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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 157

ROY S. KANGAS,

Appellant.

20 Eagle Street
Albany, New York 12207
September 14, 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 EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Number 157 on the
2 calendar, People v. Roy Kangas.

3 MR. CURLEY: May it please the court, I'm
4 Mark Curley. I'm here for Appellant Roy Kangas, and
5 I'd like to reserve two minutes - - -

6 CHIEF JUDGE DIFIORE: Two minutes, sir?

7 MR. CURLEY: - - - for rebuttal. Thank
8 you. Your Honors, this case presented competing
9 claims or sponsorship and certification of some
10 business records. There were two separate exhibits.
11 One was from the New York Forensic Investigation
12 Center, simulator solutions. And one was for
13 calibration and maintenance records, and that was
14 from the Division of Criminal Justice Services.

15 JUDGE STEIN: Can we - - - can we ignore
16 the ones from the - - - from the county and - - - and
17 just go based - - - if there's an appropriate
18 certification based on the state agencies, then why
19 isn't that okay?

20 MR. CURLEY: Well, it depends on how
21 they're put into evidence, Judge. They were put in
22 under 4518(a) and not 4518(c), and I would say that
23 there's no discussion of certification. Proper
24 analysis for a business record is 4518(a), generally.
25 And that requires an analysis of are they made in the

1 - - - in the regular course of business by someone
2 who has a duty in a close type of proximity, et
3 cetera.

4 And then you get to the second part of that
5 paragraph that says is it an electronic record, and
6 if it's an electronic record, then you have to go
7 State Technology Law 306. 306 will direct you to
8 C.P.L.R. 4439 to ask whether it's a reproduction or
9 not. Certification only comes in under 4518(c),
10 which are records that are produced in response to a
11 subpoena, and there's a good reason for that. A
12 subpoena catches someone's attention. It's too easy
13 for a certification to be a road officer
14 certification, and this case is a - - - is a good
15 example of that. The sheriff's office may have
16 thought that those were business records of their own
17 and they certified them. Said the - - -

18 JUDGE STEIN: But I'm saying if we ignore
19 what the sheriff's did and we just do what the state
20 did.

21 MR. CURLEY: If you ignore it, then the
22 certification has to be made under 4518(c), and those
23 have to be subpoenaed records. 4518(c) says they're
24 either 2306 - - -

25 JUDGE STEIN: Is that because you say that

1 4518(a) doesn't apply or doesn't apply to the - - -
2 to the government? Is that - - -

3 MR. CURLEY: 4518(a) doesn't mention
4 certification at all. I would say that certification
5 is not enough under 4518(a). And I would suggest to
6 you, Judge, that, no, the - - - I heard the first
7 case here talk about decisions that were 150 years
8 old, and I'll say to you that when electronic
9 technology is involved, ten years is 150 years.

10 JUDGE RIVERA: Agree with that. So what
11 would should have been submitted?

12 MR. CURLEY: I think - - -

13 JUDGE RIVERA: What would have been
14 appropriate in this case?

15 MR. CURLEY: To subpoena the records in
16 from either the Forensic Investigation Center or from
17 the - - - the Department - - - Division of Criminal
18 Justice Services. When they're subpoenaed in,
19 whoever is signing in response to that subpoena is
20 alerted to the gravity of - - - of the request. And
21 they know that they could be pulled into court to
22 answer it. If not, you're going to get subpoenas - -
23 - or - - - or let me use the certification that they
24 provided. It says these records are made and kept by
25 us, and they're properly protected.

1 JUDGE FAHEY: Now you're talking about the
2 Ontario County Sheriff's Department first? So you're
3 talking about - - - no, that's not Limoges, that's
4 Felshaw, right?

5 MR. CURLEY: Pardon me?

6 JUDGE FAHEY: The Ontario County Sheriff's
7 Department is Felshaw, right?

8 MR. CURLEY: Yes, that's Katie Felshaw.

9 JUDGE FAHEY: All right. All right. So
10 let's - - - I think if I understood correctly what
11 Judge Stein was saying, let's assume that her
12 certification to comply with the business records
13 exception was wrong because they were not records
14 that were ordinar - - - kept in the ordinary course
15 of business by the sheriff's department. There may
16 have been a way for her to certify them, but the way
17 she certified them doesn't meet the requirement of
18 4518(a), right.

19 MR. CURLEY: Okay.

20 JUDGE FAHEY: All right, so assuming that,
21 so then we have Exhibit 7 and Exhibit 8. Now one was
22 preserved and one wasn't, but - - - in my mind,
23 anyway. But leaving that aside, does - - - County
24 Court, as I understand it, concluded that 4539
25 doesn't apply to documents that are originally

1 created in electronic form. And here we're talking
2 about the electronic simulator solution record which
3 is what was contained in Exhibit 7. We've got the
4 data calibrations, 8, simulator solution, 7, right?

5 MR. CURLEY: Yes.

6 JUDGE FAHEY: So - - - so County says that
7 it wasn't - - - County Court seems to say, and they -
8 - - they make a good argument, that those records
9 were originally created in electronic form and that -
10 - - and this is where 4539, we - - - I suppose we
11 need to talk about that, comes into play because 4539
12 req - - - really, we're talking about PDF-type
13 context - - -

14 MR. CURLEY: Yes.

15 JUDGE FAHEY: - - - documents.

16 MR. CURLEY: Yes.

17 JUDGE FAHEY: And so they - - - it wasn't
18 created electronically so therefore, it doesn't
19 apply.

20 MR. CURLEY: Well, Your Honor, the County
21 Court concluded that all the records that were
22 submitted were originally created in electronic form
23 and were never in any sort of hard copy, but that's
24 not true. The certification from DCJS by John Digman
25 says these are photocopies. There is no way to

1 photocopy - - -

2 JUDGE FAHEY: Um-hum.

3 MR. CURLEY: - - - a purely electronic.

4 JUDGE STEIN: And there's no electronic
5 signature. He - - - he has an actual - - -

6 MR. CURLEY: He actually signed it, yes.

7 JUDGE FAHEY: Yeah.

8 JUDGE STEIN: But is - - - was the copy
9 that was received in evidence, was that an orig - - -
10 was that his - - - did that have his original
11 signature on it?

12 MR. CURLEY: No. There was no original
13 document - - -

14 JUDGE STEIN: Do we - - - how do we know
15 that?

16 MR. CURLEY: Because they came out of the
17 prosecutor's briefcase. They're faxes. They're not
18 - - - there's no pen and ink involved.

19 JUDGE FAHEY: Well, it's funny when you
20 look at them. Digman's signature on one looks like a
21 photocopy but then another one it looks like a - - -
22 it may be Limoges, it looks like electronically
23 created - - -

24 MR. CURLEY: It does.

25 JUDGE FAHEY: - - - signature. Is that

1 fair to say?

2 MR. CURLEY: Yes.

3 JUDGE FAHEY: Yeah, okay.

4 MR. CURLEY: Yes. But there's - - -
5 there's no way to challenge any of that at trial, and
6 that's - - - if you look at the testimony of Sean
7 McVicar, who was just the poor breath test operator,
8 you know, John Leonard asked him have you ever seen
9 these records before? He says, no. Do you know
10 anything about them? Do you know if they're kept in
11 the ordinary course of business? And - - - and he
12 says no, I - - - I don't know anything about that.
13 So there's a problem with a certification being
14 conclusory with a certification saying this - - -
15 these records are - - - are protected, these records
16 are not subject to tampering or degradation, or even
17 these records are business records. Who - - - who
18 knows that? So I would submit that there was no
19 proper analysis in this trial of whether they were
20 business records and certainly no analysis of whether
21 they were electronic records, how they should be
22 protected, even if they should be accepted.

23 JUDGE FAHEY: So - - -

24 MR. CURLEY: And their admission was error.

25 JUDGE FAHEY: How does 4540 come into play

1 here?

2 MR. CURLEY: 4540, Your Honor, is - - -
3 comes into play with public records.

4 JUDGE FAHEY: Um-hum.

5 MR. CURLEY: Okay, and these are not public
6 records. I - - - I had a hard time even getting
7 these records, so I would say that public records are
8 a product. They're not something that's kept in the
9 ordinary course of business. And I'll use the
10 analogy of if I publish a newspaper, the actual
11 newspaper is not a business record. Okay. It's - -
12 - it's what I'm publishing. It's my publication.
13 But my business records as a newspaper publisher are
14 my invoices and my checks and my bills. So there is
15 a separate section for public documents, and I don't
16 think it has no application here.

17 JUDGE STEIN: Where does it say "public
18 documents"? It says - - - as I look at 4540, it
19 talks about an official record.

20 MR. CURLEY: It says - - -

21 JUDGE STEIN: An official record, not a
22 public document.

23 MR. CURLEY: Well, it says "Copies
24 permitted and official publication." And that's - -
25 - that's what I meant to say.

1 CHIEF JUDGE DIFIORE: Thank you, counsel.
2 Counsel.

3 MR. COX: Good afternoon. May it please
4 the court, I'm Steve Cox for the People. Two
5 exhibits, first, I'll touch on the easiest. As Judge
6 Fahey mentioned, the Exhibit 7 is a digitally created
7 and digitally record exhibit. That's where we're
8 going from now on. That's pretty much how all
9 exhibits in these DWY - - - DWI trials will be.
10 There aren't any more handwritten and signed
11 exhibits. It means that it was never - - - it never
12 existed on paper. The analyst makes the report on
13 the computer as she's complete - - - he or she is
14 completing the work and has a process that's - - -
15 you know, it involves a number of steps to secure the
16 work once it's completed.

17 JUDGE RIVERA: How can - - - how can
18 Felshaw certify it as a business record? How is she
19 authorized to do that?

20 MR. COX: That's the - - - the first
21 question is whether that would go back to if - - - if
22 that argument is feasible that could only happen
23 under this court's decision in Cratsley and some of
24 its progeny that the sheriff's department - - -

25 JUDGE STEIN: Is there any evidence to

1 support a Cratsley analysis here?

2 MR. COX: I believe so. I mean the
3 sheriff's department gathered these - - - the records
4 from the state for purposes of ensuring that their
5 Datamaster machine operated properly. They kept all
6 these records, and what - - - what happened is rather
7 than give an original to the ADA; they've formed the
8 policy of certifying a copy of the original they had
9 to give to the ADA. So - - -

10 JUDGE STEIN: We don't know if they - - -
11 they shared procedures or anything like that, right?

12 MR. COX: I'm sorry?

13 JUDGE STEIN: Doesn't Cratsley say that
14 they have to have shared procedures or adopted - - -

15 MR. COX: Not shared procedures, but what -
16 - - what they called - - -

17 JUDGE FAHEY: So you - - -

18 MR. COX: - - - circumstantial familiarity
19 with the documents. In other words, if the sheriff's
20 department as entity B is so familiar with and relies
21 regularly upon the records of DCJS or the state
22 police in the course of their business of maintaining
23 the Datamaster instrument to be sure that it's
24 operating properly, then they can reasonably rely
25 upon those records and create their own records of

1 them. And - - -

2 JUDGE RIVERA: Who keeps the original?

3 MR. COX: I'm sorry?

4 JUDGE RIVERA: Who keeps the original?

5 What - - - what they are referring to as an original.

6 MR. COX: What - - -

7 JUDGE RIVERA: Who's got that?

8 MR. COX: What Katie Felshaw referred to as
9 an original, she kept. She has it on file - - -

10 JUDGE RIVERA: And what does she - - - what
11 - - -

12 MR. COX: - - - and she made a copy and
13 certified it.

14 JUDGE RIVERA: Okay. You say well, she
15 referred to, what - - - what is the original she's
16 referring to?

17 MR. COX: It would have been the original
18 copy she'd received from - - -

19 JUDGE RIVERA: So it's a copy.

20 JUDGE RIVERA: - - - Jennifer Limoges and
21 John Digman.

22 JUDGE RIVERA: So it's a copy?

23 MR. COX: Well, no, it's an original.

24 JUDGE RIVERA: You're saying an original
25 copy?

1 MR. COX: She received an original from the
2 state.

3 JUDGE RIVERA: That's what I'm asking.

4 MR. COX: She keeps that and makes a copy
5 of it - - -

6 JUDGE RIVERA: Okay.

7 MR. COX: - - - with a certification.

8 JUDGE RIVERA: So then even though
9 Jennifer, I'm not sure how it's pronounced Lim - - -

10 MR. COX: I'd - - - I'd say it's [Lym'
11 mose], yeah.

12 JUDGE RIVERA: Limoges?

13 MR. COX: Yeah.

14 JUDGE RIVERA: Thank you. Says that she
15 has in her possession the original, that she's turned
16 over the original. Is it - - -

17 MR. COX: You're - - - there are two - - -

18 JUDGE RIVERA: Am I reading the wrong
19 thing?

20 MR. COX: And that's the difference. They
21 are a secondary certification. What happened here,
22 and the reason I don't rely on the Cratsley argument
23 as much, is I think the trial court, if you read the
24 transcript, effectively said, eh, I'm disregarding
25 Katie Felshaw's certification because don't you have

1 the state certification here.

2 JUDGE FAHEY: You're talking about City
3 Court said that in - - - in the record?

4 MR. COX: Yes.

5 JUDGE FAHEY: They apparently did - - - of
6 course, which preserves the argument also.

7 MR. COX: Yes. So I think - - -

8 JUDGE RIVERA: I'm - - - again - - -

9 MR. COX: County Court said City Court was
10 okay doing that.

11 JUDGE RIVERA: It's just a straightforward
12 question. Who has the original?

13 MR. COX: Exhibit 1, the one I'm talking
14 about right now, Jennifer Limoges' - - -

15 JUDGE RIVERA: Is it 7?

16 MR. COX: - - - is a digital, a digital
17 document.

18 JUDGE RIVERA: Okay.

19 MR. COX: So in a Zen kind of world, the
20 original is on a hard drive in Albany, okay.

21 JUDGE RIVERA: On the hard drive. Got it.

22 MR. COX: Okay. When you print one, it
23 becomes an original - - -

24 JUDGE RIVERA: A copy.

25 MR. COX: - - - under the State Electronic

1 Records Act.

2 JUDGE RIVERA: I got it. Okay.

3 MR. COX: Jennifer Limoges had one, and
4 normally, we have one. Whoever prints one has an
5 original. That's the - - - the concept under the
6 Electronic Records Act. They're all - - - to me,
7 they're copies but under the - - - the Act, every
8 time you create one it's an original.

9 JUDGE PIGOTT: Who can you cross-examine as
10 to the accuracy of it?

11 MR. COX: They're self-authenticating
12 documents. The - - - they're - - - under 4518(c), so
13 long as you meet the requirements of that
14 certification, they're admissible as prima facie
15 evidence of the matter asserted in them.

16 JUDGE PIGOTT: I'm not suggesting that this
17 happens but there are mistakes sometimes. And if - -
18 - is there - - - if there's a mistake, no one's going
19 to know it, right?

20 MR. COX: Mistake as to the underl - - -
21 what - - - no, that's a difference under a business
22 record under 4518(a) you'd have to have a keeper of
23 the record.

24 JUDGE PIGOTT: Right.

25 MR. COX: For instance, offer that in. Now

1 that keeper of the record, you - - - you could cross-
2 examine them as to, you know, you sure you kept this
3 record. But they wouldn't know about the - - -

4 JUDGE PIGOTT: Quite - - - quite often
5 these days they basically - - -

6 MR. COX: - - - the underlying matter.

7 JUDGE PIGOTT: I'm sorry?

8 MR. COX: They wouldn't know about the
9 underlying matter.

10 JUDGE PIGOTT: Well, that's the - - -

11 MR. COX: Defense counsel in a DWI trial is
12 always free to subpoena the chemist, if they want to
13 cross-examine the chemist, about the process they use
14 to test the chemicals.

15 JUDGE PIGOTT: Well, I - - - I always think
16 who's got the burden of proof. But it's - - - the
17 only reason I ask is that we get - - - we get pretty
18 loose sometimes, and if there's an inaccurate reading
19 but we say, well, it's electronic so you can't cross-
20 examine. That's too bad. It's inaccurate, tough.
21 You know, and that's not what we want to say. We
22 want to say somebody can say why do we believe that
23 this is true.

24 MR. COX: Well, because that's exactly what
25 they are is calibration records. The requirement for

1 entering - - - the People have to show the
2 instrument's in proper working order, right, under
3 Mertz. And you do this in these DWI trials by we
4 take the most recent calibration record before and
5 after arrest, certified copies of them, so that
6 you've got probative evidence that if it was working
7 before arrest and after arrest, it was working at the
8 time of arrest. As well as the simulator solution
9 record because they have to use the simulator
10 solution record to get a plus or minus 1 - - - 0.01
11 result after they conduct the test.

12 JUDGE STEIN: Your adversary - - -

13 MR. COX: All these things - - -

14 JUDGE STEIN: - - - says that this was - -
15 - these were admitted under subdivision (a), 4518(a),
16 not (c).

17 MR. COX: I don't think so.

18 JUDGE STEIN: You don't agree with that?

19 MR. COX: No, I think the trial court
20 clearly recognized this - - - this 4518(c), that the
21 - - - in effect, I think they said it had met all the
22 requirements of 4518(c) in adm - - - in admitting
23 them into evidence - - -

24 JUDGE STEIN: And do you - - - do you - - -

25 MR. COX: - - - because it admitted it

1 without a keeper of the record and admitted it as a
2 self-authenticating document.

3 JUDGE STEIN: Do you - - - do you also
4 agree that Mr. Digman's signature is not - - - was
5 not an original on the - - - on the exhibit?

6 MR. COX: I disagree that an original
7 signature is required.

8 JUDGE STEIN: But you agree that his wasn't
9 an original?

10 MR. COX: On the document - - - well, you -
11 - - well, first of all, you have the exhibits, so
12 feel free to examine them.

13 JUDGE STEIN: Well - - -

14 MR. COX: The signature - - -

15 JUDGE STEIN: - - - we have copies of the
16 exhibit. But we do have the originals here.

17 MR. COX: Right.

18 JUDGE STEIN: And I actually looked at the
19 - - - at the originals.

20 MR. COX: Yes. Now - - -

21 JUDGE STEIN: And - - - and they looked to
22 me like copied signatures but I just wanted to
23 confirm it if - - -

24 MR. COX: Right. But that's, you know, the
25 question that pulls us to the court is, you know, in

1 today's technology, it's awful hard to tell the
2 difference between a copy and an original sometimes.
3 Before I did appeals, I did counterfeit cases. And,
4 you know, you can make money look pretty good so you
5 can make signatures look pretty good. I don't find
6 in the law where 4518(c) requires an original
7 signature. It requires a signature, a notarization,
8 part of your certification requirement, and it
9 requires an attestation, those three prongs from
10 Kennedy that say, you know, you keep this in the
11 normal course of business and so on. All that is
12 present here.

13 JUDGE GARCIA: Counsel, is - - -

14 MR. COX: It's just a copy. It's not an
15 original, but I don't think that matters.

16 JUDGE GARCIA: Now this isn't a
17 confrontation clause case, right? I mean there's
18 really no question of crossing the witness here. I
19 mean it's not confrontation.

20 MR. COX: No.

21 JUDGE GARCIA: It's civil procedure, right?

22 MR. COX: No, it's not a confrontation at
23 all - - -

24 JUDGE GARCIA: So why can't we just - - -

25 MR. COX: - - - because it's self-

1 authenticated.

2 JUDGE GARCIA: Why - - - and this
3 aspirational, why can't we just say this goes to
4 weight?

5 MR. COX: It - - - once it's admitted,
6 certainly it does. That's why I say once the court
7 received that exhibit, defense counsel was free to
8 introduce evidence to try to - - - to diminish the
9 weight of it. It's free to - - - to question the
10 fact that it's a copy in front of the jury. But all
11 I'm saying is that it was properly received and
12 admitted by the court because from all I can find, it
13 had a signature, it had a notarization, it had the
14 proper attestation to make it a 4518(c) certification
15 attached to it. And so long as the court was okay
16 with ignoring Jennifer - - - I'm sorry, ignoring the
17 sheriff's department certification and just saying,
18 hey, I've got the - - - the same state certification
19 I always have here, then it was acc - - - it accepted
20 it properly.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MR. COX: Thank you.

23 CHIEF JUDGE DIFIORE: Mr. Curley.

24 MR. CURLEY: Yes. Judge Stein, you have an
25 original, according to Mr. Cox. He just told you

1 that any copy that's made becomes an original as soon
2 as you take possession of it, which loses sight of -
3 - -

4 JUDGE STEIN: Well, if it was originally
5 electronically created. I think that was his - - -
6 that what his argument. But a separate question was
7 whether you need an original of a signature on a
8 certification of - - - of a hard - - - hard copy
9 document.

10 MR. CURLEY: Well, you need - - - you need
11 it for 4518(c). 4518(c) says other records; it
12 references 2306, which is only treatment records,
13 medical treatment records, and 2307, which references
14 books, papers, and other things of a department or
15 agency. 2307 merely excuses the personal appearance
16 of the - - - of the witness that's going to - - -
17 that the proponent's going to put on to put the
18 evidence in. So I think the subpoena aspect of
19 4518(c), again, is important because it's an
20 additional guarantee that we need. Otherwise,
21 anybody can come in and certify that - - - make the
22 decision for the judge this is a good business
23 record. This is - - -

24 JUDGE STEIN: So you're saying a
25 certification signed pursuant to a subpoena carries

1 more weight than a certification signed - - -

2 MR. CURLEY: Yes.

3 JUDGE STEIN: - - - under sworn - - -

4 MR. CURLEY: I don't know if it's fine but
5 it's - - - it's much better.

6 JUDGE STEIN: Makes a difference?

7 MR. CURLEY: Yes. And also, I would just
8 like to say that there's no record of this anywhere
9 in the - - - in the trial record. So any analysis -
10 - -

11 JUDGE FAHEY: When you say "this", what do
12 you mean? No record of what?

13 MR. CURLEY: Of any analysis that we've
14 just gone through. Of anybody asking a question how
15 do I know this is a good business record. The
16 witness they put on, he said I've - - - I've never
17 seen it before today, and that can't be enough.

18 Can I say one more thing?

19 CHIEF JUDGE DIFIORE: Yes, sir. Please.

20 MR. CURLEY: As a practical matter, in City
21 Court, if I try and subpoena in any of these
22 technicians, any of these chemists, technicians, the
23 state police would be there in a minute in County
24 Court, Supreme Court, with a motion to quash.
25 They'll come in and argue that we can't bring these

1 technicians down for every DWI court trial in City
2 Court, and I'll be out the door.

3 CHIEF JUDGE DIFIORE: Thank you, Mr. Cox.

4 (Court is adjourned)

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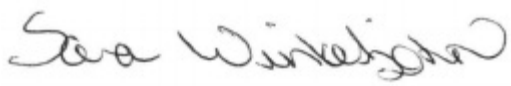
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Roy S. Kangas, No. 157 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: September 21, 2016