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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 226

DWIGHT GILES,

Appellant.

20 Eagle Street
Albany, New York 12207
November 19, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
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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1 CHIEF JUDGE LIPPMAN: People v. Giles,
2 number 226.

3 Counsel, would you like any rebuttal time?

4 MS. HOTH: Three minutes, please.

5 CHIEF JUDGE LIPPMAN: Three minutes. Sure,
6 go ahead. You have it.

7 MS. HOTH: Good afternoon, Your Honors.
8 Jan Hoth for appellant Dwight Giles.

9 Mr. Giles' 330.30 motion was not
10 procedurally defective. Under Criminal Procedure Law
11 330.30, a motion to set aside the verdict may be
12 raised on any ground appearing in the record.

13 JUDGE SMITH: Doesn't - - - doesn't that,
14 in context, mean the record that an appellate court
15 would review on direct appeal.

16 MS. HOTH: Well, exactly, Your Honor. And
17 the record that an appellate court would review on
18 direct appeal, would include a 330.30 motion and the
19 court's decision on that.

20 JUDGE SMITH: You're really saying you can
21 - - - you can create your own record for purposes of
22 having it reviewed.

23 MS. HOTH: Historically, the record on
24 appeal includes 330.30 motions, responses, and the
25 court's decision. So I'm not saying we're creating

1 anything. That's what the law provides for.

2 JUDGE SMITH: No, I - - - I didn't mean
3 that pejoratively. All - - - all records are created
4 by lawyers. But you're saying you can create it
5 after the trial at the time of the 330 motion?

6 MS. HOTH: Absolutely. It - - -

7 JUDGE SMITH: Doesn't that - - - that
8 really makes the 330 and the 440 no different,
9 doesn't it?

10 MS. HOTH: Well, no. 330.30s and 440s are
11 - - - are very, very different. But let's take this
12 in context. Here we're arguing ineffective
13 assistance of counsel. So the critical language in
14 the statute has always been "that as a matter of law
15 would require reversal or modification." So
16 historically, that's been viewed as issues that are
17 preserved.

18 And obviously that's matters that occur
19 pre-verdict. An ineffective assistance of counsel
20 claim, however, cannot be preserved pre-verdict,
21 because we can't expect counsel to be objecting as to
22 his own representation.

23 So in this context, you're not creating the
24 record, you're allowing the preservation before the
25 verdict.

1 JUDGE PIGOTT: The record, then, in - - -
2 in your definition, means the trial record, not - - -
3 because 330.30 talks about after - - - after verdict
4 and before sentencing, right?

5 MS. HOTH: Well, 330.30 motions must be
6 filed post-verdict, pre-sentencing.

7 JUDGE PIGOTT: Right. So - - - so you're
8 arguing that the record doesn't stop at the verdict.

9 MS. HOTH: Exactly.

10 JUDGE PIGOTT: And I assume your opponent
11 is arguing that it does.

12 MS. HOTH: Exactly.

13 JUDGE PIGOTT: Okay.

14 MS. HOTH: Where are - - -

15 JUDGE PIGOTT: So that's what we've got to
16 sort out?

17 MS. HOTH: Exactly, Your Honor. And
18 there's many po - - - many solid policy reasons for
19 having the record specifically with respect to
20 ineffective assistance of counsel claims, include
21 post-verdict pre-sentencing. The major one is that
22 post-verdict pre-sentencing, a defendant is entitled
23 to the assistance of counsel. He's not on a 440.10
24 motion.

25 He's also entitled to appellate review of

1 his 330 motion, should it be denied. He's not
2 entitled to appellate review of the denial of a
3 440.10. He must seek leave from a single judge in
4 the Appellate Division. Should he not get it,
5 there's absolutely no recourse, case over.

6 So when you have the situation here, where
7 you can't preserve the claim - - -

8 JUDGE SMITH: So your argument is - - - is
9 listen - - - is limited, if I understand you, to - -
10 - to issues as to which - - - as to which the
11 preservation rule doesn't apply?

12 MS. HOTH: To issues that cannot, by their
13 very nature, be preserved post - - - pre-verdict.

14 JUDGE READ: What kinds of issues would
15 that encompass?

16 MS. HOTH: Well, it encompasses all
17 ineffective assistance of counsel claims. And it
18 could encompass something that occurs post-verdict,
19 that does not fall within newly discovered evidence
20 and/or juror misconduct, which the statute allows for
21 separately, and occurs post-verdict pre-sentencing.
22 And in the interest of judicial economy, there's just
23 no sense sentencing a defendant, making him bring a
24 440.10, when it's clear that some Constitutional
25 violation - - -

1 JUDGE SMITH: There are - - -

2 MS. HOTH: - - - has occurred.

3 JUDGE SMITH: - - - there are cases that
4 say when that happens, you can bring a premature 440
5 and the - - - and the court has jurisdiction to
6 overlook it. Why isn't that a better approach than
7 the one you're urging?

8 MS. HOTH: It could very well be the
9 perfect approach. The problem here, however, is that
10 the court below did not treat this as a de facto or a
11 premature 440.10, which it could have done under the
12 judiciary law. It treated it as a 330.30 motion.
13 And therefore, defendant and his counsel were never
14 put on notice that they needed seek - - - to seek
15 leave to appeal the decision.

16 They it gets to the Appellate Division; the
17 Appellate Division says well, this could rightfully
18 be a de facto 440.10, but we can't review it, because
19 you don't have leave to appeal.

20 JUDGE SMITH: I see the Catch-22 quality.

21 MS. HOTH: Right.

22 JUDGE SMITH: Yeah, yeah, okay.

23 MS. HOTH: So if this court wanted to
24 announce that - - - you know, making it a de facto
25 440.10 is the answer, that's fine. But that has to

1 be going - - -

2 JUDGE SMITH: Well, shouldn't - - -
3 shouldn't they, and maybe did they implicitly - - -
4 shouldn't they say okay, we're treating your brief as
5 an application for leave to appeal under 440, and
6 we're denying it?

7 MS. HOTH: Well, they absolutely could have
8 done that. I - - - I don't know that - - - if they
9 could have done that, because I don't think that's
10 the way leave to appeal 440s have done - - - have
11 proceeded.

12 JUDGE SMITH: It's not the traditional way
13 of doing it. But if - - - if there's no prejudice to
14 anyone, why not?

15 MS. HOTH: In the past, courts, including
16 this on in People v. Wolf, have treated as de facto
17 400s and reached the issue and just decided it. The
18 last few years, the Appellate Divisions have suddenly
19 decided okay, it could be a de facto 440, but you
20 didn't seek leave, so we're not reaching it.

21 JUDGE PIGOTT: What's the advantage of
22 that? I'm - - - I understand, you know, that there's
23 no right to counsel in 440s, and so if you've got a
24 330, it just seems odd when arguments are made, it's
25 premature. You know, even though all of the facts

1 are there, you know, either in affidavits or on the
2 record, and a judge can make a decision, yet they say
3 well, it's too early; wait until sentencing and bring
4 the exact same motion, and then you don't have a
5 lawyer and you don't have a right to appeal.

6 MS. HOTH: Well, that's why we're arguing
7 that the 330.30 motion on these claims is the proper
8 vehicle. And the Appellate Division and this court
9 can reach - - -

10 JUDGE PIGOTT: Well, speaking - - - making
11 yourself a law professor, have we misinterpreted what
12 "record" means? I mean, the - - - because we say
13 it's not on the record if it's not on the record pre-
14 verdict.

15 MS. HOTH: Yes. The record includes post-
16 verdict, pre-sentencing.

17 JUDGE SMITH: Well, as to that - - -

18 JUDGE READ: Do we - - -

19 JUDGE SMITH: - - - on that view, why did
20 the legislature bother putting the words "in the
21 record" in the statute at all. I mean, everything -
22 - - by definition, everything in your 330 motion is
23 going to be in the record of the 330.

24 MS. HOTH: Right, but the sta - - - the
25 legisla - - -

1 JUDGE SMITH: So the - - - so the
2 legislative language doesn't restrict coverage at
3 all?

4 MS. HOTH: Exactly. It says "in the
5 record".

6 JUDGE SMITH: So why do they bother to
7 write those words "appearing on the record"?

8 MS. HOTH: I would assume so something not
9 appearing in the record can't be there. I don't
10 know. I mean - - -

11 JUDGE SMITH: Well, but it - - - but in
12 your theory, everything appears in the record by
13 definition. That is, if you - - - if you mention it
14 in your 330, it's now in the record.

15 MS. HOTH: Well, I'm limiting my argument
16 to claims that can't be preserved pre-verdict,
17 because you have to read it in context with "on the
18 record and appear as a matter of law requiring
19 reversal or modification."

20 JUDGE ABDUS-SALAAM: Counsel, is there a
21 right to a hearing in a 330.30 motion?

22 MS. HOTH: Under subsection 1, the statute
23 does not provide for a hearing. But as this case - -
24 -

25 JUDGE ABDUS-SALAAM: And they're usually

1 done on papers, aren't they?

2 MS. HOTH: Yes. As it was done here.

3 JUDGE ABDUS-SALAAM: Right. And so if
4 there's a dispute about something, then there's no
5 hearing, and whatever's put in on the 330.30 motion
6 is really not tested in a hearing?

7 MS. HOTH: Um-hum.

8 JUDGE ABDUS-SALAAM: Is it? So why is that
9 - - - why is that better than the 440.10?

10 MS. HOTH: Well, I would think that - - -

11 JUDGE ABDUS-SALAAM: Where there's a
12 hearing?

13 MS. HOTH: - - - if - - - if I understand
14 the question, counsel could decide that whatever
15 issue he was trying to raise maybe couldn't be
16 decided on the papers as opposed to here, where it
17 was - - -

18 JUDGE READ: But wouldn't we optimally
19 decide it on the papers? Or it might be better to -
20 - - I shouldn't have interrupted you, but you - - -
21 you mean that it's - - - the counsel could made a
22 decision as to whether the 330.30 was the better
23 route, or the 440.10?

24 MS. HOTH: Exactly.

25 JUDGE READ: Whether or not you want to - -

1 - you need a hearing or want a hearing or you don't
2 care?

3 MS. HOTH: Exactly. I think that by saying
4 that this claim could be brought on a 330.30, you
5 have counsel. You have counsel making the decision
6 that it - - - it's on the record, it should be
7 decided, it's viable, and there's - - - it's a waste
8 of judicial resources to wait until sentencing and
9 then bring a 440, where maybe he - - - the client
10 doesn't even have counsel.

11 CHIEF JUDGE LIPPMAN: Counsel, what about
12 Apprendi?

13 MS. HOTH: Yes, Your Honor. Apprendi.
14 It's - - - Mr. Giles' persistent felony offender sta
15 - - - sentence is unconstitutional. The Supreme
16 Court's decision in Southern has made clear that the
17 distinction that this court has always used in
18 rejecting Apprendi claims can't stand.

19 CHIEF JUDGE LIPPMAN: Why is this different
20 from Battles?

21 MS. HOTH: Well, Your Honor, it's - - -
22 what they did in Southern was say quite clearly, in
23 my opinion, that no fact can be decided by a judge
24 that's essential to the enhanced sentencing. And
25 while in Battles we - - - the court took the view

1 that the second prong was a fact-based opinion going
2 to the exercise of judicial discretion, the point is,
3 in Southern, the courts make - - - the Supreme
4 Court's making it clear, there is no distinction.

5 CHIEF JUDGE LIPPMAN: So Southern, now,
6 makes this dispositive, in your view?

7 MS. HOTH: In my view I think - - -

8 CHIEF JUDGE LIPPMAN: The Apprendi claim?

9 MS. HOTH: - - - I think it makes it
10 totally clear, under Apprendi and its progeny, that
11 any fact that is essential to enhancing a defendant's
12 punishment must be decided by a jury and not a judge.

13 In Southern itself, they were dealing with
14 fines. And no, the judge can't decide how many days
15 this fraud was going on, only - - -

16 JUDGE SMITH: Does the - - - does the judge
17 have any role left in sentencing?

18 MS. HOTH: Well, I would think that in the
19 traditional circumstances, where it's not - - -
20 you're not enhancing a sentence because of predicate
21 or persistent status - - -

22 CHIEF JUDGE LIPPMAN: So it's really when
23 the judge makes that factual determination that - - -
24 that there's a difference between that and the normal
25 sentencing?

1 MS. HOTH: Well, the persistent felony
2 offender statute requires the judge to make an on-
3 the-record fact-based opinion as to one - - -

4 CHIEF JUDGE LIPPMAN: What's the - - -
5 what's the fact-based opinion in this case, and what
6 was the result of that opinion that the judge made?

7 MS. HOTH: In - - - in this case, the fact-
8 based opinion was that Mr. Giles' prior record made
9 him incorrigible; that absolutely nothing would
10 rehabilitate him; that he was a burglar by profession
11 like dentists and lawyers, and there was no stopping
12 him.

13 CHIEF JUDGE LIPPMAN: Therefore the
14 sentence was doubled, or whatever it was?

15 MS. HOTH: And the sentence was increased
16 according to the sentencing judge, to twenty to life.
17 The Appellate Division reduced that to fifteen to
18 life. But it went from a determinate sentence to a
19 life term.

20 JUDGE SMITH: Well, how - - - how is that
21 different from an ordinary - - - forget about
22 predicates and persistence - - - a judge says - - - a
23 judge looks at the probation report, says I conclude
24 you're incorrigible, and therefore I'm giving you
25 five years more than I otherwise would. Is that

1 okay? Or do you need a jury to decide that?

2 MS. HOTH: I think would be okay. But the
3 main difference is the judge doesn't have to do that.
4 He could just say - - -

5 JUDGE SMITH: Well, but in - - -

6 MS. HOTH: - - - I'm sentencing you.

7 JUDGE SMITH: - - - as we - - - as we are
8 interpreted, our statute in cases whose names I can't
9 remember, but I have a feeling - - - I have a feeling
10 we've had this issue before.

11 MS. HOTH: Yes.

12 JUDGE SMITH: And we said there, the judge
13 doesn't have to anything, he doesn't have to find any
14 facts. He has discretion. The - - - he's holding
15 the hearing because he wants to - - - because facts
16 can be useful. Why - - - yeah, I mean - - - some
17 people have had some trouble accepting that. A lot
18 of people think we were wrong. I think one of them
19 was called Rivera and one was called something else.

20 But haven't - - - yeah, haven't we said it
21 enough times yet, that you should start working on
22 the Supreme Court and stop trying to persuade us?

23 MS. HOTH: Oh. Well, don't assume we
24 haven't been working on the Supreme Court. But no,
25 I'm one of the people who think you're wrong.

1 CHIEF JUDGE LIPPMAN: Yeah, but you're
2 saying Southern makes this clear anyway, right?
3 Isn't that - - -

4 MS. HOTH: I - - - I - - -

5 CHIEF JUDGE LIPPMAN: You're saying that
6 changes the game?

7 MS. HOTH: I'm not saying that Southern
8 changes the game. I'm saying that any ambiguity as
9 to what Apprendi covered - - - Apprendi is not
10 limited - - -

11 CHIEF JUDGE LIPPMAN: Is now - - - is now
12 clear?

13 MS. HOTH: Is now clear. It's not limited
14 to - - -

15 JUDGE SMITH: What is it - - -

16 MS. HOTH: - - - facts that are elements.

17 JUDGE SMITH: - - - what is it in Southern
18 that says that? I mean, I thought - - - I just
19 glanced at Southern, it says - - - it says the sixth
20 - - - it says Apprendi applies to fines. I mean
21 what's - - - what is the part of Southern you're
22 relying on?

23 MS. HOTH: Because Southern made clear that
24 any fact that is essential to the enhanced sentence -
25 - -

1 JUDGE SMITH: That's - - - that's what
2 Apprendi says.

3 MS. HOTH: I think Southern makes it even
4 clearer by applying it to a fine.

5 JUDGE SMITH: Which part - - -

6 MS. HOTH: It's not going to an element of
7 the crime. This court always viewed what Apprendi
8 and its progeny were saying as specifically limited
9 to facts that went to elements. And I think
10 Southern, by applying it to fines, is making clear
11 that it's not. There's no distinction between facts
12 that go to elements, facts that go to sentencing
13 discretion - - -

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

17 Counselor?

18 MS. FELDMAN: May it please the court, my
19 name is Sheryl Feldman. I'm here on behalf of the
20 People.

21 CHIEF JUDGE LIPPMAN: Counselor, take
22 Apprendi first, because we were just discussing it.

23 MS. FELDMAN: It - - - Apre - - - the
24 Apprendi issues, Southern Union doesn't change it in
25 the least. In fact, in Southern Union, they simply -

1 - - I'm just looking for the quote. Essentially what
2 they say, any fact other than the fact of a prior
3 conviction. So it doesn't change anything, because
4 that was always - - - that has always been the basis
5 of your assessment that our predicate felon laws are
6 - - -

7 CHIEF JUDGE LIPPMAN: Is this a stronger
8 case than Battles, or it's the same?

9 MS. FELDMAN: Not at all. I mean, this - -
10 - it just doesn't change anything at all. In fact,
11 in Southern Union, the - - - the People in that case
12 conceded that facts had to be decided, and they said
13 but, you know, it doesn't matter, because it's just a
14 fine. Apprendi should only apply when it pertains to
15 incarceration. And the Supreme Court just rejected
16 that.

17 CHIEF JUDGE LIPPMAN: Yeah, well - - -

18 MS. FELDMAN: They didn't change their rule
19 at all.

20 CHIEF JUDGE LIPPMAN: - - - yeah, but
21 here's a case where the sentence was markedly
22 enhanced by the judge's factual decision, right?

23 MS. FELDMAN: Well, that's the case in all
24 persistent felony offenders.

25 CHIEF JUDGE LIPPMAN: Yes, exactly.

1 MS. FELDMAN: Right. And you've already
2 decided that issue. And Southern Union gives you no
3 reason to change your decision. It just doesn't.
4 This isn't a fine case. It does - - - it has nothing
5 to do with fines. It's the same exact rule. It says
6 that this rule, the rule that you decided, applies to
7 fines.

8 JUDGE READ: What - - - talk about the 330.
9 And why isn't - - - why isn't what your opponent
10 suggests - - - why doesn't that make sense in terms
11 of judicial economy?

12 MS. FELDMAN: It's - - - first of all, it's
13 not up to this court to decide judicial economy.
14 It's up to this court to look at the statute and to
15 see what the legislative intent is.

16 JUDGE READ: Well, maybe there's a way to
17 interpret it that would - - -

18 MS. FELDMAN: Well - - -

19 JUDGE READ: - - - that would enhance the
20 interests of judicial economy. Certainly it's
21 appropriate for us to consider that.

22 MS. FELDMAN: Well - - - well, first of
23 all, I would say that it doesn't enhance judicial
24 economy, because we're up in the Court of Appeals on
25 a completely frivolous ineffective assistance - - -

1 JUDGE PIGOTT: Well, let me ask you this.

2 MS. FELDMAN: - - - claim.

3 JUDGE PIGOTT: Suppose - - - you know,
4 after verdict, before sentence, the defendant finds
5 out that his lawyer was disbarred halfway through the
6 trial. Now, he's got to do something about that. He
7 kind of thinks he was entitled to a lawyer licensed
8 to practice in the state of New York.

9 So he brings a motion under 330 to say my
10 lawyer got disbarred halfway through the trial. Your
11 argument would be you can't bring a 330. That's not
12 on the record. It's too early.

13 MS. FELDMAN: Correct.

14 JUDGE PIGOTT: So - - - so the judge,
15 knowing that this case is going to get flipped
16 because you've got an illegal lawyer halfway through
17 the trial, says, well, wait til I sentence you - - -

18 MS. FELDMAN: Right.

19 JUDGE PIGOTT: - - - and then you can bring
20 the 440, and I will make the decision that I'm
21 prepared to make today, and you can then, without a
22 lawyer, ask for permission to appeal my decision.

23 MS. FELDMAN: You know, this whole thing
24 about not a lawyer is a red herring.

25 JUDGE PIGOTT: No, it's not. It's very

1 serious.

2 MS. FELDMAN: No, no, no, no. I'll tell
3 you why it's a red herring. Because this court has
4 decided that at a 440 hearing that - - - that a
5 defendant is entitled to counsel. He could have
6 counsel.

7 JUDGE PIGOTT: No, what - - - what we - - -
8 what we decided is he may be entitled to counsel, and
9 he doesn't get counsel when he wants to bring it.

10 MS. FELDMAN: If it's not a frivolous
11 claim.

12 JUDGE PIGOTT: Right.

13 MS. FELDMAN: It's reviewed.

14 JUDGE PIGOTT: But he's - - - but he's not
15 a lawyer, and he's sitting in Attica, and he says,
16 you know, how do I - - - where do I get the form?
17 How do I do it? And - - - and if he - - - and if he
18 misses a - - - misses a comma - - - I shouldn't be
19 that cruel - - - but if - - - if somebody says well,
20 this must be frivolous, we're going to deny it
21 without a hearing, he can - - - he can ask to appeal
22 it, as opposed to a 330, where as - - - as your
23 opponent argues, your lawyer is standing there, says
24 this is what happened, the judge knows it, and can
25 make a decision.

1 MS. FELDMAN: Right. But as this court has
2 said in other procedural contexts - - -

3 JUDGE PIGOTT: Let's assume - - - I think I
4 know what you're going to say. Let's assume that's
5 true. Does that make sense?

6 MS. FELDMAN: Yes, it does make sense.
7 Because what - - - the fact of the matter is, the
8 legislature decided that they wanted to set up the
9 procedural - - -

10 JUDGE PIGOTT: Sometimes they don't make
11 sense.

12 MS. FELDMAN: But - - - but - - -

13 JUDGE PIGOTT: Does this make sense?

14 MS. FELDMAN: - - - but they did it for a
15 reason, Your Honor. Because many frivolous 440s or
16 330s are brought before courts, and they set up a
17 procedure that they could do it in what they thought
18 was an efficient manner.

19 JUDGE SMITH: Well, assuming - - - assuming
20 you're basically right, why would it be so terrible
21 to say that a court, in a proper case, has discretion
22 to overlook the fact that a 440 is brought
23 prematurely.

24 MS. FELDMAN: Well, what they - - - what
25 they can do, which is sort of what this judge did,

1 she look at it, she said, this is like completely
2 frivolous, let's get it done. And - - - and the fact
3 of the matter is - - -

4 JUDGE SMITH: No, okay. But humor me.

5 MS. FELDMAN: I am.

6 JUDGE SMITH: Assume it's a non-frivolous
7 application - - - I know they never get brought
8 against your office, but once in a while a defendant
9 might bring a non-frivolous application. Yeah. Why
10 - - - what would be so terrible about giving the
11 judge discretion to say, you know, you're premature,
12 but I don't see any good to come from waiting, and
13 I'd like to sort this out now?

14 MS. FELDMAN: Because it violates the law.
15 It vio - - - it violates - - -

16 JUDGE SMITH: Well - - -

17 MS. FELDMAN: - - - the clear law. There -
18 - -

19 JUDGE SMITH: I mean, all - - - judges do,
20 sometimes, overlook defects in proceedings, although
21 by - - - by definition, there's some violation of the
22 law. Why isn't this a defect that couldn't, in a
23 proper case, be overlooked?

24 MS. FELDMAN: Your Honor, I would just read
25 you language that you wrote in another context, in

1 Cuadrado; and you said, "It is within the power of
2 the legislature to make reasonable rules governing
3 when those defects may be complained of. As long as
4 those rules give a defendant a fair opportunity to
5 vindicate his rights, they should be enforced."

6 JUDGE SMITH: Okay, but - - -

7 MS. FELDMAN: And that's exactly what this
8 is.

9 JUDGE SMITH: - - - okay, but yeah - - -
10 it's within the legislature's power to make those
11 rules.

12 MS. FELDMAN: That's right.

13 JUDGE SMITH: Isn't it - - - isn't it in
14 our power to make a judgment about whether the
15 legislature intended that those rules should be
16 enforced with absolute strictness or occasionally
17 relaxed?

18 MS. FELDMAN: There's no question. This
19 court has already decided in Wolf, that that's
20 exactly what the legislature meant. In - - -

21 JUDGE PIGOTT: This is - - -

22 JUDGE SMITH: That it meant absolute
23 strictness?

24 MS. FELDMAN: In Wolf, it said, "The
25 Rosario objection was raised for the first time in a

1 motion to set aside the verdict brought pursuant" - -
2 - I'm - - - "brought purportedly under C.P.L.
3 330.30(1). The factual assertions concerning this
4 material were outside the record, and for that reason
5 could not be considered in a C.P.L. 330.30(1)
6 motion."

7 JUDGE SMITH: Okay, well - - -

8 MS. FELDMAN: "Therefore we agree with the
9 Appellate Division that the application was at best a
10 de facto C.P.L. 440.10 motion."

11 JUDGE SMITH: Okay, that's - - - I think
12 you slipped from arguing - - - from asking my
13 question to arguing the question that's actually at
14 issue in this case, which I suppose is forgivable.

15 But the - - - but what about the - - - the
16 second half of that, that the - - - we said, "this is
17 at most, a premature 440". We didn't say, oh,
18 horrors, we can't have premature 440s.

19 MS. FELDMAN: Well, the - - - the reason
20 that you shouldn't have it, is because if someone
21 were to bring a correct 440, the right way, they
22 would have less rights than a defendant who brings it
23 the wrong way. A defendant who brought a 440
24 correctly, expanded the record because that's the way
25 you're supposed to expand the record - - -

1 JUDGE SMITH: Well, suppose - - -

2 MS. FELDMAN: - - - that person would then
3 have to seek leave.

4 JUDGE SMITH: Okay, but suppose - - -

5 MS. FELDMAN: That person - - -

6 JUDGE SMITH: - - - suppose you bring a 440
7 the right way in every way, except you don't wait
8 until sentencing. What's - - - what - - - I
9 understand the problem, the statute says you wait
10 until sentencing. But what bad - - - what bad would
11 happen if the court were to overlook that defect?

12 MS. FELDMAN: Well, there would be nothing
13 bad, if they were held to the procedure of 440. If
14 they were held to the procedure of 440. And the - -
15 -

16 JUDGE SMITH: Okay, so - - -

17 MS. FELDMAN: - - - procedure of 440
18 requires that a defendant seek leave. Now, this
19 defendant cannot claim that he didn't realize that he
20 was doing - - -

21 JUDGE PIGOTT: Well, let's go back - - -

22 MS. FELDMAN: - - - his motion as a 440.

23 THE COURT: Ms. Feldman, the first - - -
24 the first question that was asked of your opponent
25 was, if you - - - if you appeal, is the 330 part of

1 the record. And here - - - and her answer was yes.

2 MS. FELDMAN: Only if you get leave.

3 JUDGE PIGOTT: No, no. I'm - - - a 330.

4 You bring a 330, right, and - - - and it's part of

5 the appellate record, right?

6 MS. FELDMAN: Well, it's not a matter of

7 the appellate record. The law says - - -

8 JUDGE PIGOTT: No, no, no, wait. That was

9 - - -

10 MS. FELDMAN: - - - any ground - - -

11 JUDGE PIGOTT: - - - that was a preamble -

12 - -

13 MS. FELDMAN: - - - appearing in the

14 record.

15 JUDGE PIGOTT: - - - to my ques - - - that

16 was a preamble to my question. That's what she said.

17 And so then the issue became is - - - by

18 record, did they mean the trial record, or did they

19 mean the record on appeal before the appellate court?

20 MS. FELDMAN: Well, of course, when you're

21 following the procedure and make - - - 330 motion to

22 set aside verdict - - - when you're following that

23 procedure - - - that procedure, then any ground

24 appearing in the record, of course, it's at the time

25 that you make the motion. It makes - - -

1 JUDGE PIGOTT: Well, the motion is part of
2 the record.

3 MS. FELDMAN: Is the - - - no - - - well,
4 if the motion has additional facts that were not part
5 of the record, then it's not a proper - - - well,
6 here's the other thing. In an ineffective assistance
7 claim, this court has said - - - this court has said
8 that it - - - unless the non-record proof has been
9 aired, a defendant cannot prevail on a - - - on a
10 ineffective assistance - - -

11 JUDGE PIGOTT: Ineffective.

12 MS. FELDMAN: - - - claim. In order for
13 non-record proof to be aired, you might have to have
14 a hearing. Hearings are not authorized under 330.30.

15 In - - - like as in this case, where Mr.
16 Feinman provided an affidavit that gave all good
17 reasons - - - such good reasons that they abandon all
18 of the reasons except for one, and then tacked on a
19 new reason to try and beef it up.

20 These - - - there is a procedure for that.
21 You do it in a 440. You're not allowed, under the
22 statute, to do it in a 330.

23 JUDGE PIGOTT: But you don't mind a de
24 facto 440?

25 MS. FELDMAN: Well, if - - - if you do it

1 under - - - if you do a de - - - I do mind a de facto
2 440. I really do. Because in reality - - - in
3 reality, I don't even understand how this is speeding
4 up things.

5 JUDGE PIGOTT: Well, because you - - -

6 MS. FELDMAN: This is - - -

7 JUDGE PIGOTT: - - - don't have to wait
8 until sentencing. And if - - -

9 MS. FELDMAN: Sentencing was happening on
10 that day.

11 JUDGE PIGOTT: I was almost done. I just
12 had a comment.

13 MS. FELDMAN: Okay, sorry.

14 JUDGE PIGOTT: You know - - - the judge
15 knows that - - - that he or she is going to flip the
16 case because - - - use my disbarment, you know,
17 saying, well, if the lawyer was disbarred, he
18 couldn't appear here, and here you went through your
19 trial. But, Ms. Feldman tells me I can't tell you
20 that, because she says I've got to wait until
21 sentencing. You want to be sentenced now, before the
22 pro - - - probation report, and then I'll can - - -
23 then I can vacate your conviction? Or do you want to
24 go through the charade of coming back in three
25 months?

1 MS. FELDMAN: Your Honor, the reality of it
2 is, if it's after verdict, if it's after verdict, the
3 case is on for sentencing. So all the judge has to
4 do is sentence the defendant, then he could file the
5 same motion - - -

6 JUDGE PIGOTT: Now, see - - -

7 MS. FELDMAN: - - - that he filed before.

8 JUDGE PIGOTT: - - - but now you're telling
9 - - - you're telling the court, what you got to do is
10 violate what your rules would be, where you would ask
11 for a pre-sentence report and determine whether or
12 not the sentence you're going to give is proper,
13 because Ms. Feldman says all you got to do is
14 sentence him that minute, and then you're into 440 as
15 opposed to a 330.

16 MS. FELDMAN: No, that's not what happened
17 here.

18 JUDGE PIGOTT: I'm almost done. Which then
19 says, that a 330 and a 440 are - - - are effectively
20 the same.

21 MS. FELDMAN: No. The way things work is
22 that defendant's convicted after trial. The case is
23 adjourned for sentence. A pre-sentence report is
24 prepared.

25 JUDGE PIGOTT: Right.

1 MS. FELDMAN: The next time it's on the
2 calendar, the defendant is going to be sentenced.
3 Defendant says, I don't want to be sentenced - - -
4 that's what happened in this case - - - I don't want
5 to be sentenced. I have an ineffective lawyer.
6 Here's my motion.

7 JUDGE PIGOTT: I get that. But what - - -
8 my question was, if at the time of the - - - of the
9 verdict, right, the judge is going to say I find you
10 guilty, and he says wait a minute, Judge, my lawyer
11 got disbarred.

12 MS. FELDMAN: Well, then - - - then that -
13 - - then he should move for a mistrial at that time.

14 JUDGE PIGOTT: But, no, he's been
15 convicted.

16 MS. FELDMAN: And that's prior to verdict.

17 JUDGE PIGOTT: He's been - - - I'm almost
18 done. He's - - - he's been convicted. Now you're
19 saying, you've got to wait the three months for
20 sentencing to bring the identical motion that the
21 judge knows he's going to grant?

22 MS. FELDMAN: Well, in the - - - in the
23 law, there's a provision that says if you could have
24 made a record of your lawyer's disbar - - -
25 disbarment before the verdict, you should have - - -

1 JUDGE SMITH: You - you - - -

2 MS. FELDMAN: - - - done it.

3 JUDGE SMITH: - - - you're fighting the
4 hypothetical.

5 MS. FELDMAN: I'm really not.

6 JUDGE SMITH: Yeah, just - - - Judge Pigott
7 is asking, I think, about a case, if a guy goes
8 through the trial, has no - - - thinks he's got a
9 lawyer - - -

10 MS. FELDMAN: Yeah.

11 JUDGE SMITH: - - - he's convicted on
12 Tuesday.

13 MS. FELDMAN: Right.

14 JUDGE SMITH: Sentencing is for ninety days
15 from Tuesday.

16 MS. FELDMAN: Correct.

17 JUDGE SMITH: On Wednesday, the day - - -
18 he finds out that his lawyer was disbarred.

19 MS. FELDMAN: Okay.

20 JUDGE SMITH: Does he have any alternative
21 to waiting the eighty-nine days?

22 MS. FELDMAN: Until sentence?

23 JUDGE SMITH: Yes.

24 MS. FELDMAN: He could - - - well, the fact
25 that his lawyer was - - -

1 JUDGE SMITH: Does he have any alternative
2 to waiting the eighty-nine days?

3 MS. FELDMAN: Not necessarily. Because - -
4 -

5 JUDGE PIGOTT: You'd say no?

6 MS. FELDMAN: I - - - it's not a definite
7 no, because if it's one of those rare cases where
8 based on the face of it - - - based on the face of
9 what appears in the motion, you could decide this
10 ineffective - - -

11 CHIEF JUDGE LIPPMAN: Is this hypothetical
12 one - - -

13 MS. FELDMAN: - - - assistance claim - - -

14 CHIEF JUDGE LIPPMAN: - - - of those cases?

15 MS. FELDMAN: No. Because - - - because
16 there have been cases where lawyers have been
17 disbarred, and they're not ineffective.

18 CHIEF JUDGE LIPPMAN: So the answer is,
19 they have to wait all that time?

20 MS. FELDMAN: I'm saying there has to be a
21 hearing, perhaps and - - -

22 JUDGE SMITH: Well, but if it - - - and if
23 it was - - -

24 MS. FELDMAN: - - - the only way you could
25 - - -

1 JUDGE SMITH: - - - but if it was a rare
2 case, based on the face of what appears in what
3 record?

4 MS. FELDMAN: Based on what appears in the
5 record at trial. Let's say - - -

6 JUDGE SMITH: Well, all - - - the lawyer's
7 disbarment is not going to be in the record at trial.

8 MS. FELDMAN: That's right. And that - - -
9 that is not one of those rare - - -

10 JUDGE SMITH: So you're saying he's - - -

11 MS. FELDMAN: - - - occasions.

12 JUDGE SMITH: - - - got to wait the eighty-
13 nine days.

14 MS. FELDMAN: So my answer is no. Yes.

15 CHIEF JUDGE LIPPMAN: Even though he just
16 found out the day before?

17 MS. FELDMAN: Yes. That my answer is that.

18 JUDGE SMITH: And does that - - -

19 CHIEF JUDGE LIPPMAN: And is that fair? Is
20 that right?

21 MS. FELDMAN: Yes, it is, because as this
22 court has - - -

23 CHIEF JUDGE LIPPMAN: Or is it putting - -

24 -

25 MS. FELDMAN: - - - repeatedly said - - -

1 CHIEF JUDGE LIPPMAN: - - - or - - - or
2 counsel, is it putting form over substance?

3 MS. FELDMAN: You're not precluding the
4 defendant entirely from ever bringing this claim.
5 You're just - - -

6 CHIEF JUDGE LIPPMAN: What is the rationale
7 of waiting - - -

8 MS. FELDMAN: - - - you're just - - -

9 CHIEF JUDGE LIPPMAN: - - - that time?

10 MS. FELDMAN: Because that's what the
11 legislature says. And he has a remedy.

12 CHIEF JUDGE LIPPMAN: And there's no
13 discretion to do something that does serve the
14 economy of time and fairness?

15 MS. FELDMAN: How does - - - how is that
16 the economy of time?

17 CHIEF JUDGE LIPPMAN: Because we're going
18 to deal with this issue now. Why should he wait that
19 time? What's going to be achieved?

20 MS. FELDMAN: You - - - because if there
21 has to be a hearing, as Judge Abdus-Salaam pointed
22 out, there's only two subjects of 330.30 that you're
23 even allowed to have a hearing on. You're not
24 allowed by statute to have a hearing.

25 JUDGE PIGOTT: Your - - -

1 MS. FELDMAN: Ineffective assistance claims

2 - - -

3 JUDGE PIGOTT: Your argument, though is
4 that he's got to wait, because that way he loses his
5 lawyer, and he loses his right to appeal.

6 MS. FELDMAN: He doesn't lose his lawyer.
7 If there's a hearing, he has a right to a lawyer.

8 JUDGE PIGOTT: If there's a hearing.

9 MS. FELDMAN: You decided this at - - -

10 JUDGE PIGOTT: Ms. Feldman, if there's a -
11 - - if there's a hearing. But what you know and I
12 know is that in one hun - - - not one hundred
13 percent, but ninety-nine and forty-four-one-
14 hundredths percent of 440s, he's never given a
15 lawyer. They're denied, and he has no right to
16 appeal.

17 MS. FELDMAN: Well, that's not true that he
18 doesn't have a - - -

19 JUDGE PIGOTT: Your chances - - - your
20 chances are better at a 440 than at a 330.

21 MS. FELDMAN: Your Honor, does - - - that
22 is not necessarily true. And it's not necessarily
23 true that he's going to be deprived of a lawyer. And
24 - - - and the fact of the matter is that you con - -
25 - I mean, in - - -

1 JUDGE PIGOTT: Don't quote me, now.

2 MS. FELDMAN: - - - I mean, in more - - -

3 JUDGE PIGOTT: You can quote Smith. Don't
4 quote me.

5 MS. FELDMAN: - - - in many cases - - - in
6 many cases, you have said, in addition to Cuadrado,
7 "We will not resort to interpretive contrivances to
8 broaden the scope and application of statutes,
9 especially when an adequate legal remedy, aside from
10 a direct appeal was available." And that was - - -

11 CHIEF JUDGE LIPPMAN: Okay, one last - - -

12 JUDGE SMITH: Okay, but - - -

13 CHIEF JUDGE LIPPMAN: - - - one last
14 question. Judge Smith, go ahead.

15 JUDGE SMITH: Okay. If we could just go
16 back to the - - - the eighty-nine-day delay,
17 hypothetical.

18 MS. FELDMAN: Yeah.

19 JUDGE SMITH: Is it fair to say that your
20 answer to the question of why should he have to wait
21 the - - - the eighty-nine days, and your only answer
22 - - - but it may be a perfectly good answer - - - is
23 because the statute says so?

24 MS. FELDMAN: The statute says so. That's
25 correct. And there's certain procedures that are

1 allowed under the statute.

2 CHIEF JUDGE LIPPMAN: Okay.

3 MS. FELDMAN: If I can just talk for one -

4 - -

5 CHIEF JUDGE LIPPMAN: No, counsel - - -

6 MS. FELDMAN: - - - minute about the - - -

7 CHIEF JUDGE LIPPMAN: - - - counselor - - -

8 MS. FELDMAN: - - - the merits of the

9 ineffective assistance - - -

10 CHIEF JUDGE LIPPMAN: - - - counselor.

11 MS. FELDMAN: - - - claim?

12 CHIEF JUDGE LIPPMAN: Your time's up.

13 Let's go to your adversary.

14 MS. FELDMAN: Okay. Thank you.

15 MS. HOTH: I have to disagree that the
16 statute says what my opponent is saying it says.
17 Nowhere in the statute is "record" limited to pre-
18 verdict. And nor is there any policy reason for
19 limiting it.

20 JUDGE PIGOTT: But she is right, though,
21 that that's generally the way it's been treated?

22 MS. HOTH: But the way that it's been
23 treated doesn't mean that that's the be all and end
24 all, because in the past, if a court was faced with
25 this situation, including this court in People v.

1 Wolf, you called it a de facto 440, and you reached
2 the merits of it.

3 You determined in Wolf that it couldn't be
4 brought by a 330.30, it should have been a 440.10,
5 but the merits were not - - -

6 JUDGE PIGOTT: It's a - - - but it - - - to
7 take Ms. Feldman's point with respect to it being the
8 law, all right, and you make the point that in a 440
9 you're not entitled to a lawyer; are you entitled to
10 a lawyer to a de facto 440?

11 MS. HOTH: Well, I think that what's
12 happened, though, because it's pre - - - yes.
13 Absolutely. Because it's pre-sentence. So you're
14 entitled to a lawyer throughout the pendency of your
15 trial, which is why you get a lawyer on a 330.30
16 motion.

17 So I don't understand why we would want
18 them to wait. And the fact that the legislature said
19 you don't get a lawyer on a 440.10, because we want
20 to stop all the frivolous motions, I think, is wrong,
21 because a lawyer is the gatekeeper to what's a
22 frivolous motion and what's not.

23 So lawyers aren't going to bring 330.30
24 motions that are frivolous. The defendant might try
25 to fire his attorney and do it pro se. But the point

1 is, the lawyer's not going to do it. The lawyer's
2 the gatekeeper.

3 As my opponent pointed out, several of the
4 defendant's claims here were dropped, and others were
5 raised. The lawyers were acting as the gatekeepers
6 to the issue.

7 JUDGE READ: But isn't a 330 sort of an
8 inappropriate vehicle for ineffective assistance,
9 just because - - - just because there might be - - -
10 there often are going to be factual issues that have
11 to be tested in a hearing?

12 MS. HOTH: Well, I - - - I disagree. I
13 think in most situations even when they're brought in
14 440, hearings are not ordered.

15 JUDGE READ: Yeah.

16 MS. HOTH: They're always - - - they always
17 seem to be decided on the papers, whether - - -
18 especially where, as here, counsel submits an
19 affidavit, the viability of - - -

20 JUDGE READ: So there's no advantage - - -
21 there's no advantage in waiting?

22 MS. HOTH: Again, what I would say is that
23 if there is any sort of advantage in waiting, the
24 attorney could make that determination, and then you
25 wouldn't bring it on a 330.30. He'd say we're going

1 to need a hearing; this is something that requires
2 more exploration.

3 But there shouldn't - - - there's nothing
4 in the statute that prohibits what happens here, and
5 there's many, many good policy reasons for why what
6 happened here is appropriate.

7 CHIEF JUDGE LIPPMAN: Okay, counselor.
8 Thank you. Thank you both.

9 MS. HOTH: Thank you.

10 CHIEF JUDGE LIPPMAN: Appreciate it.

11 (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. Dwight Giles, No. 226 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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