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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

Papers Sealed

-against-

No. 128

JAMES R. POLEUN,

Appellant.

20 Eagle Street
Albany, New York 12207
September 09, 2015

Before:

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

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 128, People v.
2 Poleun.

3 Counsel, you want any rebuttal time?

4 MR. FRAZIER: No, Judge. Thank you.

5 Excuse me.

6 CHIEF JUDGE LIPPMAN: You don't want it?
7 What'd you say, counsel?

8 MR. FRAZIER: No rebuttal. Thank you.

9 CHIEF JUDGE LIPPMAN: No rebuttal. Go
10 ahead, counsel.

11 MR. FRAZIER: Little voice problem today.

12 CHIEF JUDGE LIPPMAN: That's okay.

13 MR. FRAZIER: I'd like to just address
14 preservation first. It was not raised by the People
15 in the Appellate Division, it was in the Appellate
16 Division decision, that the request to be present
17 issue was - - - was not preserved. It's our position
18 that that's a bit of a red herring, that - - - that
19 it shouldn't even be an issue here. This defendant
20 wrote two letters to the court. He indicated that he
21 wanted to be heard, he wanted to participate in this
22 hearing. Everyone seems to ignore that. The
23 People's briefs, both in the Appellate Division here,
24 Judge Murphy's decision, and in the Appellate
25 Division decision, they ignore the fact that he - - -

1 he was essentially pleading with the court saying, I
2 want to participate, I've got a lot to say, there's
3 things - - -

4 CHIEF JUDGE LIPPMAN: Yeah. But based on
5 what he said - - - I understand you're starting with
6 preservation, but what's involuntary about it? He
7 says, you know, I want to be there but I can't.

8 MR. FRAZIER: It's what - - -

9 CHIEF JUDGE LIPPMAN: I'm worried about
10 something, so listen, I talked to my lawyer, I've
11 talked to this one, I've talked to that one, he'll
12 present the arguments, so I won't be there. And - -
13 - you know, what - - - what's - - - why is that
14 involuntary?

15 MR. FRAZIER: It's involuntary because of
16 why. Because he says I - - - if - - - if I'm
17 transported now, they're going to bring me to Attica,
18 from Great Meadow to Attica. If I go there again,
19 I'm going to get beat up. I - - -

20 JUDGE PIGOTT: What should the judge have
21 done?

22 MR. FRAZIER: He should have required the
23 attorney to speak directly to the client. And - - -
24 and just - - - comment again on what Judge Lippman
25 just said.

1 JUDGE PIGOTT: Well, let's assume he talked
2 to his client. What - - - what then?

3 MR. FRAZIER: Well, when the judge asked
4 the defense counsel at - - - when he presented him
5 with the waiver, he said, did you speak with your
6 client, and he said, my office spoke with my client.
7 The implication there is that he never spoke directly
8 to his client.

9 JUDGE PIGOTT: Let - - - let's assume
10 whatever you want to assume. What then? I mean, you
11 say, okay, the defendant says, I'm not coming because
12 I'm not going to Attica because I'm going to get beat
13 up.

14 MR. FRAZIER: Right.

15 JUDGE PIGOTT: What does the court then do?

16 MR. FRAZIER: I think then you're presented
17 with a - - - with a - - - a waiver that is based on
18 duress and - - - and it's involuntary by its very
19 nature.

20 JUDGE PIGOTT: So what do you then do?

21 MR. FRAZIER: So - - - so you direct the
22 attorney and say, well, talk to your guy, adjourn for
23 two weeks. This guy was - - -

24 JUDGE PIGOTT: What do you do after two
25 weeks?

1 MR. FRAZIER: Hold the hearing. He was
2 going to be released in a few weeks.

3 JUDGE ABDUS-SALAAM: How - - - how would he
4 hold the hearing if - - - if the client doesn't come
5 because he does - - - he feels under duress, how
6 would he hold the hearing?

7 MR. FRAZIER: He - - - he could have - - -
8 I - - - I mean, he could have ordered him to come to
9 the county jail. There - - - there had to be
10 something he could do. He could at least look into
11 it. He - - - he could adjourn for a week and look
12 into it.

13 JUDGE PIGOTT: Can - - - can - - -

14 MR. FRAZIER: Say, is there something we
15 can do?

16 JUDGE PIGOTT: Can they do that?

17 JUDGE RIVERA: Didn't the client suggest a
18 webcam?

19 MR. FRAZIER: Pardon me?

20 JUDGE RIVERA: Didn't he suggest a webcam?

21 MR. FRAZIER: The defendant himself
22 suggested a webcam. In the second letter to the
23 judge, he said - - -

24 JUDGE RIVERA: Do you know if they - - - if
25 that's - - - if that was a real option?

1 MR. FRAZIER: I don't know if that was a
2 real option in - - - in that court.

3 JUDGE STEIN: So - - - so - - - so if any -
4 - - any defendant could then say gee, I'd really like
5 to be there, but - - - but, you know, I - - - the - -
6 - the - - - the - - - the way that they transport us
7 and everything, I - - - I don't want to be in this
8 other facility, I think it's really dangerous there.

9 MR. FRAZIER: Well, I think - - -

10 JUDGE STEIN: I've heard that - - - that
11 they - - - that they threaten people and beat people
12 up and - - - and stuff. So - - - so then that
13 imposes upon the court an obligation to hold a
14 separate hearing or arrange for webcam or some other
15 - - - is that all it takes? I mean, this isn't a ca
16 - - - I - - - I guess what - - - this isn't a case
17 where the guy said I was threatened that if I go to
18 this hearing, okay, this is what's going to happen to
19 me. I - - - to - - - to me that might be a little
20 bit different.

21 MR. FRAZIER: He - - -

22 JUDGE STEIN: But - - - but at - - - at
23 what - - - where do we draw the line?

24 MR. FRAZIER: He did - - - he did say it
25 had happened before. In - - - in the first letter he

1 said, I will get beat up as I had been before.

2 JUDGE STEIN: But is there any real way - -
3 - any practical way to ascertain whether that is in
4 fact - - - I mean, maybe he did get beat up, but
5 maybe he got beaten up because he was in a different
6 gang than the people there or something. I - - - I
7 mean, you - - - you know, I - - - I guess - - -

8 MR. FRAZIER: Certainly it's problematic in
9 doing that, but he's - - - he's in the custody of the
10 State, and it's the State that wants to put these
11 prohibitions on him and put this level three
12 designation on him. And given in this case he was -
13 - -

14 JUDGE RIVERA: But appearance at the
15 hearing is voluntary, is it not?

16 MR. FRAZIER: Appearance is always
17 voluntary at these hearings.

18 JUDGE RIVERA: Voluntary, so why - - - why
19 can't the court rely on the representations by
20 counsel and the written waiver?

21 MR. FRAZIER: If it - - -

22 JUDGE RIVERA: Perhaps he's changed his
23 mind, perhaps he feels comfortable now with his
24 counsel representing him, he had obviously been in
25 communication with counsel. Why does the court - - -

1 why can't the court rely on that? Don't you really
2 have an ineffective assistance of counsel claim?

3 MR. FRAZIER: There very well - - - very
4 well may be ineffective assistance of counsel claim
5 here. Yes. And - - - and that's why I - - - I
6 wanted to start with the preservation issue because
7 there was no way for this defendant to - - -

8 JUDGE RIVERA: But why can't the court rely
9 on counsel's representation?

10 MR. FRAZIER: If counsel had said, I spoke
11 with my client, that would be a different situation,
12 but he said, my office spoke with my client. And I -
13 - - I think that implies that he didn't speak
14 directly to him either about the waiver, the effect
15 of that waiver, or about the issues that he was
16 raising about the - - - the danger he faced if he was
17 transported.

18 JUDGE ABDUS-SALAAM: Well, again, assuming
19 that's true, counsel, going back to Judge Pigott's
20 question earlier, what would the court do? You said
21 adjourn the hearing and have counsel speak to him?

22 MR. FRAZIER: I mean the - - -

23 JUDGE ABDUS-SALAAM: Speak to his client?

24 MR. FRAZIER: These hearings are - - - are
25 - - - are quick. There - - - I mean, I think it's

1 eight pages of transcript was the - - - was the
2 hearing here. A - - - a webcam is certainly not an
3 unreasonable situation. A telephone call, even, have
4 the defendant on the telephone and - - - and do it
5 with the stenographer there over a speakerphone. I
6 mean we're - - - it's 2015; we can do a lot of things
7 like that. This guy - - - I mean there's a lot of
8 things that they were saying about him that are
9 sketchy at best. There's a - - - there's a - - - a
10 rape charge where the charges were actually dismissed
11 but the Appellate Division comments on that as one of
12 these aggrag - - - aggravating factors.

13 JUDGE STEIN: Could the defendant have - -
14 - he wrote these two letters. Could he have said,
15 you know, I'd - - - I'd really like to come but I'm
16 afraid to come, my - - - my attorney's going to be
17 there, my parents are going to be there, and here are
18 the things - - - in - - - in this letter to the
19 judge, here are the things that I - - - you know,
20 that I think ought to be raised here. Could he have
21 done that?

22 MR. FRAZIER: We all wish we had clients
23 that could be articulate and - - - and think ahead
24 like that, but he didn't do that.

25 JUDGE ABDUS-SALAAM: But he did say his

1 attorney would speak on those matters - - -

2 MR. FRAZIER: I think - - -

3 JUDGE ABDUS-SALAAM: - - - and that his
4 parents would be in the courtroom as well.

5 MR. FRAZIER: Right.

6 JUDGE ABDUS-SALAAM: I don't know that he
7 was suggesting they would speak on the matters, but
8 he did expect that his - - -

9 MR. FRAZIER: The - - -

10 JUDGE ABDUS-SALAAM: - - - lawyer would - -
11 - would point out these inconsistencies or issues
12 with the statement.

13 MR. FRAZIER: And I think if you look at
14 that eight-page transcript, you don't see very much
15 in there by way of - - -

16 JUDGE RIVERA: Again, does - - - doesn't
17 that - - -

18 MR. FRAZIER: - - - by way of refuting
19 these allegations.

20 JUDGE RIVERA: - - - get to ineffective
21 assistance of counsel claim rather than that he was
22 denied due process because he wasn't able to appear?

23 MR. FRAZIER: Possibly so. Yeah.

24 CHIEF JUDGE LIPPMAN: Okay.

25 MR. FRAZIER: Thanks, Judge.

1 CHIEF JUDGE LIPPMAN: Thanks, counsel.

2 Counsel?

3 MS. BITTNER: Thank you, Your Honor. Laura
4 Bittner on behalf of the Niagara County District
5 Attorney's Office, may it please the court. The
6 reason that none of these others avenues were
7 suggested, such as a webcam or a phone call or - - -
8 or an adjournment so that this attorney could speak
9 with his client is because defense counsel never
10 requested that. Defense counsel had a waiver in
11 front of him, their office as a whole had spoken to
12 that defendant and submitted that waiver and asked
13 the court to take that waiver as a waiver of the
14 defendant's appearance at that hearing and ask the
15 hearing to proceed.

16 JUDGE ABDUS-SALAAM: Could a webcam
17 appearance have - - - have been effected here?

18 MS. BITTNER: I appear in that court quite
19 a bit; I've never seen it done. I don't know if it
20 would have been possible or not, but again, it's
21 something that was not requested here. This
22 defendant felt comfortable after speaking with the
23 public defender's office - - -

24 JUDGE RIVERA: Well, he - - - he requested
25 it in his letter. I mean how many times does he have

1 to communicate, I'm afraid, I've gotten beat up
2 before, I really want to be there, there's lots of
3 problems with - - - with what - - - what the
4 government is saying about me, maybe I can do it by -
5 - - how many times does the incarcerated person have
6 to - - - have to present this to the court?

7 MS. BITTNER: Well, he sent the initial two
8 letters and then had an opportunity, as we see in the
9 waiver, to speak with his attorney, and I think that
10 what the court needs to rely on is this final waiver
11 that shows that, you know, he knew the time, he knew
12 the date, he knew that the hearing was going to
13 proceed in his absence, and that he had spoken with
14 his attorney. I think that if we had, you know, only
15 the two letters to look at, I think we might have a
16 very different scenario, but since we have a waiver
17 of appearance here that seems to be knowing and
18 voluntary in this case, I think that's something that
19 the court can rely on here.

20 JUDGE STEIN: Though - - - you would agree,
21 though, that there are circumstances under which an
22 allegation of coercion or threat or - - - or
23 something of that nature might require some further
24 action?

25 MS. BITTNER: Absolutely. And had, after

1 defense counsel, the public defender's offices spoke
2 with this defendant, thought that there was something
3 that needed to be brought to the court's attention,
4 my assumption would be that they would have done so,
5 but as all parties involved in this seemed to be
6 comfortable with this waiver and for defense counsel
7 to be proceeding, we don't have that scenario here.

8 CHIEF JUDGE LIPPMAN: Okay.

9 MS. BITTNER: Thank you, Your Honor.

10 CHIEF JUDGE LIPPMAN: Thank you, counsel.

11 Okay. Thank you both. Appreciate it.

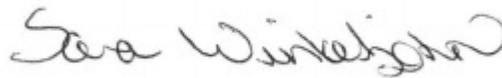
12 (Court is adjourned)

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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. James R. Poleun, No. 128 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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