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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 16 & 17

TREVIS D. BAKER,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
January 8, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start  
2 with numbers 16 and 17, People v. Trevis D. Baker.

3 Counselor, do you want some rebuttal time?

4 MR. DAVIS: Two minutes, please, Judge.

5 CHIEF JUDGE LIPPMAN: Two minutes, sure.  
6 Go ahead.

7 MR. DAVIS: Timothy Davis on behalf of Mr.  
8 Baker.

9 One of the principal characteristics by  
10 which we distinguish a free nation from a police  
11 state is the freedom of individuals to verbally  
12 oppose or challenge police action without fear of  
13 arrest.

14 JUDGE READ: Do we have to overrule  
15 Tichenor to find in your favor?

16 MR. DAVIS: No, you do not.

17 JUDGE READ: Why not?

18 MR. DAVIS: In Tichenor, it appeared this  
19 court said that "abusive" under the disorderly  
20 conduct statute could mean two separate things: one,  
21 either fighting words; or two, words directed at  
22 inciting a crowd to acts of violence. Because in  
23 Tichenor, what happens is, the person - - - the  
24 defendant, Tichenor, obviously uses fighting words.  
25 I believe he spits in front of the police officer,

1 calls him, I think it was, a fucking pig, shoves him  
2 on the shoulder, when the police officer turns to him  
3 he says "don't fuck with me". And that's when the  
4 police officer goes to arrest him. That's clearly  
5 fighting words.

6 JUDGE READ: Well, here we had what? We  
7 had an assault of a police officer sometime before  
8 this other incident where the girlfriend or the woman  
9 was taping and there were a number of people and he  
10 said some rather insulting things to the police  
11 officer. Is that so much different?

12 MR. DAVIS: It's tremendously different.  
13 The assault in that case happened, like, a month  
14 before. That was when the police were arresting Mr.  
15 Baker on another incident - - -

16 JUDGE READ: Um-hum.

17 MR. DAVIS: - - - totally separate from  
18 this. In this case, the girlfriend is videotaping  
19 the police when they're in her neighborhood. The  
20 police, all they want to know, supposedly, is who she  
21 is and what she's doing. Instead of just going up to  
22 her and saying to her, ma'am, what's your name and  
23 why are you taping me, they - - -

24 CHIEF JUDGE LIPPMAN: Is the videotaping  
25 the unique part of this case? Is that what makes it

1 different from a lot of these other cases?

2 MR. DAVIS: I don't think so. Because I  
3 think the police officer testified almost directly in  
4 accordance with what is actually shown. And the  
5 police officer himself admitted that there was a  
6 private con - - -

7 CHIEF JUDGE LIPPMAN: I mean, they  
8 disagree, though - - - they disagree as to the number  
9 of people who were there?

10 MR. DAVIS: Well, really the number of  
11 people there, I would argue, is irrelevant in this  
12 case, because the people are simply standing there.  
13 Mr. - - - Mr. Baker is not inciting them to attack  
14 the police officers.

15 CHIEF JUDGE LIPPMAN: What is he doing?  
16 What is he doing?

17 MR. DAVIS: He's simply have a conversation  
18 with the police officer, where the police officer  
19 explains to him - - - and this is in the police  
20 officer's own words, when asked why he ran the plate,  
21 the police officer says, either I can do whatever I  
22 want to do or run whatever plate I want to run. And  
23 Mr. Baker says - - - stands up and says, "Fuck you;  
24 that's harassment." There's no doubt that's a  
25 private conversation heard only by the police - - -

1 CHIEF JUDGE LIPPMAN: So is it - - -

2 MR. DAVIS: - - - officer.

3 CHIEF JUDGE LIPPMAN: - - - is it all a  
4 private conversation, even though there are people  
5 around there? Or how does that work?

6 MR. DAVIS: No. I would agree that the  
7 second remark is not a private - - - private  
8 conversation.

9 CHIEF JUDGE LIPPMAN: As he's walking away?

10 MR. DAVIS: As he's walking back. But the  
11 police officer says to him - - - yells out the window  
12 - - - and he admits to this in his testimony - - -  
13 what did you say? And that's when Mr. Baker, who's  
14 walking backwards across the street - - -

15 CHIEF JUDGE LIPPMAN: Turns around.

16 MR. DAVIS: - - - then says something to  
17 the effect of "that's harassment". "Motherfucker"  
18 may have been used, and "fuck you" again. There's no  
19 doubt there's people hearing that. But he's not  
20 inciting them to some act of violence. And it's  
21 clear from the tape, they're just standing around  
22 watching, which this officer said was not unusual.  
23 He said whenever you come into a neighborhood and  
24 park the cars and begin to roust people to see who's  
25 a suspect and who's not, that a crowd of people

1 gather.

2 JUDGE GRAFFEO: Well, building - - -  
3 building on what you've just been talking about, I  
4 want to ask you about the analytical framework.  
5 Because I don't - - - I don't necessarily see that  
6 the pure speech cases are equivalent to this.  
7 Because this is a statute that has a public harm  
8 component. So in Weaver and in Munafo - - - if I'm  
9 pronouncing that correctly - - - and also in Todaro,  
10 the court always focused on the public harm  
11 requirement. And don't you have a decent case on  
12 that?

13 MR. DAVIS: Well, yes. I would say there's  
14 no public harm here.

15 JUDGE GRAFFEO: I mean, I don't see why we  
16 have to analyze the pure speech cases, why we can't  
17 just look at what we have on the statutes that have  
18 public harm as a component. Isn't that a distinct  
19 factor - - -

20 MR. DAVIS: Well, I think that is a  
21 distinct - - -

22 JUDGE GRAFFEO: - - - in our case law?

23 MR. DAVIS: - - - there is. There is no  
24 public harm here. There is no public harm. People  
25 standing around watching is not - - - and listening

1 to somebody speak in public, using nonfighting words,  
2 words that don't incite anyone to violence - - -

3 CHIEF JUDGE LIPPMAN: Well, therefore,  
4 where do we have to - - -

5 MR. DAVIS: - - - that's - - - there's no -  
6 - -

7 CHIEF JUDGE LIPPMAN: - - - deal with free  
8 speech?

9 MR. DAVIS: I guess you don't have to deal  
10 with free speech. You could simply say that this is  
11 - - - that there's no public component to this.

12 That's correct. But I mean, I think, though, if  
13 that's the case, you have to either make clear why  
14 this is different from Weaver and those other cases.  
15 And that's, I think, the speech is involved in that.

16 JUDGE SMITH: Well, why is it different  
17 from Weaver?

18 MR. DAVIS: Well, in this particular case,  
19 you have a - - - one brief comment with Mr. Baker  
20 walking back across the street, simply saying I don't  
21 want anything more to do with you. As one federal  
22 judge I cited, I think it was in the McCormick case,  
23 says this is R-rated language of simply buzz off, get  
24 away from me.

25 In Weaver, what you have is repeated - - -

1 I'm not sure of the exact language used in Weaver - -  
2 - but what you have is a distraught woman sitting on  
3 a curb in a wedding dress, which is some sort of a  
4 public spectacle, I think, in and of itself - - -  
5 she's weeping - - -

6 JUDGE SMITH: In the middle of the night in  
7 a peaceful village. This wasn't the middle of the  
8 night in a peaceful village?

9 MR. DAVIS: No. And in that case you have  
10 this - - -

11 JUDGE GRAFFEO: Aren't you a little bit - -  
12 -

13 MR. DAVIS: - - - guy - - - sorry.

14 JUDGE GRAFFEO: - - - aren't you a little  
15 bit similar - - - I mean, I would think that you  
16 could argue you're a bit similar to the case with the  
17 farmer and the rifle. There were some other people  
18 around, but there wasn't evidence of any intent to  
19 incite the other individuals.

20 MR. DAVIS: That's correct.

21 JUDGE GRAFFEO: He was on his land. Here,  
22 you're kind of near their home. That - - - it just  
23 seems to me that our court, generally, has looked at  
24 that public harm aspect in analyzing the cases and  
25 not done it strictly on pure speech.



1                   MR. DAVIS: I guess the reason why I dealt  
2 with the speech issues is because I think the Supreme  
3 Court has dealt with it a little bit differently, and  
4 they've looked at this - - - the speech - - -

5                   JUDGE GRAFFEO: But a lot of their statutes  
6 didn't have a public harm requirement.

7                   MR. DAVIS: Well, actually, Cohen v.  
8 California was a breach of the peace statute, as was  
9 Chaplinsky. And Texas v. Johnson, Virginia v. Black,  
10 the cross-burning statutes, both of those had a  
11 public element. But what the court has said is that  
12 speech can only be prosecuted, essentially, if there  
13 is a public harm, which is why fighting words can  
14 actually be prosecuted, because there's something  
15 beyond - - -

16                  JUDGE SMITH: So you say the statutory and  
17 the Constitutional issues sort of merge?

18                  MR. DAVIS: Yes.

19                  JUDGE SMITH: But - - - or another way of  
20 saying that is that our statute complies with the  
21 Constitution, so what's the problem?

22                  MR. DAVIS: Yes. But I'm saying our  
23 statute complies with the Constitution if "abusive"  
24 is limited to fighting words or, basically, the  
25 Brandenburg scenario.

1                   JUDGE SMITH:  And - - - yes, but there - -  
2                   - I mean, as Judge Graffeo's saying, there is  
3                   precedent that our statute is more limited than some  
4                   of those the Supreme Court had problems with.

5                   MR. DAVIS:  I think Tichenor, although  
6                   Tichenor did not conclusively close the door to a  
7                   broader interpretation, the way I read Tichenor is  
8                   that "abusive" is limited to fighting words or  
9                   incitement.

10                  JUDGE PIGOTT:  Why is this not a mixed  
11                  question of law and fact?

12                  MR. DAVIS:  This court's held before that  
13                  when the facts are not in dispute - - -

14                  JUDGE PIGOTT:  I know.  But - - -

15                  MR. DAVIS:  Right.

16                  JUDGE PIGOTT:  - - - why isn't this one a  
17                  mixed question of law and fact?  I mean, the officer  
18                  testified that there was a crowd behind the camera.  
19                  The judge said, you know, there was this possibility  
20                  of upset.  Aren't we bound by that?

21                  MR. DAVIS:  No.  First of all, I don't  
22                  remember the court specifically saying there was a  
23                  possibility of the crowd becoming upset.

24                  JUDGE PIGOTT:  I was paraphrasing.

25                  MR. DAVIS:  Excuse me?

1 JUDGE PIGOTT: I was paraphrasing.

2 MR. DAVIS: May I just finish? My time is  
3 up?

4 CHIEF JUDGE LIPPMAN: Yes, go ahead.

5 MR. DAVIS: This court has also held,  
6 following the Supreme Court and New York Times v.  
7 Sullivan, that when it comes to free speech issues  
8 and the First Amendment, in carving out the line  
9 between what is permitted speech and what is not,  
10 that this court is not bound by the facts found below  
11 by the court, and must actually delve into the facts  
12 and determine whether or not they were reasonable  
13 based upon the record.

14 CHIEF JUDGE LIPPMAN: Okay, counselor.  
15 Thanks. Let's hear from your adversary.

16 MR. DAVIS: Thank you.

17 MR. KAEUPER: Good afternoon. Geoffrey  
18 Kaeuper for the People.

19 CHIEF JUDGE LIPPMAN: Counselor, where's  
20 the incitement here? What happened that would lead  
21 one to believe that - - -

22 MR. KAEUPER: Right.

23 CHIEF JUDGE LIPPMAN: - - - he was rallying  
24 some kind of - - -

25 MR. KAEUPER: Right.

1 CHIEF JUDGE LIPPMAN: - - - protest or  
2 whatever?

3 MR. KAEUPER: I think we have to look at  
4 the whole context, and not just that snippet of a few  
5 seconds when he's cursing at the officer.

6 CHIEF JUDGE LIPPMAN: What is the context -  
7 - -

8 MR. KAEUPER: The whole - - -

9 CHIEF JUDGE LIPPMAN: - - - beyond what we  
10 see there?

11 MR. KAEUPER: Right. The whole context is  
12 you have a group of people on the street who are  
13 berating these - - -

14 CHIEF JUDGE LIPPMAN: How big is the group?

15 MR. KAEUPER: I believe the officer  
16 testified it was about ten people.

17 JUDGE SMITH: But some of them - - - some  
18 of them, he said, arrived as he was arresting the  
19 defendant. So it really was only five or six at the  
20 time he makes the decision to arrest?

21 MR. KAEUPER: That - - - right. That's  
22 probably right. And when you see the beginning of  
23 the video, you see about that number of people sort  
24 of milling about in various places at the - - -

25 JUDGE SMITH: But you don't - - - but you

1 don't see on the video the crowd that he described.  
2 He says they're behind the camera.

3 MR. KAEUPER: Right. No, no, I was talking  
4 just at the very beginning of the video when the  
5 defendant, I don't think, is even in the screen at  
6 that point. You do see - - -

7 JUDGE SMITH: So it was not a deserted  
8 street?

9 MR. KAEUPER: Right. It's definitely not a  
10 deserted street. It's definitely heard by everyone  
11 there.

12 CHIEF JUDGE LIPPMAN: But what did he do -  
13 - -

14 MR. KAEUPER: But - - -

15 CHIEF JUDGE LIPPMAN: - - - to incite or -  
16 - -

17 MR. KAEUPER: Right. But - - - yes, but so  
18 the context, you have the girlfriend videotaping  
19 this. She's constantly yelling at the officers,  
20 "This is harassment," et cetera, et cetera. You've  
21 got one guy showing off - - - you know, look at the  
22 marks on my wrist from where they handcuffed me.  
23 It's all in this context of people - - -

24 JUDGE SMITH: Where's the harm? I mean,  
25 aren't people allowed to do that, to complain - - -

1 MR. KAEUPER: Oh, absolutely. And nobody  
2 gets arrested for doing that.

3 JUDGE SMITH: And who besides the off - - -  
4 I mean, you don't rely just on the insult to the  
5 officer, do you? I mean, the insult to the officer  
6 would not be enough to justify an arrest for  
7 disorderly conduct, or would it?

8 MR. KAEUPER: No, no. It certainly has to  
9 have the public dimension.

10 JUDGE SMITH: Where - - - what happened bad  
11 to the public here?

12 MR. KAEUPER: Well, nothing bad happened,  
13 but that's not - - -

14 JUDGE SMITH: Or was threatened?

15 MR. KAEUPER: - - - a requirement. Yes.  
16 Right. I think the threat is here, you have a group  
17 of people who are very angry at police already. And  
18 this guy's going to come in and sort of amplify.

19 CHIEF JUDGE LIPPMAN: What's the  
20 significance that it's being videotaped?

21 MR. KAEUPER: Well, I mean, I think that  
22 contributes to the overall situation. This is a - -  
23 -

24 JUDGE GRAFFEO: Well, several times in the  
25 video she seems to comment that her lawyer told her

1 to videotape.

2 MR. KAEUPER: Right, right. Yes, I - - -

3 CHIEF JUDGE LIPPMAN: If she hadn't been  
4 videotaping, is this situation any different?

5 MR. KAEUPER: I don't think - - - I don't  
6 think it fundamentally changes it. Whether - - -

7 JUDGE SMITH: How do we know the crowd was  
8 angry?

9 MR. KAEUPER: I mean, I think the videotape  
10 shows us that. The girlfriend is yelling, "This is  
11 harassment," and - - -

12 JUDGE SMITH: I didn't see an angry mob on  
13 the videotape.

14 MR. KAEUPER: I don't know that I would say  
15 it was an angry mob. But again, I mean, we're  
16 talking five to ten people - - -

17 JUDGE SMITH: Was anybody except the  
18 defendant and his girlfriend angry?

19 MR. KAEUPER: I think they're all angry. I  
20 mean, I think that's why - - -

21 JUDGE SMITH: How do you know that?

22 JUDGE GRAFFEO: I don't think I heard any  
23 other voices on the videotape other than the  
24 girlfriend, the defendant, and the police officer.

25 MR. KAEUPER: Well, there certainly is the

1 person - - -

2 JUDGE GRAFFEO: There's a voice - - -

3 MR. KAEUPER: - - - who shows - - -

4 JUDGE GRAFFEO: - - - somebody near - - -

5 near the girlfriend while she's videotaping. It

6 sounds like she's talking to somebody standing near

7 her, but - - -

8 MR. KAEUPER: Right.

9 JUDGE GRAFFEO: - - - I - - -

10 MR. KAEUPER: And then - - -

11 JUDGE GRAFFEO: - - - you saw a crowd on

12 the video?

13 MR. KAEUPER: There are definitely people  
14 on the street there, yes, absolutely. Now, at the  
15 time when he's arrested, you don't see because of the  
16 position of the camera.

17 CHIEF JUDGE LIPPMAN: And she's basically  
18 narrating this, right, as to what's - - -

19 MR. KAEUPER: Right.

20 CHIEF JUDGE LIPPMAN: - - - happening?

21 MR. KAEUPER: Right. But at the time of  
22 arrest, you do hear numerous people make sounds - - -  
23 gasping sounds or something - - - you know, reacting  
24 to the arrest. So I think there is - - - the  
25 videotape, even though it doesn't show you - - -



1 CHIEF JUDGE LIPPMAN: What specifically  
2 that's said, really, meets the statutory requirement  
3 here?

4 MR. KAEUPER: I think when you go into a  
5 situation like that where you have a group of people  
6 - - - whether you could describe it as a mob or not -  
7 - - but you have a group of people on the street who  
8 are vigorously criticizing the police - - -

9 CHIEF JUDGE LIPPMAN: So then there's a  
10 different standard when there's a group of people who  
11 are agitated as opposed to - - -

12 MR. KAEUPER: When - - - and - - -  
13 absolutely. And you go in and inflame them.

14 CHIEF JUDGE LIPPMAN: - - - just a few  
15 people and they're standing around watching?

16 MR. KAEUPER: Right. I mean, so I mean the  
17 defendant has said - - -

18 JUDGE SMITH: You're not really saying that  
19 vigorous criticism of the police is disorderly  
20 conduct?

21 MR. KAEUPER: No, no, no, no. Absolutely  
22 not. Absolutely not. But if you have - - - I mean,  
23 you act within the context in which you are. And  
24 that's the context in which the defendant chose to  
25 confront this officer, accuse him of harassment, yell

1           obscenity at him. And, you know, I think the officer  
2           had good reason to believe that that was likely to  
3           further inflame this crowd and become a potential  
4           public problem.

5                           And I think - - -

6                           JUDGE GRAFFEO: Which of our cases do you  
7           think is most akin to your situation?

8                           MR. KAEUPER: Well, I mean, in some ways, I  
9           suppose, maybe Todaro is. I mean, Tichenor, I think,  
10          would have to be overruled; I think Todaro probably  
11          also. The guy's on the street corner and the police  
12          officer tells him to move along, and he says, you  
13          can't tell me to f-in' move. You know, I think that  
14          case is less clearly disorderly conduct.

15                          CHIEF JUDGE LIPPMAN: And what is the  
16          significance of the police officer saying I don't  
17          know why I'm arresting you, when he asks why are you  
18          arresting me, or what's this all about, or whatever  
19          it was?

20                          MR. KAEUPER: I don't remember that comment  
21          from the officer. But I mean, I think it's clear he  
22          knows what he's arresting him for. I mean, he radios  
23          to his partner and tells him he's going to arrest him  
24          for disorderly conduct. I think the fact that he  
25          didn't want to have a - - - continue to have - - -

1 CHIEF JUDGE LIPPMAN: Didn't want to have a  
2 confrontation with him?

3 MR. KAEUPER: Yes. I mean, I don't think  
4 he has to answer every question that somebody puts to  
5 him.

6 So - - - but I think then, in that broader  
7 context, we don't have just a crowd of people  
8 standing around. This isn't a matter of just mere  
9 spectators. These are people who are already  
10 inflamed about exactly what he's going to try to - -  
11 -

12 CHIEF JUDGE LIPPMAN: What are - - -

13 MR. KAEUPER: - - - amp up.

14 CHIEF JUDGE LIPPMAN: - - - what are the  
15 free speech implications of all of this?

16 MR. KAEUPER: I don't think there are free  
17 speech implications.

18 CHIEF JUDGE LIPPMAN: So this is a straight  
19 statutory case?

20 MR. KAEUPER: Absolutely. And I guess I  
21 would say that if - - - if the argument is that this  
22 is - - - that the statute, although Constitutional,  
23 is unconstitutional as applied here, I think that  
24 can't - - - that argument can't work, because this is  
25 a probable cause case. So I mean, the officer

1 doesn't have to assess Constitutionality; he has to  
2 assess do I have probable cause to believe somebody's  
3 violated a statute. He doesn't have to sit there and  
4 assess - - -

5 JUDGE SMITH: Well, if the arrest is made  
6 under a statute that's unconstitutional as applied,  
7 do we suppress the evidence or not?

8 MR. KAEUPER: I don't believe we do.

9 JUDGE SMITH: So you - - - so you say that  
10 we don't reach the Constitutional issue, because if  
11 it's within the statute, then you had probable cause  
12 to arrest, even though the prosecution might have  
13 failed?

14 MR. KAEUPER: Right, absolutely. And the  
15 exclusionary rule is designed to deter police  
16 conduct. So - - -

17 JUDGE SMITH: On the other hand, I suppose,  
18 when - - - we still, if we're going to interpret the  
19 statute, we have to - - - we would probably not want  
20 to interpret it in a way that would render it  
21 unconstitutional?

22 MR. KAEUPER: Right, right. But I mean - -  
23 -

24 JUDGE SMITH: So don't we go around in a  
25 circle? You're not interpreting the Constitution;

1           you're interpreting the statute. But if he wasn't  
2           complying with the statute, then the arrest is bad,  
3           and the evidence gets suppressed?

4                     MR. KAEUPER: I'm not sure I follow that.

5                     JUDGE SMITH: The Const - - - I see your  
6           point that if we - - - a Constitutional violation  
7           doesn't lead to suppression.

8                     MR. KAEUPER: Um-hum.

9                     JUDGE SMITH: But a statutory violation  
10          does. And we should interpret the statute to be in  
11          compliance with the Constitution.

12                    MR. KAEUPER: Sure.

13                    JUDGE SMITH: So if you have a - - - so if  
14          you would have a Constitutional violation, then you  
15          probably do have a statutory violation. And we've  
16          been - - -

17                    MR. KAEUPER: Right.

18                    JUDGE SMITH: - - - wasting our breath for  
19          the last five minutes.

20                    MR. KAEUPER: Right. Yes, sorry. I think  
21          that's correct. But I think here the statute is  
22          Constitutional. And I think the defendant here  
23          violated the statute, or even if he couldn't have  
24          been convicted at trial, even if this were a legal  
25          sufficiency case and you would have said no, not

1           legally sufficient, this is probable cause. And I  
2           think the officer had probable cause to believe that  
3           the defendant intended to incite the group of people  
4           that was there.

5                       And I think this - - - I mean, maybe not  
6           the most important point, but as far as the video  
7           goes, I think the video - - - the fact that she's  
8           videotaping this is - - - we heard about police  
9           states and so forth - - - I don't think officers  
10          typically do things that they think are illegal when  
11          somebody's obviously videotaping them there. So I  
12          think the notion that this is some sort of police  
13          state is overblown a bit.

14                      The - - - I think the officer had - - -  
15                      JUDGE SMITH: On the other hand, vigorous  
16           criticism of police officers is pretty close to the  
17           core of free speech protection, isn't it?

18                      MR. KAEUPER: I would think that's  
19           certainly at the core of free speech protection,  
20           absolutely. But again, nobody got arrested for  
21           criticizing the police. I mean, the police are  
22           sitting there for a long - - - this goes on for a  
23           long time. And they're taking all of it. Nobody's  
24           jumping up and saying I'm going to arrest them for  
25           criticizing us. They're taking all of that for - - -

1 I don't know how long it goes on - - -

2 CHIEF JUDGE LIPPMAN: Well, how long is the  
3 video?

4 MR. KAEUPER: I don't recall. And it's  
5 broken up. There are things that interrupt it. I'd  
6 have to go back and look at the timestamp - - -

7 JUDGE GRAFFEO: The end of the tape - - -

8 MR. KAEUPER: - - - but it is timestamped.

9 JUDGE GRAFFEO: - - - at the end of the  
10 tape, it seems like somebody else is holding the  
11 video camera, because it's - - -

12 MR. KAEUPER: That - - - yes, I believe  
13 that's correct. And then the girlfriend is sort of  
14 walking and sort of walking in the direction that the  
15 car is taking the defendant; yes.

16 CHIEF JUDGE LIPPMAN: Okay, counselor.  
17 Thanks.

18 MR. KAEUPER: Thank you.

19 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

20 MR. DAVIS: Just a few things. Under the  
21 People's theory of the disorderly conduct statute,  
22 the more offensive or egregious the police action,  
23 the less right or privilege that a person would have  
24 to criticize that conduct for fear that people who  
25 have been aggrieved or offended by the police action

1 would become upset.

2 In Texas v. Johnson, the Supreme Court said  
3 very clearly, "Every expression of a provocative idea  
4 will not incite a riot. And the government cannot  
5 presume that" - - -

6 CHIEF JUDGE LIPPMAN: I think he's talking  
7 about contextually - - - looking at this in the  
8 contextual sense that we're talking about the  
9 situation where it's the middle of the night in a  
10 quiet town; a situation where you're on a street and  
11 there are a number of people around. He's just  
12 saying you have to put it into context.

13 MR. DAVIS: Well, I would disagree, I guess  
14 with the People's characterization of the video,  
15 then. There is no yelling at the police officers.

16 CHIEF JUDGE LIPPMAN: No, no. But you  
17 agree there's a contextual - - -

18 MR. DAVIS: I would agree there's a  
19 contextual - - -

20 CHIEF JUDGE LIPPMAN: - - - piece to this?

21 MR. DAVIS: - - - yes. And what is  
22 important about the con - - - is the context here,  
23 are the words actually spoken by Mr. Baker. He  
24 doesn't incite anyone. He's not saying let's get the  
25 police. He's not running up to the police and



1 saying, "motherfucker". He's walking away. He's  
2 trying to disengage from this situation.

3 There is no - - - there is no way to look  
4 at that video and Mr. Baker's actions and reach the  
5 conclusion that he's trying to incite anybody to do  
6 anything. He's criticized the police officer, told  
7 him what he thinks of him, and is then leaving.

8 To the extent the situation is exacerbated,  
9 it's exacerbated by the police officer not refusing  
10 to take - - - acknowledge Mr. Baker's comments for  
11 what it was, and then leave.

12 Under Brandenburg, it's clear that not - -  
13 - there's a two-part test. Not just that the crowd  
14 is likely to be incited, but that the speech actually  
15 used by the individual must be intended to incite the  
16 riot. It can't be like a negligent incitement by  
17 simply presuming that somebody, upon hearing the F-  
18 word, is going to lose control and then go attack a  
19 police officer.

20 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank  
21 you both. Appreciate it.

22 MR. DAVIS: Thank you.

23 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Trevis D. Baker, No. 16 & 17 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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