

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 114

KENNETH PADILLA,

Appellant.

20 Eagle Street
Albany, New York 12207
May 2, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

RANDALL D. UNGER, ESQ.
Attorneys for Appellant
42-40 Bell Boulevard
Suite 302
Bayside, NY 11361

MATTHEW T. MURPHY, ADA
NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
Appeals Bureau
One Hogan Place
Room 854
New York, NY 10013

Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: And we'll start with
2 number 114, People v. Padilla. Counsel?

3 (Pause)

4 MR. UNGER: Your Honors, there are three
5 substantial reasons why the defendant's conviction
6 should be reversed in this case: an unlawful search
7 and seizure, insufficient evidence and serious
8 prosecutorial misconduct.

9 CHIEF JUDGE LIPPMAN: Counsel, the - - -
10 what exactly happened with the - - - with the car?
11 In other words, why is it that the - - - are the
12 speakers - - - did they come with the car?

13 MR. UNGER: We don't know.

14 CHIEF JUDGE LIPPMAN: I mean - - -

15 MR. UNGER: We really don't know.

16 CHIEF JUDGE LIPPMAN: - - - you know, was
17 it more like a fixture that was there, or is it
18 something that looked sort of unusual? You know what
19 I mean, added after the fact?

20 MR. UNGER: As I understand it, the
21 defendant purchased the car used. It is equally
22 possible that he purchased the vehicle with the
23 speakers already affixed in the trunk.

24 CHIEF JUDGE LIPPMAN: You don't know.

25 MR. UNGER: There's no proof either way.

1 CHIEF JUDGE LIPPMAN: Let me just stop you
2 in that thought for a second. Rebuttal time, how
3 much?

4 MR. UNGER: Oh, I'm sorry, two minutes.

5 CHIEF JUDGE LIPPMAN: Two minutes.

6 MR. UNGER: Thank you.

7 CHIEF JUDGE LIPPMAN: Continue, yeah.

8 MR. UNGER: So we don't know the answer to
9 that question. I would respectfully submit that that
10 was the prosecution's burden to prove, for example,
11 that the defendant did it.

12 CHIEF JUDGE LIPPMAN: Well, let's say - - -
13 let's - - - does it ma - - - does that issue matter?

14 MR. UNGER: I think it does.

15 CHIEF JUDGE LIPPMAN: I mean, if you see
16 something, if you go into the trunk and you see
17 something that looks unusual, added, you know, is it
18 okay to go in there, as opposed to if it came with
19 the car; that would be a more intrusive kind of
20 thing?

21 MR. UNGER: We're not arguing that it
22 wasn't all right for the police officer to open the
23 trunk, and to review - - -

24 CHIEF JUDGE LIPPMAN: No, no, but to go
25 beyond - - -

1 MR. UNGER: - - - to view it.

2 CHIEF JUDGE LIPPMAN: - - - behind the
3 speakers.

4 MR. UNGER: Well, I - - -

5 JUDGE GRAFFEO: You're objecting to the
6 dismantling of the speakers, is that or - - -

7 MR. UNGER: I don't - - - I don't think - -
8 -

9 JUDGE GRAFFEO: What is it that bothers you
10 about - - -

11 MR. UNGER: What bothers me is the --

12 JUDGE GRAFFEO: - - - what they did in the
13 trunk?

14 MR. UNGER: I'm sorry. The search in
15 general, the officer admitted during the suppression
16 hearing that he was searching for contraband. That
17 flies in the face of what an inventory search - - -

18 JUDGE SMITH: Well, he - - - he - - -
19 admitted that at one point he was - - - he was
20 looking in a place where he thought drugs might be,
21 but the - - - but didn't - - - didn't both courts
22 below find that it wasn't a pretextual search?

23 MR. UNGER: We submit that those courts
24 were incorrect in their finding, because - - -

25 JUDGE SMITH: If an officer - - - if an - -

1 - yeah, if you're doing an inventory search --

2 MR. UNGER: Yes.

3 JUDGE SMITH: - - - and you see an opening
4 in the car where you think drugs are likely to be,
5 are you supposed to say, I better leave those alone;
6 they might be drugs?

7 MR. UNGER: You know, I - - - that's a
8 difficult question to answer. The purpose of the
9 inventory search, primarily, is to inventory the
10 contents of the vehicle.

11 JUDGE SMITH: I understand, but wouldn't it
12 be a little bit embarrassing if you did an inventory
13 search - - -

14 MR. UNGER: Well - - -

15 JUDGE SMITH: - - - and it turned out later
16 you've left drugs in the car?

17 MR. UNGER: If there's something I would
18 suggest that's apparent to the officer at the time
19 he's viewing, let's say, the seats or the floor, and
20 there seems to be something that's askew.

21 CHIEF JUDGE LIPPMAN: What's the
22 significance of the taking apart some of the seats
23 prior to this thing to the trunk?

24 MR. UNGER: Well - - -

25 CHIEF JUDGE LIPPMAN: What's that all

1 about?

2 MR. UNGER: The evidence - - -

3 CHIEF JUDGE LIPPMAN: Does that make a
4 difference?

5 MR. UNGER: Yes, there was evidence
6 presented at the hearing that the vehicle had been
7 damaged by the police. There was evidence that the
8 seats had been opened up, all sorts of things that
9 were changed.

10 CHIEF JUDGE LIPPMAN: So in an - - - so in
11 answer to Judge Smith's question, if it's readily
12 apparent, I think everyone would agree and you're
13 doing an inventory search - - -

14 MR. UNGER: Of course.

15 CHIEF JUDGE LIPPMAN: - - - so you
16 inventory whatever, even if it's contraband or
17 whatever it is. But are you saying that - - - that
18 you can't go beyond a cursory examination in the
19 ordinary course or can you lift things up, look
20 underneath? Let's say they - - - putting aside the
21 damage that there may have been to the car, can you
22 look under things? Can you say, oh, under these
23 speakers, if you would take a normal - - - could that
24 be in the normal course?

25 MR. UNGER: Yes, if the Patrol Guide issued

1 by the police department - - -

2 CHIEF JUDGE LIPPMAN: I see.

3 MR. UNGER: - - - if it authorizes these
4 activities, these types of things to be done.

5 CHIEF JUDGE LIPPMAN: So there's got to be
6 a protocol and you got to follow the protocol.

7 MR. UNGER: Exactly.

8 CHIEF JUDGE LIPPMAN: Yeah.

9 MR. UNGER: And one of the protocols that
10 this officer certainly violated was taking the
11 contents of the passenger section of the vehicle and
12 handing them over to a relative of the defendant,
13 without making a meaningful inventory of what he
14 turned over.

15 JUDGE GRAFFEO: Is - - -

16 JUDGE PIGOTT: That was just doing you a
17 favor, wasn't it?

18 MR. UNGER: That's right. And it's a kind
19 gesture. It may not have been a gesture that the
20 officer would have made if it wasn't to a fellow
21 officer - - -

22 JUDGE PIGOTT: Right.

23 MR. UNGER: - - - who the sister happened
24 to be.

25 JUDGE GRAFFEO: Didn't the officer write

1 something in the memo book - - -

2 MR. UNGER: She signed - - -

3 JUDGE GRAFFEO: - - - about - - - and she
4 signed?

5 MR. UNGER: She signed that I received a
6 lot of stuff. That's it. No meaningful inventory.
7 It's for the officer who's conducting the so-called
8 inventory search, to make it - - -

9 JUDGE RIVERA: But if he then comes back
10 and follows - - - let's for one moment say he came
11 back, then, after that, and he follows the protocol
12 otherwise, does the original - - - let's call it a
13 breach of the Patrolman's Guide, vitiate what might
14 be proper conduct afterwards?

15 MR. UNGER: Well, I think what it does is,
16 it demonstrates that the officer was acting with
17 discretion. And it's counterintuitive, I
18 acknowledge, when we say an officer's using
19 discretion, but in the area of inventory searches,
20 that's what's forbidden. And this officer - - -

21 CHIEF JUDGE LIPPMAN: No discretion?

22 MR. UNGER: No discretion.

23 JUDGE GRAFFEO: So you don't - - -

24 MR. UNGER: He follows - - -

25 JUDGE GRAFFEO: So you didn't - - - you

1 don't want - - - you didn't want him to give the
2 plastic bags with the kid's stuff to the sister?

3 MR. UNGER: You know what? As one of the
4 Judges said a moment ago, it was a good, kind,
5 gesture. But it demonstrates the kind of discretion
6 that an officer conducting an inventory search is
7 forbidden from doing.

8 JUDGE SMITH: Are you - - -

9 JUDGE READ: So he can't do it at all, or
10 it would have been okay if he had listed everything?

11 MR. UNGER: It'd be okay, for example, if
12 the Patrol Guide has a provision: you may return
13 property to - - -

14 JUDGE SMITH: But does any - - - does any
15 departure from the Patrol Guide require suppressing
16 the result of the search?

17 MR. UNGER: If it's a substantial breach,
18 and this one was, yes. I would suggest that it does.

19 JUDGE SMITH: Is there a case that says
20 that?

21 MR. UNGER: Well, I think that this court
22 in its prior decisions, I think the Supreme Court has
23 emphasized the importance of a protocol that sets
24 forth the rules that need to be followed by officers
25 and that the officers must comply with. And if they

1 don't - - -

2 JUDGE GRAFFEO: We've - - - we've allowed
3 some flexibility in the descriptions and how thorough
4 the in - - -

5 MR. UNGER: Well - - -

6 JUDGE GRAFFEO: - - - how thorough the
7 documentation is completed. Doesn't that kind of
8 fall under that umbrella?

9 MR. UNGER: I don't know that it does,
10 because I think then we're getting into almost a
11 harmless error type of analysis, which doesn't apply
12 in search and seizures. So I don't think that would
13 be appropriate. If I can just quickly go to the
14 other points, which I think - - -

15 CHIEF JUDGE LIPPMAN: Quickly, counsel, you
16 better - - -

17 MR. UNGER: - - - merit the court's
18 attention. The sufficiency of the evidence. The
19 whole case here depended on the statutory
20 presumption, which is a rebuttable one and was in
21 fact, in this case, rebutted.

22 CHIEF JUDGE LIPPMAN: How was it rebutted?

23 MR. UNGER: Rebutted by the fact that other
24 people - - -

25 CHIEF JUDGE LIPPMAN: That's enough?

1 MR. UNGER: I think that alone was enough.
2 The fact that there was no access. The defendant
3 himself, even if he was in the vehicle - - - which
4 was disputed - - - but even if he was seated in the
5 driver's seat at the time the police stopped him, he
6 had no access to the area in the trunk.

7 CHIEF JUDGE LIPPMAN: Okay, cou - - -
8 quickly, what's your other points, because your red
9 light's on.

10 MR. UNGER: Just the last one, the
11 prosecutorial misconduct, which I think is - - -

12 CHIEF JUDGE LIPPMAN: Go ahead.

13 MR. UNGER: - - - egregious in this case.
14 The prosecutor mercilessly vouched for the
15 credibility of the police officers, reversed the
16 burden of proof, denigrated the defense, did so many
17 improper things, both during examination of witnesses
18 and during summation. I think that would be another
19 ground for this court to reverse.

20 CHIEF JUDGE LIPPMAN: Okay, counsel.

21 MR. UNGER: Thank you.

22 CHIEF JUDGE LIPPMAN: Thanks, you'll have
23 your rebuttal, counsel.

24 MR. UNGER: Thank you.

25 CHIEF JUDGE LIPPMAN: Thank you.

1 Counsel?

2 MR. MURPHY: Good afternoon, Your Honors,
3 Matthew Murphy for the People.

4 CHIEF JUDGE LIPPMAN: Counsel, what were
5 the protocols that the officer followed here?

6 MR. MURPHY: He made a detailed list, as
7 the hearing court found. He made a detailed and
8 complete list of each and every item, more than two
9 dozen items that were retained by the police
10 department. And he listed all of the more valuable
11 items that he - - -

12 CHIEF JUDGE LIPPMAN: He didn't list what
13 he gave to the other officer, right?

14 MR. MURPHY: He did actually list the most
15 valuable items that he released to her, and that's
16 actually supported by her testimony as well, that the
17 types of items that he released to her were things
18 like diapers, flip-flops and baseballs. Whereas the
19 things that he recorded in the memo book that he
20 released to her, were things like an iPod, a cell
21 phone - - -

22 CHIEF JUDGE LIPPMAN: Why did - - - why did
23 he open up the - - - go under the speakers; that
24 apparently took him a while to do that?

25 MR. MURPHY: He - - -

1 CHIEF JUDGE LIPPMAN: Why - - - why did he
2 do that?

3 MR. MURPHY: First of all, in terms of the
4 timing, he testified that the reason why it actually
5 took a long amount of time was he needed to find a
6 screwdriver. So the bulk of the time in between
7 there was just him finding a screwdriver.

8 CHIEF JUDGE LIPPMAN: Well, what's - - -
9 what's the protocol that allows him to do that?

10 MR. MURPHY: The protocol not only allows
11 him - - -

12 CHIEF JUDGE LIPPMAN: Is there anything in
13 the manual or in general - - -

14 MR. MURPHY: Yes.

15 CHIEF JUDGE LIPPMAN: - - - about their
16 instructions?

17 MR. MURPHY: The manual and the protocol
18 not only allows him to remove the speakers, it
19 requires him to remove any - - -

20 CHIEF JUDGE LIPPMAN: What does it say that
21 requires it?

22 MR. MURPHY: It's - - - and he testifies at
23 the hearing that he has to remove anything from the
24 car that is not factory installed. And that's noted
25 in the - - -

1 JUDGE SMITH: Is that in writing somewhere
2 or is that just his understanding of the policy?

3 MR. MURPHY: It's his understanding of the
4 policy and it's the hearing - - - the hearing court
5 credits his testimony.

6 JUDGE SMITH: But he - - - he testified
7 that he knew the pound - - - the pound wouldn't take
8 the car if the speakers were still there.

9 MR. MURPHY: Yes, and one of the purposes
10 of inventorying these items is so that they're not
11 stolen when they go to the pound. And an expensive,
12 multi-part speaker and stereo system like this, would
13 have been the first thing stolen from the car when it
14 - - -

15 JUDGE PIGOTT: How about four chrome
16 wheels?

17 MR. MURPHY: Is the question whether chrome
18 wheels would also - - -

19 JUDGE PIGOTT: Do you jack the car and take
20 them off, because they're not factory installed and
21 they could get stolen?

22 MR. MURPHY: If it can be done without
23 damaging the vehicle, yes. Those should - - -

24 JUDGE PIGOTT: I just didn't see that
25 anywhere either, and I - - - I was just curious about

1 the - - - not particularly necessarily to this case,
2 but generally speaking, when you have a situation
3 like this where you're doing a favor for somebody and
4 then you're - - - you're admitting that, yeah, I
5 shouldn't have - - - I shouldn't have been looking in
6 the panels, but, you know, I did, and, you know,
7 maybe that was a breach to the protocol.

8 And then taking these speakers out and
9 taking an hour to do them, I'm just wondering, how
10 much time do police officers have to do inventory? I
11 would think that this - - - that the speakers would
12 have stayed; the wheels would have stayed; they'd
13 have put it in the impound lot and move on.

14 MR. MURPHY: Well, as he testified at the
15 hearing, the reason why it actually took so long, was
16 first, he had to - - - the officer had to give in - -
17 -

18 JUDGE PIGOTT: Forget that, though. Forget
19 that. I'm just thinking, generally speaking, the
20 police officers are going to do an inven - - - is
21 this a - - - is this a forfeiture? Does he lose the
22 car if he gets convicted?

23 MR. MURPHY: There are separate forfeiture
24 proceedings. I don't believe that happens
25 automatically, but I'm not sure and that wasn't in

1 the record.

2 JUDGE PIGOTT: Is that possible in this
3 case?

4 MR. MURPHY: I'm not sure how the
5 forfeiture proceedings progress - - -

6 JUDGE PIGOTT: Because there's testimony
7 that it was a forfeiture. But - - -

8 MR. MURPHY: He - - - I think --

9 JUDGE PIGOTT: - - - he gets the car back
10 at some point. Does he - - - does he have to put the
11 speakers back in and - - - I'm just wondering the
12 logic of that. Is - - - because I don't remember
13 seeing it in the manual either - - -

14 MR. MURPHY: The - - -

15 JUDGE PIGOTT: - - - that they would go to
16 that length.

17 MR. MURPHY: The logic of it, and it is in
18 the manual that one of the purposes of removing these
19 items from the car is so they're not stolen or
20 they're not then later claimed to have been stolen, a
21 claim of theft against the police department - - -

22 MR. MURPHY: Why wouldn't - - - again, I'm
23 not - - - I'm not - - - why wouldn't you simply say,
24 you know, personally installed speakers. Take a
25 picture of them, leave them in - - - you know, I

1 don't why you - - -

2 MR. MURPHY: Because if they're left - - -

3 CHIEF JUDGE LIPPMAN: I don't know why
4 police officers would want to spend so much time
5 taking things out of a car that's ultimately going to
6 be returned to the owner.

7 MR. MURPHY: I don't - - - they're not
8 doing it because they want to, they're doing it
9 because they're required to do it, and the pound - -
10 -

11 JUDGE PIGOTT: That's what I'm saying.

12 MR. MURPHY: The pound - - - and the - - -
13 Officer Lanzi - - -

14 JUDGE PIGOTT: Who says it's required to do
15 it?

16 MR. MURPHY: Officer Lanzisero says it at
17 the hearing.

18 JUDGE PIGOTT: I know that, but I mean,
19 he's not - - - he's not the commissioner.

20 MR. MURPHY: Right, it's also - - -

21 JUDGE PIGOTT: He's not - - - he's not the
22 Supreme Court of the United States. I'm just
23 wondering, who says that when you impound a car that
24 you have to go to these lengths when police officers
25 have a lot more - - - better to do than to look for a

1 screwdriver for forty-five minutes. That's all. I
2 just don't - - - don't get it.

3 MR. MURPHY: He testifies that that's the
4 departmental policy and that the impound lot would
5 not accept any vehicle with these nonfactory-
6 installed items, and certainly the fact that this is
7 a large - - -

8 CHIEF JUDGE LIPPMAN: But - - - but what
9 about the damage to the seats? What's that all
10 about?

11 MR. MURPHY: The only person who
12 characterizes any sort of damage to the seats being
13 done throughout the entire hearing is the defense
14 attorney. And the judge, upon looking at the
15 pictures that were offered by the defense in
16 evidence, says to the defense attorney at the
17 hearing, you keep using the phrase "ripped apart";
18 what are you talking about? They're not ripped
19 apart.

20 JUDGE SMITH: Do we - - - do we have those
21 pictures?

22 MR. MURPHY: They were - - - they were the
23 defense exhibits. I don't believe that they were
24 provided. I have trial exhibits with me. I'm happy
25 to provide a copy to the court. And it's my

1 understanding they were the same photos. But they
2 were not technically the People's hearing exhibits.
3 But upon - - -

4 JUDGE RIVERA: If - - - if - - - I believe,
5 it's Ms. Vasquez. If Ms. Vasquez had said, I want to
6 take the speakers, would he had allowed her to take
7 the speakers?

8 MR. MURPHY: He - - - it not only appears
9 he would have allowed her, she says in her testimony
10 they were simply too heavy to carry.

11 JUDGE RIVERA: Couldn't take them; they
12 were too heavy. So if she had taken them, right,
13 does - - - does then the search of the trunk stop?

14 MR. MURPHY: Well, it wouldn't have stopped
15 because the wheel wells still hadn't been searched
16 yet.

17 JUDGE RIVERA: So he has to do that part
18 also?

19 MR. MURPHY: He is - - - he's obligated to
20 search the car thoroughly under police protocols, and
21 that - - -

22 JUDGE SMITH: So if the speakers - - - if
23 the speakers hadn't been there, he still would have
24 found the gun.

25 JUDGE RIVERA: Would have done the same

1 thing.

2 MR. MURPHY: Absolutely. And in terms of
3 whether these were factory-installed speakers or not,
4 it's important to remember that these speakers
5 actually prohibited someone from opening that spare
6 tire compartment, which is not the way that
7 presumably Lexus designs their speakers in the back
8 of their cars.

9 JUDGE RIVERA: In he had searched and there
10 were no speakers, he opens up the trunk and does he
11 have to also inventory the spare tire itself? Does
12 he have to remove it? What does he have to do?

13 MR. MURPHY: He - - - he test - - - he
14 doesn't say this explicitly at the hearing. He later
15 clarifies it even further at trial, that the wheel
16 itself and the owner's manual are the only things
17 that can be left.

18 JUDGE RIVERA: Um-hum.

19 MR. MURPHY: And that testimony - - - he
20 doesn't elaborate that fully at the hearing, but he
21 makes it clear in other words. All this - - -

22 CHIEF JUDGE LIPPMAN: So your view is
23 everything here was in the ordinary course?

24 MR. MURPHY: Everything was in the ordinary
25 course. And another way to think of it is literally

1 the only thing that Lanzisero does that may even be
2 slightly improper, is that he fails to record a
3 limited number of these less valuable items that he
4 releases to the sister as a courtesy. Everything
5 else was completely in keeping with the policy, and
6 the hearing court noted that.

7 JUDGE PIGOTT: Did he say something about
8 taking off the panels?

9 MR. MURPHY: He didn't - - - he didn't take
10 off the panels; it seems that he slid them aside,
11 because he noticed that they were askew. He didn't -
12 - - he didn't remove seatback panels. What he
13 testified to is he saw that they were askew, and he
14 was aware that these were compartments that were
15 occasionally used - - -

16 JUDGE PIGOTT: No, I'm just - - - I'm just
17 questioning when you say he said, you know, that the
18 only thing he did that was not part of the protocol
19 was, and I think he even said that that was not part
20 of the protocol, and for the reasons that you are now
21 saying. But it's not protocol for them to remove
22 these panels.

23 MR. MURPHY: It actually - - - it is - - -
24 it is protocol to search the entire car, and that
25 would - - -

1 JUDGE PIGOTT: But he misspoke?

2 MR. MURPHY: I don't believe that that's -
3 - - I may be wrong, but I don't believe that that's
4 the way he phrased it. And he continually tries to
5 explain himself at the hearing, and is cut off by the
6 defense attorney. Eventually the judge has to
7 interject and tell him - - -

8 JUDGE PIGOTT: I don't - - - I'm not trying
9 to - - - I thought he did a very nice job of
10 testifying. I'm not picking on him. I - - - and the
11 defense did not challenge the whole procedure, where
12 it sounds like, the more you keep describing it, they
13 take the car apart as part of the inventory. You're
14 saying they can slide these panels; that's protocol.
15 They can - - - they can - - - everything is fair game
16 except the owner's manual and the spare tire. I
17 mean, at some point, inventory becomes search.

18 MR. MURPHY: Well, it's - - -

19 JUDGE PIGOTT: And that's kind of what
20 we're looking for, because if you don't probable
21 cause for a search, you probably can't do it. And if
22 you're simply doing an inventory to protect, as they
23 say, the three things: the police, the stuff, and
24 the defendant's stuff - - -

25 MR. MURPHY: They have an obligation to

1 search every area of the car. And the fact that this
2 is an area where there could be drugs hidden, it
3 could be an area where there's cash hidden, it could
4 --

5 JUDGE PIGOTT: Oh. So your argument is,
6 that when he was stopped on the street, they had a
7 right to search for drugs, even though they had no
8 probable cause to believe there's any drugs in the
9 car; it's just what they do.

10 MR. MURPHY: They're not searching for
11 drugs. They're conducting an inventory search - - -

12 JUDGE PIGOTT: But isn't that the
13 difference?

14 MR. MURPHY: Well, I - - - whether the
15 officer was subjectively hoping to find drugs,
16 whether he believed based on his prior experience
17 that he might find drugs, has really no impact on the
18 legitimacy of him following - - -

19 JUDGE SMITH: Doesn't - - - doesn't Johnson
20 suggest otherwise? Doesn't Johnson say that the
21 Robinson rule that motive doesn't matter is
22 inapplicable in inventory cases?

23 MR. MURPHY: It does say that, Judge, but
24 this is very distinct from Johnson. There was a
25 detailed inventory list. This does not have the air

1 of a ruse the way that the facts were in Johnson.
2 And the hearing court explicitly - - -

3 JUDGE PIGOTT: I think that's true, but you
4 keep saying that there's no - - - that there's no
5 bounds. You keep saying they - - - this is protocol;
6 this is what they do. They search panels. They take
7 the trunk apart. They can look under the hood. They
8 can - - - they can do everything. The only thing
9 they have to do is leave the spare tire and the
10 owner's manual in the car, and that's it. And I'm
11 not sure you want to make that argument. And I don't
12 think that's what --

13 MR. MURPHY: I'm not - - - I'm not making
14 that argument, Judge, that there's no bounds. I'm
15 actually saying that there are bounds, and that they
16 require the police to search the car thoroughly.

17 CHIEF JUDGE LIPPMAN: Counsel, but don't -
18 - - don't you accept the basic premise of Judge
19 Pigott's question, which is, there's a point at which
20 this, sort of, falls over into the search cate - - -
21 that it could be that - - - that at some point,
22 there's got to be a difference between an inventory
23 and searching for something.

24 I mean, isn't there a line there? Is it
25 always - - - is it always - - - are you saying the

1 two of them always fall together?

2 MR. MURPHY: No, I'm saying the question -
3 - - and I think that the line would be is this a ruse
4 simply to look for evidence? And the hearing court -
5 - -

6 CHIEF JUDGE LIPPMAN: In your mind if
7 there's no motive to look for evidence, and the - - -
8 and the normal protocol is you take apart the whole
9 car? I think that's what Judge Pigott's saying. If
10 you can - - - if you can take off the panels, if you
11 can take out everything except - - - whatever it is,
12 the manual, doesn't that, in effect, become - - -
13 become a search?

14 MR. MURPHY: No, because it's removing - -
15 - it's removing their discretion. It's obligating
16 them to look through the car thoroughly according to
17 the departmental procedures - - -

18 CHIEF JUDGE LIPPMAN: Thoroughly means the
19 whole car goes out? Everything comes out of the car?

20 MR. MURPHY: Not everything - - - not
21 everything is out of - - -

22 CHIEF JUDGE LIPPMAN: What if you took the
23 seats out too? If you - - -

24 MR. MURPHY: The seats presumably were
25 installed by the factory.

1 CHIEF JUDGE LIPPMAN: No, no, no. But I'm
2 saying could it - - - would it be, if it was the
3 normal protocol to where you inventory everything, if
4 you took everything out of the car and put it on the
5 side of the car - - -

6 MR. MURPHY: That protocol --

7 CHIEF JUDGE LIPPMAN: - - - would that
8 still be an inventory search?

9 MR. MURPHY: That protocol itself may be
10 crossing - - -

11 CHIEF JUDGE LIPPMAN: Per se no good.

12 MR. MURPHY: - - - crossing the line, but
13 that's not the case here, and there's never even been
14 a challenge to the protocols themselves.

15 CHIEF JUDGE LIPPMAN: Okay, thanks,
16 counsel.

17 MR. MURPHY: Thank you, Your Honors.

18 JUDGE PIGOTT: Mr. Unger, isn't he right,
19 that you're not challenging the procedures, you're
20 just challenging what happened here?

21 MR. UNGER: Well, what I'm challenging is,
22 we have the Patrol Guide, which is supposed to give
23 the police officers guidance as to how they conduct
24 an inventory search. And if the officer doesn't
25 follow that guide - - -

1 JUDGE PIGOTT: Right. You're saying the
2 guide's - - -

3 MR. UNGER: - - - then it's not a true
4 inven - - -

5 JUDGE PIGOTT: You're saying the guide's
6 fine. If he vio - - - if he goes beyond the guide,
7 then there's an issue.

8 MR. UNGER: I - - -

9 JUDGE PIGOTT: Mr. Murphy's saying - - -

10 MR. UNGER: Yes. I don't - - -

11 JUDGE PIGOTT: - - - if you get - - -

12 MR. UNGER: I'm sorry, Judge. I don't
13 think that the Patrol Guide gives the officers carte
14 blanche to tear the car apart. I'm sure - - -

15 CHIEF JUDGE LIPPMAN: Are you saying - - -

16 MR. UNGER: - - - there's nothing in it.

17 CHIEF JUDGE LIPPMAN: Do you think, under
18 the record here, that every one of these so-called
19 inventory searches are really searches?

20 MR. UNGER: This one.

21 CHIEF JUDGE LIPPMAN: Or are you saying
22 that this one went beyond what's the normal course?
23 In general - - -

24 MR. UNGER: The latter.

25 CHIEF JUDGE LIPPMAN: - - - inventory

1 searches are all right?

2 MR. UNGER: Well, inventory searches are
3 all right, if they follow the protocols.

4 CHIEF JUDGE LIPPMAN: I mean, in light of
5 the testimony of the officer of what goes on, is
6 every one of them bad, or is it just - - -

7 MR. UNGER: I - - -

8 CHIEF JUDGE LIPPMAN: - - - his
9 interpretation is bad?

10 MR. UNGER: Again, when you say "an
11 officer's interpretation", you're getting into
12 dangerous territory of discretion - - -

13 CHIEF JUDGE LIPPMAN: Because they have
14 discretion, yeah.

15 MR. UNGER: - - - which is not supposed to
16 be exercised. In terms - - - I wanted to address - -
17 -

18 JUDGE SMITH: What did he - - - what did he
19 do - - - other than give the stuff to the sister,
20 what did he do that he wasn't supposed to do? Take
21 out the speakers, you say is wrong?

22 MR. UNGER: Sliding the panels. Taking - -
23 -

24 JUDGE SMITH: What did he do with the
25 panels?

1 MR. UNGER: He was sliding them, damaging -
2 - -

3 JUDGE SMITH: You mean, you can't - - -

4 MR. UNGER: - - - damaging --

5 JUDGE SMITH: When you do an inventory
6 search, and there's a panel that's loose, you can't
7 slide it to see what's behind it?

8 MR. UNGER: Well, there was evidence that
9 it wasn't loose until the officers got a hold of it.
10 I think that's what really what happened here.

11 JUDGE SMITH: You say that he - - - you say
12 he dismantled it?

13 MR. UNGER: I'm not saying he did it
14 himself, but there were other officers who certainly
15 had that opportunity.

16 JUDGE SMITH: So really, I mean, is that -
17 - - is that - - - can we accept on this record as a
18 fact that somebody dismantled the car? Or dismantled
19 part of the car?

20 MR. UNGER: Well, the car was dismantled.
21 It was not in the condition that it was left.

22 JUDGE SMITH: Well, you say that there was
23 a panel that was loose. It might have been loose
24 when they got it.

25 MR. UNGER: Anything is possible, but I

1 think the evidence was - - -

2 JUDGE SMITH: Well, but, well - - - but --

3 MR. UNGER: - - - sufficient to rebut that
4 - - - that assertion.

5 JUDGE SMITH: Is the mere existence of a
6 loose panel that he looked behind, does that justify
7 suppressing the evidence?

8 MR. UNGER: Well, with that assumption, no,
9 but that's not what the record, I think, reflects.
10 And I think it was the officers who actually caused
11 the damage in a search for evidence.

12 JUDGE SMITH: And what's the best evidence
13 that they caused it?

14 MR. UNGER: You have the damage to the
15 seats themselves. I think that alone tells us what
16 was really going on here, and the officer admitting,
17 when he testified, I was looking for contraband.

18 JUDGE READ: The damage - - - the damage to
19 the seats you're talking about, is that reflected in
20 the pictures we don't have in the record?

21 MR. UNGER: Well, I believe that the
22 pictures did show the damage, yes.

23 JUDGE READ: Okay.

24 MR. UNGER: So I think the court would be -
25 - -

1 JUDGE PIGOTT: You can see the officer's
2 point, though, if there's a loose panel or something,
3 and, you know, after this case is over, the defendant
4 says, you know, that 10,000 dollars I had in the - -
5 - you know, behind the panels is missing.

6 MR. UNGER: Sure, sure. And - - -

7 JUDGE RIVERA: So if he had - - -

8 MR. UNGER: I'm sorry.

9 JUDGE RIVERA: If he had followed the
10 protocol until he got to the trunk, are you saying he
11 breaches the protocol when he takes time to find a
12 screwdriver to unscrew the speakers?

13 MR. UNGER: I think - - - I can't answer
14 the question the way it's exactly phrased, but I
15 think the fact that he takes up to an hour to unscrew
16 these speakers - - - he determines that these are not
17 factory-installed, he determines that they have to be
18 removed - - -

19 JUDGE SMITH: Well, he - - - he - - - he
20 testified that he knew that the pound would not take
21 the things with the speaker in there. We - - -

22 MR. UNGER: Well - - -

23 JUDGE SMITH: We have to accept that as
24 true, don't we?

25 MR. UNGER: Well - - -

1 JUDGE SMITH: Or at least, is there any - -
2 -

3 MR. UNGER: Again - - -

4 JUDGE SMITH: - - - basis for rejecting it?

5 MR. UNGER: I would say that sounds like
6 another interpretation that this officer used in
7 doing what he did in this case, not - - -

8 JUDGE RIVERA: But if there no - - - if
9 there were no speakers, could he have opened the
10 trunk, lifted, looked at the spare, is there any
11 problem with that?

12 MR. UNGER: I don't think that there would
13 be a problem. I don't think so at all.

14 CHIEF JUDGE LIPPMAN: Okay, counsel.

15 MR. UNGER: Thank you.

16 CHIEF JUDGE LIPPMAN: Thanks. Appreciate
17 it. Thank you both.

18 (Court is adjourned)

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Kenneth Padilla, No. 114 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: May 10, 2013