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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 45

CLEMON JONES,

Appellant.

20 Eagle Street
Albany, New York 12207
February 18, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 45, People v.
2 Jones.

3 Counsel, would you like any rebuttal time?

4 MR. CIRANDO: Yes, Your Honor. Good
5 afternoon. Two minutes, if necessary. Thank you.

6 CHIEF JUDGE LIPPMAN: Sure. Go ahead,
7 counsel.

8 MR. CIRANDO: May it please the court, John
9 Cirando from Syracuse appearing on behalf of the
10 appellant Clemon Jones. And this is an appeal from
11 an order denying the defendant's pro se Article 440
12 motion to set aside his persistent felony offender
13 sentence of fifteen to life. It's our position that
14 the Appellate Division incorrectly affirmed the order
15 denying the motion, and the defendant should be
16 sentenced as a second felony offender to serve four
17 to seven years - - - or four to seven max and the
18 minimum be half of that.

19 CHIEF JUDGE LIPPMAN: Counsel, how does
20 that square with the statutory language about the
21 persistent felony offenders?

22 MR. CIRANDO: Well, the persistent felony
23 offender statute, Your Honor, provides - - - we - - -
24 we submit, unconstitutionally - - - that the out-of-
25 state felony does not have to have a New York

1 predicate - - -

2 CHIEF JUDGE LIPPMAN: Right.

3 MR. CIRANDO: - - - as long as the person
4 has a year - - -

5 CHIEF JUDGE LIPPMAN: It has to be above a
6 certain - - -

7 MR. CIRANDO: - - - a year in jail.

8 CHIEF JUDGE LIPPMAN: It has to be a
9 serious crime, right?

10 MR. CIRANDO: No.

11 CHIEF JUDGE LIPPMAN: No?

12 MR. CIRANDO: It has to be a felony in
13 another jurisdiction. That - - - that's what we're
14 talking about here.

15 CHIEF JUDGE LIPPMAN: No, but - - - but
16 there are other provisions beyond that that it has to
17 be more than one year in prison.

18 MR. CIRANDO: That's - - -

19 CHIEF JUDGE LIPPMAN: So - - - but there is
20 - - - this is - - - I guess my question there was
21 there is some legislative scheme behind this. It's
22 not arbitrary. They're saying it doesn't have to
23 equate with something in New York, but it has to be
24 more than one year. They have to be in prison - - -

25 MR. CIRANDO: You have - - -

1 CHIEF JUDGE LIPPMAN: - - - prior to the
2 commission of the present felony.

3 MR. CIRANDO: No, that's - - - that's the
4 same for a predic - - - a second felony offender or -
5 - - or a predicate felon. The only difference
6 between this and the predicate felony statute is that
7 you have to serve time in jail, at least one year.

8 CHIEF JUDGE LIPPMAN: Right.

9 MR. CIRANDO: Other than that, it's a
10 mirror image of the second felony offender statute.
11 Now - - -

12 CHIEF JUDGE LIPPMAN: There - - - there are
13 other states in the country who have the law as we
14 do, right?

15 MR. CIRANDO: Thirteen states have the law
16 as we do. Twenty - - - twenty - - - my brief says
17 twenty-one, but my math was wrong. I think twenty
18 have it the way we submit it should be, that - - -
19 that you have to have a felony within that state.
20 And fourteen states don't - - - do not have the
21 habitual.

22 CHIEF JUDGE LIPPMAN: Well - - - go ahead.

23 JUDGE STEIN: Didn't - - - didn't the
24 legislature explicitly reject your argument? Didn't
25 they - - -

1 MR. CIRANDO: Well, they - - -

2 JUDGE STEIN: - - - say that there are
3 different purposes here, different reasons, and what
4 they're looking to do is to - - - to target people
5 that have committed serious crimes and - - - and have
6 been repeatedly exposed to penal sanctions. That's
7 not a requirement of the predicate felony statute,
8 correct?

9 MR. CIRANDO: When you look - - - the - - -
10 the - - - the total answer is - - - is - - - is yes,
11 but, with all due respect, Your Honor, the - - - the
12 - - - the rationale that the Fourth Department used
13 was the commission staff notes from 7010 when they -
14 - - when they put it in which - - - which - - -

15 JUDGE STEIN: You don't always get that - -
16 - that - - - that clear - - -

17 MR. CIRANDO: - - - cov - - - which covered
18 those things. However - - -

19 JUDGE STEIN: - - - legislative intent.

20 MR. CIRANDO: How - - - however, the
21 justification that they gave was that it was
22 extremely difficult to administer to - - - for the
23 courts to have problems to determine if it's a felony
24 in New York. But then they changed the law in '75
25 with - - - with the - - - the predicate felony

1 statutes and all of the predicate felony statutes to
2 provide that it must be a felony in New York. So - -
3 -

4 JUDGE STEIN: They didn't change that on
5 the persistent felony statute.

6 MR. CIRANDO: They - - - they didn't.

7 JUDGE STEIN: And the persistent statute is
8 discretionary. So the court can take all of that
9 into consideration in deciding whether to - - - to
10 sentence somebody as a persistent felon.

11 MR. CIRANDO: There's no discretion on
12 whether or not you get to the two felonies. The
13 discretion comes in in the second half of whether or
14 not your essential predicate felon is a bad person
15 that we should put in jail for life. So I think
16 there is a - - - there - - - there is a - - - it - -
17 - it's - - - the discretionary part comes in later.
18 It doesn't come in for the - - - the - - - what do
19 you call it - - - qualification.

20 JUDGE STEIN: But isn't that the issue, how
21 long - - - how long they're exposed to incarceration?

22 MR. CIRANDO: But the - - - the - - - the
23 question is does that person qualify to be within
24 that rubric of a persistent felony and is a felony
25 offender. And - - - and it's our position that it's

1 not.

2 And when you look at everything you said,
3 Judge Stein, as to the rationale behind the predicate
4 felony statute - - - or, I'm sorry, persistent felony
5 statute - - - to justify it back in 1965, back in '75
6 when they changed the second felony offender statute,
7 they specifically said that those reasons that - - -
8 that they gave in 6 - - - '65 weren't valid reasons.
9 And now it seems to be, as the Court of Appeals said
10 in Parker, I think the language they used was fairer
11 and more logical to do it when you have a conviction
12 that is a - - - a felony in New York.

13 JUDGE ABDUS-SALAAM: Well, counsel, on - -
14 - on the issue of discretionary versus mandatory,
15 when you said predicate felon, I - - - I thought - -
16 - I took that to mean a second felony.

17 MR. CIRANDO: Yes, yes.

18 JUDGE ABDUS-SALAAM: Right. So I think
19 what Judge Stein was saying is that on the
20 persistent, it's discretionary. And I - - - I wasn't
21 clear with your answer was that it's discretionary
22 after the second felony or - - -

23 MR. CIRANDO: No, it's discretionary - - -
24 it's discretionary - - - does that felony - - - two
25 felonies, you can be considered for persistent felony

1 offender statute.

2 JUDGE ABDUS-SALAAM: Right.

3 MR. CIRANDO: Okay? But whether or not the
4 judge is going to sentence you as a persistent felon
5 is discretionary. But you - - - once you get in the
6 - - - I'm - - - we're talking about getting into that
7 category, in - - - into that box on top of the roll-
8 top desk, as you're in that - - - that slot. And
9 it's our position that they're - - - they're
10 mandatorily putting him in there because of a felony
11 that's not a felony in New York, which we submit is
12 not - - - is not appropriate and is - - - would have
13 to be arbitrary, unfair, and illogical, as the court
14 said in Parker, when you - - - when you - - - you do
15 that. And - - -

16 JUDGE ABDUS-SALAAM: Well, is it - - - is
17 it illogical or unfair or - - - because to - - - to
18 be determined a predicate felon, then you have to
19 have a New York felony, because it is mandatory.

20 MR. CIRANDO: Two.

21 JUDGE ABDUS-SALAAM: Right. You have to
22 have a predicate New York felony before the one that
23 you're now being considered for.

24 MR. CIRANDO: But look - - - look - - - but
25 look at the difference in sentencing. Under your

1 scenario, if he's a predicate - - - a predicate
2 felon, second felony offender, he gets - - - if he
3 gets the max of seven, he serves the three-and-a-half
4 to seven. If he's a persistent, he has to have a
5 minimum of fifteen and the maximum is obviously life.
6 So there is a - - - quite a bit of difference there.

7 And when you look at the four cases that
8 came after Parker, after the law was changed, the
9 four recent cases from the First Department and the
10 Third Department, those cases found that the
11 individual was not a predicate felon because that
12 felony - - - the second felony, let's say - - - or
13 not - - - persistent felon because the second felony
14 wasn't a felony in New York. So they applied, what
15 we submit, was a - - - a proper and a logical, fair
16 and - - - approach.

17 CHIEF JUDGE LIPPMAN: Okay, counsel.

18 MR. CIRANDO: Thank you.

19 CHIEF JUDGE LIPPMAN: Thanks, counsel.

20 You'll have your rebuttal.

21 MR. CIRANDO: Thank you.

22 MR. KAEUPER: May it please the court,
23 Geoffrey Kaeuper for the People.

24 CHIEF JUDGE LIPPMAN: Counsel, why does the
25 - - - the persistent felony offender law makes sense,

1 and why is it fair?

2 MR. KAEUPER: Yeah. Well - - -

3 CHIEF JUDGE LIPPMAN: What's the logic
4 behind it?

5 MR. KAEUPER: Right. And - - - and I think
6 - - - I guess the first point I would make is the - -
7 - the - - - that's a matter for the legislature to
8 determine that.

9 CHIEF JUDGE LIPPMAN: No, I get that.

10 MR. KAEUPER: Right.

11 CHIEF JUDGE LIPPMAN: I get that. Go
12 ahead.

13 MR. KAEUPER: But it - - - it makes sense
14 because you cast a wider net when you - - - when the
15 judge has the discretion to then pick among the
16 people who are ensnared in that net and say these are
17 the people for whom this is an appropriate sentence
18 and these are the people for whom it is not. I mean,
19 judicial discretion is - - - is - - - is always a
20 part of sentencing.

21 CHIEF JUDGE LIPPMAN: But there's a
22 difference in theory, right, between the second
23 felony offender and the persistent, right?

24 MR. KAEUPER: Absolutely, absolutely. And
25 so the - - -

1 CHIEF JUDGE LIPPMAN: The theory - - - tell
2 us the theory of one versus the theory of the other.

3 MR. KAEUPER: Well, the second felony
4 offender, it's - - - it's determined by the
5 conviction. So it doesn't matter - - - you can get -
6 - - you can get a probationary sentence - - -

7 CHIEF JUDGE LIPPMAN: You can't be a second
8 felony offender unless you had a New York felony to
9 begin with?

10 MR. KAEUPER: Right. Right. It's - - -
11 it's a - - - it's a smaller class, but, you know - -
12 - yeah. So it's a - - - it casts a - - - a smaller
13 net but it's mandatory. So even if you got a
14 probationary sentence - - -

15 CHIEF JUDGE LIPPMAN: The second one is a
16 wider net but not mandatory?

17 MR. KAEUPER: And - - - and it's based upon
18 the idea that you're - - - you - - - you have
19 somebody who has shown that they have been
20 recalcitrant in the face of serious punishment. So
21 it's not enough to have - - - have gotten the
22 probationary sentence on - - - on one of those
23 qualifying - - -

24 CHIEF JUDGE LIPPMAN: Serious punishment
25 meaning more than one year?

1 MR. KAEUPER: Exactly. Exactly, Your
2 Honor. And so that's - - - I mean, that's - - -
3 that's a very significant difference in how you're
4 gauging whether someone has proven themselves to be
5 persistent and therefore to require a - - - an
6 extended period of incarceration.

7 JUDGE RIVERA: Even if it's - - - even if
8 it's something that in New York would not carry the
9 same sentencing consequence - - - consequences?

10 MR. KAEUPER: Absolutely, absolutely.
11 Because even - - -

12 JUDGE RIVERA: It's possible to have one
13 New York felony and then five of these things that
14 would never be felonies in New York and you can end
15 up in jail for life?

16 MR. KAEUPER: Well, I mean, I think at some
17 point, you're - - - you're going to have probably
18 some sort of abuse of discretion in - - - in
19 sentencing that - - -

20 JUDGE RIVERA: How - - - how many? How
21 many do you need for abuse?

22 MR. KAEUPER: Well, I - - - I mean I think
23 it - - - I think partly - - - I don't think it - - -
24 I don't think it turns so much on whether or not the
25 - - - the felony would - - - would strictly qualify

1 under Olah. There's lots of conduct that doesn't
2 technically qualify under Olah, which is clearly
3 conduct that New York finds abhorrent.

4 JUDGE STEIN: Just minor differences in the
5 statute.

6 MR. KAEUPER: Exactly. You can get a
7 kidnapping statute, a first-degree kidnapping statute
8 in another stat - - - in another jurisdiction that,
9 because of the particularities of our kidnapping
10 statute, is a misdemeanor in New York. So, I mean,
11 that - - - you know, but if you're talking about like
12 the kind - - - the kind - - - you know, somebody's
13 got eight blasphemy convictions in some other - - -
14 other state and gets, you know, one low-level
15 nonviolent felony in New York, I think probably that
16 would be an abuse of discretion to sentence that
17 person as a - - - as - - -

18 CHIEF JUDGE LIPPMAN: You think blasphemy
19 is serious? Is that what you're telling us?

20 MR. KAEUPER: I think that the New York
21 legislature has - - - has - - - had made its - - -

22 JUDGE PIGOTT: Your - - - your point, though, is that
23 - - - that there would be some discretion with the
24 judge, right?

25 MR. KAEUPER: Absolutely.

1 JUDGE PIGOTT: If the blasphemy had
2 happened before the person committed the felony in
3 New York, what happens then?

4 MR. KAEUPER: I - - - I'm - - - I'm sorry.
5 Could you - - -

6 JUDGE PIGOTT: My - - - my thought is this.
7 You're - - - he - - - he - - - this person is a - - -
8 is - - - may be a persistent, not because he
9 committed blasphemy first and then committed the
10 felony in New York, but only because he committed the
11 felony and - - - I'm getting it backwards. But you
12 understand what I'm saying? He could - - - he could
13 commit the crimes out of state, but if it precedes
14 the felony here, he doesn't become persistent, right?

15 MR. KAEUPER: Maybe I'm not understanding.
16 But, I mean, the - - - the - - - the crime - - - he
17 has to have - - - have committed the crime - - - the
18 pri - - - the predicate crimes before he commits the
19 crime in New York, and he has to have served his
20 sentence of more than one year before - - - before he
21 commits the - - - the current New York crime.

22 So, I mean, as - - - so I think there is
23 also an argument for even things that New York would
24 not deem to be appropriate to criminalize still
25 counting as - - - as predicates. Because the idea is

1 you - - - wherever you are, you chose to violate the
2 laws of that state. You served this - - - this
3 prison term, and you come out and you still think
4 yeah, it's still worth it to violate the laws of - -
5 - of - - - now I'm in New York. I'll violate their
6 laws because I just don't care about whether or not I
7 - - - I follow the laws of whatever jurisdiction - -
8 -

9 CHIEF JUDGE LIPPMAN: Does it matter that
10 more states take the opposite position? It must be a
11 crime in - - - in - - -

12 MR. KAEUPER: No. I mean that's - - -
13 that's a - - -

14 CHIEF JUDGE LIPPMAN: Have any - - - have
15 any relevance to you?

16 MR. KAEUPER: - - - judgment for the
17 legislature.

18 CHIEF JUDGE LIPPMAN: That's of no
19 relevance because of the legislature in our state
20 chooses to do it this way?

21 MR. KAEUPER: Absolutely, absolutely. The
22 - - - the only way to get defendant's outcome here is
23 to find that - - - that the statute is
24 unconstitutional as applied to him. And I think it
25 doesn't work under - - - under any of the - - - the

1 theories that he's put out. I mean, they're all
2 directly controlled by Parker. This court addressed
3 that almost forty years ago. And I think that
4 there's just no reason to overrule Parker in this
5 case.

6 CHIEF JUDGE LIPPMAN: Okay. Thanks,
7 counsel.

8 MR. KAEUPER: Thank you.

9 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

10 MR. CIRANDO: Yeah, briefly, thank you.
11 We're talking about other state - - - the crimes in
12 other states. I think, as we delineated in our
13 brief, throwing an egg at a mailbox is a felony for
14 three years. Bear wrestling in Alabama is a felony.
15 You can get more than a year.

16 JUDGE PIGOTT: You have a problem with
17 that? Never - - - never mind.

18 MR. CIRANDO: I'm a Bear - - - Bear Bryant
19 fan. Releasing twelve heart-shaped balloons in
20 Florida, you can get five years in jail. Adultery in
21 Michigan and Tex - - - Texas I'm not going to talk
22 about.

23 JUDGE RIVERA: Well, he says - - - he says
24 that's where the discretion comes in; that a judge
25 could look at that and say well, that - - - that's

1 not really showing the kind of bad actor that - - -
2 that New York is really and truly concerned about.
3 And that's - - - that's the point of discretion.

4 MR. CIRANDO: I - - - I think that goes
5 back to the - - - to the - - - the - - - the person
6 that - - - that you're saying this person is a - - -
7 is - - - is a - - - is a predicate felon who - - -
8 who you think is a bad person. But he - - - he
9 becomes a bad person - - - or he becomes into that
10 category when you consider him a bad person when you
11 consider ridiculous crimes that he may have committed
12 in another jurisdiction.

13 And I don't think that's - - - that - - -
14 that's not fair or illog - - - or - - - or logical,
15 especially when you apply it to this individual here
16 who the judge threw the book at, but he should have
17 sentenced him as a predicate felon. Other than that,
18 we'll rely on our brief, and thank you very much.

19 CHIEF JUDGE LIPPMAN: Okay. Thank you.
20 Thank you both.

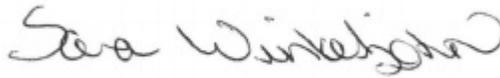
21 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Clemon Jones, No. 45 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: February 22, 2015