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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 228

ANDRE COLLIER,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
November 13, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Penina Wolicki  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Collier.

2 Counselor, do you want any rebuttal time?

3 MR. CASTRO: Yes, Your Honor. If I may  
4 reserve two minutes, I'd appreciate it.

5 THE COURT: Two minutes - - -

6 MR. CASTRO: Good afternoon, Your Honors -

7 - -

8 THE COURT: - - - go ahead.

9 MR. CASTRO: Good afternoon. Claude Castro  
10 for the appellant, Andre Collier.

11 The issue before the court is rather  
12 direct. Where a plea is found to be illegal, does  
13 the defendant have the right to vacate that plea?  
14 And we respectfully submit that the answer to that  
15 question is yes, and that the orders of appeal from -  
16 - - were erroneous, because what the tri - - - what  
17 the Appellate Division essentially gave to the trial  
18 court was the option of either permitting the  
19 defendant to withdraw his plea or to permit the court  
20 to "give him the benefit of his bargain".

21 And we submit to you that the concept of  
22 benefit of the bargain should not apply here.

23 CHIEF JUDGE LIPPMAN: Does it matter that  
24 the ultimate term, the aggregate is less than it was  
25 before?

1 MR. CASTRO: No, Your Honor, it does not.  
2 The question - - - and I think as this court has held  
3 - - -

4 CHIEF JUDGE LIPPMAN: There's no place to  
5 go from the beginning once - - -

6 MR. CASTRO: I agree with you.

7 CHIEF JUDGE LIPPMAN: - - - once it's  
8 illegal. Is that what you're saying?

9 MR. CASTRO: That's my point. Once it's  
10 illegal, it's illegal. And I think at that point,  
11 there's a Constitutional right and a due process  
12 right to be able to withdraw that plea.

13 JUDGE SMITH: So that if you, forget - - -  
14 forget about the two counts. You pleaded guilty on a  
15 deal for five years and you look up in the statute  
16 book and it says you've got to get ten, you say this  
17 is an outrage, I want my plea back, the People say  
18 I'll get the legislature to pass a law, it cuts it  
19 down to five. Say no, I get my plea back?

20 MR. CASTRO: No, Your Honor. If they could  
21 give you - - - and I think this court addressed the  
22 issue - - - the promise; in other words, if he could  
23 be - - - had been given the twenty-five and five on  
24 resentencing, then obviously the court would have  
25 been able to impose that sentence.

1                   But the fact of the matter is that it could  
2 not, because as a matter of law, the five-year  
3 sentence that was promised and given initially is  
4 simply no longer available. And there is no way on  
5 remand - - -

6                   JUDGE ABDUS-SALAAM: It was never available  
7 according to - - -

8                   MR. CASTRO: Correct. It was never  
9 available. But that was the promise that he relied  
10 upon in consenting to the deal.

11                  JUDGE SMITH: In common sense, aren't you  
12 better off with ten years consec - - - concurrent,  
13 than five years consecutive?

14                  MR. CASTRO: Your Honor, the answer to that  
15 question is obviously yes. But the real question is,  
16 does the defendant have a right under these  
17 circumstances to withdraw his plea?

18                  CHIEF JUDGE LIPPMAN: He's got a right to  
19 have exactly what he bargained for before? That's  
20 his right?

21                  MR. CASTRO: But Your Honor, what he  
22 bargained for, let's look it. And I'm not being  
23 facetious.

24                  JUDGE SMITH: He can get exactly what he  
25 bargained for, but he can reject something better?

1 MR. CASTRO: Well, Your Honor, let's bear  
2 in mind what he bargained for. He was told by the  
3 judge it's going to be twenty-five years on the first  
4 count, five years on the second, with no promise as  
5 to whether it would be consecutive or concurrent. So  
6 he could be - - - he could have been facing thirty  
7 years. So there was never a bargain at twenty-five.

8 And the reason I'm saying that, again, not  
9 being facetious, obviously twenty-five years is  
10 better than thirty. But this goes back to the issue  
11 of the validity of the plea and the ability - - -

12 JUDGE ABDUS-SALAAM: But isn't the problem  
13 - - -

14 JUDGE RIVERA: Yeah, but it's a better deal  
15 unless - - - unless the other - - - I mean, these are  
16 two sentences - - - unless the other one's  
17 overturned, right?

18 MR. CASTRO: Correct. It's a better deal -  
19 - -

20 JUDGE RIVERA: So if the other one's  
21 overturned, it's not such a good deal.

22 MR. CASTRO: He may go to trial.

23 JUDGE ABDUS-SALAAM: But Mr. Castro - - -

24 MR. CASTRO: The ques - - -

25 JUDGE ABDUS-SALAAM: - - - isn't the

1           problem here the sentence itself and not the plea?  
2           Isn't that what we said - - - I mean, didn't we say  
3           if it's the sentence that's a problem then that can  
4           be corrected, but if it's, you know, something - - -  
5           if it was unknowing, involuntary, whatever else, that  
6           would be a due process problem. But don't we have a  
7           problem here with the sentence, because one part of  
8           the sentence was illegal and can't that be corrected?

9                       MR. CASTRO: Your Honor, I think this court  
10           has said that once one part of the sentence is  
11           illegal, everything's illegal. And I think that's -  
12           - - that's very clear.

13                      JUDGE READ: Which - - - what case would  
14           you cite to?

15                      MR. CASTRO: Your Honor, I cite to the case  
16           of People v. Taveras, which discussed the impact of  
17           CPL 440.20, which did allow a defendant to challenge  
18           an illegal sentence.

19                      And again, as we put in our brief and as  
20           the commentaries show, that section does not require,  
21           number one, that you raise that issue on appeal, and  
22           number two, if you look at also the Second and Third  
23           Department and Fourth Department cases that we've  
24           cited, they all state that where the plea has two  
25           parts to it, and if one is illegal, it's part and

1 parcel - - -

2 CHIEF JUDGE LIPPMAN: So it's a package  
3 deal?

4 MR. CASTRO: - - - of the plea.  
5 Absolutely.

6 CHIEF JUDGE LIPPMAN: Is that the idea?

7 MR. CASTRO: It's a part - - - and the  
8 language has been "part and parcel of one plea."

9 JUDGE SMITH: Would it be - - - what would  
10 be unfair about making it an unpackaged deal, about  
11 saying, okay, you're unhappy with your - - - you got  
12 ten years instead of five on robbery number 2, you  
13 can withdraw your plea to robbery number 2, go to  
14 trial on that one, meanwhile, just do your twenty-  
15 five years on robbery number 1?

16 MR. CASTRO: Because, Your Honor, the plea  
17 was made with the understanding that it was going to  
18 be a package deal. And I think that's what the  
19 statute and what the cases say.

20 That was his understanding. That was the  
21 basis of his plea.

22 JUDGE ABDUS-SALAAM: But what if - - - what  
23 would have happened had the trial judge, at  
24 sentencing, run the sentences concurrently and then  
25 found out that the ten - - - the five-year sentence

1 was illegal? Would you say he should be able to  
2 withdraw his plea then?

3 MR. CASTRO: No. I think maybe at that  
4 point, Your Honor, he had a promise of twenty-five  
5 years which could be delivered.

6 JUDGE ABDUS-SALAAM: Well, no. According  
7 to you, the promise was made at the plea, not at the  
8 sentencing.

9 MR. CASTRO: That's correct, at the plea.  
10 But I'm say - - - but you're saying - - -

11 JUDGE ABDUS-SALAAM: At the plea he said -  
12 - -

13 MR. CASTRO: - - - that if the promise was  
14 - - -

15 JUDGE ABDUS-SALAAM: - - - at the plea - -  
16 - but at the plea the judge said it's up to me at  
17 sentencing whether I'm going to run it concurrent or  
18 consecutive.

19 MR. CASTRO: Correct.

20 JUDGE ABDUS-SALAAM: And this judge decided  
21 to run it consecutive, and then found out that the  
22 second half of it was illegal.

23 MR. CASTRO: Correct.

24 JUDGE ABDUS-SALAAM: So I'm saying, what  
25 would be the difference if the - - - if at sentencing

1 the judge had run it concurrently?

2 MR. CASTRO: Because the difference would  
3 be, Your Honor, is that on resentencing, the court  
4 could have fulfilled that promise. And I think  
5 that's what this court has said, and that's what the  
6 Supreme Court said as well, that if you can fulfill  
7 the promise, then the defendant does not have the  
8 right to withdraw.

9 JUDGE ABDUS-SALAAM: Well, but the court is  
10 fulfilling the promise. In fact, it's doing better  
11 than the promise.

12 MR. CASTRO: But the promise was five - - -  
13 he still is being sentence to ten years. He's still  
14 being sentenced to ten years on a count that he was  
15 promised five. And under these circumstances, we say  
16 to Your Honor, even though ultimately it may have  
17 been better for him - - -

18 JUDGE ABDUS-SALAAM: My point was that he's  
19 getting the same thing he would have gotten had the  
20 trial judge run it concurrently initially.

21 MR. CASTRO: If the court had done that.  
22 But the court didn't. And the court cannot.

23 JUDGE ABDUS-SALAAM: But that was at  
24 sentencing, not at the plea. And you're saying the  
25 plea is a problem?

1 MR. CASTRO: That's correct. That's  
2 correct, Your Honor, because the plea - - - and maybe  
3 I'm not being clear, but we have to look at the plea,  
4 because it was, what was the understanding of the  
5 defendant at the time he made his plea. What was the  
6 promise that was made to the defendant at the time  
7 that he made his plea?

8 It's irrelevant what happens later. It's  
9 at that point. He was promised a sentence of twenty-  
10 five years and five. And that sentence has been  
11 found to be illegal. And I say to you, there is no  
12 way for the trial court to have kept that promise.  
13 And this court has said, if you cannot do it, then  
14 the defendant has the right to withdraw.

15 CHIEF JUDGE LIPPMAN: Okay, counselor.  
16 Thank you.

17 MR. CASTRO: Thank you very much, Your  
18 Honors.

19 MR. SHARP: May it please the court, Steven  
20 Sharp on behalf the People. There are two remedies  
21 when a promised sentence is not or cannot be  
22 fulfilled exactly as promised. The first is a remedy  
23 that the defendant can withdraw his plea. And the  
24 second is that the promise can be fulfilled, specific  
25 performance can be given - - -

1 CHIEF JUDGE LIPPMAN: Yeah, yeah. But it's  
2 - - - but the operative word that you said were  
3 exactly what he was supposed to get. If it's exactly  
4 what they're supposed to get, no issue. Once it's  
5 not exactly, how do you get past that?

6 MR. SHARP: Because courts have - - -

7 CHIEF JUDGE LIPPMAN: If it's a  
8 Constitutional question?

9 MR. SHARP: Because courts have uniformly  
10 viewed the "exactly" in terms of what the reasonable  
11 expectations were.

12 CHIEF JUDGE LIPPMAN: Exactly means if you  
13 get five years less, then it's - - - you got it,  
14 even though - - - even though you didn't get what you  
15 were originally supposed to?

16 MR. SHARP: Exactly is that - - -

17 CHIEF JUDGE LIPPMAN: Do you follow what  
18 I'm saying? What are you saying? Exactly is  
19 exactly.

20 MR. SHARP: Well, exactly is - - -

21 CHIEF JUDGE LIPPMAN: If it's not exactly,  
22 is there any room?

23 MR. SHARP: Exactly is the benefit of his  
24 bargain.

25 CHIEF JUDGE LIPPMAN: Um-hum.

1 MR. SHARP: And - - -

2 CHIEF JUDGE LIPPMAN: You're saying the  
3 benefit of the bargain. He's arguing that unless he  
4 gets exactly what he's supposed to, it's not a  
5 benefit of the bargain analysis. How do you answer  
6 that? That's the question before us.

7 MR. SHARP: Because in Selikoff, this court  
8 made clear that the promise can be fulfilled, and it  
9 doesn't need to be precisely, as long as it's  
10 legitimate - - -

11 JUDGE SMITH: As long as - - - you're  
12 saying if it's - - - if it's no worse than what he  
13 bargained for then it's exact - - - then it's just as  
14 good as exactly?

15 MR. SHARP: Yes. And in this case, I mean,  
16 you can view it as he received an aggregate sentence  
17 of between twenty-five and thirty at the time of the  
18 plea. That was what was promised.

19 CHIEF JUDGE LIPPMAN: But - - -

20 JUDGE SMITH: But what about the maybe  
21 remote possibility that for some reason the twenty-  
22 five-year sentence goes away; he gets federal habeas  
23 on the twenty-five-year sentence, and then he's - - -  
24 and then he's doing ten years instead of five. Isn't  
25 he aggrieved at that point?

1 MR. SHARP: Yes, I would agree, then at  
2 that point, if that was to occur, then on Count V,  
3 his legitimate expectations at that time would not be  
4 met, and he can move to withdraw at that time.

5 JUDGE SMITH: So you're saying it's - - -  
6 he does have that right, but he doesn't have it until  
7 it happens?

8 MR. SHARP: Correct.

9 CHIEF JUDGE LIPPMAN: But don't our cases  
10 say that this is a due process issue?

11 MR. SHARP: No - - -

12 CHIEF JUDGE LIPPMAN: Our cases don't say  
13 that ?

14 MR. SHARP: Are - - - you're - - - I mean,  
15 referring to Catu and Hill - - -

16 CHIEF JUDGE LIPPMAN: Yeah.

17 MR. SHARP: - - - I think that there's a -  
18 - -

19 CHIEF JUDGE LIPPMAN: And Van Deusen and  
20 everything else. Go ahead.

21 MR. SHARP: I think there's a very big  
22 distinction between post-release supervision and  
23 general incarceration. That's what this court made  
24 clear in Catu and Hill, because the rights at issue  
25 there, particularly when you had a range of five to

1           fifteen in Van Deusen, or you had a - - - the minimum  
2           term, which was less than five years, was you were  
3           exposing the defendant to far greater time. And not  
4           knowing the post-release supervision, meaning, wasn't  
5           aware of curfew restrictions that could have been  
6           imposed, travel restrictions. But most  
7           significantly, a violation of probation, which would  
8           have, if it was violated, kept him incarcerated  
9           possibly far longer than he ever anticipated at the  
10          time of the plea.

11                        And that's not what we have here. What we  
12          have here is a range that was given of twenty-five  
13          and five, either consecutive or concurrent, meaning  
14          twenty-five to thirty years. And ultimately on the  
15          resentence, he was given twenty-five years. And  
16          that's why it's really a violation of a sentencing  
17          expectation and not his due process rights.

18                        JUDGE RIVERA: Well, but you're treating  
19          the sentences together, right? His point is I never  
20          would have waived my rights if I knew that on this  
21          sentence I couldn't get this time; and when I thought  
22          about - - - when I thought about what I would waive  
23          my rights to, I was thinking about both sentences.  
24          But if I had known that this sentence I couldn't get  
25          the promise fulfilled, I would not have waived my

1 rights, not only on this sentence but on the other  
2 sentence.

3 MR. SHARP: And that's an entirely - - -

4 JUDGE RIVERA: Or on the other conviction,  
5 excuse me.

6 MR. SHARP: And that's an entirely  
7 hypocritical position.

8 JUDGE RIVERA: Why so?

9 MR. SHARP: Because there's no doubt that  
10 had he been given the offer of twenty-five on one and  
11 ten concurrent on the other, that that would have  
12 changed his plea at this time. He pled to ultimately  
13 - - -

14 JUDGE RIVERA: How do we know that? How do  
15 we know that?

16 MR. SHARP: Because it's common sense when  
17 you look at the plea. And he's given the offer of  
18 you face between twenty-five and thirty years, and  
19 then he pled guilty, allocuted to both, and then to  
20 say that well, no, he wouldn't have accepted it if  
21 his aggregate exposure would have only been twenty-  
22 five. It's hypocritical.

23 JUDGE SMITH: You're saying that the person  
24 was never born who would prefer the thirty to the  
25 twenty-five?

1                   MR. SHARP: Yes. And certainly - - - and  
2                   that's a different position in this case than in the  
3                   post-release context, where ultimately he could have  
4                   been exposed to more in Catu and Hill, for instance -  
5                   - -

6                   JUDGE SMITH: Isn't it really just as hard  
7                   in Hill to imagine the person who would have turned  
8                   down the lesser prison time than - - - in other  
9                   words, you say no sane person takes more time than  
10                  less time. But isn't it also true that no sane  
11                  person prefers prison to post-release supervision?

12                  MR. SHARP: Sure. But that's what this  
13                  court held in Catu and Hill, was you know, that that  
14                  was a due process violation. And so under that - - -  
15                  but I think it's distinct - - - distinctly different  
16                  in this case. And certainly in - - - at least in  
17                  Catu, you had a different situation where he could  
18                  have been in prison far longer. It was that  
19                  situation. And Van Deusen was a range.

20                  Hill, of course - - -

21                  JUDGE SMITH: You read Hill as turning  
22                  essentially on that comment in the footnote, that  
23                  maybe there's a theoretical possibility that he'd  
24                  have more time with the PRS?

25                  MR. SHARP: Yes. And - - - and certainly

1           it seemed like this court, in Hill, went at length to  
2           distinguish post-release supervision as a - - -  
3           involving a lot greater rights at issue than simply  
4           looking at it from a prison component, with the  
5           curfew restrictions, travel restrictions, and those  
6           sorts of things.

7                         Thank you.

8                         CHIEF JUDGE LIPPMAN:  Okay, thanks,  
9           counselor.

10                        Counselor, rebuttal?

11                        MR. CASTRO:  If I may, very briefly, Your  
12           Honor.

13                        I just want to note, in the Selikoff case  
14           that counsel just alluded to, in that case the court  
15           gave the defendant the right to withdraw when the  
16           sentence was set aside, and he rejected that.  So I  
17           don't think that that's productive on this appeal.

18                        And I think as Your Honor indicated, the  
19           courts - - - this court in Hill, Van Deusen, Catu,  
20           all said that if the sentence is different - - - and  
21           that's the language by this court - - - if the  
22           sentence is different, then the defendant - - - and  
23           if he's not given the right to withdraw, then the  
24           plea becomes involuntary and unconstitutional.

25                        CHIEF JUDGE LIPPMAN:  Your adversary says

1 that's hypocritical, the argument that you're making.

2 MR. CASTRO: Your Honor, it's not  
3 hypocritical, it's Constitutional.

4 JUDGE SMITH: Doesn't the law get - - -

5 MR. CASTRO: It's his right. It's his  
6 right. It may be not a wise move - - -

7 CHIEF JUDGE LIPPMAN: You're saying, he may  
8 be right, but he's wrong in the fact that the  
9 Constitution - - -

10 MR. CASTRO: That he - - - he has the right  
11 to be wrong, Your Honor. He has a Constitutional  
12 right to be wrong.

13 JUDGE SMITH: Are you - - -

14 MR. CASTRO: And that's - - -

15 JUDGE SMITH: - - - the logic - - -

16 MR. CASTRO: I'm sorry, Your Honor.

17 JUDGE SMITH: The logic of your position  
18 that if this had been reversed he'd agreed to a ten-  
19 year sentence, and then they look in the statute book  
20 and say, wait a minute, five is the maximum, you're  
21 going to have to take five, he can say no, I'm not  
22 taking the five, I want my plea back?

23 MR. CASTRO: If I have the right to do  
24 that, that's my point, Your Honor. If the - - - if  
25 the plea was illegal - - - if the plea is illegal - -

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JUDGE SMITH: Yeah. Assume - - - assume that it's a - - - assume that you find out the day after you pleaded that you're going to have to take half the time than you agreed to, that's a ground for withdrawing your plea?

MR. CASTRO: Your Honor, again, if the plea is illegal - - -

JUDGE SMITH: Is that a yes?

MR. CASTRO: The answer's yes. If the plea is illegal, then I submit to you, under applicable law and based on due process rights, the defendant has the option and the right to elect to withdraw his plea. Thank you, Your Honors.

CHIEF JUDGE LIPPMAN: Okay. Thank you both. Appreciate it.

(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 v. Andre Collier, No. 228 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

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Date: November 18, 2013