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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 58

JARROD BROWN,

Respondent.

20 Eagle Street
Albany, New York 12207
March 24, 2015

Before:

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

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 58, People v.
2 Brown.

3 (Pause)

4 CHIEF JUDGE LIPPMAN: How much rebuttal
5 time do you want?

6 MS. FENN: Two minutes, Your Honor.

7 CHIEF JUDGE LIPPMAN: Two minutes, go
8 ahead.

9 MS. FENN: Assistant District Attorney
10 Danielle Fenn for appellant. May it please the
11 court. Here the Appellate Division erred in holding
12 that paroled defendants were eligible for
13 resentencing.

14 CHIEF JUDGE LIPPMAN: Let - - - tell us
15 about the changes that came from the amendment
16 between the - - - the original DOCS and the
17 Department of Corrections and Community Supervision.
18 What's that all about? What - - - what happened?
19 Why did they do it? And how does that impact on this
20 case?

21 MS. FENN: First, what happened. There was
22 legislation in 2011 that merged the Division of
23 Parole - - -

24 CHIEF JUDGE LIPPMAN: Right.
25

1 MS. FENN: - - - and the Department of
2 Correctional Services to one agency.

3 CHIEF JUDGE LIPPMAN: What's the - - - what
4 was the purpose of that?

5 MS. FENN: That purpose was - - it was
6 clearly a budget bill. These were conforming
7 technical amendments to change thirty-six different
8 statutes to change the name DOCS to DOCCS.

9 CHIEF JUDGE LIPPMAN: Yeah. But when you
10 say budget bill, it had no operational significance?

11 MS. FENN: It was mainly a budget bill.
12 There was language - - -

13 CHIEF JUDGE LIPPMAN: But I asked you did
14 it have an operational significance?

15 MS. FENN: To the agency, to the merged
16 agency - - -

17 CHIEF JUDGE LIPPMAN: Yeah.

18 MS. FENN: - - - yes. There - - - where it
19 was now a combined agency, it was - - -

20 CHIEF JUDGE LIPPMAN: It was a budgetary
21 bill that resulted in operational changes. Once
22 those operational changes took place, what impact
23 does it have on the - - - the situation on the case
24 in front of us?

25 MS. FENN: There were operational changes

1 but there were no substantive changes. It merely
2 changed the agency name. It did not intend to confer
3 new benefits on parole defendants or to change the
4 custody requirement of Section 440.46.

5 CHIEF JUDGE LIPPMAN: Yeah. But - - - but
6 did it change - - - when you read the plain language
7 of the statute, did that change, that operational
8 change, change the - - - the import of the words that
9 are in the statute?

10 MS. FENN: No, Your Honor.

11 CHIEF JUDGE LIPPMAN: Why not?

12 MS. FENN: Before - - - before these
13 amendments, custody clearly meant incarceration.
14 This court's precedent - - -

15 CHIEF JUDGE LIPPMAN: What - - - what after
16 the amendments? What does it mean?

17 MS. FENN: It still had the same meaning,
18 because the purpose of the amendment was to merge
19 these two agencies, not to provide new benefits to
20 parole defendants.

21 CHIEF JUDGE LIPPMAN: Let me ask you a
22 question. Isn't the - - - these amendments, didn't
23 they have a greater policy change in terms of reentry
24 and having a seamless connection between the people
25 who were in and the people who were on parole?

1 Wasn't the whole idea that it should be part of the
2 same piece of cloth, and that's what this was all
3 about?

4 MS. FENN: There was language about
5 creating a seamless transition, but that seamless
6 transition was through the merger of the two
7 agencies. But when - - -

8 CHIEF JUDGE LIPPMAN: Right. But - - - but
9 isn't it for - - - I - - - I guess what I'm saying, I
10 - - - I - - - I'm not trying to argue it. I'm trying
11 to understand. Didn't it have a policy meaning
12 that's important in terms of the issue before us, in
13 terms of the theory of people who should be together
14 whether they're in or whet - - - whether they're
15 under - - - under the general umbrella of this new
16 department?

17 MS. FENN: Your Honor, to the extent there
18 was a policy reason or a policy purpose, that would
19 not be served by ending parole early.

20 CHIEF JUDGE LIPPMAN: Why not? Why
21 wouldn't it be served if the idea is you are still
22 within this continuum of being in or still being
23 subject to the supervision of now this new merged
24 department?

25 MS. FENN: While parole defendants are in

1 the supervision of this merged department - - -

2 CHIEF JUDGE LIPPMAN: Yeah.

3 MS. FENN: - - - the effect of resentencing
4 is to end their parole. That's the practical effect
5 of resentencing - - -

6 JUDGE PIGOTT: Maybe.

7 MS. FENN: - - - parole defendants.

8 JUDGE PIGOTT: I mean it's - - - it's
9 discretionary, is it not? I mean you can apply for
10 resentencing but you don't automatically get it.

11 MS. FENN: That's correct, Your Honor.
12 It's a two-step process. The first step is
13 eligibility, and the second step is substantial
14 justice.

15 JUDGE PIGOTT: So why would you oppose
16 this? I mean it seem - - - it seems to me if - - -
17 you know, if they got some people and they deserve
18 resentencing, they're going to get resented. If
19 they don't, they don't. Why - - - why would the
20 People care?

21 MS. FENN: In this case, Your Honor, when
22 the legislature enacted the 2009 DLRA, there were
23 very specific requirements. It was a two-step
24 process. It was eligibility and then - - -

25 JUDGE PIGOTT: No, I understand all that.

1 I - - - I - - - I - - - I just don't understand the
2 vociferous nature of your - - - of - - - of your
3 complaint about it. It would seem to me if I - - -
4 if I was the jailer, for example, and they say we can
5 get some of these people out under the - - - under
6 the DLRA, I'd say hey, go to it. I - - - you know,
7 I'll give you the keys. I don't know why we would
8 necessarily say we want to take away from the justice
9 system the ability to at least cull from those that
10 are there those who deserve to be resentenced because
11 the whole DLRA was addressed to very tough drug laws.

12 MS. FENN: Um-hum. It - - -

13 JUDGE ABDUS-SALAAM: Could I just amend
14 that? Are - - - is Mr. Brown in or out? Is he out
15 on parole or is he in custody?

16 MS. FENN: He is currently out. His parole
17 was discharged in 2012 shortly after he was
18 resentenced. According to his original sentence, the
19 six to twelve, he would have been on parole
20 supervision 'til 2017. And to go back to Judge
21 Pigott's question - - -

22 CHIEF JUDGE LIPPMAN: Yeah, but - - - but -
23 - - but let me amend also that isn't the judge just
24 really saying the - - - the judge has the - - - the
25 final word. So what's the problem? The judge is

1 going to decide. Once you get past the first whether
2 you're eligible, the judge then decides. And if the
3 person should be out in the judge's discretion and
4 it's in the interest of justice, why isn't - - - and
5 I - - - I don't mean to speak for Judge Pigott, but
6 why isn't that a good thing?

7 MS. FENN: Well, in this case, Your Honor,
8 the legislature was very clear with a two-step
9 process, eligibility and then substantial justice.
10 And in this case - - -

11 CHIEF JUDGE LIPPMAN: Yeah. But the judge
12 still has that second portion within his or her
13 control. And if the person should be out, again, why
14 is not that a fair and a good thing, from a policy
15 perspective, that if - - - if - - - if they meet
16 substantial justice let's have them out. You know,
17 there's such a whole discussion in this country, in
18 New York and around the country, about, you know,
19 whether we have too many people incarcerated.

20 And here you have a statutory process that
21 allows a - - - a - - - a judge to use their
22 discretion in the interest of substantial justice to,
23 if people shouldn't be in, let them out. Why - - -
24 put aside your technical interpretation of after the
25 amendment and how the statute reads. Isn't that a

1 good thing?

2 MS. FENN: In this case, Your Honor, the
3 effect of resentencing parole defendants is to end
4 their parole. And to the extent that the legislature
5 felt it was or the department felt - - -

6 CHIEF JUDGE LIPPMAN: So if - - - no, but
7 answer me yes or no. It's not a good thing from a
8 policy perspective? If the interest of justice
9 merits them being released and being out, why isn't
10 that a positive thing for our state, for our
11 government, and for our society? From a - - - look
12 at it from a policy viewpoint - - - I understand your
13 very specific technical argument about the statute
14 and the amendment and how it changes and how it can -
15 - - why, from a policy perspective, isn't this a good
16 thing for our state?

17 MS. FENN: If there are policy issues then
18 that's for the legislature to determine. And in this
19 case in the 2009 - - -

20 CHIEF JUDGE LIPPMAN: But there is language
21 in the legislative statute that certainly, from its
22 plain reading, given the amendment, would appear to
23 say it's okay for these people to be eligible.

24 MS. FENN: Your Honor, I would beg to
25 differ. But in the 2011 amendments these were

1 conforming amendments and there was nothing in that
2 legislative history.

3 JUDGE READ: I have a question about - - -
4 just about practically what's going on. The - - -
5 Mr. Brown says that a lot of large counties, like
6 Bronx County I think was the example, are actually
7 resentencing under the DLRA. Is that correct? So
8 that is happ - - - this is happening in some parts of
9 the state?

10 MS. FENN: There are some lower-court
11 decisions where they are resentencing defendants, and
12 there are some where they are not. But in this case
13 there's strong policy reasons that show that
14 eligibility - - -

15 JUDGE STEIN: Well, from a policy
16 perspective, why is this any different from allowing
17 someone who is in prison when they make their
18 application but is released before the application is
19 decided? Why is this, from a practical standpoint
20 and a policy standpoint, any different? If they're
21 already out or if they're out before their
22 application is decided. What - - - what's the
23 difference?

24 MS. FENN: Well, in this court's holdings
25 in Paulin and in Santiago, the evil that was sought

1 to be cured by the DLRA was to alleviate the burden
2 of - - -

3 JUDGE STEIN: But how is that - - - how is
4 that alleviated if the person's out by the time their
5 application gets decided?

6 MS. FENN: But if the operative time was
7 the filing of the resentencing - - -

8 JUDGE STEIN: I understand that. But if
9 the policy is - - - if it is as you say, to relieve
10 people of the burden of incarceration, but they're
11 already out on parole when the application is
12 decided, how is that furthering that policy?

13 MS. FENN: To the extent that there is a
14 policy for reintegration, there is relief available
15 to these parole defendants. They could apply after
16 two years of unrevoked parole. So there are - - -
17 they are being treated differently but they're not
18 being treated unfairly. And they do have the remedy,
19 which the legislature - - -

20 CHIEF JUDGE LIPPMAN: Counselor, but aren't
21 we supposed to construe this kind of statute in terms
22 of the purpose of the Rockefeller reforms? Shouldn't
23 we construe it liberally? And don't these parolees
24 still have - - - they're still under certain
25 conditions. They have an interest in reducing the

1 length of the sentence. Why doesn't this conform
2 perfectly to what the purpose behind this remedial
3 legislation is? Why shouldn't we look at it from a -
4 - - a broad liberal construction of it?

5 MS. FENN: While there was an - - - there
6 was an ameliorative purpose, that wasn't the only
7 purpose of the 2009 Drug Law Reform Act. And, of
8 course, when they - - - the legislature was enacting
9 this, the evil to be cured was these harsh sentences,
10 not to eliminate parole supervision, which is the
11 practical effect of resentencing defendants. And
12 these parole defendants have access to transitional
13 programs. They're being benefit - - -

14 CHIEF JUDGE LIPPMAN: Okay, counsel.

15 MS. FENN: They're being benefited.

16 CHIEF JUDGE LIPPMAN: Okay, counsel.

17 You'll have rebuttal. Let's see what your adversary
18 has to say about all of this.

19 Counsel.

20 MR. CROW: Your Honors, David Crow for Mr.
21 Brown. If I may start by addressing some of the
22 court's questions that are obviously on your - - -

23 CHIEF JUDGE LIPPMAN: Address the policy
24 issues.

25 MR. CROW: Certainly, Your Honor. I think

1 there's no question that this is a case where all the
2 policy interests line up in favor of allowing for
3 these - - -

4 CHIEF JUDGE LIPPMAN: Why? Why?

5 MR. CROW: - - - to be resentenced.

6 CHIEF JUDGE LIPPMAN: How? How and why?

7 MR. CROW: As Judge Pigott noted and as
8 this court's Sosa decision also noted, it's a two-
9 step process. Eligibility, the Sosa court said,
10 should be construed broadly, because there's the
11 safety valve of the substantial justice - - -

12 JUDGE ABDUS-SALAAM: What about our Paulin
13 decision?

14 MR. CROW: - - - determination.

15 JUDGE ABDUS-SALAAM: Do we have to overrule
16 it if we decide in your favor?

17 MR. CROW: The Paulin decision?

18 JUDGE ABDUS-SALAAM: Yes.

19 MR. CROW: Not at all, not at all. Paulin
20 was the case that allowed parole violators who were
21 back in incarceration to be resentenced. This would
22 simply extend that process to an additional group.
23 And, in fact, on a policy point of view it's - - -
24 it's - - - it's really compelling. The People fought
25 the Paulin decision saying it would be unfair to give

1 parole violators the chance to be resentenced, but
2 for law-abiding parolees to have to continue serving
3 their sentences.

4 JUDGE ABDUS-SALAAM: Wasn't - - - wasn't
5 the dividing line there being in custody or out on
6 your own supervision or parole supervision? Wasn't
7 that the dividing line? That's what I mean about our
8 Paulin decision. That - - -

9 MR. CROW: That - - -

10 JUDGE ABDUS-SALAAM: - - - we said you have
11 to be in custody.

12 MR. CROW: Yes. And that was the - - -
13 that was the change as of March 2011. So anyone who
14 applied before the statute was amended unquestionably
15 had to be incarcerated at the time they applied. As
16 the - - -

17 CHIEF JUDGE LIPPMAN: Does it matter
18 whether the statute particularly intended to address
19 this additional group?

20 MR. CROW: No, it does not.

21 CHIEF JUDGE LIPPMAN: That - - - is that
22 what the legislative intent - - - shouldn't we care
23 about the legislative intent, or do we look to the
24 plain language and how this consolidation now reads
25 when you read the language in conjunction with the

1 executive law, et cetera?

2 MR. CROW: Well, it - - - it's both, of
3 course. It's - - - it's the language of the statute
4 should be given the broadest reading that it can
5 naturally be given, because it's a remedial statute.
6 So you look at that phrase, "custody of the
7 Department of Corrections and Community Supervision,"
8 and you give it the broadest natural reading.

9 JUDGE ABDUS-SALAAM: Counsel, we're here
10 because DOCS changed from DOCS to DOCCS, correct?

11 MR. CROW: Yes.

12 JUDGE ABDUS-SALAAM: And so what really
13 changed other than the name to bring us to the point
14 where we're now saying someone who was under the
15 supervision of DOCS but now - - - not under the
16 supervision of DOCS but now is under supervision of
17 DOCCS is eligible for a resentencing under the DLRA?

18 MR. CROW: I mean that takes us back, I
19 think, to Judge Lippman's first question, which is
20 what was the - - - the broad purpose of the merger
21 statute. And I strongly disagree with my adversary
22 who describes it as merely budgetary. When you go to
23 the DOCCS Web site, you'll see that they recognize
24 that it's substantive in nature and that that 2011
25 law made a whole series of substantive changes to the

1 relationship between - - -

2 JUDGE PIGOTT: Well, that just struck me as
3 some pretty good lawyering. I - - - I was wondering
4 if the legislature, when they - - - when they did
5 this said, boy, this is going to be great for - - -
6 you know, it'll loosen up the DLRA?

7 MR. CROW: I mean I couldn't honestly say
8 that the legisla - - - there's no legislative history
9 specifically on this point. But what is significant
10 is that when the 2011 law came in, the drafters, the
11 - - - the technical people, went through the
12 correction law, went through the executive law, made
13 a whole series of changes, and they clarified now, is
14 this merger going to create some confusion about
15 whether we're talking about incarcerated or
16 nonincarcerated persons. And I cite a whole series
17 of those in my brief. CPL 440.46, the language
18 regarding the resentencing, was left intact, the
19 broadest possible phrase, custody of the combined
20 department. So - - -

21 CHIEF JUDGE LIPPMAN: What's the - - -
22 what's the - - - the philosophy when you say there's
23 much more than budgeting? You know, I mentioned
24 before this reentry philosophy of a continuum. Is
25 that what it is? Is it a new - - - is it a new

1 theory as to whether you're in or you're out, you're
2 still in this broad group of people who are under
3 some kind of supervision. Is it one to the other and
4 - - - and - - - and is there something behind it?

5 MR. CROW: Absolutely, Your Honor. And
6 that's what the Appellate Division correctly
7 recognized here: the concept that you now have one
8 agency which is responsible for the oversight of all
9 individuals from the moment they begin serving their
10 state sentence until the moment they are discharged
11 from that sentence. And it reflects the reality,
12 which is that you now have a whole spectrum of ways
13 in which that sentence can be served. Some of them
14 are traditional prisons, others are halfway programs,
15 and then there's the pure parolee. And that's the
16 spectrum that the 2011 law said put them all under
17 one commissioner.

18 JUDGE ABDUS-SALAAM: What was the change?

19 JUDGE READ: They're all in custody.
20 They're all in custody?

21 MR. CROW: They're all in custody of the
22 new department were supervisees and incarcerated
23 persons and everybody in between, Willard Program
24 people, comm - - - community treatment programs, et
25 cetera. There's a whole range.

1 JUDGE STEIN: Is that different from people
2 who are received into custody, for example, under
3 Section 71?

4 MR. CROW: Yes, Your Honor. There are - -
5 - there are - - - I'm not arguing that every time the
6 phrase "custody of the department" is used it could
7 also be interpreted as supervision.

8 JUDGE STEIN: So how do we know which
9 interpretation? And does - - - does that make it
10 ambiguous rather than the plain language question?

11 MR. CROW: In a - - - in a sense, yes. And
12 that's where, for resentencing, the tie has to go to
13 the - - - to the applicant. But I would also say, as
14 this court addressed that problem in the Hawkins
15 case, it recognized that the term "custody" is not
16 fixed; it's not defined. You have to look to each
17 statute and make a conclusion.

18 JUDGE ABDUS-SALAAM: But what - - - what -
19 - - what was the change in the DLRA under this
20 amendment that now says that someone on parole is
21 eligible for DLRA resentencing?

22 MR. CROW: The change in the language of
23 CPL 440.46 was to change DOCS to DOCCS. And I want
24 to contrast that with other changes in the 2011 law
25 where a specific narrowing phrase was inserted to

1 make clear that it's only the incarcerated persons
2 under the custody of the Department. So there were
3 narrower and there were broader sets of language that
4 emerged from that 2011 law. And when it came to the
5 resentencing statute, it was the broadest possible
6 phrase that was used, and so it refers to
7 incarcerated and those under community supervision.

8 CHIEF JUDGE LIPPMAN: Okay, counselor,
9 anything else?

10 MR. CROW: Just as - - - as far as the
11 policy goes, I think the - - - that - - - that as the
12 Appellate Division recognized, we're really
13 eliminating not just - - - we're not just following
14 the intent of the new law, but we're eliminating a
15 very serious anomaly that was the case before the
16 merger. Before the merger, those who were better
17 behaved - - - I'm sorry - - - those who were worse
18 behaved and got a parole violation could apply, and
19 those - - -

20 JUDGE STEIN: But what about the other
21 provisions that do call for early termination of
22 parole and other things if - - - if someone's
23 behaved? Why doesn't that take care of it?

24 MR. CROW: There are a variety of kinds of
25 relief that were granted under the original 2004

1 DLRA. But the fact that different forms of relief
2 are available at all different points in the process
3 - - - you can get out of prison more quickly, you can
4 be discharged after two years of good behavior - - -
5 none of those substitute for the resentencing part of
6 the statute.

7 And for my clients, people like Mr. Brown,
8 they have addiction problems, they have mental health
9 problems. It's very difficult for them to go two
10 years of unrevoked parole, which is one of those
11 safety valves. They deserve the chance to come
12 before a judge and say this person on the merits is
13 someone who has served enough time, five, six, eight
14 years, and I'm going to let them off their sentence
15 even if they can't make that full two years of
16 unrevoked parole.

17 CHIEF JUDGE LIPPMAN: Okay. Thanks,
18 counselor. Appreciate it.

19 Counselor, rebuttal.

20 JUDGE PIGOTT: Ms. Fenn, in - - - Judge
21 Cohen in his - - - in his writing said, "In
22 expressing its intent in enacting the 2011
23 amendments, the legislature cited the evolution of
24 the sentencing structure for it to focus on reentry
25 and, thus, the need to provide for a seamless network

1 for the care, custody, treatment, and supervision of
2 a person from the day a sentence of state
3 imprisonment commences until the day such person is
4 discharged from supervision in the community." And
5 he said that in - - - say, in contrary to the
6 People's contention that the amendments were not
7 purely budgetary or technical. Was he correct or did
8 he misunderstand?

9 MS. FENN: No, Your Honor. Where there was
10 language about the seamless transition, it was about
11 the mergers of agencies. And there's also policy
12 reasons that, to the extent there was a hope for a
13 seamless transition, that ending parole supervision
14 early, which is the - - - generally the effect of
15 resentencing a parole defendant, does not achieve
16 those goals.

17 The legislature had various programs for
18 parole defendants to participate in. They are
19 supposed to have a transitional accountability plan.
20 And there is an idea that there's a step down from
21 complete incarceration to supervision within the
22 community to complete liberty in the community. And
23 to the extent that there is an abrupt end to a parole
24 supervision, that does not further that policy goal
25 of reintegration.

1 Moreover, in regard to the argument where
2 there's a safety valve. There is a two-step process,
3 and in the 2009 DLRA the legislature could have said
4 that every Class B drug felon was eligible and then
5 made it clearly up to the courts just doing a
6 substantial justice inquiry. But that's not what
7 happened. There's a two-step process, and while the
8 2009 DLRA was ameliorative in nature, that does not
9 mean that the eligibility requirements can be
10 ignored.

11 Just to briefly touch on defendant's
12 argument that a tie has to go to the applicant. In
13 the extent that there is a presumption in favor of
14 resentencing, that only applies to the second prong,
15 the substantial justice prong, not to the eligibility
16 requirements. And to the extent there is an anomaly,
17 there is nothing in the 2011 legislative history to
18 show that that's what the legislature was trying to
19 fix.

20 CHIEF JUDGE LIPPMAN: Okay. Thank you
21 both.

22 MS. FENN: Thank you.

23 CHIEF JUDGE LIPPMAN: Appreciate it.

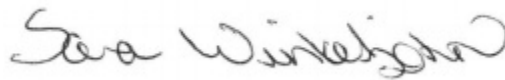
24 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Jarrod Brown, No. 58 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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