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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 18

GAFFNEY (LUKE J.),

Appellant.

20 Eagle Street
Albany, New York
February 10, 2026

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Donna Gould
Official Court Transcriber

1 CHIEF JUDGE WILSON: Last case on the calendar is
2 People v. Gaffney.

3 MS. SWARTZ: Good afternoon. May it please the
4 court. Melissa Swartz on behalf of appellant, Luke
5 Gaffney. I respectfully reserve two minutes for rebuttal.

6 CHIEF JUDGE WILSON: Yeah.

7 MS. SWARTZ: This court's decisions in Carter and
8 in Jennings left open the possibility that a defendant's
9 counsel could be found ineffective for failing to object to
10 a repugnant verdict.

11 CHIEF JUDGE WILSON: Can I start you with a
12 little different question?

13 MS. SWARTZ: Yes.

14 CHIEF JUDGE WILSON: In your leave application
15 letter, you said, first, the only charge that would have
16 been sent back for the jury's consideration was the
17 attempted assault in the second degree since attempted
18 murder in the second degree was not repugnant with the
19 aggravated assault on the police officer. Are you making
20 that argument now or not?

21 MS. SWARTZ: I am, Your Honor.

22 CHIEF JUDGE WILSON: Okay.

23 MS. SWARTZ: I'm making both arguments, but I'm
24 going to - - -

25 CHIEF JUDGE WILSON: That was not clear from your

1 brief.

2 MS. SWARTZ: And I apologize for that oversight.
3 It's something I've thought about since about 3 a.m. this
4 morning - - -

5 CHIEF JUDGE WILSON: Okay.

6 MS. SWARTZ: - - - if I'm being candid.

7 CHIEF JUDGE WILSON: So you are - - - you are
8 also - - - okay. I just wanted to clear that up.

9 MS. SWARTZ: Yes. Correct.

10 CHIEF JUDGE WILSON: Yeah.

11 JUDGE SINGAS: So you're making that today, right
12 now?

13 MS. SWARTZ: I think it's implied in my brief
14 that - - -

15 JUDGE SINGAS: How?

16 MS. SWARTZ: - - - that there's nothing to lose,
17 right? And I do make mention of the assault.

18 CHIEF JUDGE WILSON: Now, your nothing to lose
19 argument is based, I thought, on a different proposition,
20 which is that the - - - the - - -

21 JUDGE CANNATARO: The sentence.

22 CHIEF JUDGE WILSON: Yeah, the sentencing for the
23 murder was going to be actually less than the sentencing
24 for the aggravated assault on the police officer, and so
25 even if he were convicted of that, it's something - - - you

1 couldn't send it back. Even if he were convicted of that,
2 there'd be nothing to lose.

3 MS. SWARTZ: Well, I think my argument is
4 actually the complete inverse. You have to start from the
5 other way around, which is by failing to object, there was
6 nothing to lose in this case besides - - -

7 CHIEF JUDGE WILSON: Well, the question is, why?

8 MS. SWARTZ: Because - - -

9 CHIEF JUDGE WILSON: There's nothing to lose
10 because - - -

11 MS. SWARTZ: Defense counsel gave up. What is
12 the ultimate relief? The possibility of the ultimate
13 relief, which is a full acquittal, by failing to object and
14 whether or not that is ineffective.

15 JUDGE CANNATARO: The question is, did he give up
16 the acquittal of the attempted murder?

17 MS. SWARTZ: So if worst-case - - -

18 JUDGE CANNATARO: Is that going back to the jury
19 when the - - - when the verdict is repugnant or not? Or is
20 that an unsettled area of law?

21 MS. SWARTZ: I don't know if it's necessarily
22 unsettle. My - - - unsettled. My reading of CPL 310.50 is
23 that it possibly could be a discretionary decision on
24 whether or not the judge found that the attempted murder
25 verdict was obviously a full acquittal.

1 JUDGE CANNATARO: So the judge could have sent
2 attempted murder back to the jury or not.

3 MS. SWARTZ: I believe the judge had discretion
4 to do so, and that's why I've taken the position that even
5 if the attempted murder went back to the full jury, I still
6 don't think - - -

7 CHIEF JUDGE WILSON: Well, but saying that he had
8 discretion to send it back is not consistent with the
9 language I just read from your leave letter, I think, which
10 you said, the only charge that would have been sent back,
11 so I'm still puzzled about what you're arguing.

12 MS. SWARTZ: So if - - - I guess my leave
13 application - - - upon reconsideration and drafting the
14 brief, I didn't want to overstate a position. I didn't
15 want to be stuck saying something that was potentially an
16 overstatement based on my reading of 310.50. And whether -
17 - -

18 CHIEF JUDGE WILSON: So - - - okay. So - - -

19 MS. SWARTZ: Because if it's discretionary, well,
20 then the judge always has a choice whether or not to send
21 back.

22 CHIEF JUDGE WILSON: But then it sounds like
23 you're not any longer making the argument that was in your
24 leave application letter.

25 MS. SWARTZ: So I continue to maintain that best-

1 case scenario, the only thing that was getting sent back
2 was the attempted assault. Worst-case scenario, and that
3 is with giving the court discretion - - - if the reading of
4 310.50 is to give them discretion was that the - - - the
5 two charges that would be sent back would include the
6 attempted murder.

7 And under that worst-case scenario, the attempted
8 murder still left with - - - my client with nothing to lose
9 because attempted murder is also a B felony, the same as
10 aggravated assault on a police officer. It actually has a
11 better sentencing scheme than aggravated assault on a
12 police officer. So the only thing to lose - - -

13 CHIEF JUDGE WILSON: And they would all merge, I
14 guess, is your - - - also your point. The sentencing - - -

15 MS. SWARTZ: Pardon me?

16 CHIEF JUDGE WILSON: The sentences would all have
17 to be run consecutively.

18 MS. SWARTZ: The sentence - - -

19 CHIEF JUDGE WILSON: I'm sorry.

20 MS. SWARTZ: Concurrent.

21 CHIEF JUDGE WILSON: Concurrently. I'm sorry.
22 Concurrently.

23 MS. SWARTZ: Correct. They absolutely have to be
24 concurrent.

25 JUDGE CANNATARO: But Counsel, if the court had

1 the discretion to send back murder - - - attempted murder
2 and did do that, and there was a conviction, you know, I -
3 - - your argument about sentencing is well-taken, but that
4 could have affected the - - - if there was a conviction of
5 attempted murder on the second go around, that could very
6 well have changed the judge's sentencing from what was
7 given out the first time.

8 And if - - - even if you disagree with that,
9 there's no question that the defendant would have left the
10 trial with two convictions instead of one conviction,
11 which, to me - - - I mean, maybe I'm naïve, but it's worse
12 to have two convictions in your life than it is to have
13 one. So I don't under - - - I don't fully - - -

14 JUDGE RIVERA: Especially if one is for attempted
15 murder.

16 JUDGE CANNATARO: Yes. There is a lot of stigma
17 that goes along with being branded an attempted murderer.
18 So I'm not sure I understand your argument that he had
19 nothing to lose.

20 MS. SWARTZ: So I want to hit a couple issues
21 that you raised.

22 JUDGE CANNATARO: Yeah, because I raised a couple
23 there.

24 MS. SWARTZ: Correct. The first is that the
25 stigma of the two - - - in this case, the stigma is the two

1 felonies. That's the People's position, right? If there's
2 ever two felonies, that because it's two felonies, that
3 stigma is so great, it can be seen as strategic.

4 My response to that is, well, if you're foregoing
5 the greatest relief a defendant could possibly have, the
6 reason a defendant goes to trial, which is to seek an
7 acquittal, how can that be reasonable or legitimate? I
8 don't believe it can just because it's two felonies.

9 JUDGE RIVERA: I'm sorry. I'm not following this
10 argument at all.

11 MS. SWARTZ: Okay. If the two - - - if the court
12 accepts the position of the two felonies, the stigma - - -

13 JUDGE RIVERA: Okay.

14 MS. SWARTZ: - - - of having two felonies as
15 opposed to one felony is enough.

16 JUDGE RIVERA: Okay.

17 MS. SWARTZ: I think that that does not
18 meaningfully grapple with what defense counsel is foregoing
19 in exchange for that. So certainly, you could say, well,
20 it's a strategy. He didn't want his client to be convicted
21 of two felonies.

22 JUDGE HALLIGAN: So what is defense counsel
23 foregoing exactly?

24 MS. SWARTZ: He's foregoing the greatest relief,
25 and that's the potential of his client to be acquitted or

1 to be convicted of the lesser instead of the greater.

2 JUDGE SINGAS: Or to be convicted of both.

3 MS. SWARTZ: Correct. But I don't think the two
4 - - - the stigmatization - - - and they rely on this
5 court's decision in Greene, right? That stigma alone - - -

6 CHIEF JUDGE WILSON: But doesn't that sound like
7 a strategic decision that is weighing what the chance of a
8 clean acquittal is versus the chance of a conviction on one
9 or a conviction on both? Doesn't that sound like a
10 calculus that the trial lawyer has to make based on the
11 evidence and his client's wishes?

12 JUDGE SINGAS: And based on the jury notes that
13 were coming out in this case specifically.

14 MS. SWARTZ: But the two convictions of itself -
15 - - these are the exact same level of felony. I'm not
16 making an argument about a lesser felony.

17 JUDGE RIVERA: And it may very well be that
18 throughout the representation, client - - - the client may
19 have indicated what they might have tolerated.

20 MS. SWARTZ: I think if we - - -

21 JUDGE RIVERA: But it's a high risk anyway in
22 this case to go to trial.

23 MS. SWARTZ: I think if we polled a hundred
24 criminal defendants on whether or not they wanted a second
25 felony conviction that had no meaningful bearing on their

1 life besides a fact - - -

2 JUDGE SINGAS: I know, but you keep saying it has
3 no meaningful bearing, but if I'm a judge, and I say, you
4 know what? You got convicted of one crime, so I'm going to
5 sentence you to ten years, but now you've gotten convicted
6 of two crimes, so I'm going to sentence you to fifteen
7 years.

8 JUDGE RIVERA: And one is attempted murder.

9 CHIEF JUDGE WILSON: Right.

10 MS. SWARTZ: And if I'm a judge, and I have the
11 option - - - if I'm looking at, well, I can - - - the
12 minimum I could get - - -

13 JUDGE SINGAS: No, no, but in my scenario, why
14 isn't that feasible? And defense attorney can say, you
15 know what? I'm not going to take that chance because now
16 I've got one conviction, and I'll just deal with that as
17 opposed to an enhanced sentence because of two separate
18 convictions. Regardless if the sentences merge, regardless
19 if they're the same maximum sentence, I, as a judge, might
20 decide because you've been convicted of a second felony,
21 I'm going to enhance your punishment.

22 MS. SWARTZ: I don't think county courts are - -
23 - or supreme courts are allowed to do that.

24 JUDGE CANNATARO: Why not?

25 MS. SWARTZ: Those are concurrent.

1 JUDGE CANNATARO: When a judge has a
2 discretionary sentencing capability, why can't they take
3 into account that not - - - you know, not only is there a
4 conviction of this one crime, now we have an attempted
5 murder conviction, so I'm going to give you more time.
6 That - - - isn't that the essence of that sort of
7 discretion?

8 MS. SWARTZ: And then, I guess, that goes back to
9 what's being given up. I'm not advocating here that
10 defense counsel gave up some sort of evidentiary ruling or
11 a juror that seemed - - -

12 JUDGE TROUTMAN: But what you're missing is - - -
13 you mention concurrent sentences, but if one is convicted
14 of one crime, they could have been sentenced on the lower
15 end of the minimum as opposed to the greater end even if
16 the sentences run concurrently. So attorneys make
17 strategic decisions.

18 MS. SWARTZ: And I'm - - - the question before
19 the court is whether or not it's reasonable to forego your
20 client's potential acquittal.

21 CHIEF JUDGE WILSON: No, I don't think that's the
22 question. I think the question is whether that was a
23 strategic decision.

24 MS. SWARTZ: And whether that - - - it's a
25 legitimate and reasonable strategic decision.

1 CHIEF JUDGE WILSON: Colorable, yeah.

2 MS. SWARTZ: Right? But is it - - -

3 CHIEF JUDGE WILSON: Right.

4 MS. SWARTZ: - - - a strategic decision to forego
5 acquittal? It's the ultimate relief in a criminal case.

6 JUDGE CANNATARO: That's the upside, but what
7 about the downside?

8 MS. SWARTZ: I mean, but it's what you're giving
9 up.

10 CHIEF JUDGE WILSON: That's why people plead
11 guilty is they're making a strategic decision for - - -

12 JUDGE RIVERA: Well, no, but - - -

13 CHIEF JUDGE WILSON: - - - for their acquittal.

14 JUDGE RIVERA: - - - to be - - - it's not
15 actually you're giving up an acquittal. You're giving up
16 the possibility - - -

17 JUDGE TROUTMAN: Possibility.

18 JUDGE RIVERA: - - - of an acquittal.

19 MS. SWARTZ: Correct.

20 JUDGE HALLIGAN: And one could just - - -

21 JUDGE RIVERA: Right? And counsel may weigh that
22 very differently for the reasons already stated by my
23 colleagues.

24 MS. SWARTZ: And I understand the court's
25 position - - -

1 JUDGE CANNATARO: Yeah.

2 MS. SWARTZ: - - - and the way that the court is
3 looking at that secondary felony and what may happen. It's
4 - - - I'm not sitting here saying, oh, this court is
5 absolutely wrong. I get that you and - - - but my position
6 is you have to take a look at whether or not that
7 stigmatization and the potential - - - the possibility of a
8 small increase - - -

9 JUDGE TROUTMAN: But see, you focus on the word
10 may, and so may is a possibility. It's a gamble. They're
11 decisions that defense attorneys make at trial in the
12 moment, based on what they see right then and there, that
13 later on, others may see differently, but is that truly an
14 ineffective decision?

15 JUDGE RIVERA: And if I can just quickly add
16 something to that, it could very well be, of course, as
17 Judge Singas has suggested, counsel assessed the
18 possibility of acquittal and viewed it as a - - - unlikely
19 to get that acquittal.

20 MS. SWARTZ: But how can you - - -

21 JUDGE RIVERA: Does that matter in the analysis?

22 MS. SWARTZ: I do think that matters because
23 you're still foregoing - - - again, I'm going to repeat
24 myself - - - what is the ultimate - - -

25 JUDGE RIVERA: What if you - - - what if you sit

1 there, as a lawyer, and you say, okay, anything's possible,
2 one percent chance of an acquittal, but this looks like
3 ninety-nine percent chance of you're going to be found
4 guilty?

5 MS. SWARTZ: But how do you - - - how does
6 anybody know that? I've seen juries do insane things that
7 I never thought they would ever do. I mean, we can't have
8 any sort of prediction over what a jury's going to do.

9 JUDGE CANNATARO: And that is strategy.

10 JUDGE SINGAS: I know, but in this case
11 specifically, the jury - - -

12 JUDGE TROUTMAN: That's the point.

13 JUDGE SINGAS: - - - the jury asked the question
14 in the note, how to proceed if we unanimously agree on one
15 charge, and that's the - - - and then they come back guilty
16 on one charge. So if I'm a defense attorney, I'm saying,
17 you know what? This jury wanted to come back on that one
18 charge the way they did, and I'm making a decision now,
19 strategically, not to resubmit these charges because I
20 might end up with more convictions.

21 MS. SWARTZ: And I understand the court's
22 position.

23 JUDGE SINGAS: Okay.

24 MS. SWARTZ: My position is that giving up the
25 acquittal in any case, giving up the possibility of an

1 acquittal in any case is ineffective assistance of counsel.

2 So unless the court has any other questions for
3 me, I'm going to ask you to reverse.

4 CHIEF JUDGE WILSON: Thank you.

5 MS. SWARTZ: Thank you.

6 MR. VALDINA: Good afternoon, Your Honors.
7 Christopher Valdina for the People. May it please the
8 court.

9 As the court has already observed, several
10 members of the court, it was inherently a strategic
11 decision of counsel - - -

12 JUDGE SINGAS: Well, can I just ask you - - -

13 MR. VALDINA: Yes.

14 JUDGE SINGAS: - - - what you think the defense
15 was arguing in their briefing?

16 MR. VALDINA: I think, at its essence, their
17 argument is that because he's looking at a concurrent
18 sentence on the attempted murder, and that's the lower
19 count in terms of the sentencing exposure, that he had
20 nothing to lose going back to the jury. I think that's her
21 argument. Of course, our position is they did have
22 something to lose, an acquittal on a serious felony,
23 attempted murder.

24 And as several members of the court have
25 observed, that could impact the court's sentencing even

1 though concurrent sentences were required. And indeed, the
2 court mentioned, during sentencing, that the jury got it
3 right, indicating that the defendant's conviction of just
4 the one count influenced the court's sentencing. It's also
5 important to the defendant, who insisted, in his testimony,
6 in his presentence interview, and in his comments at
7 sentencing, that he didn't intend to kill the deputy.

8 CHIEF JUDGE WILSON: Look, I think it's a very
9 interesting question about whether - - - right in front of
10 you - - - whether the attempted murder charge could go
11 back, but counsel's not arguing that, so I think that's not
12 in front of us. It's - - -

13 MR. VALDINA: Yeah, it is - - - it's not in front
14 of - - -

15 CHIEF JUDGE WILSON: Yeah.

16 MR. VALDINA: - - - the court, no. And our view,
17 of course, of - - - is that it would have gone bad.

18 CHIEF JUDGE WILSON: Right. And I think that's
19 an interesting question.

20 MR. VALDINA: It is an interesting question, I
21 agree, but it's not developed.

22 CHIEF JUDGE WILSON: Right.

23 JUDGE RIVERA: Do you agree that it's an open
24 question?

25 MR. VALDINA: I agree it's an open question. I

1 mean, our position, if we were on the merits, would be
2 everything goes back.

3 CHIEF JUDGE WILSON: Yeah.

4 JUDGE HALLIGAN: And you think that that survives
5 McElrath and Evans?

6 MR. VALDINA: Yes, because it doesn't - - - that
7 - - - McElrath was decided after, but even if it had been
8 decided when the trial was going on, it would not have
9 affected anything because if you look at Justice Alito's
10 concurrence in McElrath, this doesn't affect that stage of
11 the proceedings.

12 JUDGE HALLIGAN: Well, that's the question - - -

13 MR. VALDINA: Yeah.

14 JUDGE HALLIGAN: - - - I suppose, is that what,
15 in fact, the majority opinion is holding.

16 MR. VALDINA: Sure. But that - - -

17 JUDGE HALLIGAN: Sounds like that could be left
18 for another day.

19 MR. VALDINA: Absolutely, Your Honor.

20 JUDGE RIVERA: And that could factor into
21 counsel's determination.

22 MR. VALDINA: It - - -

23 JUDGE RIVERA: Counsel also said, well, that's an
24 open question. I don't want to risk that it's going to be
25 decided against my client.

1 MR. VALDINA: Absolutely. Yes, Your Honor.

2 CHIEF JUDGE WILSON: Well, and also, I think,
3 very hard to hold somebody ineffective on something that's
4 an open question.

5 MR. VALDINA: Absolutely. It's got to be clear-
6 cut and dispositive.

7 So unless the court has any other questions, I
8 thank the court for its time.

9 CHIEF JUDGE WILSON: Thank you.

10 MS. SWARTZ: I can't imagine that I'm going to
11 add anything that's me not just regurgitating that they
12 forego the absolute acquittal.

13 So unless the court has questions for me, I ask
14 you to reverse. Thank you.

15 CHIEF JUDGE WILSON: Thank you.

16 (Court is adjourned)

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

I, Donna Gould, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Gaffney (Luke J.), No. 18 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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