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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 181

WILSON J. TARDI,

Appellant.

20 Eagle Street
Albany, New York 12207
October 19, 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 MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Appeal number 181,
2 People of the State of New York v. Wilson J. Tardi.
3 Counsel.

4 MR. MODRZYNSKI: May it please this
5 honorable court, Phil Modrzynski for the appellant.
6 And if I may, I respectfully request two minutes of
7 rebuttal time.

8 CHIEF JUDGE DIFIORE: Yes, sir.

9 MR. MODRZYNSKI: As the court is well
10 aware, the appellant claims two issues on this
11 appeal. First that the seizure of appellant's
12 vehicle from the Target parking lot was
13 unconstitutional pursuant to Cheektowaga's towing and
14 impound policy. And second, that nonetheless, the
15 inventory subsequent to that was also
16 unconstitutional; it was unreasonable in violation of
17 that statute.

18 JUDGE GARCIA: Is it clear, counsel, and
19 I'm having some trouble with it, I admit. What basis
20 did they take the car under?

21 MR. MODRZYNSKI: I agree with you that it
22 is confusing, especially when considering the trial
23 judge's decision. They had argued originally that
24 pursuant to their general order 0-5-8, that they're
25 required to take the vehicle based upon an

1 individual's arrest; that's from public or private
2 property.

3 Then on top of that, they also sought out the
4 consent of a Target loss prevention individual, and they
5 had them sign a tow authorization form, which trial
6 counsel wasn't aware of at the time because that document
7 was never produced. But apparently, they signed this tow
8 authorization form where Target consented for the removal
9 of the vehicle indicating it was there without
10 authorization.

11 JUDGE GARCIA: And that was argued at the
12 trial court, that they had this consent or request to
13 tow, or whatever it is.

14 MR. MODRZYNSKI: It came up at the hearing,
15 however, the form was actually never produced. But
16 the witnesses for the People did - - - were in
17 agreement that the form was signed. However, the
18 officers testified that they had to take the vehicle
19 pursuant to this policy.

20 JUDGE GARCIA: And as I read that - - -
21 that part of this policy, you can tow a vehicle like
22 that, but you can only search it - - - inventory
23 search it if it's not locked, right, it has to be
24 unlocked.

25 MR. MODRZYNSKI: And that's - - - that's

1 what becomes semi-confusing. So the towing and
2 impound policy, their policy, even though it's not
3 the objective of the policy it indicates that yes,
4 you can take this vehicle if someone is arrested,
5 even from private property. But - - -

6 JUDGE GARCIA: But let's go to the
7 illegally parked.

8 MR. MODRZYNSKI: Yes, yes. And then the -
9 - - in regards to the inventory of the vehicle, they,
10 for whatever individual purpose, has specifically
11 discerned that there are, I believe, four or five
12 bases to which a vehicle shall not be inventoried.

13 JUDGE GARCIA: Right.

14 MR. MODRZYNSKI: And they're specifically
15 in there. And in this case, it was an illegally
16 parked, unlocked - - - or I'm sorry, illegally parked
17 locked vehicle.

18 JUDGE STEIN: Did you argue that it was
19 illegally parked unlocked vehicle? I thought your
20 whole argument, and the courts below, was that it was
21 legally parked, and that's why it couldn't be
22 removed.

23 MR. MODRZYNSKI: The - - - based upon
24 Target's tow authorization form to issue their
25 consent, originally, I believe trial court may have

1 argued partially that it was legally parked, it
2 should not have been towed because it was there, but
3 really the argument is that the taking of the vehicle
4 was not necessary as a public caretaking function
5 because it was causing no one harm.

6 And then if new Target wanted it removed
7 because the individual was someone who had taken
8 items from them, it's not parked with consent because
9 he's not, you know, a customer, then it becomes an
10 illegally parked vehicle pursuant to the - - -

11 JUDGE GARCIA: Illegally parked.

12 MR. MODRZYNSKI: - - - Cheektowaga statute.

13 JUDGE GARCIA: And did you object at the
14 trial court to the fact that with an illegally parked
15 vehicle, you can't search it if it's locked?

16 MR. MODRZYNSKI: Trial court did not
17 specifically raise that issue. However, that does go
18 to preservation, which I did want to touch on, so
19 thank you.

20 In regards to the preservation, ultimately, the
21 judge of the trial court determined that the Cheektowaga
22 Police followed their procedures. It was alleged that
23 they do not follow the procedures and the inventory was
24 illegal. However, that specific point, in regards to the
25 vehicle being parked, I do not believe was noticed. It

1 was not necessarily specifically raised.

2 However - - -

3 JUDGE STEIN: Well, there is some crossover
4 here between the two. Okay. On the one hand, there
5 is the driver was arrested, right, and then on the
6 other hand, it was illegally parked.

7 So if - - - if the police followed the
8 arrest avenue, and they say he was arrested, there
9 was nobody else to take the car, and Target was
10 saying that there was history of theft and vandalism,
11 and so there was a community caretaking aspect here,
12 what's wrong with - - - what's wrong with that?

13 MR. MODRZYNSKI: Well, respectfully, I
14 would disagree. At that point, it's a caretaking
15 function looking only out for the individual that was
16 arrested. Here, Mr. Tardi was arrested while exiting
17 the Target.

18 JUDGE STEIN: Well, none - - - okay. Go
19 ahead. Sorry.

20 MR. MODRZYNSKI: I mean - - -

21 CHIEF JUDGE DIFIORE: But you have the
22 victim of a crime, you have Target.

23 MR. MODRZYNSKI: Yes.

24 CHIEF JUDGE DIFIORE: The police just
25 arrest someone who drove the car onto their private

1 parking lot. And the victim of the crime is asking
2 the police to remove the car of the person who is
3 just arrested. How is that unreasonable action on
4 the part of that - - - those police officers?

5 MR. MODRZYNSKI: That in and of itself is
6 not. What we have is a hybrid of that. So assume
7 that the vehicle was seized just because Target
8 wanted it gone, that's fine. However, the
9 Cheektowaga Police own inventory policy says they are
10 not authorized to inventory those vehicles. They
11 chose to outline that; that's what makes the
12 inventory unreasonable.

13 JUDGE STEIN: But it doesn't say they can't
14 - - - they can't inventory the vehicle if it's
15 illegally parked and unlocked or locked, and the
16 owner is arrested.

17 MR. MODRZYNSKI: However - - -

18 JUDGE STEIN: So if the only basis is that,
19 then yes. I would say that that was - - - that would
20 limit them. But if there's another basis, which is
21 that the owner was arrested, and we have these other
22 - - - this request and everything else - - -

23 MR. MODRZYNSKI: Well, and what it has, and
24 I'll specifically read it, I would agree with you
25 that there is a crossover, and I think so with the

1 People. And it reads, and it's page 19 of the
2 appendix: "An inventory will be conducted on all
3 vehicles towed at the direction of a police officer
4 unless a vehicle is to be processed for evidence,
5 privately towed, released at scene, towed due to
6 weather emergencies, or an illegally parked locked
7 vehicle."

8 So it doesn't give an exception for the arrest
9 under there. It says all vehicles will be inventoried but
10 for this subsection of 4 or 5, and forgive me, I lost
11 count.

12 So it specifically says that type of vehicle
13 will not be inventoried. So I think what happened
14 originally is they argued the seizure was because it was -
15 - - we had this arrest, but no, we got the consent of
16 Target to remove it.

17 Once they got that consent of Target to remove
18 it, which had to have outlined that it was illegally
19 parked, which again, is not part of the record because the
20 forms were never produced, but everyone agrees signed it.

21 So Target signs this form, says, we want this
22 this vehicle off our property. Then the police, if they
23 so choose, pursuant to their own policy, then have the
24 power to impound the vehicle. I mean, the police aren't
25 necessary supposed to be acting on behalf of Target, but

1 if they choose to, fine; that is acceptable and that is
2 reasonable under those circumstances.

3 However, then that vehicle cannot be
4 inventoried, and that's per their own policy. I did not
5 draft their policy; I don't know why - - -

6 JUDGE RIVERA: Can - - -

7 JUDGE ABDUS-SALAAM: That's the - - -

8 MR. MODRZYNSKI: - - - that that was their
9 intention.

10 JUDGE ABDUS-SALAAM: That's the part that I
11 don't think you've preserved in the court below.

12 MR. MODRZYNSKI: The judge, in his determin
13 - - - well, in the omnibus motion, and some of the
14 moving papers thereafter, it was challenged that the
15 inventory was not conducted pursuant to police
16 procedures. That in and of itself does, I would
17 argue, preserve that.

18 The People also responded that it was,
19 pursuant to their procedures. These procedures were
20 introduced as a part of the record, although, yes,
21 you are correct, that specifically was not pointed
22 out in argument. However, the trial judge did, when
23 rendering his opinion, determine that they did act
24 pursuant to this policy, and in accordance with this
25 policy, thus preserving the issue for Appellate

1 review. I do - - -

2 JUDGE RIVERA: Can I - - - can I ask about
3 what's on record on 23, 24, these procedures for
4 handling the vehicle parked on private property. Is
5 it your position this doesn't apply or that this does
6 apply?

7 Because it has a provision, whether it's - - -
8 there's a posting pursuant to Article 3, or there it not a
9 posting pursuant to Article 3, either case, the owner of
10 the vehicle should be advised, and the police officers
11 have to attempt to contact the owner. Are you saying this
12 also applied; did you make that argument?

13 MR. MODRZYNSKI: And that's - - - that
14 becomes the issue with the - - - the - - - the
15 original challenge that was made to the seizure of
16 the vehicle, which was based upon the rest. And the
17 vehicle was registered to the mother of the
18 appellant.

19 JUDGE RIVERA: Yeah.

20 MR. MODRZYNSKI: And there was no - - - and
21 although the record - - - I see my time is up, may I
22 briefly respond?

23 JUDGE RIVERA: Please.

24 MR. MODRZYNSKI: Although there is no
25 particular record of anyone being contacted, the

1 People and I think the court below - - - or no, the
2 trial judge had indicated that, you know, the vehicle
3 was necessary to be removed because of all of these
4 things.

5 Realistically, the appellant was asked if
6 he drove, he said no, the police then went and talked
7 with loss prevention, they indicated that they'd like
8 the vehicle removed, no one was contacted, he was not
9 asked if he was with anyone else that could drive the
10 vehicle, and it becomes unreasonable as a seizure
11 because they haven't proven that it was necessary.

12 Further, there was more parking spaces
13 available, as was produced and agreed by the - - - the
14 People's video showed that there was no need to have the
15 vehicle removed at that time.

16 Thank you.

17 CHIEF JUDGE DIFIORE: Thank you, sir.

18 Counsel.

19 MR. POWERS: Good afternoon, Your Honors.

20 CHIEF JUDGE DIFIORE: Good afternoon.

21 MR. POWERS: I've got to say, I'm in awe of
22 your stamina this afternoon.

23 I guess I'll start with the impound question,
24 point one.

25 It is our position that this case is controlled

1 by, and factually superior to, this court's decision in
2 Walker, where you said that where the driver of the
3 vehicle is arrested - - -

4 JUDGE GARCIA: But counsel, let me stop you
5 there. I mean, this to me, seems like, you know, you
6 make an arrest, it's two for one, you get a search
7 warrant free. And free, meaning you don't have to go
8 to a judge and actually show probable cause.

9 So any time you make an arrest, so you could go
10 into a bank, arrest a bank employee for embezzlement, and
11 say to him, did you drive here today to work, and then you
12 could go out, impound the car, and search it.

13 That seems to me to offend some fundamental
14 concept within the Constitution.

15 MR. POWERS: I appreciate what you're
16 getting at, Your Honor, and I think the kind of
17 scenario that you're describing is one we saw in the
18 Sixth Circuit case my opponent cites, Duguay, where
19 you have an impounded and inventory that occurs where
20 one, there is no indication that the car needs to be
21 removed, and two, even if it did need to be removed,
22 there was someone there who could have moved it.

23 JUDGE GARCIA: But this is - - - that's
24 different. So if you have a DWI, and that person is
25 driving the car, and you pulled him over, you impound

1 the car. If you are fleeing from a bank robbery and
2 you arrest the driver, you impound the car.

3 If you're on the side of the road, there's
4 a passenger, you get into these other questions about
5 could you take a - - - but here, the person is in the
6 store, commits the crime, and he happened to drive
7 there, and under your policy, instead of going to a
8 judge and saying, there's probable cause to expect
9 that he - - - to believe that he has stolen
10 merchandise in his car, you say, we arrested you
11 inside the store, so we get to search your car
12 because you are a driver?

13 MR. POWERS: Well, Your Honor, I
14 acknowledge that we would not have had probable cause
15 to search the vehicle.

16 JUDGE GARCIA: Right.

17 MR. POWERS: But if you look back at
18 Walker, Walker says, where the driver of a vehicle is
19 arrested, and we know all of that is true of
20 defendant.

21 JUDGE GARCIA: But driver of a vehicle
22 when? Driver of a vehicle - - - you could say that
23 at the bank scenario that he was a driver of a
24 vehicle to get the work and then he embezzled money
25 inside the bank. I think under your policy, then you

1 would say - - -

2 MR. POWERS: Well, I - - -

3 JUDGE GARCIA: - - - we can impound your
4 car and search it.

5 MR. POWERS: One of the things I did in
6 preparation for this case, Your Honor, was review the
7 record in Walker. And if you look back - - - I'm
8 sorry, it's page 12 of the record in Walker, not of
9 this case, but of Walker, you find out that the facts
10 are virtually identical.

11 Defendant was pulled over admittedly for a
12 VNT infraction, but he stopped his vehicle, and the
13 vehicle was impounded and inventoried from a Tops
14 parking lot, which is really no different - - -

15 JUDGE GARCIA: But he was driving it when
16 they stopped him.

17 MR. POWERS: I don't understand the
18 distinction.

19 JUDGE GARCIA: Was the - - - the defendant
20 Walker, was he driving the car?

21 MR. POWERS: Yes, he was the driver. So -
22 - -

23 JUDGE GARCIA: And they pull him - - -

24 MR. POWERS: - - - just as this defendant
25 was.

1 JUDGE GARCIA: He's in the car when they
2 make the arrest.

3 MR. POWERS: Correct.

4 JUDGE GARCIA: This person is in the store.
5 So it seems to me the connection between driving and
6 this arrest is so attenuated, that essentially what
7 you're doing is you're saying any time we make an
8 arrest, and that person drove in some way in a
9 relation, even to getting to the scene of the crime,
10 we can search the car.

11 MR. POWERS: Well, if - - - if the vehicle
12 had been somewhere that it belonged, Your Honor, I
13 would agree with you. The problem is that it did
14 not.

15 JUDGE GARCIA: No, but that's a different
16 basis for doing this. I think that's the case of, we
17 got consent from the store, it's no longer legally
18 parked, they don't want it in the lot, and then you
19 have this issue of did you comply with your own
20 procedures for inventory, and then is that preserved.

21 But as a fundamental matter, when you arrest
22 somebody for a crime, not in a vehicle, completely
23 different, but you say you drove to the scene somehow, I
24 just don't understand how that could possibly be
25 constitutional.

1 JUDGE STEIN: Counselor, is that what - - -
2 is that what the policy here says?

3 MR. POWERS: The policy states, and this is
4 on page 1 of the policy, virtually the exact same
5 thing that Walker says. That where a defendant is
6 subjected to a valid custodial arrest and his vehicle
7 is on private property, among other things, law
8 enforcement may validly impound the vehicle. And in
9 that case, it also authorizes the inventory.

10 JUDGE RIVERA: So where - - - where does
11 this procedure for handling vehicles fall in, that's
12 on the appendix 23 and 24? Or is it your position
13 that it doesn't apply at all?

14 MR. POWERS: My understanding from the
15 transcript, Your Honor, and I - - - I admit I haven't
16 looked at that provision in some time, my
17 understanding was that it did not apply in this
18 particular scenario.

19 JUDGE RIVERA: So why - - - why not? I
20 mean, it's illegally parked because it's a vehicle on
21 private property, and the private - - -

22 MR. POWERS: Oh - - -

23 JUDGE RIVERA: - - - owner wants you to
24 remove it. And as I understand this procedure, it
25 says that the officer, the State officer, because

1 this is about contacting the police - - -

2 MR. POWERS: Um-hum.

3 JUDGE RIVERA: - - - will attempt to
4 determine the ownership of the vehicle, and attempt
5 to contact the owner.

6 MR. POWERS: I - - - I'm sorry, Your Honor.
7 I misunderstood. I think that relates to the kind of
8 carve-out provision from page 1, if my memory of the
9 - - -

10 JUDGE RIVERA: Okay.

11 MR. POWERS: - - - general order is
12 correct, that they have the discretion to attempt to
13 contact someone in the case of a valid custodial
14 arrest. But I might be - - - I'm sorry, Your Honor,
15 I don't have that page in front of me.

16 JUDGE RIVERA: It says, "will", not may,
17 officer will - - -

18 MR. POWERS: I - - -

19 JUDGE RIVERA: Okay.

20 MR. POWERS: I'm sorry, Your Honor, I don't
21 have the page in front of me. I'm sorry.

22 JUDGE STEIN: I want to get back to the - -
23 - to the other part of the policy. I thought your
24 argument was that the policy authorizes the police to
25 remove the vehicles from the private property to

1 ensure the safety of the vehicle and its contents.
2 Not merely because he happened to be arrested and the
3 car was there on a private parking lot.

4 MR. POWERS: I have - - - my recollection
5 of the testimony was - - -

6 JUDGE STEIN: Am I wrong?

7 MR. POWERS: - - - no, was that it
8 contemplated all of those things. I think maybe more
9 of that testimony came from - - - from Tops maybe,
10 than the officer - - - or excuse me, Tops - - -
11 Target, I'm sorry.

12 JUDGE RIVERA: Well, if it's illegally
13 parked in a parking lot, that's always the case,
14 right? I mean, they're always removing it.

15 MR. POWERS: Correct. I mean, that
16 happened in South Dakota v. Opperman, correct.

17 Just with respect to the parked locked
18 provision, it is our contention that that claim is
19 unpreserved. Defendant never argued below that the
20 vehicle was illegally parked. He never argued that the
21 G.O. specifically required dispirit treatment in that
22 instance.

23 So under this court's decision in Tutt and many
24 others, it's our position that that claim is unpreserved.

25 Unless there are other questions, I guess I can

1 stop there, Your Honors.

2 CHIEF JUDGE DIFIORE: Thank you, counsel.

3 MR. POWERS: Thank you.

4 CHIEF JUDGE DIFIORE: Counsel.

5 MR. MODRZYNSKI: Briefly, just to touch on
6 a few points. I know Judge Garcia, you had asked of
7 my opposing counsel a hypothetical in regards to a
8 second option to search a vehicle. You had started
9 with that, and that's essentially, I think, what this
10 started out as in this particular case.

11 Where the individual was arrested not near
12 the vehicle. He said he didn't drive it, then went
13 to get that information just so they could then go
14 after and search that vehicle. That's why the
15 policy, on its face, is unconstitutional, that anyone
16 who is arrested, the car needs to be seized.

17 JUDGE GARCIA: Well, I think as applied,
18 right, I mean, on it is the argument would be.
19 Because on its face, a DWI, you could take the car.
20 That would not be unconstitutional, right?

21 JUDGE STEIN: Well, isn't the provision
22 that I just read that it has to be necessary to
23 protect or - - - now I lost it, but are - - - sorry.

24 Yeah, to ensure the safety of the vehicle
25 and its contents. Isn't that - - - doesn't that

1 limit the discretion? So in other words, if there is
2 no - - - here there was proof, at least, that Target
3 said, we have a history of break-ins and vandalism.
4 So as applied here, at least it follows - - - there
5 was some limit on the officer's discretion, wasn't
6 there?

7 MR. MODRZYNSKI: Well, in - - - and upon
8 review, perhaps it looks that way. However, there
9 was no indication that that information was related
10 to any officer on scene. That that's why they wanted
11 it removed.

12 That was the testimony at the hearing as to
13 why they wanted it moved, to justify that, because I
14 think they felt obligated because they were called to
15 testify at the hearing. But there was nothing to
16 indicate that they told the officer, we would like it
17 removed because of this.

18 They could have it removed because it's on their
19 property and it's not supposed to be, and that's fine.
20 But that's assuming the officers didn't take it pursuant
21 to the arrest provision, which is what they originally
22 claimed that they did, was take it pursuant to the arrest
23 provision.

24 JUDGE ABDUS-SALAAM: Well, could they have
25 mixed motives here? Could they take it for both

1 reasons?

2 MR. MODRZYNSKI: I'm sure there's always
3 mixed motives, so yes.

4 JUDGE ADBUS-SALAAM: And they did - - -

5 JUDGE RIVERA: Well, in a parking lot,
6 isn't this always the motive? I mean, what else
7 would there be? You're not allowed to leave it
8 overnight in a parking lot. The point is that
9 someone might break in, right, I mean, isn't that - -
10 -

11 MR. MODRZYNSKI: Well, and that's - - - and
12 that's what they're saying, that the public
13 caretaking function - - - in this particular case,
14 they asked him if he drove, he said no. That
15 relieves the officers of any liability at that point.

16 They are not accountable if anything
17 happens to his vehicle, nor could they be held
18 accountable. So they're not serving a public
19 caretaking function; they're serving a personal,
20 private function for Target, which is fine, however,
21 they have to follow their policies, and they did not
22 do that in this particular case.

23 Thank you.

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 (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. Wilson J. Tardi, No. 181 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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