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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 39

TYRELL NORRIS,

Appellant.

PEOPLE,

Respondent,

-against-

No. 40

ELBERT NORRIS,

Appellant.

20 Eagle Street
Albany, New York 12207
February 07, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 39.
2 Counselor, you want any rebuttal time?

3 MR. LAISURE: Yes, Your Honor, three
4 minutes, please.

5 CHIEF JUDGE LIPPMAN: Go ahead.

6 MR. LAISURE: Skip Laisure for Tyrell
7 Norris. I'm with the Appellate Advocates. I also
8 represent Elbert Norris.

9 CHIEF JUDGE LIPPMAN: Um-hum.

10 MR. LAISURE: Neither the DLRA, Drug Law
11 Reform Act, nor Penal Law 70.25, which controls
12 concurrent and consecutive sentencing, restricts the
13 DLRA resentencing court from imposing concurrent
14 sentences on any and all drug counts, subject to DLRA
15 resentencing.

16 CHIEF JUDGE LIPPMAN: Well, what - - - what
17 is - - - what does the statute say? Isn't it silent?

18 MR. LAISURE: The - - - well, the statute
19 is silent on - - -

20 CHIEF JUDGE LIPPMAN: So how do we know - -
21 -

22 MR. LAISURE: - - - on the
23 concurrent/consecutive - - -

24 CHIEF JUDGE LIPPMAN: How do we know what
25 the - - -

1 MR. LAISURE: Well, I'll - - -

2 CHIEF JUDGE LIPPMAN: - - - what to do if
3 the statute is silent?

4 MR. LAISURE: Your precedent is a good
5 place to start, Your Honor. In Matter of Goord, the
6 court established the rule that the last judge in the
7 chain can decide whether consecutive or concurrent
8 sentences are going to be ordered. We have that.

9 JUDGE READ: Well, what about Acevedo?

10 MR. LAISURE: I'm sorry?

11 JUDGE READ: What about Acevedo?

12 MR. LAISURE: Well, Acevedo - - - which
13 followed Yannicelli - - - Acevedo said that a judge
14 can't - - - a resentencing judge cannot change the
15 consecutive order as to a nondrug count that is not
16 subject to resentencing.

17 JUDGE READ: So you think it's - - -
18 because it's a drug count, that's the distinction?

19 MR. LAISURE: Absolutely, Your Honor.

20 JUDGE READ: Why does that make sense?

21 MR. LAISURE: It makes sense because what
22 happens is, and I want to reference Vaughan, because
23 this court cited to Vaughan. In Vaughan, two things
24 were stated. One, the DLRA counts are the defect
25 that is to be corrected by a resentencing. And the

1 other thing Vaughan said was that 430.10 is what - -
2 - is what bars resentencing for a count that's not
3 subject to - - - that bars changing the
4 consecutiveness.

5 JUDGE SMITH: But doesn't - - - doesn't
6 Vaughan talk about the purpose of the Drug Law Reform
7 Act was to mitigate the harshness of the mandatory
8 Rockefeller Drug Law sentences.

9 MR. LAISURE: Exactly.

10 JUDGE SMITH: I mean, you're - - - but the
11 consecutive sentences here weren't mandatory. I
12 mean, the people who wrote the Drug Law Reform Act
13 weren't worrying about people getting consecutive
14 sentences when the judge wanted to give it to them.

15 MR. LAISURE: No, not specifically, they
16 were not. That's true. But - - - but what you have
17 to remember about - - - about the DLRA and - - - and
18 the fact that determinate sentences are being
19 substituted for indeterminate ones, is that
20 indeterminate sentences are very different from
21 determinate ones. They have much lower minimum
22 sentences - - -

23 CHIEF JUDGE LIPPMAN: Yeah, but the bottom
24 line is, don't you have to have the authority
25 conferred to do this? I mean - - -

1 MR. LAISURE: The DLRA confers the
2 authority by giving the sentencing judge - - -

3 CHIEF JUDGE LIPPMAN: It doesn't say
4 anything about the consecutive/concurrent issue,
5 right?

6 MR. LAISURE: No, no, no, but it gives the
7 court authority to deal with both sentence - - - with
8 both counts, which is not the case under Acevedo;
9 it's not the case under Yannicelli.

10 JUDGE SMITH: Then you rely on fact that in
11 this one they had - - - he actually did vacate both
12 convictions - - - both sentences.

13 MR. LAISURE: Well, yes, I mean, that's
14 part of it.

15 JUDGE SMITH: And the statute calls for him
16 to vacate them both.

17 MR. LAISURE: That's correct.

18 JUDGE GRAFFEO: You're - - -

19 MR. LAISURE: And that calls both sentences
20 into play.

21 JUDGE GRAFFEO: You're looking for an
22 authority to change a consecutive sentence to a
23 concurrent, correct?

24 MR. LAISURE: Or vice-versa.

25 JUDGE GRAFFEO: I was going to say, it may

1 work to your client's favor in this case. But what
2 about someone who had concurrent sentences but a very
3 poor record in prison, because, frankly, so did - - -
4 Mr. Norris didn't exactly have a sterling record - -
5 -

6 MR. LAISURE: I understand.

7 JUDGE GRAFFEO: - - - of disciplinary in
8 prison, right? What if the judge feels you've got
9 such a poor record in the correctional facility;
10 you've engaged in violent conduct in the correctional
11 facility. I want to change this to a consecutive
12 sentence.

13 MR. LAISURE: I don't think that anything
14 would stop him from doing that, presuming, of course,
15 that - - - because remember, we have the presumption
16 that a lower sentence overall should be - - - should
17 be given.

18 JUDGE SMITH: And you - - - you also have
19 the option of turning it down, if you don't like it,
20 right?

21 MR. LAISURE: That's correct. That's
22 correct. But the point is why - - -

23 JUDGE GRAFFEO: That's true in this case.
24 If you don't like it, you can turn it down.

25 MR. LAISURE: Well, right, because it was

1 actually worse for him than the sentence he had,
2 which is why he turned it down, and that's the whole
3 point of this, is why - - - why - - -

4 JUDGE GRAFFEO: But we've been - - - we've
5 been reticent to read something into the DRLA (sic)
6 that's not there - - - DLRA.

7 MR. LAISURE: Well, but see, the point is
8 not that there isn't anything there. The - - -
9 what's there is that for all the counts that we're
10 talking about, we're subject to resentencing under
11 the DLRA. He was eligible for resentencing. The
12 question is, was there a bar toward doing the
13 consecutive - - -

14 CHIEF JUDGE LIPPMAN: But the - - - but the
15 judge could have reduced the sentence to the minimum
16 term, right? He chose not to.

17 MR. LAISURE: That's true, but, you know, a
18 sentencing judge may well determine that a count is
19 worth a certain number of years because that's the
20 culpability for that count, and separately determine
21 whether those counts should be served consecutive or
22 concurrently.

23 JUDGE GRAFFEO: Am I wrong - - -

24 MR. LAISURE: You can't assume that it's an
25 aggregate determination.

1 JUDGE GRAFFEO: Didn't this judge also say
2 that even if he could, he wouldn't have?

3 MR. LAISURE: Yes.

4 JUDGE GRAFFEO: Because of this
5 individual's role?

6 MR. LAISURE: Well, no, no. He - - - what
7 he said was that he didn't want to do any better than
8 what the People had offered. But he was laboring
9 under the misconception that he couldn't do any
10 better than - - - than - - - than, you know, the
11 consecutive time. Had he known he could do
12 concurrent time, would he have come to the same
13 conclusion? Possibly, but we don't know that, which
14 is why this is not academic and it's why it should be
15 sent back.

16 The point here is that - - - is that
17 there's nothing that stops resentencing on - - - on
18 both counts and the change to concurrent time,
19 because - - -

20 CHIEF JUDGE LIPPMAN: So, is this really a
21 policy decision on our part since the statute doesn't
22 say anything, really?

23 MR. LAISURE: Well, Your Honor - - -

24 CHIEF JUDGE LIPPMAN: I mean - - -

25 MR. LAISURE: - - - the statute says

1 enough.

2 CHIEF JUDGE LIPPMAN: - - - consistent with
3 the ameliorative purpose of the 2009 DLRA, what are
4 you saying, really? That by allowing them to do
5 this, it's more consistent with the purpose? Is that
6 your argument?

7 MR. LAISURE: I am saying that. I am
8 saying that. But I'm not saying that that is the
9 only reason that they have the authority - - - that
10 the courts have the authority to do it.

11 The reason that the nondrug count can't be
12 resentenced is that 430.10 says when you've started
13 serving a sentence, it can't be changed, okay? And
14 that was the case in Yannicelli with the term of
15 imprisonment and it was the case in Acevedo with the
16 nondrug count. That count cannot be touched - - -

17 CHIEF JUDGE LIPPMAN: So, if that's - - -
18 if they're not saying - - -

19 MR. LAISURE: - - - but here, both counts
20 can.

21 CHIEF JUDGE LIPPMAN: If you're not saying
22 you can't, you can. That's your - - - basically,
23 your argument.

24 MR. LAISURE: That's right, because - - -
25 because both counts have been opened up and therefore

1 there's no 430.10 bar. If there's no 430.10 bar,
2 then you have 70.25 which permits a court to look at
3 this and order concurrent time. You have the
4 ameliorative purpose of it that - - - that, you know,
5 furthers judicial discretion, particularly in a case
6 like this where the offer was going to be worse than
7 what he had. And you have the last judge rule.

8 These are all reasons why the court can and
9 was - - - had the authority to do this. And there
10 isn't any - - - anything that says - - - anything in
11 70.25 that says he can't. There isn't anything in
12 430 that says he can't. There isn't anything
13 anywhere else that says he can't. And when you've
14 got a statute like the DLRA that is so, you know,
15 bent and determined to give people who are eligible
16 better sentences, it doesn't make sense to tie the
17 judge's hand, the way that the People are asking that
18 it be done.

19 JUDGE GRAFFEO: So if we had this exact
20 fact pattern, but the judge doing the resentencing
21 had said, I know I can do concurrent sentences, but I
22 choose not to. Instead, here's what I'm ordering.
23 That would be okay.

24 MR. LAISURE: We wouldn't be here. That's
25 right, Your Honor. That's the - - - that's the whole

1 idea. And we can't know what he would have done.

2 And we - - - you have a look at the DLRA, the - - -

3 JUDGE GRAFFEO: He did make some comments
4 on the record, didn't he?

5 MR. LAISURE: He did make some comments on
6 the record, but he was clear - - - he was clear that
7 he does - - - did not have the authority to change
8 the consecutiveness of those sentences. So - - -

9 JUDGE GRAFFEO: I thought he said that even
10 if the People hadn't made the offer - - -

11 MR. LAISURE: Well, he said he - - -

12 JUDGE GRAFFEO: - - - he wasn't - - - he,
13 based on his role with the drug gang and also his
14 disciplinary record in the prison, that he would not
15 have agreed to altering the sentence.

16 MR. LAISURE: He wouldn't have come to that
17 conclusion on his own, Your Honor. But by agreeing
18 to resentence him, he determined that he was
19 eligible, and that substantial justice did not
20 dictate that he not be resentenced. And once the
21 judge comes to that conclusion, then he should be
22 operating under the - - - you know, his full amount
23 of discretion when he makes his decision. And this
24 judge was not. This judge thought he was constrained
25 by the consecutive nature of it, and that was the

1 point.

2 The other thing I want to mention about the
3 ameliorative effect of the DLRA is that - - - is that
4 there are - - - there are a couple of things about
5 that indicates that the court - - - that the
6 sentencing court - - - is intended - - - the
7 legislature intended that the court have this power.

8 For example, there is no predicate felony
9 offender sentence that can be given to drug offenders
10 now. And it doesn't make sense that the court - - -
11 that the legislature would have said we're outlawing
12 persistent felony offender sentences, but we're going
13 to require consecutive sentences whenever the, you
14 know, those had been done originally. There's a
15 tension there; that doesn't make sense.

16 And the legislature also said we're going
17 to allow you to ask for resentencing on C, D, and E
18 felonies, even though the C, D, and E felonies are
19 not - - - you can't go - - - you know, you can't get
20 a better sentence on those by yourself. You can only
21 get them if you're a B felon.

22 And the point is, they - - - the
23 legislature looked at the B felony offender with C,
24 and D, and E sentences, and said, if they've got
25 consecutive sentences or whatever sentences on these

1 other lower counts, the sentencing judge is not going
2 to be able to do right by the B felony, because
3 there's all these other counts hanging around with
4 longer sentences. So let's let him do those, as
5 well. Well, this is parallel to that.

6 You know, why constrain the judge's power
7 to do consecutive sentence on a concurrent
8 sentencing, if you're allowing a different judge to
9 change the C, D, and E felonies.

10 JUDGE GRAFFEO: What's the specific relief
11 that you're asking from us?

12 MR. LAISURE: That it be sent back for
13 resentencing, you know, with the court being
14 instructed that he has the authority to run them
15 concurrently.

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

18 MS. DONHAUSER: May it please the court,
19 Caroline Donhauser, for the People, who are the
20 respondent in these cases.

21 CHIEF JUDGE LIPPMAN: Counsel, why wouldn't
22 it be more consistent with the purpose of the 2009
23 DLRA to - - - for the judge to have the authority to
24 change the concurrent/consecutive?

25 MS. DONHAUSER: Your Honor, when you're

1 looking at what is consistent, I think you have to
2 look at the text of the statute.

3 CHIEF JUDGE LIPPMAN: But we agree the
4 statute is silent. I'm asking you another question.
5 Why is that more consistent that the court would be
6 able to do that?

7 MS. DONHAUSER: Again, Your Honor, I'd go
8 back to the statute, because I think that you have to
9 look at the statute in order to figure out the - - -

10 CHIEF JUDGE LIPPMAN: I'm asking you from a
11 policy perspective.

12 MS. DONHAUSER: The policy was decided by
13 the legislature when they wrote the statute.

14 CHIEF JUDGE LIPPMAN: I - - - I understand
15 the argument that it's silent and that it is not one
16 way or the other in the statute. There's no specific
17 authority. I'm just asking you, if you look at the
18 purpose of the DLRA, is there a good argument to be
19 made that allowing the judge to change the
20 consecutive/concurrent dynamic pursuant to the
21 purpose or the ameliorative purpose of the statute?

22 MS. DONHAUSER: The focus of the DLRA was
23 to allow a judge, upon resentencing, to change an
24 indeterminate prison term to a determinate prison
25 term.

1 CHIEF JUDGE LIPPMAN: Correct.

2 MS. DONHAUSER: The legislature and nothing
3 in 44 - - -

4 CHIEF JUDGE LIPPMAN: So it should be less
5 harsh, right? I mean, that's the purpose of this?

6 MS. DONHAUSER: Yes, Your Honor.

7 CHIEF JUDGE LIPPMAN: Okay. So all I'm
8 asking is a simple question - - - you could say, no,
9 I don't think so. Because of that, does it seem more
10 consistent with the overall purpose to allow the
11 judge to do that? Or - - - I understand that the
12 other argument is you need specific authority; it
13 doesn't say it, it doesn't have it. That's all I'm
14 asking.

15 MS. DONHAUSER: Again, Your Honor, I'm
16 sorry that I'm being thick here - - -

17 JUDGE SMITH: Maybe you should start your
18 answer with a yes or no and then explain. Is it more
19 consistent with the sta - - - is it more consistent
20 with the purpose of the - - - is it more consistent
21 with the legislative policy to allow the judge to do
22 this?

23 MS. DONHAUSER: I think it depends on how
24 you've couched the legislative policy, Your Honor.
25 And if you look at the DLRAs as a whole, the policy

1 has been, in general, to provide a judge a discretion
2 to impose a less harsh, in general, determinate
3 sentence on a defendant.

4 However, in some instances, for example
5 with drug offenders who have prior violent histories,
6 in fact, the legislature provided for a determinate
7 sentence, a minimum, that was higher than the
8 previous indeterminate minimum. So, that, yes, less
9 harsh in certain instances, but perhaps not less
10 harsh in all instances. And that's why I've been
11 reluctant to - - - you have to first examine - - -

12 JUDGE SMITH: It sounds like a "no" to me,
13 actually.

14 CHIEF JUDGE LIPPMAN: Me, too.

15 MS. DONHAUSER: I guess - - - I guess, Your
16 Honor - - - I guess it's a "no".

17 CHIEF JUDGE LIPPMAN: Okay.

18 MS. DONHAUSER: And again, I'm going - - -
19 so now I'm going to turn back to the statute, because
20 I think it's - - -

21 CHIEF JUDGE LIPPMAN: Go ahead, counsel,
22 please.

23 MS. DONHAUSER: - - - because that clearly
24 is where the legislature was quite specific in its -
25 - - in its text.

1 CHIEF JUDGE LIPPMAN: Well, specific in
2 some regards, silent in others.

3 MS. DONHAUSER: It was specific in what a
4 resentencing court could do. And what it stated in
5 440.46 - - -

6 CHIEF JUDGE LIPPMAN: And I understand your
7 argument that if they didn't say they can do it, they
8 can't do it. That's your argument.

9 MS. DONHAUSER: And the reason why they
10 can't do it - - -

11 CHIEF JUDGE LIPPMAN: We get that.

12 MS. DONHAUSER: And the reason why they
13 can't do it is because there's another section of the
14 CPL, which has never been amended by the DLRAs, that
15 says that once a valid sentence that was imposed in
16 accordance with the law, which was exactly the
17 situation in these cases, and the defendant has begun
18 serving that - - - that sentence of imprisonment,
19 that sentence cannot be changed, unless "specifically
20 authorized by law." It didn't say authorized. It
21 said "specifically authorized by law." And there is
22 no specific authorization in 440.46.

23 JUDGE SMITH: What about his argument about
24 the C, D, and E felonies? I'm not sure I - - - I'm
25 not sure I followed, but he says that they - - - if

1 they can change the C, D, and E felonies, why can't
2 they change the consecutive nature of the terms?

3 MS. DONHAUSER: Again, because it's not
4 specifically authorized by law. In fact - - -

5 JUDGE SMITH: And - - - but the C, D, and
6 Es are?

7 MS. DONHAUSER: Exactly, Your Honor. They
8 are - - - it's in 440.46(2), specifically authorizes
9 a resentencing court, if it's resentencing a
10 defendant on a Class B felony offense, for which that
11 defendant is eligible to be resentenced, it may also
12 resentence the defendant on a drug felony of - - - C,
13 D, or E drug felony offense, if that offense - - - if
14 that conviction was - - - I believe it has to have
15 been part of the same commitment order or imposed - -
16 - there's somewhat slightly more specific language
17 that's actually in my - - - in my brief.

18 JUDGE SMITH: What about the fact that the
19 - - - the statute, the DLRA, does say that the judge
20 has to vacate both convictions - - - both sentences
21 and resentence. Isn't that a - - - doesn't the word
22 "resentence" imply resentence either concurrent or
23 consecutive?

24 MS. DONHAUSER: No, Your Honor. And again,
25 I think you can look at this court's decision in

1 People v. Acevedo. It's clear - - -

2 JUDGE SMITH: Well, but - - - but that - -
3 - but that language wasn't in the - - - that fact was
4 not present in Acevedo that you were vacating both
5 sentences.

6 MS. DONHAUSER: You are vacating the - - -
7 the drug sentence.

8 JUDGE SMITH: Yeah.

9 MS. DONHAUSER: So presumably, when you - -
10 - if you're vacating a drug sentence - - -

11 JUDGE SMITH: No, but it - - - maybe it's -
12 - - maybe this is superficial, but it sounds to me
13 that if you're only vacating one sentence and leaving
14 the other one alone, the power to make them either
15 concurrent or consecutive is less clear than if
16 you're vacating both.

17 MS. DONHAUSER: But then again you have to
18 look at what does the statute say you can do once
19 you've vacated the sentence. And if you look at
20 Section 23, it talks about the term of the sentence.
21 What term is going to be imposed? I submit to this
22 court that when they're talking about the term of the
23 resentence, they talking about - - -

24 CHIEF JUDGE LIPPMAN: But what about - - -

25 MS. DONHAUSER: - - - the term of

1 imprisonment.

2 CHIEF JUDGE LIPPMAN: But I think what the
3 judge is driving at is what about the term you vacate
4 both sentences. What implications does that have
5 when if you're vacating it, why couldn't you at that
6 point, change the concurrent/consecutive?

7 MS. DONHAUSER: Again, be - - - Your Honor,
8 because the sentences are valid, so you're only
9 vacating that aspect which you have been specifically
10 authorized by law to change.

11 JUDGE SMITH: The statute doesn't say
12 vacate an aspect?

13 MS. DONHAUSER: No, Your Honor, it does
14 not.

15 JUDGE SMITH: It says vacate the sentence.

16 MS. DONHAUSER: Yes, Your Honor, it does,
17 but the ability to impose a different term is
18 specifically in 440.46. And that says you have to
19 impose a determinate sentence pursuant to Penal Law
20 Section 60.04 and 70.70. It doesn't say anything
21 about, oh, and by the way, 70.25 you can also make a
22 change with the consecutive and the concurrent. And
23 indeed, I would argue, the fact that it says that you
24 can only impose a determinate sentence pursuant to PL
25 Sections 60.04 and 70.70, shows that the legislature

1 was being very specific here.

2 A court which is imposing an original
3 sentence on a class B felony drug offender could
4 impose a sentence of probation, a definite sentence,
5 a sentence of parole supervision. None of those
6 options are - - - are available to a - - - to a
7 resentencing court. A resentencing court can only
8 impose a determinate sentence pursuant to Penal Law
9 Sections 60.04 and 70.70.

10 JUDGE SMITH: I mean, doesn't it - - - but
11 it does not go on to say, and they must be either
12 consecutive or concurrent as they previously were.

13 MS. DONHAUSER: That's correct, Your Honor.
14 But again, the way they previously were is valid.
15 It's a lawful sentence.

16 JUDGE SMITH: Well, how can it be valid
17 after it's been vacated?

18 MS. DONHAUSER: Excuse me, Your Honor?

19 JUDGE SMITH: How can they be valid after
20 they were vacated?

21 MS. DONHAUSER: The only reason why they've
22 been vacated is for this very specific reason to
23 replace a determinate prison term - - - indeterminate
24 prison term with a determinate prison term. And it's
25 a very narrow statute.

1 CHIEF JUDGE LIPPMAN: Yeah, but - - - but
2 again, and I - - - I think we're beating a dead horse
3 after a point, but what does it mean when you say you
4 can vacate it? It doesn't say vacate an aspect of
5 it. You're vacating it. So when you vacate it, then
6 the judge has the powers that the judge has. Why - -
7 - why is that not the logical sense of that? Once
8 you're vacating it, how can he not have the power to
9 make it concurrent, consecutive or whatever he wants?

10 MS. DONHAUSER: I think, Your Honor, just
11 the use of the word "vacate" does not suddenly give -
12 - -

13 CHIEF JUDGE LIPPMAN: Well, that's what I'm
14 focusing on.

15 MS. DONHAUSER: Yes.

16 CHIEF JUDGE LIPPMAN: What does that mean?

17 MS. DONHAUSER: And for example, in People
18 v. - - -

19 CHIEF JUDGE LIPPMAN: What - - - what - - -
20 what does that mean, the use of the term "vacate"?

21 MS. DONHAUSER: I think in this situation,
22 it means very narrowly vacating the term.

23 CHIEF JUDGE LIPPMAN: Yeah, yeah. But
24 doesn't it mean the same in any situation; you're
25 vacating it?

1 MS. DONHAUSER: No, Your Honor. In People
2 v. Lingle, Your Honor specifically said, the term
3 "vacate" does not mean that the resentencing court
4 can go back and change every aspect of the sentence.
5 They - - - the resentencing court could only go back
6 and change the Sparber error - - - correct this
7 Sparber error. Yes, the term had been used - - - the
8 word "vacate" had been used - - -

9 CHIEF JUDGE LIPPMAN: Okay, but that gets
10 us back - - -

11 MS. DONHAUSER: - - - but that's the same
12 thing.

13 CHIEF JUDGE LIPPMAN: That gets it back to
14 the policy issue of what did the statute stand for,
15 what were they trying to do in the most general way,
16 you know. And is that - - - is being able to change
17 the concurrent/consecutive nature of it more
18 consistent with the purpose of the statute. That's
19 what we're trying to - - - what we're grappling with,
20 you know.

21 MS. DONHAUSER: But I think the purpose of
22 the statute and the thought of the legislature had
23 always been upon ameliorating the prison terms.

24 And, for example, in the case of Tyrell
25 Norris. This court could have given this defendant

1 vast amelioration of its sentence. The defendant is
2 serving a fifteen- to thirty-year sentence.

3 CHIEF JUDGE LIPPMAN: Yeah, but he - - -
4 but maybe he also could have been - - - done
5 consecutive/concurrent, but he thought he didn't have
6 the power, as he said.

7 MS. DONHAUSER: He thought he didn't have
8 the power. He also made it quite clear he had no
9 intention of going below what the People had proposed
10 of an aggregate twenty-one years. So, I - - - I
11 mean, I think that it's very clear that Judge Marrus
12 had no intention of providing this defendant with
13 greater amelioration than an aggregate of twenty-one
14 years.

15 But in any event, the point is in what the
16 legislature would have thought of is that this court
17 could have given this defendant as little as an
18 aggregate of six years, maintaining the consecutive
19 relationship. That's a vast improvement from
20 fifteen- to thirty-years to a determinate of six
21 years. No need to go into the consecutive/concurrent
22 relationships, changing only the prison terms,
23 because that has been what the focus is of the
24 legislature in its - - -

25 JUDGE SMITH: Are you now - - - are you now

1 arguing - - - this is an argument about what the
2 judge had power to do, or are you saying we need not
3 decide what he had power to do because he wasn't
4 going to do it, anyway?

5 MS. DONHAUSER: I think in Tyrell Norris,
6 you - - - you need not decide it. I think the
7 question is academic, because it's entirely clear
8 that the judge was actually even reluctant to impose
9 a twenty-year aggregate sentence. And remember, this
10 is only a proposed resentence; no sentence has, in
11 fact, been vacated. No resentence has, in fact, been
12 imposed.

13 In the Elbert Norris case, which is the
14 other case before Your - - - before Your Honors, in
15 that situation, that court was proposing what would
16 be the minimum sentence in that case, that is,
17 changing the indeterminate - - -

18 JUDGE SMITH: Oh, so it's not - - - it's
19 not - - - in Elbert Norris, it's not academic, and
20 we've got to decide it anyway.

21 MS. DONHAUSER: That's correct, Your Honor.
22 I believe in Elbert Norris you do have to decide it.
23 I would note that in Elbert Norris, the fact that the
24 aggregate prison term - - - a determinate prison term
25 would still be quite lengthy, and that the judge

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1 cannot give the defendant the great leniency that the
2 judge could give to Tyrell Norris, had he so chosen;
3 had he decided to exercise his discretion in that
4 regard - - - is entirely in keeping with the
5 legislature's concept that a drug offender with a
6 prior violent history, as this court itself has said
7 in Yusuf and in Dais, that a defendant with a prior
8 violent history should be treated differently than a
9 drug offender with a prior nonviolent history. Those
10 with prior violent histories are going to be subject
11 to harsher sentences than those with nonviolent
12 histories.

13 Your Honors, I see my light is on.

14 CHIEF JUDGE LIPPMAN: Okay, thanks,
15 counsel.

16 MS. DONHAUSER: Thank you, Your Honors.

17 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

18 MR. LAISURE: Yes, Your Honor. Counsel was
19 talking about Section 430.10. If you look at that
20 closely, it refers to a "sentence of imprisonment."
21 It didn't say "sentence". A "sentence of
22 imprisonment" cannot be changed once it's begun. In
23 Sparber, Yannicelli, Acevedo, Vaughan - - -

24 JUDGE SMITH: You say that - - - you say
25 that means only the number of years, not the - - -

1 not the consecutive or concurrent nature of it?

2 MR. LAISURE: That's exactly right, and
3 that's why all those cases that I just mentioned, all
4 of those were terms of imprisonment that were not
5 defective, and so the courts had no ability to change
6 the concurrent nature because it was tied to a
7 sentence that was not being disturbed, and could not
8 be disturbed, under 430.10.

9 This sentence was disturbed under 430.10 by
10 authority of the DLRA. The DLRA says you can
11 resentence this person on this count. Once that
12 sentence is - - - is being changed, there's no
13 logical reason to assume that the
14 concurrent/consecutive nature of it can't be changed
15 along with it. 430.10 does not say sentence
16 generally, or it doesn't say aspect of sentence. It
17 says the term. So there's no bar. Once there's no
18 bar, there's no reason that the court is constrained
19 in the way it normally is constrained.

20 CHIEF JUDGE LIPPMAN: Your argument is once
21 you vacate, the judge is free to - - -

22 MR. LAISURE: Yes, I mean - - - that's
23 right. Once you vacate pursuant to the DLRA
24 authority, yes.

25 CHIEF JUDGE LIPPMAN: Okay.

1 MR. LAISURE: I wanted to point out the C,
2 D, and E argument I made before. That - - - I - - -
3 that was an indication of the legislative intent.
4 They want the court to be able to craft a sentence
5 that gives real relief, and that's the point of the
6 C, D, and E, and you can - - -

7 JUDGE SMITH: And her point of course is,
8 with the C, D, and E they said it, and with
9 consecutive/concurrent they didn't say it.

10 MR. LAISURE: That's right; that's right.
11 But I'm - - - that's why I was saying, I'm limiting
12 it to intent.

13 JUDGE SMITH: I know, I just - - -

14 MR. LAISURE: But if you look at the
15 determinate sentences and the way they played out in
16 this case, that - - - there's a reason for all of
17 this. And that is that if the determinate sentence
18 takes over, you've got a much higher minimum sentence
19 and you have post-relief supervision different from
20 the indeterminate sentences that are being vacated.
21 If you can't - - - if the court can't take those
22 things into account with everything else as a
23 package, then the DLRA purpose is not being served.

24 And that's why, to the extent that - - -
25 that the DLRA is silent, it actually gives you some

1 clues as to what was intended. 70.25 allows it. The
2 last judge rule allows it. There's no statutory bar.
3 The ameliorative purpose furthers it. The policy
4 favoring judicial discretion favors it. There's no
5 reason to constrain the courts this way.

6 CHIEF JUDGE LIPPMAN: Okay.

7 MR. LAISURE: Thank you.

8 CHIEF JUDGE LIPPMAN: Thank you both.

9 Appreciate it.

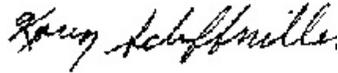
10 (Court is adjourned)

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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. Tyrell Norris, No. 39 and People v. Elbert Norris, No. 40 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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