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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 96

ISAAC DIGGINS,

Appellant.

20 Eagle Street
Albany, New York 12207
April 24, 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: Number 96, People v.
2 Diggins.

3 Counsel, would you like any rebuttal time?

4 MR. REARDON: I would, Your Honor. I'd
5 like two minutes.

6 CHIEF JUDGE LIPPMAN: Two minutes, you've
7 got it. Go ahead, counsel.

8 MR. REARDON: May it please the court, my
9 name is Roy Reardon, and I appear for the appellant
10 here. And I think we have before us, what I see as,
11 a relatively easy issue to state. And that is the
12 issue of whether or not, in the context of what
13 happened here, there was really a trial, there was
14 really an opportunity for adversaries to come
15 together to produce a just result.

16 JUDGE READ: What should the judge have
17 done under these circumstances?

18 MR. REARDON: Your Honor, that - - - that
19 is an excellent question, and I was hoping somebody
20 would ask it. Basically this, it was very clear to
21 the judge. There are a couple of instances which I
22 call showstoppers in this case. The trial lawyer for
23 the defendant said, I - - - talking about his
24 summation - - - he's not going to sum up. And then
25 he says, Judge, I'm not going to do anything. And

1 then in the next line he says, and that means
2 everything. Now, that shuts that trial down.

3 JUDGE SMITH: I still haven't heard what
4 the judge is supposed to do.

5 MR. REARDON: I'm about to get to that.
6 What the judge is supposed to do, when he hears that
7 the lawyer is going to do nothing, is conclude that
8 he must act. Now, what should the judge do in these
9 circumstances? This - - - this defense lawyer is
10 employed by the Neighborhood Defender Services of
11 Harlem, good outfit. What he should have immediately
12 done is I want your superiors here this afternoon.

13 JUDGE SMITH: Although the lawyer - - - the
14 lawyer represented that he had already discussed it
15 with his supervisors.

16 MR. REARDON: He did, but Your Honor, you
17 haven't read carefully - - - and maybe I haven't - -
18 - the entire record. The lawyer said that twice,
19 when asked by the judge. First he said I've talked
20 it over with my superiors, and his superiors were
21 with him, he basically said.

22 But the point in time came when the judge
23 said to the lawyer, do you think if I ordered your
24 superiors to try the case, they would take the same
25 position as you? Or words to that effect; it's in

1 the record. And lawyer says, "I doubt it; I honestly
2 doubt it." And then he proceeds to say, "If you were
3 to relieve me" - - - and that's what the lawyer
4 wanted desperately here - - - "one of my superiors
5 might try the case. He's sure there's an 18-B lawyer
6 out there who will try it, or a Legal Aid lawyer who
7 will try it."

8 JUDGE GRAFFEO: Why isn't this a strategy
9 of silence, like in U.S. v. Sanchez?

10 MR. REARDON: Sanchez, if I - - - with all
11 due respect to Your Honor, Sanchez was a Second
12 Circuit case. It came - - - obviously came after
13 Cronic. It didn't follow Cronic. It adopted
14 Strickland as the test which it would use on that
15 case. It recognized that Cronic existed, but didn't
16 think it satisfied getting into the exception that
17 Cronic presented.

18 JUDGE SMITH: Is your answer to Judge
19 Graffeo that a strategy of silence is in itself
20 ineffective assistance?

21 MR. REARDON: No, I think - - - yes, I
22 think it could be. I think it generally is.

23 JUDGE SMITH: So - - - so if I - - - if I
24 get in trouble, I got to find myself a lawyer who's
25 willing to do a strategy of silence and then I get a

1 reversal.

2 MR. REARDON: I think that's where the
3 judge has to come into the act. And - - -

4 JUDGE READ: So the judge should have
5 relieved the counsel?

6 MR. REARDON: The judge should have held a
7 hearing, brought in the supervisors. What are you
8 going to do? This gentleman says he's going to
9 nothing, and he means everything. That's not
10 acceptable.

11 CHIEF JUDGE LIPPMAN: Counsel, what do you
12 make of the lawyer's saying that this is an ethical
13 thing for him, that that - - - it's not a strategy;
14 it's a matter of ethics. What does that mean, and
15 what is the judge to make of that?

16 MR. REARDON: What the judge is to make of
17 that is the ethical burden - - - and the judge knew
18 this - - - that the lawyer has - - - this is not
19 stating it the way it's written in the book - - - to
20 fight for the last bit of juice in his body to
21 vindicate his client's rights - - -

22 JUDGE PIGOTT: Didn't that happen here?

23 MR. REARDON: - - - within the bounds of
24 the law.

25 JUDGE PIGOTT: I looked at - - - you know,

1 the judge - - - I would have thought the judge would
2 have just issued a bench warrant and moved onto the
3 next case, and then whenever they tracked this guy
4 down, they'd try him then. The judge chose not to do
5 that. But he did have a Parker hearing, and it was
6 clear that this defendant knew damn well he was
7 supposed to be there at the time and place for the
8 trial. The defense lawyer did a job that ended up
9 with a pretty healthy 440.

10 So to the extent that given that he didn't
11 have his client, and as he was pointing out it's a
12 domestic violence case, and he can't do much without
13 it, he kept the People honest. The People kept
14 trying to get him to admit that this was a tactic,
15 which he would not do, and then he - - - once this
16 guy gets convicted, he still had the very viable 440,
17 which led to a hearing, which led us here.

18 It sounds to me like what the defense
19 lawyer did there laid out a pretty good strategy - -
20 - it didn't help his client, but his client decided
21 to take off.

22 MR. REARDON: Your Honor, if I tell you
23 that lawyer had nothing to do with the 440, that we
24 did?

25 JUDGE PIGOTT: Well, I know, but he

1 testified.

2 JUDGE SMITH: Except provide the record for
3 it.

4 MR. REARDON: I'm sorry, Your Honor.

5 JUDGE SMITH: But he provided the record
6 for it.

7 MR. REARDON: But the record didn't give
8 him the ability to prevail on the 440. All he got
9 was a hearing. And the judge said he's not entitled
10 to the relief he seeks on the 440.

11 JUDGE SMITH: And you're telling us the
12 judge was wrong.

13 MR. REARDON: On the 440 hearing?

14 JUDGE PIGOTT: Right.

15 MR. REARDON: Absolutely wrong. There was
16 no basis upon which the judge could conclude - - -

17 JUDGE SMITH: Then I guess - - - I mean,
18 what I think Judge Pigott is suggesting is, wasn't
19 the strategy that - - - whether it was a strategy or
20 not, wasn't what this guy did a lot more effective?
21 He's got an arguable case in the Court of Appeals.
22 Otherwise what he had was a - - - was an empty chair
23 trial in a domestic violence case with strong
24 evidence. It sounds to me like this was - - - this
25 was one of the more successful performances by a

1 trial lawyer.

2 MR. REARDON: I think it was violative of
3 his ethical duty - - -

4 JUDGE SMITH: Well, that's a different
5 question, isn't it?

6 MR. REARDON: - - - and I think the issues
7 that he stated to the court, in response to why I'm
8 not doing it - - - I'm not doing it, because I can't
9 cross-examine the wife; I can't cross-examine the
10 friend of the wife - - -

11 JUDGE SMITH: But what - - - what motive do
12 you attribute to the lawyer? Wasn't he trying to
13 help his client?

14 MR. REARDON: No, Your Honor, I don't.

15 JUDGE SMITH: What was he trying to do?

16 MR. REARDON: With all due respect, I think
17 he was trying to get himself relieved.

18 JUDGE RIVERA: Counsel, I just want to go
19 back on your understanding of the record, perhaps
20 I've misread it. I thought that it's - - - at one
21 point, when he was pressed by the judge, he did say
22 that if he thought he could be of benefit to the
23 client, that he would intervene - - -

24 MR. REARDON: Yes.

25 JUDGE RIVERA: - - - and as a result,

1 participate. That does not strike me as I will do
2 nothing; I am completely out of it; I have shut down;
3 I'm sitting in a corner.

4 MR. REARDON: Your Honor has basically
5 stated the record as it is. May I suggest, and I'm
6 aware of that record, that Your Honor look at the
7 language before and after the statement. And what
8 the statement actually is if he can - - - this is 267
9 or something of the record, in that area - - -
10 "Right, I have no problem using the term tactical."

11 The judge was pressing him, because the DA
12 came in - - - the supervisor - - - pounding the
13 table, hold him in contempt, Judge; he's making a
14 fool of this proceeding. And he comes back where the
15 judge almost says, I'm about to hold you in contempt,
16 my friend.

17 JUDGE RIVERA: Um-hum.

18 MR. REARDON: "Right, and I have no problem
19 using the term technical in combination with
20 ethically; tactically and ethically, if I feel I need
21 to interject myself, I will." The fact that he
22 didn't, we can say - - -

23 JUDGE SMITH: He did once, didn't he?

24 MR. REARDON: I beg your pardon?

25 JUDGE SMITH: He did - - - he did, when he

1 had a chance to win, when all of a sudden it looked
2 like the complaining witness wasn't going to show up,
3 then all of sudden the lawyer wakes up and he's
4 fighting.

5 MR. REARDON: I didn't see any fight in the
6 defense of the client.

7 JUDGE SMITH: He said - - - he says swear a
8 witness. "Swear a witness; let jeopardy attach."

9 MR. REARDON: Oh, that - - - he wanted that
10 because if the witness didn't show, he thought he'd
11 get a double jeopardy in a miss.

12 JUDGE SMITH: Exact - - - yes. Yes, and
13 isn't that what an effective lawyer does?

14 MR. REARDON: Not if he's doing it
15 tactically.

16 JUDGE SMITH: Can't we infer from this
17 record that that was the first time he had a shot at
18 doing anything for his client and he did it.

19 MR. REARDON: Not if he's doing it
20 tactically, Your Honor.

21 CHIEF JUDGE LIPPMAN: Counsel, let me ask
22 you a question. Under what federal or state
23 precedent should we grant you relief? What is - - -
24 what is the basis of it? If you we use the federal
25 standard, do you win or lose? If we use the state

1 standard, do you win or lose?

2 MR. REARDON: I think in the sub - - -
3 circumstances of this case, either; under either, I
4 win. Under Cronin there was no trial; it was a
5 farce, and the lawyer saw to it. Under the New York
6 State Constitution, we're entitled to meaningful
7 representation. How could anyone possibly say Mr.
8 Diggins got anything like meaningful representation?

9 JUDGE GRAFFEO: And could you just
10 summarize, because we have so many Parker cases - - -

11 MR. REARDON: Yes.

12 JUDGE GRAFFEO: - - - what are we telling
13 the trial judges to do in these situations?

14 MR. REARDON: You got to dig, Judge. You
15 got to bring in the supervisors and find out whether
16 or not this is the position of the neighborhood legal
17 defense entity in Harlem. And they're going to say
18 it isn't. That's my suggest - - -

19 JUDGE GRAFFEO: So ineffect - - -

20 MR. REARDON: - - - and they would try the
21 case.

22 JUDGE GRAFFEO: - - - so the ineffective
23 assistance claim is based on what the judge does, not
24 what the attorney does?

25 MR. REARDON: We're going to get a

1 continuance in the case; that's what going to come
2 out of this, because this guy is not going to try the
3 case - - -

4 JUDGE PIGOTT: Well, in the 440, didn't he
5 testify that they investigated - - - that they
6 interviewed witnesses - - -

7 MR. REARDON: Sure.

8 JUDGE PIGOTT: - - - and it was at that
9 point, I mean, having done all that, that the
10 strategy hatched. And then I think at - - - I forget
11 where it was; it might have been at sentencing or
12 whatever - - - where he said that the wife was never
13 put in fear.

14 MR. REARDON: Yes.

15 JUDGE PIGOTT: I mean, he did make some
16 arguments. I mean, no - - - it wasn't - - - it
17 wasn't - - - other than the fact that he lost his
18 file, it wasn't incompetence. It does look like he -
19 - -

20 MR. REARDON: No, I'm - - - I don't - - -

21 JUDGE PIGOTT: - - - was trying to be as
22 effective as he could.

23 MR. REARDON: I don't think we've ever
24 argued incompetence. We argued that he got himself
25 in a fix here, thinking that by saying he's going to

1 do nothing, and I mean, everything, that the judge
2 would give him a continuance - - -

3 JUDGE PIGOTT: Yeah.

4 MR. REARDON: - - - because it's impossible
5 to go ahead with a case like that - - -

6 JUDGE SMITH: And the cont - - - he was - -
7 - you say he was looking for a continuance, which, of
8 course, would have been in his client's interest,
9 wouldn't it?

10 MR. REARDON: Sure, but if you think that's
11 in the interest of justice, Your Honor, I think we
12 might get to disagree.

13 JUDGE SMITH: Well, was it his job to serve
14 the interests of justice or the interests of his
15 client?

16 MR. REARDON: Well, there's an obligation
17 to be candid, too, Your Honor, of lawyers, and I
18 think a lawyer who is trying to get a continuance can
19 say legitimate things, like, I'm not going to try
20 this case.

21 CHIEF JUDGE LIPPMAN: Okay, coun - - -

22 MR. REARDON: But - - -

23 CHIEF JUDGE LIPPMAN: Go ahead, finish your
24 sentence.

25 MR. REARDON: If he's - - - if it's a

1 matter of ethics, I don't think he can, Your Honor.

2 CHIEF JUDGE LIPPMAN: Okay, counsel, you'll
3 have your rebuttal.

4 Counselor?

5 MS. FELDMAN: May it please the court, my
6 name is Sheryl Feldman. I'm here on behalf of the
7 People. I'd like to sta - - -

8 CHIEF JUDGE LIPPMAN: Counsel - - -

9 JUDGE GRAFFEO: One - - -

10 CHIEF JUDGE LIPPMAN: What kind of
11 meaningful representation is this?

12 MS. FELDMAN: Well - - -

13 CHIEF JUDGE LIPPMAN: Wasn't this whole
14 trial a nonevent?

15 MS. FELDMAN: No, I would like to start,
16 Your Honor, by answering the question that you asked
17 counsel, which was whether he loses under - - - wins
18 under state or federal.

19 CHIEF JUDGE LIPPMAN: Well, let's take
20 under state. What about meaningful representation?

21 MS. FELDMAN: Okay, absolutely. Your Honor
22 - - -

23 CHIEF JUDGE LIPPMAN: What kind of
24 representation did the defendant get in this case?

25 MS. FELDMAN: Your Honor, this court has

1 already decided that this defendant got meaningful
2 representation under the state constitution. It
3 decided that in Diggins and it decided that in Aiken.

4 And I just want to be clear here, in
5 Diggins, which was this court's prior take on this
6 very case, when he was - - - he sought to challenge
7 his predicate status based on this case - - - this
8 court observed that - - - and this is a quote from
9 this court - - - "Defendant was tried in absentia,
10 giving rise to an inference that the attorney's
11 nonparticipation was a protest strategy that would
12 not support a claim of ineffective assistance."

13 JUDGE SMITH: That's a - - - that's a - - -

14 MS. FELDMAN: That's Aiken.

15 JUDGE SMITH: That's a useful point for
16 you, but you're not really saying we're bound by
17 those words.

18 MS. FELDMAN: No, no, no. No, but you
19 cited Aiken. You cited Aiken for that principal.
20 Aiken is indistinguishable from this case. Cannot be
21 distinguished at all.

22 JUDGE SMITH: Does the fact that Cronin
23 came along later make a difference?

24 MS. FELDMAN: Not at all, Your Honor. And
25 Sanchez, in fact, deals with that straight on.

1 CHIEF JUDGE LIPPMAN: Why isn't this 100
2 percent Cronic?

3 MS. FELDMAN: Why isn't it?

4 CHIEF JUDGE LIPPMAN: Yeah.

5 MS. FELDMAN: Because Cronic says - - -

6 CHIEF JUDGE LIPPMAN: What went on here
7 that has any meaning?

8 MS. FELDMAN: Because Cronic says that
9 first they had - - - counsel has to prove that this
10 was an unreasonable strategy. And he didn't. He
11 didn't prove it. This - - - first of all, I'm sure
12 that this court was aware of Cronic when it decided
13 Diggins in this case - - - dealt with this case. And
14 this case - - - and in Diggins, the court said that
15 it gives rise to an inference. It was up to the
16 defendant - - - it was the defendant's burden to
17 overcome that inference.

18 JUDGE READ: Well, was Cronic - - -

19 MS. FELDMAN: He didn't.

20 JUDGE READ: Was Cronic an absconding case?

21 MS. FELDMAN: No, it wasn't. And that's
22 the other thing here. Everybody's talking about what
23 the judge should have done, what the lawyer should
24 have done. Nobody's talking about what this
25 defendant should have done. The defendant should

1 have shown up for court, and then he would have had
2 the trial that he's complaining he didn't receive.

3 JUDGE GRAFFEO: Well, if there had been a
4 continuance and a warrant for him, maybe we wouldn't
5 be in this pickle.

6 MS. FELDMAN: Well, there was a warrant for
7 him. A warrant was issued immediately. A Parker
8 hearing was held, and the judge found that he
9 voluntarily absconded from the proceedings.

10 JUDGE SMITH: Yeah, but accepting all that,
11 if he did everything he did, he absconds, the judge -
12 - - the judge says we're going to go ahead with the
13 trial in absentia. They go ahead with the trial in
14 absentia, and his lawyer sleeps through the trial.
15 That's ineffective assistance, isn't it?

16 MS. FELDMAN: Because it's not a strategy.

17 JUDGE SMITH: It is, isn't it?

18 MS. FELDMAN: It's not a strategy to sleep.
19 Yes, that is ineffective, because it's not a strategy
20 to sleep.

21 JUDGE SMITH: Um-hum.

22 MS. FELDMAN: As Your Honor recognized,
23 this record - - -

24 CHIEF JUDGE LIPPMAN: This is - - - but how
25 is this - - -

1 MS. FELDMAN: - - - is crystal clear.

2 CHIEF JUDGE LIPPMAN: How is this a
3 strategy?

4 MS. FELDMAN: Because it's crystal clear.
5 The lawyer, what he was trying - - -

6 CHIEF JUDGE LIPPMAN: It's crystal clear
7 that it's a strategy?

8 MS. FELDMAN: Yes.

9 CHIEF JUDGE LIPPMAN: What's the strategy?

10 MS. FELDMAN: The strategy is to upset - -
11 -

12 CHIEF JUDGE LIPPMAN: Pretty poor stra - -
13 -

14 MS. FELDMAN: - - - this trial in absentia.

15 CHIEF JUDGE LIPPMAN: Pretty poor strategy
16 if this is his strategy.

17 MS. FELDMAN: It's a great strategy. It
18 got him to the Court of Appeals twice.

19 CHIEF JUDGE LIPPMAN: Why isn't it - - -
20 why isn't it more obvious that this guy wanted to be
21 relieved?

22 MS. FELDMAN: He - - - Your Honor, the
23 reason he wanted to be relieved was part of the
24 strategy. He wanted a trial where the defendant
25 could be present. If there was a continuance,

1 perhaps the defendant would have been present.
2 Perhaps, also, there were not - - - may not have been
3 a victim in this case and the People wouldn't have
4 been able to go forward.

5 As part of the Parker hearing, the judge
6 decided that the People's case would be prejudiced if
7 they didn't go forward. This guy was out on the
8 street looking for his wife while he was - - - while
9 he was disobeying - - -

10 JUDGE SMITH: Is - - - are you - - -

11 MS. FELDMAN: - - - the mandate of the
12 court.

13 JUDGE SMITH: Are you suggesting that's the
14 reason for going ahead with the trial in absentia,
15 because in this kind of case you don't know whether
16 the victim's going to be interested tomorrow?

17 MS. FELDMAN: That is all over this record.
18 It's at the Parker hearing, it's at the point where
19 the victim did not show up. The prosecutor made a
20 clear record of how important it was, because the
21 defense counsel's strategy almost worked at that
22 point. The judge was going, well - - - when the
23 victim didn't show up - - - well, maybe we should
24 just have a continuance and see, you know, we'll put
25 it off, and see if, you know, by then, maybe the

1 defendant will be back. And the prosecutor said, no,
2 Judge, please, in this type of case, we have to go
3 forward now. The defendant - - -

4 JUDGE RIVERA: Okay, so they go forward.
5 They're in the trial. He sits there. He's not doing
6 anything. Where is there meaningful representation?

7 MS. FELDMAN: Well, he did - - - he did do
8 things. He didn't just sit there.

9 JUDGE RIVERA: Well, what would those
10 things be?

11 MS. FELDMAN: What - - - well, the judge
12 went through what those things were. He asked for an
13 instruction, and said - - - he wanted the jury to be
14 instructed on - - - that they were not to hold the
15 defendant's absence against him - - -

16 JUDGE PIGOTT: Yeah, but he didn't - - - I
17 don't think he - - - he didn't participate in jury
18 selection. He didn't open, didn't cross-examine.
19 Didn't participate in the Huntley - - -

20 MS. FELDMAN: Well, because if he would
21 have participated in any of these things, then he
22 wouldn't be able to stand here and say, look at him.
23 He did nothing.

24 JUDGE PIGOTT: But that's Mr. Reardon - - -

25 JUDGE RIVERA: That's the whole point.

1 JUDGE PIGOTT: - - - that's the point.

2 JUDGE RIVERA: Isn't that the point?

3 MS. FELDMAN: But if you look at the
4 record, this is what counsel was setting up - - -

5 CHIEF JUDGE LIPPMAN: That was - - -

6 MS. FELDMAN: It was brilliant.

7 CHIEF JUDGE LIPPMAN: But if - - - but if -

8 - -

9 MS. FELDMAN: It was a brilliant strategy.

10 CHIEF JUDGE LIPPMAN: Counsel, counsel,
11 don't you think you're giving him a little too much
12 credit if - - -

13 MS. FELDMAN: No, I don't.

14 CHIEF JUDGE LIPPMAN: - - - brilliance is
15 doing nothing?

16 MS. FELDMAN: Your Honor, we're - - - I'm
17 standing in front of you. I'm standing in front of
18 you right now because of what he did.

19 CHIEF JUDGE LIPPMAN: You're not doing
20 nothing. You're arguing this case. I get that.

21 MS. FELDMAN: I would not be standing here

22 - - -

23 JUDGE READ: Are you saying all brilliant
24 strategies don't yield success - - -

25 MS. FELDMAN: Exactly.

1 JUDGE READ: - - - is what you're saying.

2 MS. FELDMAN: That's exactly what I'm
3 saying.

4 JUDGE PIGOTT: But if you compared this
5 case to most criminal cases, the defendant doesn't
6 take the stand.

7 MS. FELDMAN: Well, in most - - -

8 JUDGE PIGOTT: So, I'm - - -

9 MS. FELDMAN: - - - in most - - -

10 JUDGE PIGOTT: I'm almost done.

11 MS. FELDMAN: In most criminal cases, Your
12 Honor, defendants show up for trial.

13 JUDGE PIGOTT: I'm almost done; I'm almost
14 done. So the fact that he says the defendant wasn't
15 there, I mean, he wasn't going to put him on the
16 stand, anyway.

17 MS. FELDMAN: Well, no, that's not true,
18 Your Honor. They - - - in fact, at the 440 hearing -
19 - -

20 JUDGE PIGOTT: I'm kind of amazed at how
21 proud you are of defense counsel after you got a
22 guilty verdict.

23 MS. FELDMAN: I'm not - - - I'm not
24 necessarily proud. I think he was trying to
25 manipulate the system. And I think because he did

1 manipulate the system, I'm standing in the Court of
2 Appeals right now. So I'm not proud of him, but I'm
3 saying that it's not fair for the defendant to come
4 in here now and say, oh, woe is me, I didn't get a
5 fair trial, when he didn't even show up. He impaired
6 the - - - his counsel's defense, and then the defense
7 said - - - the defendant chose - - - there wasn't a
8 shred of evidence to support it; even his girlfriend,
9 Puddin, supported the - - - the - - -

10 JUDGE RIVERA: Okay, but counsel - - -

11 MS. FELDMAN: What was he supposed to do
12 without the defendant?

13 JUDGE RIVERA: But counsel, you're in the
14 trial - - -

15 MS. FELDMAN: Yeah.

16 JUDGE RIVERA: - - - the attorney says, I'm
17 not going to do anything. The attorney doesn't do
18 all the things Judge Pigott already laid out for you
19 - - -

20 MS. FELDMAN: I understand that.

21 JUDGE RIVERA: - - - what - - - how is that
22 meaningful representation?

23 MS. FELDMAN: This - - -

24 JUDGE RIVERA: And I just want to confirm
25 here. You're not suggesting that a defense attorney

1 would choose the possibility of losing at a trial, in
2 the hopes of succeeding on appeal. Because it sounds
3 like that's your argument.

4 MS. FELDMAN: Your Honor, there are
5 countless cases, cases that counsel cites, Aiken,
6 Diggins, there's a million cases that say that
7 silence, in fact, may be a reasonable strategy.

8 JUDGE RIVERA: A reasonable strategy in the
9 hope of losing it - - - winning at trial, not hoping
10 to get to the Court of Appeals over here, is that
11 what you're saying to us?

12 MS. FELDMAN: No, it's not the hope of
13 winning at trial. It's the hope of derailing a trial
14 in absentia. That was what the strategy - - - this
15 guy said it himself. I was never going to get an
16 acquittal on this case.

17 CHIEF JUDGE LIPPMAN: So does he - - - does
18 he forfeit the right - - - the defendant absconded,
19 bad conduct, does he forfeit the right to counsel
20 completely?

21 MS. FELDMAN: He didn't. He was a zealous
22 advocate. This guy was willing - - -

23 CHIEF JUDGE LIPPMAN: Oh, counsel, you
24 could call him a lot of things. I don't think you
25 could call him a zealous advocate.

1 MS. FELDMAN: Yes, I can, Your Honor,
2 because he - - - this guy was - - - because he's so -
3 - -

4 CHIEF JUDGE LIPPMAN: This guy is really
5 something, let me tell you.

6 MS. FELDMAN: Because - - -

7 CHIEF JUDGE LIPPMAN: You really give him a
8 lot of credit.

9 MS. FELDMAN: No, well, he so firmly
10 believed that the strategy that he was taking - - -

11 CHIEF JUDGE LIPPMAN: Everyone in this room
12 is going to get him as a lawyer, because he seems to
13 be so able to manipulate beyond everybody else in
14 that courtroom.

15 MS. FELDMAN: Your Honor, if these people
16 choose not to show up in court, this is the lawyer
17 they want, because this lawyer so firmly believed - -
18 -

19 CHIEF JUDGE LIPPMAN: So every defendant
20 who absconds should go to this lawyer?

21 MS. FELDMAN: Absolutely. Absolutely.

22 JUDGE PIGOTT: Do you and your - - -

23 MS. FELDMAN: They'd be lining up.

24 JUDGE PIGOTT: Ms. Feldman - - -

25 MS. FELDMAN: If you reverse this case,

1 they'll be lining up for this lawyer.

2 JUDGE PIGOTT: Ms. Feldman, Ms. Feldman, in
3 your view, could this lawyer, had he wanted to use a
4 tactic, have gotten a mistrial somewhere along the
5 line?

6 MS. FELDMAN: Yes. Absolutely.

7 JUDGE PIGOTT: So he didn't do that, so
8 that - - - so - - -

9 MS. FELDMAN: Well, no, he could've gotten
10 a mistrial because if one - - - and there was
11 discussion about this; he testified to this at the
12 440. If one juror sat there and thought - - - and
13 agreed with Judge Lippman that this was, oh, my God,
14 this guy's not getting a fair trial, you would have
15 gotten a hung jury. There's your mistrial.

16 JUDGE PIGOTT: No, no, no. No, what I'm
17 suggesting - - -

18 JUDGE RIVERA: So then he is hoping to win
19 the trial.

20 MS. FELDMAN: Well, that's not winning.
21 That's not winning.

22 JUDGE RIVERA: Which one is it?

23 MS. FELDMAN: That's retrying it.

24 JUDGE RIVERA: Because I don't know who the
25 people are who you're referring to, but - - -

1 MS. FELDMAN: If that's what you mean by
2 winning, yes, he could have won that way.

3 JUDGE RIVERA: Was successful for his
4 client.

5 MS. FELDMAN: Absolutely. Absolutely.
6 Could have gotten that, but he - - - he admits that
7 there was no way with this defense that he could have
8 gotten the defendant an acquittal. So he thought
9 better to get him a new trial where he could be
10 present. That's what the strategy was here. The
11 record makes that clear as day.

12 JUDGE PIGOTT: One of the things you - - -

13 MS. FELDMAN: And Aiken - - -

14 JUDGE PIGOTT: Before you go, Ms. Feldman,
15 one of the things that he may - - - mentioned at
16 sentencing, if I'm not mistaken, is that the wife was
17 not in fear of her life at the time of this
18 confrontation. Now, wouldn't that have been a pretty
19 good summation?

20 MS. FELDMAN: No, Your Honor, it wouldn't
21 have been for two reasons. First of all, in the
22 criminal mischief charge, you don't have to prove
23 that she was in fear.

24 JUDGE PIGOTT: That's the little one.

25 MS. FELDMAN: You have to prove that he

1 attempted to put her in fear.

2 JUDGE PIGOTT: Mischief's not a big one.

3 MS. FELDMAN: Yeah, so pointing a gun at
4 any person would put them in fear. But above and
5 beyond that, what the - - - what the prosecutor
6 pointed out is that when the victim testified, she
7 was sobbing. Twice - - - twice, they had to disturb
8 - - - you know, they had to ask her do you want a
9 break, when she was talking about that. So of course
10 she was in fear.

11 And the other thing is, the other important
12 part of that is, had he not participated in the
13 trial, had he not questioned the victim, and then he
14 gets up and sums up, he would not be able to stand
15 here, and go, whoop, look at this, he did nothing.
16 He did nothing.

17 CHIEF JUDGE LIPPMAN: Okay, counsel,
18 thanks, counsel.

19 Counsel, rebuttal?

20 MR. REARDON: Thank you, Your Honor. I
21 can't fathom how anyone could legitimately say that
22 there was meaningful adversarial activity here. It
23 was a sham. And I think we have to acknowledge that.
24 The problem with saying it and asking for a flat
25 reversal is that you're stuck with the proposition

1 Honor, who said it was loaded on the street that
2 night? There was no proof of that. The judge raised
3 that issue during the charge conference; he wanted to
4 charge circumstantial evidence. The DA says no, no
5 circumstantial evidence charge. What do you have to
6 say, Mr. Lawyer, representing Diggins? Nothing.
7 That's the kind of representation he gave him on
8 critical issues, not just the trial, evidentiary
9 issues. The cross-examination of Mrs. Diggins and
10 all of the rest - - -

11 JUDGE SMITH: The lawyer testified at the
12 440 that he thought that his chances of acquittal
13 were very, very slim. He wasn't wrong, was he?

14 MR. REARDON: The lawyer, several times,
15 said he's going to be convicted - - -

16 JUDGE SMITH: No, no, no, the question - -
17 - no, no, the question, was he right that his chance
18 of acquittal were very slim?

19 MR. REARDON: I don't think so.

20 JUDGE SMITH: You think - - - you think
21 this was - - - he had a good shot at a not guilty
22 verdict?

23 MR. REARDON: I think he did, Judge, and if
24 you've got a minute, it'll take a minute for me to
25 explain to you how. Let me explain it to you.

1 Mrs. Diggins was humiliated by what her
2 husband was doing with a woman in the neighborhood.
3 She called it messing around, walking through the
4 neighborhood. She has four children. She's got a
5 home for them. Totally humiliated and embarrassed
6 for her children. She will not come to court without
7 the judge issuing a warrant.

8 She comes to court with a warrant, number
9 two. When the - - - when the incident happens - - -
10 when the incident happens, she, Mr. Diggins and the
11 girlfriend are there shouting and cursing at each
12 other.

13 JUDGE SMITH: There's another - - - there's
14 another witness who claimed to have seen the gun.

15 MR. REARDON: That's the other - - - the
16 other person that I'm mentioning, Ms. Bryant.

17 JUDGE SMITH: So you - - -

18 MR. REARDON: She's a two-time cocaine
19 loser.

20 JUDGE SMITH: So the defense theory then is
21 that this whole thing - - - the gun was a fiction of
22 these two witnesses and it's just a coincidence that
23 the loaded gun gets found under the defendant's bed
24 that evening?

25 MR. REARDON: No, I'm not saying it's a

1 coincidence, Your Honor. I'm not, at this point,
2 arguing there was no gun. I raised with you the
3 question of was it - - - was it loaded, because you
4 suggested it was loaded, and there's no proof of
5 that.

6 JUDGE SMITH: You say he loaded it before
7 he put it under his bed.

8 MR. REARDON: He didn't put it under his
9 bed. It wasn't even his apartment. It was Puddin's
10 apartment; that's the girlfriend. But let me - - -
11 if I just could take - - -

12 CHIEF JUDGE LIPPMAN: Go ahead, counsel,
13 finish.

14 MR. REARDON: Let me end what happened
15 here. Okay, they're down there shouting - - - okay,
16 let's assume he's got the gun, and he's asking her to
17 back up and all that stuff. And what happens then?
18 Puddin, the girlfriend, says, put that gun away. And
19 that's exactly what he does, and jumps in his car,
20 and beats it away.

21 Bryant, the witness, Your Honor, was
22 talking about - - - the two-time cocaine loser, what
23 does she say? He got disgusted and left. It - - -
24 are we talking about intent to injure? That's in the
25 record, Your Honor. That's in the record. He got

1 disgusted and left. Now, there's one piece to this
2 puzzle.

3 CHIEF JUDGE LIPPMAN: Go ahead, counsel,
4 one more piece.

5 MR. REARDON: So the whole thing is over in
6 the street. What happens then? Mrs. Diggins says,
7 let's go to my apartment, Puddin, I want to show you
8 that he lives with me, that he's the husband, that
9 he's the father of these four kids that I have. And
10 then five women head up to Mrs. Diggins' apartment.
11 And they see, Mrs. Diggins is trying to show Puddin,
12 this guy is really her husband, why are you busting
13 up this marriage, for God's sake?

14 CHIEF JUDGE LIPPMAN: Okay, counsel.

15 MR. REARDON: I got to have thirty seconds,
16 Judge.

17 CHIEF JUDGE LIPPMAN: Thirty seconds,
18 counsel.

19 MR. REARDON: Here's the kisser on this.
20 Puddin says - - - this is the evil one, Puddin - - -
21 Puddin says, I need a drink; let's go get a drink.
22 All five women go downstairs, pile in the truck, to
23 go get Puddin a drink. Does that sound like intent
24 to injure somebody or does that sound like domestic
25 relations? Does that sound something that belongs in

1 the felony court rather than - - - in the family
2 court rather than in the felony court?

3 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
4 you. You're both zealous advocates. Appreciate it.

5 (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. Isaac Diggins, No. 96 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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