



Halscott Megaro

June 25, 2019

Hon. Janet DiFiore
Chief Judge, New York Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Re: People v. Thomas D. Cox
Docket # 2018-02323 (Second Department)
Indictment # 1200N-2015 (Nassau County)

Dear Judge DiFiore:

I represent Thomas D. Cox, the Defendant-Appellant in the above-referenced action. On June 5, 2019, the Appellate Division, Second Department, affirmed an Order of the Supreme Court, Nassau County (Honorable Robert A. McDonald, J.S.C.), entered January 18, 2018, designating the Defendant-Appellant a Level 3 Sex Offender after a Sex Offender Risk Level Determination Hearing pursuant to Corrections Law Article 6-C.

Accordingly, I am hereby respectfully requesting that this Court grant this application for certificate, pursuant to CPL § 460.20 and § 500.20 of the Rules of this Court, permitting further appeal. No previous request for leave to appeal to this Court has been sought.

I have enclosed copies of the briefs that were filed in the Appellate Division, as well as the decision of the Second Department, and the record on appeal. There was no co-defendant in this action.

Oral argument via telephone conference call is requested for this application; if this application is granted, oral argument in person would be requested for the appeal itself.

The issues to be raised in this appeal are as follows:

1. Whether the Defendant-Appellant Should Have Been Assessed Points Under Risk Factor Number 1 For Forcible Compulsion Where the People Used Impermissible Double Hearsay and Did Not Prove by Clear and Convincing Evidence These Points Should Have Been Allotted?



www.HalscottMegaro.com
407-255-2164

Halscott Megaro, P.A.
1300 N Semoran Blvd, Suite 195
Orlando, FL 32807

2. Whether the Supreme Court's Upward Departure from the Preliminary Risk Level Based on the Defendant-Appellant's Criminal History Constituted Impermissible Double Counting Because His Criminal History was Properly Assessed Through the Risk Assessment Instrument?

The relevant facts for this appeal are as follows:

Defendant-Appellant was convicted upon a plea of guilty to Sex Trafficking (Penal Law § 230.34(5)(a)) and was sentenced to 1 to 3 years in the NYS Department of Corrections and Community Supervision on June 27, 2018. Defendant-Appellant was simultaneously prosecuted in the United States District Court for the Western District of New York in Docket # 1:16-CR-00012-RJA-HKS in a six-count indictment for the crimes of 18 U.S.C. § 2421 (Interstate Transportation for Purposes of Prostitution) (three counts) and 18 U.S.C. § 1591(a) (Sex Trafficking) (three counts). In the concurrent Federal prosecution, he was convicted upon his plea of guilty to one count of Sex Trafficking of a Minor in violation of 18 U.S.C. § 1591(a), and sentenced to 175 months incarceration and 5 years supervised release. This conviction was based, in part, on the same conduct for which he was convicted in the instant case in the Nassau County Supreme Court. The remaining counts were dismissed in satisfaction.

A Risk Assessment Instrument was prepared on July 24, 2017, and the Defendant-Appellant was scored at 105 points, this placed him in the Level 2 or moderate factor range. There were no overrides present in the Risk Assessment Instrument, but an additional memorandum in support of an upward departure was attached thereto.

A hearing pursuant to Corrections Law § 168-n was held on January 10, 2018 and January 18, 2018 before the Honorable Robert McDonald, J.S.C. At the start of the hearing, the People sought to admit four exhibits into evidence for the court's consideration. Those exhibits were as follows:

Exhibit 1 – Federal Sentencing Memorandum by the United States Attorney

Exhibit 2 – Defendant-Appellant's criminal history

Exhibit 3 – Risk Assessment Instrument with accompanying memorandum

Exhibit 4 – Nassau County Department of Probation Pre-Sentence Investigation Report

Defense counsel objected to Exhibit #1, the United States Attorney's Sentencing Memorandum, arguing that People's Exhibit #1 was an advocacy document and impermissible hearsay. Counsel complained that the Federal prosecutor's memorandum referenced the contents of the Federal Pre-Sentence Report, which was not provided to the defense.

The People responded by erroneously arguing that because the Defendant-Appellant pled guilty to the entire Federal indictment, all of the underlying conduct set forth in the Federal prosecutor's memorandum was admissible and relevant. The People further indicated they were not in possession of the Federal PSR, nor gave a reason as to why not.

The court overruled the defense's objection, stating while prosecutors are advocates, they are also officers of the court; they provide information with the intent of it being used in a presentation to a judge well versed in the facts of the case. The court did still recognize the sentencing memorandum as an advocacy document.

All four exhibits were received in evidence, and the People argued for an upward departure to classify Defendant-Appellant as a Level 3 sex offender. Under risk factor number 1, use of violence, the People requested 10 points be assessed, relying upon the Nassau County Pre-Sentence Report for factual basis. For risk factor number 2 the People requested 25 points be assessed for sexual intercourse, deviate sexual intercourse, or aggravated sexual abuse against the victim, relying upon Exhibits # 3 and # 4, Defendant-Appellant's criminal history and the Nassau PSR, respectively. Regarding risk factor number 5, the People requested an assessment of 20 points because the victim was between the ages of 10 and 16. The People said this was supported by Exhibit # 4, similar to the justification of risk factor number 7. The People argued the Defendant-Appellant only established a relationship with the victim to victimize her, and further requested 15 points for risk factor number 9, relying upon the Defendant-Appellant's prior criminal history. Finally, the People requested 15 points for risk factor number 11, referencing the case summary in the Risk Assessment Instrument (RAI) and a previous drug conviction listed in People's Exhibit # 2 as well as Defendant-Appellant's own admission of using marijuana in Exhibit # 4.

The defense objected to the assessment of points for risk factor number 2, arguing there was no basis for a finding of sexual intercourse between the Defendant-Appellant and the victim. In response, the People relied upon the Nassau PSR, which attributed a statement to the arresting officer in which he alleged Defendant-Appellant forced the victim to engage in sexual intercourse, according to the victim. Defendant-Appellant objected to the use of officer's statement, insisting the statements made by the officer are impermissible use of double hearsay.

The court questioned the People as to where in the record the sexual contact between Defendant-Appellant and the victim was present. The People responded it was the threat of violence inferred from the officer's testimony. The court determined case law was needed to support a finding of sexual contact. The People then argued that a finding was justified under a theory of accessorial liability. They contended even if the Defendant-Appellant was not the one engaging in the sexual act, he should still be held liable because his actions led the victim to be in the room leading to the sexual conduct. The defense opposed a finding under this theory, arguing that the case law cited by the People was inapposite. Ultimately, the court rejected the People's theory of accessorial liability. Defense counsel further argued that the People failed to establish forcible compulsion for

the same reasons – that the case law cited by the People was inapposite to the facts of this case.

The People requested an upward departure from the presumptive risk level 2, relying mainly upon the allegations contained in the Federal sentencing memorandum (Exhibit #1) as justification for this departure. The factual allegations contained in the Federal sentencing memorandum were for conduct that Defendant-Appellant did not admit to, nor was he convicted of, in either the Nassau County Supreme Court or the Federal court. These “facts” were expressly taken from allegations from the Federal Pre-Sentence Report, which was not provided to the defense. The People continuously referenced this Exhibit and its contents while they made their argument about Defendant-Appellant’s criminal history and future risk.

In response, the defense objected to an upward departure, arguing the standard of review the court must use is clear and convincing evidence of aggravating circumstances not adequately taken into consideration through the RAI. Counsel submitted that the People failed to satisfy this burden. She reasserted her objection to Exhibit # 1 being entered into evidence, and argued the People failed to present clear and convincing evidence to corroborate the allegations contained in Exhibit # 1. Counsel further argued the use of the Defendant-Appellant’s criminal history as an aggravating factor was incorrect because it was already accounted for in the RAI.

The court assessed points for risk factor numbers 1, 5, 7, 9, and 11. The court decided not to assess points under risk factor number 2, for the aforementioned reasons, which gave Defendant-Appellant a preliminary score of 80 points, placing him at the bottom of the presumptive Level 2 range.

The court then granted the People’s application for an upward departure, and adjudicated Defendant-Appellant a Level 3 Sex Offender, providing the basis as follows:

Now, the People are seeking an upward departure, based upon the fact that, following this conviction -- as I'm recalling, following this conviction, defendant was convicted federally of a series of charges, and People produced a sentencing memorandum that was given by the United States attorney. I do find that that sentencing memorandum does lay out specific crimes the defendant has been convicted of, and the specific nature of those crimes the defendant was convicted of, I believe, warrant the upward departure.

...

As I said, I am finding the upward departure is warranted. I find clear and convincing evidence to support the conclusion that there is no special designation, and I find clear and convincing evidence defendant should be rated Level 3. This constitutes the decision of the Court.

A short form order will follow to constitute an appealable order.

The court then issued a short-form order, which set forth the court's reasoning for the upward departure on January 18, 2018 as follows:

However, the People further proved by clear and convincing evidence the existence of aggravating factors not taken into account by the guidelines warranting an upward departure of the defendant's classification to a Level 3 Sex Offender. The basis for the upward departure is the Court's consideration of the totality of Defendant's criminal history which is not completely captured in scoring on the risk level instrument.

On appeal, Defendant-Appellant argued that the additional 10 points for use of forcible compulsion should not have been assessed because it was based solely on double hearsay, citing this Court's decision in People v. Mingo, 12 N.Y.3d 563 (2009). In addition, Defendant-Appellant argued that the People failed to establish by clear and convincing evidence aggravating factors that were not already taken into account by the Risk Assessment Instrument – criminal history – and the trial court engaged in impermissible double-counting.

The Second Department held that the first claim was not properly preserved, and generally held that the trial court providently exercised its discretion in upwardly departing without addressing the substance of Defendant-Appellant's second claim.

Defendant-Appellant seeks review in this Court on those issues. Counsel relies upon the attached brief for further argument as to each of those claims raised herein, and incorporates those arguments by reference in the interest of brevity. However, Defendant-Appellant urges this Court to revisit its own binding precedent in the cases cited therein.

Please notify me when a Judge of this Court has been assigned to consider this application. I thank you for your kind consideration in this regard.

Respectfully Submitted,

Patrick Michael Megaro, Esq.

Enc.
CC

ADA Amanda Manning, Esq.
Nassau County District Attorney's Office
262 Old Country Road
Mineola, New York 11501

P

US POSTAGE & FEES PAID
 PRIORITY MAIL
 FLAT RATE PADDED ENVELOPE
 ComBasPrice

06250009210004
 FROM 32801



stamps
 endicia
 06/25/2019

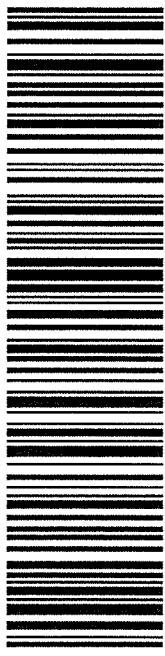
PRIORITY MAIL 2-DAY™

1300 N Semoran Blvd
 Suite 195
 Orlando FL 32807

C011

SHIP TO: Hon. Janet DiFiore
 Court of Appeals Hall
 Chief Judge, New York Court of Appeals
 20 Eagle Street
 Albany NY 12207-1009

USPS TRACKING #



9405 5118 9956 1464 3322 01

stamps endicia Shipping Label Receipt

Tracking Number: **9405 5118 9956 1464 3322 01**

PRIORITY MAIL 2-DAY with Tracking *
 Electronic Service Fee: \$0.00
 Total Postage and Fees: \$7.55
 Weight: 2 lbs 2 oz
 Print Date: 06/25/2019 Mailing Date: 06/25/2019

From: 1300 N Semoran Blvd
 Suite 195
 Orlando FL 32807

To: Hon. Janet DiFiore
 Court of Appeals Hall
 Chief Judge, New York Court of Appeals
 20 Eagle Street
 Albany NY 12207-1009

USPS
 Postmark
 Here

*Regular PRIORITY MAIL 2-DAY Service postage rates apply. There is no fee for Tracking service on PRIORITY MAIL 2-DAY services with use of this electronic shipping label. Postmark required if fee refund requested. Delivery information is not available by phone for the electronic option.

Instructions:

1. Adhere shipping label to package with tape or glue - DO NOT TAPE OVER BARCODE. Be sure all edges are secured. Self-adhesive label is recommended.
2. Place the label so it does not wrap around the edge of the package.
3. This package may be deposited in any collection box, handed to your mail carrier, or presented to a clerk at your local Post Office.
4. Each confirmation number is unique and can be used only once - DO NOT PHOTOCOPY.
5. You must mail this package on the "mail date" that is specified on this label.





US POSTAGE & FEES PAID
 PRIORITY MAIL
 FLAT RATE PADDED ENVELOPE
 ComBasPrice

062S0009210004
 FROM 32801



stamps
 endicia
 06/25/2019

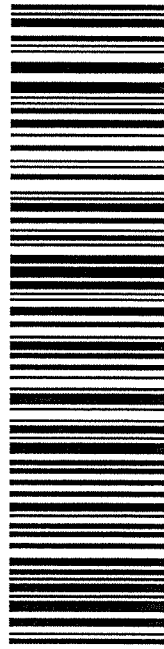
PRIORITY MAIL 3-DAY™

1300 N Semoran Blvd
 Suite 195
 Orlando FL 32807

C001

SHIP TO: ADA Amanda Manning, Esq.
 Nassau County District Attny Office
 262 Old Country Road
 Mineola NY 11501-4271

USPS TRACKING



9405 5118 9956 1464 3317 92

stamps endicia Shipping Label Receipt

Tracking Number:

9405 5118 9956 1464 3317 92

PRIORITY MAIL 3-DAY with Tracking *
 Electronic Service Fee: \$0.00
 Total Postage and Fees: \$7.55
 Weight: 2 lbs 2 oz
 Print Date: 06/25/2019 Mailing Date: 06/25/2019

From: 1300 N Semoran Blvd
 Suite 195
 Orlando FL 32807

To: ADA Amanda Manning, Esq. USPS
 Nassau County District Attny Office Postmark
 262 Old Country Road Here
 Mineola NY 11501-4271

*Regular PRIORITY MAIL 3-DAY Service postage rates apply. There is no fee for Tracking services on PRIORITY MAIL 3-DAY services with use of this electronic shipping label. Postmark required if fee refund requested. Delivery information is not available by phone for the electronic option.

Instructions:

1. Adhere shipping label to package with tape or glue - DO NOT TAPE OVER BARCODE. Be sure all edges are secured. Self-adhesive label is recommended.
2. Place the label so it does not wrap around the edge of the package.
3. This package may be deposited in any collection box, handed to your mail carrier, or presented to a clerk at your local Post Office.
4. Each confirmation number is unique and can be used only once - DO NOT PHOTOCOPY.
5. You must mail this package on the "mail date" that is specified on this label.

