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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 80

DAVID LOFTON,

Appellant.

20 Eagle Street
Albany, New York
May 21, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 80, the People of the
3 State of New York v. David Lofton.

4 MR. SHIFFRIN: Brian Shiffrin on behalf of David
5 Lofton.

6 May I request to reserve two minutes for
7 rebuttal, please?

8 CHIEF JUDGE DIFIORE: You may.

9 MR. SHIFFRIN: Thank you. Before addressing the
10 youthful offender point, I'd like to first urge that it was
11 Constitutional error for the District Attorney to be twice
12 permitted to argue in summation that the prosecution's case
13 was undisputed, unchallenged, and uncontested.

14 This was a case in which Mr. Lofton exercised his
15 right to remain silent and attacked the prosecution's case
16 through cross examination - - -

17 JUDGE STEIN: If it's error, is it subject to
18 harmless error analysis?

19 MR. SHIFFRIN: Yeah, it's subject to - - - to
20 Constitutional harmless error because - - - because the
21 nature of the error is - - - is that it went to the right
22 of the defendant to remain silent and - - - and the burden
23 of proof.

24 Under the Constitutional harmless error test of
25 harmless beyond a reasonable doubt, the - - - test, there

1 is a reasonable possibility here that the offensive
2 comments, especially because they were given - - - the
3 judicial sanction made an impact. This is a case where
4 contrary - - -

5 JUDGE GARCIA: Counsel, didn't the judge also
6 instruct the jury that the burden never shifts?

7 MR. SHIFFRIN: He instructed the burden never
8 shifts, but his - - - his - - - the judge's instruction
9 after the - - - denying the second objection actually
10 worsened the situation. Because the judge said that, and
11 it's set forth in both - - - in both our briefs and the
12 record, is, the ruling is based upon the opportunity given
13 to challenge - - - the defendant's attorney to challenge
14 the evidence. Suggesting that the defendant didn't - - -
15 did not, in fact, challenge the evidence.

16 Instead, in this case, in detail, in summation,
17 the defense counsel pointed out all the problems with the
18 evidence, which resulted in acquittal of two of the four
19 counts. This was a case in which the jury did not accept
20 the complainant's testimony, and we know that because if
21 they accepted her testimony, there would have been a
22 conviction of all four counts.

23 JUDGE STEIN: Could it have been fair comment on
24 the evidence where - - - where the defendant was making an
25 - - - proffering a - - - a view of the case that no

1 evidence was presented to support?

2 MR. SHIFFRIN: Respectfully, no, Your Honor.
3 There was a statement on page A 291, appendix 291 saying
4 that there was a criminal trespass here, and that's not
5 challenged for - - - that's not challenged. They then
6 immediately - - -

7 JUDGE STEIN: No, no, but he was arguing that it
8 was - - - there was a previous relationship, it was
9 consensual, and - - - and - - - and so on and so forth, and
10 so could that not have been a fair response to - - - to
11 that theory?

12 MR. SHIFFRIN: To that - - - it's actually - - -
13 the - - - that actually highlighted the problem, because
14 the two counts in which there were acquittal, okay, where
15 the counts where the physical evidence didn't back up the
16 complainant's allegations. The counts in which there were
17 conviction were the counts in which the argument based,
18 again, in summation on the lack of evidence, based on her
19 appearance, based on the failure to do anything in
20 disarray, was that this was consensual - - - consensual
21 behavior, and therefore it was a criminal trespass, but not
22 - - - not a sexual count, and therefore not a burglary.

23 That - - - that argument that it was consen - - -
24 that it was consensual was effectively negated by the
25 court's instruction that he had an opportunity to challenge

1 in cross examination, and it didn't do so. So it's our
2 position that the court's instruction actually worsened the
3 harm of that - - - of that argument - - - of that argument.
4 Not made once, but made - - - first of all, the DA made it
5 three times. The first time, objection sustained, repeated
6 two more times, and then after the second time the
7 objection overruled, the District Attorney again said,
8 undisputed.

9 So the message here was undisputed, unchallenged,
10 and uncontroverted. And that is an improper argument, and
11 we believe, in a case where the jury had problems with the
12 complainant's testimony, we don't believe it was harmless.

13 Moving back to point one, this is a case, it was
14 a fifteen year old convicted of enumerated sex offense.
15 This case - - - court in Middlebrooks made it clear, that
16 in such cases, two - - - two determinations are required.
17 One, it has to be an on the record determination as to
18 whether the statutory factors for the exceptions to allow
19 the youthful offender eligibility were met, and if - - - if
20 so, a second determination as to whether or not the
21 defendant should be adjudicated a youthful offender.

22 In this case, when the defense counsel made the
23 request for adjudication of Y.O. as - - - as recommended by
24 the PSI report, the court's only response is that it's
25 certainly outside the realm of this court's consideration

1 following trial. That cannot meet the Middlebrooks
2 requirement - - -

3 JUDGE FAHEY: It was in a context, though, that
4 was a little bit broader than that. Weren't the court's
5 remarks in a larger context, Mr. Shiffrin?

6 MR. SHIFFRIN: The court had just explained the
7 source - - - again, I believe it's page 295 of the - - -

8 JUDGE FAHEY: Go ahead.

9 MR. SHIFFRIN: - - - on the record.

10 JUDGE FAHEY: I'm listening.

11 MR. SHIFFRIN: The court had just explained why
12 he was - - - the court was imposing consecutive maximum
13 sentences. However, you cannot tell from that statement by
14 the court that that is not under consideration whether or
15 not there was a refusal to consider a Y.O., whether or not
16 there was - - - the determination of Mr. Lofton was
17 eligible for Y.O. treatment, or whether or not he - - -
18 there was a determination was eligible, but not giving Y.O.

19 JUDGE RIVERA: What - - - what should he have
20 done? What should the judge have done, gone through every
21 single factor?

22 MR. SHIFFRIN: No. They - - -

23 JUDGE RIVERA: What is it that you're saying is
24 the rule?

25 MR. SHIFFRIN: The rule has to be that the record

1 has to be sufficient to tell what was decided and why,
2 which doesn't require enumeration of all the factors. I
3 find you're not eligible because the statutory factors were
4 not met would be - - - it would be sufficient.

5 JUDGE WILSON: Well, determination might mean
6 result or it might mean explanation. And how do we know
7 which it is here?

8 MR. SHIFFRIN: And the - - - indeed, that's the
9 problem.

10 JUDGE WILSON: We know the result, right?

11 MR. SHIFFRIN: I should point out, this was a
12 pre-Middlebrooks, pre-Rudolph case, which perhaps explains
13 why the judge didn't do what Middlebrooks says. Three
14 times, this court in Middlebrooks said, you need an
15 on-the-record statement as to whether or not the
16 statutory-fact exceptions were met. That wasn't done here.

17 JUDGE FAHEY: So you know that usually the Court
18 of Appeals is very reluctant to require a litany by trial
19 judges. It - - - it seems though that that's what you're
20 asking for, some particular catechism that he has to
21 resign.

22 MR. SHIFFRIN: I want to be clear that - - - that
23 if I have given that impression, that's not what I'm
24 urging. I'm not arguing there has to be a detailed
25 analysis of each - - - of each factor, but there has to be

1 enough. There has to be enough to tell, first of all, in a
2 case where the section - - - where a person is convicted -
3 - -

4 JUDGE STEIN: Is it - - - would it be enough to
5 just say, I have considered the factors under the statute,
6 and I've determined that defendant is not eligible - - -

7 MR. SHIFFRIN: Absolutely.

8 JUDGE STEIN: - - - for Y.O.?

9 MR. SHIFFRIN: Because then - - - then, when I
10 say "we", both the attorneys at the trial level court and
11 the - - - then the courts - - - appellate courts making
12 review to determine whether an abuse of discretion can know
13 what was decided and why. And that - - - that, I believe -
14 - -

15 JUDGE GARCIA: Counsel - - -

16 CHIEF JUDGE DIFIORE: But is there any - - -

17 MR. SHIFFRIN: - - - is all that's required.

18 JUDGE GARCIA: Counsel, did you - - -

19 CHIEF JUDGE DIFIORE: - - - really any view of
20 this record that - - - that suggests that the judge didn't
21 consider the absence of mitigating circumstances - - -

22 MR. SHIFFRIN: His - - - his language saying - -
23 -

24 CHIEF JUDGE DIFIORE: - - - as described in his -
25 - - his characterization of the case, and what he thought

1 of these acts?

2 MR. SHIFFRIN: Respectfully, the judge's words
3 that's beyond the court's consideration suggests that he
4 didn't consider it. The literal meaning of the judge's
5 words - - -

6 JUDGE WILSON: And what he said - - - what he
7 said right - - - what he said right before that were, "The
8 trial evidence completely controverts the statements made
9 by the defendant and the probation department.

10 "The defendant continues to deny any involvement
11 whatsoever regarding sexual contact with the victim, again,
12 totally inconsistent and contrary of what the jury
13 ultimately determined.

14 "There was overwhelming evidence that the
15 defendant has to the sexual acts that were performed on the
16 victim.

17 "Defendant engaged in what I deemed to be some of
18 the most vicious and blatant criminal behavior by an
19 individual who was only sixteen years of age at the present
20 time.

21 "The trial evidence brought home to the court the
22 very violent and vicious nature of the conduct of the
23 defendant.

24 "And the probation report concluded that the
25 defendant posed a threat to society."

1 Those were the things he said right before
2 saying, and youthful offender status is out of the
3 question.

4 MR. SHIFFRIN: Okay. And just so it's clear,
5 everything that you just said was said with respect to why
6 the judge was imposing the sentencing that he imposed. The
7 court then said, and additionally, then it goes to - - -
8 there's a request for a PSI for - - - for youthful offender
9 adjudication. If the judge said, and for the reason I just
10 stated, I determine he's not eligible, done.

11 JUDGE WILSON: So those reasons are sufficient if
12 he had tied it to the youthful offender status.

13 MR. SHIFFRIN: Yeah. And it wasn't tied to the
14 issue of - - - of Y.O.; it was tied to the - - - the
15 imposition of the particular sentence.

16 JUDGE GARCIA: So counsel, this is a case before
17 Middlebrooks, where we hadn't said yet - - - I think it's
18 four years before Middlebrooks, we hadn't said yet, you
19 need to do this, with reference to these factors I would
20 find they don't apply.

21 And following up on what Judge Wilson said, it
22 seems this record is more robust as to why they don't
23 apply. So we would be sending a case back at this point to
24 give the opportunity for the judge based on, essentially,
25 those same findings to put in the record. And I don't find

1 those two factors apply. One of which is roll in the
2 offense, which clearly doesn't apply here.

3 So it's only mitigating. He went through that
4 litany four years before Middlebrooks, and now we're going
5 to send it back so he can say, and because of those same
6 reasons, I don't think he's a youthful offender.

7 MR. SHIFFRIN: Again, not criticizing the judge
8 for not anticipating Middlebrooks. In Middlebrooks, this
9 court rejected the contention that the burden is on the
10 defendant to show the exceptions were met, but rather said
11 in every case - - - in every case it's required. It wasn't
12 done here. This is a case on direct appeal.

13 JUDGE GARCIA: But if they're the same factors he
14 just went through and didn't say those are the reasons why
15 under the mitigating prong he doesn't qualify - - -

16 MR. SHIFFRIN: I - - - I - - - I agree - - -

17 JUDGE GARCIA: - - - but says he doesn't qualify
18 as a youthful offender, I - - - I don't know what we would
19 be sending it back for.

20 MR. SHIFFRIN: We're sending it back to ensure
21 that - - - that there is not a new exception to
22 Middlebrooks which should not go - - - going to only affect
23 Mr. Lofton, the many other defendants, which is, well, if
24 we know he's not going to get it, it doesn't matter.

25 That - - - Middlebrooks is an easy thing to do.

1 The requirement is very simple. It takes less than a
2 minute to do; it wasn't done here.

3 JUDGE GARCIA: But as I remember Middlebrooks, no
4 one mentioned youthful offender, and there was no
5 discussion of it.

6 MR. SHIFFRIN: But the holding is not really, you
7 can't discuss it. It has to - - - it says three separate
8 times, it must be on - - - a on-the-record determination of
9 the statutory factors. Not done here.

10 JUDGE FAHEY: Well, this - - - this was also
11 before Rudolph too, wasn't it?

12 MR. SHIFFRIN: That's correct, Your Honor.

13 CHIEF JUDGE DIFIORE: Thank you, Mr. Shiffrin.
14 Counsel.

15 MR. MYLES: Good afternoon, Your Honors. Scott
16 Myles on behalf of the People.

17 Very brief really touching on appellant's
18 arguments in regards to the People's summation. You cannot
19 look at the People's summation in a vacuum; you have to
20 also look at the defendant's summation, which happened
21 immediately before the People's closing arguments in which
22 the defense counsel himself reiterates several times that
23 they were not challenging certain of the allegations. He
24 used the word, you'll find that the - - - the certain
25 allegations unchallenged.

1 So the fact that the People, in their summation,
2 then went ahead and agreed with the defense that there were
3 no challenges to certain of the allegations, there's no
4 error there. There was - - - if there was any kind of
5 error, it was ameliorated by the judge's instructions to
6 the jury that the burden never shifts from the People to
7 the defendant.

8 In addition, if there was any error, it would
9 have been harmless given the overwhelming nature of the
10 evidence in this case.

11 Moving on to the youthful offender issue. I
12 would like to note in regards to what Judge Garcia was just
13 saying. There has never been any argument, at any point,
14 in - - - in this case at the lower Appellate Division or
15 before this court that, in fact, this defendant is eligible
16 for youthful offender. There is no - - - there is no - - -

17 JUDGE STEIN: But - - - but didn't Middlebrooks
18 say that the court had to make that determination on the
19 record? Isn't that what Middlebrooks stands for?

20 MR. MYLES: It does, Your Honor. And - - -

21 JUDGE STEIN: Okay. So what - - - so what - - -
22 what is - - - so what does that mean?

23 MR. MYLES: I think that's what we're - - -
24 exactly what we're here for. We're here to - - - to
25 determine once and for all - - - once and for all what is

1 meant by that word, determination; what constitutes a
2 determination on the record.

3 JUDGE STEIN: Right. Is it enough to just say,
4 I'm - - - I'm sentencing you to X, which happens to be the
5 maximum sentence allowable because of all of these factors.
6 Is that enough to - - - to - - - to indicate that the - - -
7 the court considered Y.O. status and rejected it?

8 MR. MYLES: I - - - I think that just a simple
9 statement of what the sentence is after Middlebrooks would
10 not be enough. I think there has to be some indication on
11 the record that the judge is considering those factors in
12 relation to the youthful offender stature.

13 JUDGE STEIN: And - - - and where does that exist
14 in this discussion?

15 MR. MYLES: When the judge states in a single
16 unbroken - - - I believe it's one or two paragraphs, where
17 the judge goes through not mitigating factors that he found
18 in this case, but in fact aggravating factors. He uses the
19 phrase "vicious conduct".

20 JUDGE STEIN: But how - - - how do we know from
21 that that he didn't think that the defendant was legally
22 eligible; how do we know?

23 MR. MYLES: I think, given the fact that he goes
24 through all of the factors that weighed on his decision,
25 and then immediately after that says, based on all that

1 proof that came in at trial, youthful offender - - - he
2 doesn't use the phrase youthful offender, but he's clearly
3 referencing youthful offender, that is beyond this court's
4 - - - that is something that the court is not going to
5 consider for you.

6 JUDGE STEIN: Well, it says beyond - - - yeah.
7 That - - - that's the problem that I'm having, is that
8 there are several ways that that can be interpreted, and is
9 - - - if it's not a clear statement, is that enough.

10 MR. MYLES: Again, as the People put in their
11 papers, in this case, it is enough, because it's clear that
12 the court made a determination. It determined that this
13 defendant was not going to be receiving youthful offender
14 treatment. And immediately before making that
15 determination, it went through all of the reasons, all of
16 the factors in - - -

17 JUDGE STEIN: Well, but then - - - then what is -
18 - - I don't - - - I'm sorry, I have to go back. Then what
19 does Middlebrooks mean? If - - - if - - - if it's enough
20 that the court doesn't give Y.O. treatment to satisfy
21 Middlebrooks, what did Middlebrooks add to the - - - to the
22 discussion? I - - - I thought that's what Middlebrooks was
23 correcting. It was saying that isn't enough.

24 I think that's exactly what we're doing here,
25 Your Honor. Either myself and the Fourth Department or the

1 appellant is not understanding what Middlebrooks said. So
2 the appellant is urging this court to adopt a rule that the
3 court, the sentencing court, does not merely need to make a
4 determination, but it needs to state the reasons for its
5 determination.

6 JUDGE STEIN: I think that's a separate issue. I
7 - - - I'm not even getting to that issue. I - - - I'm just
8 trying to determine whether the court said enough to tell
9 us that it made a determination, as opposed to made some
10 assumptions and just went on to sentence without Y.O.

11 MR. MYLES: Well, again, I think that's getting
12 us, again, to the argument of a litany that is required a
13 specific set of words that the sentencing court needs to
14 say and were to make it clear whether or not a
15 determination is being made.

16 And again, that gets us back to what is meant by
17 the word "determination". Is a simple yes or no in the
18 context of whether youthful offender is going to be
19 granted, is that a determination.

20 JUDGE WILSON: So - - - so put aside, for a
21 moment, the - - - the things that I read that the judge
22 said during the colloquy, and pretend he hadn't said them,
23 but all that he said were the words - - - these words,
24 which he actually did say, "The request that defendant be
25 adjudicated a youthful offender is certainly outside the

1 realm of this court's consideration following trial."

2 If he said just that, does that satisfy
3 Middlebrooks or no?

4 MR. MYLES: I would say that it does, because
5 again, that is a determination. That is saying, I have
6 considered youthful offender in the context of this
7 defendant, and I am not granting it. And again,
8 Middlebrooks went through the pol - - -

9 JUDGE FAHEY: The problem - - - the problem you
10 have is - - - is that Middlebrooks was dealing with a
11 situation where you've got an eligible - - - someone who is
12 not an eligible youth because you're convicted of an armed
13 felony or a designated sex offense.

14 So that's what this kid falls - - - this
15 defendant falls in this category. Let me just finish the
16 thought. So then - - - so then the question is, the court
17 needs to make a determination. First, is this person an
18 eligible youth. Then secondly, do the mitigating factors
19 under, what is it, 720.10[3] apply.

20 That would be the normal process. You should
21 have a two-step process. Is he eligible, do they - - - yes
22 or no, no, and if - - - and if - - - or if yes, then do
23 these mitigating factors apply to this person, will we
24 grant him Y.O. status. That clearly wasn't done here.

25 But this is pre-Rudolph, pre-Middlebrooks. So is

1 the language sufficient, I guess, is the question, and
2 where is there two separate determinations in there that
3 you can point to in the record?

4 MR. MYLES: I - - - I can't point to any two
5 separate discrete points in the record because, again, it
6 is essentially one unbroken thought process - - -

7 JUDGE FAHEY: Right.

8 MR. MYLES: - - - by the judge.

9 JUDGE FAHEY: Right.

10 MR. MYLES: I would just note that Middlebrooks
11 and Rudolph also dealt with a situation where the
12 sentencing court was silent as to youthful offender. That
13 is not what happened here.

14 JUDGE FAHEY: Um-hum.

15 MR. MYLES: In Middlebrooks, this court
16 determined that, as a policy consideration for why it was
17 deciding Middlebrooks the way it did, that the youthful
18 offender adjudication is so important to certain
19 defendants, that there needs to be some indication - - -

20 JUDGE RIVERA: Well, it was also based on the
21 statutory language, right?

22 MR. MYLES: Correct. Yes.

23 JUDGE RIVERA: Yeah. So it's not just policy
24 there.

25 MR. MYLES: No, no. But the pol - - - there was

1 policy discussion.

2 JUDGE RIVERA: Let's say we disagree with what
3 you argue is the clarity of the words of the judge. So if
4 it's uncertain or ambiguous, doesn't that then, under
5 Middlebrook, said under the statute, require that it go
6 back for resentencing to get that clarity?

7 MR. MYLES: I don't believe it would, Your Honor,
8 because the wording of the statute, in my view, says that a
9 defendant is not eligible unless the judge determines,
10 based on one of those two factors, that he is, in fact,
11 eligible. That clearly did not happen here.

12 So the judge's determination that he was not
13 granting the defendant youthful offender after stating all
14 of the aggravating factors that he found after hearing the
15 proof at trial, it's the People's position that that
16 satisfies the requirements of Middlebrooks.

17 CHIEF JUDGE DIFIORE: Thank you, counsel.
18 Counsel.

19 MR. SHIFFRIN: First - - -

20 JUDGE FAHEY: Mr. Shiffrin, can - - - can you
21 jump to that point that counsel just made at the end, where
22 basically you could tell by reading what the judge said
23 that he felt that this defendant was eligible, and the only
24 question is whether or not he was going to grant it.
25 That's the way I understand that argument.

1 MR. SHIFFRIN: This is a case in which no one,
2 neither attorney nor the judge even mentioned there was a
3 conviction for an enumerated sex offense. It's not in the
4 PSI report. It's - - - it's speculation that this judge
5 even was considering the fact that it might not even - - -

6 JUDGE FAHEY: Are you familiar with Stitt, the
7 Fourth Department - - -

8 MR. SHIFFRIN: Yes.

9 JUDGE FAHEY: - - - case?

10 MR. SHIFFRIN: Stitt - - - Stitt is different in
11 a few respects.

12 JUDGE FAHEY: Um-hum.

13 MR. SHIFFRIN: Because in Stitt, the Fourth
14 Department went through the basis - - - went through his
15 ruling as to why it wasn't granting Y.O., it considered the
16 factors, and therefore, necessarily had got past
17 eligibility. Because you can't go through the factors for
18 weighing without having determined - - -

19 JUDGE FAHEY: Right. Right.

20 MR. SHIFFRIN: - - - he's eligible.

21 JUDGE FAHEY: I got it.

22 MR. SHIFFRIN: In this case, there wasn't - - -
23 this is, to me, I - - - actually, I cite Stitt, because I
24 think Stitt shows there always - - - there was not a lot
25 required to get to the Middlebrooks test, and that wasn't

1 done here.

2 There was simply impossible to read this record
3 and know for sure that the judge even considered the
4 possibility of Y.O., considered the issue of eligibility
5 for - - - under the enumerated sex offense exceptions, or
6 determined Y.O.

7 With - - - again, with respect to the summation
8 issue, counsel just argued that this was a proper response
9 to the summation because the argument was the - - - the
10 trial prosecutor argued that it was not challenged with
11 respect to certain allegations. Respectfully, that was not
12 the argument made below. The District Attorney repeatedly
13 said unchallenged, undisputed, uncontroverted, with respect
14 to all the allegations.

15 Only thing that the defense attorney said was
16 unchallenged was that criminal trespass and that there had
17 been an act of anal sex, but the argument was, that was
18 consensual.

19 And therefore, to use that as a basis for saying
20 invite - - - invited comment is simply improper.

21 Thank you, Your Honors.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. David Lofton, No. 80 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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