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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

No. 77

TERRANCE MONK,

Respondent.

20 Eagle Street
Albany, New York 12207
March 21, 2013

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

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 77, People v. Monk.

2 MR. TULMAN: May I proceed?

3 CHIEF JUDGE LIPPMAN: Sure, go ahead,
4 counselor. Will you want any rebuttal time?

5 MR. TULMAN: Yes, Your Honor. I would
6 reserve three minutes for rebuttal.

7 CHIEF JUDGE LIPPMAN: Three minutes, sure.
8 Go ahead.

9 MR. TULMAN: May it please the court. My
10 name is Scott Tulman, and it is indeed a privilege to
11 be here before you today.

12 The reality is, is that our criminal
13 justice system is a system of bail determinations,
14 guilty pleas and sentences.

15 JUDGE PIGOTT: You have to - - - where do
16 you draw the line? Obviously, the lawyer has some
17 responsibilities to his or her client. The court has
18 responsibilities to the system as a whole. And are
19 you moving the line here a little bit, where
20 obviously the defendant's going to know he's got PRS,
21 but now the court's got to explain to him what goes
22 on? Wouldn't that better be the ju - - - the
23 lawyer's job before he tells him to take the plea,
24 that he understands what PRS means?

25 MR. TULMAN: Your Honor, the answer to that

1 question is as follows. Where we move the line is
2 not where this court is prepared to move the line. I
3 think I'm in the dissent, and so I can't answer that
4 question as to what I believe, but what I can say is
5 this, this court has held that post-release
6 supervision, what we call PRS, is a core component of
7 the sentence.

8 CHIEF JUDGE LIPPMAN: Yeah, yeah, but this
9 is one step removed, I think. You know, this is - -
10 - the question is, this is a violation of PRS and
11 what happens, right, which is contingent on future
12 events, isn't it?

13 MR. TULMAN: No, Your Honor.

14 CHIEF JUDGE LIPPMAN: No?

15 MR. TULMAN: No.

16 CHIEF JUDGE LIPPMAN: Go ahead; why isn't
17 it?

18 MR. TULMAN: Well, because PRS, by
19 definition - - -

20 CHIEF JUDGE LIPPMAN: PRS, we know - - -

21 MR. TULMAN: - - - by definition - - -

22 CHIEF JUDGE LIPPMAN: - - - is a direct
23 consequence, but what about the violation of PRS?

24 MR. TULMAN: What I am talking about are
25 not violations of PRS.

1 CHIEF JUDGE LIPPMAN: What are you talking

2 - - -

3 MR. TULMAN: What I am talking about is
4 what this court has talked about in the Williams
5 case, which the reason why PRS is included in
6 calculating the maximum expiration date of a
7 determinant sentence, as this court held, is because
8 it creates a longer potential period - - -

9 CHIEF JUDGE LIPPMAN: But he was told about
10 - - -

11 MR. TULMAN: - - - of incrimination.

12 CHIEF JUDGE LIPPMAN: He was told about
13 PRS, right?

14 MR. TULMAN: In the Williams case?

15 CHIEF JUDGE LIPPMAN: No, no, in our case.
16 He was told about the length of PRS, wasn't he?

17 MR. TULMAN: Yes, Your Honor. He was told
18 in one sentence, in all of the negotiations; it was
19 thrown in.

20 CHIEF JUDGE LIPPMAN: But what else should
21 he have been told?

22 MR. TULMAN: What he should have been told,
23 Your Honor, is what Judge Bellantoni, in this case,
24 did tell him, only at the time of sentence. It's
25 what judges throughout this state almost uniformly

1 tell criminal defendants who are being - - - pleading
2 guilty for violent felonies. And it certainly
3 happens in the federal court, by analogy - - -

4 CHIEF JUDGE LIPPMAN: So what is that that
5 he told him - - -

6 MR. TULMAN: What you say - - -

7 CHIEF JUDGE LIPPMAN: What did - - -

8 MR. TULMAN: - - - this is what - - -

9 CHIEF JUDGE LIPPMAN: What is it - - -

10 MR. TULMAN: This is what Judge Bellantoni
11 said.

12 CHIEF JUDGE LIPPMAN: - - - that always
13 happens?

14 MR. TULMAN: Judge Bellantoni said at the
15 time of the sentence, "With respect to the post-
16 release supervision, a violation of post-release
17 supervision may result in reincarceration for a fixed
18 term - - -

19 CHIEF JUDGE LIPPMAN: Counsel, but - - -

20 MR. TULMAN: - - - of at least six months."

21 JUDGE READ: - - - but that's why I asked
22 you. Isn't that really up to the Board of Parole,
23 and isn't it contingent on future events as to what
24 might happen if there's a violation of PRS?

25 MR. TULMAN: No, Your Honor.

1 CHIEF JUDGE LIPPMAN: Does that - - - does
2 that change the equation in terms of informing about
3 PRS versus a violation of PRS? I understand your
4 argument, but why are you saying they're one and the
5 same? Isn't the second part dependent on some future
6 event?

7 MR. TULMAN: Your Honor, it is not, because
8 at the time that a plea is taken, a person, a
9 criminal defendant is told that there would be a term
10 of post-release supervision. If the court went and
11 said you - - -

12 JUDGE GRAFFEO: That's - - - and that's a
13 definite.

14 MR. TULMAN: That's - - -

15 JUDGE GRAFFEO: You know the term of years
16 that you're going - - - that the court is going to
17 impose PRS, but the judge doesn't know whether the
18 Board of Parole will even violate someone, no less
19 what additional sentence they may add. Isn't that
20 uncertainty? Doesn't it take it into the collateral
21 consequence category?

22 MR. TULMAN: No, it does not, Your Honor,
23 because what the court knows at the time that the
24 guilty plea is taken is what PRS means. If you just
25 said in a guilty plea and said by the way, you're

1 going to get also five years of PRS and didn't say
2 post-release supervision - - - this is a creature of
3 statute, this term. This is not something that
4 people just know. If you said, oh, and you're
5 getting PRS also, and it was left at that, and
6 somebody said, well, what is PRS, you'd say well,
7 that's for your attorney to tell you. And what I am
8 saying is that we're all in this together to ensure
9 that guilty pleas are - - -

10 JUDGE SMITH: Yeah, but so you're saying
11 that the language that you read that Judge Bellantoni
12 spoke too late, in your view, that has to be - - -
13 every - - - in every PRS case, that has to be said
14 before the plea?

15 MR. TULMAN: At the time of the plea, I
16 think it is the responsibility of the court to ensure
17 that the defendant who pleads guilty is aware of and
18 understands - - -

19 JUDGE SMITH: You're jeopardizing - - - I
20 mean, if we agree - - -

21 MR. TULMAN: - - - what PRS means.

22 JUDGE SMITH: If we agree with you, we're
23 going to have a lot of business, aren't we? I mean,
24 aren't you jeopardizing a lot of guilty pleas?

25 MR. TULMAN: No, not at all; I don't

1 believe so.

2 JUDGE SMITH: But I mean, is it - - - is it
3 your impression that the courts usually do what you
4 say they're supposed to do and this is an aberration?

5 MR. TULMAN: They do it all the time,
6 because when you take a guilty plea, the judge would
7 - - - typically what judges say is, and you
8 understand that if you violate this there could be a
9 period of further reincarceration. That is serious
10 business.

11 JUDGE SMITH: And then - - -

12 MR. TULMAN: Incarceration is what this is
13 all about.

14 JUDGE SMITH: So maybe they always say it,
15 maybe they don't, but anyway, every case where they
16 didn't, at least as long as it's still on direct
17 appeal, we'd have to reverse.

18 MR. TULMAN: Right, if it - - - if it were
19 on direct appeal. And remember, there may be many
20 defendants, although there may be some error as a
21 result of the guilty plea, they may not want their
22 guilty pleas back because they have an advantageous
23 plea bargain. So they're not going to necessarily
24 move, but if there's some situation where somebody
25 really doesn't understand what PRS meant, then you

1 know what? In justice they should have their plea
2 vacated.

3 JUDGE SMITH: But isn't that - - - but
4 isn't that a different - - - a different question? I
5 thought you were arguing that the judge has to say it
6 every time. It may be a different case if you have a
7 defendant who could say oh, I didn't understand it, I
8 thought - - - I thought PRS stood for something else,
9 and I never would have pleaded. Does your guy
10 actually say that?

11 MR. TULMAN: Your Honor, in the motion
12 papers, he does not submit even an affidavit, because
13 it was submitted just with counsel's affidavit, but
14 the issue was preserved because it was addressed.
15 And - - -

16 JUDGE SMITH: I'm not saying - - -

17 MR. TULMAN: My fallback position, Your
18 Honor, is - - -

19 JUDGE SMITH: I'm not asking about
20 preservation; I'm asking did he really make an
21 adequate showing that his plea was not knowing,
22 voluntary and intelligent because he didn't know
23 enough about PRS?

24 MR. TULMAN: Your Honor, you have - - - the
25 court, and you, in particular, Your Honor, I believe,

1 in your - - - in decisions, have pointed out the
2 importance of trying - - - of that 220 motion, to
3 make that motion to withdraw the guilty plea. Here,
4 within twenty days of entering a guilty plea, this
5 defendant moves to withdraw his guilty plea on a
6 whole myriad - - - a number of different problems.

7 JUDGE SMITH: Yeah - - -

8 MR. TULMAN: That was one ground.

9 JUDGE SMITH: - - - but I'm not sure the
10 myriad helps you, but - - -

11 MR. TULMAN: I understand that, but I just
12 have to report the facts as they are. But when he
13 raises that issue, it's the responsibility of the
14 court at that time to - - - not to say, as a matter
15 of law you are not entitled to know about that. But
16 it's the responsibility of the court, I respectfully
17 submit, to say let's question this defendant because
18 it's raised - - - very timely raised.

19 JUDGE SMITH: Okay.

20 MR. TULMAN: This is not a situation like
21 last month in Belliard where the context was that it
22 was on a 440.10 or direct appeal, rather.

23 CHIEF JUDGE LIPPMAN: Okay, counselor.

24 MR. TULMAN: This is a person who's
25 withdrawing their guilty plea and saying I - - - this

1 is not right.

2 CHIEF JUDGE LIPPMAN: Counselor, you'll
3 have your rebuttal time. Thank you.

4 Counselor?

5 MS. SAPAKOFF: May it please the court. My
6 name is Laurie Sapakoff, and I represent the People
7 in this case.

8 CHIEF JUDGE LIPPMAN: Counselor, why isn't
9 this part and parcel of the whole PRS concept? When
10 you tell a person you have PRS, don't you have to
11 explain a little bit about what it is as a direct
12 consequence of what happens?

13 MS. SAPAKOFF: No, Your Honor, it's - - -

14 CHIEF JUDGE LIPPMAN: Why not?

15 MS. SAPAKOFF: It is - - - because this is
16 contingent; in fact, it's not just one step
17 contingent, it's probably about three steps
18 contingent. It's not something that just happens to
19 the defendant; it requires the defendant, in the
20 future, to violate, by his conduct, by some act of
21 malfeasance or nonfeasance to violate one or more
22 conditions - - -

23 CHIEF JUDGE LIPPMAN: But we - - -

24 MS. SAPAKOFF: - - - and - - -

25 CHIEF JUDGE LIPPMAN: - - - we know that,

1 but this would be a statement, just, again, almost
2 explaining the - - - the essence of PRS, saying that
3 look, this is what it is, and if you violate it, it
4 has other consequences.

5 MS. SAPAKOFF: Well, I mean, a court could.
6 And by the way, I do disagree with Mr. Tulman. I
7 don't - - -

8 CHIEF JUDGE LIPPMAN: You disagree? What
9 do you think is the state of the art, the judge's
10 duty?

11 MS. SAPAKOFF: That I don't - - - I - - - I
12 see most plea colloquies where this is not explained.

13 CHIEF JUDGE LIPPMAN: You think the
14 majority they just say you have PRS et cetera?

15 MS. SAPAKOFF: That's my experience,
16 anecdotally. So I think we would have - - -

17 CHIEF JUDGE LIPPMAN: Well, we have some
18 experience with this too, but I'm just curious of
19 your - - -

20 MS. SAPAKOFF: That's my experience - - -

21 CHIEF JUDGE LIPPMAN: Yeah.

22 MS. SAPAKOFF: - - - and just from my own.
23 And I think there would be an onslaught of pleas.

24 CHIEF JUDGE LIPPMAN: You think it would -
25 - - in answer to Judge Smith's question before, that

1 it would have consequences in terms of guilty pleas -
2 - -

3 MS. SAPAKOFF: Absolutely.

4 CHIEF JUDGE LIPPMAN: - - - large numbers
5 of guilty pleas?

6 MS. SAPAKOFF: And I'm not even so sure
7 that we can say that this would not be retroactive to
8 cases on collateral review under this court's
9 decision in People v. Pepper. If the purpose of this
10 rule is to ensure the voluntariness of a plea, then,
11 you know, how - - - it seems to me it follows from
12 that that it is a manifest injustice to allow - - -
13 for this court to allow an involuntary plea to stand.

14 JUDGE RIVERA: So let's say that we decide
15 that the judge should have added that one sentence,
16 okay, is there anything else in the record that would
17 help us decide that, nevertheless, the plea is
18 knowing and voluntary, or are you taking the position
19 that if we - - - we find in favor of him on a per se
20 rule of this nature he wins?

21 MS. SAPAKOFF: I - - - I am not sure what
22 you're exactly - - -

23 JUDGE RIVERA: I'm asking, is there another
24 way to look at it and see that it was knowing and
25 voluntary?

1 MS. SAPAKOFF: Well, it - - - under this
2 court's - - - all of this court's precedent from Catu
3 and the Catu line of cases, I would say that it is
4 knowing and voluntary and intelligent. This is not -
5 - - this is not a direct consequence of a plea. Not
6 only is it something that's contingent, it is
7 entirely outside of the court's control.

8 JUDGE PIGOTT: Your previous argument,
9 though, as I understand it, is that let's assume
10 somebody pled to a manslaughter in 1995, and we now
11 say what Mr. Tulman would like us to say, which is if
12 PRS was not properly explained you can vacate the
13 plea, so now he's come back in court and he's facing
14 a second felony offender, he could, conceivably, move
15 to set aside his plea in the 1995 one, saying that -
16 - - that it was not a knowing and voluntary plea
17 because he was not properly advised of PRS, and we'd
18 find ourselves looking at a whole lot of defendants
19 who may want to make that kind of motion.

20 MS. SAPAKOFF: I think so, conceivably. At
21 the very least, it would be retroactive to cases on
22 direct appeal, it seems to me, and there are quite a
23 few of those in this - - - in this state.

24 JUDGE SMITH: Isn't it a fact, though, that
25 the words "post-release supervision" don't have a lot

1 of meaning to someone who doesn't happen to be an
2 expert in New York City criminal - - - in New York
3 criminal procedure?

4 MS. SAPAKOFF: Well, that may be true, Your
5 Honor, but I do think - - -

6 JUDGE SMITH: And I guess some of these
7 defendants are experts, but we can't assume they all
8 are.

9 MS. SAPAKOFF: No, I understand what you're
10 saying, and I think that - - - that it is for a
11 defense attorney, then, to further explain this
12 collateral - - - the collateral consequences of
13 violating the PRS.

14 JUDGE SMITH: So you're saying that it's
15 sufficient to use this term, even though it may be
16 obscure in meaning to most lay people, because that
17 alerts the defendant to ask his lawyer: Hey, what
18 does that mean? I'm going to get post-release
19 supervision; is that good or bad?

20 MS. SAPAKOFF: Well, first of all, I don't
21 think it's obscure in meaning. To tell a defendant
22 that he will be - - - he will be receiving, as a
23 mandatory part of the sentence, post-release
24 supervision, I don't think that that is something
25 that is such a complicated term of art that to the

1 average person - - - and this person, of course, was
2 intimately involved with the criminal justice system,
3 perhaps had not had PRS - - -

4 CHIEF JUDGE LIPPMAN: Would it be a better
5 practice - - -

6 MS. SAPAKOFF: - - - but had been on parole
7 - - -

8 CHIEF JUDGE LIPPMAN: - - - counselor, for
9 the judge to do it? Would that make sense to you, as
10 someone experienced in this area?

11 MS. SAPAKOFF: It would absolutely make
12 sense, but that's not the standard here. The
13 question here is, is it a direct or is it a
14 collateral consequence. And it - - - if - - - under
15 Catu, under Gravino and Ellsworth, in particular, and
16 Harnett, it simply isn't. To accept the defense
17 argument would mean a pronounced break with Catu,
18 with Ellsworth, with Gravino, with Harnett. And if
19 we look at the - - - the courts - - - in terms of it
20 being solely within the discretion of the Division of
21 Parole, I think that that was brought home in People
22 v. Belliard, where the pleading court in that case
23 was completely unaware of the fact that the defendant
24 - - - the pleading defendant, in fact, had a post-
25 release supervision case - - - I mean, I'm sorry,

1 that the Division of Parole had perhaps imposed
2 further incarceration due to a violation of post-
3 release supervision. That was the problem, but it
4 was - - - nobody knew, or I should say the court
5 certainly was unaware because it was off the court
6 track. And that's a reason that this court has held,
7 when it is outside of the court's control, as this
8 is, that it's a rea - - - that's one of the criterion
9 for finding that it is a collateral consequence of a
10 plea.

11 CHIEF JUDGE LIPPMAN: Okay, counselor.
12 Anything else, counselor?

13 MS. SAPAKOFF: Unless there are any other
14 questions, thank you very much.

15 CHIEF JUDGE LIPPMAN: Thank you, counselor.
16 Counselor?

17 MR. TULMAN: Very briefly, then, Your
18 Honor, just to address some of the concerns. To be
19 clear, what I am talking about here is the mandatory
20 exposure that a person faces as a result of post-
21 release supervision, and that is something that I
22 think is the court's responsibility to inform a
23 defendant of when that defendant is pleading guilty.
24 You can't put Damocles' sword over somebody's head
25 and say it's Damocles' sword, but not explain that it

1 can fall and what it means when it hits you. I mean
2 - - -

3 JUDGE PIGOTT: What do you think people
4 think when they're told that they're going to - - -
5 they're going to be under post-release supervision
6 for three years?

7 MR. TULMAN: What I - - - what I think it
8 could mean, that there's some kind of supervision,
9 right? You're being released from prison, you're now
10 done, you're no longer subject to incarceration - - -

11 JUDGE PIGOTT: Right.

12 MR. TULMAN: - - - and now you're going to
13 be supervised.

14 JUDGE PIGOTT: Right.

15 MR. TULMAN: And there's going to be some
16 kind of restraints while you're out of jail.

17 JUDGE PIGOTT: Right.

18 MR. TULMAN: There's nothing in that term
19 that in any way would suggest that you can go and
20 face additional incarceration beyond the term that a
21 court has already promised you in a plea bargain.

22 JUDGE PIGOTT: Is it different from parole?

23 MR. TULMAN: It is, because in parole what
24 happens - - - in parole what happens is that that's a
25 crime that's coming off of the sentence that you've

1 already received. This is additional. This is
2 reincarceration, separate and apart from the sentence
3 that you've already served, so it increases, as this
4 court has recognized, your jail exposure. And that's
5 why it's very different from parole. It's a
6 completely different animal.

7 JUDGE SMITH: Parole doesn't have to be
8 mentioned at sentencing, I suppose.

9 MR. TULMAN: Because it's a completely
10 different animal. Parole is something that's a
11 benefit that you're getting where you're being
12 released early on parole. This - - -

13 JUDGE GRAFFEO: You can still be returned
14 to incarceration, though - - -

15 MR. TULMAN: With parole, yes, but - - -

16 JUDGE GRAFFEO: - - - as well.

17 MR. TULMAN: - - - but it's a benefit that
18 you're getting in parole.

19 JUDGE SMITH: But if you're telling - - -

20 MR. TULMAN: This is a punishment - - -

21 JUDGE SMITH: Your point is if you're
22 telling somebody - - -

23 MR. TULMAN: - - - an additional
24 punishment.

25 JUDGE SMITH: - - - he's getting three to

1 ten, then you don't have to tell him that his parole
2 might be revoked, because he's still not getting more
3 than ten.

4 MR. TULMAN: That's - - -

5 JUDGE SMITH: But if he's getting ten plus
6 post-release supervision, you're saying he's got to
7 know that post-release supervision could mean
8 thirteen or fifteen.

9 MR. TULMAN: You have - - - that's - - -
10 because that's what the punishment is, that's the
11 exposure that you have.

12 Before it was asked what would my opinion -
13 - - I'm with Judge Ciparick on this - - - on this - -
14 - on this issue in many ways, in her dissents. When
15 you're talking about jail time and significant, you
16 know, increased jail, that is something that somebody
17 has to know about, and it's not just a defense
18 lawyer's job to do that, because we've just heard
19 about certain defense lawyers who can take on cases
20 and really not know about these concepts. And this
21 particular statute, as this court knows, is a
22 particularly complicated statute. That's why it's
23 for the court to address it, and that's exactly what
24 the court has said in its opinions. You must - - -
25 the court must address it, and to address it means to

1 explain what it is. And there's no uniform mandatory
2 catechism - - - I'm a big Nixon supporter, if you
3 will, but I don't drive a Ford. It's not - - - that
4 direct collateral test is something that I just have
5 issues with, and I think that this court should have
6 issues with it as well. Regardless, I think what
7 drives the day is Nixon. We go back in time; we have
8 to look at what's fair and what's appropriate. And
9 what's fair - - - although there's no mandatory
10 catechism, that has to be explained.

11 CHIEF JUDGE LIPPMAN: Okay, counselor.

12 MR. TULMAN: Thank you, Your Honors.

13 CHIEF JUDGE LIPPMAN: Thank you both.

14 Appreciate it.

15 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of THE PEOPLE OF THE STATE OF NEW YORK v. TERRANCE MONK, No. 77 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

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