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COURT OF APPEALS  
STATE OF NEW YORK

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DAVID WILLIAMS,  
  
Appellant,  
  
-against-  
  
THE PEOPLE,  
  
Respondent.  
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NO. 38

20 Eagle Street  
Albany, New York  
March 13, 2024

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 JUDGE CAITLIN J. HALLIGAN

Appearances:

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1 CHIEF JUDGE WILSON: Last case on today's  
2 calendar is People v. Williams.

3 MS. BEENEY: Good afternoon, Your Honors. May it  
4 please the court. Carola Beeney for appellant, David  
5 Williams. I'd like to reserve two minutes for rebuttal,  
6 please.

7 CHIEF JUDGE WILSON: Yes.

8 MS. BEENEY: Thank you. The lower court erred in  
9 denying Mr. Williams' motion for an independent source  
10 hearing. First, counsel moved for a probable cause hearing  
11 and warned that an independent source hearing would be  
12 necessary if the court found probable cause for the arrest  
13 lacking. The omnibus court - - -

14 JUDGE TROUTMAN: So here the court did find that  
15 there was a problem with probable cause, correct?

16 MS. BEENEY: Exactly, Your Honor.

17 JUDGE TROUTMAN: And the argument is, well, there  
18 was a hearing. So why is it necessary for yet another?

19 MS. BEENEY: Because independent source was not  
20 litigated. Neither party intended to litigate it. The  
21 court did not intend to make that decision on the probable  
22 cause hearing record. The two really central, important  
23 areas of independent source litigation that had to be  
24 fleshed out for the independent source determination was  
25 whether the arrest made the in-court ID possible. So

1           there's two areas of that. One is did the undercover ever  
2           get a good look at the seller - - - at the seller's face,  
3           importantly, before the arrest. And the omission of those  
4           details at the hearing actually suggested that the  
5           undercover was pretty inattentive to the seller's face.

6                         Second - - -

7                         JUDGE HALLIGAN: How come the face specifically.  
8           I believe at the probable cause hearing there was testimony  
9           that he saw - - - I think it was he - - - maybe it was a  
10          she - - - saw the defendant from the back and recognized  
11          the clothing as well, right?

12                        MS. BEENEY: That's exactly right - - -

13                        THE COURT: So why - - - why was that not  
14          sufficient as compared with being able to see the face?

15                        MS. BEENEY: That's exactly right. The  
16          prosecutor's probable cause case was based on a clothing  
17          match. So all that was covered in the probable cause  
18          hearing was that the undercover recognized the seller by  
19          his clothing, and that he had capacity to view the seller  
20          and his clothing.

21                        JUDGE HALLIGAN: I thought also when he said he  
22          viewed him from the back, can you not infer from that that  
23          he had some sense of, you know, for example, his height,  
24          his stature, those sorts of things?

25                        MS. BEENEY: Well, you might be able to infer a

1 great many things, but the fact is that there was no  
2 evidence of what the seller looked like, his race, his  
3 hairstyle, his build, his weight, and crucially, his facial  
4 characteristics. And the - - - the independent source  
5 question, of course, is whether the undercover could view  
6 the seller's face before the arrest.

7 JUDGE SINGAS: Well, wasn't there a testimony  
8 that he said that he was standing with the other person,  
9 and they observed the defendant walking toward him - - -  
10 like, he walked toward him, and they stopped and had a  
11 conversation, and he said, I couldn't really make out what  
12 they were saying, but I could hear that they were having a  
13 conversation. I think right before that, he said he walked  
14 toward him, so presumably he could see his face.

15 MS. BEENEY: Right. So again, there's an  
16 inference that he could see him, but there was no evidence  
17 as to his actual ability to see him and what he saw. And I  
18 think generally, what happened in the record is to some  
19 degree not the issue here. The issue is that the record  
20 was insufficient as a matter of law because the defense  
21 never had notice that it should litigate independent  
22 source, should put a - - -

23 JUDGE SINGAS: So is your position that if there  
24 was a better record then you wouldn't need a separate  
25 independent-source hearing, or you always need a separate

1 independent-source hearing in these circumstances.

2 MS. BEENEY: Certainly these hearings can be  
3 consolidated into one hearing, or they can be bifurcated.  
4 But what's important is that the court - - - the hearing  
5 court, provide the parties with notice as to the legal  
6 issues that will be determined on the basis of the record  
7 and an opportunity to flesh out the evidence. Because in  
8 our adversarial system, a court cannot make a legal  
9 determination based on just evidence coming from one party.  
10 It must allow the other party to put in its own evidence  
11 and challenge the adversaries - - -

12 JUDGE SINGAS: So if there was a full record, and  
13 let's suppose that the undercover gave testimony about  
14 several opportunities to see the lighting was good, racial  
15 characteristics, facial characteristics, there was an  
16 opportunity for cross-examination. If there was not notice  
17 per se of an independent source hearing, that would not be  
18 sufficient is your position?

19 MS. BEENEY: So I think that gets into a harder -  
20 - -

21 JUDGE SINGAS: Right.

22 MS. BEENEY: - - - question, which is essentially  
23 what happens in Marshall - - - in this court's decision in  
24 Marshall. And in there, the court did find that it was  
25 error to deny a Wade/independent-source hearing. But - - -

1 and the same result should follow here, of course - - - but  
2 found that the error was harmless because the hearing that  
3 was had covered the same ground as a Wade/independent-  
4 source hearing would have. And that essentially counsel  
5 did treat the hearing that was had as the functional  
6 equivalent and explored the issues of independent source.

7 So I would say that that - - - that's a harder  
8 question, but in our case, it is very clear that there was  
9 no notice and that neither party intended to litigate  
10 independent - - - excuse me -- - independent source until  
11 after the hearing. And I think our best evidence as to  
12 that conclusion is that the prosecutor initially rested her  
13 probable cause case without even calling the undercover,  
14 who was the only witness who would be relevant to testify  
15 at an independent-source hearing.

16 The prosecutor also stated, and I believe this is  
17 at appendix 65, in her post-hearing submission, that the  
18 purpose of the probable-cause hearing was to determine  
19 probable cause for arrest and that there was no other  
20 purpose of the hearing.

21 So the court also had a colloquy at the start of  
22 the hearing to determine what the purpose of the hearing  
23 was. And all parties either were silent or agreed that it  
24 was limited to the purpose of determining probable cause  
25 for arrest. And that word limited is important and shows

1 up in the omnibus order. The omnibus court essentially  
2 received defense counsel's omnibus motion stating that  
3 first, there would be a probable cause hearing, and then  
4 there would be an independent-source hearing if and only if  
5 there was probable - - - no probable cause found. The  
6 omnibus court essentially agreed with that plan and ordered  
7 a probable-cause hearing, quote, limited to the issue of  
8 whether there was probable cause for arrest.

9 JUDGE TROUTMAN: So here, the onus was on the  
10 court to make it clear what the parameters of the hearing  
11 was going to be. Is that what you're arguing?

12 MS. BEENEY: Given the realities of the  
13 circumstance where we have one court doing the omnibus  
14 decision and then another hearing court - - - any party can  
15 assert that the hearing was ordered for a particular  
16 purpose. I think there just has to be some discussion and  
17 agreement as to what that purpose is.

18 JUDGE TROUTMAN: Prior to it beginning.

19 MS. BEENEY: Of course.

20 JUDGE TROUTMAN: And - - -

21 JUDGE GARCIA: So Counsel - - - I'm sorry - - -  
22 so this is a notice argument, but what if - - - on this  
23 record, and I'm saying this - - - this hypothetically - - -  
24 there was an extensive testimony by the undercover on this  
25 issue, although it's labeled just a probable-cause hearing.

1           Would you still say that's not enough just because you - -  
2           - only on the notice issue. We didn't know it was for that  
3           purpose.

4                       MS. BEENEY: So I think, as in Marshall, this  
5           court took certain questions that were asked on cross-  
6           examination to essentially infer that the defense was on  
7           notice. At - - - I'm sorry - - - 509, the court writes  
8           that such questions that defense counsel asked were wholly  
9           unnecessary if, as she contends, she understood - - -  
10          defense understood the hearing to be sole - - - limited to  
11          the - - - the sole issue.

12                      JUDGE GARCIA: So you wouldn't infer notice from  
13          the types of questions?

14                      MS. BEENEY: That's what Marshall asserts, I  
15          think. But again, we have a very different case here where  
16          everyone - - -

17                      JUDGE GARCIA: Understood.

18                      MS. BEENEY: Yes. Yeah. This - - - I just want  
19          to, if it's okay, just address the second issue that an  
20          independent-source inquiry had to address, which is the  
21          intervening circumstances between the arrest and the in-  
22          court ID, which is what happened at the precinct. There  
23          was no information as to what occurred there. The parties  
24          - - - the court needed to know how long the parties weren't  
25          in each other's presence, the certainty with which the



1           undercover ID'd Mr. Williams there, his capacity to view  
2           him there, whether anyone said anything to validate that  
3           ID. That is also a crucial part of the independent source  
4           analysis, without which the court could not properly have  
5           made its finding.

6                        CHIEF JUDGE WILSON: Thank you.

7                        MS. BEENEY: Thank you.

8                        MR. YARNELL: May it please the court. Brent  
9           Yarnell for the People. The notice argument is  
10          unpreserved. The only argument that defendant made in his  
11          request for an independent-source hearing, in fact, showed  
12          that defendant was fully aware that evidence from the prior  
13          probable cause hearing could be used to make an independent  
14          - - -

15                       JUDGE TROUTMAN: But didn't the defendant say, if  
16          the court finds there is no probable cause, they wanted the  
17          hearing. And in other words, quite frankly, not wanting to  
18          call unnecessary witnesses and wait for the outcome of the  
19          first hearing to then go to the second part if it was  
20          needed.

21                       MR. YARNELL: He said that in his omnibus motion,  
22          and I think the record makes quite clear that the reason he  
23          said that is because he thought that this case, the  
24          procedure would play out the way it played out in Gethers,  
25          which is that he thought - - - he expected the undercover

1 would not testify at the probable-cause hearing, and so he  
2 thought, like in Gethers, if probable cause was found to be  
3 lacking, then they would have a separate independent-source  
4 hearing afterwards.

5 But I think there's two points to make about  
6 that. First of all, the fact that he even recognized that  
7 independent source was an alternative ground brings this  
8 case under - - - under Marshall, because what Marshall  
9 looked to wasn't whether the defendant had prior notice  
10 before the hearing, that that hearing could serve as the  
11 evidentiary record for an independent-source hearing. What  
12 Marshall looked to was simply the fact that, before the  
13 hearing, the defendant knew that an independent source  
14 would alternative was an alternative ground.

15 And secondly, the fact that defendant is even  
16 citing Gethers in his papers, and not just citing it, but  
17 quoting it extensively over several pages, shows that he  
18 clearly read Gethers. And Gethers itself says that if  
19 there is sufficient evidence of independent source - - -

20 JUDGE TROUTMAN: What about the record being  
21 clear as to the parameters of what was going to take place  
22 at the hearing before it began?

23 MR. YARNELL: Sure. So I think that the key  
24 thing here is the context in which the court made its  
25 statement. And I think when you look at the context, the

1 court was simply saying that we don't need a Wade  
2 suggestiveness hearing because defendant isn't asking for  
3 that, and so we're just going to have a Dunaway hearing.

4 And you know, there's sort of two points to make  
5 there. First of all, ordering a probable-cause hearing  
6 does not put defendant on notice that independent-source  
7 evidence won't be examined because as this court, you know,  
8 said in Marshall - - -

9 JUDGE TROUTMAN: Do you agree that the two  
10 hearings are in fact different?

11 MR. YARNELL: I don't agree that the evidence  
12 adduced at the two hearings would be different, because any  
13 evidence that was relevant to independent source is also  
14 relevant - - - or no - - - that - - - is also relevant to  
15 probable cause. Any - - - any evidence that's relevant to  
16 probable cause is also relevant to independent source - - -

17 JUDGE TROUTMAN: The extent of how you would - -  
18 - you explore certain questions; doesn't it change  
19 depending upon the determination of a lack of probable  
20 cause?

21 MR. YARNELL: I mean, I think you could argue  
22 that in theory defendant might have had an extra incentive  
23 if he knew that this evidence would also be used for - - -  
24 for - - - for independent source. But even if you think  
25 that he would have an extra incentive, I don't think that

1 extra incentive really changes the balance of incentives  
2 all that much because he still had two powerful incentives  
3 to explore any evidence of independent source. Number one,  
4 he had the powerful incentive because any evidence of the  
5 undercovers ability to observe defendant at the time of the  
6 crime was obviously highly relevant to probable cause - - -

7 JUDGE TROUTMAN: So are you - - - are you  
8 suggesting that he was to assume that independent source  
9 type information should be explored, that he was to just go  
10 ahead and go into that area, regardless of what - - - what  
11 the court may ultimately determine as to probable cause,  
12 just to be safe?

13 MR. YARNELL: I mean, we're not suggesting that.  
14 I mean, first of all, what we're saying - - - we're saying  
15 that he was aware before the hearing that if evidence  
16 relevant to independent source was adduced at the hearing,  
17 then that evidence could be used to make a probable source  
18 finding. He was aware of that because he extensively  
19 discussed Gethers in his omnibus motion papers.

20 And then, you know, I think that we would say,  
21 even if this was a case where you didn't have that, the  
22 question ultimately is whether, you know, a defendant - - -  
23 whether the court abused its discretion in not holding  
24 another hearing. And - - - and - - - so I would say that  
25 even if you assumed that the defense counsel was not

1           unaware, I think the fact that he had a very powerful  
2           incentive to, you know, develop all the same facts anyway  
3           is relevant to the question of whether another hearing  
4           really would explore new facts, different facts, or whether  
5           it simply would be duplicative and thus and thus a waste of  
6           - - - of the court's time.

7                        JUDGE TROUTMAN: So you're arguing, even if it  
8           was a mistake, no harm here?

9                        MR. YARNELL: There's no harm here. And I think  
10          what's important to note, you know, first of all, defendant  
11          did cross examine the undercover about facts probative to  
12          whether the undercover had an opportunity to see the  
13          defendant's face.

14                      So there were two points in - - - in the  
15          interaction that are worth focusing on. First is when  
16          defendant initially crosses the street and walks over to  
17          where the undercover is standing with Elfe. The defendant  
18          cross examined to ask questions about whether there was  
19          anything obstructing their view. He asked questions about  
20          how far away the defendant was from the undercover, and he  
21          asked whether the undercover could hear what defendant was  
22          saying to Elfe, given that defendant was walking towards  
23          them at that time. All those questions were probative to  
24          whether the undercover could see the defendant's face.

25                      And the second point is, after the sale actually

1 occurs and defend - - - and the undercover and Elfe are  
2 standing sort of north of the barbershop on - - - on the  
3 west side of the street, defendant asked the under - - -  
4 the undercover, "So did you get any other opportunities to  
5 observe defendant after that point?" And the undercover  
6 said, "Yeah, because that's when Elfe brought me over to  
7 defendant." And so the fact that Elfe is bringing the  
8 undercover over to defendant is obviously probative of  
9 whether, you know, he - - -

10 JUDGE SINGAS: So is that your best evidence as  
11 to the independent source? Because the record is weak  
12 here. You know, it makes me question whether the  
13 prosecutor even knew that there was an independent-source  
14 hearing going on here. What's your best evidence of an  
15 independent source?

16 MR. YARNELL: The best evidence of the  
17 independent source is the moment when the undercover walks  
18 over to the - - - the point on the corner where Elfe is  
19 standing with defendant and the undercover is only a few  
20 feet away. He's so close that even though the - - - Elfe  
21 and defendant are talking in low tones, the - - - the  
22 undercover can still - - -

23 JUDGE SINGAS: Do we have any idea what time of  
24 day that is, lighting, conditions, or anything like that?

25 MR. YARNELL: Yeah, it's about - - - it's about

1 4:45, I mean, so the whole thing started at 4 o'clock. It  
2 took a long time to get to the point that defendant was  
3 coming over, and then - - - and then I think that it ended  
4 around 4:55. So this would be around 4:45 - - - 4:50 in  
5 the afternoon.

6 I don't know if there was testimony about the  
7 lighting conditions, but what we do know certainly is that  
8 - - - is the defendant was cross-examining - - - was cross-  
9 examining the undercover about his opportunity to see  
10 defendant at this point.

11 And so we have that moment. We have the fact  
12 that the undercover saw across the street that defendant  
13 and Elfe were exchanging items. He couldn't see exactly  
14 what they were exchanging, but he could see him at that  
15 point. And then we have the third point where the - - -  
16 where Elfe brings the undercover back over to where  
17 defendant is, and defendant says, "No, I don't want to meet  
18 him at this time."

19 So all those points are points where - - -  
20 especially the first and the last one are points where they  
21 were in very close proximity, they were facing each other.  
22 And that is obviously highly probative to the question of  
23 whether - - - of whether there was an independent source  
24 and whether he had - - -

25 CHIEF JUDGE WILSON: There also has to seem - - -

1           there seems to be some confusion in the record - - - the  
2           testimony about where the buy occurred and therefore where  
3           these different people were. You've got it in paper  
4           occurring at 22:51. You've got the undercover saying they  
5           moved north to avoid the cameras there, and you've got Det.  
6           Rivera saying they moved south to 115th Street, and that's  
7           where the buy occurred. And so it casts some doubt on how  
8           - - - how valuable the evidence about the observation is  
9           and how reliable the independent source is, no?

10                   MR. YARNELL: I disagree. I can explain, sort of  
11           I think, where that confusion came from. So the undercover  
12           was very clear about where the buy occurred. It occurred  
13           on the corner, which was sort of on the south end of that  
14           block.

15                   CHIEF JUDGE WILSON: Of 116?

16                   MR. YARNELL: Right. Exactly. Oh, I think it's  
17           115. The south end of 115 on the - - - on the north end of  
18           115 - - - of 115. So I think that it happened on the  
19           corner - - - of the south corner - - - the - - - I'm sorry  
20           - - - the north - - - northwest corner of 115th and First.  
21           And then a little bit up the block - - - sort of midway in  
22           the block - - - was the barbershop.

23                   So basically, what that means is that, sort of,  
24           the barber shop where defendant was arrested was, sort of,  
25           less than a block away from where the sale occurred. The



1 undercover was not confused about that, but I think the - -  
2 - the arresting officer was. And you know, I think that -  
3 - - the court even said the real problem with the arresting  
4 officer's testimony isn't that the arresting officer was  
5 confused in the paperwork. He thought that that confusion  
6 was somewhat understandable. He thought the problem with  
7 the arresting officer's testimony was that when her error  
8 was revealed, she just denied that she made any kind of  
9 mistake. And it was her denial, her - - - her reaction  
10 when she was confronted with the mistake that - - - that  
11 cast doubt on her - - - her credibility, not the mistake  
12 itself. But the undercover was very clear about where the  
13 buy occurred.

14 And if there are no further questions, we ask  
15 that you affirm. Thank you.

16 CHIEF JUDGE WILSON: Thank you.

17 MS. BEENEY: The defense's cross-examination at  
18 the probable-cause hearing was classic probable cause  
19 cross-examination. It was a question of whether the  
20 suspect had committed a crime, and what information the  
21 arresting officer had at the time of the arrest.

22 Most of the cross-examination is, it's true,  
23 based on whether the undercover could see the seller. But  
24 that was only as to his clothing, because that's what the -  
25 - - the prosecutor was making its probable cause on was a

1 clothing match ID, not a facial match ID. The question for  
2 independent source is whether the undercover saw his face  
3 before the illegality rather than after it. But for the  
4 arrest, could he have reliably made an ID in court of the  
5 seller?

6 JUDGE SINGAS: I think the court was also relying  
7 on the fact that this was a trained observer. Do you think  
8 that that should enter at all our determination?

9 MS. BEENEY: Gethers at 163 writes that that is -  
10 - - that the - - - whether or not it's a confirmatory ID,  
11 which - - - which coincides with that inquiry, simply has  
12 no relevance in a determination of whether an  
13 identification is the product of an illegal arrest. The  
14 confirmatory ID analysis, the facts that you need to  
15 establish a legal determination of a confirmatory ID, are  
16 entirely separate - - - wholly separate from a Fourth  
17 Amendment taint analysis. And even - - - even if that's  
18 not true on this record, we have no facts as to what the  
19 quote confirmatory ID consisted of. We have one - - -

20 JUDGE SINGAS: Well, I was talking about the - -  
21 - during the - - - for the independent source inquiry. I  
22 think the judge relied on the fact that you had, not a lay  
23 witness looking at this person, but a trained observer.

24 MS. BEENEY: Yeah. I'm sorry, Your Honor.

25 JUDGE SINGAS: That's okay.

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MS. BEENEY: Gethers also says that a tainted ID is equally tainted, whether made by a lay person or a trained observer. So that quotation, I think, speaks more directly to your question.

If Your Honors have no further questions, we ask that you reverse and remand for a new trial to be preceded by an independent-source hearing.

Thank you, Your Honors.

CHIEF JUDGE WILSON: Thank you.

(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 David Williams v. The People, No. 38 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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