certainly when we're writing our briefs and we always say,
22 you know, the defendant proceeded to trial on X date - - -

23 JUDGE FAHEY: Um-hum.

24 MR. KRESS: - - - we use the date the jury
25 selection began.



1 JUDGE FAHEY: You used jury selection.

2 JUDGE RIVERA: What - - - what moment is jury
3 selection? When does that start?

4 MR. KRESS: So I think we - - -

5 JUDGE RIVERA: I - - - when I'm called to jury
6 service and I'm in the room downstairs when they call me to
7 start walking up or take the elevator, is that jury
8 selection? Is it when I'm in the courtroom? When - - -
9 when is jury selection?

10 MR. KRESS: So let me - - - let me make two
11 points in response, Judge - - -

12 JUDGE RIVERA: Yes.

13 MR. KRESS: - - - Rivera. The first is that I
14 think C.P.L. 270.15 gives the best indication of when jury
15 selection begins, and the language says that the judge
16 shall initiate examination of the jurors by - - - by - - -
17 I believe it says by introducing the - - - the parties and
18 giving a brief statement of the case.

19 So the actual language of the statute says "the
20 court shall initiate the examination of the jurors."

21 I think that's probably the clearest indication
22 of when jury selection begins.

23 JUDGE RIVERA: Why - - - why isn't it once you
24 have a jury? There's no jury until you've got the jurors,
25 correct? Otherwise you're just doing jury selection - - -



1 juror selection. There's no jury.

2 MR. KRESS: That's - - - that's correct. But I
3 mean, the selection of the jury, I think, refers to the
4 entire process, and that's actually how it's used elsewhere
5 in the C.P.L.

6 JUDGE STEIN: But aren't the concerns about delay
7 and confusion and - - - and that sort of thing, aren't they
8 implicated in - - - once the process of jury selection
9 starts?

10 MR. KRESS: That's absolutely correct, Judge
11 Stein. Absolutely is. And I think this case is a perfect
12 example of that. You had eleven jurors who had been
13 selected and sworn at the time that the defendant made his
14 request.

15 So - - - and it was clear that he was unprepared
16 to go forward with trial at that time. He had absented
17 himself from jury selection, and he kept saying over and
18 over again, I - - - you know, I don't know what's going on.

19 So I think at that point - - -

20 JUDGE FAHEY: Well, it's fair to - - - fair to
21 argue that it was a delaying tactic. I think the court
22 recognized that. But the - - - the procedural mechanism
23 that you're advocating is - - - seems to represent a
24 significant shift.

25 MR. KRESS: Well, I - - - I don't think it would



1 be a significant shift, Your Honor. I - - - I just - - - I
2 just don't think it is. I think - - -

3 JUDGE STEIN: Can the court allow a - - - a late
4 request to proceed pro se if the circumstances warrant it
5 in a particular case?

6 MR. KRESS: Yes, absolutely, Judge. In fact
7 McIntyre says that in compelling circumstances, untimely
8 requests to proceed pro se can be granted. And I know the
9 defendant points out in his brief, you know, while jury
10 selection is often the first time that a defendant will be
11 able to assess how his counsel interacts with the jury.
12 And if you really do have a scenario where all of a sudden
13 the trial strategy changes and the defendant is caught off-
14 guard, he can make an application and in those
15 circumstances could be allowed to proceed pro se.

16 JUDGE WILSON: Are you - - - are you putting any
17 weight on our decisions, for example Antommarchi, that say
18 that the jury selection process is very important as part
19 of your argument that trial starts earlier?

20 MR. KRESS: Yes, Your Honor. I think since
21 McIntyre I think you've seen that jury selection has been
22 recognized as a critical part of trial. And I think even
23 some of the - - - the commentaries that we cited in our
24 brief actually says jury selection is a critical part of
25 trial.



1 It's recognized as part of trial for other
2 Constitutional rights: the right to a jury trial, the
3 right to a public trial; defendant's right to be present
4 for a material stage of trial. In all of those contexts,
5 jury selection is considered part of the jury trial.
6 There's no - - -

7 CHIEF JUDGE DIFIORE: Counsel, what was the
8 prejudice - - - what would the prejudice have been if the
9 defendant was permitted to proceed pro se after the jurors
10 had been already voir dired -- - the eleven jurors?

11 MR. KRESS: So I mean, I think the first one is
12 you obviously - - - as I was saying before, I think he
13 would have had to have had a delay in this case, because
14 the defendant seemed unprepared to - - - to go to trial - -
15 - or excuse me - - - to proceed to represent himself at
16 that point.

17 So but apart from just delay, what are you going
18 to do with the eleven jurors who had been selected? They
19 were told at the outset that this case was going to take
20 five days. So I don't know how much time the defendant
21 would have needed to prepare himself: a week, two weeks.
22 What are those jurors supposed to do? Are they held in
23 limbo? It's more likely that they would have been
24 discharged and we would have just wasted the entire jury-
25 selection process up and to that point.



1 CHIEF JUDGE DIFIORE: Thank you, counsel.

2 Counsel?

3 MR. SCHATZ: Thank you. May it please the court,
4 Ben Schatz for Mr. Crespo.

5 CHIEF JUDGE DIFIORE: Counsel, your - - -
6 appellant raises Antommarchi and the fact that the court
7 did hold that jury selection is a material part of the
8 trial. How does - - - what is your response to that?

9 MR. SCHATZ: I think the response is that this
10 court defines trial in different ways for different
11 purposes depending on the issue. So there's the Steckler
12 case that both parties cite in the brief. There's the
13 Anderson case. And what we're talking about here is
14 governed by McIntyre. McIntyre defined trial to commence
15 on facts very similar to the facts in this case, at the
16 prosecutor's opening statement.

17 JUDGE STEIN: Did the court in McIntyre give a -
18 - - state a - - - expressly state a rationale and analysis
19 of - - - of why that particular time was what it considered
20 to be the - - - the commencement of trial?

21 MR. SCHATZ: I think you - - - you do see that in
22 McIntyre through pages of analysis it undertakes balancing
23 whether the - - - balancing the defendant's interests, the
24 reasons to - - - to proceed pro se, the court's interest in
25 maintaining orderly proceedings. The question in McIntyre



1 is - - -

2 JUDGE STEIN: But are - - - are any - - -

3 MR. SCHATZ: - - - where do we draw this line.

4 JUDGE STEIN: Right. Right. But did - - - but
5 did they give a rationale for why they chose that place to
6 draw the line?

7 MR. SCHATZ: I - - - and I think I understand
8 what you're asking. There's no - - - there's no sentence
9 saying that we - - - we picked the prosecutor's opening
10 statement because after that point, you know, the trial is
11 in full force, but before, not.

12 JUDGE STEIN: So we don't know if it's because
13 that's what the Criminal Procedure Law said at the time or
14 if it was for some other reason that they - - - that they
15 picked it.

16 MR. SCHATZ: I think we do know, because what
17 McIntyre is doing - - - and McIntyre is not just any case.
18 McIntyre is the case in the context of criminal - - - the
19 right of a criminal defendant to go pro se. It is one of
20 the greatest cases, if I may say, that this court has
21 issued on this - - - on this topic. And - - -

22 JUDGE STEIN: Well, it talked about a lot of
23 other - - - a lot of other factors that went into - - - to
24 the decision.

25 MR. SCHATZ: That's right. And so - - - and so



1 there are citations to the C.P.L. There is a citation to
2 the C.C.P. And I - - - I think what we can glean from that
3 is that the court balanced all these factors and came to
4 the conclusion that the optimal Constitutional balance for
5 this issue is struck at allowing a defendant to make a
6 request up to the point when the prosecutor gets up and
7 trial begins in earnest.

8 JUDGE STEIN: And - - - and that's certainly a
9 possible conclusion. But can't we also draw the conclusion
10 that the court was faced with, at the time of the trial
11 that they were analyzing, that they were considering, that
12 the - - - the Code was in effect, and it said one thing,
13 and it acknowledged that now, at the time of the decision
14 the Code - - - the C.P.L. says something different?

15 MR. SCHATZ: I - - - I think you have to do some
16 reading into the case to reach that conclusion. I think
17 it's a clever argument. We're on - - - we're in
18 Constitutional territory here. The court is obviously not
19 bound on a Sixth Amendment issue to see what the
20 legislature has to say about when trial begins, if the
21 legislature tomorrow decided to amend the definition of
22 "trial" to say that it starts as early as suppression
23 hearings. Obviously a request to proceed pro se wouldn't
24 have to - - -

25 JUDGE RIVERA: Well - - -



1 MR. SCHATZ: - - - begin earlier.

2 JUDGE RIVERA: - - - isn't - - - isn't it really
3 that if that were the analysis, you would put that right in
4 the case, since you now have the C.P.L. that applies moving
5 forward. You would not have left that kind of ambiguity,
6 uncertainty carrying forward.

7 MR. SCHATZ: That's right. It's a - - - it's a
8 big - - - it's a big holding to make in a citation
9 parenthetical - - - a string citation.

10 I'd like to - - -

11 JUDGE RIVERA: Can you address some of the
12 points, though, that the People raise about the disruptive
13 effect of adhering to what has been decades' old law?

14 MR. SCHATZ: The - - - I'm sorry, the - - - the
15 disruptive effect with respect to - - -

16 JUDGE RIVERA: The potential for delay and so
17 forth, yes.

18 MR. SCHATZ: Yeah, I - - - I acknowledge, delay
19 could be a problem. There's no evidence of delay in this
20 case, and I'm - - - I'm saying that recognizing that there
21 were statements made on Rikers Island phone calls where the
22 defendant says I - - - gee, I hope the complainant doesn't
23 show up. Those statements - - - so the court is aware - -
24 - were made - - -

25 JUDGE STEIN: Did the defendant give a reason - -



1 - basis for saying that he - - - he didn't think his - - -
2 his attorney would represent him appropriately?

3 MR. SCHATZ: His - - - his reason - - - and I
4 think this is - - - this often happens with indigent
5 criminal defendants - - - they can't get any kind of
6 connection with their lawyer. They are at sea. They feel
7 terribly uncomfortable giving their case to the hands of
8 someone else. And by the time they get to trial, they - -
9 -

10 JUDGE STEIN: But there's nothing in the record
11 to indicate that that was - - -

12 MR. SCHATZ: He - - -

13 JUDGE STEIN: - - - his reason?

14 MR. SCHATZ: No. And we're not raising a claim
15 that he was - - - he was entitled to new counsel or
16 anything like that. He - - - he said, essentially, I don't
17 have a relationship with this guy. I don't feel him. And
18 we're not disputing that those are - - -

19 JUDGE STEIN: He says he doesn't bring him any
20 good news, right? Isn't that - - -

21 MR. SCHATZ: That is - - - that is obviously not
22 an acceptable excuse to get a new lawyer. The question is,
23 does he still have this fundamental right to say: you know
24 what, I realize I'm going to jail. I'm going to - - - I'm
25 going to go to jail under my own banner rather than - - -



1 JUDGE FAHEY: We're - - - we're assuming that he
2 has that right. There's - - - there's no question. Of
3 course he can say that. The only question is, did he
4 timely assert it? That's all we're really - - -

5 MR. SCHATZ: Yeah, and - - -

6 JUDGE FAHEY: - - - left with. Yeah.

7 MR. SCHATZ: - - - his motive doesn't matter.

8 JUDGE FAHEY: That's fine.

9 MR. SCHATZ: That's right.

10 JUDGE FAHEY: He has the right to do that. We
11 all recognize that.

12 MR. SCHATZ: The motive doesn't matter. And - -
13 - and I want to address the C.P.L. 120.11 issue, because
14 this court has looked to C.P.L. 120.11 and decided that the
15 use of the phrase "selection of the jury" in that provision
16 means when the jury is sworn. And that's the Ayala case,
17 which we cite on page 26 of our brief.

18 Even if we say that what the legislature says
19 about when trial begins governs, Mr. Crespo's request is
20 still timely under Ayala's definition of - - - or Ayala's
21 interpretation of what C.P.L. 120.11 - - -

22 JUDGE FAHEY: Do you think that the statement is
23 dicta, or is it ruling in Ayala?

24 MR. SCHATZ: I don't think so. Ayala is actually
25 quite similar to the facts of this case. It was a Wade



1 hearing held right before jury selection began, and the
2 court says we - - - "although conducted in close proximity
3 to the commencement of defendant's trial, the Wade hearing
4 was not part of the trial itself, which in defendant's case
5 began only after the jury was sworn", citing - - -

6 JUDGE FAHEY: See - - -

7 MR. SCHATZ: - - - C.P.L. - - -

8 JUDGE FAHEY: - - - the - - - the case law hasn't
9 been so clear - - - clear on it. I thought there were some
10 Appellate Divisions decision under 121 that said the trial
11 commences when jury selection begins. In the Second
12 Department - - - there are two cases in the Second
13 Department.

14 MR. SCHATZ: I think this is the problem with
15 looking to a legislative definitional term which isn't
16 intended to focus on these - - -

17 JUDGE FAHEY: Yeah.

18 MR. SCHATZ: - - - major issues of Constitutional
19 law.

20 JUDGE FAHEY: But you'd recognize the ambiguity
21 in the interpretation of those - - -

22 MR. SCHATZ: Oh, absolutely. I think that's the
23 big problem with saying we should have a rule that the - -
24 - the timeliness - - - that it's timely up until jury
25 selection, because no one knows that jury selection means.



1 Everyone uses it differently. And right now we have a
2 beautifully clear rule, it just says when the prosecutor
3 gets up, no more. Trial has begun. And I think that's how
4 courts have interpreted it for the last forty years.

5 If there are no further questions, I'll rest on
6 my papers. Thank you.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 Counsel?

9 MR. KRESS: So I'd like to respond to the point
10 about deciding when trial begins based on the purposes of
11 the rule in question. The purpose - - - the reason why we
12 ask defendants or require defendants to invoke the right to
13 self-representation before the trial commences is to
14 promote the orderly administration of justice, to minimize
15 delay, avoid inconvenience to the jurors, avoid disruption.
16 Those are the purposes.

17 JUDGE RIVERA: But you concede that even if all
18 of those things happen, that a judge could still grant an
19 untimely request?

20 MR. KRESS: Yes, a judge could, if compelling
21 circumstances are shown. Absolutely, Your Honor. It's not
22 - - -

23 JUDGE RIVERA: And that is, you also concede,
24 because of the Constitutional right that's at play?

25 MR. KRESS: It's - - - I think it's absolutely a



1 balancing between the defendant's right to go pro se and -
2 - - and the State's interest in the efficiency in
3 administration of justice. Yes. You're trying to balance
4 the two.

5 And I think it's important to give judges
6 discretion in these scenarios where sometimes they're faced
7 with really sort of a lose-lose situation, where they
8 either, you know, delay the trial or have, you know - - -
9 have to start jury selection all over again, or if you
10 don't do that, you could be faced with a claim that the
11 defendant was forced to go to trial unprepared and - - -
12 and you face reversal on appeal. So - - -

13 JUDGE RIVERA: But if - - - if - - - if what is
14 essential here is that Constitutional right, and as the
15 defendant is arguing, there's really no opportunity - - - I
16 want to go back to this issue you were trying to respond to
17 before - - - there's really no opportunity to have a sense
18 of whether or not you're comfortable with your attorney in
19 trial - - - not what they've done beforehand, but in trial
20 - - - the - - - the first opportunity for that is at jury
21 selection.

22 MR. KRESS: Well, I think you could say that the
23 first opportunity to see your lawyer, you know, do a
24 summation, is at summation. But that doesn't mean that you
25 can go pro se - - -



1 JUDGE RIVERA: No, no, no.

2 MR. KRESS: - - - up at that point.

3 JUDGE RIVERA: But it's at that moment, at the
4 jury selection, that you're seeing, you're observing the
5 way that that counsel interacts in that room and what, if
6 any, sway they may have over these people who are going to
7 decide the defendant's liberty interest and their future.

8 MR. KRESS: And - - - and if - - -

9 JUDGE RIVERA: And - - - and you will concede
10 that most defendants don't get a lot of time with their
11 lawyer, correct?

12 MR. KRESS: I - - - that's - - - I don't know if
13 I want to make a general statement about that, but if in
14 fact, you know, you go to jury selection and you see your
15 lawyer for the first time, and you realize, oh, wow, this
16 guy is terrible, or wow, he's not rep - - -

17 JUDGE RIVERA: Or female, yeah.

18 MR. KRESS: Excuse me - - - this attorney is - -
19 - is terrible, and he or she is not representing me the way
20 that I want to, and you can make that case to the judge,
21 the judge has discretion to allow an untimely request in
22 those circumstances.

23 So if you say that jury selection beg - - - or
24 that trial begins with jury select - - - at the start of
25 jury selection, you're not saying - - -



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JUDGE RIVERA: So then, at that point, the judge is going to ask: how many times have you talked to your lawyer? How many times have you seen your lawyer?

MR. KRESS: The judge can do an inquiry, exactly. And the defendant can make the case as to why, at that point, he should be allowed to go pro se and can explain, you know, why the concerns underlying the timeliness requirement wouldn't be present in this particular case.

CHIEF JUDGE DIFIORE: Thank you, counsel.

(Court is adjourned)



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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Raymond Crespo, No. 27 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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