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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 67

JOEL JOSEPH,

Appellant.

20 Eagle Street
Albany, New York 12207
March 31, 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 everyone.

3 Our first matter on this afternoon's calendar is
4 number 67, People v. Joel Joseph.

5 Counsel.

6 MR. HOPKIRK: Good afternoon, Your Honor,
7 and may it please the court. My name is Arthur
8 Hopkirk; I represent Joel Joseph. I'd like to
9 reserve two minutes for rebuttal, Your Honor.

10 CHIEF JUDGE DIFIORE: You may have two
11 minutes, sir.

12 MR. HOPKIRK: The People's case for denying
13 suppression of the drugs here is built on a shaky
14 foundation of the police's hunches and guilt by
15 association. The rule advocated by the People and
16 endorsed by the courts below would put New Yorkers
17 who are not engaged in criminal activity at risk of
18 being forcibly seized by the police, based on
19 innocuous everyday interactions with friends or
20 relatives who happen to be reputed drug dealers.

21 Mr. Joseph took an ordinary plastic Duane Reade
22 bag from a drugstore - - - of the sort you get from a
23 drugstore - - - from the hatchback of Mr. Gonzalez's car.
24 This is the sort of bag that probably hundreds of
25 thousands of New Yorkers use every day in the ordinary

1 course of their lives to carry cosmetics, soap,
2 toothpaste, mouthwash, and other sundries.

3 The record does not support a finding of either
4 probable cause or reasonable suspicion here for Mr.
5 Joseph. There is no evidence in the relevant record that
6 the drug task force had seen or heard Mr. Joseph when he
7 picked up - - - seen or heard, rather, of Mr. Joseph when
8 - - -

9 JUDGE ABDUS-SALAAM: Counsel, what would
10 have - - - under these circumstances, what would have
11 provided reasonable suspicion to the police?

12 MR. HOPKIRK: Well, first of all, I would
13 suggest that it is significant that the police, in
14 all of these months of investigation, had never
15 recovered any drugs, as far as the record shows,
16 connected with Mr. Gonzalez. We also argue that the
17 information as to Mr. Gonzalez's activities was
18 stale.

19 But with respect to Mr. Joseph
20 particularly, it's just - - - if he'd handed over
21 money, for example - - - there is no evidence that he
22 handed over money, there is no evidence that any
23 conversations were overheard involving Mr. Joseph and
24 Mr. Gonzalez, or Mr. Joseph and anybody else. The
25 police actually knew nothing about my client

1 whatsoever when he approached that car in Harlem.

2 JUDGE PIGOTT: How did they try to justify
3 it, then, at the time of the hearing?

4 MR. HOPKIRK: Well, they attempted to
5 justify - - - is Your Honor getting at the question
6 of what the Appellate Division or the hearing court
7 said about this - - - their justification beyond - -
8 - the Appellate Division seemed to acknowledge that
9 the informant's information was not really enough.

10 They talked about context. Well, you
11 know, what's the context here? The context here,
12 they said, ir - - - Mr. Gonzalez - - - they don't say
13 anything about Mr. Joseph, but they say, Mr. Gonzalez
14 was going in and out of the apartment at irregular
15 times, he carries - - -

16 JUDGE FAHEY: Well, one of the things that
17 strikes me is - - - is that you're right, if your
18 client hadn't been interacting with someone who had
19 been under surveillance for months, I guess, Mr.
20 Gonzalez, and hadn't been subject to a surveillance
21 videos and proof offered against him by a
22 confidential informant, if it just been a regular
23 person, then you're right, the transaction of a Duane
24 Reade bag certainly wouldn't be enough to justify the
25 stop. But don't those factors, the confidential

1 informant, the finding by Judge Allen, and then the
2 suppression court's finding, weighing the credibility
3 and the police officer's testimony on surveillance
4 information that they had on Gonzalez - - - and the
5 key factor that Gonzalez appears to be a drug dealer
6 by that - - - by that rubric - - - doesn't that seem
7 to be enough?

8 MR. HOPKIRK: No, it isn't, Your Honor.

9 JUDGE FAHEY: Okay. Tell me why.

10 MR. HOPKIRK: Well, first of all, and the -
11 - - as I'm saying, maybe we should go to People v.
12 McRay, which dealt with glassine envelopes; in that
13 case, this court said that it was addressing the
14 minimum legal standard in glassine envelope cases for
15 probable cause. Here, we have a question of law
16 which involves the issue of what the minimum legal
17 standard is in cases involving generic plastic bags.

18 JUDGE FAHEY: No, that's not the question,
19 I don't think. I don't think it's a transfer because
20 if it was just a transfer, I think you're right.

21 MR. HOPKIRK: Uh-huh.

22 JUDGE FAHEY: I think the problem is that
23 you have to be placed - - - it has to be placed in
24 context by the officer's training and experience,
25 what they saw, what they knew about the person from

1 whom the plastic bag came, and then the nature of the
2 interaction.

3 Was the nature of the interaction one where
4 - - - I understood that the defendant walked up the
5 car door, talked - - - the car window, talked to him
6 for a few seconds, and then went to the back and took
7 the bag out of the trunk and walked away. The
8 officers identified that as what appeared to be a
9 drug transaction.

10 The problem I guess we have is that we
11 don't ever actually see drugs being transferred in
12 any of these cases. So - - - so it does create a
13 contextual problem where you have to say, well, what
14 does the training and experience of the officer show?

15 MR. HOPKIRK: Okay. Let me address that.
16 First of all, training and experience is fine, but
17 you actually have to know something about the current
18 case. One of the points we're making is that in
19 terms of the informant, they did not establish that
20 the information wasn't stale.

21 In terms of the surveillance, the police, as I
22 said, never recovered any drugs at all, and I would
23 suggest this might be a different case - - - I'm not
24 saying for sure that it would be different, but it would
25 be a much closer case - - -

1 CHIEF JUDGE DIFIORE: Could that have been
2 a tactic by the police, not to pursue any intervening
3 arrest?

4 MR. HOPKIRK: It could be a tactic by the
5 police, but that doesn't diminish their burden of
6 establishing probable cause and reasonable suspicion.
7 The - - -

8 JUDGE RIVERA: No, but at what time does it
9 become stale? How much time has to elapse?

10 MR. HOPKIRK: Well, I would say - - - well,
11 one thing would be - - - I note that the CPL 690. - -
12 - whatever, the one on executing search warrants
13 talks about ten days from the time you get the search
14 warrant. So that gives you some guidance. But here,
15 we have no idea when they last talked to the
16 informant. There is nothing in the record about
17 that.

18 JUDGE PIGOTT: Ms. Richards is probably
19 going to get up in a few minutes and argue it's a
20 mixed question of law and fact.

21 MR. HOPKIRK: Yes. And let me address
22 that, Your Honor.

23 The - - - and I was starting to talk about
24 McRay; here we have a question of what the minimum legal
25 standards is and whether there is any evidentiary support

1 in the record. There is no evidence in the record that
2 the task force knew anything about Mr. Joseph, there is no
3 evidence that generic plastic bags are commonly used to
4 carry drugs, as opposed to non-contraband. The task force
5 was operating on a hunch about the Duane Reade bag,
6 because a Duane Reade bag is not drug paraphernalia.

7 Let's talk about what the Appellate Division
8 called context.

9 JUDGE STEIN: Well, it wasn't - - - yeah,
10 it wasn't just the bag, was it? It was - - - it was
11 the - - - his schedule, his going in and out, and the
12 timing of things, and the whole - - -

13 MR. HOPKIRK: Yeah.

14 JUDGE STEIN: - - - the whole scenario.

15 MR. HOPKIRK: Yeah, okay. So let me
16 address those two things. First of all, on the
17 irregular schedule business, as we point out in our
18 reply brief, they say basically that this was
19 consistent with drug trafficking, but that suffers
20 from a logical fallacy, because there is no evidence
21 as to even an approximate percentage of those with
22 irregular schedules who are not involved with drug
23 dealing.

24 And we cite People v. Brown in our reply
25 brief at page 12 on that, and thus, to say that the

1 schedule is consistent with drug trafficking is
2 meaningless. And then on the carrying various bags
3 out - - - you know, the fact that you have a bunch of
4 generic bags being carried out, in itself doesn't
5 prove anything.

6 And we would suggest, as I was starting to
7 get to on another question, we might have a different
8 case here if they had had at least some occasion
9 where some drugs had been recovered from somebody who
10 had made a delivery - - - received a delivery from
11 Mr. Gonzalez. There is none of that. And without
12 some evidence, either from the informant or from
13 recovering materials that Gonzalez is routinely using
14 plastic bags to deliver drugs, the evidence - - -
15 there is a complete lack of evidence supporting - - -

16 JUDGE RIVERA: So just to clear, are you
17 saying then that what the police had to have was some
18 direct information about the - - - Gonzalez's MO for
19 drug dealing? They had to really already know in
20 advance this exact modus operandi and how defendant
21 fit into that?

22 MR. HOPKIRK: Well, they don't - - - that
23 is one way they could have gone about it. Obviously,
24 if we'd had communications involving Mr. Joseph, or
25 if we had had transfer of money seen or heard about,

1 that might be other ways. But something along those
2 lines, and we don't have any of that. And so, for
3 that reason, I would urge that the conviction be
4 reversed, and the evidence suppressed, and the
5 indictment dismissed.

6 CHIEF JUDGE DIFIORE: Thank you, sir.
7 Counsel.

8 MS. RICHARDS: May it please the court. My
9 name is Lindsey Richards and I represent the
10 respondent, the People of the State of New York.

11 Your Honors, this - - - as one judge already
12 touched on, defendant's claim here presents a mixed
13 question of law and fact. As defense counsel just touched
14 on, he essentially is just disagreeing with the factual
15 findings, with the credibility determinations, and with
16 the inferences that the lower courts drew from the
17 reliable evidence in determining that there was probable
18 cause to arrest the defendant, or alternatively,
19 reasonable suspicion that ripened into probable cause.

20 JUDGE STEIN: When do you say that the
21 defendant was under arrest?

22 MS. RICHARDS: He was under arrest, Your
23 Honor, at the moment - - - once they were inside of
24 the building.

25 JUDGE STEIN: So what about this question

1 about whether he actually pulled the defendant's hair
2 before they got to the building?

3 MS. RICHARDS: Well, Your Honor, the
4 decisions below preclude there being any sort of
5 finding that the hair was grabbed prior to the
6 officers actually identifying themselves and the
7 defendant fleeing from the officers.

8 In fact, as Judge Stolz found in his
9 decision explicitly, when the officer was following
10 the defendant into the building, the defendant turned
11 around and started to run; the officer announced
12 himself several times very loudly that he was a
13 police officer, and instructed the defendant to stop.

14 CHIEF JUDGE DIFIORE: Ms. Richards, was
15 there probable cause before the defendant took off?

16 MS. RICHARDS: Yes, Your Honor. There was
17 probable cause.

18 CHIEF JUDGE DIFIORE: Talk us through that.

19 MS. RICHARDS: Yes, Judge. When it comes
20 to probable cause, I think defense counsel is making
21 his argument by simply ignoring the circumstances
22 here, by ignoring the totality of the circumstances
23 here. We have very tr - - - very specifically
24 trained narcotics officers, DEA agents, as well as
25 NYPD narcotics officers with over thirty years of

1 experience combined. These officers were conducting
2 a five-month long investigation on the target of the
3 investigation, Mr. Gonzalez.

4 That all came from information from a
5 confidential - - - from a confidential informant that
6 Gonzalez was a large-scale drug dealer, dealing with a lot
7 of money and a lot of narcotics. So as a result of that
8 specific information, which was deemed reliable and
9 credible at the Darden hearing, these officers conducted
10 in - - - an investigation.

11 During the course of that investigation, they
12 did personal surveillance, they also had video
13 surveillance set up outside of Gonzalez's apartment
14 building. And during the course of this, they observed
15 the defendant - - - I'm sorry, Mr. Gonzalez coming in and
16 out at odd hours, carrying bags that didn't appear to be
17 containing normal items - - -

18 CHIEF JUDGE DIFIORE: Did the police - - -

19 JUDGE STEIN: Can I back you up for a
20 second about the Darden hearing?

21 MS. RICHARDS: Yes, Judge.

22 JUDGE STEIN: Do - - - is there anything in
23 the transcript that actually adds to your argument?
24 I mean, do we need that transcript - - - I know that
25 there - - - again, there's some question about

1 whether we can probably consider that, but does it
2 matter?

3 MS. RICHARDS: It actually doesn't matter.
4 I think that the court could easily determine the
5 staleness issue without even dealing with the minutes
6 of the Darden hearing. I will just touch on that
7 briefly, since defense counsel devotes a lot of his
8 time in his brief to suggesting that there was some
9 sort of stipulation by the People and the court that
10 the court could not review the Darden minutes in
11 determining whether or not there was probable cause
12 or reasonable suspicion.

13 There was no such agreement ever made. The
14 People and the court - - - if you look at the record,
15 we're simply discussing what could be elicited at the
16 suppression hearing regarding the information
17 provided by the confidential informant. Nothing
18 beyond what was elici - - - or I'm sorry, nothing
19 beyond what was written in the Darden decision was to
20 be elicited, meaning that the cops couldn't testify
21 to the substance of what the confidential informant
22 told them, which of course was in full accord with
23 the protective order, and in full accord with the
24 principles of the - - - of Darden itself.

25 But with regards to the staleness, as the

1 Appellate Division found, there is no need to even reach
2 the issue of whether or not there was some sort of
3 agreement regarding the minutes, because the police
4 investigation that was ongoing proved that the narcotics
5 operation was ongoing up until the time of the defendant's
6 arrest.

7 JUDGE ABDUS-SALAAM: And this was without
8 wiretaps, too, this was - - - you said that they were
9 surveilling Mr. Gonzalez because he was suspected of
10 being a large-scale drug trafficker. But don't the
11 police usually get wiretaps, or the DA's Office - - -
12 somebody gets wiretaps to overhear conversations that
13 might be going on about drug trafficking?

14 MS. RICHARDS: Yes, Your Honor. And from
15 the information that was elicited at the suppression
16 hearing relating to the defendant's arrest, a lot of
17 the information - - - the larger information relating
18 to the investigation and to Gonzalez wasn't elicited
19 necessarily, because that investigation went on after
20 the defendant's arrest.

21 So in addition to getting the video
22 surveillance set up outside of Gonzalez's apartment,
23 there were in fact GPS warrants and additional
24 warrants that were sought in relation to that
25 investigation into Gonzalez.

1 And I will say, I know defense counsel
2 pointed out that no drugs were recovered from
3 Gonzalez prior to the arrest of the defendant, but of
4 course, that's why the investigation was ongoing for
5 as long as it was. Had they recovered drugs prior to
6 the arrest of the defendant, Gonzalez would likely
7 have been under arrest prior to that date, and this
8 transaction never would have occurred.

9 But returning back to the reasonable suspicion
10 or the probable cause issue, I think in addition to these
11 officers' training and experience, their observations led
12 them to reach a reasonable conclusion, as the courts below
13 found, that Gonzalez was in fact a narcotics dealer and
14 his operation was ongoing up until the date of the
15 defendant's arrest.

16 And I think all of this, compounded with what
17 they actually saw on February 1st, certainly lead them to
18 believe or to find reasonable suspicion that when the
19 defendant removed a plastic bag, Duane Reade bag, from the
20 back of Gonzalez's car, it contained narcotics.

21 JUDGE RIVERA: It observed similar conduct
22 before then?

23 MS. RICHARDS: They ha - - -

24 JUDGE RIVERA: Not necessarily by this
25 defendant.

1 MS. RICHARDS: Yes, Your Honor, they had.
2 Actually, within the days leading up - - - and this
3 addresses the staleness issue as well. Within the
4 days leading up to the defendant's arrest, the - - -
5 within the weeks actually, the surveillance was amped
6 up, the officers were there more frequently. Within
7 twelve days they observed the defendant obtaining a
8 BMW, which he then was parking near his apartment,
9 which was registered on someone else's name, and then
10 three days - - -

11 JUDGE RIVERA: Gonzalez?

12 MS. RICHARDS: It was an SUV or a
13 hatchback.

14 JUDGE RIVERA: It was Gonzalez, not
15 defendant.

16 MS. RICHARDS: That was Gonzalez, correct.

17 JUDGE RIVERA: Okay, thank you.

18 MS. RICHARDS: And then within three days
19 of the defendant's arrest, the officers actually
20 observed Gonzalez get into a vehicle carrying a
21 plastic bag, speak - - -

22 JUDGE RIVERA: But defendant had not been
23 on their radar before then; is that correct?

24 MS. RICHARDS: Correct. They never saw - -
25 -

1 JUDGE RIVERA: First time they had seen
2 this particular individual, correct?

3 MS. RICHARDS: Was on the date of the
4 defendant's arrest. Yes.

5 JUDGE RIVERA: But they had seen other
6 individuals conduct themselves in a similar manner.

7 MS. RICHARDS: They had seen one other
8 individual.

9 JUDGE RIVERA: One person, okay.

10 MS. RICHARDS: And in that case, the
11 defendant got - - - I'm sorry, Gonzalez got into the
12 vehicle with a plastic bag, spoke briefly with the
13 driver of that vehicle, exited the vehicle without a
14 plastic bag. And - - -

15 JUDGE RIVERA: There was no exchange of
16 money?

17 MS. RICHARDS: Not that they observed.

18 JUDGE RIVERA: That they observed.

19 MS. RICHARDS: But again, based on their
20 training and experience, what they knew about
21 Gonzalez being a narcotics trafficker, the officers
22 reasonably concluded at that moment they had just
23 witnessed a drug transaction.

24 And so I think all of this information,
25 compounded with the officers' training and

1 experience, certainly gave rise to the conclusion
2 that they have reasonable suspicion, if not probable
3 cause, at the moment that the defendant retrieved
4 this plastic bag from the back of - - - of Gonzalez's
5 car.

6 I think the circumstances surrounding at
7 the fact that this white bag, while defense counsel
8 tries to make this sound innocuous - - -

9 JUDGE RIVERA: If we disagree with you, is
10 running away enough to get to the probable cause?

11 MS. RICHARDS: I think so, Your Honor. If
12 you believe that there was reasonable suspicion at
13 the moment that the defendant removed the plastic bag
14 from the trunk of the vehicle, certainly once the
15 officer announced that he was a police officer and
16 instructed defendant to stop, when he proceeded to
17 run and then struggle with the officer inside of the
18 building, kicking him in the face, at that moment,
19 they certainly had probable cause to arrest the
20 defendant for, the very least, resisting arrest.

21 JUDGE RIVERA: He announced he was a police
22 officer after the defendant had run.

23 MS. RICHARDS: It's - - -

24 JUDGE RIVERA: It was that he didn't stop
25 after being informed - - -

1 MS. RICHARDS: Correct.

2 JUDGE RIVERA: - - - he was a cop.

3 MS. RICHARDS: Correct. Those two things
4 seemed to happen pretty simultaneously.

5 JUDGE RIVERA: No question he heard him say
6 that?

7 MS. RICHARDS: He said he screamed very
8 loudly and multiple times, and the defendant
9 continued to run and attempted to flee up the stairs
10 before he actually physically struggled with the
11 police officer.

12 Thank you very much, Your Honors, for your time,
13 and I ask that you affirm the judgment of conviction.

14 Thank you.

15 CHIEF JUDGE DIFIORE: Thank you.

16 Counsel.

17 MR. HOPKIRK: A couple of things, Your
18 Honor.

19 First of all, just on the whole question of the
20 hair pulling before the - - - while he was still walking
21 to the building. If you look at the respondent's brief at
22 pages 17, and 64, 65, they essentially concede that this
23 occurred and that was a seizure.

24 The - - - and in terms of the mixed question
25 issue, we are not disagreeing with the factual findings;

1 we're arguing that there was a lack of evidence to meeting
2 the minimum threshold to establish probable cause or
3 reasonable suspicion.

4 The District Attorney just referred to this
5 other incident, which apparently was in the notes of
6 DiGiorgio, as somebody who didn't testify at the hearing.
7 And with respect to that, I think it's noteworthy that
8 neither the hearing court nor the Appellate Division
9 relied on that incident, and there is a good reason they
10 didn't rely on that incident, which is that first of all,
11 the - - - no drugs were recovered. Ms. Richards said it
12 was a plastic bag; I don't think actually the record
13 supports what sort of bag it is.

14 And there is no indication that he was operating
15 out of a BMW. There are a lot of differences between that
16 situation and with the lower courts not having relied on
17 that at all, I don't think this court should be relying on
18 it either.

19 And with respect to the training and experience
20 of the officers, training and experience is fine, but it
21 doesn't exempt the actions of law enforcement from
22 judicial review; and when there is evidence which does not
23 reach the threshold to establish probable cause or
24 reasonable susp - - -

25 JUDGE ABDUS-SALAAM: This - - - this

1 location was described, I think in the record, as a
2 high-crime area, but no indication that it was drug
3 prone. If it had been described as drug prone, would
4 that make a difference?

5 MR. HOPKIRK: That would certainly have
6 been a factor under this court's case law, but as
7 Your Honor points out, it was not described as drug
8 prone.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MR. HOPKIRK: Thank you, Your Honor.

11 (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. Joel Joseph, No. 67 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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