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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 81

KEVIN M. MINEMIER,

Appellant.

20 Eagle Street
Albany, New York
May 31, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next appeal on the calendar
2 is number 81, the People of the State of New York v. Kevin
3 Minemier.

4 Counsel.

5 MR. THOMPSON: Good afternoon. May it please the
6 court. Donald Thompson representing Kevin Minemier.

7 I'd like to reserve two minutes for rebuttal, if
8 I could.

9 CHIEF JUDGE DIFIORE: You may.

10 MR. THOMPSON: Thank you.

11 This case is a little bit different than People
12 v. Lofton. We're only dealing with part II of the two-step
13 process that Judge Fahey set out. And it's different in
14 that we don't have any of the factors on the record as - -
15 - as indicated by Judge Wilson in the last case.

16 This case stands for the propositions that the
17 Fourth Department has said for the first time that a silent
18 record is sufficient to deny a youthful offender
19 adjudication, contrary to a standard that had been
20 uniformly applied by all departments for the preceding
21 thirty years.

22 I think it's kind of ironic that the Fourth
23 Department, as well as the other departments, applied the
24 higher standard before Rudolph and after Rudolph. The
25 Fourth Department lowered their standard for what's

1 required.

2 JUDGE RIVERA: So - - - so what's missing here?
3 What did the judge have to say?

4 MR. THOMPSON: On the first sentence, the judge
5 said nothing at all. Simply imposed a sentence
6 inconsistent with the youthful offender adjudication.

7 If that goes up on appeal, the Fourth Department
8 says you're required to make and state for the record your
9 determination with respect to the youthful offender
10 adjudication.

11 On the second sentence, the judge said, I
12 seriously considered youthful offender adjudication the
13 first time around, and based upon all the information
14 that's available to me, I deny youthful offender. And - -
15 - and that was that.

16 We then go up on the second appeal before the
17 Fourth Department which then says, you don't have to set
18 out the factors for youthful offender determination; this
19 is sufficient. That's contrary to the standard that was
20 first applied by the Third Department in *People v.*
21 *Cruickshank*, and then uniformly applied in each of the
22 other departments.

23 And I'm not suggesting that there has to be a
24 litany or a talismanic recitation of the factors that are
25 set forth in *Cruickshank*.

1 JUDGE GARCIA: But would your - - - would your
2 transcript satisfy that test proposed by Mr. Shiffrin in
3 the case just before this?

4 MR. THOMPSON: Would my transcript?

5 JUDGE GARCIA: Yeah.

6 MR. THOMPSON: No. Mr. Shiffrin is going to kill
7 me, but no. It wouldn't. I mean, a good example of a
8 transcript that does is People v. Hall, same court,
9 different judge, cited at page 11 of my reply brief. You
10 know, that case was also held, went up to the Fourth
11 Department, they send it back to make and determine
12 youthful offender adjudication, and the judge said, Mr.
13 Hall, you're not getting youthful offender adjudication,
14 and here is why; boom, boom, boom, boom, boom.

15 JUDGE STEIN: Well, that would be great, you
16 know, because then - - - then it makes an appellate review
17 pretty easy. But - - -

18 MR. THOMPSON: Sure.

19 JUDGE STEIN: - - -- but it's - - - it's pretty
20 common in sentencing determinations that the reasons, the
21 specific reasons aren't given. And - - - and yet,
22 appellate courts review those determinations all the time.
23 What makes this different?

24 MR. THOMPSON: Rudolph makes it different.

25 JUDGE STEIN: But Rudolph says you have to put

1 the determination on the record. Okay. But I find it
2 interesting that - - - that 720.10[3] requires, explicitly
3 requires, the reasons on the record when Y.O. status is
4 granted, and then that information has to be sent to DCJS.

5 Doesn't that imply that it's not required if Y.O.
6 is denied?

7 MR. THOMPSON: Well, that's not the standard
8 that's been applied for the last 30 years by the
9 Departments under Cruick - - - the Cruickshank standard.

10 JUDGE STEIN: Well, most of those cases, as I
11 read them, not - - - not a hundred percent of them, but a
12 lot of them are where there is no determine - - -
13 determination on the record. And in many of those cases,
14 it says that, you know, no determination or reasons, and
15 we're sending it back to make a determination. The court
16 doesn't even say, and give us your reasons.

17 MR. THOMPSON: Um-hum.

18 JUDGE STEIN: So I think that the Appellate
19 Division cases are - - - are, granted, a little unclear
20 about that requirement.

21 MR. THOMPSON: They could be more clearer, but
22 there are also many Appellate Division cases that says - -
23 - that say it's particularly important to put your reasons
24 on the record when you're denying youthful offender
25 adjudication. So that - - - that's important as well, and

1 that's what we have here. Because how is an appellate
2 court going to determine whether you've abused your
3 discretion or not - - -

4 JUDGE STEIN: That's my question. How - - -

5 MR. THOMPSON: - - - on a silent record.

6 JUDGE STEIN: How does an appellate court make
7 that determination in any sentencing situation?

8 MR. THOMPSON: Well, I mean, that - - - that goes
9 to the two-part review process at the Appellate Division.
10 They can always exercise interest of justice, essentially,
11 de novo review of the sentencing determination; that's one
12 part of it. But the other part is the legal determination
13 of the abuse of discretion, and whether or not the lower
14 court abused that discretion.

15 JUDGE STEIN: Well, why can't the - - - why can't
16 the Appellate Division review the record and see if the - -
17 - if the trial court's determination is supported by the
18 record?

19 MR. THOMPSON: Well, they - - - they can always
20 do that. They can always do that. But this determination,
21 as Rudolph says, is different, more important than other
22 determinations. It's not inconsistent with other
23 determinations where factual findings have been required to
24 require that sort of abuse of discretion reviewability.

25 JUDGE STEIN: But then why - - - why would the

1 statute specifically require it only when it's - - - when
2 it's granted?

3 MR. THOMPSON: Well, that's a good question. I
4 don't know why the statute would only require it under
5 those circumstances. I know that the departments have not
6 only required it under those circumstances.

7 JUDGE STEIN: And there are other situations in
8 the CPL and in the Corrections Law where the legislature
9 has specifically and explicitly said that the court has to
10 state its reasons but didn't do that here. Should we
11 gather anything from that?

12 MR. THOMPSON: You know, I don't think the
13 intention of the legislature was to completely eliminate
14 fifty percent of the appellate review that's available to
15 the Appellate Division, and to eliminate, essentially, all
16 review by this court by not requiring anything to be placed
17 on the record when there's a denial of youthful offender
18 adjudication. It - - - it doesn't seem like that would be
19 consistent with legislative intent.

20 JUDGE RIVERA: Well - - - well, let me - - - I
21 would like you to circle back and drill down on why you say
22 Rudolph makes this different.

23 MR. THOMPSON: Because Rudolph says it's a
24 different kind of a decision. It's not just any old
25 sentencing; it's a more important decision for the youth.

1 So you know, you've got a three-time, you know, robbery
2 first defendant who's, you know, been around the block a
3 few times. You know, you have sentencing there. This is a
4 different kind of sentencing, and they - - - they
5 acknowledged that and recognized that.

6 So you know, is a little bit more required?
7 Yeah, I think a little bit more is required. I don't think
8 it's an onerous burden. You know, as I indicated in my
9 reply brief, the - - - the factors that were placed on the
10 record in People v. Hall take about a minute to read out
11 loud. It's not a great burden to place on - - - on trial
12 courts in the circumstance to ensure that appropriate
13 appellate review takes place.

14 I'd like to talk about the other point in my
15 brief - - -

16 CHIEF JUDGE DIFIORE: Yes, please.

17 MR. THOMPSON: - - - for a moment, if I could,
18 concerning the refusal of the court, summarily, basically,
19 to disclose statements that were submitted to the Probation
20 Department upon a promise, apparently, by the Probation
21 Department of confidentiality.

22 So there's two parts to this argument. One is a
23 due-process argument. The other part is a statutory
24 violation argument. I think short circuiting things, we
25 don't necessarily ever have to reach the statutory

1 violation, because, of course, that statute can't confine
2 the broader Constitutional due process, right, that the
3 defendant has to be aware of factors, or statements, or
4 information that are going to be used and possibly
5 exacerbate his or her sentence, and to respond to those
6 fairly, and - - -

7 JUDGE STEIN: Would you agree that there might be
8 situations in which disclosing the nature of a document
9 might reveal a confidential source?

10 MR. THOMPSON: There are, and the statute
11 provides for that. There - - - there are - - - and there
12 are a number of cases that say, you know, it's appropriate
13 to redact victim names, addresses, telephone numbers,
14 contact information.

15 JUDGE STEIN: My question is a little bit
16 different. Might there - - - would you agree that there
17 might be situations in which the actual substance of the
18 document by just revealing what the substance of the
19 document, the contents of the documents are, might end up
20 revealing those constant - - - those confidential pedigree
21 information.

22 MR. THOMPSON: It could if you were to reveal it
23 verbatim, for example, in a case where a confidential
24 source was used. But in those circumstances, you could
25 appropriately, I submit, reveal a summary of the

1 information so that the defendant could respond to it, and
2 at least comment on its truthfulness or its accuracy and,
3 you know, be - - - have an opportunity to be heard before
4 being sentenced, based upon a reliance on that information.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 MR. THOMPSON: Thank you.

7 CHIEF JUDGE DIFIORE: Counsel.

8 MS. MERVINE: Thank you. May it please the
9 court. Good afternoon, Leah Mervine on behalf of the
10 People of Monroe County.

11 I would just start with the second issue first,
12 since that is most recent, and note that this court can
13 really only consider the abuse of discretion standard in
14 regard to the CPL 390.50 subdivision (2)(a) issue.

15 JUDGE STEIN: How can we - - - how can we, how
16 could the Appellate Division, in this case, have determined
17 whether there was an abuse of discretion without any
18 information whatsoever about the nature of what was
19 redacted, or anything at all? How - - - how - - - how can
20 we do that?

21 MS. MERVINE: I think the answer is twofold, and
22 the first part of the answer is that this issue is ready
23 for review, and this court has created a rule for that
24 specific review in People v. Perry. And I - - - it is my
25 thought that perhaps this court is struggling with that,

1 because in People v. Perry, it discusses how the Appellate
2 Division is in the best position to review the presentence
3 investigation report.

4 And I would note that when preparing the record,
5 it would be incumbent on an appellant who wanted to have
6 the full PSI reviewed as it was presented to the court to
7 be provided to the Appellate Division. If this court were
8 to create some dicta of some sort, I would suggest that
9 perhaps that PSI be marked as a court exhibit. But I think
10 - - -

11 JUDGE STEIN: Before we get to that point, isn't
12 there a question of whether the trial court should have
13 said more on the record for - - - for the defendant to be
14 able to - - - to respond to - - - to everything that was
15 being considered against him?

16 MS. MERVINE: Absolutely, Judge Stein. That - -
17 - I think that's the ultimate question raised by the
18 appellant.

19 The People's answer is no. And in this case, I
20 think the record is very, very clear that there were
21 numerous reports submitted by both the - - - excuse me, the
22 Probation Department and the defendant. And the
23 defendant's entire sentencing packet includes opinions of
24 experts. It includes all of his friends' opinions,
25 laypeople's opinions about him, his friends, family. It is

1 the full picture of the defendant.

2 And the fact that there was one item that someone
3 wanted - - -

4 JUDGE RIVERA: The court said - - - the court did
5 say - - - considered that - - - the information of the
6 document; did it not?

7 MS. MERVINE: Absolutely.

8 JUDGE RIVERA: So how - - - how - - - even if the
9 defendant has had access to everything else - - -

10 MS. MERVINE: Yes.

11 JUDGE RIVERA: - - - if there is still a document
12 that the court is relying on, why isn't he entitled to see
13 it? That's what the statute requires.

14 MS. MERVINE: It's not that the statute requires.

15 JUDGE RIVERA: Okay.

16 MS. MERVINE: I would respectfully differ with
17 you - - -

18 JUDGE RIVERA: Why not?

19 MS. MERVINE: - - - Judge Rivera. Because of
20 People v. Perry. And in 390.50, the statute is clear. It
21 says, "In its discretion, the court may excerpt from
22 disclosure a part or parts of the report or memoranda which
23 are not relevant to a proper sentence or", and then I'm
24 skipping ahead, "are sources of information which have" - -
25 -

1 JUDGE STEIN: Sources of information.

2 MS. MERVINE: Correct.

3 JUDGE STEIN: Okay. Not - - - not - - - not what
4 information, but what the sources of the information are.

5 So here, we don't even know what the information
6 was. We don't know whether it was a part of - - - of a
7 mental-health report, we don't know whether it was part of
8 a victim statement, we don't know whether it was some other
9 thing. Maybe it was part of grand jury testimony. We have
10 no idea.

11 MS. MERVINE: In this case, I would note that the
12 court was very clear it was a one-page document titled,
13 confidential to the court. I think there is some confusion
14 that I did want to clear up in regards to the fact that
15 there was another document attached to the PSI which is
16 missing a page. That page was clearly provided to the
17 defendant as he references that report as item 18 of his
18 expert in his - - - in his sentencing report.

19 But to get back to the - - - the ultimate issue
20 of the sources. If you have a document that is attached
21 and it contains confidential information about a victim,
22 and that victim does not want it to be disclosed, any
23 portion of that document, it could reveal the source. And
24 the way that the statute has been construed, and this goes
25 back to People v. Perry.

1 JUDGE RIVERA: Did - - - did the court say that?
2 Did the court say, I'm not going to turn it over because if
3 I do, or if you know any of the content, it will reveal the
4 source?

5 MS. MERVINE: I don't think the - - - the court
6 did not say that, and I don't know that - - -

7 JUDGE RIVERA: Then how is anyone to know? Even
8 within your analysis of what the statute requires, that
9 indeed, the judge correctly exercised discretion?

10 MS. MERVINE: Two reasons. One, People v.
11 Outley. This court presumes the sentencing court, much
12 like a badge court being a trier of fact, considers only
13 information that is relevant and proper. That is a
14 presumption that is given to a sentencing court. So that's
15 - - -

16 JUDGE STEIN: Are you familiar with our - - - our
17 decision in Baxin? That was - - - that was a SORA case,
18 where we held that - - - that the defendant was entitled to
19 - - - to grand jury information?

20 MS. MERVINE: Yes. I am vaguely familiar with
21 that holding. But this is - - -

22 JUDGE STEIN: Can you - - - can you address
23 whether there is any relevance of that case to this case?

24 MS. MERVINE: I don't believe there is, and this
25 is why. Because with SORA, it is a full picture of

1 something that's happened after the fact, where the court
2 has enumerated numbers that they had, or enumerated
3 different categories that they have to view. Sentencing is
4 a totality. And here, the tenor of everything that was
5 occurring was very, very evident from the record.

6 JUDGE RIVERA: Even more so. The defendant has
7 no clue what impact this document has. And the court is
8 saying, I considered it.

9 MS. MERVINE: Correct. And the secondary part to
10 the response to your question, Judge Rivera, was that is
11 where the rule in People v. Perry comes in. That is where
12 the appellant provides that original PSI by getting a court
13 order from the sentencing court to send it to the Appellate
14 Division for review. And that is the key here. That is
15 the oversight that is required.

16 And the appellate court can make a determination,
17 as they did here, that the court did not abuse its
18 discretion.

19 JUDGE STEIN: But - - - but as I understand it,
20 the defendant is not asking us now - - - maybe I'm
21 incorrect about this - - - is not asking us to make a
22 determination as to whether that document should or should
23 not have been disclosed or any part of it. What we're
24 being asked to do is - - - is - - - is determine whether
25 the trial court said enough on the record to meet its

1 obligation under the statute - - -

2 MS. MERVINE: Correct.

3 JUDGE STEIN: - - - and under due process.

4 MS. MERVINE: And I would disagree with the due
5 process. I think that gets into a Constitutional claim.
6 It's very clear that Executive Law 71 was not followed.
7 This court's rule, 509 subdivision (b) was not followed.
8 There was never a Constitutional claim, which, in
9 appellant's reply brief, they're very clear. This is not a
10 Constitutional claim. And the only way - - -

11 JUDGE STEIN: They're challenging the statute,
12 but they're challenging the statute as applied in this
13 case.

14 JUDGE RIVERA: He's not saying the statute is
15 unconstitutional; he's just saying the judge didn't comply
16 with the statute.

17 MS. MERVINE: Then perhaps I don't see the
18 distinction. Because my understanding is - - -

19 JUDGE RIVERA: Well, let's assume we see the
20 distinction. Let me go back to the statutory argument.

21 MS. MERVINE: Okay.

22 JUDGE RIVERA: Because you focused on the
23 language. So doesn't it tell us something, that the
24 legislature specifically chose the word "sources"; that you
25 can't read this carve out as broadly as you suggest?

1 MS. MERVINE: I would disagree. I do think that
2 this has been the way that this court has interpreted in
3 its past decisions. I think that there is too much at
4 stake. Sentencing is one of the only times that a victim's
5 voice or someone else's voice, it could be favorable to the
6 defendant as well, and maybe that person doesn't want the
7 defendant to know that they're speaking up. We had a case
8 like that - - -

9 JUDGE RIVERA: You see, that's the whole point.
10 You're speculating, right? And that's the whole point.
11 Nobody knows, because the judge didn't say.

12 JUDGE WILSON: Well, here's - - -

13 MS. MERVINE: The Appellate - - -

14 JUDGE RIVERA: And that - - - that's all that's
15 at issue.

16 JUDGE WILSON: What the judge - - -

17 MS. MERVINE: The Appellate - - -

18 JUDGE WILSON: What the judge actually said was,
19 "I would note that the information was provided on the
20 promise of confidentiality. And so the court did accept
21 that from disclosure to the defense."

22 MS. MERVINE: Correct.

23 JUDGE WILSON: Why does the fact that it was
24 provided on the promise of confidentiality meet the
25 statutory definition?

1 MS. MERVINE: Because it's the court's
2 independent review of that documentation, and the court's
3 determination.

4 JUDGE WILSON: But it doesn't say he did that.
5 All he says is it was promised to be confidential. He
6 doesn't actually say that he determined it should be
7 confidential.

8 MS. MERVINE: She did determine that it should be
9 confidential, Judge Wilson. She did say that I have
10 reviewed this documentation, and I am going to go with the
11 promise of confidentiality. And I think that's crucial for
12 victims in the State of New York to be able to have their
13 voices heard in this manner.

14 JUDGE RIVERA: Is the promised confidentiality of
15 the source or of the content?

16 MS. MERVINE: I believe it is both, Your Honor.
17 And - - -

18 JUDGE RIVERA: What - - - what tells you that?
19 What's the source of that belief?

20 MS. MERVINE: The source of that belief is the
21 construction of the Statute and how it was created.

22 JUDGE RIVERA: No, no, no, in terms of the
23 document itself, since it's a promise of confidentiality.
24 Is the promise one of keeping the name confidential, or
25 everything that's been said confidential, or both?

1 MS. MERVINE: It's the promise that the court
2 reviewed. The court reviewed the information and made that
3 determination that that promise was appropriate, and that
4 is the discretion of the sentencing court.

5 And this court would have to say - - -

6 JUDGE RIVERA: Again, I'm sorry. Perhaps I'm not
7 being clear. What is the promise though? The promise to
8 keep the name confidential, or the content, or both?

9 MS. MERVINE: The document confidential so the
10 source is not - - -

11 JUDGE RIVERA: Okay.

12 MS. MERVINE: - - - revealed, Your Honor.

13 JUDGE RIVERA: All right. So where - - - where
14 do you draw that conclusion from? What tells you that it's
15 the source, and you argue that it includes also content
16 that would reveal the source?

17 MS. MERVINE: If I may, Your Honor - - -

18 CHIEF JUDGE DIFIORE: Yes, please.

19 MS. MERVINE: - - - I see I'm out of time.

20 In regards to that, I believe it is the fact that
21 the source provided the documentation to the sentencing
22 court. The sentencing court, very clearly, reviewed this
23 document and made the determination on the record and
24 stated that it was determining that this document would be
25 accepted.

1 And - - - and I guess where I draw that from is
2 that sentencing court's discretion. And there is
3 appropriate review in this case through the Appellate
4 Division, and it's incumbent to keep that presumption that
5 the trial court is reviewing information in making the best
6 determination.

7 CHIEF JUDGE DIFIORE: Counsel, how do we know
8 that the Appellate Division actually reviewed that
9 document?

10 MS. MERVINE: Your Honor, I believe that would be
11 incumbent upon the appellate - - - or the appellant, excuse
12 me. The appellant creates the record. The appellant is
13 responsible for getting that document, much like the People
14 are responsible for getting a Darden transcript that we do
15 not have access to. We need to seek the court's permission
16 to have that sent to the Appellate Division for proper
17 review.

18 And the appellant has a burden here, and we
19 believe that the Fourth Department was correct. There is
20 no litany required for youthful offender, and that that
21 document was properly accepted. And I would ask this court
22 to so find.

23 CHIEF JUDGE DIFIORE: Thank you.

24 MS. MERVINE: Thank you.

25 CHIEF JUDGE DIFIORE: Counsel. Did the Appellate

1 Division review that document, have access to that
2 document?

3 MR. THOMPSON: I don't believe they did, Judge.

4 CHIEF JUDGE DIFIORE: They did?

5 MR. THOMPSON: I believe they - - - I do not
6 believe that they did.

7 CHIEF JUDGE DIFIORE: Do not.

8 MR. THOMPSON: I was trial counsel here, so I can
9 speak to the proceedings throughout. And some would say
10 that I argued for disclosure of this document loud and
11 long, and I still have not received it. I've never seen
12 it.

13 I - - - I don't know that the Appellate Division
14 has seen it because I'm charged with putting together the
15 record for the Appellate Division, and I couldn't get it.
16 They asked - - -

17 JUDGE STEIN: You couldn't have had it sent to
18 the Appellate Division directly?

19 MR. THOMPSON: Hmm?

20 JUDGE STEIN: You couldn't have had it sent from
21 the Appellate Division - - - to the Appellate Division?

22 MR. THOMPSON: To the Appellate Division
23 directly? It's never been released to me. I've never had
24 the ability to do that. It - - - it wasn't the case like
25 where there are grand jury minutes that will be sent by the

1 prosecution separately.

2 JUDGE STEIN: And you don't know whether the
3 Appellate Division could have requested it independently?

4 MR. THOMPSON: I - - - I don't know whether they
5 could have. I know that they requested of me that I send
6 all of the presentence investigation materials that I had
7 in my possession, and I did that. But it did not include
8 this page, because the court would not release it to me.

9 And with respect to the concern that you raised
10 before, Judge Stein, what about, you know, release of the
11 content identifying the source, and that being
12 inappropriate. Well, that could be easily solved in a case
13 like this where the court could say, look, I don't want to
14 release this content to the defense because I want to keep
15 the source confidential. I'm not going to consider this
16 for purposes of sentencing.

17 And had the court said that here, we wouldn't be
18 arguing about point two of the brief, but the court didn't
19 make that representation here. And, you know, the - - -
20 the folks who did speak at sentencing spoke rather
21 aggressively and made their feelings known.

22 You know, I would anticipate that such a separate
23 sentencing document might include similar statements of
24 that nature, but I - - - I don't know because I've never
25 seen it.

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CHIEF JUDGE DIFIORE: Thank you, counsel.

(Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Kevin m. Minemier, No. 81 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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