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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

People,

-against-

ABDELOUAHAD AFILAL,

No. 170
(Papers sealed)

Appellant.

20 Eagle Street
Albany, New York 12207
October 20, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Let's go to 170,
2 People v. Afilal.

3 CHIEF JUDGE LIPPMAN: And we particularly
4 want you to talk about Tyrell because we haven't
5 heard enough about it and it involves your case. And
6 after you introduce yourself and tell me how much
7 rebuttal time you want, tell me on this particular
8 issue what happened in your case.

9 MR. STEED: Thank you, Your Honor. On
10 behalf of appellant Mr. Afilal, The Legal Aid Society
11 by Seth Steed. I was going to address - - -

12 CHIEF JUDGE LIPPMAN: How much rebuttal
13 time?

14 MR. STEED: Two minutes, please.

15 CHIEF JUDGE LIPPMAN: Two minutes. Address
16 Tyrell first.

17 MR. STEED: Address Tyrell first. So in
18 this case - - -

19 CHIEF JUDGE LIPPMAN: What's - - - what's
20 different about your case than all of these that we
21 heard?

22 MR. STEED: All the other cases were silent
23 records. In this case, there - - - it wasn't a
24 silent record, and on the spectrum of pleas, this one
25 was probably better than most but still woefully

1 deficient under Tyrell.

2 CHIEF JUDGE LIPPMAN: What was - - - what
3 did counsel say about the - - - about these kinds of
4 rights in your case?

5 MR. STEED: What did counsel say?

6 CHIEF JUDGE LIPPMAN: No, what did - - -
7 what was - - -

8 MR. STEED: So - - -

9 CHIEF JUDGE LIPPMAN: - - - got - - -
10 gotten on the record - - -

11 MR. STEED: On the - - -

12 CHIEF JUDGE LIPPMAN: - - - about these
13 rights?

14 MR. STEED: On the record, the court - - -
15 the court asked my client, was he pleading guilty
16 because he was in fact guilty. Did he understand
17 there may be cons - - - immigration consequences?
18 And there was a factual allocution and the word trial
19 was mentioned in passing, and did you discuss the
20 consequences of this plea with your attorney. That's
21 what happened here.

22 CHIEF JUDGE LIPPMAN: Good enough?

23 MR. STEED: There was no - - -

24 CHIEF JUDGE LIPPMAN: Good - - - good
25 enough?

1 MR. STEED: Absolutely not.

2 CHIEF JUDGE LIPPMAN: Why not?

3 MR. STEED: There was no mention - - -

4 CHIEF JUDGE LIPPMAN: Why isn't this almost
5 a gradation on everything we were talking about
6 before?

7 MR. STEED: In - - -

8 CHIEF JUDGE LIPPMAN: Here they don't use
9 the word Constitution, but they use the word the
10 consequences of taking the plea. Why isn't that
11 pretty close to - - - to some kind of a statement on
12 the record that this guy gets it, he's giving up his
13 Constitutional rights?

14 MR. STEED: Well, because there was a - - -
15 a complete failure to talk about the other two Boykin
16 rights that apply here.

17 CHIEF JUDGE LIPPMAN: So in your mind, you
18 got to mention all three of them?

19 MR. STEED: The court is not required to
20 mention all three. What happens is that from all the
21 on-the-record evidence in the case - - -

22 CHIEF JUDGE LIPPMAN: You got to convey
23 that you're giving up all three?

24 MR. STEED: Correct, and in fact I think
25 Judge Rivera early - - - earlier said, well, what if

1 the court asks counsel, did you discuss the Boykin
2 rights with your client - - -

3 CHIEF JUDGE LIPPMAN: Right.

4 MR. STEED: - - - and did he waive them and
5 understand them?

6 CHIEF JUDGE LIPPMAN: Right.

7 MR. STEED: If that had happened here, that
8 might have been okay. Here the - - -

9 CHIEF JUDGE LIPPMAN: But this on - - - on
10 the consequences is not enough?

11 MR. STEED: Say it again, Your Honor?

12 CHIEF JUDGE LIPPMAN: This on the
13 consequences, understanding the consequence, not
14 enough?

15 MR. STEED: Just saying understanding the
16 consequences, the consequences may be that he is
17 sentenced to time served and has to pay a fine. And
18 then there was a break in the proceeding, counsel
19 asked the client, do you und - - - you know, he - - -
20 if client needed time to pay the fine. So I think
21 what's interesting is there's some recent cases that
22 deal just with this from the Third Department, the
23 Mones case and the Vences case that I cite in my
24 reply. In those cases, there was a passing reference
25 to the trial right, but not the other two Boykin

1 rights, and there was a discussion, did you consult
2 with counsel about this. And in fact, in the Mones
3 case, they adjourn the case for one day for the
4 client to discuss the ramifications of the guilty
5 plea with counsel for another day. But when they got
6 back on the record the subsequent day, there was no
7 further discussion on the record about what that
8 conversation was.

9 CHIEF JUDGE LIPPMAN: Okay, counsel. So -
10 - - so you have a variation of - - - on a theme in
11 these kind of cases. What was the issue you wanted
12 to start talking to us about?

13 MR. STEED: The facial insufficiency issue.

14 CHIEF JUDGE LIPPMAN: Go ahead. Let's hear
15 about that.

16 MR. STEED: So in this case, my client was
17 charged with misdemeanor marijuana possession in the
18 fifth degree for possessing marijuana, quote,
19 "opposite of 676 Riverside Drive." And there are no
20 further factual allegations about the nature - - -

21 CHIEF JUDGE LIPPMAN: What could that mean
22 about the - - -

23 MR. STEED: That - - - and that's my
24 question.

25 CHIEF JUDGE LIPPMAN: Well - - - well, how

1 - - - are there buildings on both sides of the
2 street?

3 MR. STEED: There are, 676 Riverside Drive,
4 I looked it up, although this is divorced from the
5 record - - - it's on Riverside Drive and 145th
6 Street. Going westerly is Riverside Park; going
7 northerly, because this sits on a intersection, is a
8 private building. So we don't have any indication
9 and there's no further facts. It's just conclusory
10 pled - - -

11 JUDGE ABDUS-SALAAM: So your - - - your
12 position is the opposite side would be the westerly -
13 - - I mean, I'm sorry, the northerly side - - -

14 MR. STEED: Well, I - - -

15 JUDGE ABDUS-SALAAM: - - - where - - -
16 where the building is as opposed to the park side?

17 MR. STEED: My - - - my position is - - -
18 is that I don't know, and it's the prosecution's
19 responsibility - - -

20 JUDGE ABDUS-SALAAM: What should they have
21 put in the - - - in the - - -

22 MR. STEED: They could - - - they could
23 have said a - - - a bunch of things. They could have
24 said - - -

25 JUDGE PIGOTT: They said in a public place,

1 isn't that enough?

2 MR. STEED: That - - - that's a conclusion,
3 Your Honor.

4 JUDGE PIGOTT: Yeah, but didn't you waive
5 inf - - - filing of an information?

6 MR. STEED: So this is scrutinized under
7 the complaint standard where there has to be
8 reasonable cause - - -

9 CHIEF JUDGE LIPPMAN: But why - - - how
10 could it not be a public place, that address? What's
11 confusing about that? Does it have to be with such
12 great specifics? Why - - - what - - - what do - - -
13 what can we glean from they're saying whatever it is,
14 676 Riverside? Why is that not a public place?

15 MR. STEED: You - - - you can't glean much.
16 And - - - and there's a footnote in my - - -

17 CHIEF JUDGE LIPPMAN: But what would be the
18 different alternative that it could - - -

19 MR. STEED: It could be a private - - -

20 CHIEF JUDGE LIPPMAN: - - - in that
21 direction - - -

22 MR. STEED: It could be a private place. I
23 - - - I point to the McNamara case and the Matthews
24 case from the First Department last year. Those were
25 public lewdness cases, but nonetheless the

1 allegations were that the defendant was engaging in
2 lewd acts inside of a car. And the court - - - this
3 court held in McNamara in the First Depart - - -

4 JUDGE RIVERA: So that that - - - it's not
5 a - - - that - - - the statements in the accusatory
6 instrument don't say whether it's inside or outside.
7 Is that the point?

8 MR. STEED: Correct. Correct.

9 JUDGE PIGOTT: Well, you don't know - - -
10 well, wait, you don't know what's there. How can you
11 say it should be inside or outside?

12 MR. STEED: Well, that's what I'm saying.
13 We don't know anything about the nature of the
14 location.

15 JUDGE PIGOTT: They said it's a public
16 place.

17 MR. STEED: They said it's a public place.

18 JUDGE PIGOTT: Right, and so is there
19 anything contradicting that?

20 MR. STEED: Well, we - - - it's an
21 essential element of the crime. There's - - -

22 JUDGE PIGOTT: That it be in a public
23 place.

24 MR. STEED: Correct. And if - - -

25 JUDGE PIGOTT: They said it was in a public

1 place. I'm losing - - -

2 MR. STEED: They have to tell us more about
3 the nature of that place. More than - - -

4 JUDGE PIGOTT: I've never been there. So
5 if I'm the judge and they say, Judge, you know, it's
6 not a public place, what am I supposed to do? I
7 mean, I'm - - - I'm - - - because you - - - you
8 waived filing of an information, you said, you know,
9 we want to plead guilty, and they - - - they go
10 through this whole thing and - - - and he says do you
11 want to plead guilty because you're in fact guilty,
12 and he said yes. And - - - and now we're going to
13 say what?

14 MR. STEED: That this complaint - - - the -
15 - - the complaint stage is very important. That's
16 what gives the prosecution, the government the
17 ability to exercise jurisdiction over an individual.

18 JUDGE PIGOTT: Right.

19 MR. STEED: And at a minimum, there has to
20 be reasonable cause to believe that the crime
21 occurred. For marijuana possession - - -

22 JUDGE FAHEY: Usually with a plea aren't we
23 looking here in - - - at this stage, at a complaint,
24 as opposed to information for notice, do you have
25 sufficient notice of - - - of the incident and

1 there's - - - so the defendant can protect himself
2 and the double jeopardy consequences, you got to deal
3 with that. Aren't they satisfied here? Why wouldn't
4 they be satisfied in terms of notice?

5 MR. STEED: I think when you look at
6 Dreyden where - - - which was a knife case, where the
7 allegations - - -

8 JUDGE FAHEY: Gravity knives cases, yeah.

9 MR. STEED: And - - - and it was conclusory
10 pled that it was a gravity knife. Here it's
11 conclusory pled that this was a public place.

12 JUDGE PIGOTT: What would you like to - - -
13 if you were the - - - if you were the prosecutor,
14 what would you have put in there?

15 MR. STEED: I don't like to imagine me
16 being a prosecutor, but if I was - - -

17 JUDGE PIGOTT: Police officer.

18 MR. STEED: - - - it would be on side - - -
19 on the sidewalk inside of the park where there were
20 other pedestrians walking by. Something that would
21 give this - - - the - - - the court an understanding
22 about the nature of the location. And there's cases
23 that deal with this, there are trial court cases and
24 a recent Appellant Term case where the Appellant Term
25 case found the allegation at 514 Targee Street in

1 Staten Island not good enough, because saying at an
2 address doesn't let us know it's a public place. The
3 case directly on point, the Nembhard case that I cite
4 to, said opposite of 177 Nagel Street, so I think - -
5 -

6 JUDGE PIGOTT: And is it - - - is it in
7 fact true that he was in not in a public place?

8 MR. STEED: I don't - - - I don't know,
9 Your Honor. I - - -

10 JUDGE PIGOTT: He pled guilty to it.
11 That's why I'm asking.

12 MR. STEED: He did pled - - - he did plead
13 guilty - - -

14 JUDGE PIGOTT: He said I - - - I - - - I
15 possessed marijuana in a public place.

16 MR. STEED: And - - - and that was a
17 conclusion. That was part of his factual allo - - -
18 allocution, correct. But what I'm talking about is
19 before we can get to the guilty plea, the prosecution
20 has to allege facts that make out in a non-conclusory
21 - - -

22 JUDGE ABDUS-SALAAM: But there were - - -
23 there were two police officers who saw this defendant
24 with the - - -

25 MR. STEED: Correct.

1 JUDGE ABDUS-SALAAM: - - - marijuana in his
2 hand.

3 MR. STEED: Correct.

4 JUDGE ABDUS-SALAAM: So you're saying they
5 had to be inside of a building? They - - - they - -
6 - they couldn't be on the street seeing this; that
7 they possibly could have been inside of a building.
8 Is that what you're saying?

9 MR. STEED: I'm saying my client could have
10 been inside of a public place - - - inside of a
11 private place, sorry, and we don't know the nature of
12 the location. And that changes the crime. It's no
13 longer a crime, it's a violation. It's unlawful
14 possession of marijuana. And Your Honor raises a - -
15 - an interesting point; I think this case is kind of
16 dubious. They're saying at 10 o'clock in the morning
17 they saw my client dangling marijuana out in the
18 open, so maybe - - -

19 JUDGE PIGOTT: No, it said they had - - -
20 he had it in his right hand.

21 MR. STEED: He had it in his hand. It
22 wasn't burning and open - - - it wasn't burning, but
23 it was open to public view. But - - -

24 JUDGE FAHEY: Well, you know, I - - - I
25 looked at - - - I was wondering about that because in

1 the Jackson case, they could smell the marijuana. I
2 don't know if you - - - yeah, I think you used it - -
3 - and it's kind of a similar case to this. But I
4 thought in the complaint, the officer said that he
5 could smell it also?

6 MR. STEED: In this case?

7 JUDGE FAHEY: Yeah.

8 MR. STEED: That's - - - I don't recall. I
9 think the allegations were that he recovered
10 marijuana - - -

11 JUDGE FAHEY: Well, let me - - - I had it.
12 On - - - on A-4 of the record - - - geez, I'll go
13 back and look at it.

14 JUDGE PIGOTT: It says that "Deponent
15 observed the defendant holding marijuana in a public
16 place in open and public view. Deponent states that"
17 - - - "that deponent then observed Police Officer" -
18 - - so-and-so - - - "shield number in the precinct
19 recover one Ziploc bag of marijuana which the
20 defendant had possessed in a public place in open and
21 public view from the defendant's right hand. He
22 further states that if deponent believes the above
23 substance" - - - and then they go into what it was.

24 JUDGE FAHEY: "The odor emanating from the
25 substance and the observation of the packaging is

1 characteristic of this type."

2 MR. STEED: And that's after it was
3 recovered. Those are the allegations about his
4 expertise that allowed him to identify it.

5 JUDGE FAHEY: So he knew it was marijuana
6 because he smelled it not because it was burning?

7 MR. STEED: Correct.

8 JUDGE FAHEY: I see.

9 MR. STEED: So this is - - - there's two -
10 - - two - - -

11 JUDGE FAHEY: No, I - - - I see. No,
12 there's a - - - there's a rational - - -

13 JUDGE PIGOTT: Well, it says - - -

14 JUDGE RIVERA: So in part you're arguing
15 that the lack of an address must - - - must suggest
16 what? We can infer that when - - - why isn't - - -

17 MR. STEED: That we don't - - -

18 JUDGE RIVERA: - - - the inference if
19 there's not an address, it's the park - - -

20 MR. STEED: We don't know - - -

21 JUDGE RIVERA: - - - an open public place?

22 MR. STEED: We don't know that, and I think
23 the McNamara case and the - - -

24 JUDGE RIVERA: I'm saying, why isn't that a
25 proper inference?

1 MR. STEED: Because it's conclusi - - -
2 it's a conclusion without any evidentiary facts that
3 are required by Dreyden. And - - - and that's what
4 really the problem is here. And - - - and there were
5 two police officers - - -

6 CHIEF JUDGE LIPPMAN: All right, counsel,
7 finish your thought.

8 MR. STEED: Sure.

9 CHIEF JUDGE LIPPMAN: Go ahead.

10 MR. STEED: There are two police officers,
11 the prosecutor could have easily asked them give me
12 more information about the location, was it in the
13 park, was it on a sidewalk, was it across the street
14 in a westerly direction, and they could have told
15 them and it could have been - - -

16 CHIEF JUDGE LIPPMAN: Okay, counsel.
17 You'll have your rebuttal. Let's hear from your
18 adversary.

19 MR. GADLIN: May it please the court, my
20 name is Alan Gadlin, and I represent the People on
21 this appeal. And - - -

22 CHIEF JUDGE LIPPMAN: Counsel, how
23 difficult it is to - - - to - - - to make clear where
24 this is that it's in a public place?

25 MR. GADLIN: Well, look, could - - - could

1 there be more detail, yes. But these are complaints;
2 they're not depositions.

3 CHIEF JUDGE LIPPMAN: No, no, we get that.
4 But couldn't you do it? Is it so much effort to - -
5 -

6 MR. GADLIN: Well - - -

7 CHIEF JUDGE LIPPMAN: - - - to make clear -
8 - - because you're saying it's a public place. What
9 about his argument that if - - - if you look like
10 this way, there's - - -

11 MR. GADLIN: Well, the natural inference
12 from the language "opposite 676 Riverside Drive" in
13 and of itself what's suggested is - - - isn't the
14 building, because if you meant some other building,
15 you would give that address. And I would remind the
16 court that - - -

17 JUDGE ABDUS-SALAAM: What if it had been in
18 front of 676 Riverside Drive? Would that give you an
19 idea that it would be public?

20 MR. GADLIN: Yes; in fact, I think one of
21 the cases defendant relies on, the trial court cases
22 - - - Sherman I - - - it might be - - - kind of
23 distinguishes "at" from "in front of". They say "at"
24 is no good because you could think "at" means in the
25 building.

1 CHIEF JUDGE LIPPMAN: So what about
2 opposite?

3 MR. GADLIN: Well, opposite is more like in
4 front of. Again - - -

5 CHIEF JUDGE LIPPMAN: Why couldn't it be
6 inside opposite?

7 MR. GADLIN: Because that - - - the - - -
8 the idea is that is not the way people normally
9 speak. You're entitled to use reasonable inferences.

10 JUDGE RIVERA: You're saying opposite is
11 across the street?

12 MR. GADLIN: Across the street.

13 JUDGE RIVERA: Why didn't it say across the
14 street?

15 MR. GADLIN: Because he said opp - - - the
16 officer wasn't thinking - - -

17 JUDGE RIVERA: Why didn't it say in the
18 park? I mean, all of those have more detail. I
19 understand your argument is - - -

20 MR. GADLIN: Yeah, and - - -

21 JUDGE RIVERA: - - - you don't need to have
22 more detail.

23 MR. GADLIN: - - - and - - - and that's - - -

24 -

25 JUDGE RIVERA: The question is why not?

1 MR. GADLIN: - - - we - - - we are not
2 suggesting that this is the ideal complaint, but you
3 also have to keep in mind - - -

4 JUDGE RIVERA: Well, the - - - the question
5 is whether or not it's sufficient.

6 MR. GADLIN: Right, but again, it's
7 sufficient. This is after waiver of information and
8 after a plea, so the standard is notice to prepare a
9 defense, double jeopardy projection (ph.). There's
10 clearly notice to prepare a defense because he gave
11 one in his - - -

12 JUDGE PIGOTT: Well, yeah, but he - - - I
13 think your opponent's argument is that - - - that he
14 waived the filing, and everything after the comp - -
15 - the motion to suppre - - - or - - - or to dismiss
16 the complaint for in - - - inadequacy was denied. So
17 - - -

18 MR. GADLIN: Yeah, that might be true. But
19 - - - but notice, you would see me look at the
20 beginning, do you have notice to prepare a defense
21 from the complaint? The answer is yes because he
22 used a - - -

23 JUDGE RIVERA: Well, not knowing where the
24 police claim, right, he is, where's the notice?

25 MR. GADLIN: Well, becau - - - because

1 first of all, they can go look and defendant knows he
2 - - -

3 JUDGE RIVERA: Who's the "they" can go
4 look?

5 MR. GADLIN: The defense attorney, defense
6 investigators.

7 JUDGE RIVERA: But that's his point, right.
8 He says if I look this way, there's a building, if I
9 look that way, there's a park.

10 MR. GADLIN: Well, that - - -

11 JUDGE RIVERA: And either way is opposite.

12 MR. GADLIN: Well, first of all, that's not
13 - - - as a factual matter, that's not our - - - our
14 understanding. But the other thing - - -

15 JUDGE RIVERA: I understand it's divorced
16 from the record.

17 MR. GADLIN: - - - is those might be lovely
18 trial defenses, but again, we're looking at a
19 misdemeanor complaint. Again, notice, yes; his
20 defense apparently was - - - and he said in the - - -
21 on this motion, I was just sitting on a bench with my
22 girlfriend, I didn't have any contraband in public
23 view.

24 JUDGE RIVERA: Um-hum.

25 MR. GADLIN: So clearly this was detailed

1 enough for him to pare - - - prepare a defense - - -

2 CHIEF JUDGE LIPPMAN: Under the - - - the

3 lower - - -

4 MR. GADLIN: Under the lower standard,

5 right.

6 CHIEF JUDGE LIPPMAN: - - - requirement,

7 yeah.

8 JUDGE ABDUS-SALAAM: Well, what about the

9 merits, counsel, about this? What about the - - -

10 turning to the merits, what about the - - - the

11 court's statement that you're giving up your right to

12 trial, but - - -

13 MR. GADLIN: As a trial - - -

14 JUDGE ABDUS-SALAAM: - - - not all three

15 Boykin rights?

16 MR. GADLIN: Well, for you to rule in

17 defendant's favor, you would actually have to

18 overrule Harris in this case, and particularly, there

19 are two - - - two - - - there are six cases in

20 Harris, two of them Alicea and Ramsey, the judge, as

21 in this case, elicited an express waiver of the right

22 to trial but didn't mention the other two Boykins.

23 This court looked at all the circumstances and said

24 the allocution was fine. Notably, this - - - this

25 court listed other factors such as defendant was

1 represented by counsel, discussed pleas with the
2 court, acknowledged the facts of the crime, admitted
3 understanding the consequences of the plea, and said
4 they were voluntarily pleading guilty.

5 CHIEF JUDGE LIPPMAN: What does admitting
6 the - - - understanding the consequences of the plea
7 - - - what does that mean?

8 MR. GADLIN: Well, it can mean - - - Harris
9 could - - -

10 CHIEF JUDGE LIPPMAN: In - - - in the
11 context of all we've been talking about today about
12 what you have to - - -

13 MR. GADLIN: Well - - - well, the - - -

14 CHIEF JUDGE LIPPMAN: - - - make sure that
15 defendants' rights are preserved, what does aware of
16 the consequences mean?

17 MR. GADLIN: Well, it actually mean - - -
18 can mean several things, like here - - -

19 CHIEF JUDGE LIPPMAN: Mean aware of the
20 three Boykin rights?

21 MR. GADLIN: It doe - - - it does - - -
22 it's not limited to that, because there are many
23 consequences of plea. Again, we - - -

24 CHIEF JUDGE LIPPMAN: But is it inclusive
25 of that?

1 MR. GADLIN: It - - - it - - - you know,
2 Harris didn't spell it out. It - - - it merely said
3 the judge asked that.

4 CHIEF JUDGE LIPPMAN: It's good - - - it's
5 good enough, right?

6 MR. GADLIN: Well, it's good enough when
7 you take - - - again, you take everything in context.
8 In Harris, as in this case, you actually have a judge
9 ask - - - I mean, the exact quote is, "Do you
10 understand that by pleading guilty, you are giving up
11 your right to a trial?" "Yes, Your Honor." That's
12 not a passing mention of the right to trial.

13 CHIEF JUDGE LIPPMAN: Right.

14 MR. GADLIN: That's a full allocution of
15 that Boykin right.

16 CHIEF JUDGE LIPPMAN: Right.

17 MR. GADLIN: And - - - and again, that's -
18 - -

19 CHIEF JUDGE LIPPMAN: And the consequ - - -
20 and the consequences say a lot - - -

21 MR. GADLIN: That - - -

22 CHIEF JUDGE LIPPMAN: - - - say a lot also,
23 right, in your mind?

24 MR. GADLIN: Right, and - - - and it's - -
25 - and you have to take everything in context. The -

1 - - for fifty years, maybe more now, this court has
2 stressed the role of counsel. And something is
3 important to keep in mind; it's not just that the
4 defendant knows what the Boykin rights are, it's a
5 knowing, voluntary, and intelligent waiver, meaning
6 not only do you know what it is, you think it's a
7 good idea. Well, the court can't do that; that has
8 to be counsel. It requires a - - - a discussion of
9 the entire case - - -

10 CHIEF JUDGE LIPPMAN: Yeah, but it's the
11 court's burden to - - -

12 MR. GADLIN: To get it.

13 CHIEF JUDGE LIPPMAN: - - - get the record
14 straight, right?

15 MR. GADLIN: That is, but then the question
16 is what is that record.

17 CHIEF JUDGE LIPPMAN: Yeah.

18 MR. GADLIN: It cannot be a silent record.
19 There has to be an - - -

20 CHIEF JUDGE LIPPMAN: Right.

21 MR. GADLIN: - - - an affirmative
22 indication.

23 CHIEF JUDGE LIPPMAN: Right, right.

24 MR. GADLIN: Here where you have an
25 affirmative showing of a waiver of right to trial and

1 you have defendant saying, I've discussed the plea
2 and all its consequences, I'm satisfied with my
3 counsel's performance, that's actually - - -

4 CHIEF JUDGE LIPPMAN: So here the - - -

5 MR. GADLIN: - - - more than you had in - -
6 -

7 CHIEF JUDGE LIPPMAN: - - - totality is
8 clear to you?

9 MR. GADLIN: Under - - - under totality
10 it's clear. It's not necessarily that there always
11 has to be a Boykin right, but here there was - - -

12 CHIEF JUDGE LIPPMAN: Okay, counsel.

13 MR. GADLIN: - - - and there was much more.
14 Unless the court has any question, I'd ask the court
15 to - - -

16 CHIEF JUDGE LIPPMAN: Anything else? Okay,
17 thanks, counsel.

18 MR. GADLIN: Thank you.

19 CHIEF JUDGE LIPPMAN: Counsel, rebuttal.

20 MR. STEED: Just briefly, we are seeking
21 Burwell relief here. This was a relatively minor
22 crime and my client completed his sentence of time
23 served. And mentioning trial alone doesn't satisfy
24 the - - - the mandates of Tyrell. There's nothing on
25 the record about the other Constitutional rights - -

1 -

2 CHIEF JUDGE LIPPMAN: What about the
3 consequences language?

4 MR. STEED: The consequences language still
5 doesn't disc - - - doesn't put on the record and - -
6 - and show that the defendant knew about the
7 Constitutional rights he was waiving. And say - - -

8 CHIEF JUDGE LIPPMAN: So your test, you got
9 to mention all three?

10 MR. STEED: In my test, all three have to
11 be discussed, but the source of that discussion can
12 be the court asking - - -

13 CHIEF JUDGE LIPPMAN: Right.

14 MR. STEED: - - - your client, the court
15 asking defense counsel.

16 CHIEF JUDGE LIPPMAN: But the - - -

17 MR. STEED: The prosecution can be
18 involved.

19 CHIEF JUDGE LIPPMAN: The court is setting
20 the table, though, the court is - - -

21 MR. STEED: It's the - - - it's the court's
22 burden. Tyrell mandates that. But - - -

23 JUDGE RIVERA: But he says that wasn't - -
24 - that didn't happen in Harris.

25 JUDGE ABDUS-SALAAM: Yeah.

1 JUDGE RIVERA: We have to overrule Harris?

2 MR. STEED: You don't have to rule - - -

3 overrule Harris. There's been - - -

4 JUDGE RIVERA: Why not?

5 MR. STEED: - - - there's been decisions

6 since Harris, Philip v. - - - Hanson v. Phillips

7 which is a Second Circuit case, but looking at state

8 case laws exactly on point with this case where

9 there's sort of one right given, and then the other

10 Third - - - Third Department cases.

11 JUDGE ABDUS-SALAAM: If that's - - - if

12 that's correct, then why do we even have to overrule

13 this?

14 MR. STEED: Because this was wrongly

15 decided. The Appellate Term got it wrong here in - -

16 - in saying that this plea was knowing, voluntarily,

17 intelligently entered, where there's no indication

18 that my client understood what trial meant even

19 though it was mentioned.

20 JUDGE PIGOTT: Well, I was struck by the

21 fact that the court said, you know, he - - - he

22 denied all the motions in - - - in the case and - - -

23 and then he says, "We'll adjourn for hearing and

24 trial, how's March 6th?" And defense lawyer says,

25 "Your Honor, we do have a disposition." The court

1 said, "All right, would you like to enter a plea?"
2 And he says, "Yes, my client authorized me". And - -
3 - and they go on with all of this and the judge says,
4 you realize you have a right to a trial, et cetera.
5 It seemed like it was the - - - the - - - the
6 defendant that inspired the plea colloquy that - - -
7 that - - - that morning or afternoon or whenever it
8 was and said this is what we want, time served, we're
9 out of here.

10 MR. STEED: I think we have to afer - - -
11 infer a lot by what Your Honor is saying. What we
12 need is on the record representations that this plea
13 was knowingly, voluntarily, intelligently entered and
14 the client understood the Constitutional rights.

15 JUDGE RIVERA: It - - - it sounded like - -
16 -

17 MR. STEED: And I - - - I don't - - - just
18 because he wanted to plead guilty and get this over
19 with could actually mean the opposite. He didn't
20 understand he was giving up these important rights.

21 JUDGE RIVERA: Counsel, a minute ago I
22 thought you were saying that even - - - even the
23 court's question, "Do you understand you're giving up
24 your right to a trial" and he answers "Yes, Your
25 Honor" is not good enough. You're saying that

1 question is not good enough? I thought - - -

2 MR. STEED: I'm saying that - - -

3 JUDGE RIVERA: - - - your argument was
4 about the other two rights.

5 MR. STEED: My argument is about the other
6 two rights.

7 JUDGE RIVERA: Okay, so this right, you
8 think that question is enough?

9 MR. STEED: I don't think it is enough. I
10 don't know that - - -

11 JUDGE RIVERA: What else does he have to
12 do? Are you saying he has to explain what a right to
13 a trial is in detail?

14 MR. STEED: I think by explaining the other
15 two Boykin rights, it gives meaning to the word
16 trial. Just saying trial alone - - -

17 JUDGE ABDUS-SALAAM: But when - - - when
18 have we - - - when have we ever decided that only
19 saying you're giving up a right to a trial is not
20 sufficient, those words, as opposed to some other
21 more detailed explanation of what a trial is?

22 MR. STEED: This court hasn't said that.

23 JUDGE ABDUS-SALAAM: Right, that's what I'm
24 asking you.

25 MR. STEED: Yeah, yeah.

1 JUDGE ABDUS-SALAAM: So what - - - what
2 case are you relying on that says we can do that?

3 MR. STEED: I'm relying on Hanson v.
4 Phillips case and the Third Department cases, Vences
5 and Mones, that looked at pleas and said although the
6 court said trial, they didn't say - - - there wasn't
7 enough information on the record to affirmatively - -
8 - affirmatively - - -

9 CHIEF JUDGE LIPPMAN: Okay, counsel.

10 MR. STEED: - - - show that the client pled
11 guilty knowingly.

12 CHIEF JUDGE LIPPMAN: Thanks, counsel.

13 Thank you both. Appreciate it.

14 (Court is adjourned)

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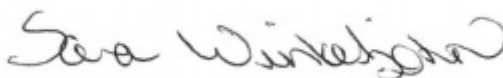
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Abdelouahad Afilal, No. 170 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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