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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 11

GERALD FRANCIS,

Appellant.

20 Eagle Street
Albany, New York
January 9, 2020

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
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 11, The People of the
3 State of New York v. Gerald Francis.

4 Good afternoon, Counsel.

5 MR. FERGUSON: Good afternoon, Your Honors.
6 Harold Ferguson for appellant, Gerald Francis. We'd like
7 to request two minutes for rebuttal.

8 CHIEF JUDGE DIFIORE: You may.

9 MR. FERGUSON: It's - - - this is a strange
10 situation. A client - - - we file a motion - - -

11 JUDGE FEINMAN: So - - - so how do you get around
12 the plain language of the statute?

13 MR. FERGUSON: The plain language of the statute?
14 Very simple. The decision here is we filed a motion, it
15 was denied. That decision is adverse to my client.

16 JUDGE GARCIA: But that's not what the statute
17 says. I think going to Judge Feinman's point, it doesn't
18 say the decision is adverse, right? What does the statute
19 say?

20 MR. FERGUSON: It's talking about any issue of
21 law, any matter of fact, that was decided adversely to the
22 appellant. The issue here is you're looking at a court
23 that has engrafted a standard onto the 440.20 statute that
24 doesn't exist.

25 JUDGE STEIN: Well, let's talk about 440.20 for a



1 second. I - - - I'm not sure I see how 440.20 even
2 contemplates a motion to - - - to challenge an illegally
3 low sentence. What - - - what that statute says is that -
4 - - that setting aside the - - - the illegal sentence,
5 right, doesn't invalidate the status of the underlying
6 conviction, and the court must resentence to the correct
7 sentence.

8 MR. FERGUSON: That's correct, Your Honor.

9 JUDGE STEIN: All right. So here, the court
10 can't do that, right, because it would present double-
11 jeopardy problems, right?

12 MR. FERGUSON: No, it doesn't present a double-
13 jeopardy problem, because by filing this motion, my client
14 is waiving any double-jeopardy issue.

15 JUDGE GARCIA: Do you have any case that says you
16 can do that - - - that you can waive double-jeopardy?

17 MR. FERGUSON: But it - - -

18 JUDGE GARCIA: Is there any case law on that?

19 MR. FERGUSON: It's any time the defendant is - -
20 - any time the defendant tries to overturn any conviction,
21 it is, in essence - - -

22 JUDGE GARCIA: Waiving double-jeopardy?

23 MR. FERGUSON: - - - avoiding a double-jeopardy
24 claim, Your Honor.

25 JUDGE FAHEY: Well, I thought that double-



1 jeopardy waivers were limited to instances like a mistrial,
2 and - - - and I think there's case law on that. But I know
3 of no other instance, unless you - - - I'll look at it, if
4 you tell me there's one, but - - -

5 MR. FERGUSON: But Your Honor, here, again, we
6 want - - - we want you to look at what is a plenary
7 statute.

8 JUDGE GARCIA: So you're saying if you went back
9 and you won here, you've waived that double-jeopardy
10 argument, so the court now could say okay, you get two
11 years; go in for a year? Because that's what you're doing
12 by waiving the double-jeopardy argument, right?

13 MR. FERGUSON: Well, what - - - what our - - -
14 what my client is attempting to do is, my client has now
15 been released on parole.

16 JUDGE GARCIA: No, I know. But let's say they
17 don't buy your argument that it - - - because you
18 misrepresent - - - your client misrepresented his identity
19 to the court, you're not getting our plea back, so now
20 you're going to get two years, go in for a year. You've
21 waived double-jeopardy.

22 MR. FERGUSON: Your Honor, that - - - but that's
23 not what DaForno cite. What The People cited in DaForno
24 was there the defendant was advised that if, in fact, he
25 had had another conviction, that therefore he wouldn't have



1 the opportunity to get his plea back. There was no such
2 thing in - - -

3 JUDGE GARCIA: But let's say they don't give you
4 your plea back. Could - - - you've waived double-jeopardy;
5 could you get more time now - - -

6 MR. FERGUSON: Absolutely.

7 JUDGE GARCIA: - - - since you - - - so you
8 could?

9 MR. FERGUSON: Absolutely. And in fact - - -

10 JUDGE FAHEY: So wouldn't you - - -

11 MR. FERGUSON: - - - and in fact that's - - -

12 JUDGE FAHEY: - - - wouldn't you - - - wait a
13 minute.

14 MR. FERGUSON: - - - that's exactly what my
15 client - - -

16 JUDGE FAHEY: Excuse me.

17 MR. FERGUSON: - - - that - - -

18 JUDGE FAHEY: Wouldn't you then - - - if he gives
19 you - - - you did time. You finished. You got six plus -
20 - - plus probation right, on the '88; is that right?

21 MR. FERGUSON: Yes, Your Honor.

22 JUDGE FAHEY: Six plus - - - so then he'd go
23 back. But it was two-to-four that he could have gotten; is
24 that correct?

25 MR. FERGUSON: That was the minimum that he would



1 have gotten.

2 JUDGE FAHEY: Right. All right. So let's go - -
3 - he goes back and he gets two-to-four, isn't that subject
4 to an immediate double-jeopardy challenge?

5 MR. FERGUSON: But Your Honor, he's looking - - -
6 what Mr. - - - what Mr. Francis is looking here, is the
7 opportunity to take this case back to trial. When he gets
8 his plea back, he would be looking for exoneration here.

9 JUDGE FAHEY: Um-hum.

10 MR. FERGUSON: When this - - - when filed this
11 originally - - -

12 JUDGE FAHEY: I understand - - - I understand
13 what you want to do. But there's - - - there's - - - you
14 have no right to say that that's going to happen.

15 The second thing you have no right to say is
16 going to happen, you go back, and you get to four - - - you
17 get a reconsideration, and it's denied, some 440.20 motion.
18 It's just simply denied again.

19 I guess what I'm saying is, I understand how you
20 argue it's adversely effective. It's an intelligent
21 argument. My question is, is your argument is predicated
22 on outcomes that are not guaranteed and that it seems like
23 a trial court has the right to exercise, for instance, in
24 sentencing, on an amount of discretion that will
25 automatically create legal problems that abolish the right



1 that you're trying to achieve.

2 MR. FERGUSON: I don't agree with that, Your
3 Honor.

4 JUDGE FAHEY: Um-hum.

5 MR. FERGUSON: Again, I want to - - - I - - -
6 looking at 440.20, as it is, and it was amended in 1995,
7 and it was expanded as to scope, there is nothing in that
8 statute that says you can't - - - that there is an
9 aggrieved-by-the-error standard. There's nothing in that
10 statute that says I can't go back in and challenge my
11 client's sentence as being illegally low. The legislature
12 had the opportunity to do so. They chose not to do so.

13 Here, when this began, the goal of my client was
14 to try and get out from under his mandatory violent
15 persistent felony offender - - -

16 JUDGE FAHEY: I understand.

17 MR. FERGUSON: - - - status. He has now been
18 released on parole. I spoke to him again this morning to
19 ensure myself that he understood that the possibility now
20 is that if - - - if we were successful, and this gets - - -
21 and again, all we're asking for is an appellate review by
22 the Appellate Division on this issue - - - is that the
23 possibility is this could lead to you being reprosecuted on
24 a 1987 case; you could be reconvict - - - you could be
25 convicted after trial, and you could go back to prison.



1 And he says he understands that, and that's
2 exactly how he wishes to proceed here. So - - -

3 JUDGE FAHEY: So this falls under the category of
4 - - -

5 JUDGE FEINMAN: Like the - - -

6 JUDGE FAHEY: - - - this falls under the category
7 of be careful what you ask for in life?

8 MR. FERGUSON: Well, Your Honor, the - - - this -
9 - - this was a whole series of cases that I had with Mr.
10 Gould, Mr. Benjamin, and Mr. Francis all together.

11 JUDGE WILSON: He's taking - - - he's taking his
12 chances that in a thirty-three-year-old prosecution, the
13 witnesses may not be around anymore?

14 MR. FERGUSON: That - - - but again, Your Honor,
15 this was a simple gun possession case. All you would need
16 is the - - - the element of operability there, and
17 something of the arresting officer who would have been able
18 to testify. So we're not talking about some complicated
19 case that's involved here.

20 JUDGE STEIN: Yeah, but we don't know where the
21 arresting officer is.

22 MR. FERGUSON: No, we don't know where the
23 arresting officer is.

24 JUDGE FEINMAN: Thirty-three years, there's a
25 good chance he's retired or she's retired, but - - -



1 MR. FERGUSON: But I - - - I'd like to go back to
2 Judge Garcia's point about that - - - that he falsely gave
3 his name. We don't know that.

4 JUDGE GARCIA: He forgot his name?

5 MR. FERGUSON: No, no. We don't know under what
6 circumstance that he was prosecuted under the name of
7 Gerald Francis. There's nothing in this record that
8 indicates that - - -

9 JUDGE GARCIA: No, but knows when he stands up in
10 front of the court, and they're saying you - - - you,
11 whoever you are, don't have a prior conviction, he knows
12 that's not true. He knows he has a prior conviction.

13 MR. FERGUSON: Again, Your Honor, there was
14 nothing in the plea colloquy that talked about a prior
15 conviction whatsoever. That's DaForno, which The People
16 are relying upon. There is nothing that - - -

17 JUDGE GARCIA: And then next time - - - and it
18 seems to me that every time this happens, and it happens
19 two or three times, where he has used a different name to
20 avoid being sentenced as a predicate for whatever past he
21 does have, he gets out of it, until the last time when they
22 - - - maybe because of technology, they connect all these
23 aliases he's, in one way or another, been using.

24 So at the end, in '97, he gets the twenty-three
25 to life sentence. And now it seems - - - and very openly,



1 have you admitted this strategy - - - is the mirror of that
2 strategy to try to take out these convictions based on the
3 fact that they didn't know his real identity and do exactly
4 what he did before, which is avoid the predicate status, in
5 this case, by manipulating the timing of the convictions
6 and sentences.

7 MR. FERGUSON: But again, it's not a matter of
8 game - - -

9 JUDGE GARCIA: What kind of message is that? I
10 mean, as - - -

11 MR. FERGUSON: No - - -

12 JUDGE GARCIA: - - - an adverse result for your
13 client?

14 MR. FERGUSON: But Your Honor, here - - - may I
15 answer, Your Honor?

16 CHIEF JUDGE DIFIORE: Yes, of course.

17 MR. FERGUSON: What we're talking about here is
18 assumptions that are being made, and that in the five
19 months that this case continued to exist, from the time of
20 arraignment to eventually plea and sentence, that at no
21 point - - - it was simple. All you had to do was run his
22 fingerprints through SAFIS and it would have come out. And
23 - - -

24 JUDGE GARCIA: In '97 he had an offer that was
25 much better than this that was then pulled off the table,



1 right?

2 MR. FERGUSON: That's correct, Your Honor.

3 JUDGE GARCIA: And why was it withdrawn?

4 MR. FERGUSON: It was withdrawn because they
5 realized what his correct status was at that time.

6 JUDGE GARCIA: Right, which he hadn't revealed
7 until that point.

8 MR. FERGUSON: And again, you're - - - you're
9 assuming that my client is somehow versed in the law, prior
10 to 1997, Your Honor.

11 JUDGE GARCIA: Based on three prior convictions.
12 I am assuming that.

13 MR. FERGUSON: Based on his prior convictions.
14 But any type of research that this individual did was post
15 his 1997 conviction. That's when he got directly involved
16 into doing legal research and the like.

17 So to say that this is a level of gamesmanship -
18 - - and I - - - I do want to point out that what The People
19 have attempted to do in other cases - - - and we had People
20 v. Perry, which was mooted out before this court - - - The
21 People's goal is to have 470.15 declared unconstitutional
22 as stripping the appellate courts of jurisdiction, running
23 afoul of the New York State Constitution.

24 So for The People to come back here now and say
25 oh, we're going to use this and say, oh, yes, 470.15 works



1 when it goes against the defendant, but we're going to try
2 and overturn that in a subsequent case, that - - - talking
3 about gamesmanship, that's gamesmanship too, Your Honor.

4 As I - - - here, there's no doubt his sentence
5 was illegal. This - - - there was nothing in 440.20 that
6 prevented him from doing this. And that for - - - to allow
7 a trial court judge to change a - - -

8 JUDGE STEIN: The question is, is whether he's
9 entitled to have that review - - - that decision reviewed
10 on appeal.

11 MR. FERGUSON: Right. But what you ow - - - what
12 you would be doing was allowing here, a trial court judge,
13 by judicial fiat, to amend a state statute that's the
14 province of the legislature that's not the province of a
15 trial court judge.

16 CHIEF JUDGE DIFIORE: Thank you, Counsel.

17 MR. FERGUSON: Thank you, Your Honor.

18 CHIEF JUDGE DIFIORE: Counsel?

19 MR. GOLDFINE: Thank you, Your Honors, and may it
20 please the court. Samuel Goldfine, on behalf of The
21 People.

22 Below, at the 440 court, defendant complained
23 that his sentence was illegally lenient. That motion was
24 denied, and on appeal the Appellate Division recognized
25 that defendant was obviously not adversely affected by that



1 sentencing error. He manifestly benefited from it. He had
2 created it. And as a result, that 470.15 barred its
3 consideration of the merits of the case.

4 Now, there's been a lot of discussion about
5 440.20, but respectfully, I think that's irrelevant to this
6 case. Whether or not the underlying decision was right or
7 wrong, the question on appeal is whether or not 470.15,
8 which governs the scope of the Appellate Division's
9 jurisdiction, applies here. And plainly, under the plain
10 language of the statute, it does.

11 Defendant benefited from the sentencing error.
12 And accordingly, he was not adversely affected by it.

13 The notion that 440.20, that the denial itself,
14 could be the error, contravenes the plain language of the
15 statute. I think Judge -- Judge Garcia pointed out that
16 it was the error or defect in the criminal court proceeding
17 underlying that order, not the order itself.

18 And defendant's reading of the statute renders
19 that adverse effect language largely pointless. Anything
20 could be made adverse, as in this case, by raising it
21 unsuccessfully below.

22 Also turning to the idea that defendant didn't
23 give false names for some kind of purpose - - -

24 JUDGE RIVERA: What's - - - what's the only basis
25 the Appellate Division - - - what's the basis the Appellate

1 Division gave for saying it had no jurisdiction?

2 MR. GOLDFINE: The Appellate Division's basis was
3 that defendant was not adversely affected by the sentencing
4 error that he identified.

5 JUDGE RIVERA: Okay, so - - - yes, but the - - -
6 why is that correct, if his point is he's got a motion
7 that's denied and that they have jurisdiction to determine
8 that, and then they can reach the merits? That point is on
9 the merits.

10 MR. GOLDFINE: Well, I think the - - - 470.15 is
11 going to require some examination of the underlying facts,
12 because the statute is commanding the appellate court to go
13 beyond the mere - - - beyond the order and to look at the
14 impact on the defendant, whether or not there was an
15 adverse effect from the specific error or defect in the
16 sentence.

17 JUDGE RIVERA: Well, he's - - - unless I
18 misunderstood him, and I'm sure he'll correct me when he
19 gets up on rebuttal, I - - - I thought the argument was the
20 denial of the motion meant that the court is not exercising
21 the jurisdiction that the CPL provides to determine whether
22 or not the denial of the motion is correct?

23 MR. GOLDFINE: I'm sorry, Your Honor, I - - -

24 JUDGE RIVERA: And that he is aggrieved because
25 of that.



1 Ultimately, yes, sure, the AD may very well hold
2 against him on the merits.

3 MR. GOLDFINE: I think the legislature has just
4 expressed a clear intent that the appellate court shouldn't
5 be wasting resources on a case where the defendant cannot
6 point to an adverse effect that he suffered here. And
7 plainly, the sentencing defect did not harm defendant in
8 any way. There was no adverse effect there.

9 He benefited from it to such a degree that he
10 continued to lie to the authorities about his identity and
11 obtained a similar sentencing benefit in a subsequent case.

12 JUDGE RIVERA: I - - - I thought, again, that his
13 argument - - - and again, he'll correct me if I'm wrong - -
14 - the argument he's making is the adverse effect is that he
15 doesn't have appellate review of what he's arguing is an
16 incorrect determination about the sentencing.

17 MR. GOLDFINE: I - - - I believe that contravenes
18 the plain language of the statute. It's - - - the denial
19 of the order itself is not enough. It's what's the impact
20 on the defense. And here, there's no impact.

21 I mean, even if you're to assume that the error
22 could be this long chain of litigation that's going to
23 result in him unsettling his richly deserved predicate
24 status, that he doesn't say there's any reason he doesn't
25 deserve that; he committed all those crimes - - - that's



1 beyond the scope of the statute.

2 It's not the error or defect in any criminal - -
3 - I'm sorry - - -

4 JUDGE FAHEY: And you know, it's - - - I guess -
5 - - I think - - - when I think about it, when I struggled
6 with this case, as we all have - - - it breaks down into
7 two parts: what's the meaning of "adversely affected"; and
8 how broad of a meaning should we give that?

9 And sentence-by-sentence, I think you're
10 absolutely right. It's - - - it's - - - he's not adversely
11 affected. But in the context of recidivist statutes, it
12 becomes more complicated and more difficult to determine
13 where you draw the line for whether somebody's adversely
14 affected or not.

15 And that - - - that's why I was asking the
16 questions about double-jeopardy, because it seems to me
17 that if we found that there was double-jeopardy here, that
18 it wouldn't be necessary for us to - - - to engage in that
19 analysis, would it?

20 MR. GOLDFINE: Right, Your Honor. Well, I think
21 the statute itself does narrow the scope to a certain
22 degree.

23 JUDGE FAHEY: No, but stay with my question. If
24 we found - - - if we found that double-jeopardy applied
25 here, would we need to engage in the "adversely affected"



1 analysis that both Counsel have argued for us?

2 MR. GOLDFINE: No - - - no, Your Honor.

3 JUDGE FAHEY: I see.

4 MR. GOLDFINE: Because at that point, there - - -
5 there's no possible - - - there's no adverse effect. The
6 defendant would be left in the situation he's in now.

7 JUDGE FAHEY: Um-hum.

8 MR. GOLDFINE: He - - - he most likely couldn't
9 be resentenced because of double-jeopardy, and the - - -
10 the status quo would remain. There's no adverse effect.

11 JUDGE GARCIA: Counsel, to get to that double-
12 jeopardy argument, though, we would first, at least, have
13 to assume that there could be an adverse effect - - - it's
14 possible - - - in a contingent proceeding, essentially,
15 right? That you could go back after you get a good - - -
16 after you get your un-lenient - - - your unlawfully lenient
17 sentence overturned, you could go back and use that to undo
18 your plea, and then you could take that undoing of your
19 plea and go and undo your sentence on the '97 conviction.

20 But if we adhere to a rule that says you look at
21 this proceeding and what was being challenged here and the
22 result, we never get to the double-jeopardy issue, do we?

23 MR. GOLDFINE: Correct, Your Honor. And I think
24 that that narrowing of the scope is in the plain language
25 of the statute. It's not an adverse effect that may have



1 affected the defendant in any criminal court proceeding,
2 it's "the" criminal court proceeding.

3 JUDGE GARCIA: Right.

4 MR. GOLDFINE: And I think that narrowing is for
5 a specific purpose, because it's hard to imagine another
6 circumstance where this type of claim would arise.

7 The legislature is trying to tamp down on these
8 types of appeals where the heart of them is really
9 gamesmanship. Even the correction that defendant is
10 seeking is not to have a correct sentence imposed. He now
11 wants his plea back. And at thirty years after the fact,
12 it's likely impossible that the police officers are alive
13 or that they remember what happened, that the paperwork is
14 still available to prosecute this conviction.

15 In reality, if defendant is entitled to withdraw
16 his plea, he's going to have an acquittal here.

17 If there are no further questions, I rest on my
18 brief and ask that you affirm.

19 CHIEF JUDGE DIFIORE: Thank you, Counsel.

20 MR. GOLDFINE: Thank you, Your Honor.

21 CHIEF JUDGE DIFIORE: Counsel?

22 JUDGE GARCIA: Counsel, is that your argument for
23 harm in this proceeding, that be - - - it's because the
24 Appellate Division refused to review the underlying issue?

25 MR. FERGUSON: Absolutely, Your Honor.



1 JUDGE GARCIA: But then wouldn't - - - any time
2 they apply 470.15, wouldn't you have harm? Like any time
3 you apply that statute, you're not getting a review, for
4 whatever reason, so you always are harmed, so it's kind a
5 Catch-22, right?

6 So any time you apply 470.15, I'm harmed. So
7 there's an adverse effect, even though there's not an
8 adverse effect leading to the application - - -

9 MR. FERGUSON: Your Honor, this time it's
10 whenever there is a motion filed that is denied, that a
11 defendant has filed, that denial is adverse to the
12 defendant.

13 JUDGE GARCIA: I understand that argument.

14 MR. FERGUSON: Right.

15 JUDGE GARCIA: I understand that argument. But -
16 - - but you're not arguing because they applied 470.15 and
17 didn't review that, that's your harm?

18 MR. FERGUSON: Right.

19 JUDGE GARCIA: Your harm is the denial of your
20 original motion?

21 MR. FERGUSON: That's correct, Your Honor.

22 JUDGE GARCIA: Right.

23 MR. FERGUSON: And to go back, it's - - - we have
24 to take a look at 440.20 in the context of how it was
25 amended. It was amended in 1995 in direct response to the



1 reinstitution of capital punishment in the State of New
2 York.

3 And therefore, they expanded the scope of 440.20
4 to help defendants who were facing the possibility of
5 death, so that you have a statute - - -

6 JUDGE STEIN: Not to help them set aside an
7 illegally low - - -

8 MR. FERGUSON: That's correct, Your Honor.

9 JUDGE STEIN: - - - sentence.

10 MR. FERGUSON: Because that would be used - - -
11 because those - - - all of those factors could have been
12 used as aggravating factors.

13 JUDGE STEIN: But also 440.20.

14 MR. FERGUSON: That's right, Your Honor.

15 JUDGE STEIN: Right? It wasn't designed to allow
16 defendants to set aside illegally low sentences.

17 MR. FERGUSON: There is - - - it is written as a
18 plenary statute. There is no exception to it.

19 When they looked at it in 1995, and they decided
20 to amend it, they - - - the legislature had the province,
21 if they wanted to, to said (sic) it only applies to
22 illegally high sentences. But here, there is no exception
23 whatsoever in 440.20.

24 JUDGE RIVERA: So if - - - so if the court
25 disagrees with his argument about whether or not merely a



1 denial of the motion in and of itself is enough to get you
2 the aggrievement, do you lose? Do we have to affirm?

3 MR. FERGUSON: I hope not.

4 JUDGE RIVERA: No, the question of law - - - as a
5 question of law. I know you have some other basis.

6 MR. FERGUSON: I think we have to look at the - -
7 - the - - - the over - - - the overall policy
8 considerations here. And part of the policy considerations
9 here is what, in effect, has occurred in this particular
10 case is a trial court judge looks at a plenary statute and
11 added an exception that does not exist in the statutory
12 language. And the Appellate Division is avoiding looking
13 at amendment by judicial fiat.

14 That can't be allowed by this court. All we're
15 asking for is a review by the Appellate Division of the
16 merits.

17 CHIEF JUDGE DIFIORE: Thank you, Counsel.

18 MR. FERGUSON: Thank you, Your Honors.

19 (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 The People of the State of New York v. Gerald Francis, No. 11 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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