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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 58

JAMES R. MCINTOSH,

Appellant.

20 Eagle Street
Albany, New York
June 6, 2019

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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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on the
2 calendar is The People of the State of New York v. James
3 McIntosh.

4 (Pause)

5 CHIEF JUDGE DIFIORE: Good afternoon, counsel.

6 MR. HOBBS: Good afternoon. May it please the
7 court, James Hobbs of the Monroe County Public Defender's
8 Office, on behalf of James McIntosh. I would reserve two
9 minutes for rebuttal.

10 CHIEF JUDGE DIFIORE: Of course.

11 MR. HOBBS: The trial court's error in refusing
12 to res - - - instruct on either of the two requested forms
13 of non-intentional homicide calls for reversal in this
14 case.

15 JUDGE FEINMAN: So let's start with the very
16 basic threshold question. What is your reasonable view
17 that you're urging of the evidence here that would justify
18 any lesser-included being charged?

19 MR. HOBBS: Well, the key - - - the most
20 important part of it is that Mr. McIntosh testified in
21 detail that he acted solely with the intent - - - in
22 thrusting the knife forward, solely with the intent to
23 scare off and back away his drunk and belligerent roommate,
24 who was charging forward at him, and that he did not
25 foresee the possibility that this would cause a serious



1 injury or lead to his death.

2 In fact, you know, his testimony was that the
3 roommate continued to charge forward into the knife, when
4 he thought that the thrusting motion would cause him to
5 back off and be scared away.

6 So that testimony clearly makes this a reckless
7 and brings it - - - act and brings it within - - -

8 JUDGE FEINMAN: Wasn't justification charged in
9 this case?

10 MR. HOBBS: Justification was charged.

11 JUDGE FEINMAN: And that had to be rejected,
12 right, as part of convicting him on the greater offenses?

13 MR. HOBBS: That's correct. And I - - - I
14 believe what the - - -

15 JUDGE FEINMAN: So I - - - I'm still having
16 trouble understanding the reasonable view, given that fact.

17 MR. HOBBS: If they rejected justification, then
18 they - - - they found that his action was not objectively
19 reasonable. That's the most you can infer from - - - from
20 the fact that they've rejected justification, that that - -
21 - he didn't make out a case that that was called for and
22 that it was an appropriate way of acting. And that's
23 completely consistent with it being reckless and being
24 negligent.

25 CHIEF JUDGE DIFIORE: Counsel, is the court bound



1 to accept the defendant's testimony that he was unaware of
2 the risk that - - -

3 MR. HOBBS: For the - - - the purpose of the
4 standard - - - the standard of review for whether or not to
5 charge, or the - - - the legal standard for whether or not
6 to charge the lesser-included offense, is - - - is - - -
7 and effectively you are bound by it - - - that you have to
8 take the - - - the light - - - the evidence in the light
9 most favorable to the defense.

10 CHIEF JUDGE DIFIIORE: And is the court entitled
11 to look at the evidence of the nature of the wound?

12 MR. HOBBS: Sure. Sure. And - - - but in this
13 case the - - - the Medical Examiner's testimony was quite
14 consistent with his - - - his testimony. She agreed that
15 the force could have been supplied by the - - - the victim
16 coming forward into the knife, and that his theory of how
17 the - - - the angle of the wound was consistent - - - she
18 couldn't rule that out.

19 So I think there's nothing about - - -

20 JUDGE FAHEY: Well, what about - - - what about
21 the argument that - - - that this was error, but the error
22 was harmless because a conviction of the top count would
23 preclude that? You're arguing intent. Recklessness is
24 sort of non-homicidal intent. That's what you're arguing
25 that he should have charged that.



1 And the - - - the - - - I think the case is
2 Boettcher or Betcher - - - I'm not sure how to say it - - -
3 says that if you're convicted on the top count, then you've
4 established homicidal intent and that - - - that question
5 is disposed of. So while it may have been error, it was
6 harmless error.

7 MR. HOBBS: Correct. I've outlined in - - - in
8 the brief, there are a couple of precedents from this court
9 that - - -

10 JUDGE FAHEY: Um-hum.

11 MR. HOBBS: - - - that don't apply the Boettcher
12 rule, and in circumstances that are quite similar to this.
13 And those are - - - the key ones are Green and Lee.

14 JUDGE FAHEY: Um-hum.

15 MR. HOBBS: And there have been attempts to
16 distinguish Green. But they don't get to the heart of
17 what's parallel between Green and this case.

18 JUDGE FAHEY: Well, Green - - - Green was a - - -
19 I'm just looking at my notes here - - - it was assault 1,
20 it wasn't - - - it wasn't - - - and there they - - - the
21 court held it wasn't a lesser-included offense of attempted
22 manslaughter 2, right?

23 MR. HOBBS: The - - - I believe the charges were
24 attempted murder - - -

25 JUDGE FAHEY: Um-hum.



1 MR. HOBBS: - - - in the second degree, assault
2 in the first degree. So the jury was presented with a
3 choice - - - you know, intent - - - a crime where they
4 would have to find intent to kill - - -

5 JUDGE FAHEY: Right.

6 MR. HOBBS: - - - and a crime where they would
7 have to find intent to - - -

8 JUDGE FAHEY: The important point is is you have
9 three crimes.

10 MR. HOBBS: Right.

11 JUDGE FAHEY: You have the murder crime, right?

12 MR. HOBBS: Um-hum.

13 JUDGE FAHEY: Homicidal crime. And then you have
14 assault 1 and then attempted assault 2. That was the
15 lesser included offense, it was held, doesn't apply to
16 attempted assault 2, right?

17 MR. HOBBS: I believe that was assault 2, was the
18 crime - - -

19 JUDGE FAHEY: Okay.

20 MR. HOBBS: Yeah. Not attempted.

21 JUDGE FAHEY: Oh, okay.

22 MR. HOBBS: That was what they were not charged
23 with.

24 JUDGE FAHEY: It might not have been - - - but
25 assault 2. All right.



1 So the - - - the elements weren't the same. They
2 weren't in the same line. The CPL doesn't set them out in
3 the same fashion.

4 MR. HOBBS: But the elements do line up - - - the
5 factual issues and the elements do line up with this case,
6 if you look at the mens rea.

7 The jury found intent to kill and intent to cause
8 serious physical injury, which is precisely what they found
9 in Green and precisely what they found here, and the court
10 said that doesn't rule out that if they had been given
11 recklessness, they would have abandoned both of those
12 findings of intent and moved to recklessness.

13 And that's - - - because recklessness is a
14 different form of culpability.

15 JUDGE STEIN: What - - - what - - - what impact,
16 if any, does - - - does the failure of the defendant to
17 object to the trial court's error in not charging the - - -
18 the murder and the manslaughter in the alternative - - -

19 MR. HOBBS: I don't - - - I don't think that it
20 has an effect here. I - - - my argument does not - - - I
21 have made an argument that because you have both verdicts,
22 the Boettcher rule shouldn't apply.

23 But I have a second argument which is also that
24 even if they had - - - they had been given them in the
25 alternative and the jury had - - - if we can hypothetically



1 assume the jury would have stopped at murder, that that - -
2 - the rule - - - Boettcher rule still should not apply
3 here.

4 And that's - - - there's a precedent for that in
5 Lee and a number of Second and First Department cases that
6 have followed Lee. And that is just simply because the
7 factual issues - - - the charges given to the jury and the
8 charges - - - don't line up with what was the key factual
9 issue in the case. They weren't given a choice that
10 reflects what the defendant's testimony was, but that his
11 crime was merely reckless and therefore a mitigated form of
12 culpability.

13 So to come around - - - back around to your
14 question, I would say that I don't think it has any impact.
15 But if he - - - it would only go to that first argument, if
16 it did.

17 JUDGE GARCIA: I thought Lee just dismissed the
18 lower count. Am I missing something in Lee? I thought the
19 remedy in - - - in our Lee case was they dismissed the
20 lower count of possession?

21 MR. HOBBS: I believe Lee reversed for a new
22 trial where they were to have - - -

23 JUDGE GARCIA: What's the cite - - -

24 MR. HOBBS: - - - the jury would - - -

25 JUDGE GARCIA: - - - what's your Lee cite?



1 MR. HOBBS: The cite to Lee is 35 NY2d 826.

2 JUDGE GARCIA: Okay.

3 MR. HOBBS: And there, the crimes lined up
4 exactly. It was murder in the second degree, manslaughter
5 in the first degree, were both given to the jury, and the
6 court said, look, there was evidence that the defendant was
7 intoxicated, and the circumstances are very strange here.

8 JUDGE STEIN: Yeah - - - yeah, but - - - but
9 there, the intoxication - - - the argument was that - - -
10 that there was no capability of forming intent. Was - - -
11 was there an intoxication charge requested or - - - or
12 given here at all?

13 MR. HOBBS: There was not an intoxication charge
14 here.

15 JUDGE STEIN: Okay. So - - -

16 MR. HOBBS: The - - - the People presented
17 evidence that Mr. McIntosh was intoxicated. One of the
18 witnesses, Terry Snyder (ph.), testified that he was drunk,
19 he was slurring his speech, he could also - - - and the
20 defense also presented evidence that he was drinking all
21 day long. And that - - - that evidence of intoxication is
22 at A-590 in the People's case.

23 JUDGE STEIN: But isn't - - -

24 MR. HOBBS: So the jury certainly could have
25 credited that.



1 JUDGE STEIN: Is there any view of the evidence
2 that - - - that he was so intoxicated that he could not
3 form an intent?

4 MR. HOBBS: I don't - - - that was not an
5 argument made, and I don't think that's the case. But you
6 don't have to be so drunk to not be capable of forming an
7 intent. And he said I had the intent to back him off.

8 JUDGE STEIN: But - - - but - - - but that - - -
9 that goes to your argument that - - - that the jury should
10 have been provided with an opportunity to find a non-
11 intentional crime.

12 MR. HOBBS: Right.

13 JUDGE STEIN: And - - - and you rely on Lee. But
14 Lee was the circumstance where there was evidence that
15 there was an inability to form any kind of intent.

16 MR. HOBBS: It's still the same basic point that
17 Boettcher does not apply when you have this disputed
18 factual issue. And you can't just look at verdict on the
19 top count, therefore the more remote lesser is not - - -
20 not available.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MR. HOBBS: Thank you.

23 CHIEF JUDGE DIFIORE: Counsel?

24 MR. MYLES: Good afternoon, Your Honors. May it
25 please the court, Scott Myles on behalf of the People.



1 The question this court has to decide is whether
2 or not Boettcher means what it says. Does the conviction
3 for the top count preclude any relief on the failure to
4 read lesser - - - more remote, lesser-included counts?

5 In this case, the defendant was convicted of the
6 top count, murder in the second degree. That conviction
7 necessarily precludes any argument that the jury might have
8 found guilty on a reckless mens rea. Reckless and intent
9 are mutually incompatible. They cannot both happen.

10 So the jury in this case returned a verdict of
11 guilty of murder in the second degree. Now, due to an
12 error on the part of the court - - -

13 JUDGE FEINMAN: Right. So if he - - - if he
14 didn't - - - if he had - - - if the trial judge had charged
15 the "must acquit" language, we wouldn't even be here.

16 MR. MYLES: Exactly. It was that error that, as
17 far as I can tell, has - - - has never occurred in the 112
18 years since this rule was outlined in People v. Granger,
19 and it is unlikely to ever occur again.

20 Were it not for that very unusual circumstance,
21 we would not be here.

22 So the only question that this court is - - - is
23 really presented with is does that second error by the
24 court remove this case from the line of cases under People
25 v. Granger for that exception, which was outlined, again,



1 in People v. Boettcher, that the failure to read the more
2 remote, lesser-included is necessarily harmless error when
3 there is a conviction on the top count?

4 So the - - - the dissenting opinion in the
5 Appellate Division was of the opinion that - - -
6 essentially that the conviction for the manslaughter in the
7 first degree, because of the decisions in - - - in cases
8 like People v. Green, means that it's not harmless error.

9 I believe that's a misreading of People v. Green.
10 The rule is, as was discussed in Boettcher, in - - - in
11 dicta, and again, in Green, that if there is a conviction
12 for the top lesser-included count, in this case,
13 manslaughter in the first degree - - -

14 JUDGE FAHEY: But let me ask this. If the court
15 had charged in the alternative - - -

16 MR. MYLES: Yes.

17 JUDGE FAHEY: - - - then would the defendant have
18 been entitled to a manslaughter 2 charge as a lesser-
19 included offense?

20 MR. MYLES: He - - - well, the question is not
21 would he have been entitled to it, the question is would
22 the failure to read it be necessarily harmless error.

23 JUDGE FAHEY: Well, the - - - the reason I ask is
24 because then the jury would have had it in front of them to
25 consider, and this way - - -



1 MR. MYLES: Yes.

2 JUDGE FAHEY: - - - they didn't have it to
3 consider.

4 Usually what happens is they - - - they convict
5 on the top and they - - - they don't address the other
6 ones. But here, they convicted on two different lines.

7 MR. MYLES: Correct.

8 JUDGE FAHEY: Right.

9 MR. MYLES: Because of that failure to read the
10 alternative.

11 JUDGE FAHEY: Yeah, and that - - - and that
12 failure meant that they did not have in front of them the
13 manslaughter 2 charge. That's the way I understand the
14 dissent's argument. Am I incorrect about that?

15 MR. MYLES: I - - -

16 JUDGE FAHEY: Tell me how you read it.

17 MR. MYLES: - - - I read the dissent's argument
18 more as saying that because there was a finding of guilt as
19 to the lesser-included, which was read - - - manslaughter
20 in the first degree - - -

21 JUDGE FAHEY: Um-hum.

22 MR. MYLES: - - - that because of the dicta in
23 Boettcher and the decision in Green, which says that it is
24 not harmless error when there is a conviction for the top
25 lesser-included which is read - - -



1 JUDGE FAHEY: Um-hum.

2 MR. MYLES: - - - that it's not harmless error.

3 However, all those cases were discussing that the
4 conviction of the top lesser-included, as an assumption
5 that there was an acquittal on the top count charged - - -

6 JUDGE FAHEY: Right. And that's not what you
7 have here.

8 MR. MYLES: That is not what we have here.

9 So again, had the jury been read the correct
10 instructions, they never would have gotten to man 1. They
11 certainly never would have gotten to man 2, even if it had
12 been read, which is why this case still falls squarely
13 within the Granger exceptions.

14 JUDGE WILSON: Well, is there - - - is there an
15 argument that had the jury been given the manslaughter 2
16 charge, it would have had something different in kind in
17 front of it, in that - - - in looking at the two charges it
18 did have in front of it, what it was being asked is: how
19 serious an injury did the defendant intend to inflict? And
20 the man 2 charge would have asked a different question, not
21 about the seriousness of the injury but about whether there
22 was an intent to injure at all.

23 And so that's a - - - that sort of takes you out
24 of the Boettcher/Granger line, which you know, when it's -
25 - - when you're talking about how much money in a larceny



1 case, that seems somewhat different in kind to what's going
2 on here.

3 MR. MYLES: It does - - - it is different in the
4 sense that, again, you're correct, it - - - it is a
5 separate mens rea. And that question of whether or not
6 cases with a different mens rea than the top count charged
7 and the top lesser-included charged should be an exception
8 to the Granger rule.

9 The - - - the appellant in this case is asking
10 for you to carve out an exception to the Granger exception,
11 so an exception to the Granger rule when it is a different
12 mens rea. That is, I believe, an extension that has not
13 specifically been disavowed by this court, but it has been
14 disavowed by this court in the sense that the defense is
15 asking you to encourage jury nullification by another name.

16 The - - - the jury in this case specifically
17 found the defendant intended to cause the death of the
18 victim and did, in fact, cause the death of the victim.

19 JUDGE WILSON: But possibly because it didn't
20 know it had the op - - - the option to say, you know, when
21 he caused the death of the victim, he did it really
22 criminally net - - - negligently, but maybe not
23 intentionally.

24 So their choices were acquit or say he intended
25 to do it, and it was closer to he intended to do it than he



1 had no responsibility.

2 MR. MYLES: Exactly, Your Honor. They had the
3 choice to acquit if they found that he did not intend to
4 cause the death. By carving out the exception that the
5 appellant urges this court to cave out, again, we would be
6 encouraging juries to reach compromise verdicts, which this
7 court has repeatedly found is - - -

8 JUDGE RIVERA: But haven't we also said that we -
9 - - the other problem we're trying to avoid with submitting
10 the lesser-included is a jury feeling that there is some
11 culpability, and they don't want to acquit completely.

12 MR. MYLES: Which is why - - -

13 JUDGE RIVERA: And this is where you're stuck in
14 this case.

15 MR. MYLES: Which is exactly why the Boettcher
16 and Granger rule exists in the first place, because in - -
17 - in this case, as in the entire Granger line of cases - -
18 -

19 JUDGE RIVERA: Um-hum.

20 MR. MYLES: - - - the jury was given a choice
21 between levels of culpability. They were given a choice
22 between murder in the second degree and manslaughter in the
23 first degree. They found him guilty - - -

24 JUDGE RIVERA: But - - - but if the choice is
25 more as to what Judge Wilson is suggesting, then their



1 choice is acquit or find guilty, and they're not - - - and
2 we're back to the problem that we're trying to address by
3 not letting the jury really be stuck with either we have to
4 let this person completely go or we've got to find them
5 guilty of something.

6 MR. MYLES: Again, I - - - I believe the Granger
7 rule, as it stands, is the appropriate balance between
8 those two choices.

9 The jury in this case was not given just murder
10 in the second degree or acquittal.

11 JUDGE RIVERA: Um-hum.

12 MR. MYLES: They were given murder in the second
13 degree, manslaughter in the first degree, and as Granger
14 and - - - and Boettcher and the entire line of cases has
15 said, the find - - - the finding of guilt on the top count
16 in - - - in that situation precludes - - -

17 JUDGE FAHEY: Let me ask this. Does - - - does
18 your office concede that this was error on the court's part
19 but that it was harmless, or are you saying it was not
20 error?

21 MR. MYLES: We do make the argument that it was
22 not error. I - - - I understand that it's a very low
23 threshold for whether or not they should have been read
24 manslaughter in the second degree. It's the view most
25 favorable to the defendant. The defendant did testify on



1 his own behalf.

2 However, we do make the argument, and I believe
3 it is - - - it is a valid argument, that the defendant did
4 not - - - did not make out a case for reckless mens rea in
5 this case.

6 The defendant, if you read his testimony and you
7 read the - - - the defense's case, really, in its entirety,
8 was trying to have his cake and eat it too throughout the
9 entire case. He was going for a justification defense,
10 which given the facts, was, I believe, a much stronger
11 defense than a reckless mens rea.

12 And so his testimony was going back and forth.
13 He was saying well, I - - - I intended to - - - to stab
14 him, but I didn't really intend to stab him. I just wanted
15 to - - - to get him to - - -

16 JUDGE STEIN: Well, no. I mean, we've recognized
17 that you can have an intent to - - - to - - - to stab
18 somebody but not intend the level of injury necessary to
19 meet the higher crimes, such as serious physical injury
20 versus physical injury or certainly, death. Right? So - -
21 -

22 MR. MYLES: That's certainly true, Your Honor.
23 But I don't believe the defendant's testimony in this case
24 - - - and even a reasonable view - - - would lead one to -
25 - - us to see recklessness instead of intent, given the



1 fact that he was stabbing somebody in the chest with a
2 knife.

3 JUDGE STEIN: Well - - -

4 JUDGE FEINMAN: So - - - so the point being that
5 there's different levels of intentional crime - - -

6 MR. MYLES: Yes.

7 JUDGE FEINMAN: - - - based on his testimony but
8 not negligence or - - -

9 MR. MYLES: Or recklessness.

10 JUDGE FEINMAN: Yeah, reckless.

11 MR. MYLES: Correct. But - - -

12 JUDGE RIVERA: But there is a view of the
13 evidence that it's the - - - the victim who propels himself
14 into the knife.

15 MR. MYLES: That was - - - that was what the
16 defense argued, certainly. And the medical testimony did
17 not - - - did not preclude that - - -

18 JUDGE RIVERA: Correct.

19 MR. MYLES: - - - as a possibility. However, the
20 People are not conceding that it was error in this case.
21 However, I do believe our - - - the much stronger argument
22 is that even if it was error, that Granger, Boettcher, the
23 entire line of cases, says that it is harmless error.

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 MR. MYLES: Thank you.



1 CHIEF JUDGE DIFIORE: Counsel?

2 MR. HOBBS: Thank you, Your Honors.

3 CHIEF JUDGE DIFIORE: You're welcome.

4 MR. HOBBS: The problem with the - - - the
5 Boettcher and the Granger rules is they don't attend to the
6 way in which the charges line up with the factual issues in
7 the case. And so not every set of hierarchy of greater and
8 lesser-included offenses falls in a - - - a neat line.
9 Some of them have elements that differ in certain ways.
10 And that's the case here.

11 We have two intent crimes and one - - - and
12 reckless and negligence crimes, which are different in
13 kind. And those crimes corresponded to what Mr. McIntosh
14 testified and what the other defense evidence supported.

15 The jury was given a choice that did not line up
16 with his testimony. He never testified that he had the
17 intent to cause serious physical injury or the intent to
18 commit murder. He - - - his intent brought it squarely
19 within recklessness.

20 The jury did - - - to find man 1, the jury would
21 have still had to disregard his evidence. Essentially, his
22 testimony had the effect of I took a risky act, a risky
23 defensive act - - -

24 JUDGE STEIN: But - - - but if the jury - - -

25 MR. HOBBS: - - - I didn't mean - - -



1 JUDGE STEIN: - - - thought that he - - - he
2 didn't mean to cause death - - -

3 MR. HOBBS: Um-hum.

4 JUDGE STEIN: - - - certainly, they - - - they
5 could - - -they had this available - - -

6 MR. HOBBS: It's still - - - that's - - -

7 JUDGE STEIN: - - - lesser-included, right?

8 MR. HOBBS: That's a theoretical possibility.
9 But they still would have had to ignore exactly what he
10 said and disbelieve - - - discredit what he was saying,
11 which is even that - - - I didn't mean to cause - - - I
12 didn't mean to stab him. I didn't mean to cause serious
13 physical injury. I just meant to poke him and for him to
14 scare - - - be scared and back off.

15 And so under the law and under common sense, when
16 someone says yeah, I did something reckless, or I did
17 something dangerous, but I didn't mean for this bad outcome
18 to happen, no one thinks that should be wholly exonerating.
19 And this jury reasonably did not think it was wholly
20 exonerating. But they weren't given the choice to give it
21 the weight that the law allows it.

22 The law is that this should be a lower form of
23 culpability. And the jury had no choice to do that, but
24 instead just to acquit him. And in People v. Moran,
25 Cardozo, this court has said, juries should not be left



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with that choice between conviction of murder and
acquittal.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. HOBBS: Thank you.

(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 The People of the State of New York v. James R. McIntosh, No. 58 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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