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COURT OF APPEALS  
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,  
  
RESPONDENT,  
  
-against-  
  
DEVON T. BUTLER,  
  
APPELLANT.  
-----

NO. 95

92 Franklin Street  
Buffalo, NY  
November 16, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

CLEA WEISS  
MONROE COUNTY PUBLIC DEFENDER  
Attorney for Appellant  
10 N Fitzhugh Street  
Rochester, NY 14614-1211

BENJAMIN HOLWITT  
BROOME COUNTY DISTRICT ATTORNEY  
Attorney for Respondent  
45 Hawley Street, #4  
Binghamton, New York 13901-3722

Christy Wright  
Official Court Transcriber

1 CHIEF JUDGE WILSON: Okay. The next case on the  
2 calendar is People v. Butler.

3 MS. WEISS: Good afternoon, Your Honors. Clea  
4 Weiss, on behalf of Devon Butler. May I please reserve  
5 three minutes for rebuttal?

6 CHIEF JUDGE WILSON: Three?

7 MS. WEISS: Three.

8 CHIEF JUDGE WILSON: Yes.

9 MS. WEISS: Thank you. My client, Mr. Butler,  
10 was made to stand on the side of a road while Apache, the  
11 police canine, was directed towards him and put his nose in  
12 Mr. Butler's groin to sniff him for evidence of narcotics.  
13 This court should hold that that conduct was a search.

14 JUDGE RIVERA: Wait. Let's just be a little  
15 clear. What is it exactly we can reach in this case, given  
16 the - - - the argument about the LaFontaine issue?

17 MS. WEISS: This court can reach the question of  
18 whether the canine sniff was a search, and then pursuant to  
19 LaFontaine, after addressing whether it is a search, this  
20 court should remit to Broome County Court for consideration  
21 of the legal standard that would be applicable to such a  
22 search and whether that legal standard is met.

23 JUDGE CANNATARO: Can we reach the issue of the  
24 search under the federal Constitution, the state  
25 Constitution or both?

1 MS. WEISS: This court can reach that question  
2 under both Constitutions because it was preserved under  
3 both Constitutions. County court's decision cites to  
4 decisional law, citing the Fourth Amendment and the New  
5 York State Constitution and the Third Department as well,  
6 expressly holds under both Constitutions that it was a  
7 search.

8 JUDGE GARCIA: But it seems to me, Counsel,  
9 county court relied exclusively on federal cases with the  
10 exception of one state court case that itself relies on  
11 federal cases.

12 MS. WEISS: In addressing whether the canine  
13 sniff was a search, county court primarily relies on People  
14 v. Price, which was a case from this court addressing  
15 canine sniffs of luggage. The Price case is quite similar  
16 to the United States v. Place case, also a Fourth Amendment  
17 case about canine sniffs of luggage. So throughout county  
18 court's discussion in which it's essentially applying the  
19 Katz test, and saying that there's not a reasonable  
20 expectation of privacy in the air surrounding your body.  
21 It is repeatedly citing to Price for that proposition.

22 JUDGE GARCIA: Price itself cites exclusively  
23 federal cases, as I read it.

24 MS. WEISS: And you know, if - - - what I would  
25 submit to this court is that if the court finds that county

1 court's decision was only based on the Fourth Amendment,  
2 that finding that this conduct that the canine sniff is a  
3 search is appropriate under the New York State  
4 Constitution, but it's also the correct ruling under the  
5 Fourth Amendment. And it's the correct ruling under the  
6 Fourth Amendment, primarily because of the Katz test, which  
7 asks, first, is there an expectation of privacy that a  
8 person has and two, does society recognize that expectation  
9 of privacy as a reasonable one?

10 JUDGE SINGAS: Does your argument hinge on the  
11 fact that the dog made contact with your client, or would  
12 it matter if the dog didn't make contact?

13 MS. WEISS: Whether there's contact or not is not  
14 a dispositive fact in my argument. I think it's a search  
15 when a dog is led into proximity of a person. In this  
16 case, whether there's close proximity or contact is not  
17 totally clear from the facts. Obviously, if there is  
18 contact under Jardines and Jones, the trespassory theory of  
19 the Fourth Amendment would apply. We've got contact - - -

20 JUDGE RIVERA: How close does the dog have to get  
21 if you don't need contact?

22 MS. WEISS: It's a search when a dog is led  
23 towards a person to sniff them for evidence of narcotics.

24 JUDGE CANNATARO: Well, you have Place as well as  
25 Jardines and Jones. And so we kind of know that you can't

1 get - - - you can't be so far away that it would be the  
2 distance roughly, that a dog might be able to sniff a  
3 person's luggage, right? But you're saying it could be  
4 something less than actual contact, so how do you draw that  
5 line?

6 MS. WEISS: I think that when we ask whether a  
7 canine sniff is a search or not, the exact proximity of the  
8 canine to the person is not - - - is not a dispositive  
9 fact. And I think that if this court were looking for a  
10 distance or a hard-line rule about what that would be, I  
11 would say it's touching distance. Can you reach out your  
12 hand and touch the dog? Could the dog step forward  
13 immediately and touch you? So I think that that sort of  
14 close proximity of the distance where we might stand  
15 talking to a police officer during a traffic stop, we're  
16 talking to another person - - -

17 JUDGE HALLIGAN: Why is that the appropriate  
18 standard, the touching proximity standard that you're  
19 offering?

20 MS. WEISS: I would submit that proximity is not  
21 a crucial part of determining whether this is a search  
22 under the Katz test. I think we have a reasonable  
23 expectation of privacy not to be subjected to canine sniff  
24 searches and that society is prepared to recognize that  
25 expectation.

1                   JUDGE HALLIGAN:  Would that be true if the dog  
2                   were as far away, for example, as - - - as you are from the  
3                   bench?  Is there no role that proximity plays at all?  Or  
4                   is it simply that if the canine can detect an odor in the  
5                   air, no matter how far distant, that that is a search?

6                   MS. WEISS:  I would submit that if the canine is  
7                   able to - - - to smell and to be detecting odors emanating  
8                   from somebody's body, that that is - - - that would be a  
9                   search.

10                  CHIEF JUDGE WILSON:  So could the proximity or  
11                  the contact affect the standard?  That is - - - let me be  
12                  more clear.  The dog - - - I actually have a dog who likes  
13                  to do this, but anyway, dog pushes its head up into  
14                  somebody's groin.  That's pretty intrusive and you might  
15                  need a higher standard to allow that.  But a dog at a  
16                  twenty-foot distance maybe is less intrusive?

17                  MS. WEISS:  I agree that when we're looking at  
18                  what is the legal standard that should apply to such a  
19                  search, the intrusiveness - - - that the proximity, whether  
20                  it's a contact sniff - - - sniff, whether it's a close  
21                  proximity sniff, becomes an important factor when we're  
22                  looking at the standard, whether it should be probable  
23                  cause or reasonable expectation.

24                  CHIEF JUDGE WILSON:  We can't get to that here.

25                  MS. WEISS:  Agreed.  But whether we're looking -

1 - - when we're looking at whether it's a search or not,  
2 then the proximity to me is not an important factor in  
3 that.

4 JUDGE TROUTMAN: And is it dispositive also  
5 because of the direction - - - the dog being pointed in a  
6 particular direction?

7 MS. WEISS: That's correct. I think one of the  
8 important factors in this case that is a finding of fact  
9 that county court made and a finding of fact that the  
10 Appellate Division affirms, is that Officer Bracco directs  
11 Apache towards Mr. Butler. It is an intentional search  
12 where the dog is led to.

13 JUDGE TROUTMAN: So would it be different if the  
14 dog was just in the area and no one directed, but then the  
15 dog went towards the person? Is that different?

16 MS. WEISS: I agree that an unintentional alert,  
17 right, if a police officer is not meaning to conduct a  
18 search, he is just out with the dog, and the dog alerts,  
19 that that may not constitute a search. And I think the  
20 case United States v. Reyes addresses unintentional canine  
21 alerts, but that's not the case. The case here is a  
22 directed search.

23 JUDGE HALLIGAN: What if the officer has the  
24 canine out in a public area, for example, a park, and is  
25 not directing the dog at any specific individual, but is

1 simply walking around a public space where there are a lot  
2 of folks outside and the dog alerts.

3 MS. WEISS: In that circumstance, I think we have  
4 to look at, you know, is the officer - - - is the dog at  
5 work. You know, if the officer is taking the dog for a  
6 pleasant walk, that's one thing.

7 JUDGE HALLIGAN: No, let's assume the dog is at  
8 work, but alerts at, you know, 20 feet away. And the  
9 officer was not directing the canine at any particular  
10 individual.

11 MS. WEISS: That would be an unintentional alert  
12 in that circumstance. And I think the example of 20 feet  
13 away, that's certainly some distance. I think we'd be in  
14 in a different circumstance if the officer was, you know,  
15 searching for general criminality by taking a dog around to  
16 different groups of people in a park and seeing what the  
17 dog might or might not get interested in. I think the line  
18 between, oops, my dog unintentionally alerted to some  
19 people in a park versus taking my dog intentionally into a  
20 park to, you know, get close to people is something that  
21 would have to be addressed on a case-by-case basis to look  
22 at what the officer's true intentions were.

23 JUDGE CANNATARO: Counsel - - -

24 CHIEF JUDGE WILSON: I -- I'm sorry.

25 JUDGE CANNATARO: Doesn't Jardine speak of the



1 license that people give when they go out into public  
2 places? In other words, sometimes people give off odors of  
3 things that can be detected by other humans and probably  
4 even better by dogs. And it seems as if Jardine recognizes  
5 that fact and accepts that some - - - some things maybe - -  
6 - maybe Judge Halligan's example of walking through a park,  
7 are acceptable because that's, I guess, not part of your  
8 expectation of privacy. We do have to account for that in  
9 any holding we make here, wouldn't we?

10 MS. WEISS: That - - - that what is, I guess, the  
11 odors that emanate from somebody's body are essentially in  
12 public spaces?

13 JUDGE CANNATARO: Yeah. I mean, I don't know,  
14 you could - - - you could walk out of your house emanating  
15 a strong odor of marijuana that's so strong people can  
16 smell it, much less a dog.

17 MS. WEISS: I think that's why the looking at the  
18 directing a canine to conduct a sniff of a person is  
19 important because that's where we get into the demeaning  
20 and humiliating aspect, where it is inappropriate for  
21 people or animals to be led to conduct sniffing of people.

22 JUDGE CANNATARO: So a limitation would have to  
23 be that the dog was set in motion to a person, or at least  
24 towards a person?

25 MS. WEISS: That's correct. Toward - - -

1 JUDGE CANNATARO: Or at least towards a person.

2 MS. WEISS: - - - towards people or towards a  
3 group of people. And I think with Judge Halligan's  
4 example, a dog is set in motion towards a park. Let's go  
5 sniff people in the park.

6 JUDGE RIVERA: With the - - - with the - - - with  
7 the intent to have actual contact with the human body?

8 MS. WEISS: I don't think that the intent to have  
9 contact would be important, but the intent to lead a canine  
10 towards people to conduct sniffing.

11 JUDGE RIVERA: I'm having a little bit of - - -  
12 I'm a little confused why we're going down this rabbit  
13 hole. Because in this case, you have contact, correct?  
14 Correct?

15 MS. WEISS: I think the testimony is that the  
16 canine put his nose in Mr. Butler's groin - - -

17 JUDGE RIVERA: But there is actual contact. So  
18 anything the court might say about actions not involving  
19 contact strike me as dicta and not relevant. Am I missing  
20 something in your argument? Do we have to decide that to  
21 be able to decide this case?

22 MS. WEISS: No, I think to the extent - - -

23 JUDGE CANNATARO: So would you take that rule?  
24 Would you take a contact rule for purposes of this case?

25 MS. WEISS: I think that under the Fourth

1 Amendment, a close proximity rule is also appropriate.  
2 Yes, under Jardines, if a dog makes contact with a person,  
3 that's clearly a Fourth Amendment search. But I think that  
4 a broader rule that says directing a canine into - - -

5 JUDGE RIVERA: What I'm saying is what - - -  
6 what? Why would we be deciding that here? This is  
7 contact. It doesn't even raise issues of what the numerous  
8 questions you're getting about the type of proximity in  
9 terms of the distance, in terms of the intent, in terms of  
10 the location. It strikes me that that is more appropriate  
11 when we actually have to decide that.

12 MS. WEISS: The reason I'm not focusing on the  
13 contact here is that county court's findings of fact and  
14 conclusions of law do not say contact. The Third  
15 Department's decision affirming county court's - - -

16 JUDGE RIVERA: So you think this is related to  
17 the LaFontaine question?

18 MS. WEISS: I think that the - - - the - - - the  
19 description of this as a contact search is the Third  
20 Department's description. I think that's an inference from  
21 Detective Bracco's testimony. But it is not county court's  
22 findings of fact.

23 JUDGE RIVERA: But let me just clarify here  
24 what's going on in this record and what happened below with  
25 respect to the argument. Did not defense counsel argue

1 that it's an unconstitutional search?

2 MS. WEISS: Correct.

3 JUDGE RIVERA: Yes? Okay. All right. So that -  
4 - - then you have a finding that it's not a search because  
5 it's a sniff of the air. And a sniff of the air doesn't  
6 have the same level of expectation of privacy and therefore  
7 not a search. Okay. Isn't that automatically rejecting  
8 the contact argument? So why can't we reach it? Why is  
9 there some LaFontaine bar to that?

10 MS. WEISS: There is not a LaFontaine bar to  
11 addressing whether it was a search, which could include  
12 addressing whether there was contact, and if there was  
13 contact then it is a search.

14 CHIEF JUDGE WILSON: So - - --

15 JUDGE SINGAS: Is - - -

16 CHIEF JUDGE WILSON: Let me get one and - - - so  
17 Judge Cannataro mentioned something that actually fed into  
18 the question I was trying to ask a couple of minutes ago  
19 and maybe an irrelevant question. It's certainly out of  
20 left field. But I assume that there are an awful lot of  
21 these drug detection dogs who have been trained to sniff  
22 marijuana, and that's now not a crime. And so even in the  
23 hypothetical where the officer is walking the dog through a  
24 park, the dog may react - - - dogs may react to something  
25 that is no longer illegal. That seems to me to be an

1           undesirably intrusive result. It may be transient because  
2           these dogs will at some point be out of service. But what  
3           do we do about that now, if anything?

4                   MS. WEISS: Well, I agree with Your Honor. There  
5           is no marijuana in this case. So that's not something that  
6           would be addressed in this case. But a dog that alerts to  
7           marijuana, at this point, I think is out of commission  
8           because it would give false positives. So it smells legal  
9           marijuana in somebody's car. It alerts. That can furnish  
10          probable cause for the search of an interior of a vehicle  
11          where they find legal marijuana. And so I don't think a  
12          canine who is trained to alert to marijuana can be used at  
13          this juncture. And on suppression - - -

14                   JUDGE GARCIA: Okay. That's not relevant here,  
15          right? I mean - - -

16                   CHIEF JUDGE WILSON: Right, I think I prefaced my  
17          question that way.

18                   JUDGE CANNATARO: It's not this case.

19                   JUDGE SINGAS: Yeah, I don't know if you know the  
20          answer to this question, but is the contact only when the  
21          drugs are recovered? In other words, is the dog trained to  
22          make contact only to demonstrate where it is that the drugs  
23          are? Do you understand what I'm asking? As a - - -

24                   MS. WEISS: I do understand. You know, in this  
25          record, there's no description of the canine's training and

1           what it is supposed to do other than it's a passive-alert  
2           dog that sits. So there's no description of is it supposed  
3           to get close or to touch where it detects the drugs in  
4           order to indicate to its handler? I think - - -

5                   JUDGE SINGAS: My question is, right, would there  
6           only be contact when a dog has alerted that there are  
7           drugs, and then wherever the defendant placed them is where  
8           the dog would alert that there are drugs? And I don't know  
9           if the alerting is the contact. That's what I'm trying to  
10          get at.

11                   MS. WEISS: The alerting is sitting. So making  
12          contact would not be a part of - - - of showing where the  
13          drugs are. And the example I would give, Your Honor, is  
14          where canines are used to circle the exterior of vehicles  
15          and to conduct sniff searches that way it can't make  
16          contact with where the drugs are, if the drugs are, say, in  
17          the center console or somewhere within the car. So they're  
18          still alerting outside of the vehicle to indicate that they  
19          sense something within the vehicle.

20                   JUDGE SINGAS: I think they can alert to a  
21          specific area. They can alert to a passenger car or a  
22          compartment or a trunk, if I'm not mistaken.

23                   MS. WEISS: They can, but where they would be,  
24          say, touching a vehicle or indicating on the vehicle might  
25          not be necessarily exactly where the drugs would be within

1 the vehicle. I think the canines are trained to get as  
2 close as they can to the odor to pinpoint where it is. And  
3 that's why it leads often to contact or extremely close  
4 proximity as the canine is investigating where is this odor  
5 coming from.

6 JUDGE SINGAS: Okay.

7 CHIEF JUDGE WILSON: Thank you.

8 MS. WEISS: Thank you.

9 MR. HOLWITT: Thank you, Your Honors. May it  
10 please the court. Benjamin Holwitt on behalf of the  
11 People. I would like to start with a point that, Your  
12 Honor - - - sorry, Judge Rivera made as to county court's  
13 decision-making process. As Your Honors are aware, county  
14 court ruled that this was a sniff of the air surrounding  
15 the defendant. Therefore, I think the - - - the relevant  
16 question, or the relevant fact, is that there was no  
17 contact.

18 JUDGE CANNATARO: Well, county court concluded  
19 that it was a sniff of the air for purposes of coming to a  
20 conclusion that it wasn't a search.

21 MR. HOLWITT: Correct.

22 JUDGE CANNATARO: My understanding, correct me if  
23 I'm wrong, is that you've sort of conceded the search issue  
24 on this appeal, or haven't you?

25 MR. HOLWITT: I - - - so as Your Honors may be





1 JUDGE TROUTMAN: So you're saying, it's not a  
2 search?

3 MR. HOLWITT: It's not a search because if you  
4 look - - - if Your Honors look at the - - - the entirety -  
5 - - the totality of what happened, Detective Bracco went to  
6 retrieve Apache essentially, immediately upon his release  
7 from the car. He was pulling towards the defendant and - -  
8 -

9 JUDGE TROUTMAN: So police officers, whether they  
10 have any reason to believe, they can just get the dog and  
11 the dog can just walk around just on a - - - if come and  
12 that's fine, not a search?

13 MR. HOLWITT: No, Your Honor. I think that as  
14 county court found, and as the Third Department found, the  
15 events leading up to the decision to retrieve Apache, there  
16 was reasonable error found and suspicion on which to do  
17 that. The sole, I think, variance happened to be on the  
18 point of contact and whether or not that was a search.

19 JUDGE RIVERA: So then given the alleged  
20 LaFontaine issue, in your view, what is it that we can  
21 reach on this appeal? What can we resolve?

22 MR. HOLWITT: So I think that, you know, as  
23 pointed out in our brief, there was - - - the ultimate  
24 issue is - - - was whether, and forgive my wording of this,  
25 it was whether the totality of the encounter was proper,

1           which both county court and the Third Department went  
2           through the various steps of the encounter and - - -  
3           forgive me - - -

4                     JUDGE RIVERA:   But each marked the encounter  
5           differently.

6                     MR. HOLWITT:   I'm sorry, Your Honor?

7                     JUDGE RIVERA:   Each marked that encounter  
8           differently.  So again, what legal question can we resolve  
9           on this appeal?

10                    MR. HOLWITT:   So I - - - Your Honors, can resolve  
11           the question of whether it was a search or not.  And I  
12           think that Your Honors can reach, you know, the standard,  
13           and you know, if Your Honors determined that it was a  
14           search, you can reach the standard - - -

15                    JUDGE SINGAS:   You know the answer to my  
16           question, Counsel, whether or not the dog only touches when  
17           it detects narcotics?  Is that how it alerts?

18                    MR. HOLWITT:   To be perfectly honest with Your  
19           Honor, I don't know.  But you know, on - - - on that point,  
20           you know, both - - - not really on that point, but sort of  
21           on that point, both county court and the Third - - - well,  
22           the Third Department characterized it as, you know, a very  
23           minimal contact.  And I believe my reading of both county  
24           court's decision and order, and the testimony of Detective  
25           Bracco and Detective Haven, and the Third Department's

1 decision, the canine, Apache, you know, was in odor and  
2 following essentially the scent of contraband, in this  
3 case, drugs. And the intrusion, whatever level that was,  
4 as soon as that happened was when the alert happened, so.

5 JUDGE TROUTMAN: What role does an officer  
6 directing the animal have, if any?

7 MR. HOLWITT: So in general, I don't actually  
8 know the answer to that question. I would disagree with  
9 counsel's characterization that in this case, Detective  
10 Bracco directed Apache, as I was mentioning earlier,  
11 immediately on - - - upon retrieval, more or less, of  
12 Apache from the car, he was pulling towards the defendant,  
13 and Detective Bracco guided him back towards the car where  
14 he started to walk around and put his paws inside the open  
15 door of the vehicle. After the - - -

16 JUDGE TROUTMAN: So are you arguing that the  
17 canine was acting in a spontaneous manner somehow?

18 MR. HOLWITT: So I do have to concede that  
19 Detective Bracco, his testimony was that he thought to  
20 himself, well, let's what - - - let's see, what is, you  
21 know, I - - -

22 JUDGE CANNATARO: He brought Apache over to the  
23 defendant, right?

24 MR. HOLWITT: His testimony, Your Honor, I  
25 believe it's page A111 or 112 of the record before this

1 court was that he extended the leash and Apache walked  
2 around the defendant and Detective Haven.

3 JUDGE CANNATARO: Is that a distinction with a  
4 difference? He gave the dog the - - - the leash, the  
5 freedom to go to the defendant.

6 MR. HOLWITT: I don't think it's a distinction  
7 without a difference, Your Honor. I think that, you know,  
8 giving a lead, the freedom to roam and follow the scent is  
9 different than, you know, pulling and directing, hey, go  
10 over here.

11 JUDGE HALLIGAN: But the same - - - the same  
12 testimony says, well, let me see if there's any odor on Mr.  
13 Butler. So whether or not he walked the dog over to Mr.  
14 Butler or extended the leash so that the dog could go over  
15 to Mr. Butler, it seems to me that indicates that he was  
16 intending that the dog investigate Mr. Butler, no? He  
17 says, let's see if there's any odor on Mr. Butler.

18 MR. HOLWITT: Yeah, that was his - - - if I'm not  
19 mistaken, that was his thought process at the time.

20 JUDGE HALLIGAN: How is it relevant whether he -  
21 - - and maybe I'm misunderstanding you and you don't think  
22 it's relevant? But I thought I heard you say there was a  
23 difference that mattered with respect to whether he, the  
24 officer, walked up to the defendant with the dog or whether  
25 the dog was given an additional leash and approached the

1 defendant himself.

2 MR. HOLWITT: Well, I think that there's  
3 definitely a difference between simply having a thought and  
4 like letting additional leash - - -

5 JUDGE HALLIGAN: But this is whether it's a  
6 search.

7 MR. HOLWITT: - - - go through and whether he is  
8 actively directing the dog. My reading of the testimony  
9 from the hearing was more that it was, you know, loosening  
10 a grip and letting Apache go where the scent led him. And  
11 again, you know, I do want to belabor this point. You  
12 know, Apache, on his own, twice, was, you know, in order  
13 which - - -

14 JUDGE HALLIGAN: Well, in response to the  
15 question, do you use Apache on Mr. Butler, the officer  
16 says, I did.

17 MR. HOLWITT: Yes. I - - - I don't have, you  
18 know, a response to that other than, you know, I don't  
19 think there's any testimony to warrant a finding that  
20 Apache was directed or led towards - - - Detective Bracco,  
21 you know, gave the freedom to go where the scent led. And  
22 I also - - - I want to stress to Your Honors that this is -  
23 - - you know, this was a vehicle in traffic stop. And you  
24 know, in addition to the numerous exceptions to the warrant  
25 requirement, you know, canine searches of the exterior of a

1 vehicle are, you know, allowable under a reasonable  
2 suspicion. They're a founded suspicion standard, and these  
3 same justifications for lessening - - -

4 JUDGE CANNATARO: So you don't see a LaFontaine  
5 issue here?

6 MR. HOLWITT: To be frank, Your Honor, no, I  
7 don't. I - - -

8 JUDGE CANNATARO: That was not part of the  
9 Supreme Court's holding. They just held it wasn't a  
10 search - - - I'm sorry. Was it the Supreme Court? Yeah, I  
11 think so. That - - - that it wasn't a search.

12 MR. HOLWITT: Correct. But you know, it went on  
13 to find a reasonable basis for the pursuit based on  
14 everything that had - - - had occurred during the stop and  
15 the interview. And - - - and again, I think that the  
16 important or the ultimate question is whether the approach  
17 of Apache towards the defendant and the search of the - - -  
18 or the sniff of the vehicle were proper. And I think that,  
19 you know, both courts determined that it was. They  
20 differed in their interpretation of the facts as to why.  
21 But I don't think that the Third Department decided any  
22 issue that was not overall decided on by the lower court.

23 CHIEF JUDGE WILSON: Didn't it decide the  
24 standard if it is a search?

25 JUDGE CANNATARO: The Appellate Division did, for

1           sure.

2                       MR. HOLWITT: That's right. Right. Yes.

3                       CHIEF JUDGE WILSON: And that was - - - that was  
4 not - - - and that was not decided by the trial court,  
5 right?

6                       MR. HOLWITT: That is true.

7                       CHIEF JUDGE WILSON: So I mean, to me, it sounds  
8 like the Appellate Division affirmed criminal conviction on  
9 a ground that - - - actually a novel ground that we haven't  
10 decided what that standard is, that wasn't reached by the  
11 trial court.

12                      MR. HOLWITT: But in doing so it - - - it was  
13 answering the question of again whether the totality of the  
14 circumstances of the approach - - - of the entire encounter  
15 were - - - were proper and, I mean, you know, if Your  
16 Honors ultimately decide that, you know, that is not the  
17 issue, you know, obviously we likely - - - or it goes back  
18 to county court. But respectfully, I don't think that  
19 that's, you know, the ultimate issue that - - - that was  
20 handled in either court. And again, you know,  
21 respectfully, I think that the - - - you know, I didn't  
22 even get into the issue of the ultimate standard. But you  
23 know, you know, I think that ultimately, this wasn't a  
24 search. If it was, if the Appellate Division found that  
25 properly, I think that, you know, the - - - the reasonable

1 suspicion standard based on the cases cited in our brief,  
2 and the situations cited therein, is the proper standard  
3 for this specific set of facts.

4 Thank you, Your Honors.

5 JUDGE CANNATARO: Counsel, I just found some  
6 language from the Horton dog sniff case from the Fifth  
7 Circuit, and I was looking for it when you were talking  
8 about the standard. They say intentional - - - quoting  
9 someone else, they say, "Intentional close proximity  
10 sniffing of a person is offensive, whether the sniffer be  
11 canine or human". Their language, not mine. Assuming this  
12 case allows us to go beyond a touch, would this be an  
13 adequate standard, intentional, meaning launched by a  
14 human, a law enforcement individual, and close proximity,  
15 or would it have to be something even broader than that, do  
16 you think?

17 MS. WEISS: No. I think an intentional search in  
18 proximity, in close proximity is the standard. And that's  
19 the standard that Horton v. Goose Creek, B.C. v. Plumas and  
20 Tedford v. State from Florida. Three cases construing the  
21 Fourth Amendment have found that a noncontact sniff search  
22 when it's intentional is a search under the Fourth  
23 Amendment. And with regards to dignity and - - - and the  
24 sort of humiliating nature of a canine sniff, this court  
25 recognized a matter of Patchogue-Medford Congress of



1 Teachers that the Fourth Amendment is designed to protect  
2 dignity. That is one of the interests with the Fourth  
3 Amendment.

4 And just to return briefly to the question of is  
5 this an intentional search, county court's findings of  
6 fact. I'm going to quote here, "Bracco then brought Apache  
7 towards defendant." So under - - - with the testimony in  
8 this case and county court's findings of fact, it is  
9 unquestionable in this case that this is a directed search  
10 of Mr. Butler.

11 CHIEF JUDGE WILSON: So could I ask you, counsel  
12 reminded me that there was an automobile stop involved  
13 here. So we have People v. Devone, which I think applies a  
14 level two De Bour framework to automobile stops for the  
15 purpose of a canine sniff. But subsequently, the U.S.  
16 Supreme Court decides Rodriguez and uses what sounds to me  
17 like a higher test. We may not need to get to that here at  
18 all, because I think maybe LaFontaine prevents us from  
19 doing that. But would LaFontaine prevent us from reversing  
20 this conviction that is applying a probable cause standard,  
21 for example, or the standard from Rodriguez?

22 MS. WEISS: So the Third Department in its  
23 decision applies Devone and finds that there's a founded  
24 suspicion that allowed Bracco to first lead the canine  
25 around Mr. Butler's car. But because the incidents of the

1 traffic stop had been concluded by that time, he's got his  
2 tickets for driving without a license, in this case,  
3 Rodriguez applies with the reasonable - - - reasonable  
4 suspicion standard. And to the extent that Rodriguez sort  
5 of supersedes Devone in most circumstances, relying on  
6 Devone in the context of a traffic stop, I believe is no  
7 longer acceptable. I would not say that Rodriguez  
8 overrules Devone because Devone may still apply in a  
9 context where there's a parked car and there's not a  
10 seizure because, of course, Rodriguez is a seizure case.  
11 But in the context of a traffic stop where the person is  
12 seized, as Mr. Butler was, the Devone Standard, I think has  
13 been superseded by the Fourth Amendment jurisprudence in  
14 Rodriguez.

15 CHIEF JUDGE WILSON: And then the second part of  
16 my question is, would that, should we choose to do so,  
17 allow us to reverse the conviction here on that basis?

18 MS. WEISS: It would, Your Honor.

19 CHIEF JUDGE WILSON: Without offending  
20 LaFontaine?

21 MS. WEISS: There may be a LaFontaine remittal to  
22 determine in the first instance whether the facts - - -  
23 whether there was reasonable suspicion for the search - - -  
24 for the search of the car in that context.

25 CHIEF JUDGE WILSON: Thank you.

1 MS. WEISS: If I may briefly just close, in our  
2 brief, we cite extensive history about the racial - - -  
3 racially disparate use of canines to police, and that  
4 section is in our probable cause section. But I would like  
5 to submit to the court that it is also applicable to the  
6 Katz test and determining whether this is a search or not.  
7 History is relevant under the Katz test because it informs  
8 what society thinks is reasonable and what a reasonable  
9 expectation of privacy is. And citizens of New York are  
10 affected by this history. They may have had parents who  
11 marched in the civil rights era and remember, you know,  
12 abuses of dogs in that time. And I think that that means  
13 that our expectation of not wanting to be approached by  
14 large aggressive dogs like Apache, who is a cross-trained  
15 dog to apprehend, bite, and attack suspects, is a  
16 reasonable one, and that this - - - that society would  
17 recognize that right is reasonable.

18 CHIEF JUDGE WILSON: Thank you.

19 MS. WEISS: Thank you.

20 (Court is adjourned)

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

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Butler (Devon T.), No. APL-2021-128 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: Christy Wright

Agency Name: eScribers

Address of Agency: 7227 North 16th Street  
Suite 207  
Phoenix, AZ 85020

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