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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 76

LEROY CARVER,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
April 26, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Number 76 on the  
2 calendar, People v. Leroy Carver.

3 MS. SOMES: Good afternoon. May I please  
4 have three minutes for rebuttal?

5 CHIEF JUDGE DIFIORE: Certainly.

6 MS. SOMES: May it please the court, Janet  
7 Somes on behalf of Leroy Carver.

8 The most sig - - - among the most significant of  
9 the errors by counsel in this case, is his failure to move  
10 for suppression of key evidence taken from Mr. Carver's  
11 pockets and his person after what the rec - - - trial  
12 record shows was an unlawful arrest.

13 JUDGE STEIN: Would that have helped him  
14 with - - - with the - - - the evidence that was found  
15 in the vehicle?

16 MS. SOMES: Would that - - - I think what  
17 we have is two - - - we have two things. We have the  
18 search of him after the arrest, and then we have the  
19 evidence in the vehicle.

20 JUDGE STEIN: We do, but if he had  
21 succeeded, theoretically, in having the items found  
22 on his person suppressed, would that have helped him  
23 in any way with the items in the vehicle?

24 MS. SOMES: I think at trial, it would have  
25 helped him, but I can't say that it would help him -

1 - - -

2 JUDGE STEIN: How would that have helped  
3 him?

4 MS. SOMES: Because the items that were  
5 taken from his - - - the camera and the Avon lip balm  
6 were items that were taken specifically and directly  
7 from him. That was the direct link to Mr. Carver in  
8 the burglary. Other - - -

9 JUDGE STEIN: If you believe his story, it  
10 was no more connected to him than the other - - - the  
11 other things in the vehicle.

12 MS. SOMES: Well, I think that when you put  
13 it that way, if you believed his story, the having  
14 those items on his person, that gave an additional  
15 hurdle that he had to clear with the jury. There is  
16 an - - - you know, they had to not only believe that  
17 he wasn't in the car or that he wasn't there, but he  
18 had to explain away this really devastating evidence  
19 that was found in his pocket, and that - - -

20 JUDGE RIVERA: Undermining his defense, his  
21 version of what occurred.

22 MS. SOMES: Yes. Yes, exactly.

23 JUDGE GARCIA: Counsel, and just to Judge  
24 Stein's point, there seemed to be some confusion at  
25 the Appellate Division over what your argument was.

1           Whether it was failure to make a motion to contest  
2           the legality of the vehicle stop, that Judge Stein  
3           was talking about, or was it the stop, the frisk, and  
4           the personal items recovered. So what is the  
5           position here?

6                       MS. SOMES: Our position below was that  
7           they - - - the attorney was ineffective for not  
8           making a suppression motion. What I did was I took  
9           the strongest argument I thought, which was the  
10          unlawful arrest, and really focused on that. What  
11          the dissent then saw, they saw my argument globally;  
12          and that is what I am arguing here today.

13                      The arrest part of it, the unlawful arrest,  
14          I think on this trial record, we - - - it's not a  
15          close issue. I think it's indisputable that this was  
16          an unlawful arrest.

17                      JUDGE GARCIA: So to go back, just - - -  
18          you are arguing ineffective for failure to move to  
19          suppress on - - -

20                      MS. SOMES: Absolute - - -

21                      JUDGE GARCIA: - - - based on a vehicle  
22          stop.

23                      MS. SOMES: Yes, absolutely.

24                      JUDGE GARCIA: Okay. So what in this  
25          record indicates that anything was missed, with the

1           respect to the vehicle stop? I mean, there is - - -  
2           for example in another case we had, there was an  
3           inventory saying there was no crack in the  
4           windshield, or not noting it, or - - - is there  
5           anything here that would indicate that there was a  
6           reason that this stop would be suspect?

7                       MS. SOMES: Absolutely. There is a - - -  
8           there is a colorable basis on this record to show  
9           that there is - - - that a suppression motion should  
10          have been asked for, and would have been granted.

11                      What we have was, the officer had testified  
12          that the - - - he was in a park - - - he was in a  
13          parking lot, and - - - or he was on the road when a  
14          car came out of the parking lot. And it was - - -  
15          came out of the parking lot in the dark, and it is  
16          actually in back of him. He then pulls over and lets  
17          the car go around him, and then he follows the car  
18          for almost a mile.

19                      During that time, it's dark, and the cars  
20          are moving, and it seems to me that there is a good  
21          basis to really challenge, did the officer see what  
22          he contended that he saw. Also, there is a basis to  
23          look at what the officer actually testified to at the  
24          trial. He said that there was a sticker on the  
25          windshield, and that there was something hanging from

1 the rearview mirror. Those are not - - -

2 JUDGE STEIN: But is there any evidence  
3 that that wasn't the case, if there wasn't a sticker  
4 on the windshield, and that there was nothing hanging  
5 from the mirror?

6 MS. SOMES: No, because we didn't have a  
7 hearing. And that wasn't - - - that would not have  
8 been the focus of the trial; that would have been the  
9 focus of a hearing. But when you look at what the  
10 officer said, he said that, you know, these things  
11 were hanging there.

12 That doesn't - - - that's not a vehicle and  
13 traffic violation unless there is a little bit more  
14 about what's hanging there. First of all, it has to  
15 be obscuring the view of the driver. And then there  
16 is also, you know, stickers can be on the windshield  
17 in certain places.

18 So we don't have any of that, we just have  
19 the officer's conclusory belief that there may have  
20 been a vehicle and traffic violation. We don't have  
21 specifics that show that it was. It's not like the  
22 cracked windshield in the last case where, yes, it's  
23 a cracked windshield or it's not. Here, he did not  
24 give enough information to really be able to  
25 determine.

1                   But I would point you to page 587 of the  
2 record. 587 of the record is a photograph, People's  
3 Exhibit number 1, which shows the car. And the car -  
4 - - that photograph does - - - it shows a little  
5 something hanging from the rearview mirror, maybe,  
6 but it doesn't show any stickers; it doesn't show  
7 anything else.

8                   So I think on this record, we can't  
9 conclude that the officer was correct when he says he  
10 stopped for a vehicle and traffic violation, because  
11 we don't know that the windsh - - - that the driver's  
12 - - - from his perspective, that the - - - his view  
13 was obstructed.

14                   JUDGE GARCIA: So then going to the stop.  
15 The officer could make an investigatory stop, right,  
16 you don't have to have probable cause to arrest.  
17 Let's say he makes an investigatory stop, does a pat-  
18 down, finds these items. What in the record  
19 indicates - - - I mean, he sees these items in the  
20 car - - - I mean, assuming the stop is okay, he sees  
21 the items in the car, they're acting very nervously,  
22 they give him a false name, they give him a false  
23 story about they were, and one guy takes off with a  
24 bag.

25                   And this door is open when he goes there,

1 and the seat belt is off on your client's side of the  
2 car. What is there any indication he didn't have the  
3 basis at that point to do a stop and frisk?

4 MS. SOMES: Because at that point, he - - -  
5 first of all, he had no report of a crime whatsoever.  
6 The - - - he knows that the driver has just fled, and  
7 the driver could flee for a bunch of reasons.

8 JUDGE GARCIA: But let's say he's covered  
9 in blood, but you don't have a report of a murder.

10 MS. SOMES: And there was a case, and I  
11 can't remember what that case was, but we don't have  
12 that, because that was kind of, this is an exigency,  
13 you know, there is something going on here, and  
14 somebody might be in - - - we don't have that.

15 JUDGE GARCIA: Like a bag full of stuff  
16 with gloves on top, and somebody taking off from the  
17 car.

18 MS. SOMES: That's not - - - that's not  
19 probable cause to arrest, and what we had here was -  
20 - -

21 JUDGE GARCIA: But is it probable - - - is  
22 it enough to be able to stop him and take him in for  
23 investigatory - - - an investigatory stop?

24 MS. SOMES: No. No, it's not. Because  
25 what we know from People vs. Battaglia is that you

1 cannot look at - - - you know, some things that might  
2 kind of be suspicious, or just a messy car, we can't  
3 look at that and then hold the defendant - - - arrest  
4 him, hold him, while you go off and look for a crime.

5 Here what we had, we had an - - - almost an  
6 hour between the time of the traffic stop and when  
7 the burglary was actually discovered by the  
8 homeowner. So under Battaglia, you know, this is  
9 just - - - this is so far outside the bounds of what  
10 this court has held - - -

11 JUDGE GARCIA: So given all these facts in  
12 this case, the officer should have let him go.

13 MS. SOMES: I'm not saying the officer  
14 should have let him go. I'm saying that there was  
15 enough on this trial record to show an unlawful  
16 arrest, and that that should have resulted in a  
17 suppression motion being made by counsel.

18 JUDGE RIVERA: If he says the coat is not  
19 his, nothing in the coat is his, why does he have  
20 standing to argue about this?

21 MS. SOMES: Because it's the fruit of an  
22 unlawful arrest. If you look at - - - and then to go  
23 back to Hicks, I just wanted to kind of clarify that  
24 in Hicks, you know, that was a investigatory  
25 detention which was lawful, where they knew a crime

1 had occurred, they knew the witnesses were right  
2 around the corner, and they could dispel or confirm  
3 their suspicion quickly.

4 We don't have any of that. What we've got  
5 is, Mr. Carver being handcuffed, put in the back of a  
6 police car, and sitting there, and then taken to the  
7 station, while we still don't have a crime.

8 JUDGE STEIN: Another question, if he had -  
9 - - if he was successful in suppressing the coat and  
10 its contents, couldn't the People have used that to  
11 impeach him if he testified?

12 MS. SOMES: I don't believe so. I think  
13 that possibly his testimony could have opened the  
14 door to that, but I don't believe that the - - - that  
15 the - - - that it could have been otherwise used.

16 JUDGE STEIN: Well, if his testimony is as  
17 it was, and it appears to be the only real defense he  
18 could - - - he could mount, was, you know, I didn't  
19 know what was going on, I just woke up and, you know,  
20 there I was, then why wouldn't that open the door to  
21 saying, well, jeez, we're wearing the coat, and it  
22 had - - - it had the camera and the lip balm in it.

23 MS. SOMES: I think when you look at - - -  
24 I think it's U.S. v. Havens, Supreme Court case where  
25 this issue was - - - was decided. And what the

1 Supreme Court did in that case was they really looked  
2 at what the testimony was. And the testimony had to  
3 be pretty specific to, you know, find that the door  
4 had been open. And I don't think that with such  
5 general denial of, you know, I woke up in the car, I  
6 don't know what happens; I don't think it gets to  
7 that point.

8 CHIEF JUDGE DIFIORE: Thank you, counsel.

9 MS. SOMES: Thank you.

10 MR. MYLES: Good afternoon, Your Honors.  
11 Scott Myles for the People.

12 The defendant in this case did receive  
13 meaningful representation, and although defense counsel  
14 did make some errors, his representation did not fall  
15 below the standard of reasonable competence.

16 The suppression motion in this case had little  
17 to no chance of success. Therefore, the defense counsel  
18 is not - - -

19 JUDGE PIGOTT: Why is that? What was - - -  
20 what was his - - - what was his reason for stopping  
21 the car?

22 MR. MYLES: Your Honor, based on the very  
23 little amount that is in the record - - - there is  
24 nothing in the record to indicate that there would  
25 have been any grounds for challenging the actual stop

1 of the vehicle.

2 JUDGE PIGOTT: Do - - - do you know why he  
3 stopped him?

4 MR. MYLES: He's testified that he saw an  
5 object, a sticker in the windshield, and also an  
6 object hanging from the rearview mirror, obstructing  
7 - - -

8 JUDGE PIGOTT: It's not like a pretextual  
9 stop to you?

10 MR. MYLES: Potentially, Your Honor, but -  
11 - -

12 JUDGE PIGOTT: So if it was potentially,  
13 wouldn't it be a good idea to maybe bring a motion  
14 and see if the court would agree?

15 MR. MYLES: If - - - possibly, Your Honor;  
16 but that's not the standard that we need to look at.  
17 The standard is whether or not that motion would have  
18 had a chance of success.

19 JUDGE PIGOTT: And if someone says, you  
20 know, the - - - whatever was hanging was  
21 inconsequential, and the sticker was not within the  
22 range of the driver, it gets suppressed, right?

23 MR. MYLES: It - - - again, there - - - the  
24 testimony of the officer leads - - - gives no  
25 indication that that would have been the case, that

1 it would have resulted in suppression.

2 JUDGE ABDUS-SALAAM: Is that the standard  
3 that this court has articulated, counsel, little  
4 chance of success, or is it that there has to be  
5 colorable claim?

6 MR. MYLES: Well, the standard is that  
7 attorney is not ineffective if the motion would have  
8 had little to no chance of success. I - - - it's - -  
9 - in this case, at least - - - at least as it applies  
10 to this case, the distinction between that and  
11 whether or not it's a colorable claim is really a  
12 distinction without a difference. In this case, the  
13 suppression motion would not have had - - - or excuse  
14 me, would have had little to no chance of success,  
15 therefore the failure - - -

16 JUDGE PIGOTT: Why is that?

17 MR. MYLES: I'm sorry, Your Honor?

18 JUDGE PIGOTT: Why - - - why would it have  
19 had little or no chance of success?

20 MR. MYLES: Because based on the  
21 information that is in the record, the stop was a  
22 lawful stop.

23 JUDGE PIGOTT: In what - - - what sense?  
24 Was there testimony as to the size of the thing that  
25 was dangling, and the - - - and where the sticker

1 was?

2 MR. MYLES: There was not, but there was  
3 testimony that there were objects obscuring the  
4 driver's view, and that that would constitute a  
5 violation of the vehicle and traffic law.

6 JUDGE PIGOTT: I just think that ought to  
7 be challenge. I - - - I'm not judging this case  
8 right now, you know, we've had so many seatbelt  
9 violation stops, you know, and I - - - which is fine,  
10 but I mean, then - - - then all kinds of things are  
11 found in cars, and I get that.

12 And then someone has got a rosary hanging  
13 from their rearview mirror, and that's okay to stop;  
14 you can stop somebody for that. And I don't know, it  
15 just seems to me at some point there ought to be  
16 somebody challenging this stuff and saying, it's not  
17 obstructing the driver; stop doing this. And this  
18 may have the case, that's all I'm saying.

19 MR. MYLES: Potentially, Your Honor.

20 But I would also note, Your Honor, that  
21 that argument was essentially unargued at the Fourth  
22 Department. Appellant's argument at the Fourth  
23 Department focused almost exclusively on the property  
24 that was found as a result of the detention and the  
25 search of the defendant.

1                   And as was thoroughly argued in that case  
2                   at the court below, the property that was recovered  
3                   was not recovered as the result of an arrest; it was  
4                   simply detention. And based on the facts as they  
5                   were - - -

6                   JUDGE STEIN: Well, don't - - - don't you  
7                   think they had a pretty good argument that it was  
8                   arrest? I mean, he testified that they ordered him  
9                   out of the car at gunpoint, that, you know, that he  
10                  was handcuffed, he was - - - he was put into the  
11                  police car, and - - - and then there was testimony  
12                  that the other officer was writing up what they would  
13                  normally right up after an arrest. I mean, that's -  
14                  - -

15                  MR. MYLES: There was - - -

16                  JUDGE STEIN: That's some evidence, isn't  
17                  it?

18                  MR. MYLES: There was testimony about the  
19                  prisoner data report that was being collected in the  
20                  car. But the testimony as to when that occurred was  
21                  not clear. And again, we have - - - that officer,  
22                  who was taking a prisoner data report, did testify  
23                  that there was a number of things that were going on  
24                  in the investigation prior to him doing that.

25                  There was the search for the driver of the

1 vehicle who had fled, there was the tow of the  
2 vehicle, there were a number of things going on. And  
3 at some point during that, there was the 9-1-1 call  
4 from the home owner reporting that a crime had  
5 occurred.

6 JUDGE RIVERA: But when it gets stopped for  
7 the VTL - - - supposed VTL violation, could - - -  
8 he's the passenger, could he walk away? He's not the  
9 driver, it's not his car; could he walk away?

10 MR. MYLES: At the - - - at the point that  
11 he was stopped?

12 JUDGE RIVERA: Car stopped, yeah.

13 MR. MYLES: Without any other information,  
14 potentially.

15 JUDGE RIVERA: Correct.

16 MR. MYLES: Potentially, yes. However,  
17 that's not what occurred. What did occur prior to  
18 him - - - prior to the driver fleeing, was both the  
19 defendant and the driver gave, what the officer knew  
20 was false statements. They lied to him regarding  
21 where they were coming from and what they had been  
22 doing. They give false names, the officer - - -

23 JUDGE RIVERA: And then that's connected to  
24 the VTL violation how?

25 MR. MYLES: I - - -

1                   JUDGE RIVERA: With respect to him as the  
2 passenger.

3                   MR. MYLES: Well, it's leading the officer  
4 to a reasonable suspicion that the defendant was  
5 involved in a crime.

6                   JUDGE PIGOTT: If that was true, and then  
7 they pulled a gun, put him in the back of the car in  
8 handcuffs, when - - - when were they going to arrest  
9 him?

10                  MR. MYLES: When they knew that a crime had  
11 in fact occurred. When that - - -

12                  JUDGE PIGOTT: So he hadn't been arrested,  
13 he - - - you know, at that point he was free to  
14 leave. He could say, take these handcuffs off, I've  
15 got to go to a meeting.

16                  MR. MYLES: He was not free to leave at  
17 that point, Your Honor. He was being detained; he  
18 was being detained so the officer could further his  
19 investigation.

20                  JUDGE ABDUS-SALAAM: But how long could  
21 they detain him? How - - - this was about an hour, I  
22 think, before there was a report of a crime. Could  
23 they have detained him for more than an hour, less  
24 than an hour; how long could they detain him before  
25 we would consider or you would consider that an

1           arrest?

2                   MR. MYLES: That is not clear. I think  
3 more than an hour is a reasonable amount of time.  
4 Given - - -

5                   JUDGE PIGOTT: If it's unclear, shouldn't  
6 there have been a motion of some sort maybe addressed  
7 to that issue?

8                   MR. MYLES: Again, Your Honor, we have to  
9 look at whether or not that motion would've had any  
10 chance of success.

11                   JUDGE PIGOTT: It sound like you're saying  
12 it might have been - - -

13                   MR. MYLES: Well, what - - -

14                   JUDGE PIGOTT: - - - we don't know the  
15 answer to a lot of questions.

16                   MR. MYLES: What I - - - what I was going  
17 to say, Your Honor - - -

18                   JUDGE PIGOTT: I'm sorry.

19                   MR. MYLES: - - - is that I don't think an  
20 hour would fall within any risky amount of time. And  
21 again - - -

22                   JUDGE ABDUS-SALAAM: You say more than an  
23 hour.

24                   MR. MYLES: I - - - I would say more than  
25 given - - - I think you would have to look at the

1 specific facts and circumstances in each individual  
2 cache - - - in each individual case. And in this  
3 case, the officer had a great deal of suspicion that  
4 a crime had been committed.

5 JUDGE RIVERA: Well, what's the crime, he  
6 as the passenger, has committed? What - - - what's  
7 the suspicion about his - - - his possible criminal  
8 act?

9 MR. MYLES: That he had the same connection  
10 as the driver to the property that was in the car.

11 JUDGE RIVERA: I'm the cop, I looked in the  
12 back of the car, the driver and the passenger have  
13 given me wrong information about their names, they  
14 are little bit nervous and agitated, the driver just  
15 ran out; that's enough for me to stop the passenger  
16 at that point.

17 MR. MYLES: Well, again Your Honor, the  
18 driver did run away and - - -

19 JUDGE RIVERA: (Indiscernible).

20 MR. MYLES: When the officer got back to  
21 the car, in his view, the passenger was in the  
22 process of also attempting to run. His seat belt was  
23 off, he was in the process of opening the door; he  
24 was in the process of attempting to flee just like  
25 the driver had. So at that point, both the driver

1 and the passenger have equal culpability as far as  
2 the property that's been - - -

3 JUDGE RIVERA: So if the driver had lied,  
4 and the defendant, the passenger refused to answer,  
5 could he have gotten up and walked away, or is there  
6 now suspicion also?

7 MR. MYLES: At - - -

8 JUDGE RIVERA: Or refuses to answer; he has  
9 a right not to answer, yeah?

10 MR. MYLES: Refuses to answer the officer  
11 as to who he is?

12 JUDGE RIVERA: Correct.

13 MR. MYLES: Again, at the point that the  
14 officer looks in the car and sees the property, sees  
15 the screwdriver, the gloves, the other property, I  
16 think at that point - - -

17 JUDGE RIVERA: Assumes it's not theirs  
18 because they've lied; is that why?

19 MR. MYLES: Given - - -

20 JUDGE RIVERA: People never put things in  
21 the back seat?

22 MR. MYLES: Given the location of the  
23 vehicle, the time of day, the other property that he  
24 sees, the gloves, the screwdriver, the items that - -  
25 -

1 JUDGE RIVERA: Where's the screwdriver?

2 MR. MYLES: I'm sorry, Your Honor.

3 JUDGE RIVERA: Where's the screwdriver?

4 MR. MYLES: I believe the screwdriver was -  
5 - - I apologize; I believe the screwdriver wasn't  
6 found until after the defendant was detained.

7 JUDGE RIVERA: All right. Okay.

8 MR. MYLES: I believe it was in the front  
9 seat by his feet. But the duffel bag with the gloves  
10 and the laptop were in plain view, and again, given  
11 the time of day and the location, the officer was  
12 reasonable in his further inquiries.

13 And at the point that he did take the  
14 defendant - - - that he detained the defendant,  
15 whether or not the detention at some point would have  
16 become a de facto arrest, without the 9-1-1 call  
17 reporting the actual crime, the property that was  
18 recovered from the defendant was recovered  
19 immediately. It was recovered as soon as he was  
20 taken out of the car and the officer frisked the  
21 defendant.

22 JUDGE ABDUS-SALAAM: But it looks like  
23 there was, you know, there was some suspicion of a  
24 crime, and you were looking for a suspect or  
25 something to attach to a crime. So you were - - -

1           there was a - - - you were waiting for a crime to  
2           happen.

3                         MR. MYLES: I think actually, Your Honor,  
4           the opposite is true. Is that they had a suspect,  
5           and they were looking for the crime.

6                         JUDGE ABDUS-SALAAM: That's what I'm  
7           saying, you're looking for a crime.

8                         MR. MYLES: Yes. They were - - - the  
9           officer was trying to determine what the situation  
10          was and what was going on. And given the  
11          circumstances, given the fact that he - - - the  
12          defendant had lied to him, had no identification, had  
13          in fact given him a false name, it would have been  
14          unreasonable for the officer, given that - - - the  
15          facts as he knew them, to simply let the defendant  
16          walk away.

17                        JUDGE RIVERA: Because he has a duffel bag  
18          and a laptop in the back seat of the car, it's not  
19          his.

20                        MR. MYLES: And was - - - and had lied to  
21          the officer, and was attempting to flee.

22                        CHIEF JUDGE DIFIORE: Thank you, counsel.

23                        MR. MYLES: Thank you, Your Honors.

24                        CHIEF JUDGE DIFIORE: Counsel.

25                        MS. SOMES: Thank you.

1                   In People vs. Ryan, this court said thirteen  
2 minutes was too long for a lawful investigatory detention.  
3 Here, we have far more time - - -

4                   JUDGE GARCIA: Counsel - - -

5                   MS. SOMES: - - - and we have circumstances  
6 - - -

7                   JUDGE GARCIA: Counsel, I'm sorry, excuse  
8 me. On that point, on how long, right, isn't the  
9 issue here the pat-down? So if they can stop this  
10 defendant, and pat him down, and they find this,  
11 isn't how long they detain him - - - doesn't that go  
12 to whether he makes statements, or what happened  
13 subsequent to that?

14                   Why would the length of detention after a  
15 lawful pat-down search affect that issue?

16                   MS. SOMES: I guess, I would disagree that  
17 it was a lawful pat-down search right away. He - - -  
18 the - - -

19                   JUDGE GARCIA: But the timing though - - -  
20 okay. Assume we can argue lawful or not, but don't  
21 you go by what the facts are at the time that's done?  
22 How would, how long he's detained after, affect the  
23 legality of the pat-down?

24                   MS. SOMES: Because I think when you look  
25 at what happened here in total, it's an unlawful

1           arrest from the very beginning. The officer said  
2           that when he took him into custody, he pat-frisked  
3           him. He said that the minute he was starting to open  
4           the door, he ordered him out of the car, and at that  
5           point he secured him. So what we've got is a full  
6           blown arrest, right from the minute that Mr. Carver  
7           was ordered out of the car.

8                        The pat-fr - - - you know, the officer  
9           didn't pat-frisk him first and then kind of, you  
10          know, talk about things, and eventually decide he was  
11          going to handcuff him, and throw him in the back of  
12          the car; this was a full blown arrest right from the  
13          beginning.

14                       Hicks is the - - - is permissible - - -  
15          investigatory detention is permissible because it is  
16          so quick to confirm or dispel suspicion. And it is  
17          minimal, minimal intrusion; here, we have the maximum  
18          intrusion.

19                       Hicks, you had - - - the defendant was  
20          allowed to park his car. Defendant was told, you  
21          know what, if these people don't identify you, you're  
22          going to be released, and so there was an expectation  
23          of a release. So Hicks, there wasn't a - - - an  
24          arrest by any means; here, this was a full-blown  
25          arrest. And so this is far outside the circumstances

1 of Hicks.

2 And I'd just like to point out, or say - - -  
3 respond to one of Judge Pigott's questions. You know,  
4 this is an adversarial process, and my client is entitled  
5 to challenge the evidence. If we are in a position where  
6 every time the police say, jeez, you know, I stopped him  
7 for a V & T because, you know, I thought he was going too  
8 fast, and, you know - - - does that take the ability to  
9 def - - - to challenge the evidence away from the  
10 defendant?

11 And here, what we have, we have, clearly this  
12 record shows that there was a basis to make the motion,  
13 and I don't think that, you know, we have to show that we  
14 would win the motion, but there was certainly a basis to  
15 make it, and if the attorney here had made the motion,  
16 we're not sure what would happen. And that's why I think  
17 in Bilal, what we've got is, you know - - - waiting for  
18 the Bilal decision to come out, because I thought maybe  
19 that would give me a little bit of guidance here. But I  
20 think what the court in Bilal did was, it recognized that  
21 without a hearing, we don't know, and there is a lot - - -

22 JUDGE STEIN: Yeah, but in Bilal, the  
23 officer's testimony, there was something on the  
24 record that cast out as to, you know, what the  
25 circumstances were. Here, there, you know, there is

1           just nothing on the record that would cast any doubt  
2           to the legality of the stop.

3                       MS. SOMES: To the le - - - I - - - and I  
4           think that when you look at the photograph - - - and  
5           there is an argument that could have been made here.  
6           And I think when you look at the photograph, you  
7           consider that this wasn't in the dark. You know, we  
8           shouldn't always have to just take the officer's word  
9           for that, especially here when his word doesn't  
10          exactly constitute a vehicle and traffic violation.

11                      And just one, if I could just mention the  
12          sentencing here, my client was - - - had years of his life  
13          on the line, and the attorney did not say anything on his  
14          behalf. He basically said, Judge, you heard the evidence  
15          and, you know, you know where we stood on it.

16                      CHIEF JUDGE DIFIORE: Thank you, counsel.

17                      (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Leroy Carver, No. 76 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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