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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

KELVIN SPEARS,

No. 204  
(papers sealed)

Appellant.

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20 Eagle Street  
Albany, New York 12207  
October 23, 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  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start  
2 with number 204, People v. Spears.

3 Counsel, do you want any rebuttal time?

4 MS. SOMES: I would like two minutes,  
5 please.

6 CHIEF JUDGE LIPPMAN: Two minutes, sure, go  
7 ahead. You're on.

8 MS. SOMES: Janet Somes on behalf of Mr.  
9 Spears. An adjournment in this case would have  
10 protected Mr. Spears' fundamental right to the  
11 assistance of counsel. And there was no competing -  
12 - -

13 CHIEF JUDGE LIPPMAN: Counsel, why - - -  
14 why did - - - why did he wait so long to seek this  
15 time to consider more what his options were, when  
16 there was already seventy days since he had had an  
17 opportunity to make the decision? He'd had some  
18 private time to make it. What's the - - - the - - -  
19 the logic of waiting all that time, and then when you  
20 - - - when you come in, you - - - you then say, gee,  
21 I want to think about this more, or - - -

22 MS. SOMES: Right. First, we don't know  
23 what the reason was. The court never asked any  
24 questions about why he had been able - - - unable to  
25 meet with his attorney.

1 CHIEF JUDGE LIPPMAN: Right, but - - -

2 JUDGE SMITH: He could have volunteered.

3 MS. SOMES: Pardon?

4 JUDGE SMITH: Why didn't he volunteer?

5 MS. SOMES: Why didn't he volunteer - - -

6 JUDGE SMITH: Or why - - - or his lawyer

7 volunteer. I mean, the - - -

8 MS. SOMES: Well - - -

9 JUDGE SMITH: - - - the judge wasn't - - -  
10 wasn't forbidding them for giving reasons for the  
11 application.

12 MS. SOMES: No, no, but here, the - - - the  
13 court below did not make its decision denying the  
14 adjournment based on a finding that - - - a factual  
15 finding that he, for some reason, was neglectful or  
16 should have come forth sooner. What the court here  
17 decided was that he was going to deny the adjournment  
18 because Mr. Spears had not said adequate enough  
19 things to - - -

20 CHIEF JUDGE LIPPMAN: Yeah, but what's the  
21 - - - but that's the point. What's the compelling  
22 reason for the - - - for the adjournment?

23 MS. SOMES: The compelling reason for the  
24 adjournment was so - - -

25 CHIEF JUDGE LIPPMAN: And for the delay in

1           - - - in moving to consider whether we want to make  
2 motions.

3                       MS. SOMES: I think that the compelling  
4 reason for the adjournment was because he had not  
5 been able to speak with his counsel, and the record  
6 shows he had been unable to.

7                       JUDGE GRAFFEO: But he - - -

8                       JUDGE PIGOTT: The lawyer admitted that,  
9 right?

10                      JUDGE GRAFFEO: But there was an eight-week  
11 delay - - - there was eight weeks between the plea  
12 and the sentencing - - -

13                      MS. SOMES: Right.

14                      JUDGE GRAFFEO: - - - and he waited until  
15 the day before to call his attorney.

16                      MS. SOMES: Yes. And - - -

17                      JUDGE GRAFFEO: And she had another  
18 appointment with another client.

19                      MS. SOMES: I guess - - -

20                      JUDGE GRAFFEO: That's not really a very -  
21 - -

22                      MS. SOMES: I would suggest that it might  
23 be a bit unfair to fault Mr. Spears under the  
24 circumstances of this case. One of the last things  
25 that he heard from the judge on the day of his plea

1 was, in no case will I allow you to withdraw your  
2 guilty plea.

3 And I think it might be unfair to then  
4 suggest to him or fault him for not meeting with his  
5 attorney to go talk about doing something that the  
6 court had said I will not allow you to do.

7 JUDGE READ: So what elevates - - -

8 JUDGE ABDUS-SALAAM: Did he have the  
9 opportunity - - - I'm sorry.

10 JUDGE READ: So what elevates this to an  
11 abuse of discretion? That's - - - that's where I'm  
12 lost.

13 MS. SOMES: I think it's an abuse of  
14 discretion because there is - - - there is a  
15 compelling fundamental right of Mr. Spears to talk to  
16 his attorney, to confer with her about a right that  
17 he has to move to withdraw his plea. And on the  
18 other hand, there's nothing competing - - -

19 JUDGE ABDUS-SALAAM: He did have an  
20 opportunity to speak with his lawyer, according to  
21 the attorney, though, when she explained to the judge  
22 that she had heard from Mr. Spears at 3 o'clock the  
23 day before and he wanted to come by at 4 o'clock.  
24 But she said, I spoke to him this morning. And, you  
25 know, this is - - - so they did have an opportunity

1 to discuss what he might propose as a reason for the  
2 - - - the adjournment.

3 MS. SOMES: I think that Mr. Spears - - -  
4 this was his first time - - - this is his first  
5 criminal conviction. And so he's not someone who's  
6 very savvy about the process. The last thing he  
7 hears is the judge saying, I won't let you withdraw  
8 your guilty plea under any circumstances.

9 He then has a - - - what is apparently a  
10 very brief conversation before court with his  
11 attorney. We don't know what the sum and substance  
12 of that conversation was. The court didn't ask any  
13 questions. And so it - - - to - - - to then to  
14 somehow say, you know, he should have been able to -  
15 - - to withdraw his plea, you need a written motion  
16 to withdraw your plea.

17 And I think that also this is a matter  
18 where he needed to understand what his options were.  
19 And the court had told him something - - -

20 CHIEF JUDGE LIPPMAN: What went on the  
21 first time before the seventy-day - - - eight weeks  
22 before? Didn't he understand his options? And  
23 apparently, you know, a fully educated decision - - -

24 MS. SOMES: I think that the - - - the  
25 attorney's statement made at the time of the plea

1           that she had reviewed his options and the  
2           consequences of a plea doesn't go to, and now he  
3           understands that he has the right to withdraw to  
4           plea, and - - - and the right to counsel to - - - to  
5           try to do that.

6                        CHIEF JUDGE LIPPMAN:  But he doesn't say he  
7           really wants to withdraw it.  He says I want to  
8           consider - - -

9                        MS. SOMES:  Yes.

10                      CHIEF JUDGE LIPPMAN:  - - - whether - - -  
11           whether - - -

12                      MS. SOMES:  Right.

13                      CHIEF JUDGE LIPPMAN:  - - - you know, to -  
14           - - to move to withdraw.

15                      MS. SOMES:  Yes.  And up until that point,  
16           he - - - and we don't know what the attorney said,  
17           but up until that point, he probably thought I don't  
18           have that.  That is not one of my options.  That's  
19           not on the table, because the judge told me under no  
20           circumstances will I allow you to withdraw your plea.

21                      JUDGE PIGOTT:  Well, on the flip side, it -  
22           - - it struck me, one of the reasons why I - - - I  
23           granted leave in this is that when - - - when he was  
24           arrested, he was charged with a D felony, and he was  
25           held - - - he couldn't make bail for three months.

1                   And then all of a sudden he gets probation  
2                   if he takes a plea. And which is - - - I guess, in  
3                   his situation, was hard to turn down, since he, at  
4                   the time of the bail hearing, he'd had a job and - -  
5                   - and they were asking for OR and he didn't get it,  
6                   and I don't know what happened to his job.

7                   Now he's told that he can get out of jail  
8                   by taking this plea. The plea colloquy -- it seemed  
9                   to all come from the District Attorney. The - - -  
10                  the - - - I - - - I got the impression that the judge  
11                  was observing a deal being made by the District  
12                  Attorney talking to the defendant who was represented  
13                  by counsel, and saying, do you understand that you're  
14                  giving up these rights. Well, he's not giving them  
15                  up to the DA. And it - - - and it seemed to me it  
16                  was the judge's job to do that.

17                  And yet, when it came time for the Huntley,  
18                  people don't show up and they get an adjournment. If  
19                  he had done that, he had been arrested, and - - - and  
20                  there would have been a warrant out. So the whole  
21                  system, it seemed - - - looking at it from somebody  
22                  who'd never been arrested before, it seemed to be  
23                  tilted the wrong way.

24                  And it didn't seem to me, since you're  
25                  giving him probation anyway, to hurt anyone by



1           saying, sure, take all the time you want, if you want  
2           to move to vacate your plea, and we'll take a look at  
3           the merits.

4                       MS. SOMES: That's exactly right. And I  
5           think that the record in this case justifiably raises  
6           some concerns about whether or not the plea in this  
7           case was knowing, intelligent, and voluntary. If it  
8           was induced in part by the fact that, you know, his  
9           release from custody, that's - - - that's a  
10          bargaining chip that really shouldn't be on the table  
11          when you're considering a plea. That can be unduly  
12          coercive.

13                      JUDGE READ: Is that issue before us,  
14          though?

15                      MS. SOMES: That issue is not, but I - - -  
16          I raise - - - I say that just because this plea is  
17          suspect, I think. This plea is suspect, and then  
18          you've got the judge saying we're not going to let  
19          you withdraw. And so the fact that he goes for, you  
20          know, seventy days without contacting his attorney,  
21          and this is his first experience in the criminal  
22          justice system, I don't think is surprising.

23                      He did everything he was asked to do. He  
24          was told to come back to court. He came back to  
25          court. He was told to meet with probation.

1 JUDGE RIVERA: Is there - - -

2 MS. SOMES: He did that.

3 JUDGE RIVERA: - - - is there anything in  
4 the record to suggest the length of the adjournment  
5 that he was seeking?

6 MS. SOMES: There is not. And, you know,  
7 he - - - it could have been a matter of, you know, go  
8 out in the hallway for a little bit. Maybe you can  
9 under - - - help him to understand what - - - what's  
10 - - -

11 JUDGE RIVERA: So the judge - - - should  
12 the judge have inquired?

13 MS. SOMES: Pardon?

14 JUDGE RIVERA: Should the judge have  
15 inquired?

16 MS. SOMES: I think that the judge should  
17 have inquired, and I think that the judge should have  
18 asked a little bit more about what - - - well, why  
19 haven't you been able to meet with your attorney?

20 JUDGE RIVERA: Is that best pra - - -  
21 practice, or just - - - or can you point to a case  
22 that requires that?

23 MS. SOMES: I can't point to a case right  
24 now. Somewhere around Utica, I'll probably be able  
25 to.

1                   JUDGE READ: Well, we don't - - - we don't  
2 usually - - - we - - - I don't imagine that there are  
3 many cases that review a judge's denial of a request  
4 for an adjournment. It's fairly unusual, because  
5 that's left to the discretion of the judge.

6                   MS. SOMES: It is left to the discretion of  
7 the judge. And the cases where you have done it,  
8 you've basically looked at what - - - what is at  
9 stake here. The People weren't going to be  
10 prejudiced. The court's schedule wasn't going to be  
11 prejudiced. There was noth - - - there was no  
12 downside. And here we have a defendant who is  
13 clearly confused about the legal landscape upon which  
14 he found himself, and he was trying to understand it.

15                   CHIEF JUDGE LIPPMAN: I think the judge was  
16 a little perplexed, I would guess, that all of  
17 sudden, he comes in and says, I want to think about  
18 this more, when, you know - - - when he was - - -  
19 when he was in front of the judge the first time,  
20 again, ready to go forward, educated, understands.

21                   MS. SOMES: And the fact that they said  
22 that it was an educated decision doesn't mean that it  
23 was not coerced, and it doesn't mean that - - - that  
24 he was actually guilty. And when you look at his  
25 colloquy, I think there's an argument that could be

1 made that he was not actually guilty, because he did  
2 not admit to elements of the crime that take it from  
3 accidental - - -

4 CHIEF JUDGE LIPPMAN: Okay, counsel, let's  
5 hear from your adversary, and then you'll have your  
6 rebuttal time.

7 Counsel, what would have been the great  
8 harm to - - - to grant an adjournment here, to let  
9 him, whatever, go speak to his attorney for five  
10 minutes or whatever?

11 MS. TUBBS: Your Honor, Erin Tubbs from the  
12 Monroe County District Attorney's Office for the  
13 People. And it's - - - it's true that the court  
14 could have granted the adjournment. And it probably  
15 would have been easier for me - - -

16 CHIEF JUDGE LIPPMAN: Well, you wouldn't be  
17 here if they did - - -

18 MS. TUBBS: Exactly.

19 CHIEF JUDGE LIPPMAN: - - - but - - -

20 MS. TUBBS: And all of us.

21 CHIEF JUDGE LIPPMAN: - - - let's - - -  
22 let's - - - why - - - why in that circumstance - - -  
23 what possible harm could there have been to - - - to  
24 grant the adjournment? I mean - - -

25 MS. TUBBS: Well, given - - -

1 CHIEF JUDGE LIPPMAN: While exercising  
2 discretion, what - - - what could have, you know,  
3 gone into the judge's mind not to allow him to do  
4 this? What - - - why are we - - - what lesson are we  
5 teaching this defendant?

6 MS. TUBBS: Well, in exercising discretion,  
7 the court has to weigh whether or not the request for  
8 an adjournment is a delay tactic. And what other - -  
9 -

10 CHIEF JUDGE LIPPMAN: A five-minute delay  
11 tactic would have been a problem?

12 MS. TUBBS: Well, I - - - I would respond  
13 to that that the defendant did not, at any point, ask  
14 for five minutes to meet his attorney.

15 CHIEF JUDGE LIPPMAN: No, but the judge  
16 could have said, look, you - - - you pled two months  
17 ago, fine. You need a couple of minutes; go ahead,  
18 but we're not going to allow things to be delayed.

19 MS. TUBBS: Sure. And - - - and certainly  
20 there would have been nothing wrong with that.  
21 However - - -

22 CHIEF JUDGE LIPPMAN: But he wasn't  
23 required to do it, is your answer.

24 MS. TUBBS: Of - - - of course, that, and  
25 also that - - -

1 JUDGE RIVERA: But the judge denied it  
2 without - - - as I take it - - - not even - - -  
3 there's nothing on the record that suggests how much  
4 time he's even asking for the adjournment.

5 MS. TUBBS: Well - - -

6 JUDGE RIVERA: Yes, it could have been five  
7 minutes - - - maybe he wants five weeks, who knows -  
8 - - to really assess whether or not it's a delay  
9 tactic.

10 MS. TUBBS: Well, it's - - - it's not on  
11 the record that he asked for as little as five  
12 minutes. He - - - the only thing he - - -

13 JUDGE RIVERA: Well, there's no - - -  
14 that's my point.

15 MS. TUBBS: Yeah, well, I - - - and I don't  
16 think that we can assess that request. I don't think  
17 that request could be properly determined.

18 JUDGE PIGOTT: Well, the People opposed it  
19 - - - any adjournment, and - - - and - - -

20 MS. TUBBS: The - - - the People did oppose  
21 an adjournment. The People did not oppose a five-  
22 minute to talk to his attorney and the rea - - -

23 JUDGE PIGOTT: Yes, they did. They - - -  
24 they said, "It's been eight weeks since the date of  
25 the plea, and certainly there was any" - - - "if

1           there was any indication prior to today's date that  
2           there was some difficulty with the plea, that should  
3           have been brought to the court's attention long  
4           before now. It's also my recollection that at the  
5           time of the plea, there was no difficulty or any  
6           indication that the defendant didn't understand or  
7           really know what he was doing in terms of entering  
8           the plea."

9                         So they opposed any adjournment, and then  
10           they argued, essentially, what their contentions  
11           would be if he had made the motion, but of course, he  
12           didn't have a chance to make his arguments for  
13           vacating the plea, because the judge wouldn't listen  
14           to him.

15                         MS. TUBBS: My response to that would be  
16           with - - - the exact request the defendant was asking  
17           for was not to be sentenced today.

18                         JUDGE PIGOTT: How does that square with  
19           the fact that - - - that the People didn't appear at  
20           the Huntley hearing and the judge had no difficulty  
21           with that?

22                         MS. TUBBS: Well, I believe that the  
23           transcript from the date that the Huntley hearing was  
24           scheduled gives us nineteen lines that essentially  
25           tell us only that it was 10:15. The prosecutor

1           wasn't there, and the witnesses weren't there. We  
2           don't know when the hearing was scheduled for, what  
3           time it was scheduled for. We don't know why the  
4           prosecutor wasn't in the courtroom at that time.

5                         JUDGE PIGOTT: You're saying he may have  
6           had a reasonable excuse and therefore we shouldn't  
7           look at it?

8                         MS. TUBBS: Well, I - - - yes, and - - -

9                         JUDGE PIGOTT: And I'm looking at what the  
10          judge said to the defendant here, when he says "I  
11          want an adjournment so I can look at my legal  
12          options. This is a very big decision at this point  
13          in time. I was unable to contact my counsel to  
14          address some of these things". The court says,  
15          "Thank you. Based on what you said, the statement  
16          you've made that you've pled guilty, the request is  
17          denied. Anything further?"

18                        Now, that's not what the D - - - what the  
19          judge said to the People when they didn't appear for  
20          the Huntley hearing.

21                        MS. TUBBS: Well, the reason that I brought  
22          up what happened du - - - on the transcript at the  
23          Huntley hearing was that we don't know whether the  
24          prosecutor was running late to court, whether they  
25          were outside the courtroom talking to witnesses. We



1 don't even know how long it had been since the  
2 hearing had been scheduled for initially.

3           What we do know is that three days later, a  
4 plea bargain had been negotiated between the  
5 prosecutor and the defense attorney that was  
6 acceptable to the defendant. And I think it's  
7 reasonable to assume that conversations based on what  
8 the prosecutor said on that date occurred between the  
9 two parties, that they were able to work out this  
10 plea. I don't think that we can speculate - - -

11           JUDGE SMITH: Was - - - was the - - - did  
12 the - - - did the defendant oppose the adjournment of  
13 the Huntley hearing?

14           MS. TUBBS: Yes. The defense counsel did  
15 oppose the adjournment.

16           With respect to the question as to whether  
17 the defendant was given a fair shake, Judge Pigott.  
18 I think the - - - the Supreme Court had to look at  
19 what had happened previously in weighing the decision  
20 to grant the adjournment - - -

21           JUDGE SMITH: If I could go back to the - -  
22 - the question of the - - - when - - - I mean, the  
23 word "adjournment", isn't that - - - doesn't that  
24 suggest something other than a few minutes or even a  
25 few hours? I mean, wouldn't they usually ask for a

1 recess if that's what they wanted?

2 MS. TUBBS: And that is my point. And  
3 actually you stated it better than - - - than I tried  
4 to, but I don't believe that the prosecutor actually  
5 did oppose a short recess, and I think if you go back  
6 to the - - -

7 JUDGE SMITH: If they - - - I mean, it's  
8 not - - I guess, my re - - - it's not - - - if all  
9 you're really asking for is five minutes, why don't  
10 you say, just five minutes, Judge?

11 MS. TUBBS: And I think that that's  
12 illuminated during the plea. At the time of the  
13 plea, the defense attorney said, my client would like  
14 a few minutes to speak with his girlfriend. The  
15 judge said, that's not a problem, and he gave them  
16 time in a private room to discuss it.

17 And the defense attorney, when she came  
18 out, said, we went over all the legal options, all  
19 the sentence ramifications, we - - - I discussed  
20 everything thoroughly with him and this is a well-  
21 educated decision, and thank you for the time that  
22 he's got to spend - - -

23 JUDGE ABDUS-SALAAM: Counselor, is there  
24 any - - -

25 JUDGE RIVERA: But counsel, it - - - it - -

1 - if you read this, and I know you've read it,  
2 whatever you may think about whether or not an  
3 adjournment for sentencing can't possibly mean five  
4 minutes, there is not clarity here on this colloquy  
5 as to the scope of the request. And I guess that's  
6 what's troubling me, a judge making a decision  
7 without knowing the scope of the request, because  
8 maybe a day wouldn't have bothered him; maybe he is  
9 interpreting that it's a month.

10 MS. TUBBS: That is a good question, Your  
11 Honor. And respectfully, I do think that the record  
12 does reflect that the defendant did not want to be  
13 sentenced on that day.

14 JUDGE SMITH: And there's - - - I'm not - -  
15 - I'm not sure which way this cuts, but doesn't it  
16 read like the defense attorney is going through the  
17 motions here, saying, Judge, I know you're not going  
18 to give it, but my client wants me to ask for it?

19 MS. TUBBS: Actually, I think that the  
20 repeated requests initially - - - right away, she  
21 comes out and says, he wants an adjournment.  
22 Repeatedly asks for it. During one of the last  
23 requests, she says, he does not want to be sentenced  
24 - - - he does not want to be sentenced today. And I  
25 think that tells us that he does not want five

1 minutes to speak with his attorney.

2 JUDGE SMITH: I mean, is - - - is the - - -  
3 I mean, I'm not sure.

4 MS. TUBBS: Is there - - -

5 JUDGE SMITH: I don't really like it when  
6 defense lawyers do that, but it sounds like - - -  
7 it's a she, right?

8 MS. TUBBS: Yes,

9 JUDGE SMITH: That she - - - that she might  
10 be signaling to the judge, Judge, I have to humor  
11 this guy, but there's really no reason for an  
12 adjournment?

13 MS. TUBBS: I think that she put his  
14 concerns out there for the court. I - - - I believe  
15 she did say he - - - we - - - we spoke yesterday at 3  
16 o'clock; we spoke before court. She asked for the  
17 adjournment repeatedly. I - - - I don't think that  
18 she was just going through the motions. I think one  
19 throw-off request, I've explained to him that this is  
20 probably not going to be granted, but I'm asking you  
21 for it anyway - - -

22 JUDGE RIVERA: Coun - - - counsel, where -  
23 - - where does it say she's - - - she's making it  
24 clear that he doesn't want to be sentenced today?

25 MS. TUBBS: On page 53 of the record.

1 JUDGE RIVERA: Yeah.

2 MS. TUBBS: He - - - they've - - - they're  
3 discussing the - - -

4 JUDGE RIVERA: Is it the line where - - -  
5 maybe it's not the line you're talking about - - -  
6 "Your Honor, if the court is directing that sentence  
7 be imposed today, despite our request for an  
8 adjournment". Is that what you mean?

9 MS. TUBBS: No, I'm - - -

10 JUDGE RIVERA: Okay, I'm sorry.

11 MS. TUBBS: - - - I'm looking further down  
12 on the page. "He does not want to be sentenced.  
13 It's not the order of protection in particular, but  
14 he does not want to be sentenced today, no."

15 JUDGE ABDUS-SALAAM: And is there - - -

16 JUDGE RIVERA: But how do you draw from  
17 that the scope is more than just not today?

18 MS. TUBBS: I believe that it may not be  
19 necessarily more than not today, but it - - - it's an  
20 adjournment of some time past today.

21 JUDGE SMITH: It's not - - - it's not five  
22 minutes.

23 MS. TUBBS: Exactly.

24 JUDGE ABDUS-SALAAM: But isn't there  
25 something else in the record that could possibly

1 suggest delay here? When he doesn't - - - when  
2 defendant doesn't get the adjournment, he says, I'd  
3 like another lawyer. So it's - - - that's suggests  
4 he's already talked to the attorney that he has and  
5 maybe he's not - - - maybe he didn't want to hear  
6 what she had to tell him about this request, and now  
7 he's saying I want ano - - - I want other counsel.

8 MS. TUBBS: Yes.

9 JUDGE ABDUS-SALAAM: And the judge said not  
10 today you can't have other counsel, but you can other  
11 counsel after I sentence you, if you so choose.

12 MS. TUBBS: I do believe that making  
13 alternative requests that he thinks might lead to an  
14 adjournment does indicate that he's asking for - - -

15 JUDGE PIGOTT: The sentence was going to be  
16 probation, right? He's walking out no matter what.

17 MS. TUBBS: He - - - well, he was already  
18 out, but yes.

19 JUDGE PIGOTT: Right, so I mean, the - - -  
20 I mean, it wasn't like he's going to Attica if he  
21 didn't get the adjournment or anything. No one was  
22 ready to cart him off.

23 Do you put any stock in what defense  
24 counsel said when she said "I did speak to Mr. Spears  
25 at 3 o'clock yesterday; he did not" - - - "he did

1 attempt to come to my office at 4. Unfortunately, I  
2 had a previous appointment with a client in custody,  
3 so I did speak to him this morning, at which point he  
4 expressed a wish to potentially vacate the plea. I  
5 would again request the adjournment. I believe the  
6 court has to at least make an inquiry basis for the  
7 request."

8 And the - - - and the court says, "You had  
9 the opportunity to tell the basis for the request.  
10 He's had an opportunity. Nothing's been said except  
11 that it's a big decision. Not enough."

12 MS. TUBBS: Yes, well, I - - - I think that  
13 answers the question for the argument of the defense  
14 counsel that the court did not inquire further as to  
15 why the - - -

16 JUDGE PIGOTT: You think that was the  
17 further inquiry?

18 MS. TUBBS: Well, I - - - he said to him,  
19 tell me why I should not sentence you today? And I  
20 do think that that was a sufficient inquiry, and I  
21 don't think the defendant responded to it adequately.

22 JUDGE PIGOTT: And the downside if he'd  
23 granted the adjournment was what?

24 MS. TUBBS: Well, there - - - I do believe  
25 that there is compelling interest to - - -

1                   JUDGE PIGOTT: No, the downside of - - - if  
2                   - - - if he had said, all right, I'll give you two  
3                   weeks to come back and you get sentenced to the  
4                   probation that you're now serving.

5                   MS. TUBBS: Oh, well, there is a - - -  
6                   there's an interest in - - - a community interest in  
7                   having people sentenced efficiently, particularly  
8                   when they're - - -

9                   JUDGE SMITH: You're - - - you're saying,  
10                  really, that there's always an interest in moving a  
11                  case, just - - - just inherent in the system of  
12                  justice that - - -

13                  MS. TUBBS: Well - - -

14                  JUDGE SMITH: - - - that sooner is always -  
15                  - - other things being equal, today is always better  
16                  than tomorrow.

17                  MS. TUBBS: That is one of the - - - the  
18                  points that I'm making. But I also think that  
19                  they're - - - in particular in this case, he was  
20                  going to be monitored and I think there is an even  
21                  greater need to monitor sex offenders, and I think  
22                  that is something that could be considered greater -  
23                  - - of greater interest than your average moving the  
24                  cases along from within the system.

25                  JUDGE RIVERA: Was there any particular



1 prejudice beyond that one?

2 MS. TUBBS: As far as - - -

3 JUDGE RIVERA: To the People?

4 MS. TUBBS: - - - getting him monitored?

5 JUDGE RIVERA: To the People? Yeah - - -

6 MS. TUBBS: I don't - - - well, the People

7 - - -

8 JUDGE RIVERA: I mean - - - I mean, if the  
9 calendar didn't permit sentencing that day, you would  
10 have waited two weeks, right?

11 MS. TUBBS: That's correct.

12 JUDGE RIVERA: It's whenever the judge  
13 chose the day. So is there some other - - - I assume  
14 you're describing this as a prejudice. Is there any  
15 other particular prejudice to - - -

16 MS. TUBBS: To the People, I don't think  
17 so. But I think that that the - - - to the community  
18 in general - - -

19 JUDGE ABDUS-SALAAM: Yeah - - -

20 MS. TUBBS: - - - and the criminal justice  
21 system, are the two points that I make, I think - - -  
22 beyond that, I don't think that the defendant put  
23 forth enough for us to say that the court abused its  
24 discretion.

25 CHIEF JUDGE LIPPMAN: Okay, counselor,

1           thanks.

2                   MS. TUBBS: Thank you very much.

3                   CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

4                   MS. SOMES: Just a couple of quick points.

5           First, the People didn't seem to be concerned about  
6           moving the case along when nobody showed up for the  
7           Huntley hearing. And second, there's been no finding  
8           here that Mr. Spears was dilatory.

9                   And I think to the - - - to the issue about  
10           why he asked for alternative counsel, I think that  
11           what we've got here is a man who is trying to  
12           understand what's going on. If he wasn't really  
13           guilty, and, you know, he hadn't done anything, he  
14           may be trying to say what are my options; I don't  
15           understand. And he said that to the judge. I don't  
16           understand. And maybe his re - - -

17                   JUDGE SMITH: Can we - - - if we rule for  
18           you, are we making - - - essentially making a rule  
19           that every time a - - - a defendant shows up at  
20           sentencing and says, you know, I need to think about  
21           it some more, he gets the adjournment?

22                   MS. SOMES: Absolutely not. There was a  
23           very spe - - -

24                   JUDGE SMITH: What - - - what distinguishes  
25           this case?

1 MS. SOMES: There was a very specific  
2 reason that - - - I mean, the record shows that he  
3 hadn't been - - - not been able to have the  
4 assistance of his counsel, understanding his options,  
5 and moving forward - - -

6 JUDGE SMITH: Well, he had - - - I mean, he  
7 hadn't - - - apparently, hadn't asked for that  
8 assistance until the day before.

9 MS. SOMES: But - - - but he got to that  
10 point and he didn't have it, and he was trying to  
11 understand. So I think we've got a record in this  
12 case that is very - - -

13 JUDGE GRAFFEO: So what would be - - - what  
14 would be the limiting language that we could use  
15 here, because we don't want every single case in  
16 front of a judge scheduled for sentencing for the  
17 defendant to say, I tried to call my attorney  
18 yesterday, so now I want a two-week adjournment.

19 MS. SOMES: Well, if - - - if he just wants  
20 an adjournment because maybe he'll get a better  
21 sentence or something, then - - - then no. But this  
22 is a fun - - - where there's a fundamental right to  
23 assistance of counsel at stake, and I think those  
24 cases will be rare, and the - - - the record bears  
25 that out, then I think that you have to look at

1           what's - - - what's the downside of granting the  
2           adjournment.  If there isn't a downside, that - - -  
3           that fundamental right to assistance of counsel has  
4           got to prevail.

5                         One other thing is that counsel's statement  
6           that she thought that this was an educated plea is  
7           really not any sort of a substitute for a judicial  
8           determination on the merits of a properly brought  
9           motion to withdraw a plea made with the assistance of  
10          counsel, so I don't think that that - - - those  
11          statements are really impactful on - - - on the issue  
12          here.

13                        CHIEF JUDGE LIPPMAN:  Okay, counsel.

14                        MS. SOMES:  Thank you.

15                        CHIEF JUDGE LIPPMAN:  Thanks.  Thank you  
16          both.

17                        (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. Kelvin Spears, No. 204 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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