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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

(Papers sealed)

-against-

No. 156

LUIS A. PABON,

Appellant.

20 Eagle Street
Albany, New York 12207
September 14, 2016

Before:

CHIEF JUDGE JANET DIFIORE
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
ASSOCIATE JUDGE MICHAEL J. GARCIA

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Number 156, People v.
2 Luis Pabon.

3 MR. SHIFFRIN: May it please the court,
4 Brian Shiffrin on behalf of Mr. Pabon. I - - - I
5 request to reserve two minutes for rebuttal, please.

6 CHIEF JUDGE DIFIORE: You have two minutes,
7 sir.

8 MR. SHIFFRIN: Thank you, Your Honor.

9 CHIEF JUDGE DIFIORE: You're welcome.

10 MR. SHIFFRIN: Mr. Pabon urges that the
11 2012 commencement of his prosecution for course of
12 sexual conduct is time barred because it - - - it
13 charged acts allegedly committed no later than 1999,
14 that it was not commenced within five years of 1999
15 as then required by CPL 30.10(3)(e). This - - -

16 JUDGE RIVERA: So - - - so, counsel, your
17 argument, well, one of your arguments, is that
18 there's a conflict between paragraph (e) and (f),
19 correct?

20 MR. SHIFFRIN: That's correct.

21 JUDGE RIVERA: Okay. What - - - what's the
22 nature of this conflict since (f) relies on another
23 provision for the period of limitations? That is to
24 say, if you read (f) it, in no place, mentions an
25 actual period of limitations. You must look outside

1 of (f) to identify the period of limitations. Where
2 is the conflict?

3 MR. SHIFFRIN: To appreciate the conflict,
4 one has to go back. There's one statute passed in
5 1996 in which the legislature simultaneously enacted
6 three different statutory provisions. First, enac -
7 - - enacted for the first time a course of sexual
8 conduct, which created a new crime, which didn't have
9 the specificity notice requirements this court set
10 forth in Keindl, set forth (f) which had a tolling
11 provision, and (e) which said for the first time at
12 the time, the only - - - only provision for any sex
13 crime a five-year limitation for - - - for this crime
14 based on the last act. If the goal was to apply (f)
15 to course of sexual conduct, the legislature would
16 have only enacted course of sexual conduct in (f)
17 because it would have achieved those purposes because
18 - - -

19 JUDGE STEIN: When - - - when would the
20 statute of limitations have run if the - - - if the
21 crime was reported?

22 MR. SHIFFRIN: If the crime - - - if the -
23 - - if the crime is reported the - - -

24 JUDGE STEIN: Then - - - then would the - -
25 -

1 MR. SHIFFRIN: That's (f) - - -

2 JUDGE STEIN: - - - tolling apply?

3 MR. SHIFFRIN: - - - (f) doesn't - - - (f)
4 doesn't apply at all bec - - -

5 JUDGE STEIN: (f) doesn't apply to that
6 either?

7 MR. SHIFFRIN: The reason (f) doesn't - - -

8 JUDGE STEIN: So that would require - - -
9 so that would require that the - - - that the charges
10 be brought within five years of when it was reported?

11 MR. SHIFFRIN: Of when the act occurred.
12 That was the way that - - - that statute was written,
13 and there's a reason for that, for two - - - two
14 different things.

15 JUDGE STEIN: Of when the act occurred,
16 okay. So if it - - - if it was reported - - - if it
17 wasn't reported until - - - let's say the act
18 occurred when the victim was - - - was five years
19 old, and it's reported when - - - when the victim is
20 eleven, right.

21 MR. SHIFFRIN: Yep.

22 JUDGE STEIN: Okay. So does that mean that
23 the statute of limitations has already run?

24 MR. SHIFFRIN: The answer is yes. Because
25 up unt - - - there was no provision enacted with - -

1 - with respect to course of sexual conduct to - - -
2 to extend the five-year period and date.

3 JUDGE STEIN: But doesn't that defeat the
4 purpose, though, of - - -

5 MR. SHIFFRIN: Well, it - - - it - - -

6 JUDGE STEIN: - - - of protecting these
7 child victims?

8 MR. SHIFFRIN: Respectfully, the child
9 victims were protected because the - - - for
10 instance, in this case, Mr. Pabon could have been
11 charged with both sodomy and sexual abuse because
12 those crimes were subject to (f) and therefore, the -
13 - - both the reporting requirement applied and also
14 the tolling provision applied. Indeed, he faced more
15 time if - - - if the prosecutor and the grand jury
16 chose to go that way because he could have - - - each
17 act could have been consecutive sentencing.

18 Instead, they - - - and he was initially
19 charged with that in the referring complaint. The
20 prosecutor and the grand jury indicted only on a
21 course of sexual conduct to avoid the specificity
22 requirements. When - - - going back to the initial
23 question as to why the difference between enacting
24 two provisions or three provisions, if the
25 legislature intended the tolling provision to apply

1 and if the - - - they need not have done (e) at all
2 because they would have achieved the five-year
3 statute of limitations.

4 JUDGE FAHEY: See, I - - - I have a
5 conceptual problem with what you're saying there, Mr.
6 Shiffrin. The problem is is that a tolling provision
7 only applies if a statute of limitation exists. A
8 tolling provision and the statute of limitations are
9 two conceptually different things. For there to - -
10 - so for - - - first, you have to have a statute of
11 limitations before you can have a tolling provision.
12 In this instance, even though there may be an
13 overlap, there's not necessarily - - - it doesn't
14 make it superfluous but there may be an overlap
15 between the two.

16 But you can't toll a statute of limit - - -
17 limitations unless you first have one to begin with.
18 So there has to be one in place. It has to - - - it
19 has to have some effect. If you're going to remove
20 it, then it has to say that specifically. Otherwise,
21 the tolling provision comes into play. And the fact
22 that they are overlapped doesn't necessarily negate
23 the two of them. And to try and - - - it seems to me
24 conceptually improper and a misunderstanding of what
25 those two provisions are.

1 MR. SHIFFRIN: The (e) never would apply,
2 never would apply under any circumstances if (f) - -
3 - if (f) applies to this crime back in 1999 because
4 there's - - -

5 CHIEF JUDGE DIFIORE: What if - - - what if
6 the child is assaulted when the child is seven, they
7 report to the State Central Register, nothing happens
8 as a result of that report, and the child is
9 continued to be assaulted? What's the statute of
10 limitations that applies?

11 MR. SHIFFRIN: The statute of limitations
12 for - - - for continuing offenses has always been the
13 last act. So for - - - for continuing offenses and
14 this is a continuing offense, it's always the last
15 act. If the one - - - therefore, again, (e) didn't
16 change that. (e) didn't change a five-year rule for
17 felonies that are not A felonies, and (e) didn't
18 change the requirement - - - the existing law that
19 for continuing offenses, the - - - it's the last act
20 that starts the commencement of a five-year period.
21 So the - - - that's still - - - if there's continuing
22 offenses, as included in the alleged course of sexual
23 conduct, the five years didn't - - - doesn't start
24 running until the last act.

25 Which is why it's a superfluous nullity if

1 you apply (f) because the continuing offense problem
2 ex - - - pardon me, language existed anyway, and the
3 five-year statute of limitations existed anyway.
4 What was achieved by adding - - - by also enacting
5 (e) in addition to creating the crime, in addition to
6 (f), we're saying because and under these
7 circumstances we're not also - - - we're allowing
8 prosecutions without the specificity requirements in
9 Keindl. We're adding a limitation - - -

10 JUDGE PIGOTT: I see your - - - I see your
11 point on that. But if - - - because it does sound
12 like if - - - you know, if (f) applies you don't need
13 (e). But why - - - why is that - - - and why don't
14 we just knock out (e)? The - - - it seemed to me
15 when they were passing that they said, you know, we
16 want to protect the children. If you got - - - if
17 you got two - - - two adults who choose not to report
18 it, you know, she's the mother but - - - and then the
19 husband or boyfriend's doing this but, you know, for
20 reasons unknown to anybody, it doesn't get reported.
21 If it's (e), five years, she's out of luck, the - - -
22 the victim.

23 MR. SHIFFRIN: Again - - -

24 JUDGE PIGOTT: But under (f), you know, she
25 - - - when she finally grows up and says, you know,

1 these two bad people did all this to me and I - - -
2 you know, and I'm now going to report it to the
3 police, what's the bad part about that?

4 MR. SHIFFRIN: Two different answers.

5 First of all, if - - - if that was their concern,
6 they - - - again, they need not have even enacted (e)
7 because (e) never goes into effect if (f) applies.
8 And there's not a single circumstance where (e)
9 applies back under the then-1999 statute, if - - - if
10 (f) applies - - -

11 JUDGE FAHEY: But see that's - - - that's
12 where I - - -

13 MR. SHIFFRIN: - - - but they're sep - - -

14 JUDGE FAHEY: No. No, because (f) can't
15 apply unless there's a statute that's being limited
16 to begin with.

17 MR. SHIFFRIN: The statute that is being
18 limited is already for all felonies, other than A
19 felonies, is always a five-year - - - five-year
20 limitation. So it was - - - there was already a
21 statute of limitations for that crime.

22 If I can briefly - - - if the court is not
23 going to dismiss under the ground, it should be
24 reversed under point two because it was error to
25 allow the police officer, over objection, to thrice

1 state his opinion - - - his opinion that my client
2 was lying - - -

3 JUDGE STEIN: Well, what was the - - -

4 MR. SHIFFRIN: - - - when he denied his
5 culpability.

6 JUDGE STEIN: What was the harm or
7 prejudice in - - - in that?

8 MR. SHIFFRIN: The - - -

9 JUDGE STEIN: I mean here you have a bench
10 trial and even though the - - - the judge's response
11 to the objection was a little bit ambiguous, I'll - -
12 - I'll certainly give you that, can't we - - - isn't
13 there sort of a presumption that - - - that it wasn't
14 - - - it wouldn't influence the judge in the way it
15 might influence a lay jury?

16 MR. SHIFFRIN: Three quick answers. Time's
17 - - - time's running out. One, there is a
18 presumption that evidence that's ruled inadmissible
19 and not admitted is not considered. There's no
20 presumption ever adopted by this court that evidence
21 that the trial judge found to be admissible is - - -
22 is not going to be considered by the - - - by the
23 judge who admitted it. This evidence was not
24 admissible for any purpose. As I point out in my
25 brief in cases such as Cunningham and Maharaj, even

1 though when a court makes an error in a trial - - -
2 in a nonjury trial and then says, well, it didn't
3 make a difference, this court has never accepted
4 that.

5 And finally, the question was not over on
6 the evidence of guilt, the harmless error analysis
7 shouldn't apply. If it - - - if harmless error - - -
8 if harmless error analysis is applied, under the
9 circumstances, given all the - - - every aspect of
10 this case of the allegations which was capable of
11 being tested were proved to be false, again, it was
12 not harmless.

13 MR. SHIFFRIN: Thank you, Your Honors.

14 CHIEF JUDGE DIFIORE: Thank you, sir.
15 Counsel.

16 MR. SHOEMAKER: May it please the court,
17 Robert Shoemaker for the People. When interpreting a
18 statute in this case, the court needs to look to the
19 spirit and purpose of the legislation. The spirit
20 and purpose of the legislation, in this case, shows
21 that sub(f) does apply to course of sexual conduct
22 against a child in the first degree.

23 JUDGE PIGOTT: Is he right, though, that -
24 - - that it doesn't make sense, the two of them
25 together?

1 MR. SHOEMAKER: I don't agree with that. I
2 think there are certain cases. Actually, Chief Judge
3 DiFiore did mention a circumstance that I put in my
4 brief where if the abuse continues after disclosure,
5 then sub(e) comes into effect, not sub(f). Because
6 the - - -

7 JUDGE PIGOTT: Why? Why does (e) come into
8 effect?

9 MR. SHOEMAKER: Because (e) says that you
10 start the statute of limitations from the date of the
11 last act.

12 JUDGE PIGOTT: Right.

13 MR. SHOEMAKER: So if that last act is
14 after the disclosure, then (e) trumps (f). Because -
15 - -

16 JUDGE PIGOTT: No. No. I mean the big
17 deal on (f) is the - - - is the age, right? And it's
18 that she can, the victim, usually a woman, can bring
19 it no matter what happens once she reaches the age of
20 majority. So - - - so whether it's reported or not,
21 whether it was the last act that was when she was
22 seventeen or whatever, the statute of limitations is
23 at least going to be from the time that she's twenty-
24 one plus five, right?

25 MR. SHOEMAKER: Well - - -

1 JUDGE PIGOTT: So - - - so (e) never
2 applies.

3 JUDGE GARCIA: Right, because it's from the
4 time it's reported, right, even under (f). So if you
5 reported earlier, your clock runs even under (f),
6 right? But what about this situation, and I still
7 don't know the answer to this, but if you have a
8 course of conduct, no reporting, starts very young
9 age but continues past eighteen, so would that be
10 considered a course of conduct where the last act is,
11 let's say, nineteen whereas (f) would start to run at
12 eighteen?

13 MR. SHOEMAKER: I'm sorry? I - - - when -
14 - -

15 JUDGE GARCIA: Was that confusing?

16 MR. SHOEMAKER: A little bit. I don't know
17 if I know the answer, either.

18 JUDGE GARCIA: So I'm sure it is. So if I
19 have a course of conduct on a minor but it extends
20 beyond the eighteenth birthday, but it starts at
21 eight, right. This is a long-term abuse. Would the
22 clock run at - - - let's say it stops at nineteen.
23 Would the nineteen - - - the act at nineteen, be
24 considered course of conduct for (e), or would you
25 start the statute of limitations at eighteen either

1 way?

2 MR. SHOEMAKER: Just thinking about it
3 right now I would think that you would start the
4 statute of limitations at the last act. Not - - -

5 JUDGE GARCIA: Which would be nineteen?

6 MR. SHOEMAKER: Right.

7 JUDGE GARCIA: Which would give you a
8 longer statute under (e).

9 MR. SHOEMAKER: Yes.

10 JUDGE GARCIA: Right.

11 JUDGE RIVERA: Okay. So can I ask why - -
12 - why - - - you start out saying we have to think of
13 the spirit and intent. Why do we do that? If - - -
14 perhaps I'm misunderstanding this argument, I've
15 something in - - - in both the sets of briefs here or
16 in the language of the statute. (f) doesn't have a
17 period of limitations. There is no statute of
18 limitations in (f). (f) is a tolling provision.

19 MR. SHOEMAKER: Yes.

20 JUDGE RIVERA: You always have to look
21 external to (f). Where is the conflict with (e)?

22 MR. SHOEMAKER: I don't think there is one.

23 JUDGE RIVERA: And there's no conflict from
24 your side. But why are you telling us - - - that's
25 what I'm saying. You're telling - - - I - - - it

1 sounded to me like you were saying you have to look
2 at the spirit and intent suggesting that there's some
3 ambiguity or difficulty in simply looking at this as
4 (f) as a tolling provision.

5 MR. SHOEMAKER: Well, someone thought there
6 is ambiguity here which is why we're here. There was
7 a dissenter at the Appellate Division. Assuming that
8 the two subsections can't be reconciled - - -

9 JUDGE RIVERA: Um-hum.

10 MR. SHOEMAKER: - - - that's when we look
11 to the spirit and the intent at the legislation.
12 Assuming that (e) and (f) can't coexist, assuming
13 that - - -

14 JUDGE RIVERA: But this is my question.
15 How can they not when (f) is not a statute of
16 limitations? It is a tolling provision, and (e) is
17 the statute of limitations? I - - - I could see the
18 argument that (f) doesn't tell you which is the
19 statute of limitations. That seems to me, perhaps,
20 something that's got legs. But to suggest between
21 (e) and (f) you're choosing the - - - the time in (f)
22 or the time in (e), unless I've misunderstood the
23 defendant's argument, I don't see how you do that
24 because (f) has no time.

25 MR. SHOEMAKER: Yeah, I think - - - I'm - -

1 - I'm kind of taking the defendant's argument right
2 now but I - - -

3 JUDGE RIVERA: Yeah.

4 MR. SHOEMAKER: - - - think it - - -

5 JUDGE RIVERA: But tell me what the
6 People's position is about how you read the statute.

7 MR. SHOEMAKER: How I read the statute is
8 that (f) applies and I think, I don't what to speak
9 for Mr. Shiffrin, but his argument is that (e)
10 doesn't matter because the statute of limitations for
11 all felonies is already - - - was already written.
12 So (f) could have simply tolled that instead of
13 tolled this new subsection (e).

14 JUDGE RIVERA: Okay. So where - - - where
15 is the other time period? Where's this other time
16 period he's talking about?

17 MR. SHOEMAKER: The five - - - the five
18 years that applies to all, yeah.

19 JUDGE RIVERA: Five years, period.

20 MR. SHOEMAKER: That applies to all nonA -
21 - -

22 JUDGE RIVERA: All right.

23 MR. SHOEMAKER: - - - at the time. Yes.

24 JUDGE RIVERA: And now I'm better
25 understanding that, thank you.

1 JUDGE STEIN: Well, why - - -

2 CHIEF JUDGE DIFIORE: Counsel, shifting
3 gears a little bit, was the trial judge obligated to
4 make a factual record in response to the claim by the
5 lawyer of juror misconduct?

6 MR. SHOEMAKER: No. And I - - - I couldn't
7 - - - honestly, I couldn't find any cases on that
8 that the judge was looking at - - - it's unclear what
9 he was looking at, but it looks like he was looking
10 at some kind of police paperwork and the defense
11 attorney objected. The next day, I think he moved
12 for a mistrial and asked the judge to sequester his
13 cell phone, his computer, and basically anything the
14 judge had been looking at during the previous day of
15 the trial. And I cite in my brief - - - even though
16 I couldn't find cases, I cite in my brief the
17 practical considerations that would go against making
18 a rule there. If - - - if judges weren't allowed to
19 look at things, then you'd have a subpar judge in
20 every bench trial.

21 JUDGE STEIN: Well, then what would be the
22 remedy? Let's - - - let's just say that the - - -
23 the judge was doing something completely
24 inappropriate, looking at something that wasn't in
25 evidence or communicating with somebody that he - - -

1 he shouldn't have been communicating. What would be
2 the remedy for that if there's no record?

3 MR. SHOEMAKER: I'm not sure. But I - - -
4 I guess to your - - - the first part of your
5 question, it's okay that he's looking at something
6 that's not in evidence. He - - - he - - - let's say
7 something's about to be introduced into evidence; he
8 needs to know what that thing is going to be.

9 JUDGE STEIN: But what if it - - - what if
10 it was never introduced into evidence? It was never
11 - - - it wasn't marked as an exhibit, there was no
12 indication that anybody was going to refer to that
13 but he happened to have it, I don't know, through - -
14 - somehow from discovery or - - - or whatever?

15 MR. SHOEMAKER: I mean I supp - - - he - -
16 - I suppose the defense attorney could try to make a
17 record but then at the same time, we'd have this
18 situation where in all bench trials, everything the
19 judge looks at has to be made a record, we have to
20 put everything in the record that the judge is
21 looking at. I don't know if that's the rule that we
22 want for - - -

23 JUDGE STEIN: Well, is there anything in
24 between that could possibly be a rule? Or you're
25 just saying bal - - - when you balance it out, then

1 we just have to - - - we just have to assume that
2 there was nothing improper going on?

3 MR. SHOEMAKER: For bench trials, we
4 presume - - - there's a presumption of regularity for
5 trials, and if it something inappropriate and the
6 defense attorney brings it up, given that
7 presumption, we need to presume that the judge will
8 say that if something was indeed inapprop - - -

9 JUDGE STEIN: Then it's an irrebuttable
10 presumption, actually, isn't it?

11 MR. SHOEMAKER: If - - -

12 JUDGE STEIN: If we don't require a record
13 be made of it.

14 MR. SHOEMAKER: Yeah, that's - - - I guess
15 that's right. We'd expect the judge to make a record
16 if something is inappropriate, he was looking at
17 something inappropriate. I would like to touch
18 briefly on - - -

19 JUDGE RIVERA: Well, you got to have - - -
20 the record, what would be the point to object if not
21 to, under your scenario, to preserve it for further
22 review, right?

23 MR. SHOEMAKER: Well, there was an
24 objection here. The - - - what I - - -

25 JUDGE RIVERA: No, I know there is here.

1 But I'm saying the - - - the point of this, if you're
2 really sort of following through your analysis in
3 then - - - in this that anything comes in and the
4 judge can sift through it, then the only point of
5 objection under that analysis would be to preserve it
6 for appellate review as opposed to for purposes of
7 the cure?

8 MR. SHOEMAKER: I think the - - - the point
9 of objecting would be to alert the trial judge that
10 something's wrong. That's why we have attorneys - -
11 -

12 JUDGE RIVERA: So if the judge indicates
13 that he or she thinks there's nothing wrong
14 presumption is rebutted?

15 MR. SHOEMAKER: In this, yeah, it is.

16 JUDGE RIVERA: And if the judge stays
17 silent and says you have your objection?

18 MR. SHOEMAKER: You - - - we still have the
19 presumption of regularity; we have the presumption
20 the judge is not looking at anything inappropriate.
21 Which actually brings me to point two of the brief,
22 which is what Mr. Shiffrin talked about last, that
23 the - - - there was no prejudice in the judge
24 listening to the testimony of the police officer.
25 There actually is a case from this court, it's not in

1 my brief, I found it in while preparing for oral
2 argument, but it's - - - I did show it to Mr.
3 Shiffrin. It's People v. D'Abate, D-apostrophe-A-B-
4 A-T-E, 37 NY 2d 922. In that case, the prosecutor
5 asked inappropriate questions on cross-examination.
6 That was - - - that testimony was admitted at trial
7 but this court held that the impropriety was not
8 prejudicial, especially since this was a nonjury
9 case. That's what the case says. It's a one-page
10 opinion.

11 So applying that case to these facts, there
12 was no prejudice given, A, the presumption of
13 regularity that the judge is not taking anything
14 inadmissible or inappropriate into account and B, the
15 fact that even on the record we have the judge
16 saying, well, I'm not taking his opinion. I'm
17 listening to his testimony.

18 JUDGE FAHEY: Well, the problem is is that
19 how does a judge, who's also the fact finder, ignore
20 facts that the judge erroneously admitted? I can see
21 that if he was given facts at a suppression hearing
22 ahead of time and, of course, he - - - he ruled on
23 that, he would have heard facts that may or may not
24 have been admitted. But at trial, the facts that are
25 in the record, how would a judge ignore those facts -

1 - -

2 MR. SHOEMAKER: Well, he did - - -

3 JUDGE FAHEY: - - - that he himself
4 admitted?

5 MR. SHOEMAKER: He did ignore it in this
6 case. He said he was ignoring it. He said I'm not
7 taking his opinion. I'm listening to his testimony.

8 JUDGE FAHEY: Right, but he didn't exclude
9 them from the record. He didn't deny admittance,
10 right. He didn't suppress his testimony. He didn't
11 say no, that's not admissible testimony.

12 MR. SHOEMAKER: Right. And maybe if it - -
13 -

14 JUDGE FAHEY: So it's - - - so it's in the
15 record. So he admitted it. So that means it's part
16 of the record that he - - - that he considers.

17 MR. SHOEMAKER: And maybe - - -

18 JUDGE FAHEY: That's an entirely different
19 thing from the suppression of, say, you know, a
20 statement that he knows about but it's not in front
21 of his in trial because it was improperly suppressed
22 before.

23 MR. SHOEMAKER: And maybe if this were a
24 jury trial he would have given the jury an
25 instruction. But for nonjury trial, the judge need

1 not instruct himself.

2 JUDGE STEIN: But what instruction? The
3 instruction usually is you can only consider it for
4 this limited purpose. And either that or the
5 instruction is you must totally disregard it because
6 I - - - it was erroneously admitted. Here, there was
7 no legitimate purpose, so what would the instruction
8 be?

9 MR. SHOEMAKER: Well, I think - - - I don't
10 know if I agree that there was no legitimate purpose.
11 I cite in my brief a few legitimate purposes this
12 testimony could have been admitted for. But I just -
13 - - I don't think he needs to instruct himself that
14 you do consider what the detective is saying happened
15 in the interrogation but you don't need to consider,
16 you know, the - - - the detective's own or the
17 investigator's own opinion that defendant was lying
18 and that's why he kept going. The lie - - - the fact
19 that - - - the investigator thought defendant was
20 lying explains why the investigator kept going. The
21 finder of fact need - - -

22 JUDGE RIVERA: Well, you - - - you have a
23 compelling argument here because the judge is saying
24 I'm not taking that - - - let me paraphrase, I'm - -
25 - I'm not taking his judgment. You have that

1 compelling argument. When the - - - but when a judge
2 doesn't make that comment, it begs the question why
3 is the judge letting in something that should not
4 have been let in? Let's say we don't agree with your
5 argument about this being appropriately - - - it
6 could appropriately have been let in. I mean we're
7 sort of stuck, are we not?

8 MR. SHOEMAKER: I don't know if we're - - -

9 JUDGE RIVERA: Why - - - why would a judge
10 be letting in something that should not come into
11 evidence but for purposes of considering that in
12 evidence?

13 MR. SHOEMAKER: And you do have some cases
14 that are actually cited in the reply brief where when
15 the - - - I think one of them, actually, the judge is
16 the one who called the witness who let in the
17 inadmissible evidence. In cases like that where the
18 record reveals the judge actually is taking into
19 consideration something inappropriate, then the
20 presumption of regularity is rebutted. That's in the
21 reply brief. There are three cases, and that's page
22 10 of the reply brief. One of them, there was no
23 explicit statement from the judge. One of them the -
24 - - this court said the judge clearly relied on the
25 inadmissible evidence. And for the third one is the

1 one where the judge actually called the witness - - -

2 JUDGE RIVERA: If I may, because you've run
3 out of time, with respect to the sequestration, did
4 the judge have to put anything on the record?

5 MR. SHOEMAKER: No, I don't think he did.

6 JUDGE RIVERA: Why not?

7 MR. SHOEMAKER: Because there's a
8 presumption of regularity. He doesn't need to say
9 what he was looking at.

10 JUDGE RIVERA: Same argument, okay.

11 MR. SHOEMAKER: You know, maybe he's
12 looking at the police report. Maybe he is - - - I
13 mean I put in my brief maybe he's text messaging the
14 administrator to ask for more time. He doesn't need
15 to put that on the record.

16 JUDGE STEIN: Well, could - - -

17 CHIEF JUDGE DIFIORE: Thank you, counsel.

18 MR. SHOEMAKER: Thank you.

19 CHIEF JUDGE DIFIORE: Thank you.

20 Mr. Shiffrin, what was the basis for
21 defense counsel's request to sequester or seize the
22 judge's computer and his cell phone?

23 MR. SHIFFRIN: What - - - what happened is
24 apparently the judge was reading the police officer's
25 deposition, which was not admitted during the

1 testimony, the police officer. In - - - in objecting
2 to that as being improper, the attorney also objected
3 at that point - - -

4 CHIEF JUDGE DIFIORE: Do we know what he
5 was reading?

6 MR. SHIFFRIN: Actually, good question.
7 That was - - - that's what the defense attorney
8 claimed that the judge was - - - was reading. The
9 judge never responded to that in denying both the
10 objection and the mistrial. And that the same
11 context the attorney also noted, Your Honor, you also
12 have been using a cell phone and computer. Again,
13 objected to that. And all - - -

14 CHIEF JUDGE DIFIORE: And what specifically
15 was it about the cell phone, for example?

16 MR. SHIFFRIN: It - - -

17 CHIEF JUDGE DIFIORE: What - - - what's the
18 basis for asking to seize a judge's cell phone?

19 MR. SHIFFRIN: Well, the - - - the problem
20 is we don't know if it was being used for permissible
21 or impermissible purposes. If the judge had simply
22 put on the record I was - - - in respect to the
23 document or - - - or with respect to the other items
24 I was - - -

25 JUDGE RIVERA: Do you have a threshold?

1 Does the defense have a threshold burden, I think is
2 what, in part, the Chief Judge is asking that - - -
3 that would then require the judge to put something on
4 the record?

5 MR. SHIFFRIN: Well, I would - - - I would
6 argue, clearly, whatever the burden standard might
7 be, it was met with respect to the document where
8 there is an - - - where there is an allegation that
9 it was a police report not in evidence and the - - -
10 and the judge was reading that which was not in
11 evidence. Which goes back to point two, which is
12 considering the - - - the repeated statement there's
13 - - - there's a presumption. The Smith case and the
14 Arnold case cited in my brief were not decided on a
15 basis of - - - of a presumption. This court has
16 never adopted a presumption that evidence that's been
17 improperly admitted is not considered by a judge in a
18 nonjury trial. The - - - in this case, there was no
19 proper basis for admission. And it's simply absurd
20 to say the judge who - - - who didn't know enough to
21 not admit that evidence didn't consider the evidence
22 for any purpo - - - any purpose. Because again, as
23 pointed out - - -

24 JUDGE PIGOTT: Well, he's not - - - he's
25 not - - - the judge isn't, you know, the guardian of

1 the defense. I mean maybe the defense wanted that
2 information in. Maybe they wanted to make the cop
3 look like a jerk and - - -

4 MR. SHIFFRIN: The defense - - - the - - -

5 JUDGE PIGOTT: My - - - my only point is
6 that you're saying, well, the - - - a judge isn't
7 smart enough to know that - - - that's not good
8 enough. I'm not sure that's true. And if it comes
9 in and there's an objection, he can say, you know,
10 I'm not going to consider it.

11 MR. SHIFFRIN: It was objected to three
12 times by - - - by the attorney. Three times when the
13 - - - the district attorney asked why did you - - -
14 why did you do this and he kept on saying because he
15 - - - because he was lying, objection, objection to
16 the why questions. Not to what you were - - - no
17 objections to what was said to the defendant. But -
18 - - but his - - - the officer's opinion was objected
19 to.

20 It was not admissible for any purpose. And
21 therefore, it's wrong to - - - to assume this judge
22 didn't consider it for any purpose. Although he did
23 say he wasn't going to consider it for - - - for the
24 officer's judgment, there was no proper purpose to
25 consider it. And under these circumstances, it was

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reversible error. Thank you, Your Honors.

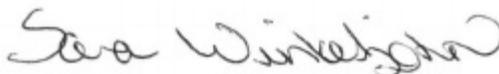
CHIEF JUDGE DIFIORE: Thank you, Mr.
Shiffrin.

(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. Luis A. Pabon, No. 156 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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