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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 40

TERENCE MCCRAY,

Appellant.

20 Eagle Street
Albany, New York 12207
February 13, 2014

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.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Counsel, we'll start
2 with number 48 - - - 40. Let's get going. Go ahead.
3 People v. McCray.

4 MR. CONNOLLY: Thank you - - -

5 CHIEF JUDGE LIPPMAN: Counsel, you want - -
6 -

7 MR. CONNOLLY: Two minutes, please?

8 CHIEF JUDGE LIPPMAN: Two minutes. Go
9 ahead. You're on.

10 MR. CONNOLLY: Our position in this case is
11 that the county court violated Mr. McCray's rights to
12 due process and to confrontation by failing to
13 disclose multiple records in the complainant's mental
14 health records that would have been of substantial
15 value to him in - - -

16 JUDGE SMITH: Is this essentially a Brady
17 issue?

18 MR. CONNOLLY: It certainly could be viewed
19 as a Brady issue. It also involves the right to
20 confrontation, which Brady does as well. But the - -
21 -

22 JUDGE SMITH: I thought - - - I thought,
23 doesn't Ritchie (ph.) say that this isn't a - - -
24 that this is essentially a Brady question?

25 MR. CONNOLLY: It does say that that is the

1 way that that court - - - the Supreme Court looked at
2 it - - - looked at this issue, yes.

3 JUDGE GRAFFEO: Counsel, what specifically
4 would be in the additional thirty-four pages that's
5 not redundant or immaterial, that was already
6 revealed in the original twenty-eight pages?

7 MR. CONNOLLY: Well - - -

8 JUDGE GRAFFEO: What's the new information
9 that you feel would have made a difference?

10 MR. CONNOLLY: Maybe the most prominent or
11 salient new information is that this complainant had
12 accused her father of attempting to sexually assault
13 her, and the other evidence in the records indicated
14 that that claim was false. And - - -

15 CHIEF JUDGE LIPPMAN: Is the relationship
16 to the father the key - - - the key area? I mean, is
17 that - - - is that a lot of your - - - your
18 contention here?

19 MR. CONNOLLY: That's a lot - - -

20 CHIEF JUDGE LIPPMAN: In addition to the
21 records that were turned over, the father is - - - is
22 the sticking point, as far as you're concerned?

23 MR. CONNOLLY: I wouldn't put it that way.
24 The father - - - the failure to turn over records
25 relating to false accusation against the father is

1 certainly significant, and it's among - - - maybe
2 it's the most important piece - - -

3 CHIEF JUDGE LIPPMAN: What's the most
4 significant thing that you want us - - -

5 MR. CONNOLLY: Yes.

6 CHIEF JUDGE LIPPMAN: - - - to reverse on?

7 MR. CONNOLLY: Well, I would say, that's
8 the most significant one, but it's certainly not the
9 only one that I submit - - -

10 CHIEF JUDGE LIPPMAN: And - - -

11 JUDGE GRAFFEO: And the Rape Shield Law
12 would not have kept that out of the proceeding
13 regardless?

14 MR. CONNOLLY: I submit that the Rape
15 Shield Law should be deemed to be irrelevant to that
16 kind of evidence where the claim is that the sexual
17 assault never happened.

18 JUDGE SMITH: Well - - -

19 MR. CONNOLLY: Not - - -

20 JUDGE SMITH: - - - well, are you entitled
21 to put in anything that's relevant, no matter how - -
22 - how much it invades the victim's privacy? Or do
23 you have to meet the Brady standard that it's - - -
24 it's material in Brady terms; that it would - - - at
25 least with a reasonable possibility of a different

1 result?

2 MR. CONNOLLY: In this situation, I would
3 say there definitely is a reasonable possibility of a
4 different result at this - - -

5 JUDGE SMITH: Yes, but I'm saying doesn't -
6 doesn't the case turn on that? I mean, I - - - I can
7 see how all this would meet a broad definition of
8 relevance, but whether - - - you know, whether a jury
9 - - - whether there's any likelihood a jury would
10 acquit you guy if it knew this stuff, is a different
11 question.

12 MR. CONNOLLY: I would say, under the
13 Ritchie test that the Supreme Court enunciated with
14 respect to const - - - United States Constitutional
15 law, that reasonable possibility would be the
16 standard. And that would easily be met in this case,
17 where there was - - - the evidence was far from
18 overwhelming. I argue - - -

19 JUDGE SMITH: Well, I mean, the - - - she -
20 - - let's assume that the jury thinks she falsely
21 accused her father, although it's not - - - I mean,
22 it was five years ago; it was an accusation that was
23 never reported to the police. It's a very different
24 kind of thing.

25 Here you've got a girl who comes out of an

1 encoun - - - comes out of this encounter in this
2 building with blood on her face, screaming, calling
3 911. Did - - - does the encounter with the father
4 really make you think that you're going to believe
5 the defendant's version of this, which is that she
6 was essentially an unpaid prostitute who got into a
7 fight with him?

8 MR. CONNOLLY: I certainly think it could,
9 yes. This is a very close case. I mean, the - - -
10 neither the majority nor the dissent thought that the
11 evidence in this case was overwhelming against the
12 defendant.

13 JUDGE SMITH: Well - - - well, the Brady
14 test isn't overwhelming. Even - - - I agree with you
15 that - - -

16 MR. CONNOLLY: No, I understand that.

17 JUDGE SMITH: - - - if the error wasn't
18 harmless. But is it - - - is it - - - but under
19 Brady, it's got to be material. Isn't that a little
20 stronger?

21 MR. CONNOLLY: There has to be a reasonable
22 possibility that if this evidence had been introduced
23 it could have affected the difference - - - it could
24 have affected the outcome, excuse me. And in this
25 situation, given all the facts and circumstances of

1 this case, where there was substantial reason to
2 doubt this complainant's account of this incident - -
3 -

4 JUDGE SMITH: What's - - - what's the
5 substantial reason, apart from - - - apart from the
6 father - - - the incident with the father years
7 before? What - - - what makes you - - - what would
8 you say to a jury that would lead you to doubt the
9 complainant's account of this incident?

10 MR. CONNOLLY: A number of factors. One,
11 her injuries were inconsistent with her account of
12 this attack. They were very inconsistent with it.
13 For example, there was no injury at all discernible
14 to her neck, although she claimed that the defendant
15 choked her.

16 JUDGE SMITH: Didn't - - - didn't the
17 hospital records show pain on rotation of the neck?

18 MR. CONNOLLY: That's subjective. There
19 was no objective evidence. There was no redness, no
20 - - - no bruising of any kind discernible in - - - in
21 the neck. The only injury she had was a bruise on
22 her cheek and a cut on the inside of her lip and some
23 scratches on her back. Cuts on her were - - -

24 JUDGE SMITH: And he - - - and he had a
25 bite mark on his arm.

1 MR. CONNOLLY: Pardon me?

2 JUDGE SMITH: And he had a bite mark on his
3 arm?

4 MR. CONNOLLY: Yes, he had a bite mark on
5 his arm, which was consistent with his account that
6 it was an altercation relating to money.

7 JUDGE SMITH: I guess - - - I guess what
8 bothers me is, you read these medical records, and
9 you get a picture of this obviously very troubled
10 child. But nothing in it suggests - - - but for all
11 her problems, I don't see anything in it that
12 suggests that she follows up consensual sex by asking
13 for money and then - - - and then lying about what
14 happened. And that doesn't - - - you - - - that
15 isn't the sort of kid that seems to emerge from those
16 records.

17 JUDGE ABDUS-SALAAM: Counsel, are you
18 limiting your arguments to just the admissibility of
19 the evidence, or are you also looking for something
20 that would lead, in discovery, that you could have
21 followed up on, that might have led to something that
22 was admissible?

23 MR. CONNOLLY: Oh, well, it's definitely
24 both. We're also arguing that the court should have
25 turned over these records so that the defendant's

1 attorney could have made further inquiry, conducted
2 further investigation. For example, with respect to
3 the - - - the prior claim - - - false - - - allegedly
4 false claim of sexual assault, defense counsel could
5 have obtained more information through investigation.

6 CHIEF JUDGE LIPPMAN: Counsel, is it the
7 sheer number of records that are at issue here? Is
8 that what's bothering you? The volume of it?

9 MR. CONNOLLY: The volume of it is
10 significant. And that there are - - - there're a lot
11 of different evidence that - - -

12 JUDGE GRAFFEO: At - - -

13 MR. CONNOLLY: - - - discuss - - -

14 JUDGE GRAFFEO: - - - at what point, though
15 - - - I mean, the jury was clearly aware that this
16 young woman had a number of significant problems.
17 It's pretty replete through the records that you were
18 provided with. And there was no subpoena for the
19 2009 hospitalization records. So, I mean, do we
20 reach a certain point where it's just more of the
21 same, more of the same - - -

22 MR. CONNOLLY: No.

23 JUDGE GRAFFEO: - - - that you're looking
24 for here?

25 MR. CONNOLLY: Respectfully, not at all.

1 For example, the other records that should have been
2 disclosed are records that this complainant
3 experienced flashbacks triggered by consensual sex.
4 And the flashbacks were to prior nonconsensual sex.

5 JUDGE GRAFFEO: Well, the disclosed records
6 talked about loss of memory in one or two instances?

7 MR. CONNOLLY: Yes, but - - -

8 JUDGE GRAFFEO: It's not a topic that was -
9 - -

10 MR. CONNOLLY: Yes.

11 JUDGE GRAFFEO: - - - completely missing
12 from the records that were disclosed?

13 MR. CONNOLLY: No, no, it wasn't. But let
14 me just again - - -

15 CHIEF JUDGE LIPPMAN: You're saying it's
16 contextual, or are you saying they're different
17 areas, in the records? The ones that you don't - - -
18 you didn't get and the ones that you get? Is it just
19 contextual in nature, or are they totally different
20 areas of inquiry or interest?

21 MR. CONNOLLY: They're quite different
22 areas of inquiry. Take the flashbacks, for example.
23 There was nothing in the disclosed records to
24 indicate, necessarily, that the flashbacks were to
25 prior sexual abuse.

1 JUDGE SMITH: What does "flashback" mean?
2 Does it mean just that she remembered the prior
3 sexual abuse or that she - - - is there evidence that
4 she actually thought it was - - - she confused the
5 events, that she thought what had happened in the
6 past was happening in the present?

7 MR. CONNOLLY: Your Honor, I don't have the
8 records, so I don't - - - they're not disclosed. So
9 I don't know. But I mean, to me, "flashback" would
10 mean that it would be pretty much akin to an
11 hallucination - - - a hallucinatory experience where
12 you feel you're - - - you're in a consensual sex - -
13 - sexual situation, and you feel that - - - you
14 believe that it's nonconsensual. You're having a - -
15 -

16 JUDGE SMITH: But isn't - - - isn't
17 hallucination a tough - - - a tough argument for you,
18 when the - - - when there's obviously a violent
19 encounter between - - - it's not as though she
20 imagined the whole thing. There was a violent
21 encounter between your client and the victim. We
22 know that. We know she bit his arm. The - - - the
23 question is, what kind of encounter was it?

24 You're saying that she, in fact, got into a
25 fight over nonpayment and hallucinated that it was

1 forcible rape? That just doesn't - - - I can't - - -
2 I have trouble getting my mind around that.

3 MR. CONNOLLY: It's important to keep in
4 mind that this is, as you noted before, this is a
5 very troubled - - - mentally troubled complainant.
6 So what may seem normal behavior to you or me, may
7 not be the type of behavior that she would engage in.
8 It may - - - so an experience that she would have as
9 a result of this consensual - - -

10 CHIEF JUDGE LIPPMAN: Okay, counsel.

11 MR. CONNOLLY: - - - sexual encounter, may
12 be quite different from the experience - - -

13 CHIEF JUDGE LIPPMAN: Okay.

14 MR. CONNOLLY: - - - that we would have.

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

18 Counselor?

19 MR. SHARP: May it please the court, Steven
20 Sharp for the People.

21 The trial court did not abuse its
22 discretion in this - - -

23 CHIEF JUDGE LIPPMAN: What about - - - what
24 about the father and the issues with the father? I
25 think that's the most troubling question.

1 MR. SHARP: Sure.

2 CHIEF JUDGE LIPPMAN: What significance do
3 you give that? And why - - - why couldn't it have,
4 in light of everything else, change the result?

5 MR. SHARP: Well, I mean, there are a
6 number of reasons. And first of all, I contend that
7 a record disclosed some prior sexual abuse by the
8 father involving the victim. That's on page A-453 of
9 the appendix. So right there, there - - - there was
10 an indication that there was some sort of sexual
11 abuse that the defense could have actually went out
12 and checked.

13 JUDGE SMITH: Was - - - but was there an
14 indication that it was - - - that it was disbelieved?

15 MR. SHARP: No, but it did say that mother
16 and patient decided not to press charges, which would
17 give rise to, well, maybe that's a possibility to
18 explore.

19 JUDGE PIGOTT: Was there a plea offer in
20 this case?

21 MR. SHARP: Yes. And there were multiple
22 plea offers, I believe.

23 JUDGE PIGOTT: What was the - - - what was
24 the offer?

25 MR. SHARP: The last one?

1 JUDGE PIGOTT: Yeah.

2 MR. SHARP: It was, I believe, a plea to a
3 misdemeanor sexual abuse - - - A misdemeanor.

4 JUDGE PIGOTT: And what was the sentence?

5 MR. SHARP: The proposed sentence? I
6 believe it was probation. I'm not sure about that.

7 JUDGE PIGOTT: And - - - and this turned,
8 then, into this twenty-two years, he got for the - -
9 - it led me to believe that there was something the
10 DA knew that they would offer somebody time served, I
11 think, is what - - - you know, on an A misdemeanor,
12 who then goes to trial and gets twenty-two years.

13 It's just so dis - - - there's such a
14 disparity there that doesn't make sense. And I
15 didn't know if that was some indication that there's
16 something in these records that the DA knew that no
17 one, to this date, knows, that would lead some - - -
18 lead to this type of a disparity in conviction and
19 sentence.

20 MR. SHARP: Well, I'll say a couple things
21 on that. And the first is, we never had possession
22 of these records, so we had no idea what was in them.
23 And if you - - - if you look at the pre-trial stage,
24 we disclosed a number of mental health issues, a
25 number of instances - - -

1 CHIEF JUDGE LIPPMAN: So why such a good
2 plea offer?

3 MR. SHARP: Well - - -

4 CHIEF JUDGE LIPPMAN: Or lenient plea
5 offer?

6 MR. SHARP: Well, there's a couple reasons.
7 The first is, in any case like this, where you have a
8 troubled emotionally and mentally fragile victim,
9 it's - - - you're looking at putting her on the stand
10 in front of twelve strangers in a public courtroom
11 and facing the person who raped her. That's
12 obviously a consideration we go into. This woman's
13 troubled enough without having to put her through it.

14 And, you know, my - - - my understanding -
15 - - I obviously wasn't the trial prosecutor in this
16 case - - - was there was some issues towards the
17 record that's not at all in the record as to why that
18 offer was made. But certainly nothing affecting the
19 complainant's credibility or anything with the mental
20 health records that are at issue here.

21 CHIEF JUDGE LIPPMAN: But it is - - - it
22 does jump out at you, what Judge Pigott just
23 mentioned, the - - - the nature of the plea offer and
24 the nature of the ultimate sentence is really quite
25 jarring - - -

1 MR. SHARP: I - - -

2 CHIEF JUDGE LIPPMAN: - - - to see the
3 difference?

4 MR. SHARP: I understand that. And
5 certainly that was an issue raised before the
6 Appellate Division that had jurisdiction to reach the
7 issue. And nonetheless, they still found that the
8 sentence wasn't harsh and excessive.

9 And so I mean, there's a number of reasons
10 that went into the offer. And ultimately, knowing on
11 the record, the defendant rejected that offer and
12 proceeded to trial. And so I - - - I don't know what
13 else to say, I guess, on that issue.

14 But with respect to the father, and the
15 record there, those records, first of all, don't rise
16 to the level of even meeting a false claim to put
17 before the jury, in my view. All it is, is a record
18 says the mother's opinion is this never happened, and
19 - - -

20 JUDGE ABDUS-SALAAM: Counsel, what - - - if
21 - - - if defendant had those records before trial
22 and he could, for example, do some investigation,
23 perhaps, question the mother or subpoena other
24 records that might have been more detailed about
25 these allegations that the victim made against her

1 father, do you think that might have had some impact
2 on the trial; might have been a very different trial
3 than what was actually - - - the case that was
4 actually tried?

5 MR. SHARP: Well, I still think that they
6 had an indication of it, based on that disclosed
7 record from the county court. But in any event, the
8 father was dead by the time that these records were
9 even disclosed. So - - -

10 JUDGE ABDUS-SALAAM: Well, I wasn't
11 suggesting that - - - that you would question the
12 father or that there would be any investigation of
13 the father. They would question the mother, who was
14 saying that this never happened.

15 MR. SHARP: Sure. And they - - - they
16 could have done that had these re - - - had these
17 records been provided to them, if they wanted to take
18 that step. But I still think, as the majority at the
19 Appellate Division found, is that they can really
20 conceive of no reason that this evidence would have
21 even ultimately been admissible at trial, because the
22 circumstances of this attempted rape, as specifically
23 mentioned in those records, is far different from the
24 rape at issue here. I mean, we're dealing with a
25 young - - -

1 JUDGE ABDUS-SALAAM: There were some - - -
2 there were some similarities though. There was an
3 indication that she was penned in a prior assault
4 that she claimed - - - she was penned against the
5 wall and she said that this particular defendant
6 penned her against the wall. There seemed to be some
7 similarities in some of the records.

8 MR. SHARP: Well, I guess, in my view,
9 that's a very tenuous connection. I'm - - - I'm
10 looking at, she was thirteen at the time of this
11 supposed attempted rape with her father, where she
12 can't consent to sex. It's a father-daughter
13 relationship; as opposed to this which is a date
14 rape, where she's eighteen and can consent, and the
15 whole issue is consent, that that is far too
16 different and attenuated to actually - - - under this
17 court's precedent in Mandel - - - reach the jury.

18 And even if we got to that point where it
19 did reach the jury, based on the entire record, the
20 mental health issues, I really can't see under a
21 Brady-type analysis, that the jury would have changed
22 its result.

23 JUDGE SMITH: Is there - - - is there an
24 issue other than the Brady issue here?

25 MR. SHARP: No.

1 JUDGE SMITH: Is this a pure Brady case?

2 MR. SHARP: It's basically a pure Brady
3 case, except the onus was on the trial court, in this
4 case, because the People never possessed the records.

5 JUDGE SMITH: But - - - but it's - - - but
6 it's error if it was Brady material, and it's not
7 error if it wasn't, and that's all there is to it?

8 MR. SHARP: Pretty much, yes, except - - -
9 I mean, with the caveat that, you know, it's an abuse
10 of discretion standard to - - - for the trial court
11 turning over the records, in my view, under this
12 court's decision in Drake, in terms of going through
13 all those records and making the disclosures.

14 CHIEF JUDGE LIPPMAN: Okay, counselor.

15 MR. SHARP: Thanks.

16 CHIEF JUDGE LIPPMAN: Thank you.

17 Counselor, rebuttal?

18 MR. CONNOLLY: Thank you. The prosecutor
19 maintains that the record on appeal indicates - - -
20 or I should say, the disclosure medical records
21 indicate that the complainant in this case did
22 previously accuse the father of sexual abuse. I
23 would suggest that it's just the contrary. If you
24 look at A-453 and A-474 of the appendix, the record
25 suggests that she never accused the father of sexual

1 abuse, but she did accuse several other people of
2 sexual abuse.

3 It mentions that she accused several people
4 of sexual abuse, and it does not mention that she
5 accused the father of sexual abuse, which is further
6 indication that this claim was false.

7 Also, Judge Smith seems to be concerned
8 about whether there's a reasonable possibility that
9 disclosure of these records would have made a
10 difference. I would draw the court's attention to a
11 letter that the - - - excuse me - - - an affirmation
12 that the prosecutor prepared in this case in
13 opposition to a motion to dismiss in which she said
14 that if there - - - I can't find the exact language -
15 - - but the effect is - - - of what she said is that
16 if there are any records that indicate that this
17 complainant ever fabricated anything or ever
18 hallucinated anything having to do with sexual abuse
19 or sexual assault, that would certainly be
20 exculpatory and would dramatically affect the
21 People's decision whether to proceed with this case.

22 JUDGE SMITH: Is there a difference - - - I
23 realize you haven't seen the undisclosed records - -
24 - but is there a difference between a fabricated
25 claim and a claim that was - - - that was not - - -

1 that was not well-founded?

2 MR. CONNOLLY: I haven't seen the records.
3 There could be a difference. But the People
4 themselves used this language. And their position
5 was, anything that indicated that she may be
6 fabricating or also hallucinating any experience of
7 sexual abuse, would be exculpatory and would affect
8 their decision to proceed.

9 Well, this is exactly what the evidence
10 that wasn't disclosed, like the flashbacks, that's
11 hallucinatory stuff, dealing with sexual abuse. And
12 it should have been disclosed.

13 CHIEF JUDGE LIPPMAN: Okay. Thank you
14 both.

15 MR. CONNOLLY: Thank you.

16 CHIEF JUDGE LIPPMAN: Appreciate it.

17 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Terence McCray, No. 40 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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Date: February 17, 2014