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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF NEW YORK,

Appellant,

-against-

NO. 80

SHARON LASHLEY,

Respondent.

20 Eagle Street
Albany, New York
November 18, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO

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1 CHIEF JUDGE DIFIORE: Okay, good afternoon. This
2 is appeal number 80 on the calendar. This is the People of
3 the State of New York v. Sharon Lashley.

4 Counsel?

5 MR. TARBUTTON: Thank you, Your Honor. May it
6 please the court, Michael Tarbutton for the People.

7 Your Honor, could I reserve two minutes for
8 rebuttal?

9 CHIEF JUDGE DIFIORE: How many?

10 MR. TARBUTTON: Two minutes, Your Honor.

11 CHIEF JUDGE DIFIORE: Yes, you may, sir.

12 MR. TARBUTTON: Thank you.

13 CHIEF JUDGE DIFIORE: Please proceed.

14 MR. TARBUTTON: Your Honors, this court should
15 not expand the illegal sentence exception to the
16 preservation requirement - - -

17 CHIEF JUDGE DIFIORE: Counsel, I'm having
18 difficulty hearing you.

19 MR. TARBUTTON: Sure. I'll try to - - - this
20 court should not expand the illegal sentence exception to
21 the preservation requirement to include the defendant's
22 claim.

23 The defendant argues that the People's omission
24 of tolling allegations from the predicate felony offender
25 statement rendered her sentence as a predicate felony



1 offender invalid. She also argues that she was not
2 required to preserve this claim because her claim falls
3 within this illegal sentence exception to the preservation
4 rule.

5 However, this court, in *People v. Nieves*,
6 emphasized that that illegal sentence exception is narrow.
7 It further explained that the illegal sentence exception
8 does not include all claims - - - all sentencing claims.

9 And in *People v. Samms*, this court set out a two-
10 prong test for determining whether a claim of sentencing
11 error falls within this illegal sentence exception. And
12 defendant's claim fails both prongs of that test.

13 Under the first prong, *Samms* explained that to
14 fall within the illegal sentence exception, the defendant's
15 claim actually has to allege a - - - that the sentence is
16 substantively illegal. It has to allege that the defendant
17 is actually sentenced improperly, that she's not, in actual
18 fact, a predicate felony offender. It's not good enough to
19 simply allege that there's a defect in the proceedings used
20 to adjudicate her a second felony offender.

21 And that's what defendant here alleges - - -

22 JUDGE FAHEY: Can I - - - can I back you up a
23 second. Just logically, isn't it the People's burden to
24 establish second felony offender status for sentencing?

25 MR. TARBUTTON: Yes, Your Honor. And - - -



1 JUDGE FAHEY: So - - - so it - - - you have the
2 original record, so you have to establish that. And if you
3 haven't done that - - -

4 MR. TARBUTTON: If we haven't done that, then
5 that means the procedures - - -

6 JUDGE FAHEY: Right.

7 MR. TARBUTTON: - - - are inadequate - - -

8 JUDGE FAHEY: Right.

9 MR. TARBUTTON: - - - to - - - to give the - - -

10 JUDGE FAHEY: Right.

11 MR. TARBUTTON: That - - - that's the defendant -
12 - - if I'm characterizing it properly, that's the
13 defendant's theory, that the legality of the sentence for
14 these purposes is - - -

15 JUDGE FAHEY: I'm just thinking of the burden
16 here now.

17 MR. TARBUTTON: Sure.

18 JUDGE FAHEY: Just the burden. And if you
19 haven't done that, wouldn't it be per se an illegal
20 sentence if you - - - at least as to that portion of the
21 sentence?

22 MR. TARBUTTON: It's an error, Your Honor, but
23 that doesn't - - - per se error, but that doesn't excuse
24 the defendant from the obligation to preserve that error
25 because simply that something is an error doesn't mean the



1 defendant doesn't have to preserve it. And Samms makes
2 this distinction clear between sentences where there's an
3 error in the proceedings, the proceedings were inadequate,
4 from where - - - ones where, as a matter of fact, the
5 defendant's claim was illegal. Samms, itself, is a claim
6 of an actual illegal sentence case where, in Samms, there
7 was this sequentially - - -

8 JUDGE FAHEY: So I think you're right about the
9 defendant's burden to raise the issue. But wouldn't the
10 Appellate Division, they have the ability to reach it in
11 the interest of justice?

12 MR. TARBUTTON: Yes, Your Honor, it would. And
13 what we ask this court to do, is to remand because it was
14 an error defined that it was preserved as an issue of law,
15 and they could consider it in the interest of justice.

16 JUDGE FAHEY: And - - -

17 JUDGE GARCIA: Counsel, I'm sorry. We could do
18 all of this, but it seems like that's a lot of work for a
19 lot of other courts. Wouldn't a simpler rule just be,
20 like, why don't you file the right certificate in the
21 beginning?

22 MR. TARBUTTON: No, Your Honor, actually, for a
23 couple reasons. First, the preservation rule actually is -
24 - - one of the purposes of it is to prevent unnecessary
25 litigation and to make sure that errors are brought to the



1 attention of the sentencing court and cured on the spot.

2 Had defendant objected, we doubt this - - - we'd
3 have filed the proper tolling allegations because they were
4 in the rap sheet in the court file. We certainly could
5 have done that before. We did that on remand ultimately.
6 Not part of this record, but we did ultimately file that.
7 She was adjudicated a second predicate felony for - - -

8 JUDGE WILSON: Well, let me stop you - - -

9 MR. TARBUTTON: - - - again - - -

10 JUDGE WILSON: - - - there then. Why isn't this
11 moot?

12 MR. TARBUTTON: Oh, it's not moot, Your Honors,
13 because for one thing, she was given a different sentence,
14 a lesser sentence. The initial sentence was three-and-a-
15 half to seven years. On remand, she was given two to four.
16 So we still have an interest in litigating - - -

17 JUDGE WILSON: And - - -

18 MR. TARBUTTON: - - - that.

19 JUDGE WILSON: - - - is that because of a failure
20 to show the predicate?

21 MR. TARBUTTON: No, Your Honor. She was - - -
22 she was adjudicated a second felony offender at resentencing
23 just like she was at the initial sentence. We filed the
24 tolling allegations, which were - - - there was no question
25 she was a predicate; there were six years of tolling.



1 And that was again evident - - -

2 JUDGE WILSON: Okay. So then you may have to
3 explain to me why the former sentence would prevail over
4 the new sentence.

5 MR. TARBUTTON: Oh, because the Appellate
6 Division's remand order, because it was based on a - - - on
7 a finding that there was an error as a matter of law, was
8 erroneous. If this court vacates that, then that initial
9 sentence is essentially resurrected, reinstated. The
10 subsequent sentence is a nullity. And then this court
11 would have - - - we'd be back to the initial appeal, would
12 have the decision to make of whether to reach the interest
13 of - - - the claim interest of justice - - - or to not
14 reach the claim, but to consider the defendant's excessive
15 sentence claim

16 JUDGE GARCIA: But why was the second sentence
17 lower if it was based on the same predicate?

18 MR. TARBUTTON: Essentially, Your Honor, it - - -
19 I think - - - I think it's safe to say it was because of
20 the COVID outbreak. The sentence was adjourned several
21 times because of the concern about the - - - whether COVID
22 was in the - - - our position was that COVID was not a
23 serious threat given that it was not very prevalent in the
24 defendant's correctional facility. But the defense counsel
25 took a different position. And - - -



1 JUDGE GARCIA: So your view would be if we - - -
2 if we were to reverse, then the initial sentence - - -
3 assuming if we have to send it back to the Appellate
4 Division, it gets through the Appellate Division again,
5 would be reinstated?

6 MR. TARBUTTON: Right.

7 JUDGE GARCIA: And that other sentencing would be
8 a nullity?

9 MR. TARBUTTON: Yes, Your Honor.

10 JUDGE GARCIA: Okay.

11 JUDGE WILSON: Except that I think you said
12 earlier that the Appellate Division could look at this in
13 the interest of justice - - -

14 MR. TARBUTTON: It could.

15 JUDGE WILSON: - - - even - - - even on the
16 remittal?

17 MR. TARBUTTON: It could. Which is why Your
18 Honors - - - why you should vindicate the preservation rule
19 in this case because preservation always has the risk that
20 a meritorious claim cannot be raised as an issue of law.
21 But that's why the Appellate Division has interest in
22 justice - - -

23 JUDGE WILSON: And you also think it could be
24 raised on a 440?

25 MR. TARBUTTON: Exactly, Your Honors, which



1 distinguishes this case from the vast majority of
2 unpreserved claims where the defendants don't have that
3 option, they have to rely on the interest of justice
4 jurisdiction which is discretionary - - -

5 JUDGE WILSON: But then you're - - - then you're
6 really not sort of meeting the fun - - - one of the
7 fundamental purposes of the preservation requirement which
8 is some deficiency of some sort, right? I mean, if you - -
9 - you're really saying, no, you shouldn't raise it on
10 direct appeal, although you can reach an interest of
11 justice, but if that doesn't happen, you can go by 440.
12 It's - - - you're multiplying the court proceedings?

13 MR. TARBUTTON: Actually, Your Honor, 440.20 is a
14 better route to dispose of these - - - these claims anyway.
15 Because as happened here, on direct appeal, the Appellate
16 Division can only recognize that there was a procedural
17 error and has to remand. They can't actually address the -
18 - - where record's not adequate to determine whether the
19 sentence is actually legal or not.

20 In a 440.20, the defendant could have claimed her
21 sentence was illegal if it had any merit. She could raise
22 that claim and had the sentence corrected in a matter of
23 weeks as opposed to waiting for over a year for the
24 Appellate Division to remand it again and start over in a
25 new proceeding to determine whether she was a predicate



1 felony offender or not.

2 So there's still advantages, procedural
3 advantages, so far as expeditiously giving the defendant
4 justice if there was an error, and in conserving judicial
5 resources. In a 440.20 motion, of course, the court could
6 - - - the parties could develop the record in the first
7 instance. That's the reason a 440.20 is there, so that you
8 don't have to go through the cumbersome round of appeal and
9 - - - and get back to the sentencing court develops there
10 to begin with.

11 So that's another reason why these cases as a
12 matter of policy should be channeled into 440.20. But as a
13 matter of this court's precedent, this court's test set out
14 in Samms requires that because this is not a case - - - a
15 claim alleging a substantive error; it's only a procedural
16 error. And it's not a claim of the legality of the
17 sentence can be established on the appellate record. So
18 for those reasons, it does fail the Samms test.

19 And actually, I think, the Appellate Division's
20 remedy they gave is very telling because the Appellate
21 Division remanded for further proceedings, in the court's
22 words, including the filing by the People of a proper
23 predicate felony statement. So the Appellate Division
24 recognized that it's quite possible as only happened, the
25 defendant would be a second felony offender, that her



1 sentence was actually legal to begin with, and also
2 implicitly recognized that it couldn't determine that on a
3 - - - on the present record. So that showed that this
4 claim falls outside of this test in Samms, that it is not
5 part of this very narrow illegal sentence exception.

6 Your Honors, one more issue I wanted to address
7 is that defendant argues that there was a notice problem,
8 that she - - -

9 CHIEF JUDGE DIFIORE: It was - - - I'm sorry,
10 Counsel, I'm having trouble hearing you.

11 MR. TARBUTTON: Sure. Sorry.

12 She argues that she couldn't have preserved her
13 claim because she didn't have notice on what tolling
14 allegations she had to dispute. But that simply
15 misunderstands what she had to do to preserve the case,
16 that she simply had to - - - to point out to the court that
17 the conviction that we allege was more than ten years old,
18 and there are no toll - - - tolling allegations.

19 CHIEF JUDGE DIFIORE: Thank you, Counsel.

20 MR. TARBUTTON: Thank you, Your Honors.

21 CHIEF JUDGE DIFIORE: Counsel?

22 MS. KAHL: Good afternoon. Allison Kahl on
23 behalf of defendant-respondent, Ms. Sharon Lashley.

24 This court can dismiss here, and should dismiss
25 here, as this issue is now moot. Ms. Lashley has been



1 resentenced as a second felony offender - - -

2 JUDGE GARCIA: Counsel, I'm sorry - - - here. In
3 that - - - in that proceeding, though, then it turned out
4 that this was fine, the tolls actually were in place,
5 right?

6 MS. KAHL: The prosecution met their burden and
7 alleged the tolling, and that is what happened below with
8 the resentencing, ultimately. But on this record before
9 the court here, there were no such allegations made and no
10 opportunity for anyone to challenge that.

11 So first, this court should dismiss it as moot as
12 to her. And this is not - - -

13 CHIEF JUDGE DIFIORE: But Counsel - - - but
14 Counsel, on the mootness point, aren't the People
15 aggrieved?

16 MS. KAHL: The People aren't aggrieved here
17 because Ms. Lashley is a second felony offender. She was
18 ultimately found to have the same - - -

19 CHIEF JUDGE DIFIORE: But on the reversal, there
20 was a sentence that was a reduced sentenced from the
21 original sentence, correct?

22 MS. KAHL: Correct. She did receive a lower
23 sentence - - -

24 CHIEF JUDGE DIFIORE: Okay.

25 MS. KAHL: - - - on the reversal.



1 CHIEF JUDGE DIFIORE: Thank you.

2 MS. KAHL: This is not an expansion of this
3 court's exception to the preservation requirement for
4 illegal sentences. Ms. Lashley's sentence here, there were
5 no allegations about tolling made at all. Under the penal
6 law, this conviction was older than ten years and could not
7 be used to enhance her sentence.

8 CHIEF JUDGE DIFIORE: Yes, but isn't your - - -
9 your burden to show the illegality of the sentence from the
10 face of the record; it has to be readily discernible from
11 the face of the record?

12 MS. KAHL: And it is readily discernible from - -
13 -

14 CHIEF JUDGE DIFIORE: How so is that?

15 MS. KAHL: Because it - - - this predicate was
16 greater than ten years old, and there is no allegations of
17 any period of incarceration anywhere in this record. It
18 could have been anywhere else. It's not in the predicate
19 statement. It's not anywhere else in this record either.
20 And the penal law prohibits using a predicate that's over
21 the ten years when there is no incarceration period. And
22 that's the face of the record that we have here. And it's
23 not a mere procedural violation, it's a violation of the
24 penal law. This predicate cannot be used to enhance her
25 sentence, as it was alleged by the prosecution below at the



1 sentence - - - initial sentencing proceeding for Ms.
2 Lashley.

3 And - - -

4 JUDGE GARCIA: But to go to your adversary's
5 point, then, and kind of the flip of what I asked him, why
6 would we want this here now, and especially after there's
7 been a resentencing where this felony actually did comply,
8 you know, it was within the time with the toll, rather than
9 having an obligation to say something then, which
10 presumably, what happened just recently would have happened
11 all those years ago. Why would we want that rule?

12 MS. KAHL: This court has created the exception
13 for illegal sentences for the preservation requirement
14 because society's interest in not having illegal sentences
15 stand is greater than requiring that initial objection.

16 JUDGE GARCIA: But this isn't an illegal
17 sentence. We know that it wasn't now. In fact, we really
18 know it wasn't now because you had a resentencing.

19 MS. KAHL: It - - -

20 JUDGE GARCIA: So why would we do that?

21 MS. KAHL: Because it was an illegal sentence
22 when it was given to Ms. Lashley. In Samms and Santiago,
23 there could have been other predicate offenses that applied
24 that made them second felony or persistent felony offenders
25 in the end. They could have gotten the same sentence in



1 the end.

2 In the People v. Fuller case, restitution could
3 have been the same set below. But the problem is if we
4 countenance these illegal sentences, that - - - that's
5 where the issue is.

6 JUDGE CANNATARO: Your adversary said earlier
7 that your initial burden when you're raising the illegal
8 sentence claim is to show that it's substantive - - -
9 substantively illegal. And I'm sort of having a little
10 trouble with the notion that something could be
11 substantively illegal at one point of time and not at
12 another. That doesn't sound substantive to me; that sounds
13 semantic, almost.

14 So I'm sorry, can you just sort of help me
15 understand how it was illegal then, but it's not illegal
16 now.

17 MS. KAHL: It was illegal then because there were
18 no allegations whatsoever about tolling. The prosecution
19 has the burden to put that forth, and they didn't put it
20 forth. That predicate cannot be used to enhance her
21 sentence on that record.

22 JUDGE CANNATARO: But that doesn't make it any
23 less legal or any more illegal, I guess.

24 MS. KAHL: I mean, it - - -

25 JUDGE CANNATARO: The truth is the truth. I



1 mean, I know - - - that's - - - that's a pretty bold
2 statement; the truth can be many things, but you know what
3 I mean.

4 MS. KAHL: Yes, Your Honor. The problem is on
5 the record before the court, that was an illegal sentence,
6 which was under their own theory, substantively illegal as
7 to Ms. Lashley. On that record, you could not enhance her
8 sentence.

9 There are tolling allegations that need to be
10 made; that issue needs to be litigated. That needed to
11 happen below, and it didn't happen here.

12 JUDGE SINGAS: Could you distinguish People v.
13 Pellegrino for us?

14 MS. KAHL: I'm on - - - I'm sorry, Your Honor,
15 could you refresh - - -

16 JUDGE SINGAS: That's a memorandum decision from
17 this court, which is similar to this, a defendant's
18 argument that there was a failure to comply with CPL 421 -
19 - -

20 MS. KAHL: Oh, yeah - - -

21 JUDGE SINGAS: - - - and we ruled that it needed
22 to be preserved.

23 MS. KAHL: So in those cases, Your Honor, and
24 this - - - this applies to Proctor and Oliver and
25 Pellegrino, it's - - - that's about how the manner of the



1 predicate was determined, and this is about the predicate
2 being used at all in this circumstance. And the predicate
3 under the facts as alleged cannot be used at all, it's not
4 a manner determination about how the predicate happened.

5 CHIEF JUDGE DIFIORE: I thought Pellegrino was
6 about the failure to include the tolling periods in the
7 predicate felony statement.

8 MS. KAHL: Your Honor, I don't believe that that
9 was the case specifically in terms of - - - in terms of how
10 the record - - - on terms of how that predicate was
11 actually determined in the end. And that's why it's
12 distinguishable from this case specifically.

13 And to that extent, those cases, Samms and
14 Santiago, put forth a new rule which would be the one that
15 applies here in this case. And I don't disagree with the
16 prosecution that that's the rule, but the rule that they're
17 putting forward is far too broad. It requires defendants
18 to prove, themselves, that it's not - - - that the sentence
19 can never apply to them and that's not what this court has
20 held. And that's not - - - what something that could be
21 established on appeal.

22 So to the extent that Pellegrino - - - Samms and
23 Santiago put forward the rule that applies here to answer
24 that question. And the notice rule - - - our argument
25 about notice, that is the real problem here. The



1 prosecution has the burden to put forward these
2 allegations, and they did not put those forth. And so
3 that's why this illegal sentence exception should apply.

4 And the 440.20 is not a vehicle that will solve
5 these problems. In 440.20, there's no right to counsel;
6 there's no right to appeal. And also, you get to the same
7 result. A plenary resentencing needs to happen here
8 because tolling can actually implicate the sentence that
9 someone gets. How soon someone got out of prison can apply
10 to what kind of sentence the judge is going to get. And
11 those concerns can happen at a plenary resentencing. So
12 that's still going to do need to happen. And it's going to
13 be the same effect as litigating this on direct appeal.

14 And there was actually no litigation at all about
15 the tolling periods. The prosecution's conceded from the
16 very beginning that they didn't allege this. It's all
17 always only been about preservation.

18 And so the 440.20 is not an end-all, be-all
19 answer to this issue, and to get it getting heard. It will
20 result in illegal sentences being insulated from appellate
21 review going forward, as well.

22 And to the extent, that they're alleging any
23 gamesmanship type arguments here, the prosecutor,
24 themselves - - -

25 JUDGE RIVERA: Counsel, I'm sorry to interrupt



1 you, I just have a question based on what you were saying.

2 Would it be possible to get to this issue on
3 direct appeal as an ineffective assistance of counsel
4 argument? Or is the record too thin to be able to do that
5 either?

6 MS. KAHL: It is a possibility. In this case, as
7 well, there would be arguments as you pointed to that the
8 record doesn't show if there was a strategic reason to not
9 object or not - - - but yes, in - - - you could reach is -
10 - - as ineffective assistance, as well, in addition to
11 interest of justice jurisdiction that the Appellate
12 Division has. If this case were reversed and needs to be
13 remanded to the Appellate Division for that determination,
14 as well, as her excessive sentence claim.

15 JUDGE RIVERA: So let's talk about the remand to
16 the Appellate Division. If this court agreed with you and
17 it's remanded for purposes of the AD to invoke its interest
18 of justice jurisdiction, I assume that what is happening
19 there is that it would invoke its interest of justice
20 jurisdiction to consider a claim. But again, if we hold
21 it's unpreserved, that it's unpreserved - - - but it sounds
22 like you acknowledge that the Appellate Division will not
23 be able to resolve that issue; it would still have to send
24 it back. Is that correct? So they would end up doing
25 exactly what they did here. Is that correct?



1 MS. KAHL: Except for the fact that there is a
2 new judgment that exists as to Ms. Lashley, where the
3 resentencing proceeding has already happened. So it would
4 depend on what this court's order is in terms of what the
5 Appellate Division considers. But yes, they would - - - it
6 would - - - she would need to have a resentencing
7 proceeding. Or they could decide it themselves, which the
8 Second Department did in People v. Tatta. They ended up
9 deciding the defendant's sentence themselves.

10 JUDGE RIVERA: Okay. But there's where I'm
11 confused. If the record doesn't establish the tolling, how
12 would they do that?

13 MS. KAHL: They - - - it would need to go back to
14 the Appellate Division.

15 JUDGE RIVERA: Yeah, but that's my point. So
16 again, it - - - certainly, the Appellate Division panel
17 could have viewed whether they did this, saying it's
18 interest of justice or not, this would have been the same
19 outcome anyway?

20 MS. KAHL: Yes.

21 JUDGE RIVERA: Um-hum.

22 MS. KAHL: Yes, Your Honor.

23 JUDGE GARCIA: Did you make an excessive sentence
24 argument?

25 MS. KAHL: Yes, we did, as well. That needs - -



1 - also needs to go before - - -

2 JUDGE GARCIA: And they didn't - - -

3 MS. KAHL: - - - the Appellate Division.

4 JUDGE GARCIA: - - - consider that, right?

5 MS. KAHL: No. It has not been reached yet.

6 JUDGE GARCIA: So they could decline to reach
7 this and then just consider the sentence excessive and
8 impose the same one that was imposed before?

9 MS. KAHL: Yes. And Ms. Lashley has been - - -

10 JUDGE GARCIA: Like, you know, the one that was
11 just imposed, I'm sorry.

12 MS. KAHL: Yeah, at this point, Ms. Lashley has
13 been out and released on parole for over a year and a half.
14 The prosecution is seeking to send her back for less than
15 six months in prison in the middle of a pandemic.

16 CHIEF JUDGE DIFIORE: Thank you, Counsel.

17 Counsel, you heard respondent's argument as to
18 why the illegality of the sentence is obvious on the face
19 of the record; you heard that?

20 MR. TARBUTTON: Sure. I don't - - -

21 CHIEF JUDGE DIFIORE: How do you respond to that?

22 MR. TARBUTTON: Well, the error, the procedural
23 error, is evident on the face on the record, there are no
24 tolling allegations, and they're ought to be.

25 But the illegality of the sentence is not evident



1 on the face of the record. Because the illegality of the
2 sentence would require knowing whether there actually is
3 tolling or not. And certainly, the rap sheet, which is in
4 the court file, suggests that there is, but that can't be
5 used conclusively. So that suggests that you don't know.
6 And again, the Appellate Division's remedy showed that.

7 Your Honors, I wanted to address Judge Rivera's
8 question about ineffective assistance because I think that
9 - - - that illustrates the reason for preservation should
10 be vindicated in this case. If you had a meritorious
11 claim, you might be able to tell on direct appeal whether
12 counsel's ineffective. Here, counsel's definitely not
13 ineffective because counsel negotiated a second felony
14 offender sentence. Everyone knew she was a second felony
15 offender, which is probably why this error happened,
16 because litigators tend to focus on issues that are
17 litigated, not on issues that are - - - that are agreed to
18 by all the parties.

19 This is why cases - - - this kind of claim,
20 preservation should be required so that the defendant can't
21 let an error go into the record that no one cared about
22 because we knew it didn't actually implicate the actual
23 legality of the claim, and then turn around on appeal, and
24 litigate it and get the windfall of a - - - frankly, a
25 futile remand, have a do over that ended up having the same



1 conclusion the defendant was a second predicate - - - a
2 second felony offender, which was the initial. Of course,
3 the initial - - -

4 JUDGE WILSON: I guess I don't see the benefit to
5 the defendant, I mean, especially because the defendant
6 could have raised this under 440. I don't see why anyone
7 really would do this. I mean, I see it happened here, but
8 I don't understand.

9 MR. TARBUTTON: Why - - - the benefit of actually
10 raising the claim to begin with?

11 JUDGE WILSON: Yeah, if it's meritless?

12 MR. TARBUTTON: Right. That's true - - -

13 JUDGE WILSON: Frankly - - -

14 MR. TARBUTTON: - - - where it was. Which is why
15 preservation would discourage meritless, futile claims - -
16 -

17 JUDGE WILSON: But no - - - but I'm saying I
18 think that the fact that it's meritless, and all you get is
19 what? You still are - - - if you're incarcerated, you're
20 still incarcerated. You get a remand, the People put their
21 proof in, and you're where you were. What do you get out
22 of that?

23 MR. TARBUTTON: Right. Nothing. Which is why
24 preservation would prevent those claims being raised as an
25 issue of law.



1 JUDGE WILSON: Well, you'd raise them as 440s.

2 MR. TARBUTTON: You'd raise them as 440, but
3 frankly, Your Honors, the defendant is not going to have
4 the motivation to raise a 440.

5 JUDGE WILSON: Then that's what my point is. I'm
6 not sure why they have any different motivation on a direct
7 appeal. It seems like you get nothing either way.

8 MR. TARBUTTON: Right. But the direct appeals -
9 - -

10 JUDGE WILSON: So - - -

11 MR. TARBUTTON: - - - tend to happen if there's
12 any claim the record can be raised, even if it doesn't
13 benefit the defendant. If I could - - -

14 JUDGE GARCIA: Did you used to get - - -

15 MR. TARBUTTON: Sure.

16 JUDGE GARCIA: - - - something because of the
17 sequencing, which you don't get anymore. Was that one of
18 the reasons they used to want to do this? I mean, was that
19 an incentive before? Because I know we changed some of the
20 sequencing - - -

21 MR. TARBUTTON: Right.

22 JUDGE GARCIA: - - - right?

23 MR. TARBUTTON: Right. Whereas - - - where
24 recency didn't actually change the sequencing - - -

25 JUDGE GARCIA: Right.



1 MR. TARBUTTON: - - - for - - - and that wouldn't
2 be, of course, in defendant's case because she has - - -
3 she did commit a crime subsequent to this; that's why her
4 sentence was enhanced afterwards. But that wouldn't affect
5 the case in that.

6 Your Honors, if I could address - - -

7 JUDGE RIVERA: Counsel, if I can just ask you. I
8 want to follow up on the question that Judge Garcia asked
9 of defense counsel.

10 Could the Appellate Division avoid the remand for
11 resentencing by addressing this through excessive sentence?

12 MR. TARBUTTON: It could, Your Honor.

13 JUDGE RIVERA: If it's not clear what the
14 sentence is. I'm just not sure. I'm asking.

15 MR. TARBUTTON: Sure. It could. If this court
16 finds - - -

17 JUDGE RIVERA: Okay.

18 MR. TARBUTTON: - - - this - - - this claim
19 requires preservation, the Appellate Division erred by
20 reaching it as a matter of law, it would have to remand to
21 the Appellate Division to determine whether to exercise
22 interest of justice.

23 If it did, that would require remand to the
24 sentencing court to - - - for us to reallege the tolling
25 allegations all over again. If it didn't, it could say



1 that's it or it could decide that the sentence is excessive
2 and reduce it. So that would be an option the Appellate
3 Division would have.

4 CHIEF JUDGE DIFIORE: Thank you, Counsel.

5 JUDGE RIVERA: Okay.

6 MR. TARBUTTON: Thank you.

7 (Court is adjourned)

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

I, Amanda M. Oliver, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of New York v. Sharon Lashley, No. 80 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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