

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 12

RAYMOND LEACH,

Appellant.

20 Eagle Street
Albany, New York 12207
January 12, 2016

Before:

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:

STEVEN A. FELDMAN, ESQ.
FELDMAN & FELDMAN, ATTORNEYS AT LAW
Attorneys for Appellant
626 Reckson Plaza
West Tower, 6th Floor
Uniondale, NY 11556

ELIZABETH L. SCHULZ, ADA
ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
18 Seward Avenue
Middletown, NY 10940

Karen Schiffmiller
Official Court Transcriber

1 JUDGE PIGOTT: Our first case this
2 afternoon is People of the State of New York v.
3 Raymond Leach.

4 Mr. Feldman, welcome.

5 MR. FELDMAN: Thank you very much, Your
6 Honor.

7 The post plea waiver that was used in this
8 case should be banned by this court.

9 JUDGE PIGOTT: Before - - - before you go
10 too much further, would you like any rebuttal time?

11 MR. FELDMAN: Two minutes, Your Honor,
12 please, thank you.

13 The appellate waiver that was used in this
14 case is unenforceable because it was not made part of
15 the pleading calculus, and that - - -

16 JUDGE PIGOTT: Well, it was mentioned - - -
17 it was - - - it's funny that the district attorney's
18 supplemental record is larger than yours. And one of
19 the things that they included, I think it was on page
20 9 of the record, although it - - - it was part of
21 yours, was that the judge said to him, and you'll - -
22 - and you will waive your right to appeal, and he
23 said yes.

24 MR. FELDMAN: That's correct.

25 JUDGE PIGOTT: That was - - - that was - -

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

-

MR. FELDMAN: But - - -

JUDGE PIGOTT: - - - that was at the plea.

MR. FELDMAN: But - - - but that, Your Honor, is not sufficient for a knowing, intelligent, and voluntary appellate waiver, because the judge has not informed the lay defendant - - - in this case, a defendant who had mental problems - - - of his rights, and the appellate rights are so vitally important.

JUDGE RIVERA: What - - - what else did the judge need to say - - -

MR. FELDMAN: Well, the - - -

JUDGE RIVERA: - - - given our decision of People v. Sanders? What - - - what else?

MR. FELDMAN: Well, the - - - the - - - what the judge should have told him is that - - - that his appellate rights were very important, that they would be foreclosed if he entered into the appellate waiver. And he should have discussed various factors in - - - in his background to make sure that he understood the import of the waiver and the court should have spoken to him in plain English about what the appellate waiver meant, and - - - and he - - -

1 JUDGE ABDUS-SALAAM: So counsel, I'm sorry.
2 You said that the judge should discuss various
3 factors in the defendant's background. Are you
4 saying every judge should look in each - - -

5 MR. FELDMAN: No - - -

6 JUDGE ABDUS-SALAAM: - - - defendant's
7 background - - -

8 MR. FELDMAN: Well, in this particular case
9 because of the competency issue, the judge should
10 have explored that issue, but - - -

11 JUDGE FAHEY: But I didn't think you - - -
12 I didn't think you raised the competency issue on
13 appeal.

14 MR. FELDMAN: Well, we're - - - we're
15 raising the appellate waiver issue, and - - -

16 JUDGE FAHEY: But that - - - that really
17 isn't the same, though, as his competency.

18 MR. FELDMAN: That's true.

19 JUDGE FAHEY: Yeah.

20 MR. FELDMAN: But one sentence is
21 completely inadequate to - - - to - - -

22 JUDGE FAHEY: You know, you - - - you - - -
23 I tend to think - - - speaking only for myself - - -
24 that you may be right as - - - as - - - as to that
25 issue. And - - - and also assuming that that's all

1 that was done at the plea, and then at the
2 sentencing, he signs a written waiver, but by then
3 he's already waived the right. So he should have
4 done it before. I - - - I understand that argument.

5 Oddly enough, in this case, though, the
6 same waiver procedure was done by the same judge, and
7 it seems to have been invalid - - - found invalid a
8 number of times in the Second Department before,
9 except for this case. Is there something special
10 here that I missed?

11 MR. FELDMAN: That - - - that's not
12 correct, Judge.

13 JUDGE FAHEY: Okay, correct me.

14 MR. FELDMAN: As a matter of fact - - -

15 JUDGE FAHEY: Yeah?

16 MR. FELDMAN: - - - in People v. Gil, which
17 we argued in our firm, the Second Department found
18 the appellate waiver ineffective. It's 109 AD 3d.
19 484.

20 JUDGE FAHEY: Well, I said invalid. You
21 said ineffective. Okay, go ahead.

22 MR. FELDMAN: What - - -

23 JUDGE PIGOTT: He was agreeing with you.

24 JUDGE STEIN: He's - - - yeah.

25 MR. FELDMAN: Right, right. Well, but what

1 - - - what I'm saying is that - - - that the Second
2 Department has, in a roundabout way, said that the
3 post-plea appellate waiver is ineffective precisely
4 because it - - - it doesn't fulfill the purpose of
5 what a waiver should be - - -

6 JUDGE RIVERA: And in those - - -

7 MR. FELDMAN: - - - knowing, intelligent
8 and voluntary.

9 JUDGE RIVERA: And in those cases, did the
10 judge also give this one - - -

11 MR. FELDMAN: Yes, it was the same judge.

12 JUDGE RIVERA: - - - phrase - - - one
13 sentence - - - I'm sor - - - in those other cases,
14 did the judge also ask at the plea, do you waive your
15 right to appeal, and nothing else?

16 MR. FELDMAN: In Gil, same judge, same
17 strategy that the judge used - - -

18 JUDGE RIVERA: Okay. The judge also asked,
19 as he did here, have you talked to your attorney
20 about these - - -

21 MR. FELDMAN: No.

22 JUDGE RIVERA: No?

23 MR. FELDMAN: And he - - - he didn't here
24 either. He - - - he didn't - - -

25 JUDGE RIVERA: No, he did here, yes. "Did

1 you speak to your attorney?"

2 MR. FELDMAN: But the - - - but the point
3 is that - - - that - - - Your Honor, that - - -

4 JUDGE RIVERA: Well, no, does that make a
5 difference?

6 MR. FELDMAN: It does, but it - - - but
7 it's not - - -

8 JUDGE RIVERA: He asked, are you waiving
9 your right to appeal and then - - - and then you ask,
10 did you speak to your attorney? Does that matter?
11 Does that make it different from just saying, do you
12 waive your right to appeal?

13 MR. FELDMAN: It does.

14 JUDGE RIVERA: Okay. Tell me why?

15 MR. FELDMAN: But - - -

16 JUDGE RIVERA: Um-hum.

17 MR. FELDMAN: - - - as I said before - - -
18 I don't want to belabor the point, but one sentence
19 is insufficient. The Second Department recently
20 ruled that because of the enormous number of
21 appellate waivers that have been found unenforceable,
22 they announced a series of - - - of rules that trial
23 judges should now follow, and it is very, very
24 divergent than what happened in this plea.

25 JUDGE STEIN: If - - - if it - - - if the

1 order of what happened had been switched, would - - -
2 would - - - would we be here? Would you be
3 challenging that?

4 MR. FELDMAN: No, if it - - - Your Honor,
5 if it had been switched, then this would not be an
6 issue, because - - -

7 JUDGE STEIN: But you're not challenging
8 the - - - the - - - the - - -

9 MR. FELDMAN: No.

10 JUDGE STEIN: - - - the colloquy and the -
11 - - the - - - the written waiver and all that was
12 perfectly fine - - -

13 MR. FELDMAN: Yes.

14 JUDGE STEIN: - - - it was just done too
15 late.

16 MR. FELDMAN: Yes.

17 JUDGE STEIN: I just want to be clear on
18 that.

19 MR. FELDMAN: No - - - it was too little
20 too late, and the reas - - -

21 JUDGE STEIN: Well, let - - - you said "too
22 little, too late". That's what one of the things - -
23 -

24 MR. FELDMAN: Right.

25 JUDGE STEIN: - - - that I'm trying to just

1 hone you in on.

2 MR. FELDMAN: Right.

3 JUDGE STEIN: Was it - - - was it too
4 little or was it just too late?

5 MR. FELDMAN: It - - - it was too little
6 because it didn't comply with the Second Department's
7 rules about what trial judges should - - -

8 JUDGE PIGOTT: Well, that's where - - -

9 MR. FELDMAN: - - - tell a defendant - - -

10 JUDGE PIGOTT: That's where I - - - I want
11 to pick a bone with you on - - - on your - - - on
12 your record, you know, your supple - - - your
13 appendix left out, you know, pages 5, 6, 7, where he
14 goes through - - - better than almost anyone we've
15 had, you know, he - - - he goes through every single
16 - - - do you understand that under the Constitution
17 of the United States you have the right to be silent
18 and - - - and on - - - on every single one - - - I'm
19 going to get there; I know you - - - you're going to
20 talk about waiver, but after he goes through all of
21 these, which you didn't include in your pun - - - in
22 your appendix.

23 He says "You have a clear brain, is that
24 right? Yes. Good. You must meet the - - - with
25 probation and cooperate with them at your pre-

1 sentence investigation. You must be here on the date
2 that I set this matter down for sentence. You must
3 waive and give up your right to appeal. Do you
4 understand this plea promise?"

5 So he was telling him that you going to
6 have to - - - you know, sign this waiver when you
7 come back for sentencing. Now I'm not sure it was
8 right or wrong, but he certainly understood, it
9 seems, what was going on.

10 MR. FELDMAN: No, be - - - because he
11 wasn't explained at the plea. I'm not talking about
12 the sentence.

13 JUDGE PIGOTT: Right.

14 MR. FELDMAN: The - - - the only way a
15 defendant can enter a knowing, intelligent and
16 voluntary plea when the People ask for an appellate
17 waiver, is to understand the full dimension of what
18 he's doing. And that's the reason why one sentence
19 at the plea is insufficient, because it's not part of
20 the pleading calculus, but - - -

21 JUDGE PIGOTT: Well, he got to appeal
22 anyway, right?

23 MR. FELDMAN: Yes.

24 JUDGE PIGOTT: So he's - - - you know, he's
25 out - - - in fact, he's up here.

1 MR. FELDMAN: Yes.

2 JUDGE PIGOTT: What struck me too was, I
3 went back - - - I think it was part of the record - -
4 - was his pro se brief at the Appellate Division.
5 And he laid out in minute detail what happened here,
6 and - - - and at the CLA, when we were talking about
7 this, I'm not sure a crime was committed and yet - -
8 -

9 MR. FELDMAN: Yes.

10 JUDGE PIGOTT: - - - and yet the defense
11 counsel, you know, breezed right by that. In fact,
12 essentially said, yeah, he admits he did something
13 wrong, but he did it for the right reason or
14 something, but I - - - I - - - no one - - - did
15 anybody talk to these people? I mean, you got a
16 health - - - health place that threw these records in
17 a dumpster.

18 MR. FELDMAN: Right.

19 JUDGE PIGOTT: And - - - and all of a
20 sudden, he's guilty of - - - of something, because of
21 their defalcation, and - - - I know you're ready - -
22 - getting ready to talk - - - but I'm thinking, who
23 did something - - - this - - - they - - - they admit
24 this. They admit that they - - - they threw these
25 records out.

1 And - - - and they say - - - he says that
2 they invited him - - - he couldn't think of a figure.
3 He wanted these people to be able to sue the health
4 department and - - - or the health organization, and
5 she's the one that said, if we give you 10,000
6 dollars, will you - - - so it wasn't like he was
7 extorting this 10.

8 And then when they have - - - when the CFO
9 turns out to be the police chief pretending to be a
10 CFO and they arrest him the minute he accepts the
11 check, it just seemed to me there were so many
12 questions in this case. And - - -

13 MR. FELDMAN: Your Honor, that - - - that
14 really is a brilliant analysis of this case. You
15 basically took my entire argument right there.

16 JUDGE PIGOTT: It was his brief that - - -
17 that was his brief, Mr. Feldman.

18 MR. FELDMAN: Right. And - - - and the - -
19 - what this case does in the Second Department,
20 because no crime was committed, was a criminal - - -

21 JUDGE ABDUS-SALAAM: So his plea to
22 extorting money from the center was false?

23 MR. FELDMAN: No - - - no, Your Honor,
24 there - - - there was no extortion. A negotiated,
25 arms-length agreement for a finder's fee is not a

1 criminal act. There is no mens rea, there is no
2 taking and therefore, there is no attempted grand
3 larceny.

4 JUDGE RIVERA: So - - - so if you drop your
5 wallet - - - go outside and drop your wallet, I find
6 it. I call you, and say, if you want your wallet
7 back, you got to give me 2,000 dollars. Am I extort
8 - - - is that extortion?

9 MR. FELDMAN: If the wallet had 100,000 - -
10 -

11 JUDGE RIVERA: Or is that - - - I'm asking
12 for a reward?

13 MR. FELDMAN: If - - - if the - - - if the
14 wallet has 100,000 dollars, and we negotiate, which I
15 would not do, but - - -

16 JUDGE RIVERA: Fine. And what was the
17 negotiation? What was the negotiation? I told you
18 this is what you need to do to get the money back.
19 Where - - - where is there a bargaining position and
20 that we're negotiating in that - - -

21 MR. FELDMAN: Well, it's a finder's fee.
22 And what this - - -

23 JUDGE RIVERA: Did I say that?

24 MR. FELDMAN: Did who say it?

25 JUDGE RIVERA: In my hypothetical, have I

1 said it's a finder's fee, or have I said if you want
2 the wallet back, you got to give me 2,000 dollars?
3 Is that a demand for a reward or is that extortion -
4 - - if you ever want to see this wallet again, if you
5 want it back, you've got to give me 2,000 dollars?
6 Does it mean something?

7 JUDGE STEIN: Didn't he - - - didn't he
8 threaten to file lawsuits? Does that change the
9 equation at all?

10 MR. FELDMAN: No, because it's just a
11 negotiating strategy on - - - to - - - to enhance a
12 finder's fee.

13 JUDGE PIGOTT: Well, that was - - - that -
14 - - I guess the point is that was an argument that
15 wasn't made at the - - - at the trial level. I mean,
16 it - - -

17 MR. FELDMAN: That - - - that's correct,
18 because there was a plea.

19 JUDGE PIGOTT: Right. And is that your
20 argument?

21 MR. FELDMAN: But he - - - but the
22 defendant pro se said to the judge that he did - - -
23 when the judge asked him if he committed a criminal
24 act, he - - - "Is that a fair statement?" He said
25 that is not a fair statement.

1 JUDGE STEIN: Well, then he made further -
2 - -

3 MR. FELDMAN: He did not commit a crime.

4 JUDGE STEIN: He made further inquiry,
5 didn't he - - - did the court?

6 MR. FELDMAN: But the judge didn't. He - -
7 - what the judge did was what - - - he did not make -
8 - -

9 JUDGE STEIN: Well, counsel did something.

10 MR. FELDMAN: There was a duty to inquire
11 once there was a denial of guilt. And what the judge
12 basically did was bullied the defendant and asked the
13 same question again whether - - -

14 JUDGE STEIN: Well, there - - - there was
15 an off - - - I - - - there was an off-the-record
16 discussion between the defendant and counsel before
17 the court asked the question again, correct?

18 MR. FELDMAN: That's correct.

19 JUDGE STEIN: Okay. So it wasn't just, you
20 know, I'll ask you once and you gave me the wrong
21 answer, I'll ask you again.

22 MR. FELDMAN: But that's really what
23 happened. The - - - the - - - the - - -

24 JUDGE STEIN: Well, that's not on the
25 record.

1 right?

2 MR. FELDMAN: Right. But the - - - the
3 issue here was not a Robin Hood defense. That - - -
4 that was never - - -

5 JUDGE FAHEY: Oh, I thought that was when
6 he was saying he was going to give the money to
7 someone else, so he was robbing from the poor and
8 giving it to some - - - robbing from the rich and
9 giving it to someone else - - - some - - - the middle
10 class, and that was his - - - that was his - - - the
11 core of his Robin Hood defense. That's what I - - -
12 I understood that argument to be.

13 MR. FELDMAN: That - - -

14 JUDGE FAHEY: That's seems relatively
15 straightforward. What I don't understand is your
16 argument that - - - you're talking about the Lopez
17 exception and whether or not the Lopez exception
18 applied, and the court says to him, just given the
19 GHVFC, the records - - - if he had found him at - - -
20 if he - - - why he should have just given them to
21 them when he found them, and the defendant responded,
22 "That's not a fair statement." And you're saying
23 that invokes the Lopez exception? That's the way I
24 read your brief.

25 MR. FELDMAN: Well, the - - -

1 JUDGE FAHEY: Go ahead.

2 MR. FELDMAN: What - - - what I was arguing
3 was that this plea falls under the rare case
4 exception - - -

5 JUDGE FAHEY: Right.

6 MR. FELDMAN: - - - because there's a
7 denial - - - an explicit denial of guilt, after which
8 - - -

9 JUDGE FAHEY: So when you're saying - - -
10 so - - - so I'm clear - - - you're saying when he
11 says "That is not a fair statement", he's denying
12 guilt?

13 MR. FELDMAN: Yes.

14 JUDGE RIVERA: What's the element he
15 negates?

16 MR. FELDMAN: Theft.

17 JUDGE FAHEY: Let me - - - I - - -

18 MR. FELDMAN: He - - - he didn't - - -
19 there was no stealing, there was no taking in this
20 case. It was a negotiated finder's fee.

21 JUDGE PIGOTT: That she suggested that - - -
22 - that the health department - - - health agency
23 suggested. They said if we - - - you know, we'll
24 give you 10,000 dollars, you give us the records
25 back, right? The Appellate Division said that this

1 is more - - - this is ripe for a 440, that there are
2 some facts that are not on the record that it would -
3 - - would seem appropriate for a 440. Do you know if
4 one's been filed?

5 MR. FELDMAN: I believe he - - - he filed a
6 440.

7 JUDGE PIGOTT: Okay.

8 MR. FELDMAN: I'm not aware of what's - - -
9 what the contents are.

10 JUDGE PIGOTT: Yeah.

11 MR. FELDMAN: But I - - - I see my time is
12 up.

13 JUDGE PIGOTT: Yeah, we'll - - - we'll
14 catch you on the - - -

15 MR. FELDMAN: Okay, thank you very much,
16 Your Honors.

17 JUDGE PIGOTT: Thank you, sir.

18 Ms. - - - Ms. Schulz, welcome.

19 MS. SCHULZ: May it please the court, my
20 name is Elizabeth Schulz. I represent the People in
21 this matter. I'm here to discuss with you today why
22 I believe that the defendant's conviction should be
23 affirmed.

24 JUDGE STEIN: Can I ask you a question
25 about the - - - the waiver issue? I'm questioning

1 whether we can reach the validity of the appeal
2 waiver issue, because - - - do you agree that if the
3 defendant is correct that he negated an element of
4 the crime, the plea wasn't voluntary, and it has to
5 be vacated. But if he's not correct, then the issue
6 of the appeal waiver's unpreserved. Do you - - - do
7 you agree with that?

8 MS. SCHULZ: I - - - I believe so. I - - -
9 what we argued was that he - - - if he's challenging
10 his plea as involuntary, then the issue of the waiver
11 is really irrelevant, and it would - - - to this - -
12 - for this court to decide the issue, it would
13 basically force the court to issue an advisory
14 opinion, which I don't believe that this court would
15 be able to do in this instance. So really the heart
16 and - - -

17 JUDGE FAHEY: So if we go to the plea
18 waiver, we - - - we've got to address it. The
19 voluntariness can never be waived, so it doesn't
20 really matter. It's irrelevant, is your point.

21 MS. SCHULZ: If - - - if that's truly what
22 the defendant's arguing. He makes multiple
23 arguments. At least as far as the waiver is
24 concerned, our opinion is that it - - - it's really a
25 procedural argument, that if he doesn't object to, it

1 can be waived. He really makes no valid challenge to
2 the sufficiency - - -

3 JUDGE RIVERA: Well, I'm sorry. What's the
4 - - - the procedural argument being what?

5 MS. SCHULZ: It's basically - - -

6 JUDGE RIVERA: I thought his argument is
7 the court failed to determine, as shown by the face
8 of the record, that he has a full understanding of
9 his waiver of his right to appeal, therefore, his
10 plea is not knowing, intelligent and voluntary.

11 MS. SCHULZ: I - - - we're arguing that
12 it's procedural in that it - - - the actual execution
13 of the waiver was delayed post-sentence. So if he
14 had a problem with the waiver, that - - -

15 JUDGE RIVERA: So you're taking the
16 position that - - - let me got - - - get this.
17 You're saying the only waiver happened at sentencing?

18 MS. SCHULZ: Well, he was informed of the
19 waiver at the time - - -

20 JUDGE RIVERA: No, no, no. When does he
21 waive his right to plea?

22 MS. SCHULZ: Well, he - - -

23 JUDGE RIVERA: What's the People's position
24 on that?

25 MS. SCHULZ: He executes the - - -

1 JUDGE RIVERA: To appeal, excuse me.

2 MS. SCHULZ: He executes the waiver at
3 sentence with - - -

4 JUDGE RIVERA: Okay, is that when you're
5 saying he waives his right to appeal?

6 MS. SCHULZ: Correct.

7 JUDGE RIVERA: At sentencing?

8 MS. SCHULZ: Yes.

9 JUDGE RIVERA: Not when he takes the plea?

10 MS. SCHULZ: He's informed of the waiver at
11 the time of the plea allocution as a component of the
12 plea bargain, but he doesn't actually waive it until
13 sentence, when he executes a waiver with his attorney
14 that he's reviewed with the attorney.

15 JUDGE RIVERA: And so what - - - what case
16 allows the court to delay the colloquy and confirming
17 that a defendant understands - - -

18 MS. SCHULZ: Well - - -

19 JUDGE RIVERA: - - - what's entailed in the
20 consequences of a waiver of the right to appeal - - -

21 MS. SCHULZ: Well, we cite a case - - -

22 JUDGE RIVERA: - - - until sentencing?

23 MS. SCHULZ: We've cited case law in our
24 brief that referenced the fact that a defendant could
25 waive his right to appeal after a trial, post-

1 verdict.

2 JUDGE PIGOTT: Before the sentence?

3 MS. SCHULZ: Before sentence.

4 JUDGE FAHEY: Now, let me go - - - let me
5 go - - -

6 JUDGE PIGOTT: How about after?

7 JUDGE FAHEY: - - - and ask the same
8 question I asked counsel be - - - I'm sorry, Judge.
9 I didn't mean to interrupt - - - excuse me.

10 JUDGE PIGOTT: After sentence?

11 JUDGE FAHEY: Yeah.

12 MS. SCHULZ: It - - - to me it was at the
13 same time, but I think that what the panel's missing
14 is that when the defendant did this at the time of
15 sentence, there's no question that the fact that he's
16 waiving his right to appeal is separate and apart
17 from the other rights that he waives by virtue of the
18 - - - the guilty plea. So it's not conflated, which
19 is an issue that is frequently a reason to invalidate
20 waivers in a colloquy.

21 JUDGE RIVERA: Okay, but it - - - it - - -
22 okay. So if I'm understanding you, he goes and he
23 takes a plea. He is, as - - - as Acting Chief Judge
24 Pigott has already described, given this ex - - - got
25 - - - go through this extensive quality - - -

1 colloquy about the - - - the trial rights that he is
2 waiving, that he's giving up on that plea. Everybody
3 agrees with that. It doesn't seem to be an issue in
4 the case. It's obvious on its face in the record.

5 You're saying that - - - that the defendant
6 could then take a plea, and then at the sentence say,
7 and in addition, I waive my right to appeal. So you
8 take a plea, and then at some later point in time,
9 waive the right to appeal.

10 MS. SCHULZ: Well, that's what appears to
11 have happened here from the - - -

12 JUDGE RIVERA: No, I know that's the - - -

13 MS. SCHULZ: - - - face of the record, so I
14 - - -

15 JUDGE RIVERA: I understand that, counsel,
16 I'm just trying to get straight - - -

17 MS. SCHULZ: Right.

18 JUDGE RIVERA: - - - what you say is the
19 basis by which the challenge here, which is the
20 challenge to the plea, is nevertheless meritless
21 under that scenario? If he doesn't know about the
22 consequences of a waiver of the right to appeal when
23 he takes the plea, then how is the plea valid,
24 knowing and intelligent?

25 MS. SCHULZ: Well, the waiver of the right

1 to appeal is really - - - in this case, it's really
2 separate from the arguments that he's - - - he's - -
3 - it's not the same as the plea itself.

4 JUDGE RIVERA: Well, we've said that in
5 Lopez. We've said that in other - - -

6 MS. SCHULZ: Right.

7 JUDGE RIVERA: - - - cases, of course, but
8 I - - - but when I take the plea, if I'm the
9 defendant, aren't I supposed to know what the
10 consequences are of taking the plea, including my
11 rights to appeal?

12 MS. SCHULZ: Well - - -

13 JUDGE RIVERA: Isn't that what we have
14 said?

15 MS. SCHULZ: Yes, but here the - - - the
16 result would simply be the invalidation of the
17 waiver. It has - - -

18 JUDGE RIVERA: Let me try it another way.
19 Let me try it another way. Let me try it another
20 way. So he gets to sentencing, judge goes through
21 this colloquy on the waiver of the right to appeal,
22 and defendant says, I don't give up that right. So
23 do you then, as the ADA, then say, okay, then we are
24 pulling out of this plea?

25 MS. SCHULZ: He - - - I - - - I think it

1 would be - - -

2 JUDGE RIVERA: The judge - - - must the
3 judge automatically allow withdrawal of the plea?

4 MS. SCHULZ: Potentially - - -

5 JUDGE RIVERA: I mean - - -

6 MS. SCHULZ: - - - they would have - - - he
7 may have to entertain - - - I think he would have to
8 file a motion to withdraw the plea.

9 JUDGE RIVERA: And his grounds would be
10 what?

11 MS. SCHULZ: That he wasn't advised of the
12 consequences of the - - - the waiver.

13 JUDGE RIVERA: Exactly, that's the point.
14 But you're confirming that he hasn't been advised of
15 those consequences, correct? You've just said that.

16 MS. SCHULZ: Well, he was - - -

17 JUDGE RIVERA: I - - - that was my first
18 question to you.

19 MS. SCHULZ: He was advised of the waiver,
20 but they did the actual colloquy at the time of
21 sentence.

22 JUDGE PIGOTT: Judge Fahey, you had a - - -

23 JUDGE FAHEY: We were talking before about
24 the Second Department with the questions on that. It
25 seems - - - at my count, there are five cases in the

1 Second Department that have held this particular type
2 of procedure to be wrong. What distinguishes this
3 case? It's the same judge, same process there to - -
4 - they seem to have - - - the other ones - - -

5 MS. SCHULZ: To be honest with you - - -

6 JUDGE FAHEY: Let me finish.

7 MS. SCHULZ: Oh, I'm sorry.

8 JUDGE FAHEY: The other ones - - - it's - -
9 -

10 MS. SCHULZ: I apologize.

11 JUDGE FAHEY: It's all right. It's all
12 right. It's tough getting an argument. This is a
13 tough crowd. It - - - Gil was one of the - - - the
14 cases that - - - that the appellant had mentioned
15 before, but anyway, the five cases themselves all
16 seem to be in front of the same judge, in the same
17 procedure, they've held it to be wrong; yet in this
18 one, they said the appeal waiver was valid. It's
19 your burden; why?

20 MS. SCHULZ: I have no idea. I - - - it - -
21 - - previously - - -

22 JUDGE FAHEY: So then - - - then let's - -
23 - let's assume the appeal waiver was invalid and
24 let's just go to the - - - the KVI (ph.) argument,
25 the real argument in the case.

1 MS. SCHULZ: Right.

2 JUDGE FAHEY: Right, go ahead.

3 MS. SCHULZ: Well, we feel that - - - I - -
4 - I'm aware of Judge Pigott's feelings on this
5 matter. After having multiple leave conferences, I
6 think I told him that the first time he told that
7 there was no crime committed, I said I had a cardiac
8 event, and I continue to do so, frankly, but I - - -
9 I think that I wouldn't want this court to be misled
10 by statements that this defendant made that were
11 really outside of the record of the plea in his - - -
12 in his pro se supplemental brief.

13 You know, there's no point in having a
14 guilty plea if a defendant can come in after he's - -
15 - he's forfeited his legal de - - - his defenses,
16 basically, and said I'm not going to contest the
17 People's allegations; I'm not going to go to trial;
18 I'm going to plead guilty; and gets a benefit, and
19 then has the chance to go to the Appellate Division
20 and argue, like - - - I don't know where he got these
21 facts. They're not my understanding of the facts. I
22 mean, my concern is that if I go into all of the
23 facts, I'll be arguing matters that are outside of
24 the record.

25 JUDGE PIGOTT: That's right, and you know,

1 and - - - and I - - - I feel your pain with respect
2 to that, but it - - - it just struck me that it was
3 never there, for example, Ms. Muller at - - - who I
4 think was the executive director, there's no
5 statement from her in the record that - - - that - -
6 - you know, that - - - that I had, because I had the
7 - - - you know, the Appellate Division one.

8 And nowhere - - - she must have appeared in
9 the grand jury, but - - - but nowhere is there any
10 evidence that - - - probably because it didn't come
11 up till his brief - - - that - - - that what he said
12 is true, that they threw these records out. And - -
13 - and - - - and I thought, they're the ones that
14 ought to be embarrassed, and - - - and then - - - and
15 then the scenario that he - - - at least he developed
16 in his brief really seemed bizarre and - - - and
17 that's why I - - - I couldn't figure out, you know,
18 what was going on. But it's not even argued here,
19 so.

20 MS. SCHULZ: I mean, there's two scenarios
21 from that. It - - - one is that it's bizarre
22 because, you know, he's - - - he's being picked on
23 and he didn't actually commit a crime. Or the other
24 one is that it's really bizarre and his attorney did
25 the right thing by having him plead guilty before he

1 could go to trial on his so-called defenses and get
2 smacked on a possible sentence of one-and-a-third to
3 four.

4 So it's really - - - I - - - before I let
5 the court get led down this path, I just want to
6 refer back to the plea allocution where he says - - -
7 he admits to overreaching. He admits that he
8 extorted money from them. He - - - he admits that
9 they weren't his records.

10 JUDGE PIGOTT: But what - - - weren't the -
11 - - in that defense, we could go over all of this - -
12 - but he never said he extorted money. He, you know
13 - - - he - - - that was I think it was the judge put
14 - - - put that word in the record or maybe - - -
15 maybe it was the district attorney, the ADA, but - -
16 - but - - - because he kept - - - you know, he kept
17 talking about however this thing unfolded, and - - -
18 and - - - and no one refuted it. I guess that's what
19 kind of got me going and gave you a heart attack.

20 MS. SCHULZ: It did. Well, I - - - the
21 thing that is is that there's no doubt that this is a
22 very vocal defendant and he is intelligent. And when
23 the court was going through the allocution, and his
24 attorney said, you know, on the record, I believe - -
25 - my client understands that he extorted money and he

1 broke the law, and there is no Robin Hood defense and
2 the court affirmed him, yes, that's correct; there is
3 no Robin Hood defense, he doesn't say anything. And
4 he never moves to withdraw the plea on this su - - -
5 sufficiency of the allocution.

6 His 440 motion wasn't filed until after his
7 conviction was affirmed in the Appellate Division, so
8 it couldn't preserve any of the issues that he's
9 trying to raise here. I mean, I have - - - to me
10 there's - - - there's nothing - - -

11 JUDGE FAHEY: Well - - -

12 MS. SCHULZ: - - - in the plea allocution
13 that renders it involuntary or invokes the Lopez
14 exception.

15 JUDGE FAHEY: No, I was - - - I was
16 interested on the extortion question. The judge does
17 what everybody does is - - - is he read the - - -
18 read the charge. He basically - - - and the way I
19 read it, it says, that you - - - did you intend to
20 steal property that's valued in the excess of 3,000
21 dollars from the GHVFHC and that you did this by
22 means of attempting to extort property, question. Do
23 you admit that, question; then he says "yes".

24 MS. SCHULZ: Correct.

25 JUDGE FAHEY: So he doesn't - - - he

1 doesn't directly admit it, but - - -

2 MS. SCHULZ: Right. But he - - -

3 JUDGE FAHEY: - - - didn't use the word,
4 but he - - - he - - - but he agrees with what the
5 judge is saying.

6 MS. SCHULZ: Right, correct.

7 JUDGE PIGOTT: Wasn't that strange? I
8 mean, it - - - it - - - the 3,000 hit me. I realize
9 it's a threshold thing, but the way he told the
10 story, if - - - if she'd said, you know, we'll write
11 - - - we'll write you a check for 1,000 dollars, he
12 would have accepted that.

13 MS. SCHULZ: I don't - - - I don't think
14 that's - - - that's really what happened here. I
15 think that this entire scenario was his creation,
16 and, you know, his in - - - attempts to explain on
17 appeal what happened as - - - you know, a liti - - -
18 a stipulation to settlement, and you know, we had
19 this agreement.

20 That's not what happened at all. He did
21 everything, but you know, put a gun to their heads.
22 And then he - - - you know, if someone forced you to
23 sign a contract, that doesn't necessarily mean you
24 can enforce it. And there was an attorney in the
25 Appellate Division who did the same thing and was

1 disciplined.

2 So I - - - I don't know - - - you know, we
3 - - - I think we feel affronted because we feel like
4 he got the benefit of his bargain, and he said he
5 wasn't going to go to trial on this, and now he's
6 coming back and saying, well, this was really a
7 contract. Well, if you thought it was a valid
8 contract, you should have gone to trial.

9 JUDGE PIGOTT: Yeah, that's what we
10 wondered. Well, tha - - - thank you, Ms. Schulz.

11 MS. SCHULZ: You're welcome.

12 JUDGE PIGOTT: Mr. - - - Mr. Feldman, you
13 have a few minutes.

14 MR. FELDMAN: Your Honors, just two quick
15 points, just so there's no confusion. My
16 understanding of - - - of the People's argument
17 regarding the appellate waiver was that that could be
18 unpreserved, and this court, in no - - -

19 JUDGE STEIN: Where does - - - where does
20 it get you? I mean, so if - - - if we agree - - - if
21 we agree that the procedure here and that the - - -
22 the waiver of the right to appeal was invalid and
23 ineffective, does that render the plea involuntary or
24 does that just enable or pre - - - reserve for the
25 defendant his appeal rights?

1 MR. FELDMAN: Correct, the latter.

2 JUDGE STEIN: Okay. So, if that's the
3 case, then doesn't it still have to be preserved, his
4 argument? Unless - - - unless the Lopez exemption
5 applies - - - exception applies.

6 MR. FELDMAN: No. The - - - there is - - -

7 JUDGE STEIN: Why?

8 MR. FELDMAN: I'll tell you why. There's a
9 body of federal case law enunciated by the First
10 Circuit Court of Appeals as of, I believe, 2014,
11 which talks about appellate waivers and if there is
12 no objection, it will be reviewed for plain error if
13 a challenge is raised on appeal. In New York State,
14 no court has ever talked about nonpreservation with
15 an appellate waiver.

16 JUDGE STEIN: Well, if there was no - - -
17 if there was never a waiver of the right to appeal
18 here, if they didn't even talk about the waiver of
19 right to appeal, it wasn't part of the bargain, then
20 aren't we back - - - aren't we at your - - - your
21 argument on - - - on whether they negated an element
22 of the crime?

23 MR. FELDMAN: Yes.

24 JUDGE STEIN: Okay. So one - - - I don't
25 under - - -

1 MR. FELDMAN: Because one is procedural and
2 this is on the merits.

3 JUDGE STEIN: I don't understand why the
4 waiver of the right to appeal has any effect on what
5 we're doing here.

6 MR. FELDMAN: Because if the waiver of the
7 right to appeal is enforced, he would be barred from
8 addressing the merits in point 2 of - - - of the
9 brief.

10 JUDGE STEIN: How - - - well, how could it
11 be barred if it goes to the voluntariness of his
12 plea? The appellate - - - the waiver of the right to
13 appeal doesn't bar a challenge - - -

14 MR. FELDMAN: Right.

15 JUDGE STEIN: - - - to the voluntariness of
16 the plea, so again, I don't - - - I don't understand
17 the effect of it.

18 MR. FELDMAN: The - - - a - - - a - - -
19 that's correct. A challenge to an appellate waiver
20 based on voluntariness survives the appellate waiver,
21 but there's a little twist on that, because we're
22 also arguing that the appellate waiver wasn't knowing
23 and intelligent, which is slightly different than
24 whether it was voluntary. And we're - - - we're just
25 touching all the bases to make sure that the post-

1 plea appellate waiver is - - - is found prohibited
2 because a defendant has to know all of his rights ab
3 initio and not at sentence when it's too late.

4 JUDGE PIGOTT: I think we have your
5 argument. Thank you, Mr. Feldman.

6 MR. FELDMAN: Oh, thank you very much, Your
7 Honors.

8 (Court is adjourned)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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. Raymond Leach, No. 12, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: January 19, 2016