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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 65

PERNELL A. FLANDERS,

Appellant.

Syracuse University College of Law
950 Irving Ave
Syracuse, NY 13244
March 25, 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

Appearances:

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Let's go to number
2 65, People v. Flanders.

3 Okay, counsel. We're going to go to 65.
4 Do you want any rebuttal time, counsel?

5 MR. RASPANTE: No, thank you, Your Honor.

6 CHIEF JUDGE LIPPMAN: No rebuttal time. Go
7 ahead. You're on.

8 MR. RASPANTE: Your Honor, John - - - may
9 it please the court. John - - -

10 CHIEF JUDGE LIPPMAN: Yes.

11 MR. RASPANTE: - - - Raspante on behalf of
12 Pernell Flanders in the case of People of the State
13 of New York v. Pernell Flanders, appealing
14 convictions for attempted murder in the second
15 degree, reckless endangerment, and attempted assault
16 in the first degree, Your Honor.

17 CHIEF JUDGE LIPPMAN: What's the problem
18 here with the two guns and all of this? What's - - -
19 what is the heart of your argument?

20 MR. RASPANTE: Your Honor, the People
21 should have proven what they indicted him for. The
22 indictment was clear - - -

23 CHIEF JUDGE LIPPMAN: Does it really matter
24 which weapon they used based on that - - - that
25 indictment?

1 MR. RASPANTE: Absolutely, Your Honor.

2 CHIEF JUDGE LIPPMAN: Why?

3 MR. RASPANTE: Because this jury had to
4 make a determination as to whether one gun was used
5 or another gun was used or both. They should not - -
6 -

7 CHIEF JUDGE LIPPMAN: Why did they have to
8 make that determination, and why isn't it just the
9 same vengeful impulse that treated - - - and why
10 shouldn't we treat it as just one transaction? Why
11 is this not in sync with the indictment?

12 MR. RASPANTE: It's - - - it's not a case
13 where this defendant had a - - - a gun in his hand,
14 and a rifle strapped to his back. There was an
15 intervening incident there where he went back to the
16 vehicle to retrieve the rifle. There's a serious
17 question as to whether the gun created a serious
18 physical injury or whether it was the rifle.

19 JUDGE RIVERA: How long did it - - -

20 JUDGE READ: That's a question.

21 JUDGE RIVERA: - - - how long did it take
22 to go get the rifle?

23 MR. RASPANTE: Actually - - -

24 JUDGE RIVERA: Or does that not matter?

25 MR. RASPANTE: I don't think it matters. I

1 think the case law is clear that - - - that the time
2 is not dispositive, but whether - - -

3 JUDGE STEIN: But does the case law say
4 that if he stops to - - - to reload his - - - the
5 same gun, that it's - - - it's two different - - -

6 MR. RASPANTE: I think we're dealing with
7 two different - - -

8 JUDGE STEIN: - - - acts?

9 MR. RASPANTE: - - - instances, in that
10 when he used his pistol, he was engaged in - - - in a
11 physical contact with the victim. He was losing
12 ground. And the - - - also the victim's fiancée was
13 involved there. That's when he used the pistol.

14 Then he went back to the vehicle to
15 retrieve his rifle.

16 JUDGE STEIN: But I'm talking about the
17 time frame. When is that - - - why is that different
18 from if he stops whatever he's doing and reloads his
19 ammunition and then continues to shoot, let's say it
20 was the same gun?

21 MR. RASPANTE: Um-hum.

22 JUDGE STEIN: There was a break in the
23 action, so to speak, but we don't say that those are
24 two different acts.

25 MR. RASPANTE: And for that reason, because

1 there's that break - - - that break, the - the - -
2 the jury had to make this determination. And they
3 shouldn't have to be burdened by that. We don't know
4 if - - -

5 JUDGE ABDUS-SALAAM: Counsel, what was the
6 jury charged?

7 MR. RASPANTE: Pardon?

8 JUDGE ABDUS-SALAAM: What was the jury
9 charged?

10 MR. RASPANTE: They were - - -

11 JUDGE ABDUS-SALAAM: Don't they have to
12 make a determination - - -

13 MR. RASPANTE: They were - - -

14 JUDGE ABDUS-SALAAM: - - - in light of the
15 charge given to them?

16 MR. RASPANTE: They were told an
17 instruction that mirrored the indictment, that the
18 People had to prove beyond a reasonable doubt that
19 the defendant used the gun and the rifle. And then
20 the judge constructively amended that when the jurors
21 asked could it be the gun, could it be the rifle,
22 could it be both?

23 That constructive amendment was improper.
24 That - - - such an amendment required application by
25 the People, notice to the defendant, and there

1 shouldn't be any prejudice. And he was, in fact,
2 prejudiced by this. So - - -

3 JUDGE PIGOTT: How was he prejudiced?

4 MR. RASPANTE: Because the jurors had to
5 make a determination as to whether - - - did the gun
6 create serious physical injury, or the rifle, or
7 both. They should not have been put in that
8 position, Your Honor.

9 JUDGE PIGOTT: Well, your defense was
10 justification.

11 MR. RASPANTE: Well, you know, the
12 circumstances were different from the time he had to
13 use the pistol and he had to use the rifle.

14 CHIEF JUDGE LIPPMAN: Anything else,
15 counselor?

16 MR. RASPANTE: No, Your Honor.

17 CHIEF JUDGE LIPPMAN: Thank you.

18 MR. RASPANTE: Thank you.

19 CHIEF JUDGE LIPPMAN: Appreciate it.

20 Counsel, come on up. Let's hear your
21 argument.

22 MR. COX: Thank you. May it please the
23 court, Steve Cox for the People, from Oneida County.

24 CHIEF JUDGE LIPPMAN: Why doesn't it make a
25 difference which gun it is? What about unanimous

1 verdict and that kind of thing?

2 MR. COX: Because some of the cases this
3 court's had in the past in this area, I think focus
4 more on what a deadly weapon is. And here - - - in
5 fact, Kaid, for instance.

6 CHIEF JUDGE LIPPMAN: So as long as it's a
7 deadly weapon, it doesn't really matter?

8 MR. COX: Sure. So long as he possessed
9 the intent initially going in to cause serious
10 physical injury and death by use - - - by means of a
11 deadly weapon, and that injury was caused by means of
12 a deadly weapon. The close causal connection - - -

13 CHIEF JUDGE LIPPMAN: Consistent enough
14 with the indictment, you believe?

15 MR. COX: I believe, yes. The close causal
16 conn - - -

17 JUDGE RIVERA: So if he went - - - if he
18 went back to get a machete?

19 MR. COX: I'm sorry?

20 JUDGE RIVERA: If he went back to get a
21 machete instead of a rifle?

22 MR. COX: If that - - -

23 JUDGE RIVERA: Does it matter.

24 MR. COX: - - - ended up - - - sure. If
25 there was - - - assuming there was evidence that a

1 machete was - - - or - - or - -or handgun caused
2 serious physical injuries, then yes.

3 So he possessed - - - he was in possession
4 of - - -

5 JUDGE RIVERA: Regardless of the difference
6 in the wounds?

7 MR. COX: I - - - well, in your
8 hypothetical, then, are there gunshots or machete
9 wounds?

10 JUDGE RIVERA: If - - - well, that's the
11 question, isn't it?

12 MR. COX: So that would - - - that would be
13 a question of fact, then, for what is before the
14 jury. Here we have fact - - - the facts spell out
15 that we have three casings found from a .380, a hand
16 gun, five from a rifle. The - - - Mr. Thorington is
17 wounded at least seven times. So - - - but you're
18 unable to determine forensically which bullet caused
19 which wound, or necessarily - - - you know, I don't
20 think that the statute requires the specificity of
21 knowing which bullet caused serious physical injury.

22 JUDGE PIGOTT: Well, but it - - - it can be
23 argued, and I think defense counsel is arguing that,
24 you know, I don't want to say you overcharge people,
25 but you know, the - - - the number of charges - - - I

1 mean, it was, you know, a street fight - - - granted,
2 it was a street fight with - - - with weapons. But
3 to charge all of those, and then - - - and then the
4 jury gets confused, and the court gave the
5 instruction that was different than the trial proof.
6 Because he said you can - - - you can convict him of
7 one or the other.

8 MR. COX: Well, that's the - - -

9 JUDGE PIGOTT: But you're arguing and - - -
10 both.

11 MR. COX: I guess that's the concept I have
12 trouble with. I don't know that he changed anything
13 when he answered that question. I think he was
14 illuminating the charge he'd given them. The charge
15 was that you - - - the defendant had to be in
16 possession of a deadly weapon.

17 JUDGE PIGOTT: Is there a - - -

18 MR. COX: Here it's a loaded firearm.

19 JUDGE PIGOTT: - - - what - - - but is it
20 conceivable that if you want - - - if you were trying
21 the case saying it was one or the other, and they
22 wanted to bring in forensics to say under no
23 circumstances was it the rifle - - -

24 MR. COX: Sure, if - - -

25 JUDGE PIGOTT: - - - that would be a

1 defense they could have. And they didn't have - - -
2 they didn't have that opportunity, because you're
3 arguing "and", you're trying "and" all the way
4 through. So you know, it could be any number of
5 shell casings out there.

6 And then the judge says, well, you don't
7 really have to find two, you can find one.

8 MR. COX: There could have been - - - given
9 that - - - at the outset, let me say, this was not a
10 well worded indictment. I would not have put an
11 "and" and joined these two weapons. You could have
12 said and/or. You could have merely said "a loaded
13 weapon", and had - - - had a sufficient indictment.

14 JUDGE ABDUS-SALAAM: And that's what the
15 judge actually gave - - - that's the instruction the
16 judge gave to the jury in response to their note,
17 isn't it?

18 MR. COX: Yes, I think so.

19 JUDGE ABDUS-SALAAM: Have we allowed that?

20 MR. COX: I'm sorry, what?

21 JUDGE ABDUS-SALAAM: Has - - - has this
22 court allowed that?

23 MR. COX: I think the judge simply
24 interpreted the "and" to mean that either of them
25 constituted - - - it's a little Zen here - - - but

1 either of them or together, they constituted a deadly
2 weapon under the definition of a loaded firearm. It
3 doesn't - - - the statute doesn't make clear that the
4 loaded firearm you possess has to be singular.

5 Kaid, for instance, where this court's - -
6 - I'm sorry - - - the Third Department said, but this
7 court didn't take up, whether - - - were there three
8 knives involved, whether they had to demonstrate
9 whether it was one or two of, or all three knives
10 that caused the injuries. But the fact that you were
11 - - - someone was attacked with three knives and
12 caused - - - and they - - - and therefore resulted -
13 - -

14 JUDGE ABDUS-SALAAM: Were there any Court
15 of Appeals - - -

16 MR. COX: - - - in serious physical injury.

17 JUDGE ABDUS-SALAAM: - - - cases that say
18 the same thing or something similar?

19 MR. COX: Yes.

20 JUDGE ABDUS-SALAAM: And what's your best
21 case for that?

22 MR. COX: I'm sorry, could you say that
23 again?

24 JUDGE ABDUS-SALAAM: Are there any Court of
25 Appeals cases that say something similar to the Kaid

1 case from the Third Department, and what's your best
2 case for that?

3 MR. COX: Well, the logic, I think, is from
4 Wells, where there was a charge of attempted murder,
5 a singular charge of attempted murder of a police
6 officer, but the defendant was firing at two police
7 officers. The indictment didn't specify which police
8 officer the defendant was trying to kill, but this
9 court said that wasn't necessary.

10 And here, I don't think - - - I think it's
11 the same thing. It doesn't matter which weapon - - -
12 the defendant didn't intend to cause serious physical
13 injury with the .380 but not the .22, and it's not
14 necessary to find that he joined the two and only
15 intended to cause serious physical injury if he hit
16 him with both. It's that he possessed these two wea
17 - - - instruments, these two loaded firearms, and as
18 a result of that attack, serious physical injury was
19 inflicted by means of a loaded firearm, which is a
20 deadly weapon.

21 CHIEF JUDGE LIPPMAN: Counselor, anything
22 else?

23 MR. COX: No. Thank you.

24 CHIEF JUDGE LIPPMAN: Okay, thank you.

25 (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. Pernell A. Flanders, No. 65 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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Date: April 2, 2015