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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

No. 78

LANCE RODRIGUEZ,

Respondent.

20 Eagle Street
Albany, New York
October 18, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUSTICE JOHN C. EGAN, JR.

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: For the next matter, number
2 78, People v. Lance Rodriguez, we are pleased to be joined
3 by our colleague, John Egan, from the Appellate Division,
4 Third Department.

5 MS. KON: Good afternoon. May it please the
6 court. Hannah Kon on behalf of appellant, Lance Rodriguez.
7 May I reserve four minutes for rebuttal?

8 CHIEF JUDGE WILSON: Yes.

9 MS. KON: The question that is before this Court
10 is whether Ofc. Shell effected a seizure when he commanded
11 Mr. Rodriguez to stop and pulled him over on a public road
12 because if that was a seizure, it was an unlawful one.

13 It is undisputed that Ofc. Shell did not have
14 reasonable suspicion of a crime, probable cause of a
15 traffic violation when he initiated the seizure. It's that
16 - - -

17 JUDGE SINGAS: So is that your argument now, that
18 it's - - - is it that this stop amounted to a seizure? Or
19 are you asking for a per se rule that any stop of a
20 bicyclist on a public roadway is a - - - is a level three
21 automatic? What are you asking this court to decide?

22 MS. KON: Yes, I'm - - - I think that any - - -
23 the rule should be, like it is for cars and motorcycles and
24 all other vehicles, the rule should be that on a public
25 road, any time a police officer asks a bicyclist or any - -

1 - any vehicle on the public road to stop, that - - - that's
2 a seizure, because it's always a mandatory encounter. It's
3 not consensual. No reasonable person would feel they are
4 free to disobey or disregard a police command to stop on a
5 public road.

6 JUDGE TROUTMAN: What about the claim that
7 there's a difference between a motor vehicle and a bicycle?

8 MS. KON: Well, I don't actually think that - - -
9 that that is true in terms of what a reasonable person
10 thinks that they can do on the road, because we know the
11 VTL requires everyone on the road, whether they're on a
12 bicycle or a scooter or a hoverboard, any of those things,
13 requires them to stop when police tell them to stop.
14 There's a lawful order doctrine.

15 JUDGE TROUTMAN: So is an important distinction
16 between a pedestrian walking versus a bicyclist is that
17 they're in the roadway and they're - - - they're in motion
18 when they're told to stop in the roadway. Is that what
19 makes it a difference from being a pedestrian walking?

20 MS. KON: Yeah, I think - - - I think what the
21 difference is - - - is if the operative factor is the
22 public road. What do we have to - - -

23 JUDGE GARCIA: Does the person who's running in
24 the public road get the same rule then?

25 MS. KON: Well, yeah, and again you would just

1 look at what does a reasonable person expect. And a person
2 - - - first of all, running - - - you know, public roads
3 are not designed for - - - for runners and pedestrians.

4 JUDGE GARCIA: Well, it's not designed for a lot
5 of stuff, but. So a person - - - there are people running
6 in the road all the time, just like they ride their bikes
7 on the sidewalk. But you're running in the road. There's
8 no sidewalk, let's say. You're running in a public road.
9 They get the same rule as a bicycle rule?

10 MS. KON: If they're actually in the - - - the
11 road, then they're - - - they're not supposed to be in - -
12 - in the road. It's a violation of the VTL, so you could
13 stop - - -

14 JUDGE GARCIA: But there's no - - - there's no
15 sidewalk. You can't be in the road? How do you go?

16 MS. KON: So if - - - if there is no sidewalk and
17 there is no shoulder, you're supposed to be all the way,
18 you know, to the right. And yeah, if - - - if there's a
19 runner in the road running down the road and police say,
20 like they did in this case, for example, police, hold up,
21 then I think a reasonable person who's in the road thinks
22 that they have to stop.

23 JUDGE CANNATARO: And that's level three?

24 MS. KON: You would need a level three - - -

25 JUDGE GARCIA: So the rule is anyone in the road,

1 you have to be going running, or if you're walking in the
2 road, that would also apply?

3 MS. KON: Yeah, I mean, I think so. But again,
4 that's not really a - - -

5 CHIEF JUDGE WILSON: What if you're in a
6 crosswalk?

7 MS. KON: Crosswalk is a pedestrian area, and I'm
8 not - - -

9 JUDGE TROUTMAN: But there's some places in
10 upstate New York where there are no sidewalks, and they're
11 walking - - - a person is literally walking along the
12 roadway. Are you saying because they happen to be walking
13 along the roadway, it's the same as the motor vehicle?

14 MS. KON: No, what I'm saying is that you always
15 look at what a reasonable person in that situation would
16 think. A reasonable bicyclist on a public road knows that
17 they have to comply with the same rules as cars and knows
18 that they have to stop. There is no reasonable person who
19 thinks they can disregard a police command to stop when
20 they're bicycling down a roadway.

21 CHIEF JUDGE WILSON: What if the bicyclist is
22 already stopped? Let's say I'm on my bike, but I stop at a
23 red light and the police come up.

24 MS. KON: Well, it's - - - it's the same rule as
25 cars, I think. You can - - -

1 CHIEF JUDGE WILSON: So it's the motion doesn't
2 really matter - - -

3 MS. KON: Well, no, I think it - - - I mean, I
4 think it does. I think when cars are parked or stopped,
5 you don't require a level three. So I think it would be
6 the same rule for any bicyclists or - - -

7 CHIEF JUDGE WILSON: Wait. So your understanding
8 of the law is if I'm driving in my car and the police want
9 to stop me, but they don't have a level three, all they
10 have to do is to wait till I get to a red light and stop,
11 and then it's no longer level three?

12 MS. KON: Well, no, I think - - - I think I might
13 have misunderstood - - -

14 CHIEF JUDGE WILSON: Okay.

15 MS. KON: - - - the question. So I think that
16 the bike rule - - - or it's not really a bike rule - - - I
17 think public road rule requires that, you know, like cars,
18 if someone is driving down the road on a bike - - -

19 JUSTICE EGAN: They have to obey the vehicle and
20 traffic law.

21 MS. KON: Correct.

22 JUSTICE EGAN: Just like drivers of cars,
23 correct?

24 MS. KON: Correct.

25 JUSTICE EGAN: Isn't there testimony here at the

1 suppression hearing that the officer observed your client
2 driving down the middle of the road and cars having to stop
3 or get out of the way?

4 MS. KON: So my client was not violating any
5 provision of the Vehicle and Traffic Law. He was - - -

6 JUDGE CANNATARO: So you're saying there isn't
7 like a reckless bicycling law the way there might be a
8 reckless driving law?

9 MS. KON: Right. And I also want to note that
10 driving down the middle of the road in this instance was
11 actually compliant with the VTL. There were - - - there's
12 no bike path. There were cars parked on both sides.

13 JUSTICE EGAN: Bicycles don't have to stay to the
14 right?

15 MS. KON: Well - - -

16 JUSTICE EGAN: Stay out of traffic?

17 MS. KON: - - - right. This was a narrow road.
18 And what the VTL says is that you have to - - - the
19 bicyclist should - - - should bicycle in a way that's safe.
20 And in this instance, it was safe as to go down the middle
21 of the road. He was going in the right direction. The
22 fact that cars had to go around him isn't indicative of
23 recklessness. In fact - - -

24 JUDGE CANNATARO: Isn't the fact that the VTL
25 seems to treat bicyclists somewhat different than it treats

1 motorists undermining of your argument that for purposes of
2 search and seizure, they should be treated exactly the
3 same?

4 MS. KON: No, because I think what the - - - what
5 the VTL - - - the relevance of the VTL here is what would a
6 reasonable person think? Everyone on the road has to
7 comply, because the reason why the VTL has carved out all
8 these different laws for roads is because they're
9 dangerous, so police need to have - - -

10 JUDGE GARCIA: So it's anything on the road - - -
11 but wouldn't you - - - I - - - how - - - don't we have
12 cases where pedestrians - - - if you do this to
13 pedestrians, they think they have to stop. I mean, they're
14 going to respond to authority. We have cases like that
15 with pedestrians.

16 MS. KON: In - - - in the public road?

17 JUDGE GARCIA: On the street. Why wouldn't a
18 pedestrian walking down the sidewalk and the police officer
19 says stop, why wouldn't they stop? Do they don't think
20 they have to?

21 MS. KON: On the sidewalk?

22 JUDGE GARCIA: Yeah.

23 MS. KON: Well, for starters, the lawful order
24 doctrine applies to public roads, not sidewalks. I think
25 that the - - - the rules for a pedestrian - - -

1 JUDGE GARCIA: You're saying what a reasonable
2 person, I thought we were talking about what a reasonable
3 bicyclist would think. Wouldn't a reasonable pedestrian
4 think the same thing?

5 MS. KON: On a roadway or on a - - -

6 JUDGE GARCIA: Sidewalk.

7 MS. KON: No, because the rules for pedestrian
8 areas are different. They don't implicate the same safety
9 concerns. Police are not given the same broad authority
10 that they are given on the roads. That - - - that
11 authority is important because they need to ensure our
12 safety. But - - - but - - -

13 JUSTICE EGAN: Your client was not in a
14 pedestrian area.

15 MS. KON: Right. He was on a road. And so he
16 was required to stop when Ofc. Shell told him to stop. And
17 because of that, he was seized. That was a seizure. It's
18 a nonconsensual encounter. You know, police have been - -
19 - the legislature has given police this broad authority,
20 but they have to exercise that authority in a
21 constitutionally sound manner - - -

22 JUDGE CANNATARO: He didn't stop the first time
23 the officer asked him to stop, did he?

24 MS. KON: No.

25 JUDGE CANNATARO: Didn't he say he had to do it



1 twice?

2 MS. KON: Yes, he - - -

3 JUDGE CANNATARO: Could that be taken in some
4 evidence that he didn't personally believe that he needed
5 to stop - - - as a bicyclist, that he needed to stop just
6 because he was in the roadway?

7 MS. KON: No, absolutely not. So again, this was
8 a very quick command that he obeyed. There's notice of - -
9 -

10 JUDGE CANNATARO: I'm talking about when he
11 disobeyed it the first time, though.

12 MS. KON: I think it was very quick and repeated.
13 But in any event, it's what would a reasonable person
14 think? So a reasonable person knows they had to stop.

15 JUDGE TROUTMAN: When the second command was
16 made, the police clearly said, police. They - - - they
17 wanted the rider to know they had authority over him.

18 MS. KON: That's correct.

19 JUDGE TROUTMAN: Arguably?

20 MS. KON: That's - - - yes. Actually, I think
21 both times they said, police.

22 JUSTICE EGAN: Yeah, they didn't - - - they said
23 it the first time as well, right?

24 MS. KON: Police. Yes - - -

25 JUDGE SINGAS: Well, I don't think we're saying

1 that there could never be a seizure of a bicyclist, right.
2 Our case law doesn't say that absent this rule. And you
3 keep saying reasonableness, but the - - - the thrust of our
4 jurisprudence on these De Bour standards is reasonableness
5 and the totality of the circumstances.

6 So why isn't that assessment - - - I think this
7 whole discussion lends itself to a totality of
8 circumstances analysis that would better fit the
9 circumstances. Is someone running too fast? Is a
10 bicyclist going too slow? People on a hover board in a
11 public roadway. Like, why not look at the individual
12 circumstances, like our laws currently require us to, and
13 then make an assessment? Was that criminality afoot? Do
14 we need reasonable suspicion?

15 The situations on the street are fluid and change
16 constantly, and doesn't a per se rule take away almost the
17 reasonableness angle of this?

18 MS. KON: No, Your Honor. The same reason we
19 need a per se rule for cars. You know, there are - - -
20 there are thousands of New Yorkers who are bicycling to
21 work every day on our public roads, and they should not be
22 subject to more police intrusion, to less Fourth Amendment
23 protection simply because they cannot afford a car.

24 JUDGE GARCIA: I'd like to get back to something
25 that Chief Judge asked you before your time runs out, which

1 is stopped bicycle, stopped car. Now, my understanding is
2 stopped car, still - - - you know, you go up, seizure or
3 no?

4 MS. KON: Yes, I think stopped - - - not a parked
5 car. Stopped car.

6 JUDGE GARCIA: Right. Stop. So stopped bicycle,
7 same rule? Stopped hoverboard, same rule? Stopped
8 scooter, stopped skateboard?

9 MS. KON: On a - - - on a public road, yes.

10 JUDGE GARCIA: So someone has a skateboard and
11 they're stopped on a public road, and you come up to them,
12 that's a seizure?

13 MS. KON: Yes. Because they are required - - -
14 they are required to stop by law. They are required - - -

15 CHIEF JUDGE WILSON: And if - - - and if the
16 skateboard is stopped on the sidewalk?

17 MS. KON: Diff - - - different rule. Pedestrian
18 areas, different rule. The legislature has really carved
19 out different rules because roads are so dangerous.
20 Sidewalks don't implicate the same safety concerns. But
21 that - - -

22 CHIEF JUDGE WILSON: You haven't been in New York
23 City lately, maybe.

24 MS. KON: You know, pedestrian areas don't
25 implicate those same safety concerns. These - - - but

1 stops on the road, they're always mandatory, so they're
2 always seizures.

3 JUSTICE EGAN: All right. You're arguing a level
4 three stop, correct?

5 MS. KON: Yes.

6 JUSTICE EGAN: All right. Supreme Court and the
7 Second Department analyzed this as a level two stop?

8 MS. KON: Correct.

9 JUSTICE EGAN: All right. Assume you're right,
10 what do we do here?

11 MS. KON: Well, then you should find that the
12 seizure was unlawful, and the resulting - - - the evidence
13 from the resulting search needs to be suppressed.

14 JUSTICE EGAN: Is that within our power, or was
15 this a case of Supreme Court utilizing the wrong legal
16 standard, and therefore, would have to send it back to
17 apply what we - - - if we say it - - - agree with you that
18 it's a level three, apply a level three standard to the
19 facts as found?

20 MS. KON: No, not in this case, because the - - -
21 there is no record support at all for the fact that there
22 might be reasonable suspicion. And the People have waived
23 any argument. They've never argued that there's reasonable
24 suspicion. There's no dispute about that.

25 JUSTICE EGAN: As to a crime?

1 MS. KON: As to a crime or - - - or probable
2 cause of a traffic violation. There - - - there is no
3 dispute in the record that that did not occur. So no, I
4 don't believe that you would need to send it back for that
5 determination. I see my time is up.

6 CHIEF JUDGE WILSON: Thank you.

7 JUDGE TROUTMAN: Why isn't it a seizure when a
8 bike is in motion on a public highway and the police
9 command that it stop in traffic?

10 MS. ZELIG: Well, Your Honor, before I answer
11 that, if I may just say, it can't be said that the lower
12 court, the Supreme Court, and the Appellate Division made
13 the wrong decision based on the facts in this case, that
14 this was a level two civilian police encounter.

15 And based upon the facts of this case - - -

16 JUDGE TROUTMAN: The facts of the case - - -

17 MS. ZELIG: Yes.

18 JUDGE TROUTMAN: - - - we're on a public roadway.

19 MS. ZELIG: We're on a public road, Your Honor.
20 But it is - - -

21 JUDGE TROUTMAN: Why is the bicyclist treated
22 differently than a motor vehicle? You have motorized bikes
23 now.

24 MS. ZELIG: Well, we're not - - - correct, Your
25 Honor, but we're not advocating that bicyclists should be



1 treated specifically different than motor vehicles. There
2 may be situations where bicycles could be treated as motor
3 vehicles. For example, if it's an e-bike - - -

4 CHIEF JUDGE WILSON: But the question I think - -
5 - the question you're - - - sorry, I'm over here - - - the
6 question that counsel has posed to us is, shouldn't we have
7 a rule for bicycles that is the same as all the rules we
8 have for motor vehicles?

9 MS. ZELIG: Absolutely not, Your Honor.

10 CHIEF JUDGE WILSON: Okay. So - - -

11 MS. ZELIG: There are many different levels - - -

12 CHIEF JUDGE WILSON: - - - so now it goes to
13 Judge Troutman's question.

14 MS. ZELIG: Correct.

15 CHIEF JUDGE WILSON: So what about a motorcycle?

16 MS. ZELIG: Depends on the situation. A
17 motorcycle could be treated as a motor vehicle. They go at
18 much faster rates of speed.

19 CHIEF JUDGE WILSON: But should - - - right. But
20 you say - - - you keep saying depending on the situation.

21 MS. ZELIG: Because it's a totality of the
22 circumstances - - -

23 CHIEF JUDGE WILSON: But you're saying, even for
24 motorcycles, you would say they should not be treated the
25 same way as cars?

1 MS. ZELIG: Well, there are situations where a
2 car could even be treated - - -

3 CHIEF JUDGE WILSON: No, but the - - - oh, so you
4 don't think there's a - - -

5 MS. ZELIG: There's a general rule.

6 CHIEF JUDGE WILSON: Yeah.

7 MS. ZELIG: The courts have said, generally, a
8 motor vehicle is a level three seizure because of the level
9 of intrusiveness that entails to stop a motor vehicle. The
10 lights, the sirens - - -

11 CHIEF JUDGE WILSON: And so generally, would you
12 say - - - generally, would you say the same about a
13 motorcycle?

14 MS. ZELIG: I would, Your Honor. I would say the
15 same, generally.

16 CHIEF JUDGE WILSON: So how about an electrified
17 bicycle that travels thirty miles an hour?

18 MS. ZELIG: It may in that particular situation.
19 If the police - - -

20 JUDGE CANNATARO: So is motorized what makes it
21 different?

22 MS. ZELIG: No. I think, Your Honor, it depends
23 on the level of intrusiveness. And that's what this
24 court's jurisprudence is - - -

25 JUDGE RIVERA: And how do you measure that?

1 JUDGE CANNATARO: Yeah.

2 JUDGE RIVERA: Is it by the speed? Is it by the
3 location on the roadway? What - - - how do you measure
4 that?

5 MS. ZELIG: It's the totality of the
6 circumstances. How do - - -

7 JUDGE RIVERA: Again, what would be the factors
8 one would look at to figure out under the totality of the
9 circumstances whether or not it's a seizure?

10 MS. ZELIG: How is that individual stopped? How
11 is that car, e-bike, bicycle, pedestrian, how is that
12 individual stopped?

13 JUDGE TROUTMAN: Okay. So in this instance, the
14 bike is in motion.

15 MS. ZELIG: Correct.

16 JUDGE TROUTMAN: It is moving. Why is it not
17 intrusive for a police officer to repeatedly command that
18 you stop? Why is it not intrusive?

19 MS. ZELIG: It's not intrusive, Your Honor,
20 because the - - - the bike - - - the defendant was going in
21 the middle of the road causing other cars to swerve out of
22 the way to avoid hitting him.

23 JUDGE TROUTMAN: So it's not intrusive because of
24 the manner in which he was operating the bike?

25 MS. ZELIG: Well, it's not - - - it - - - that's

1 the problem with this per se rule that my adversary is
2 trying to advocate. It doesn't work because - - - let's
3 take the facts of this case, which we are bound by these
4 facts, for example. What was the police going to do?
5 Would the police - - - they saw this was a public safety
6 issue. This was a dangerous - - -

7 JUDGE TROUTMAN: If they have cause to believe
8 that he's committed a violation of the Vehicle and Traffic
9 Law, wouldn't you apply - - - you could - - - the question
10 is, can you apply it the same way as you would with a car?

11 MS. ZELIG: Well, yes, Your Honor, you can.

12 JUDGE TROUTMAN: And bikes are supposed to
13 observe - - - they don't always observe the vehicle and
14 traffic laws - - -

15 MS. ZELIG: Exactly.

16 JUDGE TROUTMAN: - - - but bicyclists - - - I'm
17 not saying they're allowed to just ride in an unbridled
18 way.

19 MS. ZELIG: Correct.

20 JUDGE TROUTMAN: In this instance, you're saying
21 this was not a seizure because of the manner in which he
22 was operating?

23 MS. ZELIG: No, I'm saying that in this
24 particular case, there's two components. One, the police
25 enforcing their own public safety. And they have - - -

1 they see this defendant riding in the middle of the street.
2 Cars have to stop to avoid hitting him. The police had the
3 right, whether or not this rose to a VTL violation, and it
4 may be - - - again, not in the record. He wasn't charged
5 with this. It may be a VTL 1212 - - -

6 JUSTICE EGAN: Did he need to be, by the way?
7 Seems like there's a lot of cases where, you know, a
8 trooper stops a car on the thruway for speeding, and then
9 things develop, and drugs are found and there's a felony
10 arrest made. There's no necessarily ticket issued for
11 speeding, but that was the basis for the stop.

12 MS. ZELIG: Correct.

13 JUSTICE EGAN: Okay.

14 MS. ZELIG: Yes, Your Honor. That's my point.
15 So there - - -

16 JUSTICE EGAN: Was there a V and T violation
17 here?

18 MS. ZELIG: I'm sorry?

19 JUSTICE EGAN: We know there was no - - - a V and
20 T violation.

21 MS. ZELIG: What is V and - - - oh, Vehicle and
22 Traffic Law.

23 JUSTICE EGAN: Vehicle and Traffic Law.

24 MS. ZELIG: VTL, thank you, Your Honor. We do
25 not know. It wasn't in the record. The officer's

1 testimony was - - -

2 JUDGE TROUTMAN: And that - - - that's the point.

3 JUDGE CANNATARO: Is that - - -

4 MS. ZELIG: But that's not required, Your Honor,
5 that they're actually is - - -

6 JUDGE TROUTMAN: But the point is you - - - you
7 raise concerns about safety and the manner of operation and
8 danger to the public. But if there is a violation that's
9 occurring, of course, the police have the right to stop
10 them, charge them with that vehicle and traffic violation.
11 And you - - - you are recon - - - you are agreeing that
12 this record doesn't support there was even a violation.

13 MS. ZELIG: It's not - - - on this record, it's
14 not clear that there was a VTL violation.

15 JUDGE TROUTMAN: And you're saying it doesn't
16 matter?

17 MS. ZELIG: Correct. Because there are many
18 levels - - - the VTL violation could be a predicate for a
19 stop. And that certainly whether it comes to a motor
20 vehicle, a bicycle, and there are a myriad of cases - - -

21 JUDGE CANNATARO: Counsel, I'm sorry - - -

22 MS. ZELIG: I'm sorry.

23 JUDGE CANNATARO: I'm lost, so I just need you to
24 help me get back on - - - I was going to say help me get
25 back on the road - - - but get me back on track. You

1 started this line of questioning by saying that the rule is
2 keyed to the intrusiveness of the police action, and
3 somehow it's more intrusive for police to stop a vehicle
4 than it is to stop a bicycle. And then we sort of swerved,
5 if you will, into, I don't know, reckless riding of a
6 bicycle, or maybe even violating VTL provisions. And I
7 don't see the connection between that and intrusiveness.
8 So are you articulating two standards, or is there a
9 connection that I'm missing here?

10 MS. ZELIG: I understand your question, Your
11 Honor. No, I was answering Judge Troutman's question that
12 based upon the facts of this case, there was a recklessness
13 component. So the predicate for this police-citizen
14 encounter - - -

15 JUDGE CANNATARO: Yeah.

16 MS. ZELIG: - - - in this particular case was,
17 one, the safety of the defendant - - -

18 JUDGE CANNATARO: But you - - - I think you
19 admitted to Judge Troutman that there is no reckless
20 bicycle riding provision in the VTL.

21 MS. ZELIG: I - - - no, not on this record. It's
22 not clear. But I believe, again, off the record, that
23 under VTL 1212, the reckless driving can also apply to - -
24 - a reck - - - a reckless bicyclist. But again, that's not
25 on the record - - -

1 JUDGE CANNATARO: So are you saying that the
2 police had probable cause to believe that this defendant
3 had - - -

4 MS. ZELIG: No.

5 JUDGE CANNATARO: - - - committed a VTL violation
6 at the - - -

7 MS. ZELIG: No, Your Honor.

8 JUDGE CANNATARO: - - - time they stopped him?

9 MS. ZELIG: On this record, I'm not saying that.

10 JUDGE CANNATARO: So VT - - - that's out of it,
11 right?

12 MS. ZELIG: I am - - - correct. I am saying that
13 the VTL violation can be a predicate for the stop and under
14 Hicks, Robinson, and Hinshaw - - -

15 JUDGE TROUTMAN: So the predicate here is what?

16 MS. ZELIG: So the predicate here is twofold.
17 The predicate is, first, the initial common law, right to
18 inquire, when they saw the defendant driving - - - I'm
19 sorry - - - riding his bike in a reckless manner, and then
20 seeing the bulge in his waistband, which is the telltale
21 sign of a weapon, which, according to this court's
22 jurisprudence, would rise to a level two common law right
23 to inquire. And that's what you have to look at. You have
24 to look at the particular facts of this case - - -

25 CHIEF JUDGE WILSON: The record showed - - - I



1 thought the record showed that his hand was in his jacket
2 pocket, not his waistband?

3 MS. ZELIG: His hand was over a bulky - - - did I
4 say jacket pocket?

5 CHIEF JUDGE WILSON: No, I think it was his
6 jacket pocket on the record - - -

7 MS. ZELIG: His hand was over a bulky item on his
8 waistband. So the police then said, stop, hold up.

9 CHIEF JUDGE WILSON: So let me get you back to
10 intrusiveness for a second. How would you measure the
11 difference in intrusiveness between stopping a bicycle and
12 stopping a car?

13 MS. ZELIG: Generally, it's much less intrusive.
14 A bicycle could be on a bike path. A bicycle could be in a
15 bike lane. A bicycle could entail the officer to
16 communicate with the bicyclists; whereas, a car on a
17 roadway on a highway would be much more difficult. And
18 it's usually not occurring without the lights and sirens
19 and the stop.

20 The other way is what if the police want to
21 investigate a crime and see an individual on a bike,
22 riding, and they say, hey, can we just ask you a question?
23 Did you see any witnesses? We're investigating this case.
24 There's a much easier level to communicate with a bike than
25 there is a motorist. But again, that's the problem with

1 the per se rule.

2 JUDGE TROUTMAN: Why? Why is there - - - easier?

3 MS. ZELIG: Because you could - - - let's say an
4 individual is on a bike lane, and the officer could be on
5 foot patrol, and he's like, hey, can I just ask you a
6 question? Can I pull over? But again, speed, all those
7 other things come into play.

8 JUDGE TROUTMAN: They - - - they do come into
9 play.

10 MS. ZELIG: They do.

11 JUDGE TROUTMAN: They have bike lanes now - - -

12 MS. ZELIG: Yes.

13 JUDGE TROUTMAN: - - - designated.

14 MS. ZELIG: Yes.

15 JUDGE TROUTMAN: And more and more people are
16 riding their bikes - - -

17 MS. ZELIG: Absolutely.

18 JUDGE TROUTMAN: - - - and they're riding them at
19 excessive speeds. It - - - it - - - it's not - - -

20 MS. ZELIG: Yes.

21 JUDGE TROUTMAN: - - - as easy as you profess.

22 MS. ZELIG: Oh, exactly. That's my point, Your
23 Honor - - -

24 JUDGE SINGAS: But isn't that really the point,
25 though, that - - -

1 MS. ZELIG: That is the point.

2 JUDGE SINGAS: - - - so if Lance Armstrong is
3 riding his bicycle, then it might be an intrusive - - -

4 MS. ZELIG: Correct.

5 JUDGE SINGAS: - - - stop because you'd have to
6 get your lights and sirens - - -

7 MS. ZELIG: Exactly.

8 JUDGE SINGAS: - - - because no cop is running as
9 fast as Lance on his bicycle.

10 MS. ZELIG: Right.

11 JUDGE SINGAS: But in other circumstances that -
12 - -

13 MS. ZELIG: It may not be.

14 JUDGE SINGAS: - - - might not happen. So we're
15 - - - I - - - I think what you're saying is it would never
16 not be a seizure. It's just dependent on the
17 circumstances.

18 But going back to something that you said, if the
19 police wanted to stop and ask for information, if they were
20 investigating a crime. If this per se rule is adopted,
21 would they ever be able to do that with a bicyclist?

22 MS. ZELIG: That's exactly the problem. Maybe
23 the police would stop. Maybe it would inhibit the police
24 from performing not only their law enforcement duty but
25 their public safety duties. That's - - -

1 JUDGE TROUTMAN: But if they violate the vehicle
2 and traffic law that they're supposed to follow too - - -

3 MS. ZELIG: Then that would be a predicate for
4 the stop.

5 JUDGE TROUTMAN: Correct.

6 MS. ZELIG: But - - -

7 JUSTICE EGAN: But you're not alleging that
8 happened here?

9 MS. ZELIG: I am not. But I'm - - - I'm also
10 stating that that should not be the only factor. The
11 Constitution - - - both the United States Constitution - -
12 -

13 JUDGE TROUTMAN: So you want the police to be
14 able to stop them no matter what?

15 MS. ZELIG: No, I want - - -

16 JUDGE TROUTMAN: Is this subjective?

17 MS. ZELIG: It has to be an objective basis. The
18 point of the Fourth Amendment and the New York State
19 Constitution guarantees individual rights against
20 unreasonable searches and seizures. And unreasonable
21 requires a reasonable analysis in every single situation -
22 - -

23 JUDGE TROUTMAN: And it's not unreasonable. I
24 have my bike in motion. I'm - - - I'm going on down the
25 street, and I have cars going by me, and I'm supposed to

1 pay attention to all of it, and I have a police officer
2 yelling at me to stop. Shouldn't there be more required
3 than just because he just wants me to stop?

4 MS. ZELIG: Again, it - - - this is the problem
5 with this per se rule. It can't be enforceable. It's not
6 realistic to be able to say - - - yeah - - -

7 JUDGE TROUTMAN: But with a car, you agree, you
8 can't just stop the car.

9 MS. ZELIG: Again, depends - - - I cited a case,
10 the Second Circuit case in my brief, People v. Adegbite,
11 which is on page - - - page 43 of my brief. And in that
12 particular case, there was a car that had - - - it was in a
13 parking lot, but it had pulled away, and the police were
14 able - - - the officer on foot was able to actually stop
15 that car and inquire. And that was not ruled a car stop
16 because it was more akin to a pedestrian stop.

17 JUDGE RIVERA: So - - - so counsel, let me - - -
18 as I, too, am losing the thread of this argument - - - and
19 I'm sure it's me, not you. So what is the limitation on,
20 let's just say with the police officer's authority, that
21 you're concerned with that will be lost if the court were
22 to adopt this per se rule that your adversary is advocating
23 for?

24 MS. ZELIG: Well, the issue is - - -

25 JUDGE RIVERA: What is it that cops will not be

1 able to do that puts us all in peril? What - - - what
2 would that be?

3 MS. ZELIG: Well, what about a car riding on a
4 bike path and the officer can actually communicate with
5 that individual?

6 JUDGE RIVERA: You mean, a bike on a bike path.
7 Car or - - -

8 MS. ZELIG: A bike on a bike path - - - or a bike
9 on a - - - even a bike in a bike lane. If the officer can
10 - - -

11 JUDGE RIVERA: Okay.

12 MS. ZELIG: - - - communicate - - -

13 JUDGE RIVERA: Yes.

14 MS. ZELIG: - - - that bicyclist is exposed to
15 public view, not in a car.

16 JUDGE RIVERA: Okay.

17 MS. ZELIG: The officer can easily communicate
18 with that individual.

19 JUDGE RIVERA: Yes.

20 MS. ZELIG: The issue becomes, how does a police
21 officer know? By restricting him, saying, wait, is he on a
22 bicycle? But I can talk to him. He's right next to me.
23 Wait, I can't stop him unless I have reasonable suspicion.
24 The issue becomes - - - the protection - - -

25 JUDGE RIVERA: But in your - - - under this

1 scenario, what's your position? Could the bicyclist choose
2 to keep biking?

3 MS. ZELIG: Yes.

4 JUDGE RIVERA: Just keep biking. Don't answer
5 the question.

6 MS. ZELIG: Correct.

7 JUDGE RIVERA: And then if the officer stops him,
8 what's the - - - what's the situation now?

9 MS. ZELIG: Then it has to be evaluated. What
10 was his basis for stopping him?

11 JUDGE RIVERA: He didn't - - - he didn't stop
12 when I asked him to. The rider refused to stop when I
13 asked him to.

14 MS. ZELIG: And if that's all that he had, then -
15 - -

16 JUDGE RIVERA: That the officer asked him to - -
17 -

18 MS. ZELIG: - - - that would be a violation - - -
19 that would - - - I won't say that that's a seizure. I
20 don't have any other facts other than what you implicated -
21 - -

22 JUDGE RIVERA: It was your hypothetical. I think
23 we're kind of in the same place.

24 MS. ZELIG: Well, again - - - I'm sorry, did you
25 say a segway?

1 JUDGE RIVERA: No, no, I'm trying - - - I'm just
2 trying get - - -

3 MS. ZELIG: Same thing. Same thing.

4 JUDGE RIVERA: - - - trying to make some sense
5 of, again, what you see as the great limitation on police
6 authority under this per se rule.

7 MS. ZELIG: Because the issue, Your Honor, is - -
8 - sure - - -

9 JUDGE RIVERA: All I'm hearing from you so far
10 is, here's the problem. If an officer can either walk by a
11 bike - - - not on foot, which I think even the slowest
12 rider, that would be very - - - that would be unusual, let
13 me just put it that way, maybe a tricycle, but otherwise
14 can ride alongside them, lower their window, still watch
15 the road and not hurt anybody, and communicate with this
16 rider, that is what you want an officer to still be able to
17 do. That that's - - - that's the kind of authority that
18 you're concerned will be lost, diminished, somehow
19 jeopardized if - - - if we adopt your adversary's per se
20 rule. I just want to understand your - - -

21 MS. ZELIG: Yes. Because - - - but the reason
22 for that, Your Honor, if my - - -

23 JUDGE RIVERA: But you said, yes.

24 MS. ZELIG: Well - - -

25 JUDGE RIVERA: Your answer is, yes?

1 MS. ZELIG: Yes. Because the reason for that is
2 jurisprudence requires an officer to look at the reason - -
3 - the totality of the circumstances as to why that
4 individual was stopped - - -

5 JUDGE SINGAS: Can I just - - -

6 MS. ZELIG: - - - whether it be on a scooter,
7 inline skates, or a bicycle.

8 JUDGE SINGAS: Can I ask you, in this case, if
9 there were a per se rule, if a police officer saw a bulge
10 and saw a defendant with his hand laden with some kind of
11 weight on that bulge, if there were per se rule, would the
12 police officer be able to stop this bicyclist?

13 MS. ZELIG: If he saw the bulge?

14 JUDGE SINGAS: Just the bulge.

15 MS. ZELIG: Well, according to this court, under
16 De Bour, a bulge is level two telltale sign of a weapon.
17 And if this court enforces this rule that it's a per se
18 seizure, then no, then that police officer would not be
19 able to stop that individual, which is a problem with this
20 per se rule.

21 CHIEF JUDGE WILSON: And the same would be true
22 if the officer saw somebody with a bulge driving a car - -
23 - a convertible, let's say.

24 MS. ZELIG: A convertible? Yes.

25 CHIEF JUDGE WILSON: You couldn't - - - you still

1 couldn't - - - you couldn't stop him?

2 MS. ZELIG: No. Without the lights and sirens
3 and - - - and the way you'd be able to stop that car?
4 You're saying? Like it - - - just stop, seeing a bulge in
5 a convertible?

6 CHIEF JUDGE WILSON: Yeah.

7 MS. ZELIG: Would that be enough?

8 CHIEF JUDGE WILSON: Yeah.

9 MS. ZELIG: Well - - -

10 JUSTICE EGAN: No, you'd have to wait for a
11 vehicle and traffic law violation to occur, which - - -

12 MS. ZELIG: No, it wouldn't be enough. You'd
13 have to wait for a traffic violation. Correct. Correct.

14 JUSTICE EGAN: - - - would probably happen in
15 about two blocks, right? - - -

16 MS. ZELIG: Yeah, exactly. And then you're
17 causing now - - - also the - - - the issue really - - - and
18 I know my time is up, if I may just continue. I mean, the
19 whole point of the Fourth Amendment of the New York State
20 Constitution is to prevent, you know, police intrusion
21 based upon a whim and a caprice without any objective
22 reason for stopping these citizens. And that's really what
23 we're looking at here, the totality of the circumstances.

24 If you want to enforce that a bulge in the pocket
25 is now a level three seizure, that's - - - we'll advocate

1 that rule. But the issue is the police have - - - as long
2 as the police objectively have a reason at any level, level
3 one, level two, level three, following De Bour, this
4 court's jurisdiction, any stop is unsettling to any
5 individual.

6 And that's why the law allows for VTL to be a
7 predicate for the stop, but it doesn't have to be the only
8 - - - I mean, let me step back - - - allows the VTL to be a
9 predicate for the police-citizen encounter, but it doesn't
10 have to always be at that level. There are many levels
11 between a level one and a seizure, and that's why the
12 police need to be able to determine on a case-by-case basis
13 because of fluidity of police-citizen encounters, to be
14 able to evaluate a situation, whether it be inline skates,
15 a scooter, a bike; they need to have the flexibility.
16 Again, it's the reasonableness, the totality of the
17 circumstances.

18 Thank you, Your Honors.

19 JUDGE CANNATARO: Counsel, you are arguing in the
20 alternative, right? It's - - - it's a per se rule or it
21 was an unjustified level three De Bour intrusion, correct?

22 MS. KON: Yes. Even if this is - - - even if the
23 court doesn't do a pro - - - a per se rule and instead
24 analyzes this under the totality of the circumstances, it
25 was certainly a seizure. Ofc. Shell was asked, "At some

1 point, you yelled out, police, stop, to Mr. Rodriguez,
2 correct? Yes. You continued to pursue Mr. Rodriguez when
3 he didn't stop, correct? Yes. Then you commanded him to
4 stop a second time, correct? Correct. You yelled even
5 louder, stop the bicycle, please, correct? Yes. And at
6 that point, he did stop, correct? Yes." That's a seizure.

7 JUDGE GARCIA: It seems to me - - - and correct
8 me - - - there's no consistent federal rule here, right?

9 MS. KON: I don't - - - I believe we cited
10 several federal circuits in our brief that - - - that did
11 treat bicycles as - - - as - - - like cars. But I think
12 the interesting thing about the different federal circuits
13 is that many of them just kind of assumed that bicycles
14 should be treated like cars without actually explicitly
15 addressing it. But I think, you know, just to go back to
16 the - - -

17 JUDGE GARCIA: But it seems to me, part of that,
18 as I was reading those cases - - - and I agree with you,
19 some do seem to assume it - - - is federally, it's kind of
20 an all or nothing rule, right? Either you have a seizure,
21 or you have nothing. All bets are off. You can do
22 whatever you want within reason. Or you have a seizure.

23 In New York, we have these two levels before you
24 get to a seizure, which protects pedestrians, joggers,
25 skateboarders. And you have to get through the two levels

1 to even get to a place where you got to in this case,
2 without a per se rule, and assuming what the court was
3 looking at, right. It's that R - - - R (ph.). So doesn't
4 that - - - shouldn't that affect our analysis here, that
5 it's not all or nothing here? The pedestrian, the
6 bicyclist, the skateboarder, they all have two levels of De
7 Bour to get through.

8 MS. KON: Yeah, I think they have two levels of
9 De Bour to get through when they're in pedestrian areas,
10 when they're in areas that aren't governed by the VTL,
11 where there isn't a lawful order doctrine that requires
12 people to stop when police tell them to stop.

13 You know, we need police to know, for safety
14 reasons, that when they tell people on the roads to stop,
15 they'll stop. And this is really just solidifying what's
16 already in practice. You know, police believe that they
17 have the power to seize. Everyone on the road thinks they
18 have the power to seize - - -

19 JUDGE GARCIA: Let's say we don't want to do an
20 anything in the road rule and we want to do - - - cover
21 bicycles, let's say, or motorized bicycles, or some subset
22 of that. What would our principal dividing line be?

23 MS. KON: Well, I think it could simply be if the
24 VTL is - - - is telling the - - - is saying that that
25 vehicle has to follow the same rules of the road as the

1 cars, then - - - then they're seized just like cars - - -

2 JUDGE GARCIA: Where does the VTL, in your view,
3 end? Like, what has to follow? If you're on what? If
4 you're on a skateboard, does it apply to you?

5 MS. KON: I don't think the VTL tells
6 skateboarders that they have to follow the same rules and
7 regulations as cars, but they do say that to - - - to - - -
8 to bicyclists.

9 JUDGE GARCIA: They do say it to bikes. Any - -
10 - anything else.

11 MS. KON: And inline skates, I believe.

12 JUDGE GARCIA: Okay.

13 MS. KON: And obviously, I think motorcycles.

14 There might be - - - I think there's a - - -

15 JUDGE CANNATARO: So skateboarders don't have to
16 stop if they're in the roadway, pursuant to a police order.
17 That's not a responsibility that the VTL places on
18 skateboarders, is what you said?

19 MS. KON: No - - - no, it is because anyone in
20 the roadway has to comply with the lawful order doctrine.
21 And that's why no reasonable person in the road, even if
22 they're on a skateboard, thinks they can just disregard a
23 command to stop - - -

24 JUDGE GARCIA: Okay. So again, back to my
25 original question, so what - - - if we don't want to do

1 anything in the roadway, what's a principal dividing line?

2 MS. KON: Again, if you - - - if you decide not
3 to do that rule, then you could make a dividing line with
4 what the VTL says should be treated like cars, which would
5 be bikes and - - - and inline skates. And you could leave
6 skateboards for another day.

7 But you know, I do want to point out that the
8 issue that my adversary brings up about, you know, whether
9 police can easily communicate, that - - - that just - - -
10 that isn't the standard. The issue is whether a reasonable
11 person could - - - would feel free to leave. And a person
12 on the road doesn't think that they can ignore a police
13 command, and they risk vi - - - you know, they risk being
14 charged with the lawful order doctrine. If they do,
15 sometimes they risk much more than that - - -

16 JUDGE CANNATARO: Can I just ask you one last
17 question because your light is on, and I - - -

18 MS. KON: Yes.

19 JUDGE CANNATARO: Going back to something Judge
20 Garcia asked you just a moment ago, if what - - - if we
21 accept this rule, whether it's just for bicycles or
22 anything in the road, don't you - - - if - - - isn't the
23 natural consequence of that, that the first two levels of
24 De Bour melt away? There - - - there is no common law
25 right of inquiry for a bicyclist in the road because it's

1 either stop when told or you're permitted to continue on
2 your way. And all - - - and all those other De Bour
3 protections for different kinds of encounters would no
4 longer exist for bicyclists. Isn't - - - isn't that
5 correct?

6 MS. KON: On the public road.

7 JUDGE CANNATARO: On the road.

8 MS. KON: Yeah. Moving bicyclists on the public
9 road - - - you need a lot of - - -

10 JUDGE CANNATARO: So the rule is the police have
11 to - - -

12 JUDGE GARCIA: So say it's a very slow bicycle.
13 And the police officer says, hey, can I ask you something?
14 It's no lights and sirens. No - - - hey, can I ask you
15 something? You can't do that to a car. Although, they did
16 in the Second Circuit. I guess there's that one case. But
17 - - - and they said it wasn't a seizure. Would that be a
18 seizure?

19 MS. KON: I mean, I think they also did that in
20 Whren, which is one of our most famous cases. They - - -
21 they didn't use lights and sirens. But yeah, I think it's
22 a seizure. I think it's the same rule as cars. It has to
23 be because we can't have different rules for different
24 modes of transportation. There has to be - - - police have
25 to have a bright line rule that they can evenhandedly apply

1 on the roads. In any event, this here was definitely a
2 seizure. This was a command, a submission to the command.
3 And - - -

4 JUDGE SINGAS: One last thing. Sorry. If you're
5 riding your bicycle in the roadway, it's an automatic level
6 three. If you're riding your bicycle in Central Park, De
7 Bour applies?

8 MS. KON: I think - - - yeah, I think so. I
9 think pedestrians - - -

10 JUDGE RIVERA: Yet - - - yet another reason to
11 get rid of De Bour, but that's for another day.

12 MS. KON: And I think pedest - - - pedestrian
13 areas are - - - are different.

14 Yeah. So we would ask that this court suppress
15 the evidence found as - - - as a result of it - - - of the
16 unlawful search. And thank you very much.

17 CHIEF JUDGE WILSON: Thank you.

18 (Court is adjourned)

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

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Lance Rodriguez, No. 78 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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