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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 140

MICHAEL SANS,

Appellant.

20 Eagle Street
Albany, New York 12207
September 16, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
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: 140, People v. Sans.
2 Counsel, you want any rebuttal time?

3 MS. FABIANO: Yes, please. Two minutes.

4 CHIEF JUDGE LIPPMAN: Two minutes. Okay.
5 You're on. Go ahead.

6 MS. FABIANO: Good afternoon, Your Honors.
7 My name is Denise Fabiano, and I represent the
8 appellant Michael Sans. A folding knife that does
9 not open and lock, as specifically defined in 265, is
10 a lawful commonplace tool.

11 CHIEF JUDGE LIPPMAN: Counsel, what's
12 required here in a misdemeanor complaint as opposed
13 to an information? He waived information, right?

14 MS. FABIANO: Yes, he did waive
15 information. So - - -

16 CHIEF JUDGE LIPPMAN: So what's required -
17 - - as opposed to the higher more stringent standards
18 in an information, what's required in a misdemeanor
19 complaint?

20 MS. FABIANO: Well, we need facts of an
21 evidentiary character giving us reasonable cause to
22 believe that a crime has been committed.

23 CHIEF JUDGE LIPPMAN: And what's reasonable
24 cause mean in this context?

25 MS. FABIANO: We have to have some

1 assurance that a crime has been committed, that each
2 element of the gravity knife - - -

3 CHIEF JUDGE LIPPMAN: Okay. What's wrong
4 with - - -

5 MS. FABIANO: - - - statute has been met.

6 CHIEF JUDGE LIPPMAN: - - - with this
7 complaint?

8 MS. FABIANO: Well, if he's - - -

9 CHIEF JUDGE LIPPMAN: They don't - - - they
10 don't say, you know, we know it when we see it and
11 that kind of thing; they use the language of the
12 statute, don't they?

13 MS. FABIANO: No, they don't.

14 CHIEF JUDGE LIPPMAN: What do they use?

15 MS. FABIANO: They - - -

16 CHIEF JUDGE LIPPMAN: What's in there?

17 MS. FABIANO: They use the language for
18 opens with centrifugal force.

19 CHIEF JUDGE LIPPMAN: Right.

20 MS. FABIANO: But with regard to the
21 locking mechanism - - -

22 CHIEF JUDGE LIPPMAN: Right.

23 MS. FABIANO: - - - they say it locks
24 automatically; end of story. That's not enough to be
25 a gravity knife.

1 CHIEF JUDGE LIPPMAN: What - - - what do
2 you have to say?

3 MS. FABIANO: It has to lock by means of a
4 button, spring, lever, or other device.

5 CHIEF JUDGE LIPPMAN: So if they said that
6 it would be okay but without it it's no good?

7 MS. FABIANO: If - - - if they had
8 specified how it locked.

9 JUDGE RIVERA: Do they have to choose one
10 of them? Do they have to say it's by spring?

11 MS. FABIANO: You know, it - - -

12 JUDGE RIVERA: Do they have to say it's by
13 the lock? Or can they - - - I think in part this may
14 be what the Chief Judge was asking - - -

15 MS. FABIANO: It - - - it is a - - -

16 JUDGE RIVERA: - - - you. Can they just
17 rearticulate the language that you find in the
18 statute?

19 MS. FABIANO: No. I do think they do - - -
20 they need to be a little more specific, and I think
21 that's under Jackson.

22 JUDGE RIVERA: How much more?

23 MS. FABIANO: I think with - - - with
24 regard to the way it locks they would need to
25 specific how it locks: by a button, by a lever - - -

1 JUDGE RIVERA: So they have to choose one
2 or the other dev - - -

3 MS. FABIANO: Well, it's not choosing - - -

4 JUDGE RIVERA: Didn't it say or some other
5 device?

6 MS. FABIANO: Or it locks by a device.

7 JUDGE ABDUS-SALAAM: What - - - what about
8 that it just locked?

9 MS. FABIANO: Well, lock is subject to
10 interpretation, and that interpretation leaves open -
11 - -

12 JUDGE ABDUS-SALAAM: Well, with - - - after
13 - - - after applying centrifugal force.

14 MS. FABIANO: Um-hum.

15 JUDGE ABDUS-SALAAM: I mean the reason that
16 the statute specifies that it's a button or something
17 else is based on centrifugal force, right?

18 MS. FABIANO: No.

19 JUDGE ABDUS-SALAAM: That's the idea of a
20 gravity knife?

21 MS. FABIANO: Well, there - - - the idea of
22 the gravity knife is that it opens with centrifugal
23 force but that it locks by a mechanism, meaning it
24 doesn't just lock by friction between the knife
25 handle and the sheath; it doesn't just lock by means

1 of a bias towards opening, it flips open; and it
2 doesn't close unless you really push it.

3 JUDGE STEIN: But doesn't - - - doesn't the
4 term "lock" do - - - don't you have to assume that
5 that involves some - - - something that makes it stay
6 where it is? Isn't that what lock means?

7 MS. FABIANO: A lock actually, according to
8 the dictionary, means motionless and flexible. And a
9 - - - a blade that is wedged into place by friction
10 or by a bias towards opening is motionless.

11 JUDGE PIGOTT: What - - - what knife - - -

12 MS. FABIANO: And the language in the
13 statue would be superfluous if it just merely had to
14 say lock. Go ahead. I'm sorry.

15 JUDGE PIGOTT: What knife - - - what knife
16 do you picture as being included in this charge that
17 would not be included in this charge if they had used
18 the words that you suggest?

19 MS. FABIANO: A gravity knife.

20 JUDGE PIGOTT: No, gravity knives are
21 gravity. They - - - they - - - they count, right?

22 MS. FABIANO: Yes.

23 JUDGE PIGOTT: All right. So what doesn't
24 count? In other words, if I - - -

25 MS. FABIANO: A fold - - - a folding knife.

1 JUDGE PIGOTT: Go ahead.

2 MS. FABIANO: A folding knife. There are
3 folding knives - - -

4 JUDGE PIGOTT: A pocketknife?

5 MS. FABIANO: A pocketknife. There's - - -

6 JUDGE PIGOTT: They - - - but they don't
7 lock in place, do they?

8 MS. FABIANO: There are knives that have a
9 bias toward opening and there are folding knives that
10 have a bias toward opening, meaning they - - - they
11 have a - - - they just flip into place and they
12 remain there, and you could flip it upside down.

13 JUDGE PIGOTT: Is it a gravity knife?

14 MS. FABIANO: It's - - - it's - - - it's
15 not a gravity knife unless it locks by means of a
16 button, spring, lever, or other device. That's a
17 common lawful weap - - - knife. And - - -

18 JUDGE RIVERA: Well, I - - - I'm a little
19 confused in that response.

20 MS. FABIANO: Um-hum.

21 JUDGE RIVERA: You're saying that they stay
22 in that horizontal position, that locked position?

23 MS. FABIANO: Yes.

24 JUDGE RIVERA: That - - - not by means of
25 anything internal to the knife but some external

1 force?

2 MS. FABIANO: It could be friction between
3 the knife - - - the - - - the sheath - - - that's
4 actually - - - I - - - I cited something in my brief,
5 it was - - - maybe it was Wikipedia, I don't know if
6 that counts, but it says there are knives that do
7 remain open in an - - - in a motionless position by
8 means of friction between the sheath and the - - -

9 JUDGE ABDUS-SALAAM: But is that locked?
10 Motionless, does that mean locked?

11 MS. FABIANO: Yes, it's not moving; it's
12 not moving. And, you know - - -

13 JUDGE RIVERA: Well, but - - - but - - -
14 but if - - - if you push it without pressing the
15 button that unlocks it or if you flip it and it - - -
16 and it refolds or starts to refold then it's not
17 locked.

18 MS. FABIANO: You - - -

19 JUDGE RIVERA: Locked is it's in place and
20 will not move out of that place.

21 MS. FABIANO: Those knives you would have
22 to push closed, and - - -

23 JUDGE RIVERA: But you can without
24 releasing the locking mechanism.

25 MS. FABIANO: Right, and - - - but this - -

1 - this complaint leaves open the possibility that
2 that type of knife - - -

3 JUDGE PIGOTT: Let's take a - - -

4 MS. FABIANO: - - - was the one that was
5 recovered.

6 JUDGE PIGOTT: Let's take a Swiss Army
7 knife. You're saying that they're not covered. You
8 can go - - - you can go to almost any store these
9 days and get a Swiss Army knife. It is not a gravity
10 knife in your view, and if all they say is that it -
11 - - it locks in place, to you that doesn't mean in -
12 - - that it fits this statute.

13 MS. FABIANO: It can't fit the statute.
14 The language would be superfluous. It must lock into
15 place by a mechanism that must be deactivated.

16 JUDGE PIGOTT: That's not - - -

17 MS. FABIANO: The mechanism must be
18 deactivated to close it.

19 JUDGE PIGOTT: That's not in the statute.

20 MS. FABIANO: It's not but - - -

21 JUDGE FAHEY: Well, does - - - doesn't
22 this, though, fall into that language about an overly
23 technical reading of the misdemeanor complaint, and
24 at this point whether it's friction that locks it in
25 place or an actual button locks it in place, I don't

1 know if that's - - - if that's really your strongest
2 argument. What I'm wondering about is in the Dreyden
3 case it talked about the officer stating his
4 experience and the basis for this and - - - and what
5 - - - what do you have to say about that point?

6 MS. FABIANO: Well, they didn't allege
7 training and experience here, and certainly we would
8 have been closer to reasonable cause if they had. We
9 don't know if this officer - - -

10 JUDGE RIVERA: Well, he alleges that he
11 used it.

12 MS. FABIANO: Personal testing alone - - -

13 JUDGE RIVERA: That is I used it myself - -
14 -

15 MS. FABIANO: Right.

16 JUDGE RIVERA: - - - in a way - - -

17 MS. FABIANO: Um-hum.

18 JUDGE RIVERA: - - - that made me determine
19 that this is a knife that falls within the penal law.

20 MS. FABIANO: But that doesn't give us any
21 assurance - - -

22 JUDGE RIVERA: Why is that - - - why isn't
23 that good enough?

24 MS. FABIANO: Because it doesn't give us
25 any assurance that this officer knew the difference

1 between a gravity knife and a common folding knife.
2 And actually, it's a tricky - - - it's a - - - it is
3 a tricky - - -

4 JUDGE RIVERA: But for the purposes of a
5 misdemeanor complaint he's got to give a rendition of
6 his extensive experience and how he's able to - - -

7 MS. FABIANO: Well - - -

8 JUDGE RIVERA: - - - determine one knife
9 from the other when he uses it?

10 MS. FABIANO: I'm not saying he has to go
11 through and say I had training in X, Y, and Z on
12 these dates. Perhaps that recitation of training - -
13 - I - - - I had training and experience in the
14 identification of gravity knives, plus I tested it,
15 plus this is what led me to believe it was after I
16 tested. That would be ideal. You know, the
17 switchblade is also an illegal - - -

18 JUDGE STEIN: You say that - - - I - - - I
19 just want to stop you for a second. You say that
20 would be ideal, and we would probably agree with you.
21 But is that what's required? Does it have to be
22 ideal?

23 MS. FABIANO: I think there has to be - - -
24 it's a case-by-case basis meaning certainly here if
25 he had - - - I think if you're alleging training and

1 experience and personal testing you'd need to give
2 the basis. If you're not alleging any training
3 experience or you're not alleging - - - you - - - you
4 need to - - - you can maybe perhaps can give less
5 detail.

6 JUDGE RIVERA: Well, does Drey - - -

7 MS. FABIANO: So it's - - -

8 JUDGE RIVERA: - - - Dreyden require that
9 you must describe the training and experience?

10 MS. FABIANO: Taken literally, yes, it
11 does. And - - -

12 JUDGE RIVERA: But I think it says "with
13 reference to."

14 MS. FABIANO: Yes.

15 JUDGE RIVERA: Does that mean I have to
16 explain it if I'm the police officer?

17 MS. FABIANO: You - - - perhaps ref - - -
18 referring to it, as I indicated, would be enough.
19 But you would still need to give the basis for your
20 conclusion - - - personal testing plus the basis for
21 your conclusion so that we can be assured that a
22 crime has been committed.

23 JUDGE ABDUS-SALAAM: Wasn't - - - wasn't
24 the focus in Dreyden that there were no facts at all;
25 it was just a conclusion that this was a gravity

1 knife?

2 MS. FABIANO: Yes. Yes, so we didn't have
3 reasonable cause to - - - to - - -

4 JUDGE ABDUS-SALAAM: So it's - - -

5 MS. FABIANO: But here you can't just say
6 it's a red knife; that wouldn't be reasonable cause.
7 Just giving additional facts is not going to give you
8 reasonable cause. We need reasonable cause that this
9 knife operated in an illegal manner and fits the
10 definition of a per se weapon.

11 CHIEF JUDGE LIPPMAN: Okay, counsel. Let's
12 hear from your adversary and then you get rebuttal.

13 MS. AGEYEVA: Good afternoon, Your Honors.
14 May it please the court - - -

15 CHIEF JUDGE LIPPMAN: Counsel, is your
16 adversary not right that this complaint could be
17 drawn a little better than it was?

18 MS. AGEYEVA: Your Honor - - -

19 CHIEF JUDGE LIPPMAN: Could be more
20 specific or is it - - - is it perfect the way it is?

21 MS. AGEYEVA: Your Honor, it's fine the way
22 it is. I mean the complaint - - -

23 CHIEF JUDGE LIPPMAN: You know what I'm
24 saying.

25 MS. AGEYEVA: Can - - -

1 CHIEF JUDGE LIPPMAN: Could it be a little
2 bit better drawn - - -

3 MS. AGEYEVA: Your Honor, if it - - -

4 CHIEF JUDGE LIPPMAN: - - - with a little
5 more information?

6 MS. AGEYEVA: Yes, Your Honor. It does not
7 need to be better drawn in order to satisfy
8 reasonable cause. Reasonable cause - - -

9 CHIEF JUDGE LIPPMAN: Yeah, yeah, but
10 that's not what I'm asking you. They can do a better
11 job on the complaint, right?

12 MS. AGEYEVA: Your Honor, I mean, there
13 could always be more specifics and more facts and
14 more explanations.

15 CHIEF JUDGE LIPPMAN: But you're saying
16 it's - - - it's - - - it's all that has to be, then?

17 MS. AGEYEVA: Yes, Your Honor, and this
18 case is clearly - - -

19 CHIEF JUDGE LIPPMAN: Can we tell it's a
20 gravity knife from the description?

21 MS. AGEYEVA: Absolutely, Your Honor. This
22 case is clearly distinguishable from Dreyden, and in
23 fact, it's rep - - - represents our officer's effort
24 to comply with Dreyden, because in Dreyden this court
25 ruled that it was only - - - it was strictly

1 conclusory because there was no basis for the
2 officer's knowledge. Here we do have basis for the
3 officer's knowledge.

4 CHIEF JUDGE LIPPMAN: What's the basis for
5 the off - - -

6 MS. AGEYEVA: The basis is that he
7 personally handled and personally tested the knife,
8 and he came to two determinations. One - - -

9 JUDGE RIVERA: But her argument is that
10 there's no way from the complaint to know whether or
11 not the fact that he tested it really establishes
12 that he could, through - - - through that process,
13 have determined that it's a gravity knife.

14 MS. AGEYEVA: Your Honor, I disagree with
15 that. When he tested the knife he came to two
16 determinations. The first determination is that it
17 opened with centrifugal force; the sec - - - and the
18 second determination that it locked automatically in
19 place. Automatically is - - -

20 JUDGE RIVERA: Yeah. But the argument - -
21 - the argument stands that, you know, there are other
22 knives that seem to mimic these same requirements of
23 the statute but that are not gravity knives, and that
24 merely saying, oh, I used centrifugal force and it
25 locked may not, indeed, really explain or describe a

1 gravity knife. And without the officer saying more
2 than, well, I used it and it acted like a gravity
3 knife doesn't give the appropriate notice about the
4 basis for that determination.

5 MS. AGEYEVA: Your - - - Your Honor, in - -
6 - the understanding is that there is - - - the
7 defendant was given sufficient notice and because
8 it's - - - and the language - - - even if the
9 language did not state, for example, automatically,
10 it is our position that it would still be sufficient
11 because we are dealing here with reasonable cause - -
12 -

13 JUDGE STEIN: So you're saying - - -

14 MS. AGEYEVA: - - - which is a less
15 stringent standard - - -

16 JUDGE STEIN: Than proof beyond a
17 reasonable doubt.

18 MS. AGEYEVA: Than - - - than proof beyond
19 a reasonable doubt, exactly. If there is any - - -
20 additional facts the defendant wants to portray, you
21 know, or something against the officer or anything
22 like that that could come out at trial.

23 JUDGE RIVERA: But if he wants to show that
24 he's mistaken in his conclusion - - -

25 MS. AGEYEVA: Exactly.

1 JUDGE RIVERA: - - - that's not a question
2 that has to be resolved through some articulation by
3 the police officer in the complaint.

4 MS. AGEYEVA: Absolutely not.

5 JUDGE RIVERA: That's a question for the
6 trial?

7 MS. AGEYEVA: Exactly, Your Honor.

8 JUDGE PIGOTT: But your - - - your - - -
9 your opponent's argument, if I understand it, is when
10 - - - what he said was just as you said, "it opens
11 with centrifugal force and locks automatically in
12 place." She's saying that's fine except what it says
13 is "when released as locked in place by means of a
14 button, spring," level - - - "lever, or other
15 device," and that part is missing from the - - - from
16 this and therefore it's jurisdictionally defective.

17 MS. AGEYEVA: Yes, Your Honor. By stating
18 in the complaint that the knife locked automatically
19 in place, by stating the word automatically that is
20 essentially synonymous with - - -

21 JUDGE PIGOTT: So we - - - so the leg - - -

22 MS. AGEYEVA: - - - a device or mechanism.

23 JUDGE PIGOTT: The - - - so the legislature
24 when they put this stuff in it's - - - it's - - -
25 super - - - sur - - - surplusage - - -

1 MS. AGEYEVA: No.

2 JUDGE PIGOTT: - - - and they didn't have
3 to say button, spring, lever, or other device?

4 MS. AGEYEVA: No, Your Honor. It's - - -
5 it's not - - - it's not surplusage, but when we're
6 using it here in the complaint for the purposes - - -
7 again, given a fair and not overly restrictive
8 reading, the term automatically is synonymous with a
9 mechanism. It does not - - - it does not become
10 surplusage; it is not meaningless.

11 CHIEF JUDGE LIPPMAN: Sufficient to give
12 them notice?

13 MS. AGEYEVA: It is absolutely sufficient
14 to give the defendant notice.

15 JUDGE ABDUS-SALAAM: But what about the - -
16 - the Dreyden directive - - - I won't say it was a
17 requirement, but a directive that the police officer
18 explain or give some experience about how that
19 officer knows it's a gravity knife as opposed to
20 maybe me who pulls out a knife and I don't know
21 whether it's a gravity knife or some other kind of
22 knife?

23 MS. AGEYEVA: Your Honor, there was no need
24 here in this complaint to mention training and
25 experience, and the reason why there was no need to

1 mention training and experience is because the
2 officer personally tested the gravity knife; he
3 personally tested - - - he has personal knowledge
4 that this indeed - - -

5 JUDGE RIVERA: But what if it's the first
6 time that he's ever handled - - -

7 MS. AGEYEVA: - - - it's a gravity knife.

8 JUDGE RIVERA: - - - a knife?

9 MS. AGEYEVA: Your Honor - - -

10 JUDGE RIVERA: How do you know that he
11 knows that this is a gravity knife?

12 MS. AGEYEVA: Well, I would think that if
13 the officer is - - -

14 JUDGE RIVERA: Yeah, and again, given - - -
15 given that there are other knives that apparently
16 mimic some of these elements of a gravity knife.

17 MS. AGEYEVA: Your Honor, I am sure that in
18 order to state in the complaint that this is a
19 gravity knife I'm sure that the officers are trained
20 - - -

21 CHIEF JUDGE LIPPMAN: All officers are
22 sufficiently trained to know a gravity knife when
23 they see it?

24 MS. AGEYEVA: Well, no, it's not when - - -
25 it's - - - it's not necessarily when they see it.

1 Here we have much more - - -

2 CHIEF JUDGE LIPPMAN: And they test it.
3 All officers when they push the button or whatever
4 they do - - -

5 MS. AGEYEVA: Right, Your Honor.

6 CHIEF JUDGE LIPPMAN: - - - they all know
7 what - - - what it - - - that that's a gravity knife?

8 MS. AGEYEVA: If the officer is affirming
9 in the complaint that this is a gravity knife - - -
10 not just by testing it, oh, I tested this and just by
11 testing alone this is a gravity knife. It - - - it -
12 - - the - - - you know, he came to two conclusions -
13 - -

14 JUDGE PIGOTT: If the officer - - -

15 MS. AGEYEVA: - - - in addition to that.

16 JUDGE PIGOTT: If the officer got on the
17 stand and testified I saw the defendant coming out of
18 Target and I know that he bought a Swiss Army knife
19 and that's a gravity knife and therefore he's guilty,
20 and on withering cross-examination counsel said did
21 it have a button, spring, level - - - lever or other
22 device that would hold it in place and he said I
23 don't know, would - - - would he be acquitted?

24 MS. AGEYEVA: That's a very good question,
25 Your Honor. Again, I - - - I don't know if he would

1 be acquitted.

2 JUDGE PIGOTT: Don't you have to establish
3 each and every element of the crime charged in the
4 original charging instrument?

5 MS. AGEYEVA: That is - - - that is
6 correct, Your Honor, but again, as you mentioned,
7 that is an issue for trial.

8 JUDGE PIGOTT: No. I - - - I'm - - - I'm
9 suggesting it might not be. I mean oth - - - in
10 other words if he just gets on the stand and
11 testifies I tested it and it's a gravity knife and
12 they move to dismiss on legal sufficiency and they
13 said, well, you know, based on People v. Sans I don't
14 - - - you know I don't think that's legally - - - I -
15 - - I think it's legally sufficient. He then
16 testifies to what he said in the complaint, but he
17 does not say that there was a button, spring, level -
18 - - lever, or other device; would he be acquitted?

19 MS. AGEYEVA: Well, Your Honor, if he
20 testifies at trial and he testifies that he tested
21 this weapon and this weapon opened with centrifugal
22 force but then when it came time to locking in place,
23 if he said that he - - - he does not know or that it
24 did not lock by any kind of device then, yes, the
25 jury could have a determination to - - - to acquit

1 him. But again, here this - - - this language, it
2 does not - - - him saying it locks automatically in
3 place does not negate by any means that there was a
4 device involved.

5 CHIEF JUDGE LIPPMAN: At this point - - -

6 MS. AGEYEVA: It does the opposite.

7 CHIEF JUDGE LIPPMAN: At this point does he
8 have to - - - did he have to establish ele - - -
9 every element of the crime - - -

10 MS. AGEYEVA: No, Your Honor.

11 CHIEF JUDGE LIPPMAN: - - - in the
12 misdemeanor complaint?

13 MS. AGEYEVA: No, Your Honor.

14 JUDGE PIGOTT: It doesn't have to charge
15 each and every element of the crime charged?

16 MS. AGEYEVA: Your Honor, we have here each
17 and every element of the crime - - -

18 JUDGE PIGOTT: That's your argument.

19 CHIEF JUDGE LIPPMAN: No, no, but that's
20 not - - - that doesn't answer the question.

21 MS. AGEYEVA: Right.

22 CHIEF JUDGE LIPPMAN: Does - - - at the
23 point of a misdemeanor complaint do you have to
24 establish every element of the crime?

25 MS. AGEYEVA: Your Honor, I believe that

1 it's within information that you have to establish -
2 - -

3 CHIEF JUDGE LIPPMAN: Well, that's - - -

4 MS. AGEYEVA: - - - every element of the
5 crime.

6 CHIEF JUDGE LIPPMAN: - - - that's what I
7 was getting at.

8 MS. AGEYEVA: Yes.

9 CHIEF JUDGE LIPPMAN: What's the difference
10 between the information and the misdemeanor complaint
11 in terms of what you have to establish?

12 MS. AGEYEVA: The - - - the different is
13 that with a misdemeanor complaint you have to
14 establish reasonable cause to believe that this
15 person committed this crime. So what it is here - -
16 -

17 CHIEF JUDGE LIPPMAN: And with the informa
18 - - - and with the information?

19 MS. AGEYEVA: And with the information you
20 have to establish if every - - -

21 CHIEF JUDGE LIPPMAN: Each and ever - - -
22 that each and every element of the crime, right?

23 MS. AGEYEVA: Yes, and in fact, if every
24 fact is true would it establish every element of the
25 crime, correct. So - - - and reasonable cause is

1 essentially, as I mentioned earlier, is probable
2 cause. So when you're looking at it as probable
3 cause essentially it's did this officer have probable
4 cause to arrest this defendant by - - - after testing
5 the weapon and after determining if - - -

6 JUDGE PIGOTT: Well, wait - - - wait - - -
7 wait. Let me - - - let me - - - in the beginning he
8 says "at the above date, time, and place the deponent
9 observed the defendant in possession of a gravity
10 knife, and the deponent observed the defendant remove
11 a knife from defendant's pocket, and the deponent
12 recovered said knife from the defendant." That's
13 enough, right?

14 MS. AGEYEVA: That he recovered the said
15 knife from the defendant after testing it?

16 JUDGE PIGOTT: There was a - - - no - - -
17 yeah, there was a gravity knife - - - no, just what I
18 just read you. He said he - - - "the defendant was
19 in possession of a gravity knife."

20 MS. AGEYEVA: Well, Your Honor, in Dreyden
21 you ruled that that was not enough.

22 JUDGE PIGOTT: That's my point, and you - -
23 - but you were saying all we got to do is establish
24 probable cause. Well, if a cop says I took a gravity
25 knife off somebody it sounds like probable cause to

1 me. But I think what we were saying is that you got
2 to allege a crime, and in order to allege a crime you
3 got to establish the elements of the crime.

4 MS. AGEYEVA: And here - - - and here we -
5 - - it's sufficient to allege a crime, Your Honor.

6 JUDGE PIGOTT: Well, we're close.

7 MS. AGEYEVA: And we're - - - we're saying.

8 JUDGE PIGOTT: That's - - - that's a - - -

9 MS. AGEYEVA: We're saying that locks - - -
10 we're saying that it locks automatically in place and
11 that when we say that we're using the language
12 directly from Dreyden.

13 JUDGE PIGOTT: So you want to - - - you
14 want to say that locks automatically in place is the
15 equivalent of what I just keep reading here about - -
16 - about levers, buttons, et cetera.

17 MS. AGEYEVA: Abs - - - absolutely, Your
18 Honor.

19 JUDGE PIGOTT: Okay.

20 MS. AGEYEVA: And getting to - - - right.

21 JUDGE RIVERA: Because as you say,
22 automatically is synonymous with there is a device
23 that locks this into place, what - - - whatever that
24 may be.

25 MS. AGEYEVA: Yes.

1 JUDGE RIVERA: Maybe a button, maybe a
2 spring, some other device. As the - - -

3 MS. AGEYEVA: Correct.

4 JUDGE RIVERA: - - - language says in the
5 statute.

6 MS. AGEYEVA: The definition of automatic
7 is having a self-regulatory mechanism.

8 CHIEF JUDGE LIPPMAN: Okay, counsel.

9 MS. AGEYEVA: So that by itself - - -

10 CHIEF JUDGE LIPPMAN: Thanks, counsel.

11 MS. AGEYEVA: Yep. Thank you, Your Honor.

12 CHIEF JUDGE LIPPMAN: Okay. Rebuttal,
13 counsel. Counsel, does she have to establish - - -
14 does the - - - the People have to establish every
15 element of the crime in a misdemeanor with the - - -
16 a complaint?

17 MS. FABIANO: Yes, they need to allege
18 every element of the crime. Otherwise you don't - -
19 -

20 CHIEF JUDGE LIPPMAN: That it's proven
21 true, yeah.

22 MS. FABIANO: - - - you don't have
23 reasonable cause that a crime has been committed, and
24 you leave open the possibility that people are
25 getting arrested and charged - - -

1 CHIEF JUDGE LIPPMAN: As opposed to an
2 information?

3 MS. FABIANO: Nonhearsay allegations
4 establishing every element of the crime, obviously.
5 This - - -

6 CHIEF JUDGE LIPPMAN: In information, yes.

7 MS. FABIANO: That's in information. But
8 in - - - in this case without est - - - without
9 establishing these elements we don't have confidence
10 that a crime has been committed, and these are cases
11 - - -

12 JUDGE STEIN: Well, how does - - - how does
13 talking about training and experience establish an
14 element of the crime?

15 MS. FABIANO: It brings us a clos - - -
16 step closer to having confidence in the - - - in - -
17 - in - - -

18 JUDGE STEIN: Well, that's - - - that's
19 reasonable cause. That's - - - that's not an element
20 of the crime.

21 MS. FABIANO: It brings us a step closer to
22 - - - to having confidence in the officer's assertion
23 that it meets every element of the crime; that's what
24 it brings us closer to. But this officer - - - it
25 could have been me testing the knife. We don't know

1 his training and experience; he didn't allege any.

2 JUDGE PIGOTT: You're not impressed with
3 the argument about automatically?

4 MS. FABIANO: No, actually - - - and I can
5 speak to that. A self-regulating mechanism can be
6 the sheath and the blade. You know, it's not - - -
7 it's not a spring, lever, button, or device. And I
8 will just point out the switchblade - - -

9 CHIEF JUDGE LIPPMAN: Say that again. The
10 - - - the - - -

11 MS. FABIANO: It's not a button, spring,
12 lever, or device which is the statutory language.

13 CHIEF JUDGE LIPPMAN: What else does - - -
14 what else does it mean?

15 MS. FABIANO: It's a mechanism. It - - -

16 CHIEF JUDGE LIPPMAN: What - - - what else
17 does it mean?

18 MS. FABIANO: It could be a bias toward
19 remaining open, it could be the friction between the
20 blade and the sheath. But I'm going to point out the
21 - - -

22 JUDGE RIVERA: In those examples don't you
23 then have to manually - - -

24 MS. FABIANO: Then you have to manually
25 close them.

1 JUDGE RIVERA: - - - close it? But with
2 the lever device is it that you use the device again
3 to close it?

4 MS. FABIANO: Yes.

5 JUDGE RIVERA: Or is that also manually?

6 MS. FABIANO: No, you're right. There's a
7 - - - there would be something that would need to be
8 deactivated meaning pushed - - -

9 JUDGE RIVERA: Well, with gravity knives
10 you have - - -

11 MS. FABIANO: - - - pushed, slid - - -

12 JUDGE RIVERA: - - - you - - - you have to
13 choose.

14 MS. FABIANO: Yes, you have to choose.

15 JUDGE RIVERA: And you have to choose to
16 deactivate.

17 MS. FABIANO: Ex - - - exactly.

18 JUDGE RIVERA: But in your examples, these
19 other examples, it's something external to the
20 person. It's not a - - - right?

21 MS. FABIANO: Correct.

22 JUDGE RIVERA: That may keep it - - - it -
23 - - what you're arguing in a locked or open - - -
24 it's really you're arguing it's in an open position,
25 and it will not move from that position - - -

1 MS. FABIANO: Right.

2 JUDGE RIVERA: - - - until you use some
3 manual force to close it other than a device.

4 MS. FABIANO: Right. And switchblade is
5 under the - - - it's a per se legal weapon under the
6 same statute, and that says "the blade is released
7 automatically by means of a button, spring, or other
8 device." So - - -

9 CHIEF JUDGE LIPPMAN: How does it go - - -
10 how does it go back in?

11 MS. FABIANO: For - - - I'm sorry, for
12 which kind - - - kind of knife?

13 CHIEF JUDGE LIPPMAN: Switchblade.

14 MS. FABIANO: A switchblade you - - - you
15 can push it back in.

16 CHIEF JUDGE LIPPMAN: You push it manually?

17 MS. FABIANO: But you - - - but you - - -
18 the - - - the - - -

19 CHIEF JUDGE LIPPMAN: But on the - - - but
20 on the - - - on the gravity it's all automatic,
21 right?

22 MS. FABIANO: The gravity you have to - - -

23 JUDGE FAHEY: I think you got to hold the -
24 - -

25 JUDGE RIVERA: It's a device that drives

1 the opening and the closing on a - - - on a gravity
2 knife?

3 MS. FABIANO: A device drives certainly the
4 closing, yes.

5 JUDGE RIVERA: Okay.

6 JUDGE FAHEY: On a gravity knife?

7 MS. FABIANO: On a gravity knife.

8 JUDGE FAHEY: Okay.

9 MS. FABIANO: Yes. So under the
10 switchblade language - - -

11 CHIEF JUDGE LIPPMAN: Last thought,
12 counsel. Your red light is on.

13 MS. FABIANO: - - - automatically released
14 from a handle by means of a button, spring, or other
15 device for a switchblade, automatically, and you
16 still have - - - you still - - - they still require a
17 button, spring, lever, or other device under that
18 statute. Certainly, you could not allege possession
19 of a switchblade without alleging a button, spring,
20 lever, or other device.

21 CHIEF JUDGE LIPPMAN: Okay, counsel.
22 Thanks. Appreciate it.

23 Thank you both.

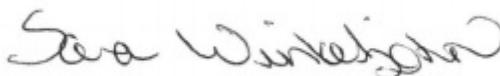
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Michael Sans, No. 140 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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