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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 76

RICHARD GONZALEZ,

Appellant.

Judicial Institute
84 North Broadway
White Plains, New York 10603
April 28, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Let's go to number
2 76, People v. Gonzalez.

3 Okay. Counsel, would you like any rebuttal
4 time?

5 MR. DEAN: Two minutes, please.

6 CHIEF JUDGE LIPPMAN: Go ahead. You're on.

7 MR. DEAN: For possession to be criminal,
8 the possession must be knowing and voluntary. The
9 question is what does "knowing" mean. Is it - - - is
10 it enough to knowingly possess a common workplace
11 tool, a utility knife, without - - -

12 CHIEF JUDGE LIPPMAN: What does the case
13 law say, counsel, on that issue?

14 MR. DEAN: The case law says - - -

15 CHIEF JUDGE LIPPMAN: Especially our case
16 law.

17 MR. DEAN: Yeah. The case law says yes, it
18 must be knowing and voluntary. And the case law
19 says, and I'm pointing particularly to People v.
20 Persce but there are other cases - - -

21 CHIEF JUDGE LIPPMAN: Yeah.

22 MR. DEAN: - - - which say that for a
23 weapon to be per se criminal, that sort of
24 criminality is limited to ac - - - "outwardly
25 dangerous and foul weapons" -- that's a quote -- that

1 no one would innocently possess. "Illegitimate
2 implements of thugs and brutes." Okay. So brass
3 knuckles, blackjacks, Kung Fu stars - - -

4 CHIEF JUDGE LIPPMAN: What about the - - -
5 what about the knife in this case?

6 MR. DEAN: This knife is a common utility
7 knife that was openly sold at Home Depot in New York
8 until 2010. You can get it on Amazon.com.

9 CHIEF JUDGE LIPPMAN: Why is it not sold
10 anymore?

11 MR. DEAN: Because Cyrus Vance brought a -
12 - - a prosecution against Home Depot and other
13 providers saying hey, if you - - - if you really know
14 what you're doing this could operate as a gravity
15 knife in that you can - - - you could flick it out
16 with centrifugal force.

17 JUDGE RIVERA: And how does the prosecution
18 terminate? How did they terminate that prosecution?

19 MR. DEAN: They agreed not to sell this
20 knife anymore.

21 JUDGE PIGOTT: Statewide - - -

22 JUDGE FAHEY: Well, there was a 1.8 million
23 dollar settlement, wasn't there?

24 MR. DEAN: Right.

25 JUDGE STEIN: So - - - so the legislature

1 saw fit to include this in - - - in a statute that
2 involves other weapons, correct?

3 MR. DEAN: Right.

4 JUDGE STEIN: So - - - so are you saying
5 that we should treat gravity knives differently from
6 other weapons that are per se violations or not?

7 MR. DEAN: No, not really. But in - - -
8 what I'm saying is it's a jury question as to whether
9 the possessor knows that the object operates in the
10 way that is criminalized by the statute.

11 JUDGE FAHEY: Well, the - - - the problem
12 is if it's a - - - if it's a per se crime to have a
13 gravity knife, I think you're right that he has to
14 know that he possessed a - - - a knife. They have to
15 show that. The question is do they - - - that your
16 argument is that he had to know that this - - - this
17 could be considered a - - - a gravity knife, and
18 that's not what a per se - - -

19 MR. DEAN: No. He does - - - he doesn't
20 actually have to know that - - -

21 JUDGE FAHEY: Okay.

22 MR. DEAN: - - - it's considered a gravity
23 knife.

24 JUDGE FAHEY: Okay.

25 MR. DEAN: He - - - all he has to know is

1 that with centrifugal force, it could be - - -

2 JUDGE FAHEY: So the charge is wrong then
3 in this case?

4 MR. DEAN: The - - - well - - -

5 JUDGE FAHEY: The charge - - - the - - -
6 the - - - the - - -

7 MR. DEAN: It's not - - - it's not a
8 gravity knife if the jury, properly charged, is told
9 what the law is.

10 JUDGE STEIN: How - - - how would you prove
11 in - - - in the usual case - - -

12 JUDGE FAHEY: I see.

13 JUDGE STEIN: - - - if someone knew that
14 centrifugal force would cause the knife to - - - to
15 open?

16 MR. DEAN: Well, here the - - - the
17 officer, the trained officer, was able to do it in
18 front of the - - -

19 JUDGE STEIN: Well, the trained officer
20 knew. But how do - - - how do we know that - - -
21 that this fellow, who was working on construction
22 projects, knew?

23 MR. DEAN: Well, he - - - he - - - he
24 wouldn't - - -

25 JUDGE STEIN: How would we - - - how would

1 we know that?

2 MR. DEAN: How would we know that he didn't
3 know?

4 JUDGE STEIN: Unless he - - -

5 MR. DEAN: Because here if the - - - the
6 jury was properly charged - - - they were concerned
7 about this issue. Had they been properly charged I'm
8 sure they would have had no trouble reaching a
9 correct verdict in this case. So this is not some -
10 - -

11 JUDGE STEIN: Well, that's because it's
12 almost impossible to prove.

13 MR. DEAN: Well, if the object - - - for
14 exa - - - you know, if - - - if you were to buy what
15 is commonly thought of as a gravity knife these days,
16 you'd have to do it on eBay and buying it as an
17 antique. Because certain objects do - - -

18 JUDGE STEIN: That's different. Maybe you
19 could create - - - you know, maybe there would be an
20 inference. But - - - but that wasn't true at the
21 time he bought this knife and - - - and we - - - I -
22 - - I - - - nor at the time - - -

23 MR. DEAN: And lots of other people, yes.

24 JUDGE STEIN: Right, exactly.

25 MR. DEAN: Lots of other - - - and I think

1 client got off the subway train, and he was cursing
2 at police officers for - - - for blocking the
3 stairwell. And as he was going up the stairwell he
4 was still cursing and some people had to move out of
5 his way. Now, this is what I have to say - - -

6 CHIEF JUDGE LIPPMAN: Was he - - -

7 JUDGE RIVERA: Well, he was also doing more
8 than that, right?

9 MR. DEAN: He was - - - I don't think he
10 was actually - - -

11 JUDGE RIVERA: Or at least the court found
12 he was doing more than that.

13 MR. DEAN: He was not doing more than that.
14 He - - -

15 JUDGE RIVERA: And wasn't he flailing his
16 arms?

17 MR. DEAN: He was not hitting anybody. He
18 was not endangering anybody.

19 CHIEF JUDGE LIPPMAN: Was he threatening to
20 the public?

21 MR. DEAN: He was not threatening the
22 public. He was yelling loudly - - -

23 JUDGE RIVERA: On a - - -

24 MR. DEAN: - - not at people but to people.
25 He was complaining about the action - - -

1 JUDGE RIVERA: And on a subway platform
2 walking up screaming and yelling and flailing your
3 arms and using obscenities directed at police
4 officers is not disorderly conduct?

5 MR. DEAN: Not in a New York City subway
6 station.

7 JUDGE READ: Well, didn't he - - -

8 MR. DEAN: I mean context is everything.
9 But - - -

10 JUDGE READ: Yeah. Well, it did cause
11 people to back away. It did cause people to back
12 away, didn't it?

13 MR. DEAN: But if I go up subway stairs and
14 people have to move out of my way because I'm going
15 up the subway stairs, that's how it works in the New
16 York City subways. There's no up - - -

17 JUDGE RIVERA: But moving out of the way -
18 - -

19 MR. DEAN: There's no up and there's no
20 down. There's just people going.

21 JUDGE RIVERA: But I think Judge - - -
22 well, I won't speak for Judge Read. But I take her
23 question to be not that - - - not that people are
24 moving out of your way in the hustle and bustle - - -

25 MR. DEAN: Right.

1 JUDGE RIVERA: - - - of going up to the
2 Number 6 on the 125th Street station - - -

3 MR. DEAN: Right.

4 JUDGE RIVERA: - - - but because you are
5 yelling. You are yelling obscenities. Your
6 obscenities are directed at law enforcement
7 officials.

8 MR. DEAN: Right.

9 JUDGE RIVERA: You're moving your arms
10 around and people are apprehensive of what might be
11 your next step.

12 MR. DEAN: No. I don't think anybody was
13 apprehensive. They were - - - I don't think that's
14 in the evidence at all.

15 JUDGE RIVERA: They're moving away because
16 - - -

17 JUDGE READ: These - - - these were - - -
18 these were hardened subway riders. We see this all
19 the - - -

20 MR. DEAN: We are - - - we are,
21 unfortunately, hardened subway riders.

22 JUDGE READ: Yeah.

23 MR. DEAN: And - - - and if I'm looking - -
24 -

25 JUDGE RIVERA: I guess the police weren't

1 so hardened.

2 MR. DEAN: Yeah. They're pretty hardened,
3 too, and, you know, if I'm walking along in a subway
4 station and someone is yelling in my ear that I'm
5 going to hell unless I repent, which, by the way, is
6 the common occurrence - - -

7 CHIEF JUDGE LIPPMAN: Happens all the time.
8 Go ahead.

9 MR. DEAN: Happens all the time. That's
10 the First Amendment. But if somebody's yelling in my
11 ear that the police are overstepping - - -

12 JUDGE RIVERA: There's a diminished
13 expectation for what's orderly on the subway is what
14 you're trying to say.

15 MR. DEAN: They - - - they - - -

16 CHIEF JUDGE LIPPMAN: Counsel, but - - -

17 MR. DEAN: Somebody's yelling that in my
18 ear.

19 CHIEF JUDGE LIPPMAN: But - - - but let's
20 cut to the chase. What should the police have done
21 in this? What were they able to do? What were they
22 allowed to do? Let's assume you're right. Context,
23 hardened subway riders, no one's apprehensive but
24 people are taking - - - maybe inconvenienced, taking
25 note of what's going on here, maybe moving a little

1 bit aside as they're moving wherever they're going.
2 What should the police have done?

3 MR. DEAN: Well, they could have done - - -

4 CHIEF JUDGE LIPPMAN: Or what was
5 legitimate for them to do?

6 MR. DEAN: What would have been legitimate
7 would have been, certainly, a level 1 and maybe a
8 level 2 inquiry. The problem here is that's not what
9 they did. They could have done that. That's not
10 what they did. They stopped him - - -

11 CHIEF JUDGE LIPPMAN: Explain the
12 difference between 1 and 2 and what they did here,
13 which I take it you think is - - -

14 MR. DEAN: Well, 1 would just be - - -

15 CHIEF JUDGE LIPPMAN: - - - is 3. Go
16 ahead.

17 MR. DEAN: At least 3, but the People
18 haven't preserved that so that's not in the case.

19 CHIEF JUDGE LIPPMAN: Yeah, go ahead. But
20 explain it.

21 MR. DEAN: But number 1 would be going up
22 to him and saying, you know, is there a problem, sir.
23 That would be number 1. Number 2 would be
24 momentarily interfering with his movement to inquire
25 as to whether there was a problem or more of a

1 problem. But that's not what happened here. That's
2 the thing. He was stopped. He was prevented from
3 getting on the subway train, and he was moved to the
4 middle of the platform. So at least a level 3 stop
5 occurred here.

6 JUDGE RIVERA: So does it matter that the
7 conduct that made the officer concerned had stopped?

8 MR. DEAN: It does matter, I think.

9 JUDGE RIVERA: Why does it matter?

10 MR. DEAN: Because in that sense there was
11 - - - you know, he could see that there was - - -
12 there really was no problem and, therefore, no level
13 3 or level 4 thing was - - - was - - -

14 JUDGE RIVERA: They could give him a
15 summons, right?

16 MR. DEAN: Summons would - - -

17 JUDGE RIVERA: He had been already
18 disorderly, correct?

19 MR. DEAN: He hadn't - - - well, actually,
20 he hadn't is my point. If he had been - - -

21 JUDGE RIVERA: No, no. I understand
22 because - - -

23 MR. DEAN: If he had been disorderly below
24 then he could have been disorderly - - -

25 JUDGE RIVERA: I understand be - - - well,

1 but, all right.

2 MR. DEAN: But it - - -

3 JUDGE RIVERA: But let's say we disagree
4 with you on that one. So the client is moving up the
5 steps. He gets onto the upper platform.

6 MR. DEAN: Right. He's not doing anything.

7 JUDGE RIVERA: The cop now follows him to
8 give him the summons.

9 MR. DEAN: Right, doesn't matter.

10 JUDGE RIVERA: And why not?

11 MR. DEAN: And the answer - - - the answer
12 is that it wouldn't matter had he actually - - - it
13 wouldn't matter had he actually committed disorderly
14 conduct. But he didn't.

15 JUDGE ABDUS-SALAAM: Well, even in - - - I
16 - - - I agree it really may not matter here because
17 what we're talking about is the knife. So even if he
18 had been stopped under level 1 and the officer saw
19 the knives - - - knife and believed that it was a
20 gravity knife, you're saying the real issue here is
21 the knife, it sounds like.

22 MR. DEAN: Well, of course, there's the
23 knife. But what I'm saying is, you know, had the
24 officer done a level 1 and then seen the knife that
25 way that would have been okay. But that's not what

1 happened. There was no level 2 or - - - or level one
2 stop.

3 JUDGE ABDUS-SALAAM: Well, assu - - -
4 assuming there was a level 1 and he saw the knife,
5 then we're back where we - - - we started.

6 MR. DEAN: We're back to whether or not the
7 knife - - -

8 CHIEF JUDGE LIPPMAN: The knife - - -

9 JUDGE ABDUS-SALAAM: We're back to whether
10 the knife was - - - yeah, right.

11 MR. DEAN: - - - should be criminalized
12 absent a jury finding that he knew what this knife
13 was about.

14 JUDGE ABDUS-SALAAM: Well, you said he had
15 owned the knife since 20 - - -

16 MR. DEAN: 2009.

17 JUDGE ABDUS-SALAAM: - - - before 2010,
18 2009.

19 MR. DEAN: Right.

20 JUDGE ABDUS-SALAAM: And he said he used
21 the knife in his profession, so he must know how the
22 knife operates, right?

23 MR. DEAN: Well, the knife is supposed to
24 operate in a way without centrifugal force. That's
25 the way the knife operates. And, again, if the court

1 has any, like, question about this it should ask to
2 see the knife. But - - -

3 JUDGE READ: So that's what you're saying.
4 The knowledge has to be the way - - - the
5 characteristics of how the knife operates.

6 MR. DEAN: He - - - he has to know the
7 characteristics of how the knife operates.

8 CHIEF JUDGE LIPPMAN: Okay, counsel.
9 You'll have your rebuttal. Let's hear from your
10 adversary.

11 MS. CHANDA: Good afternoon, Your Honors.

12 CHIEF JUDGE LIPPMAN: Counsel, start with
13 the knife.

14 MS. CHANDA: Sure.

15 CHIEF JUDGE LIPPMAN: What does he have to
16 know?

17 MS. CHANDA: He has to know, at a minimum,
18 that he is carrying the knife. So awareness and
19 knowing possession but no - - - no other mental or
20 culpable mental state is required under the statute.
21 It's - - -

22 JUDGE PIGOTT: Does that mean - - -

23 MS. CHANDA: Um-hum.

24 JUDGE PIGOTT: - - - that when - - - when -
25 - - when this settlement with Home Depot, I guess,

1 happened in 2010 - - -

2 MS. CHANDA: Um-hum.

3 JUDGE PIGOTT: - - - that he automatically
4 was now guilty of a - - - of a crime because he was
5 possessing this knife?

6 MS. CHANDA: Well, it wasn't based on the
7 settlement. It was based on the operation. So - - -

8 JUDGE PIGOTT: No. I understand that.

9 MS. CHANDA: Right.

10 JUDGE PIGOTT: But he has a knife in 2009,
11 uses it for his work.

12 MS. CHANDA: Right, um-hum.

13 JUDGE PIGOTT: Not - - - maybe not this
14 defendant, somebody else.

15 MS. CHANDA: Right.

16 JUDGE PIGOTT: They're sitting there
17 watching the news. The news says, you know, there's
18 been a settlement.

19 MS. CHANDA: Um-hum.

20 JUDGE PIGOTT: These knives are now banned.
21 Are they now guilty of criminal possession of a
22 weapon in the fourth degree because they've got one
23 in their garage?

24 MS. CHANDA: Well, if it operates as a
25 gravity knife they are - - - they are guilty.

1 JUDGE PIGOTT: So you can go around and
2 pick them all up?

3 MS. CHANDA: I'm sorry?

4 JUDGE PIGOTT: You can go - - - you can go
5 arrest all these people.

6 MS. CHANDA: Well, if - - - that's what the
7 law says. It's true.

8 JUDGE PIGOTT: And in the same - - - in the
9 same paragraph it's criminal possession of a sandbag.
10 So you want to swing by a few construction sites and
11 pick up anybody that seems to be - - -

12 MS. CHANDA: Well, I'm not sure - - - I'm
13 sorry. I do not know the exact definition of the
14 sandbag. But I do know that other per se weapons in
15 that category do specifically say, let's say,
16 designed primarily for use as a weapon but not
17 gravity knives. It's how it opens and how it
18 operates, and it operates through an aggravating and
19 dangerous characteristic which is the flick of a
20 wrist and it locks into place.

21 CHIEF JUDGE LIPPMAN: And he doesn't have
22 to know anything about the characteristic in your
23 mind?

24 MS. CHANDA: Not according to the
25 legislature.

1 CHIEF JUDGE LIPPMAN: He has it. He's
2 done. He's finished.

3 MS. CHANDA: Yes. If he knows that he has
4 the knife. That is what is - - - that's the minimum
5 requirement.

6 CHIEF JUDGE LIPPMAN: Without - - - so you
7 - - - you differ sharply with your adversary's view
8 of what he has to know.

9 MS. CHANDA: Yes.

10 JUDGE PIGOTT: So - - -

11 MS. CHANDA: And that is based on - - -

12 JUDGE PIGOTT: So I'm sitting in my living
13 room and I'm watching this thing and - - - and - - -
14 and I hear that Home Depot's not selling these
15 anymore and I've got one, and I say to myself, well,
16 doesn't open that way. I'm okay. Then I get stopped
17 and - - - and - - - and - - - and the officer goes
18 you're under arrest.

19 MS. CHANDA: Well, you're charged with the
20 - - - the exercising reasonable care in - - -

21 JUDGE PIGOTT: No, let's assume - - -
22 assume all the worst of me.

23 MS. CHANDA: - - - determining that it's
24 not - - -

25 JUDGE PIGOTT: I'm - - - I'm driving down.

1 I'm speeding.

2 MS. CHANDA: Um-hum.

3 JUDGE PIGOTT: I've got my - - - I've got
4 my knife here. And I - - -

5 MS. CHANDA: Then - - - (inaudible)

6 JUDGE PIGOTT: So I get stopped and - - -
7 and - - - and the officer says ah, you've got a
8 knife. You - - - you just committed criminal
9 possession of a weapon in the fourth. No, I didn't.
10 I said this - - - I use this to cut drywall, and he
11 says watch. And I have never seen that in my life.
12 I couldn't do it myself. He says too bad. Put your
13 hands behind your back. You're going downtown.

14 MS. CHANDA: Well, you're in possession of
15 a dangerous weapon that you should have - - -

16 CHIEF JUDGE LIPPMAN: Your answer is - - -
17 your answer is yes, you're going downtown?

18 MS. CHANDA: Yes. Yes.

19 CHIEF JUDGE LIPPMAN: That's your view of
20 it - - -

21 MS. CHANDA: If it's - - - if it's capable
22 of being open - - -

23 CHIEF JUDGE LIPPMAN: - - - regardless of
24 what might seem - - -

25 MS. CHANDA: To be - - -

1 CHIEF JUDGE LIPPMAN: - - - and I - - - and
2 I listened to that hypothetical and he says yeah,
3 that doesn't seem fair. But your answer is doesn't
4 matter; he's going downtown?

5 MS. CHANDA: Well - - -

6 JUDGE READ: And the sentence could be a
7 year, right?

8 MS. CHANDA: I'm sorry?

9 JUDGE READ: Could be a year.

10 MS. CHANDA: Could be up to a year.

11 CHIEF JUDGE LIPPMAN: So isn't there
12 something wrong with that?

13 MS. CHANDA: That's the way the legislature
14 intended it. And that's based on very - - -

15 CHIEF JUDGE LIPPMAN: Yeah - - -

16 MS. CHANDA: It's based on very - - -

17 JUDGE RIVERA: You say it's a strict
18 liability.

19 MS. CHANDA: It's strict liability.

20 JUDGE READ: But what about Penal Law
21 15.15(2)? Doesn't that say it's got to be pretty
22 clear when it's strict liability or there's a
23 presumption it's not?

24 MS. CHANDA: Well, it says and that clear
25 intent comes from the legislative history which

1 showed that once the legislature had tried to place
2 an exception for switchblade knives, which are very
3 similarly constructed and equally dangerous,
4 according to evidence before the legislature, and
5 they had tried to carve out an exception for
6 professional use. And that proved unworkable because
7 ev - - - that defense was used always and it pretty
8 much vitiated the statute. So what - - -

9 JUDGE READ: So you're saying it's clear
10 from the history of the statute if not from the words
11 of the statute?

12 MS. CHANDA: It is also clear from - - - I
13 mean, it's clear from the words of the statute
14 because the - - - the mental state is silent in the
15 gravity knife possession statute.

16 JUDGE PIGOTT: Are you worried that you'd
17 arrest an innocent person and convict them on a
18 strict liability because he happens to be a drywall
19 guy who didn't know that - - - that these things had
20 been banned and he drove in from Buffalo, New York,
21 to do a little work and all of a sudden he's - - -
22 he's in jail?

23 MS. CHANDA: Well, I do - - - that's - - -
24 the legislature deemed that the onus should be on the
25 possessor of the knife to know - - -

1 JUDGE PIGOTT: Right.

2 MS. CHANDA: - - - to take that extra step

3 - - -

4 CHIEF JUDGE LIPPMAN: Yeah, yeah. But the

5 - - - but the question is - - -

6 MS. CHANDA: - - - to deter - - -

7 CHIEF JUDGE LIPPMAN: - - - what about

8 justice.

9 MS. CHANDA: Right.

10 CHIEF JUDGE LIPPMAN: I mean that's what

11 this all about. That's - - - right?

12 MS. CHANDA: Yes. And to the extent if - -

13 - if - - -

14 JUDGE RIVERA: And in this case it's hard

15 to - - - to deal with your argument about the onus

16 when he bought it lawfully, right? He went to Home

17 Depot of all places, right?

18 MS. CHANDA: Um-hum.

19 JUDGE RIVERA: I mean it's not something he

20 went underground, went behind the truck, and bought

21 this thing. And he's - - - he uses it publicly when

22 he's at work. Everyone knows he's got this knife.

23 MS. CHANDA: But it's a knife. And he has

24 that - - - the onus is on him and he has - - -

25 JUDGE RIVERA: Well, not just a knife.

1 It's a gravity knife.

2 MS. CHANDA: Right.

3 JUDGE RIVERA: That's your point.

4 MS. CHANDA: It operates in an inherently
5 dangerous manner. And that was his responsibility to
6 take - - - exercise reasonable care to make sure - -
7 -

8 JUDGE RIVERA: You say it's like the stars
9 and all that other stuff that - - - that - - -

10 MS. CHANDA: Well, actually, Kung Fu stars,
11 it's interesting. If you look at the legislative
12 definition it says it - - - it's an - - - a weapon
13 that must be designed primarily for use as a weapon.
14 There is no such language under the definition of
15 gravity knives. It's a strict functionality test.

16 JUDGE ABDUS-SALAAM: Counsel, what - - -

17 MS. CHANDA: If you open it - - -

18 JUDGE ABDUS-SALAAM: This - - - this knife
19 happened to be in - - - in Mr. Gonzalez's pocket.

20 MS. CHANDA: Right.

21 JUDGE ABDUS-SALAAM: What if it had been in
22 the bag where he was carrying his other tools for
23 work and for whatever reason, maybe good, you know,
24 probable cause reason the officers go in the bag and
25 it's just in there. Is he arrested then?

1 MS. CHANDA: If there was probable cause to
2 go into that bag and it then operated as a gravity
3 knife, yes. I mean if - - - if for some reason
4 there's a situation in which he tried to op - - -
5 operate it numerous times or he, at trial, would say
6 that - - - or if at the trial it seemed that the
7 officers could not open it, there might be a jury
8 question as to operability. But in terms of whether
9 you have to know that you - - -

10 JUDGE PIGOTT: So he's cooked. He's - - -
11 I mean he's going - - - I - - - I understand there's
12 a sentence here. But - - - but you - - - there's no
13 discretion.

14 MS. CHANDA: No. But there - - - there - -
15 -

16 JUDGE PIGOTT: I mean he says - - - he says
17 wait a minute, you know, and he gives you all his
18 reasons. Too bad. You know, he's gone.

19 MS. CHANDA: But there's prosecutorial
20 discretion. There's a judge - - -

21 JUDGE PIGOTT: Well, that's the point.
22 That's exactly what I thought you were going to say.

23 MS. CHANDA: Um-hum.

24 JUDGE PIGOTT: So - - -

25 MS. CHANDA: And there's judicial

1 discretion.

2 JUDGE PIGOTT: So if it's Judge Pigott and
3 - - - and he's got the knife.

4 MS. CHANDA: Right.

5 JUDGE PIGOTT: Look it, Judge, we're going
6 to keep it. You know, it's - - - but don't do this
7 again. If it's some guy who's swearing at the cops
8 he's going to do three-and-a-half to seven - - - or
9 maybe a year.

10 MS. CHANDA: Plus he's a predicate felon -
11 - -

12 JUDGE PIGOTT: I understand that. I
13 shouldn't have said it that way.

14 MS. CHANDA: - - - who threatened his wife.

15 JUDGE PIGOTT: But he's going to do - - -
16 he's going to do one year on this because he's not
17 Judge Pigott.

18 MS. CHANDA: That - - - but that's - - -

19 JUDGE PIGOTT: That's prosecutorial
20 discretion.

21 MS. CHANDA: But there's also judicial
22 discretion, there's Clayton motions. There's - - -

23 JUDGE PIGOTT: I understand. I understand.

24 MS. CHANDA: And that's the part - - -

25 JUDGE PIGOTT: But what I'm saying is - - -

1 MS. CHANDA: Um-hum.

2 JUDGE PIGOTT: What I'm saying is that if
3 you chose not to exercise that discretion because the
4 guy's swearing at you and you tell the DA he's a bad
5 guy, he's doing a year where I'm walking.

6 MS. CHANDA: Well, that's - - - the
7 legislature thought that - - - believed that it was
8 more important to place the onus on the possessor of
9 a knife that he should have notice that it could be
10 potentially regulated.

11 JUDGE FAHEY: Is - - - isn't your argument
12 really - - - under the logic that - - - that this is
13 unfair, you can argue the same thing on every per se
14 violation in the statute of every single weapon?

15 MS. CHANDA: Precise - - -

16 JUDGE FAHEY: And it's really the
17 legislature's call. And - - - and - - - but it's not
18 a very good justice argument.

19 MS. CHANDA: Well, I mean, I guess in - - -
20 there's the possession of an operable firearm.

21 JUDGE FAHEY: Well, no. The guy - - -

22 MS. CHANDA: You don't need to now it's
23 operable.

24 JUDGE FAHEY: The guy - - - the guy got a
25 knife at Home Depot had sold - - - sold, and he swore

1 at a policeman, and now he's doing three and a half
2 to seven. That's the sequence of events here. And -
3 - - and he had the same bad record when he was going
4 to work that day and he wasn't doing three and a half
5 to seven.

6 MS. CHANDA: But if - - - if the fairness
7 argument is that he had no idea, I think that's more
8 of a vagueness argument that - - - and the - - - the
9 law is clear.

10 JUDGE PIGOTT: But you're saying it doesn't
11 make a difference if he had no idea. You say tough,
12 too bad, you know.

13 MS. CHANDA: Well, he's charged - - - and
14 that's the legislature's prerogative to place the - -
15 -

16 JUDGE PIGOTT: I understand that. But
17 you're - - - you're making the argument, you know,
18 well, if he said he had no idea, well, they said
19 tough. Tough, you're going.

20 MS. CHANDA: I'm sorry. You're saying if
21 he had - - - he said I had no idea.

22 JUDGE PIGOTT: Yeah. I have no idea. What
23 - - - what is - - -

24 MS. CHANDA: Prec - - - because that's what
25 happened in the switchblade experience with the

1 legislature. That's what everyone was claiming. I
2 just use it for work. And then it - - - it
3 effectively vitiated the statute. And that's - - -

4 JUDGE PIGOTT: Yeah. But you're catching
5 the dolphins with the tuna here. I mean if you've
6 got an innocent person you're saying hey, too, bad,
7 you're caught in the net.

8 MS. CHANDA: I believe in very close cases
9 there - - - there - - -

10 CHIEF JUDGE LIPPMAN: There's noth - - -
11 there's nothing here that distinguishes this
12 situation from the strict liability model?

13 MS. CHANDA: I'm sorry?

14 CHIEF JUDGE LIPPMAN: There's nothing here
15 that distinguishes this case from strict liability,
16 given that he had the knife, when he bought it, where
17 he bought it, what he was doing with it. Nothing,
18 it's just strict liability? There's no - - - no way
19 around that?

20 MS. CHANDA: It's strict liability, and the
21 legislature, as this court recognized in People v.
22 Montilla, the legislature deemed it - - -

23 CHIEF JUDGE LIPPMAN: Okay.

24 MS. CHANDA: - - - in its judgment to place
25 a greater onus on predicate felons.

1 CHIEF JUDGE LIPPMAN: Go - - - with your
2 limited time you have left - - -

3 MS. CHANDA: Um-hum.

4 CHIEF JUDGE LIPPMAN: - - - go into the
5 DeBour situation and what happened on the platform
6 that day.

7 MS. CHANDA: Well, first, it's - - - it's -
8 - - Your Honor, it's a mixed question of law and
9 fact, and so it should not be - - -

10 CHIEF JUDGE LIPPMAN: It can be a question
11 of law, can't it?

12 MS. CHANDA: Well, not in this case. There
13 are dis - - - disputed facts, and it's not - - - it
14 has not been distilled to a question of law.

15 CHIEF JUDGE LIPPMAN: Well - - -

16 JUDGE RIVERA: Well, it boils - - - boils
17 down to the credibility. You either belief Officer
18 Nadel's version - - -

19 MS. CHANDA: Um-hum.

20 JUDGE RIVERA: - - - or you belief the
21 defendant's version, correct?

22 MS. CHANDA: And that is - - -

23 JUDGE RIVERA: And that's where the judge
24 made the - - -

25 MS. CHANDA: That is a determination made

1 by - - -

2 JUDGE RIVERA: - - - judge made that
3 decision. Can I ask you - - -

4 MS. CHANDA: Um-hum.

5 JUDGE RIVERA: - - - what goes into a
6 proper assessment of credibility under that
7 circumstance? What can the judge consider?

8 MS. CHANDA: Well, the judge consider - - -
9 I mean and - - - which is perfectly the example in
10 this case - - -

11 JUDGE RIVERA: Um-hum, yeah.

12 MS. CHANDA: - - - can consider that the
13 defendant was making faces, being disruptive,
14 exhibiting the same characteristics he did while he
15 was in the subway.

16 JUDGE PIGOTT: If you concede all - - -

17 JUDGE RIVERA: So can he rely on his
18 criminal history?

19 MS. CHANDA: And criminal history, Your
20 Honor, absolutely.

21 JUDGE RIVERA: He can rely on the criminal
22 history to make his credibility determinative - - -

23 MS. CHANDA: Right, and he had an ext - - -

24 JUDGE RIVERA: Can he rely - - - can he
25 give a presumption of credibility because it's a

1 police officer?

2 MS. CHANDA: No. I do not believe that
3 that's - - -

4 CHIEF JUDGE LIPPMAN: I think he's got a
5 tough road here, the cop versus this guy who was
6 mouthing off about the cop, tough, tough credibility
7 issue for him, right?

8 MS. CHANDA: And - - - and that's - - -
9 it's - - - that's why it's - - - that's - - -

10 CHIEF JUDGE LIPPMAN: Sort of like what
11 Judge Pigott was saying before about if I'm so-and-
12 so, Judge Something or whatever I am, as opposed to
13 somebody else, you know.

14 MS. CHANDA: I mean last year in - - - in
15 Bronx County a judge dismissed a case and there was
16 similar situation. A guy was carrying a gravity
17 knife on the street and a cop - - -

18 JUDGE RIVERA: Yeah. But can I ask you
19 about - - -

20 MS. CHANDA: I'm sorry.

21 JUDGE RIVERA: I just want to ask you about
22 - - - I'm - - - I'm looking at the ruling and so the
23 judge is talking about credibility and he says I know
24 credibility issues are difficult to decide. And then
25 he said, "However, in this case I have no reason to

1 discredit the testimony of the sergeant. He has been
2 a police officer for a long period of time. He is
3 assigned to an elite unit or he was. He appeared to
4 be a credible witness." And then he says, "The
5 defendant's record speaks for itself."

6 So why doesn't that sound like a
7 presumption that an officer is always credible unless
8 something suggests that they're not credible, and a
9 defendant who happens to have a criminal history is
10 always incredible? Why - - - why can't you read this
11 the way I've just suggested?

12 MS. CHANDA: I think he was just - - - I
13 don't think he took it into a determination of the
14 credibility. He just - - -

15 JUDGE RIVERA: What's the "it"? I'm sorry.
16 In that sentence, what's the "it" that you're
17 referring to?

18 MS. CHANDA: I'm sorry?

19 JUDGE RIVERA: You said he - - - he didn't
20 take it into consideration. What's the "it"?

21 MS. CHANDA: Oh, I'm sorry. It - - - when
22 he was saying, the police officer's rec - - - record.
23 I don't think that was the basis of his credibility
24 determination. He made a passing remark about that,
25 but that was not the basis of his - - -

1 JUDGE RIVERA: Three lines of a passing
2 remark.

3 JUDGE PIGOTT: One - - - I have one quick.

4 CHIEF JUDGE LIPPMAN: Judge Pigott.

5 JUDGE PIGOTT: If - - - if we concede
6 everything that the judge says, the judge says I
7 believe the cop; I don't believe him; I - - - you
8 know, I make these findings - - - if he doesn't apply
9 the appropriate standard, that's an issue of law,
10 right? In other words, we're not going to fight over
11 whether the - - - you know, what the judge's findings
12 were. We're going to conc - - - conceding what the
13 judge found and the basis of his findings. We think
14 he's applied the wrong standard in determining that
15 this - - - that they had probable cause to - - - to,
16 first of all, stop, ticket, and then confiscate.

17 MS. CHANDA: So we're - - - in - - - in
18 accepting the judge's - - -

19 JUDGE PIGOTT: Right.

20 MS. CHANDA: - - - factual findings.

21 JUDGE PIGOTT: Yeah.

22 MS. CHANDA: If that were the case, I think
23 it would be distilled into a pure question of law and
24 that - - -

25 CHIEF JUDGE LIPPMAN: Okay, counsel.

1 Thanks.

2 MS. CHANDA: - - - that is not the case.

3 Okay. Thank you.

4 CHIEF JUDGE LIPPMAN: Counsel.

5 JUDGE RIVERA: Counsel, is it the correct
6 standard in assessing credibility?

7 MR. DEAN: You'll notice in my statement of
8 facts we're going with the officer's testimony - - -

9 JUDGE RIVERA: Okay.

10 MR. DEAN: - - - on the judge's findings.

11 JUDGE RIVERA: You're not challenging?

12 MR. DEAN: We're - - - we're just not
13 challenging those at all. That's number one.

14 Number two, Judge Pigott, yes, you would
15 have walked in Buffalo, but in New York City you
16 would have spent the night in jail, and then when
17 they ACD'd you, because you're a judge, then you
18 would have walked.

19 JUDGE PIGOTT: Oh.

20 MR. DEAN: And that's the way it's working.

21 CHIEF JUDGE LIPPMAN: It's good you
22 clarified that for him. Go ahead.

23 JUDGE PIGOTT: I feel much better, Mr.

24 Dean.

25 MR. DEAN: Does the court have - - -

1 CHIEF JUDGE LIPPMAN: Anything else,
2 counsel?

3 MR. DEAN: Does the court have questions?
4 Is there anything else that the court wants to ask?

5 CHIEF JUDGE LIPPMAN: No. I think we're
6 good.

7 MR. DEAN: Thank you.

8 CHIEF JUDGE LIPPMAN: Thanks. Thank you
9 both. Appreciate it.

10 (Court is adjourned)

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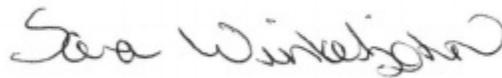
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Richard Gonzalez, No. 76 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: May 1, 2015