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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

CARLOS TORRES,

Appellant.

NO. 52

20 Eagle Street
Albany, New York
August 31, 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: Appeal number 52, The
2 People of the State of New York versus Carlos Torres.
3 Counsel?

4 MS. SKOLNICK: Good afternoon, Katharine Skolnick
5 for appellant, Carlos Torres. I'd like to reserve two
6 minutes for rebuttal, please.

7 CHIEF JUDGE DIFIORE: Of course.

8 MS. SKOLNICK: Thank you.

9 CHIEF JUDGE DIFIORE: You're welcome.

10 MS. SKOLNICK: While the New York City Council
11 have laudable goals in enacting Administrative Code 19-
12 190(b), it used inappropriate means to meet them. That
13 provision which criminalizes a negligence tort is preempted
14 by both the penal law and the vehicle and traffic law.

15 Penal Law Article 15 spells out four exclusive
16 mental states plus a very limited strict liability
17 exception applicable to all crimes. Ordinary negligence is
18 not one of them. The minimum is gross negligence which
19 requires socially undesirable conduct and a failure to
20 perceive a substantial and unjustifiable risk. And Penal
21 Law 5.05, subsection 2, states the provisions of this
22 chapter, that is the penal law, shall govern the
23 construction of and punishment for any offense defined
24 outside of this chapter. In other words, these four mental
25 states apply to all crimes in all chapters.



1 JUDGE SINGAS: Counselor, how would you reconcile
2 Feingold?

3 MS. SKOLNICK: Well Feingold simply brings in a -
4 - - an additional mental state that must be proven, but
5 recklessness is - - - is one of the four enumerated mental
6 states. And that appears in the statute that was at issue
7 in Feingold.

8 So essentially what Penal Article 15 has said is
9 that at minimum you need one of these four mental states.
10 And here we have the due care provision, which essentially
11 criminalizes something that someone does with - - - with no
12 - - - not - - - not any of these four mental states.

13 CHIEF JUDGE DIFIORE: So counsel, there are other
14 misdemeanor offenses that impose criminal liability based
15 on a civil negligence standard. What is it? VTL 1212,
16 which is the reckless driving section. And doesn't - - -
17 doesn't that - - - the existence of 1212 foreclose your
18 argument on pre - - - on preemption here?

19 MS. SKOLNICK: Well no, again, 1212 requires
20 recklessness. And that is one of the four enumerated
21 mental states, recklessness as to driving. Some of the
22 other examples that both the - - - the district attorney's
23 office and the city cited all contain at least one of those
24 four mental states even if they also require an additional
25 - - -



1 JUDGE FAHEY: Can we - - -

2 MS. SKOLNICK: - - - an additional mental state.

3 JUDGE FAHEY: - - - can we take - - - stepping
4 outside the men - - - the - - - the men - - - the mens rea
5 argument for a second. I - - - I'm asking a question about
6 constitutionality now. It if - - - if 19-90 (sic) were a -
7 - - a strict liability offense, would - - - would you be
8 challenging the constitutionality of the ordinance?

9 MS. SKOLNICK: We might - - - well, I think that
10 first of all it isn't. There is the - - -

11 JUDGE FAHEY: Well no, stay with my - - -

12 MS. SKOLNICK: - - - without due care - - -

13 JUDGE FAHEY: - - - stay with my question, not
14 yours.

15 MS. SKOLNICK: But I think the problem here is
16 that - - -

17 JUDGE FAHEY: No, no. Would you be challenging
18 the constitutionality of the ordinance? Because if you
19 wouldn't then you're in a different situation on the
20 constitutionality question.

21 MS. SKOLNICK: Well it depends which
22 constitutionality question. As to penal law preemption,
23 perhaps not, because it does allow for a strict liability
24 exception.

25 JUDGE FAHEY: Um-hum.



1 MS. SKOLNICK: But there's still the overlay of
2 vehicle and traffic law preemption where the vehicle and
3 traffic law at 16 - - - subsection 1600 and 1604 both state
4 that what the state enacts here is supreme. And any local
5 laws that conflict with it, must yield.

6 JUDGE FAHEY: Okay.

7 MS. SKOLNICK: So there is that possible
8 constitutional challenge.

9 JUDGE FAHEY: I see. I see. Thank you.

10 MS. SKOLNICK: So getting back to the - - - the
11 initial argument, this court has found that Article 15
12 applies to non-penal law crimes. And as further evidence,
13 the Bartlett Commission, in adopting the penal law, said
14 that gross was greater than ordinary civil negligence, and
15 even gross negligence was to be used sparingly. The common
16 law too has long said that more than simple negligence is
17 required for criminal liability.

18 Undergirding this is the idea of moral fault, and
19 that courts must be careful in interpreting laws that
20 impose criminal liability. And again here, the potential
21 is to impose liability for - - - for something that people
22 do every day, for quite ordinary conduct.

23 As I was - - -

24 JUDGE WILSON: Can I - - - can I just ask a - - -
25 a simple question, I think, about your preemption argument.



1 Are you - - - is it - - - are you making it only with
2 regard to the city's ordinance or also in regard to VTL
3 1146?

4 MS. SKOLNICK: We're not making it with regard to
5 1146 for several reasons. One is that Mr. Torres was only
6 convicted of the infraction at the state level, and our
7 argument is that - - - that - - - what - - - what was
8 problematic here was that this city made something a crime
9 that the state had not.

10 JUDGE WILSON: The infraction still - - -

11 MS. SKOLNICK: So that's why we - - -

12 JUDGE WILSON: - - - allows for fifteen days of
13 jail time, right?

14 MS. SKOLNICK: The infraction?

15 JUDGE WILSON: Yeah. The state infraction.

16 MS. SKOLNICK: I believe that's correct.

17 JUDGE WILSON: Okay.

18 JUDGE FAHEY: So - - - so the - - - so the core
19 of your preemption argument then, I think on conflict
20 preemption, is - - - is that - - - that this law cannot
21 oppose - - - impose a stricter penalty than the state law
22 regulating the same subject?

23 MS. SKOLNICK: It's slightly different than that.

24 JUDGE FAHEY: Okay.

25 MS. SKOLNICK: It can impose - - - or our



1 argument is not really about penalties, but rather about
2 criminalization. So the state has said that this nearly
3 identical conduct is simply a traffic infraction, where the
4 city has said that it's actually a criminal offense, it's a
5 misdemeanor.

6 JUDGE GARCIA: But doesn't it have an additional
7 element? I mean, you have to have violated the right of
8 way of the bicyclist or pedestrian, right? So it's not the
9 same crime.

10 MS. SKOLNICK: It's not identical. There is that
11 additional conduct. But making turns, changing lanes,
12 these things are all ordinary everyday activities, and
13 they're really no more or less dangerous than most other
14 aspects of driving.

15 JUDGE GARCIA: But how - - - but - - - but to
16 stay with the - - - the conflict issues, though, I mean,
17 it's not identical. So you have an additional element of
18 the one crime, right, so - - -

19 MS. SKOLNICK: Well the - - -

20 JUDGE GARCIA: - - - so they haven't really
21 criminalized - - - they haven't - - - I don't see the
22 conflict then.

23 MS. SKOLNICK: Well the other piece is that the
24 state - - - the city actually makes it a crime to cause
25 physical injury, whereas the state says you have to cause



1 serious physical injury. So in a sense, there are some
2 distinctions, but - - -

3 JUDGE GARCIA: But again, a serious physical
4 injury doesn't take into account a right of way violation,
5 right, so it's - - - again, it's not the same. It's not as
6 if they were criminalizing the same conduct differently,
7 which is a different issue and there are arguments that you
8 can do that, but just to stay with this argument.

9 MS. SKOLNICK: Sure. It's - - - it - - - there
10 are some slight distinctions in the statutes, but again, a
11 lot of what is covered by - - - by what the state has
12 prohibited is also covered by what the city has prohibited.
13 But the city has made that conduct a misdemeanor, and
14 that's the core of our - - - of our conflict preemption
15 argument.

16 But really the - - - the main argument that we're
17 making here is that - - -

18 JUDGE FAHEY: But - - - but see, let - - - let me
19 stop you there because I - - - I don't think that is the
20 same. Because the way I understand 1146(c)(1), which is a
21 traffic infraction, it only becomes a misdemeanor after
22 there's been successive convictions within a five year
23 period of time. And that's different from what we have
24 here.

25 MS. SKOLNICK: Well we're - - - we're not



1 necessarily actually dealing with 1146(d) because that is,
2 as Your Honor pointed out, the recidivist provision. So
3 what the - - - the court - - - what the state has said is
4 that when you commit something more than once, that might
5 be a mis - - - a misdemeanor. And the city has said that
6 only on doing it the first time is it a misdemeanor.

7 JUDGE GARCIA: But counsel, you were saying what
8 your main argument was. I know your light's on, I wanted
9 you to get to that.

10 MS. SKOLNICK: So the - - - the main argument
11 here is that the - - - the statute is clear - - - the city
12 statue is clear in its terms that it is prohibiting acting
13 without due care. And the penal law says that - - - Penal
14 Law 15.15 and 5.05 taken together basically state that to
15 make something a crime, and that provision applies outside
16 of the penal law as well, you need one of those four
17 enumerated mental states.

18 JUDGE GARCIA: And that would apply whether it
19 was the city or the state enacting a law outside the penal
20 law?

21 MS. SKOLNICK: That's correct. But we're - - -
22 we're arguing that the - - - as to Administrative Code 19-
23 190(b), there is that preemption problem in that the penal
24 law is supreme over what the city is permitted to do.

25 JUDGE GARCIA: Chief, may I just ask one more



1 question?

2 CHIEF JUDGE DIFIORE: Yes.

3 JUDGE GARCIA: On a different topic, you're
4 asking us to undo the plea based on the failure to give the
5 term of the conditional discharge. There was some
6 indication in the appellate term that you were only asking
7 for that with a dismissal; is that still your position
8 here?

9 MS. SKOLNICK: No. We do feel a dismissal would
10 be appropriate under People versus Burwell. Mr. Torres has
11 completed his sentence, he has no criminal record. But if
12 the court declines to do that, then it should reverse and
13 remand for further proceedings.

14 JUDGE GARCIA: Thank you.

15 MS. SKOLNICK: Thank you.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 Counsel?

18 MR. GOLDFINE: Good after - - - good afternoon,
19 Your Honors, Samuel Goldfine on behalf of the people.

20 Administrative Code is constitutional statute, it
21 constitutionally imposes criminal liability on the basis of
22 the failure to exercise due care. I think as a preliminary
23 due process matter, strict liability crimes are permissible
24 in this country and if you can impose criminal liability on
25 the basis of no mental culpability whatsoever, you can



1 impose criminal liability on the basis of some mental
2 culpability without running afoul of the constitution.

3 JUDGE GARCIA: What about the argument that the
4 penal law preempts this?

5 MR. GOLDFINE: Yes. So thank you, Your Honor.
6 So I think if you read the penal law sections, the first
7 thing to point out is that the legislature is able to
8 distinguish when it wants a provision to apply to the penal
9 law only or when it wants it to apply outside. So the
10 definitional sections in 15.00 and 15.05, those both apply
11 to this chapter of the penal law. When the legislature
12 wants to say otherwise, it states so, like in 15.15(2),
13 where it says this applies both in and outside this
14 chapter.

15 I think the best example of the true legislative
16 intent is what the legislature has done in the years since
17 the enactment of this provision. So in 1965, the same year
18 they passed the penal law, they also codified Agricultural
19 & Markets Law 370, which makes it a misdemeanor to fail to
20 exercise due care in the keeping of wild animals. So at
21 the time, the legislature believed that a non-15.05 mental
22 state was permissible for a criminal statute outside the
23 penal law.

24 Much more recently with 1146(d), the legislature
25 again criminalizes, makes it a misdemeanor, to fail to



1 exercise due care.

2 So I don't think there's any legislative intent
3 here to occupy the field of applicable criminal mental
4 states. They're allowing these other states, they're
5 passing them themselves. Plainly the penal law doesn't
6 supersede the VTL or the Agriculture & Markets Law, the
7 state is not superseding it itself. So it's just as a
8 matter of - - - of the - - - the penal law.

9 As far as the VTL preemption argument is
10 concerned, VTL 1642-a gives an express and very broad grant
11 of authority to the city to pass exactly this type of
12 legislation. It actually goes so far as to say that if
13 there's a conflict, the city ordinance shall supersede the
14 state statute. It's going - - - it's going to control. So
15 under those circumstances, and - - - and 1642-a(10) and
16 (11) both say explicitly the right of way, the rights of
17 pedestrians. I mean, it's exactly the context we're
18 talking about. So - - -

19 JUDGE WILSON: Well it doesn't actually say
20 anything about criminalizing anything, right? So you could
21 read - - - I'm not saying I do read it this way, but you
22 could read regulation traffic and rights of way and so on
23 to be where the crosswalk is going to be, how far back it's
24 going to be, those sorts of things.

25 MR. GOLDFINE: Oh absolutely, Your Honor. But I



1 do think that this - - - because of how broad the grant of
2 authority is and because it allows it to supersede, it's
3 reasonable to expect the city would legislate and regulate
4 - - -

5 JUDGE WILSON: So what - - - what about - - -
6 what about VTL 155?

7 MR. GOLDFINE: I'm sorry?

8 JUDGE WILSON: Which defines traffic infractions.

9 MR. GOLDFINE: Yeah, yeah - - -

10 JUDGE WILSON: It says - - -

11 MR. GOLDFINE: - - - right. So I don't - - - I
12 think that that allows for if there - - - if otherwise
13 authorized by statute and I think 1642 is the express - - -
14 express authorization for a city with a population in
15 excess of one million.

16 And as I was saying, I think that the - - - the
17 city - - - or the state should have expected with this
18 broad grant of authority, that the city would regulate
19 using similar tools, namely, penalties, some of which are
20 criminal, some of which are strict liability. And here, in
21 - - - in this particular context of the right of way, the
22 city is regulating using identical language. I mean, this
23 due care language comes directly from the state provision.
24 They've taken it and they put it into their statute.
25 They've elevated the penalties. They've made a first time



1 collision a crime as opposed to just a violation. But the
2 - - - the state statute still criminalizes the exact same
3 actus reus and mens rea as a misdemeanor.

4 So if there are no further questions about the -
5 - - the VTL - - - the Administrative Code provision, I
6 would turn briefly to the conditional discharge length.

7 CHIEF JUDGE DIFIORE: Please.

8 MR. GOLDFINE: Yes. So the first thing I would
9 say is that this court has never found that the length of
10 the conditional discharge is a direct consequence of a
11 guilty plea. And I think that there's a very significant
12 difference between the length of the conditional discharge
13 verse the length of probation or PRS or even a prison
14 sentence. In the - - - in the latter context, the length
15 is the most immediate direct consequence, the most
16 penological, the most significant consequence a defendant
17 is going to face. How long are their liberties going to be
18 restrained, how long are they subject to enhanced scrutiny
19 and supervision.

20 In the conditional discharge context - - -

21 JUDGE FAHEY: Well what about a conditional
22 discharge where - - - a common one, a DWI, is you could put
23 an ignition lock on the car.

24 MR. GOLDFINE: Yes, Your Honor. I mean, there
25 are - - - there are some more stringent conditional



1 discharge requirements, but overall they're much less
2 onerous and - - - and much less likely to get the defendant
3 into any kind of trouble than - - -

4 JUDGE FAHEY: I'm drinking and driving and it's a
5 real problem to get the car going, you know, with that
6 ignition lock on.

7 MR. GOLDFINE: Well absolutely, I - - - I take
8 Your Honor's point. But the penal law authorizes much more
9 stringent restrictions on probation. You have reporting
10 requirements, your officer could come to your house,
11 there's electronic monitoring. I - - - I think that the -
12 - - the context is - - -

13 JUDGE FAHEY: Is there any basis for
14 distinguishing between the severity of the limitation?

15 MR. GOLDFINE: That as opposed - - - for whether
16 or not this ends in the probation or conditional discharge?

17 JUDGE FAHEY: Yeah.

18 MR. GOLDFINE: Certainly, that's a consideration
19 for the judge and - - - and the - - - you know when - - -
20 when negotiating the plea in a case like this.

21 But I think for - - - in the conditional
22 discharge context, the length really serves as a deadline
23 more than anything else. You have such and such a time to
24 complete the conditions, which are the immediate and direct
25 consequence for the defendant, he has to in this case pay



1 his fine, complete his drive program.

2 JUDGE RIVERA: Do - - - do we need to get to that
3 issue if it's not preserved?

4 MR. GOLDFINE: Sorry, Your Honor?

5 JUDGE RIVERA: Do we need to get to that issue if
6 we conclude it's not preserved?

7 MR. GOLDFINE: On the - - - the challenge to the
8 conditional discharge?

9 JUDGE RIVERA: Yes.

10 MR. GOLDFINE: Your Honor, I mean, I - - - I
11 believe that, yes, he replied, and he was sentenced at the
12 same proceeding, but there was here a practical opportunity
13 for him to object. He was informed of the length of the
14 conditional discharge albeit moments after he pled guilty.
15 But he was asked if he understood, he stated that he did.
16 And as You Honor's pointed out, even on the appellate
17 process, he has not asked for his plea back, I guess, until
18 right now. He's asked for dismissal which is an
19 inappropriate remedy given penological considerations.

20 JUDGE RIVERA: If - - - if we agree with your
21 views, does - - - does he have an argument that his counsel
22 was ineffective?

23 MR. GOLDFINE: I - - - I - - - I don't believe
24 so, Your Honor.

25 JUDGE RIVERA: Um-hum. Because?



1 MR. GOLDFINE: I - - - I believe counsel - - -
2 counsel made - - - made an argument. It was a - - - it was
3 an intelligible argument. He did his best for the
4 defendant. I don't think there's been any suggestion that
5 counsel was ineffective here.

6 JUDGE RIVERA: Well I'm - - - I'm trying to get
7 to something else because you didn't mention the form. I
8 mean, if - - - if his argument is I didn't know, I didn't
9 realize because my lawyer didn't tell me - - -

10 MR. GOLDFINE: Right.

11 JUDGE RIVERA: - - - right?

12 MR. GOLDFINE: In that case, Your Honor, yes, he
13 has the form. He signed the form. It states all the
14 conditions, it's spelled out very plainly. By signing it,
15 he acknowledges that he understands all the conditions. So
16 again, I - - - I think that on this record it's plain that
17 defendant's plea was knowing and voluntary. He was aware
18 of - - -

19 JUDGE SINGAS: Were - - - weren't the conditions
20 met before the expiration of the CD?

21 MR. GOLDFINE: Absolutely, Your Honor. The
22 conditions were met.

23 JUDGE GARCIA: I have a question just about that
24 and I'm - - -

25 MR. GOLDFINE: Sure.



1 JUDGE GARCIA: - - - a little confused. The - -
2 - the - - - the sentencing date's September in - - - in
3 2017 - - -

4 MR. GOLDFINE: Um-hum.

5 JUDGE GARCIA: - - - and the judge at the end
6 says November, right?

7 MR. GOLDFINE: Yes.

8 JUDGE GARCIA: And that's to complete the driving
9 course and to pay the fine?

10 MR. GOLDFINE: Correct, Your Honor.

11 JUDGE GARCIA: Then on the form that's signed I
12 think the same day, it's signed by the defendant, it says
13 conditional discharge term one year. Are there any other
14 conditions in that one year, other than the ones that are
15 supposed to be met by November?

16 MR. GOLDFINE: There's a - - - there's a general
17 order to be a law abiding citizen, which I think applies to
18 all citizens regardless of whether or not you have it in
19 writing from the court. But other than that, no, Your
20 Honor.

21 JUDGE GARCIA: But so I guess the question really
22 is, so if he violates that condition in the one year, is -
23 - - what happens?

24 MR. GOLDFINE: Well as a practical matter, it - -
25 - it doesn't happen. No one gets violated on a conditional



1 discharge. The - - - the penal law authorizes serving the
2 remainder of the sentence. In this case, it would be a
3 couple days in jail. I think that's a very different
4 consideration in the probation or PRS context where the
5 violation itself is a crime, he's immediately serving the
6 six-month minimum sentence even if he has one day left. I
7 think that's just a recognition that these are - - - these
8 are different criminal penalties and the import to the
9 defendant is different.

10 JUDGE GARCIA: I guess the bottom line, though,
11 is the year term is still there despite the fact that he
12 will have completed those two conditions by November under
13 the terms of the agreement, right?

14 MR. GOLDFINE: Yes, Your Honor.

15 JUDGE GARCIA: And then there's something about a
16 December control date or something?

17 MR. GOLDFINE: Right. So as - - - as a practical
18 matter, at least in Manhattan, there's - - - they give - -
19 - judges typically give a sixty-one day compliance
20 adjournment to complete whatever the conditions are, the
21 programs, et cetera, pay the fine. I think that's what the
22 date gets up - - - I think on - - - on the record, the
23 judge, he misspeaks or says - - - gives the wrong number.
24 But I think the math checks out that the December date is
25 sixty-one days out.



1 JUDGE GARCIA: So if - - - if that - - - on that
2 date, can they just then end the term of the condition?
3 Does the judge have discretion to do that?

4 MR. GOLDFINE: I - - - I believe the judge would
5 have discretion to do it. I can't see any reason why they
6 wouldn't.

7 JUDGE GARCIA: Thank you.

8 CHIEF JUDGE DIFIORE: Thank you, counsel.

9 MR. GOLDFINE: Thank you. I ask that you affirm
10 and find the statute constitutional.

11 CHIEF JUDGE DIFIORE: Thank you.

12 Counsel, what about that language that your
13 colleague referenced in 1642-a(10), the VTL.

14 MS. SKOLNICK: 16 - - -

15 CHIEF JUDGE DIFIORE: 42-a(10) in the VTL.

16 MS. SKOLNICK: So it's true that - - - that the
17 city does have the power to regulate right of way. But
18 1600 and 1604 both provide an overlay in saying that the
19 provisions of this chapter of the VTL shall be applicable
20 and uniform throughout this state and no local authority
21 shall enact or enforce any law in conflict with the
22 provisions of this chapter. So that is still providing
23 language suggesting that anything that the city does with
24 respect to right of way still has to comport with what the
25 state has enacted.

1 JUDGE GARCIA: Counsel, your - - - your argument
2 isn't - - - just to go to something Judge Wilson said.
3 Your argument isn't that the city can't make a criminal
4 traffic violation. It's this specific one has issues,
5 right?

6 MS. SKOLNICK: Correct. The - - - the city - - -
7 as - - - as long as it doesn't conflict - - -

8 JUDGE GARCIA: Right.

9 MS. SKOLNICK: - - - with what's in the Vehicle
10 and Traffic Law.

11 JUDGE GARCIA: There's no blanket prohibition on
12 it?

13 MS. SKOLNICK: No. And for instance, the - - -
14 the district attorney's office drew or - - - drew the
15 analogy to drag racing - - -

16 JUDGE GARCIA: Um-hum.

17 MS. SKOLNICK: - - - and one reason we think that
18 that's inept is that the state and the city there both made
19 drag racing a misdemeanor. So it's not that the city can't
20 do it at all, it's that the city can't do it here - - -

21 JUDGE GARCIA: Understood.

22 MS. SKOLNICK: - - - and with this language.

23 I also just want to touch on some of the plea
24 withdrawal points since - - - since those came up.

25 JUDGE RIVERA: Can I just - - - just to clarify



1 this point you just made - - -

2 MS. SKOLNICK: Sure.

3 JUDGE RIVERA: - - - in response to the question
4 from the bench.

5 Your position is that the city can't conflict so
6 if the state has already criminalized it, all the city
7 could do is impose a heavier penalty?

8 MS. SKOLNICK: Correct.

9 JUDGE RIVERA: Correct? So it's not really about
10 can they choose to criminalize it. It's already been
11 criminalized. It's that they could impose a heavier
12 penalty through their own separate local law?

13 MS. SKOLNICK: They could. But here what they
14 did was - - -

15 JUDGE RIVERA: No, no. I just wanted to clarify
16 that that was your - - -

17 MS. SKOLNICK: Yes.

18 JUDGE RIVERA: - - - that was really the
19 fundamental point of your response.

20 MS. SKOLNICK: Yes.

21 JUDGE RIVERA: Okay.

22 MS. SKOLNICK: As to point two, first of all it
23 is within the Tyrell Lowry preservation exception (ph.), so
24 there's no problem of reaching the issue here. But I also
25 just want to point out that the length of the sentence - -



1 -

2 JUDGE RIVERA: What - - - what - - - what about
3 the form? Let me - - - the form itself says it's a one
4 year - - - that's the period on the conditional discharge.

5 MS. SKOLNICK: It does. But that wasn't - - - I
6 don't believe that was given to him in advance of - - - you
7 know before he agreed to plead guilty.

8 JUDGE RIVERA: Do you think the form is totally
9 irrelevant to the analysis?

10 MS. SKOLNICK: I think so. I think that, you
11 know, he - - - especially given that there are these other
12 dates mentioned in December. It needs to be clarified for
13 him exactly what conditions need to be met when, how long
14 the term is, and that wasn't done - - -

15 JUDGE RIVERA: So what - - -

16 MS. SKOLNICK: - - - here.

17 JUDGE RIVERA: - - - what's he subject to past
18 the six months, what are the other conditions?

19 MS. SKOLNICK: To remain a law abiding citizen.
20 And while that does apply to anyone - - -

21 JUDGE RIVERA: Was that said during - - -

22 MS. SKOLNICK: - - - at any - - -

23 JUDGE RIVERA: - - - the colloquy?

24 MS. SKOLNICK: I don't recall if it was.

25 JUDGE RIVERA: Okay.



1 MS. SKOLNICK: But - - - but the - - - the term
 2 length has to be stated. And has - - - it has to be - - -
 3 he has to be advised that that's how long he must do so,
 4 not because it isn't self-evident that we all have to abide
 5 by the law, but because he is subject to incarceration
 6 during that period. He can be resentenced. He can be
 7 reincarcerated. And despite what my adversary said, I have
 8 seen violation of conditional discharge proceedings take
 9 place. They do occur. Often when someone is rearrested.
 10 But they're not just facing the consequences for the
 11 rearrest, they're also facing the consequences for the
 12 instant offense.

13 And I just want to point out that regardless of
 14 the outcome on point one, the - - - the second point is one
 15 that this court must reach because - - - because the
 16 remaining traffic infraction, of course, was something that
 17 he pleaded to, and our first argument does not apply to
 18 that. So if the court agrees with us on point one, the
 19 remaining traffic infraction still had the - - - the plea
 20 voluntariness problem with it. And if the court does not
 21 find the administrative code provision unconstitutional, it
 22 still must reach the plea withdrawal part - - - point as to
 23 - - -

24 JUDGE SINGAS: But the defendant never asked for
 25 vacatur of his plea until the reply brief, is that right?



1 MS. SKOLNICK: No. He did ask for vacatur of his
2 plea in the opening brief.

3 JUDGE SINGAS: Okay.

4 JUDGE GARCIA: But he just didn't ask for
5 dismissal?

6 MS. SKOLNICK: We - - - we clarified the remedy
7 request on - - - in reply. But again, we do feel that - -
8 -

9 JUDGE GARCIA: Counsel - - - counsel, just to the
10 point on the drag racing, when you're talking with - - -
11 speaking in response to Judge Rivera, I thought your
12 argument on this, in part, was that it was the same conduct
13 that was penalized more severely by the city, it was one of
14 the reasons it was bad. But I thought in response to her
15 question, you said with drag racing, they could penalize
16 that more severely at the city level. Did I under - - -
17 misunderstand?

18 MS. SKOLNICK: So in - - - in both cases, at both
19 the state level and the city level, they - - - the conduct
20 was made a misdemeanor. And so the - - - the penal law and
21 the Vehicle and Traffic Law preemption arguments that we
22 made here, you can't draw the same analysis.

23 JUDGE GARCIA: So it's the classification that
24 you were arguing - - -

25 MS. SKOLNICK: Right. And that's - - - that it



1 becomes a crime at the local level here which was the
2 problem.

3 CHIEF JUDGE DIFIORE: Thank you, counsel.

4 MS. SKOLNICK: Thank you.

5 (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 the State of New York v. Carlos Torres, No. 52 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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