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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

DENNIS J. SINCERBEAUX,

No. 113
(papers sealed)

Respondent.

20 Eagle Street
Albany, New York 12207
June 1, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Number 113, People v.
2 Dennis Sincerbeaux.

3 MS. DAVISON: Good afternoon, may it please
4 the court. Mary Davison, on behalf of the appellant,
5 Mr. Sincerbeaux.

6 CHIEF JUDGE DIFIORE: Ms. Davison, would
7 you like to reserve any but - - - rebuttal time?

8 MS. DAVISON: Thank you for reminding me,
9 Judge DiFiore. Two minutes, please.

10 CHIEF JUDGE DIFIORE: Two minutes?

11 MS. DAVISON: My client, like every other
12 offender who is labeled under SORA, has the liberty
13 protected interest of being labeled accurately. And
14 I respectfully submit in this case he was not labeled
15 accurately, and thus brings his case before the court
16 for its consideration.

17 First with respect to this argument, I - -
18 - I would submit that the SORA court abused its
19 discretion as a matter of law in its de - - -
20 determination to deny the downward departure under
21 risk factor nine. My client had previously been
22 convicted of an endangering-the-welfare-of-a-child
23 misdemeanor offense, or an EWOC, some twenty years
24 prior to his - - -

25 JUDGE STEIN: He can request a downward

1 departure?

2 MS. DAVISON: Yes.

3 JUDGE STEIN: You - - - you didn't call it
4 that, right?

5 MS. DAVISON: I believe the - - - the trial
6 attorney did call it that, Judge Stein.

7 CHIEF JUDGE DIFIORE: And what were the
8 mitigating circumstances that were argued in favor of
9 a downward departure or any circumstances argued in
10 favor of a downward departure?

11 MS. DAVISON: If you look at the three
12 prong test - - - it comes from Galo - - - Gillotti,
13 is it - - - did I pronounce it correctly, [Ga-lotti]
14 - - - the first prong says that - - - that it has to
15 be a - - - a - - - something that's otherwise not
16 taken into account by the guidelines.

17 And I would submit that, because, in the
18 guidelines themselves, they allow for this downward
19 departure, just by virtue of the fact that this - - -
20 that there is no sexual component to the underlying
21 EWOC conviction, that that prong is bypassed and goes
22 next to the defendant's burden to show by a
23 preponderance that, in fact, that's true, that - - -
24 that there was no sexual - - -

25 JUDGE ABDUS-SALAAM: Well, does how does

1 our Howard - - - our recent Howard case impact the
2 analysis about whether points should be assessed or a
3 downward departure should be granted?

4 MS. DAVISON: Well, Howard, of course, was
5 different, because it involved an automatic override
6 and it's not the case here at all. I would submit -
7 - - I did in my - - -

8 JUDGE ABDUS-SALAAM: There was no sexual
9 component to that relation - - - that crime either.

10 MS. DAVISON: Right. But - - - but you
11 start - - - you started at a different point. You
12 started with the automatic override. Here - - -

13 JUDGE ABDUS-SALAAM: It's just
14 discretionary? It doesn't have to be applied?

15 MS. DAVISON: But what's not - - - but
16 what's not discretionary is the guideline in a case
17 like this, telling the SORA court that it may
18 consider a downward departure. In other words, the -
19 - - it - - -

20 JUDGE GARCIA: But what's the proofs that
21 they didn't consider it and just not do it?

22 MS. DAVISON: Well, the decision, I think,
23 first of all.

24 JUDGE GARCIA: What is it - - - what
25 specifically does it say? I mean, yes, you can look

1 at that as a basis for a downward departure, right?

2 MS. DAVISON: The court never specifically
3 sa - - -

4 JUDGE GARCIA: You can - - - it's thirty,
5 right? You argue it should be five, because there's
6 no sexual component to it?

7 MS. DAVISON: Well, it's - - - it's an
8 interesting question, because the guideline says the
9 fact that there's no sexual component may warrant a
10 downward departure.

11 JUDGE GARCIA: Right.

12 MS. DAVISON: It doesn't say you get a
13 five.

14 JUDGE GARCIA: Right.

15 MS. DAVISON: And we asked for a five. We
16 asked the SORA court to convert the - - -

17 JUDGE GARCIA: So that would be a downward
18 departure, right?

19 MS. DAVISON: The thirty to five. I - - -
20 I think it's a downward departure to a different
21 level.

22 JUDGE GARCIA: Right.

23 MS. DAVISON: And I - - - I don't - - - in
24 this case, they ask for a one-step downward
25 departure, because the twenty-five points would have

1 pushed him down to a level 2.

2 JUDGE GARCIA: True.

3 MS. DAVISON: But I don't see in the
4 guidelines where that's actually ever articulated.
5 It just says as a matter of discretion.

6 JUDGE RIVERA: It's a different score, but
7 I thought they're conceding these twenty-five points,
8 so why do we have to reach that issue?

9 MS. DAVISON: They're - - -

10 JUDGE RIVERA: They concede it.

11 MS. DAVISON: - - - conceding it as a
12 matter of law. I recognize that in Howard, it - - -
13 it - - - it would be a matter of an abuse of
14 discretion as - - - as a matter of law, and they
15 didn't address that. If the court considers that
16 concession with respect to the abuse of discretion,
17 I'm fine with that. That's - - - I won't address it
18 any further.

19 The second component, though, is - - - and
20 in a sense this addresses the question of whether the
21 court had sufficient grounds is - - - is with respect
22 to risk factors one in five, did the court have a - -
23 - did the people prove by clear and convincing
24 evidence that this conduct began when the complainant
25 was thirteen and involved the use of force or the use

1 of violence.

2 I - - - I would submit that the case law in
3 Mingo specifically allows for the admission of
4 reliable hearsay. But in this case there was no
5 reliable hearsay. In other words, what was put
6 before the SORA court was not - - - similar to the
7 other cases that this court has reviewed or that the
8 departments have reviewed.

9 CHIEF JUDGE DIFIORE: What are you
10 suggesting was put before the SORA court that was not
11 reliable?

12 MS. DAVISON: Well, for example, my client
13 was charged originally with incest that occurred
14 between August and September of 2007, I believe.
15 Incest has no component of age. And in 2007, the
16 complainant would have been twenty-five or twenty-six
17 years old.

18 CHIEF JUDGE DIFIORE: Is the SORA court
19 limited to that specific - - - those specific acts
20 charged within that August to September period?

21 MS. DAVISON: No, but I - - - I would
22 submit that this is different than cases like Mingo,
23 where there - - - there's something that's reliable,
24 something beyond simply - - -

25 CHIEF JUDGE DIFIORE: What about the

1 victim's sworn statement?

2 MS. DAVISON: I - - - I submit and we
3 submitted to the SORA court, this was not a sworn
4 statement. The victim says specifically I state the
5 following. She never says I swear to it. It's not
6 sworn to.

7 JUDGE STEIN: Why does it have to be sworn?
8 If hearsay is - - - is permissible as you say, why -
9 - - why wouldn't this be admissible, reliable hearsay
10 coming from the victim, you know, with some
11 corroboration about DNA and - - -

12 MS. DAVISON: Well, sure - - - sure.
13 Hearsay is - - -

14 JUDGE STEIN: We could go to timing, beyond
15 - - -

16 MS. DAVISON: Mingo talks about sworn
17 statements of the victim, and maybe it's splitting
18 hairs, but - - -

19 CHIEF JUDGE DIFIORE: What about statements
20 that have the form notice across the bottom? Isn't
21 that what this statement had - - -

22 MS. DAVISON: The statement says - - -

23 CHIEF JUDGE DIFIORE: - - - about false
24 statements are punishable?

25 MS. DAVISON: The statement says I

1 recognize I can be prosecuted if I made a false
2 statement. It never says I swear this is true. And
3 again, it may be splitting hairs, but it never says
4 that.

5 Moreover, my client puts - - -

6 JUDGE RIVERA: But there - - - is there - -
7 - I'm sorry. What is there to suggest that the
8 complainant is not telling the truth?

9 MS. DAVISON: My client's statements
10 controverting this. And - - - and I submit that by
11 making those statements in the context of the pre-
12 sentence report, he - - -

13 JUDGE RIVERA: That - - - that - - - that
14 cannot work under Mingo, because obviously those
15 kinds of - - - respondents in the same position as
16 your client, would have also controverted.

17 MS. DAVISON: I respectfully disagree,
18 because remember, Mingo deals with corroborating
19 factors, sworn statements, for example, the plea - -
20 -

21 JUDGE RIVERA: But it covers files. Files
22 as Judge Stein has already pointed out it may include
23 double hearsay. The hearsay heard by somebody that
24 then gets in a document. That's another level of
25 hearsay.

1 MS. DAVISON: But it doesn't cover prior
2 bad acts. So if - - - if you plead guilty to a rape
3 that satisfies an original complaint of sexual abuse
4 or endangering the welfare, for example, that's what
5 Mingo covers. This - - - these are incidents that
6 happened in 1998, some of them. These are incidents
7 that are not corroborated by - - - by
8 contemporaneously - - -

9 JUDGE RIVERA: But do you dispute that
10 other than your client saying that's not what
11 happened, that this is, what one would otherwise say,
12 is reliable. The person themselves saying this is
13 what occurred.

14 MS. DAVISON: There is no DNA. There - - -
15 in fact, are statements by the complainant saying I'm
16 not sure who the father of my children are. Then
17 certainly there was a DNA test that established that
18 another party was the father of at least one of the
19 children.

20 But I think in this case it has to be
21 considered that if, in fact, my client's version of
22 these incidents is correct and that would certainly
23 be up to the SORA court to determine, then, in fact,
24 the complainant in this matter is a codefendant in
25 the incest. And as difficult and unpleasant as - - -

1 CHIEF JUDGE DIFIORE: Say - - - say that
2 again? The complainant - - -

3 MS. DAVISON: The complainant is a
4 codefendant in the incest because she would have been
5 a consenting adult who engaged in this relationship
6 with a person of consanguinity. So it - - - although
7 it's not - - - it's a difficult concept to absorb,
8 you have to consider that in a sense she's a
9 codefendant giving statements against a codefendant,
10 and this court - - -

11 JUDGE STEIN: Wait, are you suggesting - -
12 -

13 CHIEF JUDGE DIFIORE: So are we
14 disregarding her statements about - - - completely -
15 - - about the force and the time of this - - - the
16 whole events - - - series of events began from when
17 she was first moved into the home with her father?

18 MS. DAVISON: I - - - I would submit that
19 it was up to the SORA court to begin the clock at age
20 nineteen, which is the - - - the age at which my
21 client admitted - - -

22 CHIEF JUDGE DIFIORE: And you're saying
23 that's because of the statement that she gave doesn't
24 meet the test of being a sworn statement?

25 MS. DAVISON: Nor is there any

1 corroboration, nor as in other cases are there
2 contemporaneous sworn police reports, nor are there
3 felony complaints, nor is there an indictment, grand
4 jury - - -

5 CHIEF JUDGE DIFIORE: Are you familiar with
6 our case called People v. Sullivan, in which the
7 court held that the - - - the form notice across the
8 bottom of a person's statement is a functional
9 equivalent - - - I - - - I think the exact language
10 is, "We believe this statutorily authorized form
11 notice served as a procedural and functional
12 equivalent of the more traditional type of oath or
13 affirmation."

14 And I'm wondering how that squares with
15 your argument?

16 MS. DAVISON: Again, I think it was
17 incumbent on the SORA court when these issues of fact
18 came before it, to put the burden on the People to
19 prove by clear and convincing evidence that that
20 version of events was the accurate and reliable
21 version of events, and I think that they failed in
22 that regard.

23 CHIEF JUDGE DIFIORE: Thank you, counselor.

24 MS. DAVISON: Thank you.

25 CHIEF JUDGE DIFIORE: Counsel?

1 MR. ROSEKRANS: My name is Bruce Rosekrans,
2 and I represent the People of the State of New York.

3 JUDGE STEIN: What exactly are you
4 conceding? Are you conceding that there can never be
5 points awarded under risk factor five - - - I'm
6 sorry, nine, if the endangering conviction doesn't
7 involve a sexual component?

8 MR. ROSEKRANS: No, Knox - - - Knox makes
9 that very clear, where this court held that there was
10 a series of kidnappings. I think there were, like -
11 - - there were a total of three cases before the
12 court.

13 JUDGE STEIN: So are you saying that they -
14 - - it can only be five points, not thirty points?

15 MR. ROSEKRANS: No, I'm - - -

16 JUDGE STEIN: So what - - - I - - - I'm not
17 su - - - it's - - - I'm not clear what your
18 concession is.

19 MR. ROSEKRANS: In this particular case,
20 the only proof that we had was from the probation
21 report that he had hit his son in the back of the leg
22 with a board.

23 JUDGE STEIN: Right, but - - -

24 MR. ROSEKRANS: Okay.

25 JUDGE STEIN: - - - I - - - the point - - -

1 I guess my point is, is that assuming that there is
2 no sexual component, that means that the court could
3 not award thirty points for some other reason.

4 MR. ROSEKRANS: That's why - - - that's
5 correct. And for that ca - - - in this - - -

6 JUDGE STEIN: And where - - - where do - -
7 - where do the guidelines - - - where does anything
8 say that that's the case that it's required to have
9 the - - - a sexual component?

10 MR. ROSEKRANS: I mean, it does it as a
11 blanket for all - - - that endangering the welfare of
12 a child shall be considered as a factor to be
13 considered as a - - -

14 JUDGE GARCIA: It's thirty points, right?

15 MR. ROSEKRANS: For thirty points, correct.

16 JUDGE GARCIA: So what are you conceding?

17 MR. ROSEKRANS: That in this ca - - - I'm
18 saying in this case, based on these facts that was
19 before the court, I'm saying that the appellant is
20 right.

21 JUDGE STEIN: Right about what?

22 JUDGE RIVERA: But there may be other - - -

23 MR. ROSEKRANS: Right about - - -

24 JUDGE RIVERA: - - - there may other cases

25 - - -

1 MR. ROSEKRANS: There may other cases where
2 it was appropriate.

3 JUDGE RIVERA: - - - involving this kind of
4 crime - - -

5 MR. ROSEKRANS: Correct.

6 JUDGE RIVERA: - - - where that point score
7 would be appropriate. But you were conceding that in
8 this particular case - - -

9 MR. ROSEKRANS: In this particular - - -
10 that's correct.

11 JUDGE RIVERA: - - - the twenty-five points
12 - - - well, the People would take the position that
13 the court should not count twenty-five points. That
14 court may - - - may hold otherwise.

15 MR. ROSEKRANS: Yes.

16 JUDGE RIVERA: Your concession is that you
17 may.

18 JUDGE GARCIA: And why is that?

19 JUDGE STEIN: Yeah?

20 JUDGE GARCIA: Why is it not thirty points
21 in this case?

22 MR. ROSEKRANS: Based upon what the proof
23 that was shown to the trial court in my analysis - -
24 - maybe my twenty years of - - - as a defense
25 attorney are showing in this particular case, but the

1 prosecutor - - -

2 JUDGE ABDUS-SALAAM: How does our Howard
3 analysis impact your concession?

4 MR. ROSEKRANS: The - - -

5 JUDGE ABDUS-SALAAM: You - - - you conceded
6 this before Howard was decided.

7 MR. ROSEKRANS: I don't know. I can't
8 answer that. I'm drawing a blank on Howard right
9 now. I apologize.

10 JUDGE RIVERA: Well - - - well, the one
11 that's in Howard are about a statutory - - - right -
12 - - it's about a statutory presumption - - -

13 MR. ROSEKRANS: Okay.

14 JUDGE RIVERA: - - - that even - - - even
15 if - - -- even if sex is not involved or it doesn't
16 have a sexual component, nevertheless they're treated
17 as a sexual offender for purposes of SORA.

18 MR. ROSEKRANS: Similar to Knox. I'm
19 saying this - - -

20 JUDGE RIVERA: So yeah, it's the same
21 statute as Knox, yes.

22 MR. ROSEKRANS: Yeah, same thing.

23 JUDGE ABDUS-SALAAM: Doesn't the reasoning
24 - - - wouldn't the reasoning - - -

25 JUDGE RIVERA: You don't have that - - -

1 this statute doesn't fall under that category.

2 MR. ROSEKRANS: That's right.

3 JUDGE ABDUS-SALAAM: Yeah, but wouldn't the
4 reasoning in Howard still apply, even though it's not
5 a sexual component to it? It's endangering the
6 welfare of this child.

7 MR. ROSEKRANS: You see endangering in a
8 lot of cases. It can be a range from inappropriate
9 supervision, excessive discipline. It can also be
10 used - - - quite frequently it's used to in domestic
11 violence cases between a husband and wife or two
12 parents to elevate a harassment case to a
13 misdemeanor.

14 JUDGE ABDUS-SALAAM: Yeah, but we know in
15 this case that the child was hit with a two-by-four
16 board and was bruised badly, pretty much like - - -
17 not as badly as the child in Howard, but still the
18 child was bruised pretty badly. It's not a ex - - -
19 you know, a failure to supervise.

20 MR. ROSEKRANS: I'm also taking - - -

21 JUDGE ABDUS-SALAAM: This was just active -
22 - -

23 MR. ROSEKRANS: There's also ta - - -
24 twenty years difference between - - - I think twenty
25 years from the time of that conviction and the time

1 of his plea to the sex offense.

2 That - - - and just conceding it for this
3 case. Not - - - under these set of circumstances.

4 CHIEF JUDGE DIFIORE: Was the SORA court
5 entitled to credit the statement of the victim in
6 this case?

7 MR. ROSEKRANS: Yes, Your - - - yes, Your
8 Honor. I believe there was sufficient - - - it does
9 meet the requirements of Mingo and Balic. The - - -
10 they do have the sworn test - - - sworn statement.
11 There's two statements made by the victim, and
12 they're both consistent. The sworn statement made to
13 the arresting officer as well as the victim impact
14 statement in the probation report.

15 In addition, you have a corroborating
16 statement by the victim's sister, that throughout the
17 time period between when she was a teenager, that she
18 would have bruises and she would say - - - tell her
19 that her father did it and that she was basically
20 getting special treatment and - - - for lack of a
21 better term, being bribed or paid off.

22 That all goes together to - - - each of
23 those support that statement. And I - - - I think
24 that does meet the qualifications of what's required
25 by Mingo and Balic.

1 JUDGE RIVERA: Given your position on that
2 and your concession on - - - on the first issue and
3 those twenty-five points, what is your recommendation
4 about how we should treat the case? What should we
5 do?

6 MR. ROSEKRANS: I would like to see it sent
7 back down on that issue.

8 JUDGE RIVERA: To go to the SORA court to
9 determine what?

10 MR. ROSEKRANS: To go to the SORA court to
11 - - - well, this court has several options. You - -
12 - you can discount that and impose a level two or
13 whatever the score - - - the risk assessment would be
14 without those points. I can tell you what - - - and
15 I anticipate that. We have the option, as - - - as
16 does the appellant, to petition the SORA court for a
17 modification after a period of years.

18 JUDGE STEIN: So you haven't done that?

19 MR. ROSEKRANS: We have - - - it would be a
20 moot point. The judge would look at it and say, he's
21 a level three; what are you doing here?

22 JUDGE GARCIA: I'm still a little stuck on
23 the concession here. The commentary, the guidelines
24 say, the board decided to treat endangering the
25 welfare of a child as if it was a sex crime, because

1 generally it involves sexual misconduct, especially
2 when part of a plea bargain. But that where a review
3 of the record indicates that there was no such
4 misconduct, a departure may be warranted.

5 So your position is that it was an abuse of
6 discretion for there not to be departure in this
7 case?

8 MR. ROSEKRANS: The departure should have
9 been made. That's my - - - yes. It should have been
10 made, because it was not this case. This was not a -
11 - - it was not a reduction down. We had no proof of
12 that. The only proof that was there was what the
13 probation off - - - officer discovered and put in his
14 report.

15 JUDGE STEIN: What if it was outweighed to
16 balanced - - - balanced by other factors, for
17 example, the - - - the severity of the acts of that
18 and - - - and the nature of the alleged sexual
19 misconduct here. Is - - - isn't that what you would
20 be arguing for your upward departure? So - - -

21 MR. ROSEKRANS: Which wasn't reached at
22 all, because he - - -

23 JUDGE STEIN: So if - - - if - - - if
24 you're arguing there should be an upward departure
25 and they're arguing that it should be a downward

1 departure, can't - - - wouldn't it be within the
2 judge's discretion to say, no departure, I'm sticking
3 with the points here?

4 MR. ROSEKRANS: Yes, it would be within the
5 judge's discretion for that.

6 JUDGE STEIN: Okay.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.
8 Counsel?

9 MS. DAVISON: Thank you.

10 I just want to clarify. The - - - the
11 child that was involved in the EWOC conviction is not
12 the complainant on the underlying offense here, on -
13 - - on the SORA offense. It's a completely different
14 child.

15 JUDGE ABDUS-SALAAM: It's a - - - it's a
16 son, as opposed to - - -

17 MS. DAVISON: Right, right.

18 JUDGE ABDUS-SALAAM: Yeah, I understand
19 that.

20 MS. DAVISON: So it's unlike Howard to - -
21 - to the extent - - -

22 CHIEF JUDGE DIFIORE: Is that the test? Is
23 that the standard? That both of you - - -

24 MS. DAVISON: No, no, I just - - - I just
25 want to make sure that the - - -

1 CHIEF JUDGE DIFIORE: Oh.

2 MS. DAVISON: - - - court is clear on that.

3 That's all.

4 CHIEF JUDGE DIFIORE: Oh, okay.

5 MS. DAVISON: Because it sounded to me as
6 if it was being considered something like Howard, but
7 it's - - - it's - - - it's not true at all.

8 I do want to refute the allegations that
9 the sister somehow corroborated this. In fact, the
10 sister told police she had - - - didn't know anything
11 about - - - she'd never seen any kind of conduct like
12 this. That she didn't - - - the father didn't come
13 in and take the - - - the complainant out of the room
14 like the complainant said she did. The - - - she did
15 say I saw bruises, but there was no timeline. She
16 didn't say it was when she was a teenager. She said
17 I - - - I've heard about this, but didn't give any
18 kind of indication whether this was when the
19 complainant was an adult or at any other time.

20 And there's no indication in the record
21 that the father offered the complainant special
22 treatment or bribed her in any way at the time that
23 she was a child. That's - - - that just is not in
24 the record at all.

25 If there are no other questions, I rely on

1 the brief.

2 CHIEF JUDGE DIFIORE: Thank you, counsel.

3 MS. DAVISON: Thank you.

4 CHIEF JUDGE DIFIORE: Thank you.

5 (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. Dennis J. Sincerbeaux, No. 113, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: June 8, 2016