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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 116

DAYSHAWN CROOKS,

Appellant.

20 Eagle Street
Albany, New York 12207
June 02, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Good afternoon.

2 First matter on today's calendar is number 116,

3 People v. Dayshawn Crooks.

4 Counsel.

5 MR. HUG: Good afternoon, Your Honors.

6 Your Honor, may I request two minutes of

7 rebuttal time?

8 CHIEF JUDGE DIFIORE: Yes, sir.

9 MR. HUG: Thank you, Judge.

10 Your Honors, my name is Matthew Hug, I

11 represent the appellant, Dayshawn Crooks.

12 It is the appellant's position that the
13 trial court erred in denying the appellant's request
14 for a Darden hearing, which is a very minimal hearing
15 that does not compose too much on the court or on the
16 identity - - -

17 JUDGE PIGOTT: Well, you've read your
18 opponent's brief, wasn't there other - - - wasn't
19 there a basis for the search warrant besides any
20 claimed CI?

21 MR. HUG: No, I don't believe so, Judge. I
22 think that what the People are hanging their hat on
23 really is the second controlled buy; I don't think
24 that their argument has any weight with respect to
25 control buy number one, because that one took place

1 entirely within the home, which was a multiunit
2 building.

3 At best, they heard audio, but without the
4 CI to say this transaction occurred in the
5 defendant's apartment, in the - - - or as opposed to
6 a common space, or one of the other units, there was
7 no evidence put forward to either the superior court
8 or the local court that issued the warrant that the -
9 - - this was the defendant's voice, there was no
10 voice recognition evidence put in.

11 Flatly, it's a Hamilton case - - - type
12 case from the Third Department, where it entirely
13 happened inside the building, and without the
14 statements of the CI - - -

15 JUDGE STEIN: What about the second buy?

16 MR. HUG: The second buy is more arguable,
17 I'll - - - I will admit, but I still think that there
18 are significant holes that would have required to be
19 filled in by the CI. Namely - - -

20 JUDGE STEIN: Well, and all you need is
21 probable cause, right, so it didn't have to be - - -

22 MR. HUG: Yes, all you need is probable
23 cause.

24 JUDGE STEIN: - - - proof beyond a
25 reasonable doubt. Right?

1 MR. HUG: Right. I agree.

2 JUDGE STEIN: So what's - - - what are the
3 big holes?

4 MR. HUG: Well, the whole is that the CI
5 leaves the visual of all the members of the
6 surveillance team according to Wood. So for a
7 period, he's unseen.

8 He makes a telephone call, but there is no
9 evidence to substantiate what telephone number he
10 dialed while he is out - - - outside of their visual.
11 They say that he called the defendant and someone
12 changed the meet location. And then there is a meet,
13 but while the officer testifies that they saw
14 interaction, there is no testimony in the record that
15 we saw a glassine envelope or we saw anything.

16 JUDGE GARCIA: But they search him, the CI,
17 before he goes into the meet, right, and then he is
18 in their line of sight until he has the meeting, and
19 then when he comes out, they search him and he has
20 the drugs.

21 MR. HUG: This is on the first one?

22 JUDGE GARCIA: On the one you're just
23 talking about.

24 MR. HUG: On the second one, no, they lose
25 - - - they lose visual of him entirely, of the CI.

1 JUDGE ABDUS-SALAAM: But they do have audio
2 recording of him throughout, right?

3 MR. HUG: Yes. They're - - - they're
4 listening or recording audio of the - - - on a wire
5 that's attached to the - - - to the complainant - - -
6 to the CI.

7 JUDGE FAHEY: You know - - - you know the
8 underlying purpose of Darden of course is to
9 establish that there is a confidential informant.

10 MR. HUG: Yes.

11 JUDGE FAHEY: And that seems pretty clearly
12 established in the absence of a Darden hearing here.
13 And so I thought to myself, well, maybe the
14 observations themselves that there were some verbal
15 observations on the second buy, but some of it was
16 nonverbal, and it doesn't seem to be that you would
17 really draw any distinction between those.

18 So on that spectrum of cases, from Farrow
19 to Adrion, where would you put this?

20 MR. HUG: I would put it - - - I would put
21 it closer to - - - well, Farrow and Adrion, one is a
22 continuous observation, and we don't have that
23 because, according to Wood, we lose visual of the CI.

24 JUDGE FAHEY: Um-hum.

25 MR. HUG: It's not Farrow, because Farrow

1 is really not relying on the CI much at all, aside
2 from the tip that a drug deal was going to go down in
3 a particular location. So when the police watch the
4 transaction, and they - - - they actually testify
5 that they saw one or two pink glassine envelopes, and
6 then an exchange, that that was enough for probable
7 cause.

8 JUDGE FAHEY: You're talking about Farrow
9 now.

10 MR. HUG: Right.

11 JUDGE FAHEY: I guess the question would
12 be, what about this case would make us question the
13 existence of the CI, that couldn't be sustained by
14 the simple observation of the police officers, seeing
15 and hearing what he was doing.

16 MR. HUG: Well, I think that you're going
17 solely on an audiotape, which I think is troubling.
18 You know, even if this court doesn't find it
19 troubling in this particular case, it should be
20 troubling as a rule that an audiotape can - - - can
21 substantiate the existence of a CI.

22 Especially under the circumstances where
23 the police are - - - I mean, in this case, the
24 prosecutor initially told the superior court there
25 wasn't a CI, comes back and says that there was, and

1 then we have - - - also, keep in mind we have a
2 procedure in place, that if the People have audio,
3 and they want to try extrinsic evidence, this court
4 has provided that in a situation where the CI would
5 be exposed by a Darden hearing, they can bring that
6 to the attention of the superior court, and provide
7 evidence that the CI is unintentionally unavailable,
8 and then they can use extrinsic evidence like an
9 audiotape.

10 JUDGE PIGOTT: Did the - - - did the judge
11 have the audio tapes? The judge that authorized the
12 warrant?

13 MR. HUG: It appeared as such in the
14 record.

15 JUDGE PIGOTT: It doesn't me. Because it
16 just says, "Proof by affidavit having been this day
17 made before me", and he goes on, and then he - - -
18 then he says, "I'm signing this warrant."

19 MR. HUG: Yeah, the People represented that
20 the tapes were attached to their application, the
21 audio recordings. I - - - I don't know that that - -
22 - whether Judge Carter actually observed or listened
23 to the audio. But I don't think that those audio
24 tapes, especially when it comes to the superior court
25 now, because in Chisholm, this court said that it was

1 even improper for a court to deny a reading - - - for
2 the superior court to deny the request for a reading
3 of the transcript of testimony provided by the CI to
4 the local court at the time of - - - the warrant was
5 issued.

6 So I think that what we're talking about -
7 - -

8 JUDGE STEIN: So - - - so in order to avoid
9 having the CI have to come testify, what would be
10 necessary to prove his or her existence if an
11 audiotape doesn't do it?

12 MR. HUG: Well, in this case, I don't think
13 that the audiotape necessarily establishes probable
14 cause with respect to the defendant. Whether - - -
15 whether - - -

16 JUDGE STEIN: That's a second issue.

17 MR. HUG: Right.

18 JUDGE STEIN: But as far as the fact - - -
19 the existence of a CI, just - - -

20 MR. HUG: Right.

21 JUDGE STEIN: - - - following up on Judge
22 Fahey's - - -

23 MR. HUG: Yeah, you have the existence - -
24 - what does the audiotape really show you at the end
25 of the day? It shows you - - -

1 JUDGE STEIN: No, my question is, what
2 would you need to show, aside for bringing the CI in
3 to testify before the court? How would you show the
4 existence of a CI?

5 MR. HUG: Under these facts, I think it
6 would be very difficult.

7 JUDGE STEIN: Under any facts.

8 MR. HUG: Well, I think, you know, there -
9 - - there should - - - there must be a way for the
10 People to do it without - - - without presenting the
11 CI himself. Audio, maybe visu - - - some kind of
12 video, I mean video is the easiest - - -

13 JUDGE PIGOTT: You just said - - - you just
14 that they have the audio.

15 MR. HUG: Audio plus, you know, I mean,
16 video would - - - would - - - to me, in this day and
17 age, be kind of unforgivable in a case like this not
18 to use video).

19 JUDGE PIGOTT: No, what I mean - - - when I
20 was looking at the affidavit, and then the warrant
21 itself, the warrant says it's based only on the
22 affidavit. It doesn't say only, but it says based on
23 the affidavit.

24 MR. HUG: Right.

25 JUDGE PIGOTT: You tell me that in addition

1 to this affidavit, there is also - - - the judge had
2 audio tapes.

3 MR. HUG: That's my understanding.

4 JUDGE PIGOTT: That proves that you got a
5 CI. Why do you need a Darden hearing?

6 MR. HUG: Well, because the Darden hearing
7 goes behind just proving the existence of a human
8 being. Also, you know, you need to get from the CI
9 that this evidence - - - that he says that he met
10 with - - - I mean, let's just look at - - -

11 CHIEF JUDGE DIFIORE: Doesn't the
12 conducting of the Mapp hearing, and the findings of
13 credibility the judge made, and the findings, doesn't
14 that sort of render the Darden hearing academic?

15 MR. HUG: I don't think so. Because what
16 you still have is - - - is Officer Wood saying what
17 the CI told him. So what you have really is kind of
18 a mystery to the defendant. And I think that at the
19 end of the day, what - - - a Darden hearing is very,
20 very minimal, and it takes away some of the cynicism
21 that many defendants have about - - - about the
22 criminal justice system.

23 JUDGE PIGOTT: That's - - - that's why I
24 keep asking, maybe I'm being misunderstood. If the -
25 - - if the officer says, I have a CI, and that's

1 where I got my information, then we need a Darden
2 hearing because we have got to make sure he exists.
3 If he says, I got a CI, and by the way here's - - -
4 here's the tapes that - - - that - - - from the audio
5 he was wearing when he - - - when he made the buys,
6 you don't need a Darden hearing.

7 MR. HUG: I - - - I disagree, Judge,
8 because - - -

9 JUDGE PIGOTT: And you disagree for what
10 reason?

11 MR. HUG: I disagree because of - - - on
12 two reasons. One, I don't know that it establishes
13 the existence of this CI; I just know that it's an
14 audiotape for the judge that's issuing the warrant,
15 and two, the audio in this case, and in other cases,
16 isn't going to have the defendant saying, my name is
17 Dayshawn Crooks, I'm about to tender you two grams of
18 - - -

19 JUDGE PIGOTT: No, no, but you even said,
20 the Darden is a minimal thing. It's just to prove
21 that there's a CI.

22 MR. HUG: And - - - and to establish that
23 when he said establishes probable cause for the
24 police. In other words, there's a hearing. The - -
25 - the judge doesn't clap eyes on the guy and say,

1 Aguilar-Spinelli, but it isn't a complete Aguilar-
2 Spinelli, and there are cases that state, even when
3 Aguilar-Spinelli is - - - is satisfied, does not mean
4 that the Darden hearing issue is satisfied.

5 JUDGE FAHEY: Um-hum.

6 MR. HUG: I mean, they are separate, and,
7 you know, I'll agree that there is some blending.

8 CHIEF JUDGE DIFIORE: Thank you, Mr. Hug.

9 MR. HUG: I see my red light is on.

10 CHIEF JUDGE DIFIORE: Counsel.

11 MS. GROME: May it please the court, my
12 name is Brittany Grome, I'm an assistant district
13 attorney in Albany County. I'm here on behalf of the
14 People of the State of New York, the respondent in
15 this case.

16 The direct - - - this court should affirm
17 the Third Department's holding that the direct visual
18 and audio observations of the trained police
19 detectives during two controlled buy operations
20 provided sufficient probable cause for the issuance
21 of the search warrant in this case, independent of
22 any information supplied by the confidential
23 informant.

24 JUDGE STEIN: What about losing visual
25 track of the CI?

1 MS. GROME: I submit that the record shows
2 that they didn't lose visual track of the CI in this
3 case.

4 If you actually look at the search warrant
5 application, Detective Wood affirms that the CI in
6 this case, under visual surveillance, arrived at the
7 meet location, met the defendant in this case, the
8 key exchanged a quantity of buy money for crack
9 cocaine, and then under visual surveillance, he
10 walked back to police custody.

11 JUDGE STEIN: Are you relying at all on the
12 first buy?

13 MS. GROME: Yes, I am. I think the
14 totality of the two controlled buys together is more
15 than sufficient to establish probable cause in this
16 case.

17 JUDGE ABDUS-SALAAM: Both of them, counsel,
18 you wouldn't - - - you couldn't do it with just the
19 first buy; it has to be both of them.

20 MS. GROME: I submit that the first buy in
21 this case, there is testimony, I think, that
22 Detective Regan saw the defendant walk to the top of
23 the stairs, and in this case, it was - - - it's not a
24 multi - - - its multiunit, but it's only two
25 apartments. There's one on the first floor and one

1 of the second floor. So if he observed him walking
2 to the top of the stairs - - -

3 JUDGE ABDUS-SALAAM: But what stairs was he
4 - - - did he observe him walking, was it the stairs
5 of the building, or inside the building up to the
6 apartment?

7 MS. GROME: Right. That's unclear. I'm
8 not - - - he doesn't specify which stairs he saw him
9 walking up to. So I guess, you can make an inference
10 that these are the stairs up to the apartment,
11 presumably. But assuming that he couldn't just
12 pinpoint to that specific apartment, then the second
13 controlled buy absolutely comes into play for the
14 totality of it, because this is a search warrant of
15 the apartment, and not the arrest of the defendant in
16 this case. So we're not trying to necessarily
17 pinpoint the defendant; we're trying to make a
18 connection to the apartment in this case.

19 So based upon the totality of both buys,
20 there was sufficient probable cause based upon those
21 independent observations. You have an informant who
22 was searched, he is found to have no narcotics on
23 him, he is wired, they are able to listen to the live
24 radio transmissions.

25 JUDGE STEIN: Is - - - are the tapes - - -

1 is the question of whether the court had the tapes
2 critical to the analysis?

3 MS. GROME: Not in this case, given the
4 fact that they weren't relying on any hearsay
5 information, but they have their independent
6 observations. I think if this court were to find
7 that they were relying on hearsay information, they -
8 - - from the informant, a Darden hearing would have
9 to be held, and then the tapes come into play as to
10 the existence of the confidential informant in this
11 case.

12 But I submit that doesn't - - - it's not
13 even relevant, given those independent observations
14 of the detectives.

15 JUDGE STEIN: What about the - - -

16 JUDGE GARCIA: But did they - - -

17 JUDGE STEIN: Go ahead.

18 JUDGE GARCIA: I'm sorry. Did they have
19 the tapes - - - did the judge have the tapes when he
20 signed the search warrant?

21 MS. GROME: The search warrant application
22 says that the tapes were submitted with the search
23 warrant application. It does indicate that, I think
24 it's page 49 of appellant's appendix, that says that
25 they were provided to the court. Whether the court

1 reviewed them, I don't know, but they were made
2 available. So really that's all that matters.

3 JUDGE GARCIA: As part of the application
4 for the warrant.

5 MS. GROME: Correct, Your Honor.

6 JUDGE STEIN: But does it say that they
7 were given to him, or that they were made available,
8 and is there a difference?

9 MS. GROME: I think it says that they were
10 made available on attached; I don't have any other
11 information with respect to that.

12 JUDGE PIGOTT: It says - - - it says
13 they're based on "Information and belief, the sources
14 of such information belief and grounds are a quantity
15 of crack cocaine", and then it says number two,
16 "Audio compact disc held as evidence."

17 MS. GROME: Yes. So I guess they - - - if
18 the judge wanted to see them, they were - - - would
19 be available to him. I don't - - - I guess they
20 weren't necessarily presented to him in person.

21 But they did exist, and if this court did
22 find, which I submit they weren't relying on hearsay
23 information, but in the event that they did rely on
24 hearsay information from the informant, those would
25 be a way of proving that the informant exists in this

1 case, and therefore, a Darden hearing wouldn't be
2 necessary.

3 JUDGE STEIN: What about the fact that the
4 police didn't observe an actual exchange of drugs or
5 anything that - - - packaging of drugs or anything
6 like that, does that - - - is that a problem?

7 MS. GROME: I submit that they did; I don't
8 think it's fatal here. I think the record does show
9 based upon the search warrant application that they
10 did view an exchange of drugs for the controlled buy
11 money.

12 JUDGE STEIN: They said they saw some kind
13 of transaction, right?

14 MS. GROME: Right.

15 JUDGE STEIN: Isn't that how - - -

16 MS. GROME: The search warrant application
17 does specifically say that under visual surveillance,
18 they observed him there, he met with the - - - the
19 defendant, and he exchanged a quantity of crack
20 cocaine for controlled buy money. And then he
21 returned back under visual surveillance. I think
22 what - - - I think Detective Wood's testimony can be
23 inferred in a different way. Detective Wood, if you
24 see on page 63 of the search - - - of the appellant's
25 appendix, he makes reference, well, when the

1 informant was out of our view, the eye detective
2 picked him up. So I think you can also read his
3 testimony with respect to the second control buy in
4 the same way, when he was out of our view, he's the
5 confidential informant handler; he wasn't the eye in
6 this case. So he didn't directly view the controlled
7 buy, the actual transaction, but there was an eye
8 detective involved in this case.

9 JUDGE ABDUS-SALAAM: Counsel, let me ask
10 you the question that Judge Fahey put to your
11 adversary on the Adrion and Farrow spectrum of cases.
12 Where do you think this one fits?

13 MS. GROME: I think it fits directly with
14 Farrow. These are independent observations which
15 reached the level of probable cause. This case - - -
16 and also I wanted to distinguish People v. Hamilton,
17 if I can, which I think relies on Adrion.

18 In People v. Hamilton, relies on the fact
19 that police - - - because police arrived at a
20 specific location, they wouldn't have been in the
21 position to make any observations, and therefore,
22 without the information supplied by the informant.
23 And Hamilton directly says that. But People v.
24 Farrow rejected that and said it's irrelevant why the
25 detectives arrived to a specific location, so long as

1 their independent observations when they got to that
2 location reached the level a probable cause.

3 And I submit based upon the known facts and
4 circumstances in this case, they orchestrated these
5 controlled buys. They were present for the phone
6 calls, they were - - - there was visual and audio
7 surveillance, they heard all of the interactions. So
8 whether or not they actually observed the hand to
9 hand transaction, or whether they just saw an
10 interaction and they could tie it to the apartment,
11 because they did during the second controlled buy
12 watch him leave that apartment and directly go and
13 meet with the informant, that's enough. That's
14 enough; they're not relying on anything provided from
15 the informant in that case.

16 And so that's why I submit that People v.
17 Hamilton is not necessarily relevant, and People v.
18 Farrow rejected the claim that - - - that Farrow set
19 forth.

20 And if there are no further questions,
21 thank you.

22 CHIEF JUDGE DIFIORE: Thank you.

23 Mr. Hug.

24 MR. HUG: Yes, briefly.

25 Now, at the end of the day, I think none of

1 us can really say that this CI, we know beyond a
2 shadow of a doubt that they existed. That is why a
3 Darden - - -

4 JUDGE PIGOTT: But her point - - - her
5 point is that it doesn't make any difference.

6 MR. HUG: I know that. I think that that's
7 a bridge too far. I think that that was - - - that
8 that is not a meritorious argument to make.

9 JUDGE PIGOTT: If the police saw someone
10 going into a house and coming out with drugs, and
11 they saw that happen twice, and said, we think that
12 there's drugs in the house, isn't that enough to get
13 a search warrant?

14 MR. HUG: Hamilton says, no. That's the
15 Third Department case. I will read to you a portion
16 of Wood's application support of the search warrant
17 in which he states, "The CI provided the following
18 details regarding the purchase of crack cocaine from
19 the target. The target opened the door and the CI
20 entered the common hallway, both walked to the second
21 floor apartment. The target removed a large quantity
22 of crack cocaine. The target then handed the target
23 the pre-recorded APD currency in return."

24 The only person that could have, if that's
25 true, told them that, is the CI. That is why we have

1 a Darden hearing. Why keep defendants and defense
2 counsel in the dark, and potentially allow a - - -

3 JUDGE STEIN: But that's not the only
4 transaction. There's - - - there's another
5 transaction - - -

6 MR. HUG: There is a second transaction,
7 you're right.

8 JUDGE STEIN: - - - that goes along with
9 it. Yeah.

10 MR. HUG: But that second transaction - - -

11 JUDGE STEIN: And I'm trying to understand
12 when you think - - - when there is a CI involved at
13 all that provides any information, when you think a
14 Darden hearing wouldn't be required.

15 MR. HUG: In a situation like Farrow, where
16 the CI merely tells them where something is going to
17 occur, and they watch and observe the crime itself,
18 they see the controlled substance. They did not in
19 this case. We know that they see - - -

20 JUDGE STEIN: And if we disagree with you,
21 then that - - -

22 MR. HUG: Well, if you disagree with me, I
23 guess it would be on the facts of this case it
24 doesn't fit within a Darden - - - I would hate to see
25 a rule that makes it even more difficult already.

1 The protection to the - - - to the People is the
2 Darden hearing, and now we are going to even move the
3 ball away from the defendant's even further, so
4 already, in most cases, the CI is never revealed,
5 under the - - - under the pretext that all CIs are in
6 danger.

7 Now we've given the Darden hearing as a
8 failsafe, we also have an escape valve, in the event
9 that the People can establish that the person is
10 under threat, or is unavailable due to sickness or
11 death that we can prove the intrinsic evidence,
12 something they chose not to do in this case. So they
13 can't do it now, and now we're saying, you know, we
14 need to, you know - - - so long as we provide an
15 audiotape and say, this - - - oh yeah, this is him,
16 and this is that, even though it doesn't establish
17 any background as to what the CI told them, because
18 they're not relying on the audiotape; they are
19 relying on what the CI told them.

20 They can't do anything with the audiotape
21 alone, because on its own, an audiotape of a
22 transaction isn't going to have anything
23 incriminating, at least to a specific individual. It
24 requires that explanation from the CI. And in this
25 case, they needed that explanation because they

1 didn't see the first one, and the second one is - - -
2 is cloudy at best, and leaves open the possibility
3 that while this person was out of their visual, which
4 he was, if you look at Wood's testimony closely, and
5 made a telephone call to someone that they did - - -
6 could not have established to the court on their own
7 as to who he called, and then there was some kind of
8 interaction at a distance.

9 Look, if the People want to avoid Darden
10 hearings, the way to do it is to - - - to videotape
11 these things and provide them in camera if they want
12 to do that.

13 CHIEF JUDGE DIFIORE: Thank you, Mr. Hug.

14 MR. HUG: Thank you.

15 (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Dayshawn Crooks, No. 116 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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