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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 199

TYRONE WATSON,

Appellant.

20 Eagle Street
Albany, New York 12207
October 16, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Watson.

2 Okay, counselor, you want any rebuttal

3 time?

4 MS. REA: Yes, two minutes, please, Your

5 Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes, go

7 ahead. You're on.

8 MS. REA: Thank you, good afternoon. May

9 it please the court, Natalie Rea of the Legal Aid

10 Society for Mr. Watson.

11 The question of this case is simple in

12 whether the agency defense applies to criminal

13 facilitation in the fourth degree.

14 CHIEF JUDGE LIPPMAN: What's the logic - -

15 - assume that it applies to sale. What's the logic

16 of extending that to facilitation?

17 MS. REA: When the - - -

18 CHIEF JUDGE LIPPMAN: In other words - - -

19 go ahead.

20 MS. REA: It's based on the rationale of

21 this court's decision in upholding and recognizing

22 the agency defense back in 1978, where this court

23 said the agent, the person who engages in a

24 transaction solely in the interest of the buyer, is

25 treated as the buyer, stands in the shoes of the

1 buyer, and cannot be any more criminally liable than
2 the buyer. And the court decided that this, kind of,
3 went against the language of the definition of sale,
4 but it was important to - - - to recognize the
5 legislature's recognition that a buyer - - -

6 CHIEF JUDGE LIPPMAN: Does it matter that
7 facilitation is a misdemeanor?

8 MS. REA: It matters in the sense that - -
9 -

10 CHIEF JUDGE LIPPMAN: As opposed to sale.

11 MS. REA: It matters because the
12 misdemeanor facilitation needs to facilitate a
13 felony, and the felony in the drug transaction is the
14 sale and not the purchase. By saying that the agent
15 stands in the shoes of the buyer, the court is saying
16 that he's - - - that the agent is - - - his interests
17 are aligned - - - his interest is aligned with the
18 buyer, while in the facilitation - - - to be guilty
19 of facilitation in the fourth degree, then the
20 facilitator's interest must be aligned with the
21 seller, who's the only one engaged in the felony in
22 the transaction.

23 JUDGE PIGOTT: You're drawing a distinction
24 in saying that whatever the defendant is facilitating
25 - - - he's either facilitating the purchase or he's

1 facilitating the sale, and if he's already - - - if
2 agency is already there, then he's obviously aligned
3 with the buyer, and therefore, that's where any
4 facilitation has to lie.

5 MS. REA: Precisely, Your Honor.

6 JUDGE READ: So, why isn't this just an
7 unpreserved repugnancy claim?

8 MS. REA: It's not, because the ask - - -
9 first of all, this is not repugnant. This is not a
10 repugnant verdict. And the only reason the People
11 are qualifying this or characterizing it as a
12 repugnancy is to make it unpreserved, because this is
13 not - - -

14 JUDGE SMITH: Don't you rely on the
15 inconsistency between the judge's verdict on the sale
16 and on the facilitation counts?

17 MS. REA: Yes, but based only on the - - -
18 I can do that. We can do that because the judge
19 issued - - - it was a bench trial; the judge issued a
20 specific verdict, therefore we know what he did.
21 It's essentially, technically, sale and - - - had we
22 not known, had the judge not said anything, he said I
23 acquit you of sale and I convict you of facilitation,
24 well, maybe you didn't see the sale, right? Maybe
25 there could have been no evidence beyond a reasonable

1 doubt of some element of the sale.

2 It's because the judge specifically said
3 that I find that he's an agent that it could not - -
4 - that they appear repugnant. But since it had been
5 precise - - - it was asked for. There's no question
6 that counsel asked for the agency defense as to both.
7 And at no time since these proceedings have begun,
8 has the DA been able to pause at a single
9 hypothetical, a scenario, where the judge would have
10 done anything but refuse to consider agency as to
11 facilitation. It would be irrational - - -

12 JUDGE SMITH: You're saying on this record
13 it would have been a waste of breath to make a 330
14 motion, or a waste of paper, whatever you do with it.

15 MS. REA: Well, there was no requirement at
16 this point to do anything more. It would have been
17 better. I'm not denying that it would have been
18 better. But at this - - - but what happened is the
19 judge said at the charge conference, okay, fine,
20 you're asking for agency defense. Basically, he
21 defers further argument on that issue to summation;
22 fine. In summation, the defense lawyer, I think, in
23 an absolutely beautiful way, said it is my argument
24 that - - -

25 JUDGE SMITH: Well, what's beautiful about

1 it is that she got both the verdicts she wanted and
2 the chance to argue error on appeal. I mean, doesn't
3 she - - - doesn't the way she makes her argument
4 almost say I'm making an argument on solicitation,
5 but please, convict my client on solicitation. Do me
6 a favor: acquit of sale, convict on solicitation.

7 MS. REA: I don't really want to speculate
8 on what she was thinking. I know that what she said
9 was a proper request. She said it is my argument.
10 Of course, she wasn't going to focus on the defense,
11 on facilitation. Her client had conceded criminal
12 possession in the seventh degree. So she didn't have
13 to jump up and down about the facilitation and the
14 agency to facilitation. And I think appropriately
15 so.

16 But she did what she was supposed to do.
17 She asked for it; she articulated it incredibly well.
18 The agent of the buyer is no more guilty of
19 facilitating the sale than the lone buyer, since he
20 would take the place of the buyer. You cannot see
21 something as facilitation and sale at the same time.
22 I mean, this is --

23 JUDGE SMITH: Your argument is once you've
24 said that in closing argument, you don't need to say
25 it again in a post-trial motion.

1 MS. REA: Right. And I'm saying this - - -
2 in the closing argument that was really a charge
3 conference argument as to the request of the agency
4 as to facilitation. So she could have said something
5 more. She didn't say something more. She
6 articulated precisely. She never withdrew this
7 request. And it was in the interest of her client
8 not to jump up and down any more than that and focus
9 on the sale, which she did.

10 JUDGE GRAFFEO: If we agree with your
11 position, what's left of facilitation? When would
12 facilitation apply?

13 MS. REA: Facilitation simply doesn't apply
14 when you're an agent. Facilitation has to be when
15 the person provides the mean - - - believing it
16 reasonably probable that another person is committing
17 a felony provides the means and opportunity. The
18 example I would have is: I know that Mr. X sells
19 drugs between 8 and 9, my friend - - - between 8 and
20 9 on Fridays. And one day he says somewhere - - -
21 and one day he says to me, can I borrow your car to
22 go where I know he sells drugs, and I lend him my
23 car. That is a facilitator.

24 JUDGE SMITH: And you're saying that would
25 not be aiding and abetting. You would not be liable

1 as a principal, but you would be liable as a
2 facilitator?

3 MS. REA: Right, right. The facilitator
4 being an accomplice-like kind of a person, I suppose.
5 But that would be the example. But once the
6 court - - - and there's a factual finding here that
7 this person is an agent. The agent is a facilitator,
8 and the - - - almost. So once the court found that
9 he was aligned with the buyer, by definition, because
10 that's what an agent is, then the court obviously
11 rejected - - - did not apply agency to facilitation,
12 because it would be irrational. I can't even fathom
13 how this would - - - the result would have happened
14 in any other way.

15 JUDGE CIPARICK: So it's not possible that
16 the trial court considered it and rejected it? You
17 think it was not considered at all.

18 MS. REA: I think that it refused to charge
19 itself. It simply had to do it that way, because
20 once it had found facilitation, then it had to
21 acquit. When it had found agency - - - I'm sorry - -
22 - it had to acquit as to facilitation.

23 JUDGE GRAFFEO: The court could not have
24 found facilitation, but not agency?

25 MS. REA: The court could have found - - -

1 JUDGE GRAFFEO: Hypothetically, in a drug
2 sale.

3 MS. REA: Yes, the court could have.

4 JUDGE GRAFFEO: If the person bringing the
5 buyer to the seller - - - say for instance - - -
6 doesn't share the drugs - - -

7 MS. REA: Had the - - -

8 JUDGE GRAFFEO: - - - with the buyer.
9 Could the judge determine and say, I think you
10 facilitated; you weren't an agent?

11 MS. REA: If the court had rejected agency,
12 definitely it could have found that there was
13 facilitation as to the sale. But having found agency
14 could not do that as to the sale.

15 CHIEF JUDGE LIPPMAN: Okay, thank you.

16 MS. BRODT: Good afternoon, Your Honor.
17 Sharon Brodt, for the People.

18 I'd like to address preservation first, and
19 there's a reason for that. The reason is that
20 there's a mischaracterization of what the sequence in
21 the charge conference was. What happened was
22 defendant asked for a dismissal of the charge based
23 on agency, in other words a finding that there was no
24 - - - even nothing to go to the jury. The court
25 found that - - - it rejected the trial order

1 dismissal and said, I will reserve for later whether
2 or not agency applies, but I think you might have
3 made it out for me to charge myself with agency.

4 What happens then is that at the close of
5 defendant's case, the People - - - I'm sorry; of co-
6 defendant's case - - - defendant loses dismissal
7 order. The court says, as it had said, I will
8 reserve that. The next morning the court says, I
9 will be charging myself with agency. It's not at the
10 end of summations; the court does not say I will be
11 deciding after summations. The court says explicitly
12 - - - and I have the page number - - - that it will
13 be deciding before summations whether to charge
14 itself with - - -

15 JUDGE SMITH: Didn't the judge also say you
16 can - - - when he had what he called a charge
17 conference - - - did he say are there any charges
18 except agency, because I'm going to deal with that at
19 the time I hear your closing arguments?

20 MS. BRODT: Right. But then the court
21 subsequently clarifies and says, before summation.
22 It says, I will decide that before - - -

23 JUDGE CIPARICK: Well, that's - - -

24 MS. BRODT: - - - in other words
25 initially - - -

1 JUDGE CIPARICK: Well, that's to allow them
2 to argue to that issue.

3 MS. BRODT: Right, but that's not - - -

4 JUDGE SMITH: And did he decide it before
5 closing argument?

6 MS. BRODT: Absolutely. He said I will
7 charge myself with agency before - - -

8 JUDGE PIGOTT: So he says agency is in the
9 case.

10 MS. BRODT: In the case. He says, you've
11 made a showing that agency will be in the case. It
12 should go to the fact finder, meaning - - -

13 JUDGE SMITH: And at what point, other than
14 the failure to make a repugnancy motion, which I
15 understand that, are you saying that even before
16 that, they had somehow failed to preserve the
17 argument?

18 MS. BRODT: Exactly, Your Honor. There was
19 no - - -

20 JUDGE SMITH: What is the point at which
21 they should have said something and didn't?

22 MS. BRODT: What happens is the entire
23 discussion of agency is with respect to sale; the
24 court rules it will charge itself with respect to
25 sale; and only then during summation does the

1 defendant say, oh, by the way, if you find agency - -
2 -

3 JUDGE SMITH: You mean, your theory is that
4 by not saying oh, no, you must also charge yourself -
5 - - which I find very strange; people do that - - -
6 you must also charge yourself on the solicitation
7 count. He had to say that?

8 MS. BRODT: He had to say it's applicable
9 to - - -

10 JUDGE SMITH: She had to say.

11 MS. BRODT: She had to say it's appli - - -
12 well, defendant had to say it's applicable to
13 facilitation.

14 JUDGE SMITH: Right, but she did say it in
15 closing argument. Explain to me why that's - - - was
16 too late.

17 MS. BRODT: But then immediately says, but
18 I concede there's a view of the evidence that this
19 thing might be guilty of that.

20 JUDGE SMITH: Okay, okay. But assume she
21 made the argument - - - and Ms. Rea said she made it
22 beautifully - - - assume she made it adequately in
23 closing argument. Why was that too late?

24 MS. BRODT: It wasn't too late if he made
25 it clear it was a charge request, and if subsequently

1 - - -

2 JUDGE SMITH: Wait, wait a minute. You
3 don't have to make charge requests in nonjury trials.

4 MS. BRODT: Abs - - - you do, Your Honor.

5 JUDGE SMITH: You do?

6 MS. BRODT: You have to make charge
7 requests and arguments made - - -

8 JUDGE SMITH: But what on the CPL says
9 that?

10 MS. BRODT: It's case law on preservation.
11 What happens in bench trials is, let's - - - the
12 easiest one is - - - to argue is facilitation. And
13 by the way, People v. Le Mieux that talks about
14 written charge requests, et cetera, those are cases
15 that all talk about the rules of preservation being
16 the same for trial cases and for - - - I'm sorry; for
17 jury - - -

18 JUDGE SMITH: I mean, is it the universal
19 practice in nonjury criminal cases for a judge to
20 hold a charge conference and tell you what he's
21 charging himself?

22 MS. BRODT: It's a general. Is it
23 universal? I don't know; maybe there's some courts
24 that don't.

25 JUDGE SMITH: I mean, I've - - - I never

1 did a nonjury criminal case. I did a lot of nonjury
2 civil cases. I would have thought that that's a
3 bizarre idea.

4 MS. BRODT: Well, in nonjury criminal
5 cases, there are usually requests to charge before
6 summations. And - - -

7 JUDGE JONES: But once the judge says that
8 the judge is going to consider agency, I don't think
9 it's necessary for you to insist that it be
10 considered with respect to particular counts.

11 MS. BRODT: Oh, but if there's - - - the
12 legal issue before this court - - - let's remember
13 two things about what's happening here. Defendant
14 chooses his claim. Defendant says, as a novel issue
15 of law for this court - - - because it is a novel
16 issue of law - - - that the agency of defense, if
17 it's found, must apply to facilitation. That's an
18 argument that must be made below, and it must be made
19 in the right context. And most important, defendant
20 must make it clear to the court that that's a charge
21 request.

22 The other reason for that, if I may, is
23 that there's an issue of making a record - - -

24 JUDGE SMITH: Hold on. Well, he did say -
25 - - she did say - - - the lawyer said in closing

1 argument, my argument is that the agency defense
2 applies to facilitation. What would have been
3 accomplished by her saying, and by the way that's a
4 charge request, Your Honor?

5 MS. BRODT: I'll tell you what it is - - -

6 JUDGE SMITH: What else could it be?

7 MS. BRODT: What it is, is two things. We
8 then know what happened subsequently. In other
9 words, again, defendant chooses the claim; defendant
10 has to make a record. Defendant is speculating as to
11 what - - - this court just asked the question: do we
12 know what the defendant did - - - what the court did?
13 Did it consider it and find it didn't apply? Did it
14 not charge itself? Did it ref - - - the position of
15 the defendant has always been it refused to charge
16 itself. On what basis can we assume that, given that
17 in this particular case - - -

18 JUDGE SMITH: Well, I - - -

19 MS. BRODT: I'm sorry.

20 JUDGE SMITH: Go ahead.

21 MS. BRODT: In this particular case, the
22 court said I'm going to do it. I find agency is made
23 out on a prima facie level.

24 JUDGE SMITH: I thought the position of the
25 defendant was not that it refused to charge itself,

1 but that it clearly concluded - - - there is no
2 possible reading of this record, other than the judge
3 didn't think that facilitation applied - - - that
4 agency applied to facilitation.

5 MS. BRODT: Not only has defendant said
6 that, but the defendant just said that. Clearly the
7 court refused to charge itself on agency as to
8 facilitation. It's defendant's burden if he raises a
9 claim on appeal to make - - - to not speculate if - -
10 -

11 JUDGE SMITH: Well, why is it not true that
12 it's obvious from this record that the court didn't
13 think facilitation applied to agency?

14 MS. BRODT: Because the court might have
15 found under true repugnancy that agency might apply
16 under some circumstances, but under - - - in this
17 case it doesn't apply. And that's the repugnancy
18 test, which is a very, very specific test that
19 requires theoretical impossibility; it's a whole
20 nother test that goes in this case.

21 JUDGE SMITH: If we should disagree with
22 you on preservation, tell us why you're right on the
23 merits.

24 MS. BRODT: Okay, well, in that case, it's
25 very simple, Your Honor. The case law has never said

1 that agency applies to facilitation. The closest
2 that the case law says is one case out of the many
3 agency cases where this court has said the agent
4 stands in the shoes of the buyer. But that's not
5 enough to defeat facilitation. And here's why.

6 That is an explanation of a theory behind
7 agency. In fact, what the court really says, and it
8 repeats it throughout the agency cases, is that what
9 agency does is negate the sale. It negates an
10 element of the crime of sale, because the defendant
11 has no - - - and the quote is "desire or" - - - I
12 believe - - - "interest" in making the sale happen.
13 It may even use the word "facilitating the sale."

14 But the elements of facilitation don't
15 require that desire or that interest in the sale.
16 All the element of facilitation it has is scienter.
17 And scienter is believing it probable that the sale -
18 - - that the felony is about to be committed, he does
19 something to aid the felon.

20 JUDGE PIGOTT: Can you have agency without
21 facilitation, then?

22 MS. BRODT: Can you have -- sure. Sure.
23 You can have agency - - - facilitation is charged
24 when there's something in between an outright - - -
25 three guys standing on a corner and a guy walks up to

1 them and there's middlemen, but they're all part of
2 the sales team. Facilitation is something that lies
3 between that and between - - -

4 JUDGE PIGOTT: Well, maybe I said it
5 backwards. I'm trying to picture somebody being - -
6 - saying - - - being clear that they're the agent of
7 the buyer. And obviously as the agent of the buyer,
8 they're facilitating the purchase.

9 MS. BRODT: There - - - no, there's case
10 law - - - there are cases - - -

11 JUDGE PIGOTT: You want to say they're
12 facilitating the sale.

13 MS. BRODT: There's cases where they
14 haven't done enough, where there's not enough of an
15 actus reus to be a facilitator.

16 JUDGE SMITH: So, if I'm - - - let's take a
17 case where there really was a clear case of agency.
18 I say to my executive assistant, here's fifty bucks;
19 go buy me some heroin.

20 MS. BRODT: Um-hum.

21 JUDGE SMITH: And he or she goes and does
22 that. You say the executive assistant is guilty of
23 facilitation.

24 MS. BRODT: Arguably, yes.

25 JUDGE SMITH: Well, why arguably?

1 MS. BRODT: Yes.

2 JUDGE SMITH: Absolutely.

3 MS. BRODT: Absolutely.

4 JUDGE SMITH: Yeah.

5 MS. BRODT: Absolutely. He facilitates - -

6 -

7 JUDGE SMITH: But I'm not. I'm the buyer.

8 MS. BRODT: You're not; you're the buyer.

9 JUDGE SMITH: So the executive assistant
10 committed a crime that I did not commit?

11 MS. BRODT: Absolutely.

12 JUDGE SMITH: Even though all - - -

13 MS. BRODT: Absolutely.

14 JUDGE SMITH: - - - he did was what I told
15 him to do?

16 MS. BRODT: Because the crime of
17 facilitation exists for that situation, for the
18 situation where he's not acting as part of the sales
19 team; he's doing something to facilitate the sale.
20 If I make - - -

21 JUDGE JONES: Well, assuming that the
22 facilitator was also convicted of the sale, he could
23 not be sentenced consecutively, could he?

24 MS. BRODT: Of course not. None of this is
25 consecutive. None of this is consecutive, including

1 the possession of his own drugs, because that was
2 arguably a commission from the sale. But of course,
3 it's not a consecutive count, inclusory - - -

4 JUDGE JONES: So the facilitation is a
5 separate and distinct act.

6 MS. BRODT: Right, an noninclusory - - -

7 JUDGE JONES: You're - - -

8 MS. BRODT: - - - concurrent count. A
9 separate and distinct act.

10 CHIEF JUDGE LIPPMAN: Okay, counselor,
11 thank you, counselor. Counselor, your time is up,
12 unless there's any questions from the bench. Thank
13 you.

14 Counselor, rebuttal?

15 MS. REA: This is -- two things. One, I
16 think that Judge Lippman is - - - the question is
17 precisely, can the agent of the buyer be worse off,
18 vis-a-vis the criminal law than the buyer himself.
19 And the answer to that simply has to be no.

20 CHIEF JUDGE LIPPMAN: Why? What's the
21 logic behind it?

22 MS. REA: The logic is the logic of the
23 agency defense. The facilitation - - - we have to
24 remember that facilitation requires facilitation of a
25 felony, right? Therefore, it has to be at the level

1 of the sale.

2 JUDGE PIGOTT: And if you're standing in
3 the shoes of, you can't get much taller.

4 MS. REA: Right.

5 JUDGE PIGOTT: You're still at this level.

6 MS. REA: Yes. So, it has to be at that
7 level. Once you say, and this court has said, agency
8 is you're in the shoes of the buyer, then you cannot
9 become more criminally liable - - -

10 JUDGE CIPARICK: Unless you commit a
11 separate crime, obviously.

12 MS. REA: Fine, fine.

13 JUDGE CIPARICK: An assault.

14 MS. REA: Right. But I mean, the Supreme
15 Court ruled the borrower is not the facilitator of
16 the bank loan. You can't be. So once you - - -

17 JUDGE SMITH: So take my executive
18 assistant again. I'm going to change it a little. I
19 tell the executive assistant to call my connection
20 and to have him send over some heroin. And the
21 executive assistant makes the call. What crime, if
22 any, has the executive assistant committed?

23 MS. REA: None.

24 JUDGE SMITH: He's an innocent man?

25 MS. REA: Yes. No, I don't - - - what - -

1 - he is not criminally liable, because as, in fact,
2 the practice commentaries to facilitation say that it
3 is not made to criminalize a casual act or words or
4 nonverbal conduct. It's just - - - this kind of
5 phone call - - -

6 JUDGE SMITH: What's casual about that? He
7 made a call to a heroin dealer asking him to deliver
8 heroin. You say that's not facilitating any crime at
9 all?

10 MS. REA: He made it -- in the sense that
11 he made the transaction happen. The idea, however,
12 is you don't facilitate the transaction. You
13 facilitate the sale, and if you don't facil - - - if
14 you're facilita - - - if you're assisting in the
15 purchase - - -

16 CHIEF JUDGE LIPPMAN: Isn't the sale a
17 transaction?

18 MS. REA: Well, in a transaction that
19 necessarily has two parties that are - - - that have
20 different criminal liability, you have to have the
21 facilitation at one level or the other. There's no
22 such - - - just because you have - - - the
23 transaction is both the sale and the purchase.

24 CHIEF JUDGE LIPPMAN: Okay, thank you.

25 MS. REA: Thank you very much.

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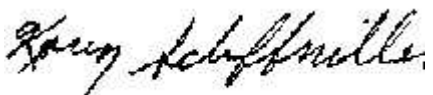
CHIEF JUDGE LIPPMAN: Thank you both,
appreciate it.

(Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of PEOPLE v. TYRONE WATSON, No. 199 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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