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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JARVIS LASSALLE,

Appellant.

No. 25

20 Eagle Street
Albany, New York 12207
January 10, 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.

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 25, People v. Lassalle.

2 MR. BAUER: May - - -

3 CHIEF JUDGE LIPPMAN: One second, counsel. Go
4 ahead.

5 MR. BAUER: Sorry.

6 CHIEF JUDGE LIPPMAN: Okay, go ahead.

7 MR. BAUER: May it please the court, my name is
8 Kevin Bauer. I represent Jarvis Lassalle. I would like
9 to reserve two minutes for rebuttal - - -

10 CHIEF JUDGE LIPPMAN: Two minutes. Go ahead.

11 MR. BAUER: - - - Judge. It is the appellant's
12 position that this is a relatively simple matter. The
13 county court committed a Catu error when they did - - -
14 she did not let him know about - - -

15 CHIEF JUDGE LIPPMAN: Could there have been a
16 strategic reason here for not raising it?

17 MR. BAUER: No, Your Honor, and the reason I say
18 that is this. First - - -

19 CHIEF JUDGE LIPPMAN: And how do we know without
20 hearing from counsel?

21 MR. BAUER: Let me take that one first, if I - -
22 -

23 CHIEF JUDGE LIPPMAN: Sure.

24 MR. BAUER: - - - if I might.

25 CHIEF JUDGE LIPPMAN: Go ahead.

1 MR. BAUER: My client served counsel with his
2 coram nobis and requested a response. He didn't get a
3 response. I don't think you should hold that against my
4 client.

5 Second of all - - - and you could have a hearing
6 under Bachert, a very quick one; it would take five
7 minutes, if we needed that, but it's our position that
8 this is a Turner error, it's not a Stultz and Baldi kind
9 of error.

10 JUDGE SMITH: But even - - - even assuming - - -
11 assuming you're right that if it was - - - if it was an
12 error it was a - - - it was a Turner error, how do we know
13 it wasn't a choice? How do you know - - - how do we know
14 your guy really wanted to have his plea back when the
15 evidence was going to be exa - - - was going to be exactly
16 the same? The only -- the only change would be he'd get
17 to hear about PRS.

18 MR. BAUER: Well, first, Judge Smith, it's my
19 understanding - - - and maybe I'm reading the case law
20 wrong, but I don't think you need an affidavit if you have
21 a Turner error because it's clear on its face.

22 Second of all, with regard - - -

23 JUDGE GRAFFEO: No, but what was the advantage
24 to - - -

25 MR. BAUER: He would get his plea back.

1 JUDGE GRAFFEO: - - - to the defendant here if
2 his plea was vacated?

3 MR. BAUER: Well - - -

4 JUDGE READ: He had a pretty good plea.

5 MR. BAUER: He did have a very good plea, but
6 first of all, the codefendant got a better plea the second
7 time around. Second of all - - - and I think this is
8 important - - - the kind of decision with regard to the
9 plea is not a decision to be made by counsel alone. In
10 other words, it didn't run with an appellate counsel's
11 warrant to decide I can win this case, but then he faces,
12 potentially, more time, so I'm not going to tell him about
13 it, I'm just going to make the decision myself. He
14 doesn't have that kind of authority. And so that would be
15 our position on the strategic - - -

16 JUDGE SMITH: Well, suppose - - - suppose he did
17 wrongly assume that the guy didn't want his plea back when
18 he should have asked him, still, if his assumption - - -
19 maybe his assumption was right. And if his assumption was
20 right, then the guy shouldn't get his plea back, should
21 he?

22 MR. BAUER: No, because the spec - - - I don't
23 think we should speculate as to what would occur. And we
24 know the codefendant got a better plea, and he deprived
25 him of an essential right. I mean, he couldn't decide to

1 tell him that, well, I can get you a plea for three to
2 five but I'm not going to tell you that because I think I
3 can give you a better deal. I mean, this is an area, I
4 think, where it's one of those single egregious errors
5 which deprives you of your right to counsel, and that
6 trumps everything under our - - - our position is, I think
7 it's a clear one.

8 He doesn't have the right, he didn't ask, he had
9 an opportunity to respond. If he had said I didn't - - -
10 I didn't raise the issue because it was bad for my client,
11 okay, we have an answer. If he said I missed it, then we
12 know that - - - that. And if he doesn't respond, well,
13 make him respond. I - - - it's one of those errors.

14 CHIEF JUDGE LIPPMAN: Without him, though, it's
15 really hard to know what went on, right?

16 MR. BAUER: Well - - -

17 CHIEF JUDGE LIPPMAN: Why he did what he did.

18 MR. BAUER: - - - that's true, and if that's the
19 tack the court's going to take, what I'm going to ask you
20 to do is hold the appeal and, under Bachert, let me
21 examine the appellate counsel and ask him. I mean, I know
22 why, but I can't tell you why because it's not on the
23 record. But we could get him in, we could take five
24 minutes, we can be back here in three months.

25 JUDGE SMITH: Or we could - - - we could give

1 the Appellate Division that pleasure, maybe?

2 MR. BAUER: Oh, certainly, certainly, I'm sure
3 they'd be happy - - -

4 CHIEF JUDGE LIPPMAN: What should the Appellate
5 Division have done in this circumstance?

6 MR. BAUER: The Appellate - - - I am puzzled by
7 the Appellate Division's decision, because the decision in
8 Burns is so clear that the connec - - - the similarity
9 between the two plea colloquies is identical, but for the
10 amount of time, that I am at a loss. They should have
11 granted him a coram nobis and heard the appeal over again.
12 It seemed to me - - - it seems - - - this seems as close
13 to a slam-dunk at the coram nobis level as you can get,
14 and so I'm baffled, but that's what they should have done.

15 And if they were concerned because of Rivera - -
16 - and they didn't cite anything; they didn't say anything
17 or cite anything - - - if they were concerned because of
18 Rivera, they should have said so or sent it back for a
19 hearing.

20 CHIEF JUDGE LIPPMAN: Okay, counselor.

21 MR. BAUER: Thanks.

22 CHIEF JUDGE LIPPMAN: Thank you.

23 MS. MILLING: Good morning. May it please the
24 court, my name is Donna Milling. I'm here on behalf of
25 the People of the State of New York.

1 CHIEF JUDGE LIPPMAN: Counselor, if this had
2 been raised, defendant would have had that granted, right,
3 the Catu violation?

4 MS. MILLING: Well, Your Honor, I'm here to tell
5 you - - -

6 CHIEF JUDGE LIPPMAN: Because there's no doubt,
7 right? His codefendant had it; if it had been raised,
8 that would have been the case, right?

9 MS. MILLING: I guess it's possible. I'm here
10 to tell you that I don't - - - I think the Appellate
11 Division was wrong when they decided Steven Burns. I
12 don't think this was a Catu error; I don't. If you look
13 at Catu, it says the absence or the failure of a court to
14 advise a defendant that PRS is - - - where there's a
15 determinate sentence, that PRS goes along with his plea.
16 This case is People v. Juan Rivera, except that I think
17 it's even better than Rivera.

18 JUDGE PIGOTT: If the Appellate Division is not
19 wrong about Burns, what then?

20 MS. MILLING: Okay. If the Appellate Division
21 is not wrong about Burns, there still was a legitimate
22 reason for counsel not to have raised this issue. And the
23 reason is that - - - as Justice Lippman just said, we have
24 to speculate here because we don't know what, if any,
25 conversation - - -

1 CHIEF JUDGE LIPPMAN: So how are we going to
2 know, though, in this case?

3 MS. MILLING: Well, we're going to know because
4 it's the defendant's fault - - - we're not going to know
5 because it's the defendant's fault. He has not provided,
6 or he did not provide the court with an affidavit from
7 counsel.

8 JUDGE PIGOTT: Yeah, but that - - - I know from
9 the Appellate Division, trying to get affidavits from
10 former attorneys on some of these cases can really be
11 difficult, and maybe a subpoena would be necessary.

12 But just to go back to basic fairness - - - I
13 hate to bring that up - - - but Burns ends up, you know,
14 with a Catu error that gets reversed. This guy's standing
15 right next to him, you know, when this is going on, the
16 same thing happens to him, and because his lawyer doesn't
17 raise it, he doesn't - - - he doesn't get the benefit of
18 that. So he's up here on an ineffective assistance. But
19 wouldn't simple justice say if Burns was entitled to it so
20 is this guy, and so we ought to give it to him and send
21 him back?

22 MS. MILLING: No, I don't. I think the
23 Appellate Division did what it did. I don't know why, I
24 guess I'm speculating and saying maybe it was a different
25 posture of the case.

1 JUDGE PIGOTT: No, but I know you said Burns is
2 wrong, so - - -

3 MS. MILLING: Yes.

4 JUDGE PIGOTT: - - - you want them to be treated
5 the same. You want to say Burns was wrong, and if the
6 Appellate Division had done the appropriate job, the two
7 of them would be sitting in jail now on their original
8 pleas. But that's why I asked you, if Burns - - - if
9 they're right about Burns, then shouldn't they both be,
10 again, in the same situation?

11 MS. MILLING: No, because the posture is
12 different. Burns was a direct appeal - - -

13 JUDGE PIGOTT: Right.

14 MS. MILLING: - - - here this is a coram nobis.

15 JUDGE PIGOTT: No, I understand that. I'm
16 trying to get down to my basic fairness here. I get that,
17 but we're - - - so we're going to say, okay, Burns, you
18 get a break. This guy, you don't, and you don't because
19 even though you're standing there at the same place, same
20 time, same error occurred, you didn't bring it up in your
21 first appeal, and therefore you've lost it, even though
22 there's now an argument that your lawyer overlooked it
23 because when they argued your first appeal it wasn't the
24 lawyer, it was Legal Aid that brought that appeal. And so
25 whether they ever talked to the trial lawyer is a very

1 good question; I doubt - - - I doubt that they did. And
2 so all they argued was the ID and harsh and excessive. So
3 I mean, it just seems to me that in our justice system, we
4 shouldn't be doing stuff like - - -

5 MS. MILLING: No, I - - - I see - - - I see the
6 point you're making, but these are two different cases.
7 And if you loo - - - as I said before, we don't know what,
8 why - - -

9 JUDGE SMITH: Well, it's theoretically possible,
10 at least you're saying. The difference is that Burns
11 wanted his plea back and Lassalle didn't.

12 MS. MILLING: Exactly.

13 JUDGE SMITH: Is there any other possible
14 difference?

15 MS. MILLING: I guess not.

16 CHIEF JUDGE LIPPMAN: Yeah, but apropos that
17 point, wouldn't it be fair to just hear from the attorney?
18 Why isn't that fair? Would you - - - wouldn't you want to
19 hear from the attorney and we'd know, maybe, the answer to
20 your - - -

21 MS. MILLING: At this point, I don't think he
22 should get a second bite at the apple. He had an
23 opportunity - - -

24 CHIEF JUDGE LIPPMAN: But in terms of fairness,
25 really, it would be a good thing, right, if we heard from

1 the attorney?

2 MS. MILLING: I guess it would be, but he - - -
3 counsel - - - there's no need to hear from the attorney,
4 because he has not demonstrated that counsel did not have
5 a legitimate reason for not raising it. Even if you look
6 at the transcript, okay, Catu says absence or failure.
7 Was the plea colloquy ambiguous? Yes. Catu doesn't say
8 ambiguous; it says absence or failure. So it's quite
9 possible that in looking at this - - -

10 JUDGE SMITH: Where is the ambiguity?

11 MS. MILLING: The ambiguity is in the fact that
12 the court - - - the court initially said do you understand
13 that your plea can subject you to a maximum sentence of
14 twenty-five years to be followed by five years of post-
15 release supervision. However, I have committed to a
16 sentence of fifteen years to be served concurrent to the
17 sentence you are now serving in that count.

18 JUDGE SMITH: Because it sounds - - - I mean, if
19 you're reading it, I understand the point that maybe
20 defendants don't always read these colloquies as intensely
21 as we assume, but if he's reading it like a good lawyer
22 and a logician, wouldn't he say, oh, that means I get PRS
23 - - - I'm exposed to PRS but the judge is telling me not
24 to worry about it; I'll just get a straight fifteen years.

25 MS. MILLING: I guess that's possible. I guess

1 I'm not thinking like the defendant, and I'm - - - if
2 you're appellate counsel, I think it was quite reasonable.
3 As you said in Turner, Justice Smith, that it was - - - it
4 was not reasonable for appellate counsel in Turner to not
5 raise - - -

6 JUDGE SMITH: Well, I mean, did he - - - I mean,
7 Catu, it seems to me, stands for the proposition that
8 you're entitled to not only to know but to have the judge
9 say you're going to get PRS on top of your prison time.
10 The judge never said that to him.

11 MS. MILLING: It's my position that she did. If
12 you - - - if you look at it and you read it, you will see
13 that he was told that PRS was a part of his sentence. But
14 even if you don't, even if you say to yourself, you know
15 what, this was a Catu error, he still has not demonstrated
16 that counsel didn't have a legitimate strategic reason for
17 not raising this. Look at what he raised on appeal. He
18 raised - - - he didn't want to upset the apple cart, is
19 all I can think of. If you look at what he raised on
20 appeal, he challenged - - -

21 JUDGE SMITH: Well, that's not all you can think
22 of. There was the other possibility, which is he just
23 missed it.

24 MS. MILLING: I don't think so. It's possible,
25 but I don't think so. If you look at what he raised on

1 appeal, he challenged the appeal waiver, he challenged the
2 ID issue. The ID issue, if he - - - if that had been
3 granted at the Appellate Division and his conviction had
4 been reversed on the ID issue, Mr. Lassalle would have
5 gone home - - -

6 JUDGE PIGOTT: I don't know. You had - - -

7 MS. MILLING: - - - just like Mr. Turner.

8 JUDGE PIGOTT: You had the ring at the pawn sh -
9 - - I mean, there was an awful lot of evidence that - - -

10 MS. MILLING: There is still a lot of evidence.
11 Yes.

12 JUDGE PIGOTT: - - - he was a crook, so it would
13 seem to me that a smart appellate lawyer would have - - -
14 could have raised the ID issue because you had the hearing
15 on that, but also, just in case, point out the - - - you
16 know, the fact that there was no PRS. I mean, they're not
17 exclusive.

18 MS. MILLING: Oh yeah, he could have raised it,
19 but we don't know. If - - - with the ID issue, when he
20 raised the ID issue, as I said, if the Appellate Division
21 had reversed his conviction, we would have had no ID - - -

22 JUDGE PIGOTT: But isn't - - -

23 MS. MILLING: - - - so he goes home.

24 JUDGE PIGOTT: I guess this gets back to the
25 lawyer issue, but I mean, if - - - this was Mr. LoTempio

1 (ph.), right? I mean, if he was - - -

2 MS. MILLING: No, it wasn't Mr. LoTempio; it was
3 Mr. Texido.

4 JUDGE PIGOTT: Oh, Texido, okay. But in any
5 event, if he said, look, we got the Niagara County stuff,
6 we've got this mess, you know, we're going to wrap this up
7 and be done, then the defendant says, well, I'm cooked
8 anyway, that makes sense, you know, I'm not going to get
9 any extra time because I've got to do the Niagara time - -
10 -

11 MS. MILLING: Yes, he had already been serve - -
12 - he already got seven years and five years of post-
13 release supervision - - -

14 JUDGE PIGOTT: So PRS - - -

15 MS. MILLING: - - - on his Niagara County - - -

16 JUDGE PIGOTT: So PRS - - -

17 MS. MILLING: - - - case.

18 JUDGE PIGOTT: So PRS - - - I mean, this - - -
19 it had nothing to do with the ID, is my point.

20 MS. MILLING: No, but if he had raised - - - if
21 he had raised the Catu error and the conviction had been
22 reversed, here we are now back again. Obviously he pled
23 guilty because he got a bargain. If the Appellate
24 Division had reversed and he had come back, now he's
25 looking at a six-count indictment, second felony offender,

1 consecutive sentencing; he's looking at fifty years.

2 JUDGE PIGOTT: Well, then you wouldn't appeal at
3 all.

4 MS. MILLING: Pardon me?

5 JUDGE PIGOTT: By that argument, you wouldn't
6 appeal at all. I get your point.

7 CHIEF JUDGE LIPPMAN: Okay, counselor.

8 MS. MILLING: Unless there are any questions - -
9 -

10 CHIEF JUDGE LIPPMAN: Anything else? No?

11 MS. MILLING: Thank you.

12 CHIEF JUDGE LIPPMAN: Thanks, counselor.
13 Counselor, rebuttal?

14 MR. BAUER: Very quickly, Chief Judge. First of
15 all, with regard to the People's position on Burns, you
16 know they didn't seek leave.

17 Second of all, with regard to the direct appeal,
18 the Fourth Department held that all the issues raised by
19 the defendant were encompassed in the plea and the waiver.

20 And third, I think the fairness argument is very
21 important here. The fact that we have one step removed,
22 we have a coram nobis, as opposed to a direct appeal,
23 seems terribly unfair when a Catu error seems to be a
24 reversal on direct appeal. That would seem to be a
25 perfect candidate for a grant of a coram nobis that he

1 could have gotten a reversal on his direct appeal and let
2 him deal with the fallout. And - - -

3 JUDGE PIGOTT: We're now four years past the
4 plea, I think.

5 MR. BAUER: Yes - - -

6 JUDGE PIGOTT: Maybe more.

7 MR. BAUER: - - - that's correct, Your Honor.

8 JUDGE PIGOTT: So you've got witnesses, you have
9 to have it as a retrial. But do we ever candidly expect
10 the defense lawyer to come in and submarine his client? I
11 mean, I don't want to say I would commit perjury, but if I
12 was this guy's defense lawyer and you put me on a stand
13 and said, you know, why did you - - - why did you not
14 argue PRS, I'd say I blew it. I mean, I would never say
15 because this dumb guy wasn't getting it and I thought he
16 deserved to do the time.

17 MR. BAUER: I think, Judge Pigott, what we would
18 expect is for the lawyer to tell the truth when he is
19 under oath.

20 JUDGE PIGOTT: I'm being too cynical, I guess.

21 MR. BAUER: Yes, and I think if he simply says,
22 you know, I missed it, that's good. And I don't think a
23 lawyer's going to say I missed it when I didn't miss it.

24 JUDGE GRAFFEO: But was there an obligation to
25 get that information as part of the coram proceeding as

1 understanding.

2 JUDGE SMITH: And so - - -

3 MR. BAUER: I was assigned - - -

4 JUDGE SMITH: - - - maybe there's an argument
5 that in a situation like that he ought to get a second
6 bite at the apple, where he didn't have a lawyer the first
7 time and where he's got a, perhaps, meritorious position.

8 MR. BAUER: I would agree.

9 CHIEF JUDGE LIPPMAN: But the Fourth Department
10 saw no obligation to make that happen.

11 MR. BAUER: No, they didn't, and again, I'm
12 baffled, Your Honor.

13 JUDGE PIGOTT: They expressed - - - there was no
14 opinion?

15 MR. BAUER: There was no writing at all.

16 CHIEF JUDGE LIPPMAN: Okay. Thanks, counselor.

17 MR. BAUER: Thank you very much.

18 (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 PEOPLE v. JARVIS LASSALLE, No. 25, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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Date: January 17, 2013