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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 98

DANIEL TALLUTO,

Appellant.

20 Eagle Street
Albany, New York
November 17, 2022

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Official Court Transcriber



1 ACTING ACTING CHIEF JUDGE CANNATARO: Good
2 afternoon. The first appeal on today's calendar is num - -
3 - number 98, People v. Daniel Talluto.

4 Counsel, whenever you're ready?

5 MR. KEEM: Good afternoon. May it please the
6 court. My name is Brad Keem, and I represent the
7 Defendant/Appellant, Mr. Talluto.

8 I'd like to reserve two minutes for rebuttal.

9 ACTING ACTING CHIEF JUDGE CANNATARO: You have
10 two minutes.

11 MR. KEEM: When affirming Mr. Talluto's
12 designation as a violent felony sex offender, the fourth
13 department majority claimed that their hands were tied, and
14 called the results illogical and unfair. We assert,
15 however, that when the application of a statute leads to an
16 unreasonable or absurd result, it cannot be effectuated.

17 Here, the absurdity is self-evident. Mr.
18 Talluto, all the parties agree, was - - -

19 JUDGE TROUTMAN: Do you agree it does read the
20 way it reads?

21 MR. KEEM: I do, Your Honor. But here, it reads
22 the way it reads, but all the parties agree he was
23 convicted of a nonviolent felony offense in Michigan. His
24 designation in New York as a violent felony sex offender is
25 then, therefore, contrary to logic.



1 JUDGE SINGAS: But what was - - - what should we
2 make of the legislature changing the language in 2002, but
3 keeping this language in?

4 MR. KEEM: I think that that language in 2002,
5 keeping it in, it still didn't understand the ramifications
6 of that change. Because it hadn't been brought up yet,
7 really.

8 JUDGE SINGAS: So is it our function to sort of
9 foresee what they should of understood or didn't?

10 MR. KEEM: I don't think it's your function to
11 foresee what they did or didn't, but what happened here is
12 still an absurd or illogical result.

13 ACTING CHIEF JUDGE CANNATARO: And what do you
14 make of the many requests to amend the statute, and - - -
15 and I think that several worth years worth of proposed
16 amendments to the statute that were never actually passed?

17 MR. KEEM: I agree that there have been several
18 requests to do so, but still, even the court - - - or the
19 legislature's failure to act doesn't mean that this court
20 can allow an unreasonable or absurd result to stand.

21 JUDGE GARCIA: But doesn't that somehow indicate
22 they don't think it's that unreasonable? If they did, they
23 would fix it. They know how it's been interpreted now. So
24 we're, in a sense, overriding the legislature's view of the
25 statute.

1 MR. KEEM: Whether they think that or not, the
2 ramifications of not doing something leads the
3 interpretation of the Correction Law, parts of this have
4 been superfluous.

5 JUDGE GARCIA: But I guess, my point is they
6 decided not to do anything. So we would say despite you
7 not doing anything, your statute, you know what it says,
8 you're not doing anything. We know better.

9 MR. KEEM: Well, in this case, yes, because it's
10 an unreasonable and absurd result. There's superfluity in
11 the statute by not doing anything.

12 JUDGE WILSON: So you have - - - you have an
13 alternate argument, right, which is that they're - - - the
14 sexually violent designation is subject to a downward
15 departure in the discretion of the court, reading of the
16 statute, that I think is laid out reasonably well in
17 Justice Renwick's dissent in Bullock. So if that is right,
18 if Justice Renwick were right, that kind of wipes out your
19 absurdity argument, no? Because then there's a mechanism
20 in the statute to deal with the - - - what you're calling
21 the absurd result.

22 MR. KEEM: It's - - - it is the escape hatch of
23 my argument. And that would be that - - -

24 JUDGE WILSON: It blows up your first argument,
25 but it - - -



1 MR. KEEM: - - - it - - -

2 JUDGE WILSON: - - - provides you a road on the
3 second?

4 MR. KEEM: Correct. And you know, that's the
5 beauty of alternate arguments, I suppose. And if, when you
6 have this opportunity in designations, right, one, two, or
7 a three, there's discretion to change that. The - - -

8 ACTING CHIEF JUDGE CANNATARO: Is there a
9 discretion to change it when this designation is
10 statutorily described? I mean, the discretion you're
11 talking about is coming off the assessment report. Here,
12 we're talking about a statutory definition of violent
13 sexual offender. We're just free to disregard the
14 statutory language in that context?

15 MR. KEEM: I think if you look at 168-1, the
16 board makes a risk level designation recommendation. Then
17 168-n, the board is to - - - or the court is to apply the
18 guidelines upon receipt of the recommendation, meaning
19 there's discretion there.

20 JUDGE RIVERA: Yeah, but the court is always
21 bound by the statute, right?

22 MR. KEEM: It is bound - - -

23 JUDGE RIVERA: If the statute sets out how one
24 would define this particular category, how can the court
25 decide otherwise?



1 MR. KEEM: Well, it's applying the guidelines
2 just as it would in a risk level determination.

3 JUDGE RIVERA: But the guidelines could not be
4 contrary to the statute. The fact of the matter is the
5 statute supersedes everything else. That's the statute's
6 what's controlling.

7 ACTING CHIEF JUDGE CANNATARO: You're meaning,
8 discretionarily depart from the guideline or from the
9 recommendations that were - - - that were created within
10 the guidelines. We can't use our discretion to depart from
11 the words of a statute, can we?

12 MR. KEEM: No, and I'm not saying that. I'm
13 saying applying the guidelines, that that is in the
14 statute, the plain language of the statute, applying the
15 guidelines would allow a court, especially in a situation
16 like this - - -

17 JUDGE RIVERA: Well, what part of the guidelines
18 would allow a court to ignore the statutory mandate?

19 MR. KEEM: There's - - - in the statute, it says
20 the essential elements, or it says the felony. So here,
21 there's the court is left with what do I do in this
22 situation.

23 JUDGE RIVERA: And if that was contrary to the
24 statute, what do you think controls?

25 MR. KEEM: I'm sorry?



1 JUDGE RIVERA: If it was contrary to the statute,
2 what controls?

3 MR. KEEM: If it's contrary - - - I - - - I'm
4 sorry, I don't understand what you're - - -

5 JUDGE RIVERA: Let try it as a hypothetical. If
6 the guidelines said something that was contrary to the
7 language in the SORA, in the statute - - -

8 MR. KEEM: Um-hum.

9 JUDGE RIVERA: - - - SORA Act, right. What would
10 control?

11 MR. KEEM: Well, I - - - I suppose - - -

12 JUDGE RIVERA: The SORA judge has this conflict,
13 what is a SORA judge to do?

14 MR. KEEM: I suppose in a typical situation, the
15 statute, I think that's what you're trying to get me to
16 say, but at the same time, the statute itself has
17 ambiguity. It has these problems, these absurdities.

18 JUDGE RIVERA: Is it really ambiguity, or is it
19 sort of these arguments is just back door way to say it's
20 unconstitutional? And I hear it's not preserved. But is
21 it really - - - is the problem really that there may be an
22 unconstitutionality to this part of the statute?

23 MR. KEEM: Absolutely, there - - - I believe that
24 there is - - -

25 JUDGE RIVERA: Um-hum.



1 MR. KEEM: - - - and that this - - - that portion
2 of the argument is not preserved, but at the same time, we
3 have these other avenues for this court to go down.
4 Because even if in the future, this statute is determined
5 to be unconstitutional, that does not necessarily help Mr.
6 Talluto.

7 JUDGE GARCIA: Counselor, if we agree with you,
8 and we do what you are asking, would this case have to go
9 back to the SORA court?

10 MR. KEEM: It depends on which way the court
11 went. If it - - - if the court finds that there is
12 discretion in finding a designation, then yes, because this
13 particular trial court stated that it didn't have
14 discretion. If the court determines that the essential
15 elements is the only thing that applies, then no, the court
16 - - -

17 JUDGE GARCIA: But even so, let's say we go on
18 the second ground. Wasn't the ground for a downward
19 departure here that the SORA court relied on the fact that
20 the determination of the defendant as a sexually violent
21 offender will be sufficient to protect the public, so the
22 SORA court departed from a two to a one?

23 MR. KEEM: Yes, Your Honor. That is actual - - -
24 that's true. That is a good point. For that purpose, that
25 would be fine. If the court ruled in that way, then the



1 court could then look at what happens now that he's not a
2 lifetime designation. I would agree with that.

3 ACTING CHIEF JUDGE CANNATARO: Thank you,
4 counsel.

5 MR. OAKES: Good afternoon. May it please the
6 court. My name is Greg Oakes, I'm the District Attorney
7 for Oswego County.

8 Your Honor, the People are asking you to affirm
9 the decision from the fourth department. We believe it was
10 correctly decided by the majority.

11 JUDGE RIVERA: Well, you didn't support this at
12 the SORA court, or at the Appellate Division. You agree
13 that there's something absurd about this outcome, correct?

14 MR. OAKES: There is something askew about it,
15 Your Honor. And it's application to this particular
16 defendant, it does seem unjust. And at the trial court
17 level, we were looking at an equity issue, but really - - -

18 JUDGE RIVERA: Well, why should the judiciary
19 stamp an imprimatur what even you think is unjust?

20 MR. OAKES: Well - - -

21 JUDGE RIVERA: And what the majority of the law
22 thought was unjust?

23 MR. OAKES: And that's exactly it. I mean, we
24 made an equities argument at the trial court, but the trial
25 court judge, I believe was correct in looking at it, that



1 the statute is what guides. And when the fourth department
2 says that their hands are tied - - - and counsel says this
3 is an unreasonable or absurd outcome, there are plenty of
4 statutes that result in absurd and unreasonable outcomes,
5 or which we may deem personally to be unjust or
6 inequitable, but we have to go by the statute and what the
7 words say.

8 ACTING CHIEF JUDGE CANNATARO: That may be so,
9 but aren't you concerned that there is, as Judge Rivera
10 intimated, an underlying constitutionality problem here?
11 Granted, it's not a preserved challenge, but it's a pretty
12 glaring problem from my perspective, anyway.

13 MR. OAKES: Your Honor, I recognize that issue,
14 and it's not the issue that's before this court. Really,
15 as it was decided by the trial court at the Appellate
16 Division below, it's simply a statutory construction issue.
17 There may come a day when that argument has been preserved,
18 when the Attorney General's office has been put on notice,
19 and it's properly before this court. In fact, I understand
20 that there is a case in, I believe it's Canandaigua County,
21 where that issue is being litigated at the county court
22 level. And it may percolate and come up to this court - -
23 -

24 JUDGE SINGAS: I know, but DA Oakes, we have to
25 wait, and then regis - - - people have to register for



1 life. I mean, the practicalities here are severe. And
2 you're saying we should turn a blind's eye to that, and
3 wait for a case that's on all fours that we can decide?

4 MR. OAKES: It - - - unfortunately, that's the
5 way our system is set up, Your Honor. Again, there may be
6 a constitutional issue, and when it's properly presented,
7 and when it's raised below and argued, again, this court
8 can act - - - and again, it would then hopefully apply
9 retroactively. So again, if it were deemed
10 unconstitutional, then this petitioner would have relief at
11 that point, and could potentially re-petition.

12 I share some of those concerns. In preparing for
13 this argument, I spoke with a colleague. And I'm prone to
14 hypotheticals, and in watching the Supreme Court and its
15 decision in Dobbs, this question come up of what would
16 happen to other cases - - - Lawrence v. Texas. And I have
17 family members and dear friends who are in the LGBTQ
18 community, and should Lawrence fall, and they go to a
19 southern state that, all of a sudden, says sodomy is
20 illegal, it's registrable, they then have to come back to
21 New York State and register, be designated a violent
22 offender.

23 JUDGE WILSON: So let me then - - -

24 MR. OAKES: They'll legislate - - -

25 JUDGE WILSON: - - - let me then get you to a - - -



1 - I think I understand where you're going. Let me get you
2 through to the alternate argument that I'm - - -

3 MR. OAKES: - - - yes.

4 JUDGE WILSON: - - - interested in. So when I
5 read 168-N sub 1, it says a determination - - -

6 MR. OAKES: Yeah.

7 JUDGE WILSON: - - - right. That an offender is
8 a sexual predator or a sexually violent offender, which is
9 what we're dealing with here, shall be made by the
10 sentencing court applying the guidelines established in
11 subdivision 5 of section 168-1 of this article. Which is
12 exactly the same language that's used in subdivision 2,
13 which is talking about the risk level determination.

14 MR. OAKES: Right.

15 JUDGE WILSON: Those two things are then both
16 described as determinations when you go through the rest of
17 n. So when I read the words of the statute, I don't find a
18 basis to distinguish between the discretion afforded the
19 SORA court in downwardly departing on the risk level, as
20 compared to the designation. They read the same. It's the
21 same set of words, and the same set of guidelines which I -
22 - - I don't believe - - - I only understand as the
23 guidelines with a capital G, promulgated by the board, but
24 - - -

25 MR. OAKES: Right.



1 JUDGE WILSON: - - - rather the list of factors
2 that are enumerated in subsection 1.

3 MR. OAKES: And Your Honor, as I look at that,
4 yeah, I believe that the designation, whether they're a
5 predator or whether they're violent, I don't believe the
6 court has discretion, because the terms of those, and those
7 specific definitions are set forth in the statute.

8 JUDGE WILSON: But why would it then say that the
9 determination should be made by the court applying the
10 guidelines established in subdivision 5 of section 168-1?
11 And if it's determined statutorily, what do the guidelines
12 have to do with it?

13 MR. OAKES: And - - - and I believe those
14 guidelines apply to the risk level, and where there's a
15 downward departure, or an - - -

16 JUDGE WILSON: That's dealing with subdivision 2.

17 MR. OAKES: - - - overriding - - -

18 JUDGE WILSON: But it's also restated in
19 subdivision 1 which regards the sexually violent offender
20 designation.

21 MR. OAKES: Okay.

22 JUDGE WILSON: I - - - that's where I - - - it
23 seems to me if there's discretion for one, there's
24 discretion for the other, the way the statute is written.

25 MR. OAKES: Right. And I see how the court can



1 reach that conclusion. Again, as I have read it, Your
2 Honor - - -

3 JUDGE WILSON: Well, does that solve the equity
4 problem here? And solve it in a more general way, which is
5 that, if it - - - and in some ways, if there is a
6 constitutional issue lurking here, interpreting the statute
7 as Justice Renwick did in Bullock, and as I'm suggesting
8 now, saves it. Because it gives some discretion in a case
9 like this, where everybody seems to agree, this isn't - - -
10 this isn't proper.

11 MR. OAKES: Right. And I'm not - - - I'm not
12 sure it saves on the constitutional issue, which a - - -
13 again, isn't here.

14 JUDGE WILSON: Right.

15 MR. OAKES: Again, it can make - - - render a
16 particular case particularly more just, in that it does
17 give the court discretion. Again, I generally believe in
18 giving courts discretion so they can make a fact specific
19 determinations based upon the equities of that case.
20 However, as I do read this statute, Your Honor, I realize
21 the parallels in those language, but I've read it as, you
22 know, the court does not have discretion in this aspect,
23 only for the rating for the departure and overrides. And
24 again, and what I talked about - - -

25 JUDGE RIVERA: Well, we'll leave it to the



1 vagaries of an individual judge. While this judge might
2 have been hospitable, another judge may not. And then
3 you're going to have a disparate treatment between two
4 people who may be absolutely - - -

5 MR. OAKES: Similarly situated.

6 JUDGE RIVERA: - - - placed thoroughly.

7 MR. OAKES: Yep. And a few moments ago when I
8 talked about potential concerns on the constitutional
9 issues, what my colleague reminded me though, is again, we
10 are bound by the statutes. Whether we personally agree
11 with it, and we are trying to anticipate potential
12 disparate treatment or unequal treatment, it is up for the
13 legislature. There is a separation of powers that we as
14 the executive branch through the prosecution, or judiciary,
15 have to follow what the law says.

16 You know, Judge Singas, as you mentioned, the
17 statute was amended in '99 to add in this provision. And
18 then in 2002, there was language that was excised or
19 removed out, where it was talking about if there is a term
20 of imprisonment of more than one year, or where the death
21 penalty applied. The legislature, after its initial
22 enactment, revisited this statute, and decided to leave
23 that language in there. Presumably, making a conscious
24 decision of whether we agree or not - - -

25 JUDGE RIVERA: What do you think that - - - just



1 clarify - - -

2 MR. OAKES: Yeah.

3 JUDGE RIVERA: - - - I know you've mentioned it
4 in your brief, but just clarify for us today. What do you
5 think animates that conscious decision? From the
6 legislature's side - - - apart from inertia, right - - -

7 MR. OAKES: I - - - and I - - -

8 JUDGE RIVERA: - - - it's on the long list, we'll
9 get to it when we get to it, not that - - - not that.

10 MR. OAKES: What animates the legislative
11 decision, I really can't be sure, Your Honor. Again, it
12 may be a conscious decision to say we don't know what the
13 laws are in other states. And through federalism, we have
14 fifty-two - - - I'm sorry, we have fifty laboratories
15 across the United States, and in some sense sixty-two
16 laboratories within the state. And again, a - - - another
17 state may be ahead of us on certain provisions of the law.
18 For a long time, other states led us in having revenge porn
19 statutes, where we didn't have that. And again, there may
20 be an offense or something that occurs. Again, in the last
21 twenty years, since this was passed, we've seen all sorts
22 of computer crimes. Some of those, unfortunately,
23 involving children. Where other states are going to be
24 ahead of us, where common sense would dictate those should
25 be registrable, but our legislature just hasn't gotten



1 there yet.

2 ACTING CHIEF JUDGE CANNATARO: Do you know if any
3 other state does what New York does in this section?

4 MR. OAKES: I don't, Your Honor. But, you know,
5 Judge Rivera, to get your point, I don't know what - - - I
6 don't know if the motivation of the legislature matters.
7 As was mentioned, the commission out of this court's
8 brought this issue to their attention. Bills have been
9 submitted. And then in the recent few years, we've had
10 one-party control of the assembly, senate, and
11 governorship, and yet that party hasn't acted on this. I
12 would think consciously, and whether that's - - -

13 JUDGE RIVERA: I recall in the brief you did
14 suggest it might not be what actually motivated them - - -

15 MR. OAKES: Right.

16 JUDGE SINGAS: - - - but a suggestion for why the
17 statute might be written this way.

18 MR. OAKES: Well, I - - - and I think the reason
19 why the statute's there is to be more encompassing, because
20 we can't always anticipate other offenses, and I think part
21 of it's also really trying to give respect to other states.
22 With the idea of recognizing that if somebody's committing
23 an offense there, they shouldn't be able to escape
24 punishment or registration in that state simply by coming
25 across the border to New York.



1 ACTING CHIEF JUDGE CANNATARO: Thank you,
2 counselor.

3 MR. OAKES: Thank you, Your Honors.

4 MR. KEEM: Justice Rivera, you mentioned
5 disparate treatment, and that's something that's already
6 happening. There's - - - in the reply brief I cited to a
7 half dozen cases where an individual was convicted of an
8 out-of-state crime vio - - - that wasn't violent, and was
9 not designated violent. So it's already happening. And
10 Mr. Talluto just happened to have - - - be unlucky with
11 what judge he was given, and that - - - that's just not
12 right. Whether it's to return the matter for a
13 discretion - - -

14 JUDGE GARCIA: Counselor, is a crime that
15 involves forcible compulsion a violent crime?

16 MR. KEEM: Your Honor, that - - - I mean,
17 you - - - I would say this particular crime is not a
18 violent crime. Mr. Talluto's - - -

19 JUDGE GARCIA: But the judge - - -

20 MR. KEEM: - - - and all of the parties in - - -

21 JUDGE GARCIA: - - - where I'm going is - - -

22 MR. KEEM: - - - I - - -

23 JUDGE GARCIA: - - - the judge here found
24 forcible compulsion, right? That's what got your client to
25 a level two - - -



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MR. KEEM: And but - - -

JUDGE GARCIA: - - - so is this really the case to argue it's not a violent crime?

MR. KEEM: If that's the finding, then we - - - when we return it back, Judge Todd - - - Judge Todd or whoever, will make a determination whether a downward departure is appropriate, and that a - - - that's the more appropriate fashion - - - the way to do this, to not have a disparate treatment among defendants in across the state.

Thank you, Your Honor.

ACTING CHIEF JUDGE CANNATARO: Thank you, counselor.

(Court is adjourned)



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

I, Kelly Vadeboncoeur, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Daniel Talluto, No. 98 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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