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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 35

ANGEL CINTRON,

Respondent.

20 Eagle Street
Albany, New York 12207
February 11, 2014

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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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 35, People v.
2 Cintron.

3 MR. BRAUN: Thank you, Your Honors. I'd
4 like to reserve two minutes of rebuttal time. May it
5 please the court - - -

6 CHIEF JUDGE LIPPMAN: Sure, go ahead.

7 MR. BRAUN: Thank you. May it please the
8 court, Justin J. Braun for the Office of the District
9 Attorney Bronx County.

10 Your Honors, this case is about the People
11 appealing a judge's erroneous vacature of a lawful
12 resentence.

13 CHIEF JUDGE LIPPMAN: Timely appealed?

14 MR. BRAUN: It was timely appealed. In
15 fact - - -

16 CHIEF JUDGE LIPPMAN: Direct appeal?

17 MR. BRAUN: It was a direct appeal. It
18 seems that counsel's arguing that it wasn't a direct
19 appeal, but there's plenty of law saying that this
20 type of appeal actually is a direct appeal, and I
21 would point to the Pirro case, which I've cited in my
22 brief.

23 The People are doing nothing out of the
24 ordinary here. We're not trying to have defendant
25 resentenced past his expiration date. We're just

1 asking that this court issue an order reversing an
2 illegature (sic) - - - and illegal vacature
3 resentence.

4 JUDGE GRAFFEO: Which case best supports
5 your position? Our Brinson case, is that - - -

6 MR. BRAUN: Actually I would say that - - -
7 that Williams best supports our position, because it
8 - - - Williams gives, in fact, a bright line, which
9 we would apply to this case, where it says that "A
10 defendant released from custody after serving his
11 period of incarceration, and the time to appeal the
12 sentence has expired," that's when the legitimate
13 expectation of finality crystallizes.

14 So in other words, there's no double
15 jeopardy problem here at all. This is an ordinary -
16 - -

17 JUDGE GRAFFEO: As long as the appeal is
18 pending, you don't have expiration?

19 MR. BRAUN: Exactly. In fact, the
20 defendant himself brought his 440.20 motion after his
21 expiration date had expired already. So in other
22 words, there was a lawful sentence with PRS going on
23 - - -

24 JUDGE SMITH: So suppose - - -

25 JUDGE ABDUS-SALAAM: One that was imposed

1 in 2008 is the one - - -

2 MR. BRAUN: One that was imposed in 2008
3 when this sentence hadn't - - -

4 JUDGE ABDUS-SALAAM: Before - - - before
5 his - - - before his incarceratory sentence ended - -
6 - or the whole thing ended in 2009?

7 MR. BRAUN: That's absolutely right.

8 JUDGE ABDUS-SALAAM: And you're asking us
9 to reinstate the 2008 - - -

10 MR. BRAUN: We're not ask - - - I'm sorry;
11 just to clarify. We're not asking a reinstatement.
12 If you issue an order saying that - - - that the
13 latest illegal vacature and resentence itself should
14 be reversed, then the sentence automatically reverts
15 back to that 2008 sentence.

16 JUDGE SMITH: Well, it - - - it sounds like
17 a re - - - you call it a reversion, but it sounds
18 like a reinstatement to me. What's the difference?
19 I mean, the - - - the state - - - it was vacated; we
20 reversed the order of vacating - - - vacating it.
21 Doesn't that reinstate it?

22 MR. BRAUN: I mean, it reinstates it
23 insofar as that - - - that becomes the sentence
24 that's - - - that's recognized, but I - - -

25 JUDGE SMITH: Let me - - - let me give you

1 - - - let me change the facts slightly. Suppose what
2 you had here - - - suppose the original resentencing
3 had come at a time when he was - - - during his
4 conditional release. And the judge who - - - before
5 whom the resentencing took place, said as I read
6 Williams, it's too late - - - this is be - - - I
7 mean, this is before Lingle - - - and as I read
8 Williams, it's too late, and I deny resentencing.
9 And you took an appeal, and during your appeal the
10 time runs. Is that a different case?

11 MR. BRAUN: Well, I'm not sure I understand
12 Your Honor's - - - Your Honor's question here, how it
13 differs from the facts of this case, because in this
14 case - - -

15 JUDGE SMITH: No, the - - - this was a
16 motion to vacate a resentence that had already been
17 imposed. I'm hypothesizing that the judge originally
18 refused to resentence him.

19 MR. BRAUN: That the judge originally
20 refused to resentence him at all, and then later - -
21 - and then after his expiration date - - - so in
22 other words, we have an original sentence that's - -
23 - that's still on the books.

24 JUDGE SMITH: Yes, yes.

25 MR. BRAUN: Yes, that would be a different

1 case. In fact, that would - - -

2 JUDGE SMITH: Well, on your - - - on your
3 theory, the pendency of the appeal extends the time.

4 MR. BRAUN: Well, no, in that - - - because
5 in that case, what Your Honor's describing is
6 actually what happened in Velez. In that case, there
7 was an original sentence, and it's also what happened
8 in Sparber.

9 JUDGE SMITH: Well, in Velez, they didn't -
10 - - they didn't get around to - - - to actually - - -
11 to - - - to the - - - to imposing PRS until after - -
12 - until after his - - - either - - - even the
13 sentencing court didn't do it until after the time -
14 - - the maximum time had run.

15 Suppose - - - suppose it were different.
16 Suppose they had done - - - suppose the - - - at the
17 time, the resentencing court makes its decision, the
18 time has not run but the resentencing court
19 erroneously thinks it has and refuses to resentence.
20 You with me?

21 MR. BRAUN: Yes.

22 JUDGE SMITH: Then he ta - - - then you
23 take an appeal. And during your appeal, the time
24 runs. Can - - - can it get reversed?

25 MR. BRAUN: Well, I - - - I would say yes,

1 Your Honor, because in this case, the point that
2 we're arguing is that at the time that we take an
3 appeal, the positions of the parties are known.
4 There's not a factual inquiry like there is with a
5 601(d) proceeding, and that point, the legitimate
6 expectations of finality are essentially frozen at
7 that moment, because every - - - as everybody is
8 aware, a direct appeal can't be decided in a day. It
9 can't be decided in a few hours. There's a pendency
10 for it, and - - -

11 JUDGE SMITH: So your theory essentially
12 for these purposes, is that the result of the appeal
13 speaks as of the day on which the - - - the decision
14 below was made?

15 MR. BRAUN: That's correct, because again,
16 how can - - - how can a defendant have a legitimate
17 expectation of finality, when they know that there's
18 a timely filed notice of appeal; there's a pending
19 appeal that's going through a set of very specific
20 procedures. The positions of the parties are known.
21 And an appeal can't be decided in a day.

22 Otherwise, it completely vitiates our
23 ability to take an appeal from an illegal decision by
24 a judge. And surely that can't be what the
25 legislature had in mind when it provided statutory

1 vehicles in the criminal procedure law for us to take
2 these appeals.

3 And again, there's no finality - - -
4 there's no issue of whether or not the finality has
5 crystallized here, because again, as DiFrancesco
6 instructs on the issue of double jeopardy, the People
7 can appeal from sentences, from resentences. That's
8 very different that - - - to what's, you know, what's
9 generally thought of as a reprosecution. And the
10 defendant can't have a legitimate expectation of
11 finality from those types of decisions.

12 Williams, of course, as I - - - as I
13 alluded to earlier, reaffirms this principle and
14 says, that while the direct appeal is pending, that
15 there can't be this - - - this bright line - - - the
16 bright line is clearly - - - we're not over the
17 bright line, because we have a timely filed direct
18 appeal pending.

19 Once more, defendant's own actions created
20 this situation, because he waited till after he
21 expired in the maximum expiration date, to even file
22 his 440.20 motion. So in other words, if - - - if we
23 don't reverse the Appellate Division here, then what
24 we're essentially saying is that a defendant can run
25 the clock. He just has to wait - - - he can have a

1 lawful sentence going on with PRS, he just has to
2 wait till the day after his maximum expiration date;
3 he can file and that's it, we can't take an appeal,
4 even if the judge is wrong. And again, that can't be
5 what was envisioned in CPL 450.30.

6 Once more, we would say that even by the
7 fact that, you know, there's - - - there's law from
8 the lower courts that says, by the fact that he
9 waited this long, that he - - - he essentially - - -
10 by challenging his sentence at all, in fact, he
11 waived double jeopardy for these purposes.

12 And this is also an important principle,
13 because once more, this isn't us dragging our heels
14 and creating a problem for him, this is his own
15 timing. If he had filed this, you know, in 2008,
16 right after the resentencing, his 440.20, this wouldn't
17 even be an issue, and we wouldn't even be talking
18 about PRS in the Court of Appeals on a late
19 afternoon.

20 And finally, you know, the more - - - the
21 most important reason why this court should reverse
22 the Appellate Division here is, again, the People
23 shouldn't be deprived of a statutory right of review
24 merely because of a technicality here that isn't
25 supported in the law. It's not support - - - it's

1 very simple. It's not support - - - there's no issue
2 of finality here, and all we are doing is appealing
3 from an illegal vacature.

4 CHIEF JUDGE LIPPMAN: Thanks, counsel.

5 MR. BRAUN: Thank you.

6 CHIEF JUDGE LIPPMAN: Counsel? We want to
7 continue talking about PRS in the late afternoon, so
8 - - -

9 MR. ZENO: It seems like we're talking
10 about - - -

11 CHIEF JUDGE LIPPMAN: Tell us what you have
12 to say.

13 MR. ZENO: - - - PRS in the late afternoon
14 for five or ten years, now.

15 CHIEF JUDGE LIPPMAN: Yes, yes. See the
16 movie that's coming out.

17 JUDGE READ: But doesn't your position kind
18 of - - - kind of create this opportunity for
19 gamesmanship that your opponent was describing?

20 MR. ZENO: No opportunity for gamesmanship
21 whatsoever. My client did not wait until he finished
22 his sentence. He waited until People v. Williams was
23 decided, and a month later, promptly moved for
24 resentencing.

25 CHIEF JUDGE LIPPMAN: Williams'

1 controlling? Is that your best case, too?

2 MR. ZENO: Williams - - - well I think
3 Williams and Velez are my best cases - - -

4 CHIEF JUDGE LIPPMAN: Velez is different,
5 though, or no?

6 MR. ZENO: I don't think it's different.
7 The question here is the same as it was in Williams,
8 Lingle, and Velez, and that's when does the court's
9 authority to correct a sentence end? It doesn't
10 matter whether it's the trial court or the - - - or
11 an appellate court.

12 JUDGE SMITH: Isn't there - - - is there a
13 difference between correcting a sentence and
14 correcting an erroneous refusal to correct a
15 sentence?

16 MR. ZENO: No, no.

17 JUDGE SMITH: Or, actually, I guess - - - I
18 guess - - - I guess what really happened here is
19 there was a sentence, there was a corrected sentence,
20 there was a vacature of the corrected sentence - - -

21 MR. ZENO: Right, the double jeopardy
22 clause forbids sentence increases and multiple
23 punishments under certain circumstances.

24 JUDGE SMITH: Okay, but if - - -

25 MR. ZENO: The name you give to them - - -

1 JUDGE SMITH: But if - - - but if a
2 sentence is erroneously reduced, why can't an
3 appellate court reverse the error?

4 MR. ZENO: It can, as long as it follows
5 the Williams rule. The People had an opportunity in
6 2001 to complain about this sentence. In 2001, my
7 client was sentenced to a ten-year sentence with no
8 PRS. They did nothing about it then. They had
9 thirty days to file a notice of appeal. They didn't.
10 They had a year to move to vacate it, they didn't.

11 JUDGE SMITH: They - - - they failed to
12 foresee Catu and a few other cases. That - - -

13 MR. ZENO: And they failed to - - - they
14 failed - - -

15 JUDGE SMITH: Not an unusual problem.

16 MR. ZENO: And - - - and Williams takes
17 that into account. Williams was confronted by five
18 defendants, who - - - where the People failed to
19 timely file a notice of appeal and object to the
20 sentence. And it formulated a rule, and it said, you
21 cannot correct a sentence once the defendant has
22 fully served his sentence, and the People's time to -
23 - -

24 JUDGE ABDUS-SALAAM: So is it your
25 position, counsel - - -

1 MR. ZENO: - - - appeal it was expired.

2 JUDGE ABDUS-SALAAM: - - - that he had
3 fully served his sentence in 2008 when he was
4 resentenced with an appropriate PRS?

5 MR. ZENO: In 2008, he had not fully served
6 his sentence, no.

7 JUDGE ABDUS-SALAAM: Right, so that's the
8 sentence that the People - - - well, the People had
9 him resentenced in 2008, and then in 2009 he says,
10 no, that's wrong. You can't impose PRS.

11 MR. ZENO: I'm not sure what your question
12 is.

13 JUDGE ABDUS-SALAAM: The People want us to
14 go back to the 2008 sentence that you agree was
15 legally imposed.

16 MR. ZENO: Right.

17 JUDGE ABDUS-SALAAM: And so you're saying
18 that we shouldn't do that?

19 MR. ZENO: That's correct. The People - -
20 -

21 JUDGE ABDUS-SALAAM: Because?

22 MR. ZENO: Because the defendant full - - -
23 has now fully served his sentence at - - - and the
24 court no longer has the authority - - -

25 JUDGE GRAFFEO: But - - -

1 MR. ZENO: - - - to increase his sentence.

2 JUDGE GRAFFEO: But in the recent Brinson
3 case --

4 MR. ZEON: Um-hum.

5 JUDGE GRAFFEO: - - - we state, talking
6 about Williams, "The temporal limitation demarcation
7 occurs once the sentence is served and the appeal is
8 completed or the time for such appeal has expired."

9 MR. ZENO: Right.

10 JUDGE GRAFFEO: They have a pending appeal.

11 MR. ZENO: They did not have a pending
12 appeal until after - - -

13 JUDGE GRAFFEO: They have a pending appeal
14 from the 2008 resentencing?

15 MR. ZENO: From the 2009 resentencing - - -

16 JUDGE GRAFFEO: 2009, rather.

17 MR. ZENO: - - - which was after his
18 sentence was completed.

19 JUDGE GRAFFEO: So why are you going back
20 to 2001?

21 MR. ZENO: Why am I going - - - because
22 that's what Williams was talking about when it wrote
23 the rule. There - - - Williams wasn't talking about
24 resentences. Williams was talking about the original
25 sentence. When it said the direct appeal is

1 concluded, they were talking about the direct appeal
2 from the conviction and sentence.

3 There was a direct appeal from the
4 conviction here. It went to the Appellate Division.
5 It - - - it was affirmed. It went to this court.
6 This court denied leave. That all happened back in
7 2004.

8 JUDGE GRAFFEO: So the Williams rule
9 doesn't apply to Lingle cases, is that what you're
10 saying?

11 MR. ZENO: The Williams rule - - -

12 JUDGE GRAFFEO: Doesn't apply to
13 resentencing cases?

14 MR. ZENO: The Williams rule absolutely
15 applies to resentencing cases. It forbids sentence
16 increases once the defendant has fully served his
17 sentence and - - - and the direct appeal is
18 concluded. When Williams said direct appeal is
19 concluded, it meant the direct - - - the original
20 direct appeal. It wasn't talking about resentences -
21 - -

22 JUDGE ABDUS-SALAAM: If you - - -

23 MR. ZENO: - - - because there was no
24 resentence there.

25 JUDGE ABDUS-SALAAM: I'm sorry, counsel.

1 If you agree that he was properly resentenced in
2 2008, in 2009, that sentence had not been completed.

3 MR. ZENO: It was completed once - - -

4 JUDGE ABDUS-SALAAM: Because PRS was - - -

5 MR. ZENO: It was completed once the court
6 resentenced him a second time. It was completed once
7 the court resentenced - - - resentenced him a second
8 time and took the post-release supervision off his
9 sentence. When he walked out of the courtroom in
10 2009, his sentence was complete. He was serving no
11 PRS. He had - - - and his sentence was complete.

12 JUDGE GRAFFEO: Even though a time for the
13 People to file a notice of appeal - - -

14 MR. ZENO: Even though the time for the
15 People - - -

16 JUDGE GRAFFEO: - - - had not expired?

17 MR. ZENO: That's - - - that's correct.

18 And - - -

19 JUDGE SMITH: And even though you now
20 concede that that - - - that that - - - that the
21 judge out of whose courtroom he walked, committed an
22 error?

23 MR. ZENO: That's right, Your Honor.

24 JUDGE SMITH: It's an error from which the
25 People effectively had no appeal.

1 MR. ZENO: That's correct. That's what
2 double jeopardy is all about. It's the accommodation
3 of the defendant's interest in finality against the
4 People's, the government, the State's right to have a
5 correct result, and it fix - - - it makes an
6 accommodation. It makes a rule that balances all of
7 those interests.

8 I would suggest that in a case like this
9 one, my client was - - - fully served his sentence
10 four years ago. Four - - - four years ago, PRS was
11 taken off his sentence. He hasn't been subject to it
12 for four years. And to add it back now would not
13 serve justice. It makes no sense.

14 When the court decided Williams, and Lingle
15 and Velez, it said, we want to create a rule that
16 promotes certainty, clarity and fairness. Creating
17 an exception to Williams that would allow a - - - an
18 appeal after the fact, just doesn't promote that
19 clarity.

20 And I want to, just for a moment, before my
21 time is up, talk about Velez, because Velez really
22 presents the same situation here - - - as it does
23 here. In Velez, the People argued that the
24 defendant's - - - defendant's expectation of finality
25 ends when a resentencing proceeding begins. That was

1 a re - - - a 601(d) resentencing proceeding. It was
2 a statutory mechanism that the legislature enacted
3 for the express purpose of allowing PRS sentence
4 corrections.

5 But this court rejected that and said, no,
6 the filing of a 601(d) notice does not terminate the
7 defendant's expectation of finality. It does not
8 defer it. This is the same thing. The no - - - a
9 notice of appeal, a statutory mechanism for
10 correcting a sentence just like a 601(d) notice, just
11 like a 601(d) proceeding, does not defeat the
12 defendant's expectation of finality because there has
13 been - - - because the defendant has served his
14 sentence and the People - - - the People's time to
15 appeal the original sentence has expired.

16 CHIEF JUDGE LIPPMAN: Okay, counsel.

17 MR. ZENO: Thank you.

18 CHIEF JUDGE LIPPMAN: Thanks.

19 Counselor, anything to add?

20 MR. BRAUN: Just very briefly, Your Honor.

21 You know, essentially, defendant's position is, so
22 long as there's no PRS, it's okay to keep correcting
23 the sentence, but as soon as you put PRS on, you
24 know, you get double jeopardy protection ceding, and
25 that's not necessarily true. You have to look at the

1 factual background of when the sentence took place
2 and - - - and whether or not the double jeopardy
3 protections actually come into play and - - -

4 CHIEF JUDGE LIPPMAN: Well, his - - - his
5 argument is that when his client walks out of the
6 courtroom, he has absolutely every expectation of
7 finality. Why wouldn't you?

8 MR. BRAUN: Except there's a thirty-day
9 period to file a direct appeal.

10 CHIEF JUDGE LIPPMAN: But your argument is,
11 as long as he's on notice that the People may appeal,
12 that's dispositive in your - - - your favor?

13 MR. BRAUN: Absolutely, because - - - and
14 again, he - - - he like - - - he wants to - - - you
15 know, my adversary wants distinguish what a - - -
16 whether it's a direct appeal in terms of what
17 Williams has decided - - -

18 CHIEF JUDGE LIPPMAN: Right.

19 MR. BRAUN: - - - but - - - but there's
20 nothing in Williams to suggest that this isn't a
21 direct appeal, and in fact, as I alluded to the Pirro
22 case, and as I alluded to CPL 550.30, it makes no
23 distinction between appealing an original sentence
24 and appealing a resentence. We - - - both of these
25 are direct appeals as contemplated by this law and

1 the statutory law. So, Your Honors, we would ask
2 that this court please reverse the Appellate
3 Division.

4 CHIEF JUDGE LIPPMAN: Okay, counsel,
5 thanks. Thank you both. Appreciate it.

6 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Angel Cintron, No. 35 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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