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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

SHARMELLE JOHNSON,

No. 104
(Papers Sealed)

Appellant.

20 Eagle Street
Albany, New York 12207
May 1, 2014

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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1 CHIEF JUDGE LIPPMAN: People v. Johnson.

2 Counselor, do you want any rebuttal time?

3 MS. STEPHENS-DAVIDOWITZ: Yes, Your Honor,
4 two minutes, please.

5 CHIEF JUDGE LIPPMAN: Two minutes. Go
6 ahead.

7 MS. STEPHENS-DAVIDOWITZ: Good afternoon,
8 and may it please the court. Lauren Stephens-
9 Davidowitz from the Office of the Appellate Defender
10 on behalf of Sharmelle Johnson.

11 In this case, the parties shared a
12 misunderstanding of the nature of the crime to - - -

13 CHIEF JUDGE LIPPMAN: What did the
14 allocution show?

15 MS. STEPHENS-DAVIDOWITZ: The allocution
16 showed that the complainant was drunk when Mr.
17 Johnson encountered her, and that she was too drunk
18 to really make a decision about whether or not to
19 have sex.

20 CHIEF JUDGE LIPPMAN: But that - - - that
21 doesn't - - - isn't instructive in terms of the
22 charge?

23 MS. STEPHENS-DAVIDOWITZ: Certainly not,
24 Your Honor.

25 CHIEF JUDGE LIPPMAN: Why not?

1 MS. STEPHENS-DAVIDOWITZ: Because the
2 charge had a - - - required that Mr. Johnson - - -
3 the charge required that the complainant be mentally
4 incapacitated, which is a term of art - - - art that
5 has a specific definition under the penal law, which
6 is that the complainant become in - - - incapacitated
7 without her consent. And - - -

8 JUDGE SMITH: Did there even have to be an
9 allocution here?

10 MS. STEPHENS-DAVIDOWITZ: There did not
11 have to be an allocution, no, Your Honor. But
12 there's a difference - - -

13 JUDGE SMITH: So why isn't this no harm, no
14 foul?

15 MS. STEPHENS-DAVIDOWITZ: Your Honor,
16 because there's a difference between an allocution
17 with no facts and an allocution with the wrong facts,
18 because an allocution with no facts could be knowing.
19 But in this - - - the most important thing - - - the
20 most important - - - really, the fundamental
21 requirement of a guilty plea is that it be knowing.
22 And when the defendant is being told you are making
23 out - - - by - - - by - - - by stating - - - saying
24 yes to these questions, you are making out the
25 elements of this charge, and he is being misled, that

1 is an unknowing plea.

2 CHIEF JUDGE LIPPMAN: So in this case, your
3 argument is that no one knows what the elements are
4 here.

5 MS. STEPHENS-DAVIDOWITZ: Certainly, Your
6 Honor, and that's - - -

7 CHIEF JUDGE LIPPMAN: Everyone - - -
8 everyone's under a misunderstanding?

9 MS. STEPHENS-DAVIDOWITZ: Yes, Your Honor,
10 and that's very, very evident from the record.

11 CHIEF JUDGE LIPPMAN: Who's the everyone,
12 and - - - and - - - and explain why each of them - -
13 - what shows that each of them doesn't understand it.

14 MS. STEPHENS-DAVIDOWITZ: Of course. I
15 would say the court, the prosecutor and defense
16 counsel are all under a misunderstanding.

17 CHIEF JUDGE LIPPMAN: And how do you know
18 they each don't understand?

19 MS. STEPHENS-DAVIDOWITZ: Well, if you - -
20 - first, there's page 103 of the appendix, where
21 right before Mr. John - - - the allocution begins,
22 the court says, "I've discussed with the parties that
23 we believe, factually, the facts support the
24 subdivision 2 of the rape 2 charge, if the defendant
25 is guilty and wants to plead guilty."

1 Then on page 109 of the record - - - first,
2 I'll note that the - - - the court refuses to
3 initially accept the allocution, you know, indicating
4 that she needs him to plead to this crime. And then
5 she simply, as we - - - as I stated below, accepts
6 the plea when Mr. Johnson says that the defendant - -
7 - that the complainant was too drunk to make a
8 decision about - - -

9 JUDGE SMITH: Suppose she - - -

10 MS. STEPHENS-DAVIDOWITZ: - - - whether or
11 not to have sex.

12 JUDGE SMITH: Suppose she had read him the
13 correct elements of the charge he pleaded guilty to,
14 and he said no, I didn't do anything like that, but
15 I'm willing to plead guilty to it to - - - to get - -
16 - to get a better deal. Is that - - - could she take
17 the plea?

18 MS. STEPHENS-DAVIDOWITZ: Absolutely.
19 Absolutely. And I would cite Serrano for that, which
20 I think is the clearest case, and Lopez.

21 JUDGE GRAFFEO: So tell us what inquiries
22 the judge should have made here that the judge didn't
23 make.

24 MS. STEPHENS-DAVIDOWITZ: The judge should
25 have - - -

1 JUDGE GRAFFEO: Because not all elements of
2 the crime have to be allocuted to, correct?

3 MS. STEPHENS-DAVIDOWITZ: Yes, Your Honor,
4 but if it's evident that the defendant does not
5 understand the crime to which he's pleading to, then
6 there's a problem.

7 JUDGE GRAFFEO: So - - -

8 MS. STEPHENS-DAVIDOWITZ: And - - -

9 JUDGE GRAFFEO: - - - tell us what the
10 judge should have asked.

11 MS. STEPHENS-DAVIDOWITZ: The judge should
12 have said, Mr. Johnson, do you understand that you're
13 pleading guilty to second-degree rape, even though
14 you have not established the elements of this crime?
15 Are you doing so to avoid conviction of first-degree
16 rape?

17 JUDGE SMITH: Do you have to do that every
18 time you have a plea to a - - -

19 MS. STEPHENS-DAVIDOWITZ: No.

20 JUDGE SMITH: - - - where you're pleading
21 down even to an impossible crime?

22 MS. STEPHENS-DAVIDOWITZ: No, Your Honor,
23 but - - -

24 JUDGE SMITH: Why do they have to do it
25 here?

1 MS. STEPHENS-DAVIDOWITZ: Well, that's true
2 - - - if they're going to go through the facts, and
3 there's - - - and Mr. Johnson's allocution casts
4 doubts on his guilt of the facts, they have to do
5 that, just like the court - - -

6 JUDGE SMITH: So you're saying if you do -
7 - - if you do an allocution, you've either got to - -
8 - you've either got to adduce the fact that he's
9 guilty of what he's pleading to or that he
10 understands he's pleading to it although he's not
11 guilty.

12 MS. STEPHENS-DAVIDOWITZ: Yes, and that's
13 what this court said in Hill, in Mox, in Serrano.

14 JUDGE RIVERA: And since you don't have to
15 allocute to all of the facts and elements, doesn't
16 this, then, encourage not doing much of an allocution
17 - - -

18 MS. STEPHENS-DAVIDOWITZ: Not necessar - -
19 -

20 JUDGE RIVERA: - - - and discourage going
21 deeply into the elements and the facts - - -

22 MS. STEPHENS-DAVIDOWITZ: But - - -

23 JUDGE RIVERA: - - - of ensuring yourself
24 that the defendant knows what they're pleading to?

25 MS. STEPHENS-DAVIDOWITZ: No, Your Honor.

1 What's important is that, you know - - - well, first
2 of all, this is a very unique circumstance where we
3 have a misunderstanding by all of the parties, right,
4 and - - - and just like in Worden, this court's very
5 recent decision - - -

6 JUDGE GRAFFEO: What's the mis - - - can
7 you say again what the misunderstanding is?

8 MS. STEPHENS-DAVIDOWITZ: Certainly. It
9 seems that all of the parties were relying on the
10 colloquial definition of mentally incapacitated, that
11 some - - - that the complainant, by being too drunk
12 to make a decision about whether or not to have sex,
13 established that element. And that's just incorrect.

14 JUDGE GRAFFEO: Am I wrong in the facts? I
15 thought he gave her marijuana before they had sex.

16 MS. STEPHENS-DAVIDOWITZ: He did say that
17 they smoked marijuana together, Your Honor. I don't
18 think that that was at all involuntary. The question
19 is whether or not the complainant was made mentally
20 incapacitated without her consent. And here we know
21 that she was very drunk when he met her. And the
22 court, actually, during the allocution, says that the
23 mental incapacity came from the fact that she was - -
24 - apparently from drinking, is what the court says.

25 But to go back to Judge Rivera's question,

1 you know, this is - - - this - - - this case is
2 completely consistent with this court's precedents,
3 and it's a very unique situation. And the questi - -
4 - in every single case that this court has ever
5 looked at that - - - that - - - that eva - - - you
6 know, when eval - - - in evaluating a guilty plea,
7 there's a requirement of knowingness. And that's all
8 we're asking for here. And when all of the parties
9 are unaware of the crime to which the defendant is
10 pleading, and his allocution casts significant doubt
11 upon his guilty, it's an unknowing plea. It's a rare
12 circumstance - - -

13 CHIEF JUDGE LIPPMAN: Well, it does - - -

14 MS. STEPHENS-DAVIDOWITZ: - - - but it's an
15 unknowing plea.

16 CHIEF JUDGE LIPPMAN: - - - it does
17 apparently happen.

18 MS. STEPHENS-DAVIDOWITZ: Yes, Your Honor,
19 it did happen in Worden as well, and that's the only
20 other case I've seen where it's happened. But - - -

21 JUDGE SMITH: But in Worden they had to do
22 the allocution because he wasn't pleading down to a
23 lower offense.

24 MS. STEPHENS-DAVIDOWITZ: That's true, Your
25 Honor, but of course in Hill, in Mox, in Serrano, the

1 defendant was pleading to a lesser included or - - -
2 a lesser included charge.

3 JUDGE SMITH: Or a lesser anyway.

4 MS. STEPHENS-DAVIDOWITZ: Yes. And - - -
5 and still, this court didn't find that - - - the
6 court found that the defendants were being misled
7 there. The defendants believed that they may have
8 pres - - - have - - - have allocuted - - - have
9 established, by their allocution, their guilt to the
10 crime when they - - - they actually hadn't. And the
11 court just had to conduct further inquiry. That
12 doesn't mean that they had to reject the plea; they
13 just had to make sure that the - - - the defendant
14 understood what he was doing.

15 JUDGE READ: So what happens here if we
16 agree with you?

17 MS. STEPHENS-DAVIDOWITZ: You reverse the
18 conviction, vacate the plea, and the - - - the
19 indictment's reinstated, and Mr. Johnson goes back to
20 the trial court.

21 CHIEF JUDGE LIPPMAN: Okay.

22 MS. STEPHENS-DAVIDOWITZ: Thank you.

23 CHIEF JUDGE LIPPMAN: Thanks, counsel.

24 MR. SEEWALD: May it please the court.

25 Andrew Seewald for the People.

1 CHIEF JUDGE LIPPMAN: Counselor, do you
2 contest the fact that apparently all of the players
3 here misunderstood the requirements of the statute?

4 MR. SEEWALD: What the plea court's mistake
5 here was that the plea - - -

6 CHIEF JUDGE LIPPMAN: Is that a yes, you
7 contest the fact that - - - that they all
8 misunderstood the requirements of the statute?

9 MR. SEEWALD: I - - - I think the
10 requirements of the statute were irrelevant.

11 JUDGE SMITH: Just out of idle curiosity,
12 did the judge know what the sta - - - can you tell
13 from the transcript whether the judge knew what the
14 elements were of the crime the man was pleading to?

15 MR. SEEWALD: It looks like she did, and
16 she was trying to - - -

17 JUDGE SMITH: She did? She - - -

18 MR. SEEWALD: I think - - -

19 JUDGE SMITH: You think she understood that
20 - - - that this was essentially a date rape - - - a
21 date rape drug crime?

22 MR. SEEWALD: I think what she was - - -
23 her mistake was the idea that the plea had to
24 factually establish all of the elements of that
25 lesser crime. That looks to be what her mistake was.

1 JUDGE SMITH: Well, but didn't she - - -
2 well, and didn't she also make the mistake of
3 thinking that she had established them?

4 MR. SEEWALD: Perhaps. It looks like she
5 was trying to - - -

6 JUDGE SMITH: So - - -

7 MR. SEEWALD: - - - kind of shoehorn - - -

8 JUDGE SMITH: - - - which means that she
9 made the third mistake - - - or maybe a different
10 version of the second, of not knowing what those
11 elements were.

12 MR. SEEWALD: Possibly, but there - - -
13 there's no indication that - - - that the judge's
14 misunderstanding about whether the plea had to
15 establish those lesser - - - that less - - - the
16 elements of that lesser charge induced the
17 defendant's plea. Even the defendant didn't say it
18 did. And - - -

19 CHIEF JUDGE LIPPMAN: But if no one
20 understands the elements, doesn't it matter?

21 MR. SEEWALD: No, I mean, the - - -

22 CHIEF JUDGE LIPPMAN: No? It doesn't
23 matter if everyone doesn't get it, what the statute -
24 - -

25 MR. SEEWALD: What's important here is - - -

1 -

2 CHIEF JUDGE LIPPMAN: - - - defines the
3 elements of the crime?

4 MR. SEEWALD: - - - is whether the
5 defendant made a voluntary and intelligent choice
6 among these - - -

7 CHIEF JUDGE LIPPMAN: But how can they make
8 a voluntary intelligent choice if no one understands
9 what you've - - - what - - - what you're pleading to.

10 MR. SEEWALD: Well, because if you look at
11 what his choice was at the time he made the plea, it
12 was take this plea to rape 2 where he gets four
13 years.

14 CHIEF JUDGE LIPPMAN: Yeah, but he doesn't
15 know what rape 2 is, and the judge doesn't know what
16 rape 2, and the prosecutor maybe doesn't know what
17 rape 2 - - -

18 MR. SEEWALD: But - - -

19 CHIEF JUDGE LIPPMAN: - - - is either.

20 MR. SEEWALD: But he knows that it's a
21 lesser charge that he - - - that will give him a - -
22 - a lesser sentence of only four years. And he knows
23 that he's facing, at this trial that's about - - -
24 that's already under way, actually, and the
25 complainant's about to testify, that he's facing a

1 minimum of eight years - - -

2 CHIEF JUDGE LIPPMAN: But could it be
3 knowing what you don't know?

4 MR. SEEWALD: Absolutely.

5 CHIEF JUDGE LIPPMAN: Why?

6 MR. SEEWALD: Because he knows what his
7 choices are. He knows that he's about to hear from
8 this victim who's going to testify that she staggered
9 home with both legs in one pant leg.

10 CHIEF JUDGE LIPPMAN: It doesn't sound like
11 - - -

12 MR. SEEWALD: And that - - -

13 CHIEF JUDGE LIPPMAN: It doesn't sound like
14 justice to me if you don't have to know what it is
15 that you're pleading guilty to - - -

16 MR. SEEWALD: Well, that's - - -

17 CHIEF JUDGE LIPPMAN: - - - or you don't
18 understand what the requirements are. How could that
19 be - - -

20 MR. SEEWALD: It's - - -

21 CHIEF JUDGE LIPPMAN: - - - right?

22 MR. SEEWALD: Well, this court's case in -
23 - - in People v. Keizer, where the - - - the - - -

24 CHIEF JUDGE LIPPMAN: We say that?

25 MR. SEEWALD: - - - the defendant - - - I'm

1 sorry?

2 CHIEF JUDGE LIPPMAN: We say that in People
3 v. Keizer?

4 MR. SEEWALD: The - - - in that case, the
5 defendant - - - this court approved a plea to
6 disorderly conduct on a petty larceny charge. There
7 doesn't seem to be any requirement that the court go
8 through an explanation of the - - - the finer points
9 of - - -

10 JUDGE SMITH: I think your adversary missed
11 there's no requirement. As I understand it, she's
12 saying, yeah, if - - - if all the conversation was,
13 you want to plead to rape 2; yes, I do; thank you,
14 good-bye, she'd have no complaint. But when you go
15 through this - - - this rather - - - or this fairly
16 elaborate ritual in which nobody knows what's going
17 on and the judge is obviously confused, doesn't that
18 taint the plea? That's really the question.

19 MR. SEEWALD: Well, this court said in - -
20 - in an opinion by the Chief Judge, in People v.
21 Goldstein, where the court was - - - the court
22 misstated what the defendant's exposure was and said
23 that - - - that that defendant was facing a - - - a
24 much greater possibility - - - possible sentence
25 after trial, grossly misstated what the defendant was

1 facing. That plea was still rational. It was still
2 a rational plea, even though the defendant in that
3 case - - -

4 CHIEF JUDGE LIPPMAN: It's rational when -
5 - - when you're misled as to - - - or don't have an
6 understanding of what it is that you're agreeing that
7 you did or that the - - - that the crime doesn't
8 require or does require certain elements and you
9 don't know?

10 MR. SEEWALD: Absolutely, because there's
11 no requirement that the - - - the elements of that
12 lesser charge be established.

13 JUDGE PIGOTT: Well, wouldn't a better
14 practice be if you're going to elicit them that they
15 be consistent with the charge to which the person is
16 pleading?

17 MR. SEEWALD: Su - - - well - - -

18 JUDGE PIGOTT: And the reason I say that is
19 - - - not that - - - not that this person is someday
20 going to get in trouble again, but when you go to
21 your second felony hearing, or when he brings a 440
22 six years from now, or any one of those, and he says,
23 you know, here's the transcript; the judge didn't
24 know, I didn't know, my lawyer was incompetent; I
25 want to vacate this whole thing, isn't he in a pretty

1 good shape to get that?

2 MR. SEEWALD: Look at what the alternative
3 would be here.

4 JUDGE PIGOTT: No, my only argument is I
5 would think that the People would want to make sure
6 the ducks are all in a row on these as well, because
7 there's - - - there's dangers here down the road.

8 MR. SEEWALD: I think that the dangers
9 would be - - - under the defendant's argument, the
10 dangers would be to future defendants.

11 CHIEF JUDGE LIPPMAN: Yeah, but you're
12 saying, I think, he doesn't have to be fully briefed.
13 And even if he is briefed, then they get it wrong,
14 it's - - - it's okay.

15 MR. SEEWALD: We can look at all of the
16 circumstances to decide whether he was making a
17 rational choice as he approached the plea bargain.
18 And he's looking at a trial where this victim's going
19 to testify about the conditions she was in, and that
20 her pelvis was bruised, and that she lost her - - -
21 her cell phone and her - - - and her bag and her - -
22 - her - - -

23 CHIEF JUDGE LIPPMAN: But if you say I
24 understa - - - if you say this is what happened, I
25 understand that, and therefore I'm pleading to X, and

1 - - - and that's not X.

2 MR. SEEWALD: Well, this court has
3 repeatedly approved pleas to hypothetical crimes that
4 no defendant could possibly admit to without lying.
5 We don't want to encourage - - -

6 JUDGE SMITH: Okay.

7 MR. SEEWALD: - - - defendants to - - -

8 JUDGE SMITH: Okay. But in those - - -

9 MR. SEEWALD: - - - to invent a scenario.

10 JUDGE SMITH: Do you have a case where he
11 pleaded to a nonexistent crime and they took him
12 through a nonexistent set of elements to the
13 nonexistent crime and he admitted to them all?
14 Wouldn't that be a little - - - a little weird, for
15 starters?

16 MR. SEEWALD: Of course, we wouldn't want
17 that to happen.

18 JUDGE SMITH: And isn't that - - - I guess
19 the real issue is isn't that really too weird to
20 permit? Should we - - - doesn't it create - - -
21 undermine confidence in the system to let that sort
22 of thing happen?

23 MR. SEEWALD: Well, what we - - - the
24 importance of the facts here were that they
25 reinforced the rationality of the plea bargain. The

1 defendant admitted that he - - - that the victim was
2 too drunk to - - - to consent to sex, and yet he had
3 sex with her anyway. So given that admission and all
4 of the - - -

5 CHIEF JUDGE LIPPMAN: That's not
6 second-degree rape, is it?

7 MR. SEEWALD: No, but it didn't need to
8 establish second-degree rape.

9 JUDGE SMITH: Is it anything? What is it?
10 Is that - - -

11 MR. SEEWALD: It's - - -

12 JUDGE SMITH: Is it third-degree rape?

13 MR. SEEWALD: It's, arguably - - - it's,
14 arguably, first-degree rape, or - - - or certainly it
15 would have been third-degree rape, but it's arguably
16 first-degree rape. There have been cases - - -
17 convictions af - - - at trial that have been upheld
18 on facts similar to that.

19 JUDGE RIVERA: But why isn't it second-
20 degree rape? Why isn't it second-degree rape?

21 MR. SEEWALD: Well, because it didn't
22 establish - - -

23 JUDGE RIVERA: Um-hum.

24 MR. SEEWALD: - - - the - - - that the
25 victim's mental incapacity was involuntary.

1 JUDGE RIVERA: Um-hum.

2 MR. SEEWALD: But it was really silent
3 about that fact. I mean he didn't - - -

4 JUDGE RIVERA: So that's what I'm saying.

5 MR. SEEWALD: Yeah.

6 JUDGE RIVERA: Why isn't it enough, if it's
7 merely silent about that?

8 MR. SEEWALD: Yeah. I suppose - - -

9 JUDGE RIVERA: Because we don't have to go
10 through any of it.

11 MR. SEEWALD: I suppose, arguably - - -
12 arguably, it could have been. I mean, it didn't - -
13 - it didn't esta - - - it didn't establish the
14 elements of that charge fully, but that's not really
15 the question.

16 CHIEF JUDGE LIPPMAN: Yeah, but here - - -

17 JUDGE RIVERA: But I guess my question is,
18 is it negating them?

19 MR. SEEWALD: No, it's not negating them.
20 It's - - - it's not negating them. And it's the
21 defendant's burden, really, to show that his plea
22 negated that - - -

23 CHIEF JUDGE LIPPMAN: Yeah, but if it
24 established some other charge, and he pled to that,
25 well, that would be okay, right?

1 MR. SEEWALD: It - - - if he - - - if he
2 pled to some other charge that - - -

3 CHIEF JUDGE LIPPMAN: If it establi - - -
4 what he said established whatever, first-degree rape
5 or third-degree rape, and he said okay, fine. But
6 here you're agreeing, and it seems apparent that the
7 judge didn't understand what the requirements are,
8 the defendant didn't understand the requirements
9 about - - - was about, and the lawyers didn't
10 understand what the requirements were. So isn't it
11 kind of - - - again, going back to whether you call
12 it fairness or justice or just call it just plain
13 weird, is that the way this justice system should
14 work?

15 MR. SEEWALD: Not at all, and the fairness
16 here was extended to the defendant. He was given a
17 great benefit here to plead guilty to that lesser
18 charge. He wanted that plea. He - - -

19 JUDGE RIVERA: Yes, your argument is that
20 as long as he wants to plea, because the deal is so
21 good, it doesn't matter that he doesn't understand
22 what he is pleading to because all he cares about is
23 a deal at the end of the day. And I - - - I think,
24 in part, or at least my concern would be, isn't that
25 a little bit too much for our plea bargain system to

1 bear, if - - - even if - - - even if we agreed that
2 the cases are not so clear on that one; I'm not
3 conceding that, but let's assume that for one moment.
4 Isn't this now the case where now the plea bargaining
5 has gone too far? You can, indeed, take a plea to -
6 - - to a crime that doesn't even exist, but at a
7 minimum, you need to know, with open eyes, that that
8 is what you are doing. Isn't - - - isn't that like a
9 basic part of the plea bargaining?

10 MR. SEEWALD: No, what we - - - what we
11 really need to know, and from - - - from the facts
12 here, we - - - we do know this, is whether the plea
13 was improvident or baseless. Was there - - - the - -
14 - the court could see, from what the defendant was
15 allocuting to, that there - - - that the plea made
16 sense to him, that there was a good reason for him to
17 take this plea.

18 JUDGE READ: So you're agreeing with Judge
19 Smith's suggestion, maybe this is no harm, no foul.
20 Is that your basic point?

21 MR. SEEWALD: Definitely no harm. I mean,
22 of great benefit to the defendant - - -

23 JUDGE READ: Okay.

24 MR. SEEWALD: - - - and certainly not harm,
25 absolutely. And defendants - - - we want defendants,

1 I think, to retain the - - - the availability of
2 these sorts of pleas and to have some flexibility for
3 them to plead guilty to lesser charges when they're
4 not necessarily a lesser included - - -

5 CHIEF JUDGE LIPPMAN: Okay.

6 MR. SEEWALD: - - - or even it's a
7 hypothetical crime.

8 CHIEF JUDGE LIPPMAN: Let's hear from your
9 adversary, rebuttal.

10 Counselor, why isn't it okay that - - -
11 that he's getting a good deal?

12 MS. STEPHENS-DAVIDOWITZ: Your Honor, the
13 circumstances of the crime don't have to show that
14 the defendant was entering a rational decisi - - -
15 entering a rational plea; he had to be entering a
16 knowing plea. And that's the difference.

17 CHIEF JUDGE LIPPMAN: Even though your
18 adversary says he knew he was getting a good deal.

19 MS. STEPHENS-DAVIDOWITZ: Not necessarily,
20 Your Honor, as we note that there - - - that the
21 allocution certainly didn't establish his offen - - -
22 his guilt of - - - of first-degree rape which - - -
23 which the respondent claimed - - -

24 JUDGE SMITH: But it didn't have to.

25 MS. STEPHENS-DAVIDOWITZ: It didn't - - -

1 it didn't have to, but that - - - but they do claim
2 that that would have - - - that that is why he's
3 getting such a good deal. But of course no one
4 thinks that they're pleading him to first-degree rape
5 - - -

6 JUDGE SMITH: Well, what - - - what they're
7 saying is that this is one of the most experienced
8 defendants you've ever seen in your life, facing a
9 very heavy charge of rape, where admitted, the
10 evidence - - - you - - - you can see problems with
11 the evidence, but you can also see problems with his
12 case. He's obviously made a judgment - - - he
13 previously pleaded to the B, and got out of it on
14 Catu grounds. Now he's pleading to the D. It sure
15 looks like the guy knows what he's doing.

16 MS. STEPHENS-DAVIDOWITZ: Your Honor, he -
17 - - there - - - none - - - none of those
18 circumstances show that he understood the crime to
19 which he was pleading. And we are not disputing that
20 - - -

21 JUDGE SMITH: Well, I mean, if he - - -

22 MS. STEPHENS-DAVIDOWITZ: - - - Mr. Johnson
23 could have entered - - -

24 JUDGE SMITH: - - - if he understood that
25 he was taking - - - that he was facing a B and taking

1 a D, and if he knows what a B and a D are, and he
2 does, isn't that all he has to know?

3 MS. STEPHENS-DAVIDOWITZ: No, Your Honor,
4 no. He has to understand what he is doing. He has
5 to understand the nature of the crime to which he is
6 pleading. And that's what Moore says. And my
7 adversary notes that he's using the totality-of-the-
8 circumstances test, but he is using it in a different
9 way. He's saying it's a totality of the
10 circumstances to determine if it's a rational plea.
11 That's not what this court said in Moore. The court
12 said that the Appellate Court needs to examine the
13 totality of the circumstances to determine whether or
14 not the defendant understood the nature of the
15 charge. And the totality of the circumstances here
16 do not show that.

17 And just to reiterate, we are not saying
18 that he could not have entered this plea, but not
19 under these circumstances.

20 JUDGE SMITH: And he could have entered it
21 without saying a word about whether we understood the
22 nature of the charge or not.

23 MS. STEPHENS-DAVIDOWITZ: Yes, Your Honor,
24 and perhaps - - - and - - - and that would be a
25 different circumstances - - - circumstance, because

1 it would not be evident that it was an unknowing
2 plea.

3 Thank you.

4 CHIEF JUDGE LIPPMAN: Okay, thanks. Thank
5 you both.

6 (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. Sharmelle Johnson, No. 104, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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