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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 48

EDWARD HARDY,

Appellant.

20 Eagle Street
Albany, New York
September 8, 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: Number 48, The People of
2 the State of New York v. Edward Hardy.

3 Counsel?

4 MR. ZAPATA: Good afternoon, Your Honors. Ronald
5 Zapata for appellant, Edward Hardy. May I please have two
6 minutes for rebuttal?

7 CHIEF JUDGE DIFIORE: How many?

8 MR. ZAPATA: May I have two minutes?

9 CHIEF JUDGE DIFIORE: You may, sir.

10 MR. ZAPATA: Thank you.

11 CHIEF JUDGE DIFIORE: You're welcome.

12 MR. ZAPATA: Your Honors, this case presents the
13 issue of whether the prosecution can change a sworn factual
14 allegation of a complainant in a facially - - - in a - - -
15 in an accusatory instrument, to change what would be a
16 facially insufficient instrument into a facially sufficient
17 instrument.

18 JUDGE FEINMAN: So, Counsel - - -

19 CHIEF JUDGE DIFIORE: So, Counsel, Section 100.15
20 in the CPL that governs form and content of the accusatory
21 instrument makes no mention of the date of the crime,
22 right? That's what this is about, the date of the crime,
23 correct?

24 MR. ZAPATA: Yes.

25 CHIEF JUDGE DIFIORE: Okay. And the legislature



1 has made the provision of the date to defendant part of
2 automatic discovery. Why would the legislature bother to
3 make the date of a pro - - - of the crime a product of
4 discovery? How - - - how does that fit in with your
5 argument? I'm not following.

6 MR. ZAPATA: Well, the date is the allegation
7 made by the - - - the deponent of the accusatory
8 instrument. That is what the reasonable cause - - -

9 CHIEF JUDGE DIFIORE: The date is the what, the
10 allegation?

11 MR. ZAPATA: The date is part of the allegation.
12 The allegation - - -

13 CHIEF JUDGE DIFIORE: Yeah. Um-hum.

14 MR. ZAPATA: - - - is that the crime occurred on
15 this particular date. And this is the sworn-to, verified
16 allegation of the complainant in the - - - in the
17 accusatory instrument.

18 And under the facial sufficiency rules of this
19 court, these - - - these - - - those allegations must have
20 a reasonable cause to believe that the crime was committed.
21 And here if the - - - if - - -

22 JUDGE FEINMAN: So if the typo was for an
23 incorrect date that was within the duration of the final
24 order of protection, which is not the case here - - - here
25 the typo put, you know, beyond the expiration of the order



1 of protection - - - but if it was within, would it still be
2 your position that it was a - - - still a jurisdictional
3 error?

4 MR. ZAPATA: There would not be a jurisdictional
5 ess - - - error, because the jurisdictional error is the
6 facial sufficiency of the instrument. And that - - - there
7 would still be a - - -

8 JUDGE FEINMAN: But - - -

9 MR. ZAPATA: - - - that would still be facially
10 sufficient there.

11 JUDGE FEINMAN: - - - if the date that's alleged
12 is still within the order of protection, the crime is still
13 alleged.

14 MR. ZAPATA: Yes.

15 JUDGE FEINMAN: It may be wrong; it may be that
16 he's able to prove that he's not guilty. But a crime would
17 still be alleged. I thought part of your argument here was
18 that because the date is beyond the expiration of the order
19 of protection - - -

20 MR. ZAPATA: Well, that's part of it, yes.

21 JUDGE FEINMAN: - - - there's no crime alleged,
22 and therefore it's a jurisdictional defect.

23 MR. ZAPATA: Yes, that's part. But there's two -
24 - - two separate analyses here. Is one, can the amendment
25 be made to the - - - to the factual allegations in the



1 complaint. And the statutory interpretation, the - - - the
2 clear language of CPL 100.45, the legislative history that
3 I've outlined in my briefs, show clearly that the
4 legislature did not allow amendments.

5 Now, the - - - the second part of that is, okay,
6 now you look at a facial sufficiency review of the
7 accusatory instrument. And there, if they supposedly have
8 a wrong date, that is the date that they swore to, and
9 therefore, there will still - - -

10 JUDGE RIVERA: So - - -

11 MR. ZAPATA: - - - be the issue.

12 JUDGE RIVERA: So why doesn't Easton survive?
13 Why - - - why doesn't Easton control? Why - - - why are
14 you arguing that that common-law rule doesn't survive the
15 CPL?

16 MR. ZAPATA: Yes, Easton does not apply because
17 the - - - the legislator showed their clear intent to allow
18 amendments only when it comes to informations, to change
19 the - - - the charges that are made in - - - in the
20 accusatory instrument.

21 JUDGE WILSON: Well, I'm not sure why you say
22 that, because as to superior court informations, the
23 legislature was clear that you could make an amendment,
24 essentially, that's consistent with Easton, right? If
25 there's not prejudice to the defendant, you could make the



1 amendment.

2 MR. ZAPATA: I'm sor - - - well, no - - -

3 JUDGE WILSON: In Section 200.70, isn't there a
4 sentence in there that says as to superior court
5 informations an amendment may be made of any sort - - -

6 MR. ZAPATA: But the - - -

7 JUDGE WILSON: - - - so long as there's not
8 prejudice?

9 MR. ZAPATA: Well, the amendment, however - - -
10 the key part with the amendments in the superior court
11 information is that it has to have a - - - a sworn basis
12 there. The superior court information has - - -

13 JUDGE WILSON: Let me - - - let me ask you this.
14 Are you trying to distinguish between superior court
15 informations and informations and misdemeanor complaints,
16 as regards to the legislative history, or not?

17 MR. ZAPATA: Yeah - - - yes - - -

18 JUDGE FEINMAN: And I'll throw in there,
19 prosecutor's information?

20 MR. ZAPATA: Well, that - - - that's the key
21 here, the prosecutors' informations. What happened here is
22 essentially the prosecutor turned what is the complainant's
23 accusatory instrument into their own instrument by amending
24 the - - - the facts of the - - - of the accusatory
25 instrument.



1 Well, prosecutors' informations, under 100.50, a
2 prosecutor's information, you cannot amend - - - you cannot
3 change the facts of the underlying instrument.

4 JUDGE WILSON: But - - - but this isn't a pros -
5 - - there's no prosecutor's information involved in this
6 matter, is there?

7 MR. ZAPATA: Well, this is essentially what ha -
8 - - what occurred. By - - - by making this amendment to
9 the facts of this officer's sworn allegations, this is now
10 the prosecutor's allegation. So now - - -

11 JUDGE FEINMAN: I'm not - - - let - - - let me be
12 very clear. And it's been a while since I sat in criminal
13 court. But my understanding is that you have the
14 misdemeanor complaint, you have an information, which is
15 what happened here - - - the court allowed it to be
16 conferred - - - and the prosecutor's information is
17 something that's typically filed right before you go to
18 trial, and supersedes the information and is much more
19 bare-bones, and reads much more like a superior court
20 information and/or an indictment.

21 And so a prosecutor's information has a very
22 specific meaning, and that's the only one that's actually
23 mentioned in the statute that can be amended, because at
24 that point, there's already been a determination that there
25 is sufficient nonhearsay allegations that satisfy, you



1 know, all the pleading requirements.

2 MR. ZAPATA: Yeah, sure. Perhaps I - - - I'm
3 confusing the issues here. I - - - I only mention the
4 prosecutor's information as a - - - a - - - more of a side-
5 by-side to compare. If - - - if the legislature was going
6 to allow a prosecutor to amend a misdemeanor complaint or
7 an information, then they would have stated so.

8 Now - - - now, under 100.50, a prosecutor can
9 file a prosecutor's information to supersede the
10 information in a misdemeanor complaint. 100.50 explicitly
11 says that the prosecutor's information has to be based on
12 the information in the misdemeanor complaint. If they're
13 allowed to amend the - - - the allegations based on a
14 superseding prosecutor's information, it makes no sense to
15 then allow them to amend it for an amended information or
16 misdemeanor complaint.

17 JUDGE GARCIA: Counsel, can I ask you something a
18 little bit different. Forfeiture. This is a guilty plea,
19 right?

20 MR. ZAPATA: Yes.

21 JUDGE GARCIA: So your arguing has to be - - - so
22 the instrument that the defendant pleads guilty to is the
23 amended instrument - - - you claim improperly amended - - -
24 but that's what they plead guilty to.

25 So for your challenge not to be forfeited, this



1 has to be a jurisdictional defect, right?

2 MR. ZAPATA: Yes.

3 JUDGE GARCIA: So preservation wouldn't matter,
4 right?

5 MR. ZAPATA: Yes.

6 JUDGE GARCIA: So we all agree there's a
7 typographical error.

8 MR. ZAPATA: I don't agree.

9 JUDGE GARCIA: You - - - you don't agree in your
10 papers this is a typographical error, that either - - -

11 MR. ZAPATA: Well, this is - - -

12 JUDGE GARCIA: - - - October versus - - -

13 MR. ZAPATA: - - - someone's sworn testimony.

14 JUDGE GARCIA: - - - January - - -

15 MR. ZAPATA: We - - - we don't know if this is
16 just an unreliable person.

17 JUDGE GARCIA: Okay, you don't agree - - -

18 MR. ZAPATA: We can't just make these - - -

19 JUDGE GARCIA: - - - it's a typographical error.

20 MR. ZAPATA: - - - assumptions.

21 JUDGE GARCIA: But if anything in Easton
22 survives, I mean, let's say your argument for the sake of
23 right now purposes, is correct, and the Civil Procedure law
24 changed. It seems to me the core holding of Easton that
25 you don't enthrone this type of error - - - "enthrone",



1 their word - - - as a jurisdictional defect, would still be
2 true. Because the argument, it seems to me, that prevailed
3 in county court in Easton was this argument, that this is a
4 jurisdictional defect under the Criminal Procedure Rules of
5 the time.

6 And our - - - this Court said no, you - - - you
7 know, you can amend. Now, assume you can't amend, I think
8 under the new rule, I think the old case law, Easton, would
9 still stand for the proposition that this type of a switch
10 of dates under these circumstances - - - call it what you
11 want - - - is not a jurisdictional error.

12 MR. ZAPATA: Well, here's the un - - - here's
13 what a jurisdictional error would be. It's does the
14 accusatory instrument allege a crime? A crime in the
15 future is not a crime. It - - -

16 JUDGE GARCIA: But it does allege a crime.

17 MR. ZAPATA: In the future.

18 JUDGE GARCIA: It alleges a crime - - -

19 MR. ZAPATA: That's impossible.

20 JUDGE GARCIA: - - - that the document that you
21 pled - - - your client pled to, alleged a crime. Your
22 claim isn't the document my client pled to doesn't allege a
23 crime, your claim was it was improperly amended. And to
24 get to that underneath the face of the document your client
25 pled to, that has to be a jurisdictional error.



1 MR. ZAPATA: I would disagree, based on this
2 Court's decision in People v. Harper. In - - - in Harper,
3 interpreting the same statute 100.45(2), to amend this
4 court stated that the amendment, since it was improper
5 under - - - under that statute, it could not be effective,
6 and therefore the accusatory instrument must be evaluated
7 based on - - - on how it was without the amendment. It's
8 the same - - - same situation here.

9 JUDGE GARCIA: But what was the amendment in
10 Harper?

11 MR. ZAPATA: I'm sorry?

12 JUDGE GARCIA: What was the amendment in Harper?

13 MR. ZAPATA: The amendment was to add a couple
14 charges.

15 JUDGE GARCIA: Right. But you see a difference
16 between adding charges and changing a date that's
17 impossible, which would have been a transposed numerical
18 date.

19 MR. ZAPATA: But there has to be some basis to
20 change the date within the four corners of the - - -

21 JUDGE WILSON: What you're saying is there should
22 have been an affiant to testify to that date and there
23 wasn't - - -

24 MR. ZAPATA: Yes, Your Honor.

25 JUDGE WILSON: - - - as to the - - - as to the



1 amended indictment.

2 MR. ZAPATA: Yes.

3 JUDGE WILSON: That's - - - that's why you say
4 it's jurisdictional?

5 MR. ZAPATA: Yes. This was why we - - - this is
6 why we have verification requirements and sworn
7 requirements, under reasonable cause requirements.

8 JUDGE FAHEY: So let me ask this. Would your
9 theory allow for a distinction between a factual amendment,
10 which you say this is, and a technical or typographical, an
11 obvious typographical error?

12 MR. ZAPATA: No. Amendments are - - -

13 JUDGE FAHEY: In other words - - -

14 MR. ZAPATA: - - - not permitted.

15 JUDGE FAHEY: - - - any - - - let me just finish.

16 MR. ZAPATA: Yes.

17 JUDGE FAHEY: Just so I'm clear. So in other
18 words, any error at all, as to the form that - - - it
19 cannot be viewed by the court in any other way except as a
20 factual merit, even if - - - as Judge Garcia was saying - -
21 - this seems to be an obvious typographical error?

22 MR. ZAPATA: Well, there has to be a basis to
23 change it, though. What - - - what's the basis to change
24 it? It's all about assumptions from the prosecutor.

25 JUDGE FAHEY: Well, it - - - I suppose the



1 factual error, would be to conform the pleadings to the
2 proof. A technical error would be you put an S at the end
3 of a word, and it was obviously singular. It was "a
4 person" instead of "persons", as an example.

5 MR. ZAPATA: Yes.

6 JUDGE FAHEY: So - - - so therefore, we're not
7 going to throw out an accusatory instrument as - - - as
8 containing a jurisdictional defect because of that kind of
9 an error.

10 Your argument would be that we would have to
11 throw that out?

12 MR. ZAPATA: I'm sorry, so what would be an
13 example?

14 JUDGE FAHEY: The argument is, is a minor
15 typographical error. Say you pluralize a word, instead of
16 calling someone "a person" you call them "a persons", and
17 you use the S at the end of the word. That would create a
18 situation where there would be a factual error that appears
19 to be an obvious typographical error that the court could
20 not ignore. And under the ruling that you're asking for,
21 we would have to throw the case out.

22 MR. ZAPATA: Well, it would be under this court's
23 facial sufficiency rule.

24 JUDGE FAHEY: No, I'm asking you, is that
25 correct? Would you agree with that?



1 MR. ZAPATA: Well, if this court, under facial
2 sufficiency - - - under a facial sufficiency review, this
3 court can consider whether the - - - whether it believes
4 something is a typo or not. But there has to be a sworn
5 basis to replace what is in the - - - in the complaint.

6 JUDGE RIVERA: But I - - - I thought your
7 argument was, in response to Judge Fahey, based on what you
8 wrote, would be that changing "persons" to "person" may not
9 - - -

10 MR. ZAPATA: It may not be amended.

11 JUDGE RIVERA: - - - fact mean it's deficient of
12 an element of the crime, whereas here you're saying it - -
13 - it's - - - the date makes it impossible.

14 MR. ZAPATA: Yes, exactly.

15 JUDGE RIVERA: And so therefore you don't have an
16 element of the crime. I - - - I thought that was the
17 argument that you were - - -

18 MR. ZAPATA: Yes. In - - -

19 JUDGE RIVERA: - - - trying to make.

20 But either way, whether we agree with you on the
21 jurisdiction - - - that it's jurisdictional or not, the
22 reality is we have to resolve this question to figure out
23 whether it's jurisdictional or not, correct? So either
24 way, we're going to get to your argument; is that not
25 correct?

1 MR. ZAPATA: You mean a facial sufficiency of - -
2 - of the - - -

3 JUDGE RIVERA: Well, the question whether or not
4 you can make the amendment.

5 MR. ZAPATA: Yes. Well - - -

6 JUDGE RIVERA: I mean, don't you have to resolve
7 that?

8 MR. ZAPATA: Yes, exactly.

9 JUDGE RIVERA: Either way?

10 MR. ZAPATA: Yes, because you - - - you can't do
11 unauthorized actions to make an instrument - - - to gain
12 jurisdiction over an instrument. You can't, for instance -
13 - - the prosecutor can't forge a signature of a - - - of a
14 - - - of a complainant who didn't sign it. The - - - a
15 court in Albany can't pretend they're a court in Manhattan
16 to gain jurisdiction over a Manhattan crime. There - - -
17 you can't do unauthorized actions to gain jurisdiction over
18 an action.

19 CHIEF JUDGE DIFIORE: Thank you, Counsel.

20 MR. ZAPATA: Thank you.

21 CHIEF JUDGE DIFIORE: Counsel?

22 MS. ZELIG: Good afternoon, Your Honors, may it
23 please the court, Mariana Zelig from Queens County DA's
24 Office, Office of Melinda Katz.

25 Defendant's reading of the statute, specifically



1 100.45, is simply unworkable, and it's simply wrong. There
2 - - -

3 JUDGE STEIN: Counsel, did - - - in court, before
4 the plea, the ADA realized that there was a problem and
5 moved to amend. Why did - - - why would the ADA move to
6 amend if they didn't think that the - - - that the
7 accusatory instrument was legally insufficient?

8 MS. ZELIG: Well, the issue is the instrument was
9 sufficient, but the - - - they're allow - - - if the court
10 is allowed to amend, which the statute permits - - -

11 JUDGE FEINMAN: So wait - - - wait a minute.

12 MS. ZELIG: - - - a replacement - - -

13 JUDGE FEINMAN: Are you saying it was sufficient
14 - - -

15 MS. ZELIG: Oh, I'm sorry.

16 JUDGE FEINMAN: Over here. Are you saying that
17 it was sufficient before the amendment?

18 MS. ZELIG: No, it was insufficient before the
19 amendment.

20 JUDGE FEINMAN: Okay, so you would concede that?

21 MS. ZELIG: I would concede that.

22 JUDGE FEINMAN: So in other words, let's say the
23 court hadn't interrupted and hadn't said anything. All
24 right? And defense counsel was making his point, and he
25 said, Judge, I'm moving to dismiss because there's no crime



1 alleged here. October whatever hasn't come, and it's
2 beyond the expiration of the order of protection. You
3 know, the order of protection expired in September, and the
4 date of the crime is alleged to be in October.

5 MS. ZELIG: Correct. And then what would happen
6 - - -

7 JUDGE FEINMAN: You would agree that that
8 complaint would be insufficient?

9 MS. ZELIG: Well, yes. And if the defendant made
10 a motion to dismiss, then what kicks in is CPL 170.35,
11 which says that on a motion to dismiss, prior to the defend
12 - - - the court dismissing it, it must - - - the statute
13 specifically says it must cure the deficiency, if it can do
14 so by an amendment.

15 JUDGE STEIN: But doesn't that assume that there
16 is a basis for making the amendment?

17 MS. ZELIG: Of course, I mean - - -

18 JUDGE STEIN: Okay.

19 MS. ZELIG: - - - if - - - yeah.

20 JUDGE STEIN: So if - - - so if - - - if neither
21 the CPL nor any common-law rules permit the amendment of
22 this instrument, then - - - then 170.35 is just not
23 applicable, right?

24 MS. ZELIG: No, I think you have to read them
25 together, Your Honor. The way it works according to the



1 statute - - -

2 JUDGE STEIN: So you're saying that 170.35 adds
3 grounds to make an amendment so that anything that is - - -
4 that there's a jurisdictional deficiency - - - now, all of
5 a sudden, even though the CPL doesn't say anything about
6 permitting amendments of this in the first place, now
7 includes anything and everything?

8 MS. ZELIG: No. No, Your Honor. Under the
9 Practice Commentaries of 170.35, it talks about
10 nonjurisdictional amendments. So of course, if it's a
11 jurisdictional defect, the People are not arguing that we
12 can amend the jurisdictional defect, and those rights are
13 not forfeited, and they do not have to be preserved.

14 But our argument in this particular case is was
15 the court permitted to make the amendment? And CPL 100.45
16 does not prohibit that. And the defendant's reading of it
17 is simply wrong. The statutory interpretation - - -

18 JUDGE FAHEY: Well, but it doesn't expressly
19 allow for it.

20 You know, what - - - what I - - - how do you
21 respond to the legislative history that the defendant
22 pointed out in his reference to the Bartlett Commission
23 under 170.35? That seems to clearly support their
24 argument.

25 MS. ZELIG: Support my argument?



1 JUDGE FAHEY: No, it support - - - I think it
2 supports their argument.

3 MS. ZELIG: Well, actually, no, Your Honor. It
4 supports the People's argument. And I'll tell you why.

5 JUDGE FAHEY: Sure.

6 MS. ZELIG: Because under - - - sure. The 1968
7 Study Bill, which had initially had the 145 including
8 amendments made to prosecutors' informations - - - I'm
9 sorry, not prosecutor's information - - - misdemeanor
10 complaints and information - - - so defendant's argument is
11 that they took that out, which means they didn't intend to
12 allow amendments.

13 However, if you look at 170.35, the 1968 Study
14 Bill, that also included that amendments could be made
15 subject to 145 or the old CP - - - the old Code 50.35. And
16 they took that out in the final 1970 CPL draft.

17 So if you look at both of those together, clearly
18 they didn't intend to limit amendments to - - -

19 JUDGE FAHEY: Well, this - - - this is one of
20 those arguments - - - those expressio unius arguments. The
21 legislature knew what they were doing. If they wanted to
22 do that, they would have done it.

23 MS. ZELIG: Correct.

24 JUDGE FAHEY: They didn't do it.

25 MS. ZELIG: They didn't do it. And the fact - -



1 - if the - - - if they wanted to put a prohibition to make
2 an amendment, something simple as this - - - first of all,
3 the issue really becomes mistakes are made. It's - - -

4 JUDGE FAHEY: So, no, no. Let me just - - -

5 MS. ZELIG: - - - normal for - - -

6 JUDGE FAHEY: - - - stay - - - slow down.

7 MS. ZELIG: Sure.

8 JUDGE FAHEY: Slow down. Let's just stay on this
9 point for a second.

10 MS. ZELIG: Sure.

11 JUDGE FAHEY: Are you saying to me that in your
12 view, the provisions of CPL 200.70 do apply to information
13 and misdemeanor complaints?

14 MS. ZELIG: No, they only apply to prosecutor's
15 information.

16 JUDGE FAHEY: I see.

17 MS. ZELIG: Everything else - - -

18 JUDGE WILSON: And superior court informations as
19 well, right?

20 JUDGE FAHEY: Right. Yes.

21 MS. ZELIG: And not only that, Your Honor,
22 further support for our position is noted that the fact
23 that form and substance facial sufficiency for CP - - - for
24 a prosecutor's information is pursuant to 135, whereas form
25 and substance as to misdemeanor complaints and informations



1 is under 100.40.

2 So there's different structures for those
3 documents, which is the reason you have to look at the
4 statutory language where it specifically limited that CPL
5 200.70, which applies to indictments, only applies to
6 prosecutors' informations, because prosecutors'
7 informations are usually the product of a grand jury. So
8 they - - - sorry - - - they're very similar documents.

9 JUDGE STEIN: Sometimes we - - - we apply the
10 principle that, we as a court, should not add something to
11 a statute that isn't there, even though we think maybe they
12 - - - the legislature intended it to be there.

13 Why shouldn't we let the legislature either act
14 or not act? Why shouldn't we say, in this case, that it's
15 not there, and so if the legislature wants it to be there,
16 then they should act? Why shouldn't that be our
17 determination?

18 MS. ZELIG: Because the reverse is true, Your
19 Honor. We could also equally say that the fact that it
20 doesn't prohibit it, means that it's not prohibited.

21 The fact - - - we should not read more into the
22 statute than simply CPL 200.70 applies to prosecutors'
23 information, nothing more, nothing less. Anything that's
24 related to misdemeanor complaints or informations, if it's
25 not jurisdictional, it's subject to amendment, and upon



1 motion to dismiss by the defendant, CPL 170.35 enables the
2 court to make the amendment.

3 JUDGE WILSON: Well, except that you could read
4 CPL 200.70 as applying to indictments and superior court
5 informations and prosecutors' informations, and stating the
6 way that those things and perhaps only those things can be
7 amended. There's no authorization in the CPL for any sort
8 of other amendment. And at least a possible policy
9 explanation is the following.

10 All the types that can be amended that are
11 specified in the CPL are ones that are instituted either by
12 a grand jury or by a prosecutor, as an officer of the
13 court. The misdemeanor complaints and the regular
14 informations can be instituted - - - instituted, you know,
15 by an affiant who could be anybody.

16 JUDGE FEINMAN: Well, and - - -

17 JUDGE WILSON: And in those circumstances, we
18 want the affiant back, if there has to be an amendment to
19 something important.

20 JUDGE FEINMAN: And I would add to that
21 observation, though, that the superior court information
22 requires a waiver from the defendant, you know, when it's
23 filed. You can't just file a superior court information.
24 You have a felony complaint, and then that's typically a
25 negotiation between the defense and the prosecution to



1 proceed by SCI rather than go forward with a grand jury
2 presentation.

3 MS. ZELIG: But again, you're speaking about
4 indictments. You're talking about prosecutors'
5 informations. It's a different facial sufficiency
6 standard. It's a different form.

7 JUDGE FEINMAN: Um-hum.

8 MS. ZELIG: It applies to a different statute.
9 It's 135 - - -

10 JUDGE FEINMAN: Which is also perhaps why it's
11 treated differently.

12 MS. ZELIG: Exactly.

13 JUDGE FEINMAN: I mean, misdemeanor complaints
14 and misdemeanor informations, there's no testing of the
15 factual allegations by a grand jury.

16 MS. ZELIG: The issue is that a prosecutor's
17 information, if - - - it's normally the product of a grand
18 jury. Therefore, it's subject to the same limitation. The
19 DA can't change something because a prima facie case has
20 already been established by the grand jury.

21 But a misdemeanor complaint, especially in this
22 particular case, where you had the - - - the domestic
23 incident report, that allows it to be a supporting
24 deposition. And according to CPL 100 - - -

25 JUDGE FEINMAN: Let me - - - let me ask you - - -



1 MS. ZELIG: Sure.

2 JUDGE FEINMAN: - - - this question. What if the
3 court had not intervened, the defendant made his motion,
4 and perhaps the defendant - - - the People responded we
5 want that motion in writing - - - that's what used to
6 happen all the time. You know, people would point out
7 various insufficiencies, you'd put it over.

8 And in the meantime, the prosecution is then free
9 to file a superseding accusatory instrument. Isn't that
10 really what should have happened here?

11 MS. ZELIG: And certainly could have happened, if
12 the defendant had preserved that issue. But instead - - -

13 JUDGE FEINMAN: Well, wasn't he cut off by the
14 court?

15 MS. ZELIG: He was. And then he didn't have to
16 take the plea. He could have said I move to dismiss or he
17 could have said you have - - - you have - - - hold you to
18 your proof. You have to dismiss the complaint.

19 And then what would have happened? They would
20 have rearrested the defendant, and then he - - - I don't
21 think the defendant would have wanted something like that.
22 They would have dismissed the complaint.

23 JUDGE FEINMAN: Well, I don't know that the court
24 would have dismissed the - - - you know, in my experience,
25 two things happen. One, the court puts it over for the



1 filing of a - - - I don't know how this term came to be
2 used - - - a superseder, or if the court does actually
3 grant it - - - and I concede it's different here, because
4 this was DV case - - - very often those cases just went
5 away, and never came back, because in the exercise of their
6 discretion, the prosecutor's office would often say, you
7 know what, just let it go.

8 JUDGE RIVERA: Counsel, I see your red light went
9 off, so I - - - I just have a question just for
10 clarification. Is it your position that the Appellate Term
11 was right in its view of 170.35 that it sets out in
12 footnote 3 of the Appellate Term's decision - - -

13 MS. ZELIG: Correct, and that - - -

14 JUDGE RIVERA: - - - that - - - that this
15 language is of a kind that may be cured by amendment, and
16 is the legislature also recognizing that the Easton rule
17 was in place at the time, and so it was adopting that - - -
18 adopting this language with the understanding that that
19 rule was in place?

20 MS. ZELIG: Correct.

21 JUDGE RIVERA: All right. Is there anything else
22 other than that reading that one might gloss on that
23 supports that particular view?

24 MS. ZELIG: Well, as I indicated, the plain
25 language does not specifically prohibit it.



1 JUDGE RIVERA: Um-hum.

2 MS. ZELIG: And there - - - the legislature's
3 enactment of 170.35 would negate their intent to prevent
4 these type of nonjurisdictional simple amendments.
5 Otherwise you'd be clogging up the system.

6 You're talking about misdemeanor court, where
7 there's thousands of cases being disposed of, you know,
8 quickly. The defendant, in this particular case - - -

9 JUDGE RIVERA: Well, the rule is a narrow one,
10 right? I mean, there has - - -

11 MS. ZELIG: I'm sorry?

12 JUDGE RIVERA: The rule is a narrow one. There
13 has to be no prejudice to the defendant - - -

14 MS. ZELIG: And no surprise.

15 JUDGE RIVERA: - - - it has to be obvious on its
16 face - - -

17 MS. ZELIG: Right.

18 JUDGE RIVERA: - - - despite - - - I understand
19 your - - - the position of defense counsel here about this
20 date. But there are other indicia - - -

21 MS. ZELIG: Of course.

22 JUDGE RIVERA: - - - of that it is a typo.

23 MS. ZELIG: Thank you, Your Honor. Exactly. If
24 it's - - -

25 JUDGE STEIN: Well, is it - - - but is there a



1 difference between, for example, let's say a typo said
2 "gum" G-U-M, instead of "gun" G-U-N, and one of this
3 nature, where - - - where you have a date that clearly
4 couldn't be correct, but then you don't know what the
5 correct date is? Is there a difference between those two
6 types of - - - of typographical errors?

7 MS. ZELIG: Well, I - - - I wouldn't say - - - I
8 couldn't say there's a difference, because on those facts,
9 the differences, yes, gum and gun is a typographical error.
10 But in this particular case, we have the supporting
11 deposition of the DIR, which has the date - - - you know,
12 the - - - the prosecutor wasn't getting the date - - -

13 JUDGE STEIN: Yeah, but those dates were already
14 - - -

15 JUDGE FEINMAN: But you would concede that DIR is
16 full of all sorts of errors. It's got the wrong year, it's
17 got the - - - it doesn't have the signature of the
18 complaining witness, is my recollection - - -

19 MS. ZELIG: It does, on the second page. It has
20 the signature.

21 JUDGE FEINMAN: Yeah. But I thought she didn't -
22 - -

23 MS. ZELIG: The date was wrong.

24 JUDGE FEINMAN: The date was wrong. Right.

25 MS. ZELIG: It was dated - - - but it was



1 January. It was right after, you know, the new year, which
2 is common. And the CPL doesn't require the date on the
3 verification.

4 JUDGE FEINMAN: Yeah, well, the whole - - -

5 MS. ZELIG: It just requires - - -

6 JUDGE FEINMAN: - - - you know, the whole issue
7 of whether the DRI - - - DIR can actually be used is - - -
8 you know. I don't know if that's actually ever made it
9 here.

10 MS. ZELIG: That's not an issue before the court.

11 JUDGE FEINMAN: Yeah, I know it's not before the
12 court. But I know it's been the subject of debate.

13 MS. ZELIG: Our - - - if I may, Your Honor, just
14 for a moment? I - - - our position is that if the
15 legislature had intended to prohibit, they would have. And
16 if you just rely on the fact that the - - - the history of
17 the Study Bills show that it was originally in 145, as to
18 the prior amendment, then equally look at the Study Bill of
19 170.35, where it was similarly in the original Study Bill;
20 and you have to look at the fact that - - - what's the
21 legislature's intent in enacting the CPL, it was to
22 simplify things.

23 Just like a verified information didn't - - - you
24 didn't have to go to court to sign it before a court, you
25 were able to do it with the short form, with the jurat at



1 the bottom. So it doesn't make sense that they would have
2 abrogated Easton. And it's limited to the specific
3 instances - - -

4 JUDGE FEINMAN: Well, except that they did, you
5 know, try to get away from the having to have the police
6 officer constantly be in the courtroom to verify these
7 things in front of the judge and all of that. But the flip
8 side of that is, doesn't that make it more important for
9 the affiants' statements under oath to be accurate and to
10 actually allege a crime?

11 MS. ZELIG: Absolutely. Absolutely, Your Honor.
12 And they did allege a crime here.

13 JUDGE FEINMAN: You know, their written
14 statements.

15 MS. ZELIG: They did allege - - - the affidavit
16 was facially sufficient. Once the court amended the date,
17 it was a facially sufficient affidavit, and the court had
18 jurisdiction to accept the plea.

19 CHIEF JUDGE DIFIORE: Thank you, Counsel.

20 MS. ZELIG: Thank you, Your Honor.

21 CHIEF JUDGE DIFIORE: Counsel?

22 MR. ZAPATA: Let's talk about Easton for a little
23 bit. Why did Easton allow the amendment there? One, the
24 complainant was there and actually presented sworn test - -
25 - testimony about the change of date. Two, Easton, their



1 basis was on the common law. And the common law said that
2 informations are as declarations in the king's suit. An
3 officer of the crown has the right of framing it
4 originally. He may amend in like manner as any plaintiff
5 may.

6 So under Easton, every single information is
7 brought by the prosecutor. The prosecutor can change
8 anything they want in there, because they are doing it
9 under the king's suit. The - - - the CPL knocks the crown
10 off of the prosecutor's head, because they provided
11 different types of instruments instead of this one inform -
12 - - information that was only brought by the - - - under
13 the king's suit.

14 They brought the misdemeanor complaint. They
15 brought the information. These are - - - both have to be
16 sworn to and verified by a different plaintiff.

17 The only accusatory instrument that could be
18 brought by the prosecutor in the CPL now was a prosecutor's
19 information. And under the CPL, a prosecutor's information
20 can only be brought - - -

21 JUDGE GARCIA: Go back to your point - - -

22 JUDGE RIVERA: But what about her point? It's
23 just not workable. Sort of what would the world be under
24 your rule? How would this have played out, and how will it
25 play out in the many other cases? She's correct. People



1 are human, they make mistakes. We don't like them, but
2 people make those kinds of mistakes.

3 The question is whether or not they prejudice the
4 defendant or whether or not they're of the kind that we
5 should be concerned about. What - - - what would your rule
6 work like day-to-day - - -

7 MR. ZAPATA: Sure.

8 JUDGE RIVERA: - - - in the courts?

9 MR. ZAPATA: It's absolutely workable. Because
10 the - - - the legislature provided the opportunity to file
11 a superseding information. All the People had to do was
12 get - - - if it was an actual mistake, get the - - - get
13 the complainant to do a superseding information. The - - -
14 this - - - this is the protections that the legislator
15 provided - - -

16 JUDGE FAHEY: Yeah, these problems - - - these
17 city court problems - - - Judge Feinman sat in city court;
18 I think Judge Stein did; I didn't - - - they're volume
19 problems, as you know if you've done this stuff.

20 And - - - and the - - - the amount of volume that
21 a city court deals with in a city like New York is - - - is
22 onerous. And so things are moved along.

23 I think that's - - - that's what we're
24 confronting here that people look at this as a de minimis
25 change, and why isn't this within the purview of the court,



1 in a - - - in a murky legislative/legislative-history
2 setting for us to have the law reach out and correct this?

3 MR. ZAPATA: Well, one, I would argue it's not
4 murky. But what is there - - -

5 JUDGE FAHEY: Well, let's - - - let's assume that
6 my statement is correct.

7 MR. ZAPATA: Okay.

8 JUDGE FAHEY: Okay. For today - - -

9 MR. ZAPATA: So you're saying - - -

10 JUDGE FAHEY: - - - anyway.

11 MR. ZAPATA: Okay, so - - -

12 JUDGE FAHEY: Go ahead.

13 MR. ZAPATA: - - - you're saying, okay, because
14 the legislature did not explicit - - -

15 JUDGE FAHEY: Because the - - - because we're in
16 a fungible area, because we're in an area where a
17 reasonable person could - - - could say, well, what's the
18 point in bringing this person in, this guy's going to plea
19 anyway. And since he's going to plea, why do we have to go
20 through all that? Why not just let's fix this
21 typographical error, that's also a factual error - - - I'm
22 not diminishing that - - - and - - - and resolve this
23 question now.

24 How was - - - how was an injustice done by doing
25 that, I guess that's my question to you?

1 MR. ZAPATA: The injustice is that the - - - the
2 defendant is entitled to all the protections that the
3 legislature has provided them.

4 JUDGE FAHEY: Right. I agree with that.

5 MR. ZAPATA: Yes.

6 JUDGE FAHEY: I - - - I agree with you. Those
7 are - - - frankly, they're sacred. But how is an injustice
8 done in this setting if the person's about to plea, and
9 you're correcting a typographical error.

10 MR. ZAPATA: Well - - - well, this also changes
11 the dynamic of the plea negotiation process. Look at what
12 happens here. The - - - the - - - the defendant gets - - -
13 sees that the prosecutor can just change the allegations
14 from the complainant to - - - to allege a sufficient crime
15 rather than force them to do anything else.

16 JUDGE RIVERA: But isn't that concern addressed
17 with, as I was mentioning to the ADA, the - - - the
18 narrowness of the rule, that this is only when it's an
19 obvious typo; there's no prejudice to the defendant? And
20 that way you've reached some balance between the rights of
21 the defendant and what our system should be concerned
22 about, and as Judge Fahey is pointing out, the demands on
23 the judges, on the judicial system.

24 MR. ZAPATA: Yes, but how does this protect
25 against the unreliable complainant? How does this protect



1 against a complainant who is careless and doesn't care, and
2 it would not follow through on anything? This is the
3 protections that the legislature has provided to the
4 defendant. It has to be sworn factual allegations.

5 And if it's not met, then the - - -

6 JUDGE RIVERA: But that's what I'm saying - - -

7 MR. ZAPATA: - - - accusatory instrument - - -

8 JUDGE RIVERA: - - - there - - - there is indicia
9 of reliability that this really is a typo. I - - - I get
10 your point when - - - when perhaps it is not so obvious. I
11 understand that. That's what I'm saying about the
12 narrowness of the rule.

13 JUDGE WILSON: If Easton survives, you're not
14 claiming there's any prejudice or surprise to Mr. Hardy; is
15 that right?

16 MR. ZAPATA: No. But notice is not - - - not the
17 only reason that we have accusatory instruments.

18 JUDGE WILSON: No, no, I'm just asking. If we
19 were to hold that Easton has survived, you're not saying it
20 needs to go back for a determination of prejudice or
21 anything like that? You're conceding that there's not
22 prejudice here.

23 MR. ZAPATA: No.

24 JUDGE WILSON: No means - - - I'm sorry. It yes
25 you're conceding that or - - -



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MR. ZAPATA: Oh. Yes, there - - -

JUDGE WILSON: Okay.

MR. ZAPATA: - - - there is no prejudice - - -

JUDGE WILSON: Okay.

MR. ZAPATA: - - - yeah.

CHIEF JUDGE DIFIORE: Thank you, Counsel.

MR. ZAPATA: Thank you.

(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. Edward Hardy, No. 48 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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