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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 43

TODD JOHNSON,

Appellant.

20 Eagle Street
Albany, New York 12207
February 13, 2014

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
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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1 CHIEF JUDGE LIPPMAN: 43, People v.
2 Johnson.

3 Counselor, do you want any rebuttal time?

4 MR. SINAIKO: Yes, Your Honor. I'd like
5 three minutes, please.

6 CHIEF JUDGE LIPPMAN: Three minutes. Go
7 ahead.

8 MR. SINAIKO: Your Honors, my name is Steve
9 Sinaiko. I'm with Kramer Levin Naftalis & Frankel,
10 pro bono counsel in this action, for the appellant,
11 Todd Johnson.

12 This case calls on the court to apply its
13 recent decision in People v. Baker to a case
14 involving the arrest for disorderly conduct of Mr.
15 Johnson, who was standing on a street corner at the
16 time of this arrest - - -

17 CHIEF JUDGE LIPPMAN: What's the problem
18 with the - - - with the arrest here? Is it - - - is
19 it that he didn't do anything wrong, and it's just
20 general gang information? Is that the - - - the
21 thrust of what you're arguing?

22 MR. SINAIKO: Well, I think - - - I think -
23 - -

24 CHIEF JUDGE LIPPMAN: That it's more about,
25 oh, we've seen him with a gang, and - - - but rather

1 than as specific as to what he did here in this case?

2 MR. SINAIKO: I think Your Honor is exactly
3 correct. That's exactly the problem here. What you
4 have is a situation where notwithstanding the public
5 harm requirement, that this court has recognized as
6 being of central importance in limiting the scope of
7 the disorderly conduct statute and providing - - -
8 both providing citizens with notice as to the conduct
9 that the statute prohibits, and putting reasonable
10 limits around the authority of police to use that
11 statute - - -

12 JUDGE PIGOTT: Could the police have done
13 anything here, in your view?

14 MR. SINAIKO: Against the record - - -
15 against the record in this case, I don't think the
16 police had any grounds to make an arrest. No.

17 JUDGE SMITH: If you - - -

18 JUDGE PIGOTT: But as to that, could they
19 do anything?

20 JUDGE SMITH: - - - if you were a resident
21 of that - - - sorry.

22 JUDGE PIGOTT: Could they tell them to
23 disperse, you're - - - you know, we know you people,
24 we know that you're up to no good, move out?

25 MR. SINAIKO: No, Your Honor. Our view is

1 Honor, for purposes of Section 240.20(6), an order to
2 move along under those circumstances, would not be a
3 lawful order. Can the police approach somebody and
4 say move along? I suppose they can.

5 CHIEF JUDGE LIPPMAN: What if they were
6 blocking - - - what if it was the case that they were
7 blocking the entrance and people couldn't get in?

8 MR. SINAIKO: Well - - -

9 CHIEF JUDGE LIPPMAN: Then they could do
10 something, right?

11 MR. SINAIKO: Your Honor, again, I'm not
12 sure. Against the record - - - against the record in
13 this case - - -

14 CHIEF JUDGE LIPPMAN: No, no, no, no.
15 Hypothetically, if they're blocking the entrance and
16 the public can't get in, the police can do something,
17 right?

18 MR. SINAIKO: Hypothetically, if there were
19 evidence that - - -

20 CHIEF JUDGE LIPPMAN: Yes, that's what I'm
21 asking you.

22 MR. SINAIKO: - - - a person was standing -
23 - - that the person was standing in the doorway such
24 that - - - and a person approached and was unable to
25 enter - - -

1 CHIEF JUDGE LIPPMAN: Yeah.

2 MR. SINAIKO: - - - was blocked from
3 entering by - - - by the person who was standing in
4 the doorway, yes, I think that - - -

5 JUDGE ABDUS-SALAAM: Do you have to have -
6 - -

7 MR. SINAIKO: - - - might qualify.

8 JUDGE ABDUS-SALAAM: Do you have to have -
9 - -

10 MR. SINAIKO: But that's not the record
11 here.

12 JUDGE ABDUS-SALAAM: Counsel, do you
13 actually have to have someone trying to get into the
14 entrance of the store, of if these folks are blocking
15 the entrance regardless of whether someone's trying
16 to get in?

17 MR. SINAIKO: I - - - I think, Your Honor,
18 that's a question that this court addressed in People
19 v. Jones. Jones was a case where the defendant was
20 pos - - - had positioned his body in the middle of a
21 sidewalk. There were pedestrians who approached who
22 had to walk around the pedestrian in order to - - -
23 in order to progress down the sidewalk - - -

24 JUDGE PIGOTT: What time of - - - what time
25 of the day or night was that?

1 MR. SINAIKO: I think that was at 2 o'clock
2 in the morning. I'm not - - -

3 JUDGE PIGOTT: I do too.

4 MR. SINAIKO: - - - sure.

5 JUDGE PIGOTT: And I don't think - - -
6 yeah, they said that there were people trying to get
7 around him, and we were trying to figure out who's
8 walking down the sidewalk at 3 o'clock in the morning
9 that was - - -

10 JUDGE SMITH: It was Times Square.

11 JUDGE PIGOTT: - - - that was somehow
12 impeded.

13 JUDGE ABDUS-SALAAM: Yeah, it was Times
14 Square.

15 MR. SINAIKO: I suspect Time - - -

16 JUDGE PIGOTT: I remember - - - I remember
17 the case.

18 MR. SINAIKO: I suspect that Times Square -
19 - -

20 CHIEF JUDGE LIPPMAN: You know, in Buffalo
21 they're not necessarily walking around at 2 o'clock
22 in the morning. Right, Judge Pigott?

23 JUDGE PIGOTT: Right. That's right.

24 JUDGE GRAFFEO: Certainly - - -

25 JUDGE ABDUS-SALAAM: Times Square, it's

1 like rush hour at all - - -

2 JUDGE GRAFFEO: - - - if there had been
3 evidence in this case that any potential customers of
4 the grocery store had been intimidated by this group,
5 that would have been sufficient to satisfy the public
6 harm element, wouldn't it?

7 MR. SINAIKO: You know, if there were
8 evidence that - - - if there were evidence that any
9 other person was in the vicinity and that that person
10 had been intimidated - - -

11 JUDGE PIGOTT: No, not evidence. What - -
12 - we're talking about probable cause. If the owner
13 of the deli called the police and said, you know,
14 that same group, they do this all the time, they're
15 hanging out in front of my store, and people are
16 intimidated and - - - and I'm losing business. Can
17 you come over here and make them move? Can the
18 police come over and make them move?

19 MR. SINAIKO: I think that's a very
20 different case from this case, but I agree with Your
21 Honor that that might be a case where dis - - - where
22 probable cause for disorderly conduct - - -

23 JUDGE SMITH: If you were - - -

24 MR. SINAIKO: - - - existed.

25 JUDGE SMITH: If you're a resident of this

1 community, and somebody told you that three - - -
2 three or four kids associated with a gang that has
3 been terrorizing the neighborhood are standing on the
4 corner and the police are not allowed to ask them to
5 move, would you be a little distr - - - wouldn't you
6 say, what do we have cops for if they can't - - - if
7 they can't deal with a situation like that?

8 MR. SINAIKO: I think, Your Honor, the
9 answer to that question depends on conduct. The - -
10 - I mean, to put it in the context of Section 240.20,
11 there is a public harm requirement. The public harm
12 requirement - - -

13 JUDGE SMITH: But is that how you would
14 explain it to a member of the community who asked you
15 what the cops were good for?

16 MR. SINAIKO: I think, Your Honor, the way
17 I would explain it to a member of the community would
18 be to say, look, the police can ask these guys to
19 move along, but can they be arrested if they don't
20 move along? Certainly not. Certainly not. And
21 would an order of that - - -

22 JUDGE SMITH: So they can - - - they can't
23 - - - what you're really saying is they can't say
24 move along. They can say please move along?

25 MR. SINAIKO: I think that's right, Your

1 Honor. I think the police - - - the police can
2 request that people do things, whether - - -

3 CHIEF JUDGE LIPPMAN: Especially, I guess,
4 when the young people themselves are members of the
5 community?

6 MR. SINAIKO: Well, certainly. I mean - -
7 - right. You have to bear in mind - - -

8 CHIEF JUDGE LIPPMAN: This - - - this young
9 man who we're talking about, lived right - - - a few
10 feet from the door of this deli, right?

11 MR. SINAIKO: Correct. The four men were
12 standing less than fifty feet from the entrance to
13 the apartment building where Mr. Johnson resided at
14 the time. That's exactly correct, Your Honor.

15 JUDGE RIVERA: And certainly, if you're
16 talking about whether it's an individual or a group -
17 - - obviously here we're talking about congregation
18 of the group - - - and they actually are intending or
19 participating in illegal activity, merely the
20 presence of an officer might discourage such
21 congregation?

22 MR. SINAIKO: With - - - without a doubt.
23 But - - - yeah, without a doubt. But here - - -

24 CHIEF JUDGE LIPPMAN: Well, that's all
25 right, right?

1 MR. SINAIKO: Certainly.

2 CHIEF JUDGE LIPPMAN: To have a cop on the
3 corner - - -

4 JUDGE RIVERA: The cop could be on the
5 corner if someone's complaining that the gang members
6 are congregating and intimidating?

7 MR. SINAIKO: Certainly. The presence of a
8 police officer almost certainly is going to deter
9 illegal behavior.

10 JUDGE SMITH: You - - - actually, you'd
11 think that maybe your client, having - - - what was
12 it - - - cocaine his pocket, might have been better
13 advised to move away when the officer suggested it.

14 MR. SINAIKO: One can wonder about these
15 things for sure.

16 JUDGE RIVERA: I thought he tried to move
17 away and they stopped him?

18 MR. SINAIKO: Well, the test - - - his own
19 testimony to - - - the testimony that Mr. Johnson
20 gave at the suppression hearing was that's exactly
21 what happened, that the police arrived on the scene
22 and that when asked to leave he did leave.

23 But Justice Nunez did not credit that
24 testimony. She credited, instead, Officer Martinez's
25 testimony. So we're not - - -

1 JUDGE RIVERA: But the goal of the officers
2 was to have them disperse. He seemed to be trying to
3 comply with the order?

4 MR. SINAIKO: That - - - that's what it
5 sounded like, according to his testimony. Although,
6 as I said, we're not - - - we're not challenging
7 Officer Martinez's - - -

8 JUDGE SMITH: But the facts we're bound by
9 are that - - - are that the officers said move and
10 the kids said - - - or the young men said we don't
11 feel like it.

12 MR. SINAIKO: We - - - we're - - - we
13 believe that the evidence should be viewed in the
14 light most favorable to the People. But - - - but
15 even viewed in that light, there's no evidence of
16 what these people looked like. There's no evidence
17 of what these people were doing at the time the
18 police - - -

19 JUDGE RIVERA: There's no evidence of the
20 conduct.

21 MR. SINAIKO: No evidence of conduct
22 whatsoever. Correct, Your Honor.

23 JUDGE GRAFFEO: How much emphasis should be
24 placed on the fact that your client was not the one
25 that was standing in the doorway?

1 MR. SINAIKO: Well, we believe - - - we
2 certainly believe - - -

3 JUDGE GRAFFEO: Does that make a
4 difference?

5 MR. SINAIKO: We certainly believe that
6 probable cause has to be established as to each
7 individual in a group of people. So probable cause
8 as to Mr. Rosario, for example, whom Justice Nunez
9 said was part - - - you know, was a few feet from the
10 door, partially blocking the door, that was certainly
11 not a finding as to Mr. Johnson. So I think probable
12 cause had to be established for Mr. Johnson
13 separately.

14 That said, even - - - you know, putting
15 that aside and taking it all and imputing it all to
16 Mr. Johnson, our position is that there still wasn't
17 enough here.

18 CHIEF JUDGE LIPPMAN: Okay, counsel. I'm
19 sorry --

20 JUDGE SMITH: Is the gang - - -

21 CHIEF JUDGE LIPPMAN: Judge Smith?

22 JUDGE SMITH: Yeah. Is the gang
23 affiliation of the young men totally irrelevant, in
24 your view?

25 MR. SINAIKO: In my view, totally

1 MR. RIVELLESE: May it please the court,
2 Vincent Rivellese for the People.

3 CHIEF JUDGE LIPPMAN: Counselor, is the
4 whole issue of gang association of any relevance
5 here?

6 MR. RIVELLESE: It's definitely of
7 relevance. It's not determinative. It's not the
8 only thing that matters here.

9 I think to - - - to refocus - - -

10 CHIEF JUDGE LIPPMAN: Is the thing that
11 matters, this particular defendant's conduct?

12 MR. RIVELLESE: Among the four. Because
13 these four people were acting together.

14 CHIEF JUDGE LIPPMAN: Yeah, yeah. Among
15 the - - -

16 MR. RIVELLESE: Yes.

17 CHIEF JUDGE LIPPMAN: - - - the four? And
18 what does the - - - whatever the other three do, how
19 does that relate to the - - - the defendant?

20 MR. RIVELLESE: Well - - -

21 CHIEF JUDGE LIPPMAN: Can you infer - - -
22 impute any of that conduct to the defendant?

23 MR. RIVELLESE: Yes, to the extent they
24 were acting together. But the thing that was the
25 most germane here, and the thing that really we

1 should focus on - - -

2 CHIEF JUDGE LIPPMAN: Yeah.

3 MR. RIVELLESE: - - - is the disobeying of
4 the lawful order. We have - - -

5 CHIEF JUDGE LIPPMAN: Lawful order to move
6 on?

7 MR. RIVELLESE: Exactly. We have all four
8 defendants - - - and three of them are no - - -

9 CHIEF JUDGE LIPPMAN: What did this guy do
10 - - - the particular - - - the defendant do, that
11 warranted the order to move on? If we're not
12 imputing the others' conduct, what did he do?

13 MR. RIVELLESE: The elements are that if
14 he's congregated in a public place - - -

15 CHIEF JUDGE LIPPMAN: No, no, what did he
16 do specifically?

17 MR. RIVELLESE: Congregated in a public
18 place, just like the element of the statute says.

19 CHIEF JUDGE LIPPMAN: Did he - - - was he
20 blocking the door? What did he do?

21 MR. RIVELLESE: He was among the group of
22 four, one of whom was blocking the door.

23 CHIEF JUDGE LIPPMAN: So - - - so you're
24 imputing that conduct to him?

25 MR. RIVELLESE: Yes, in the sense that he

1 was working together with them.

2 JUDGE ABDUS-SALAAM: Well, if - - - if this
3 is a Friday afternoon, and nobody's on the street,
4 and it's just these people in front of the store,
5 what are they exactly doing?

6 MR. RIVELLESE: Well, it's - - - one of
7 them was blocking - - - this is a factual finding - -
8 - one of them was blocking the door partially.

9 JUDGE ABDUS-SALAAM: Partially.

10 MR. RIVELLESE: And they were known gang
11 members. They were known even to the defendant in
12 his own testimony as gang members. So there's really
13 no issue that everybody involved in this knew that
14 they were gang members. We don't have to argue the
15 defendant was, although there was some evidence of
16 that as well, but that wasn't the point. The point
17 was that there were several gang members congregated
18 on the corner - - - on the corner, in front of the
19 store, one of whom was actually blocking the door a
20 little bit.

21 JUDGE SMITH: Are - - - are you saying that
22 gang mem - - - people who are known or believed by
23 the police to be gang members don't have the same
24 rights as everyone else to stand on the street?

25 MR. RIVELLESE: They absolutely do. But

1 not to block the door. And then - - -

2 JUDGE SMITH: Well, you and I don't have
3 the right to block the door either?

4 MR. RIVELLESE: Right. In fact, the lawyer
5 in that - - -

6 CHIEF JUDGE LIPPMAN: If I'm - - - if I'm
7 standing in front of the door and I have no gang
8 affiliation, and I'm just standing there, and someone
9 has to walk a little bit around me, I'm partially
10 blocking the door, am I subject to - - - to being
11 arrested if I don't move on?

12 MR. RIVELLESE: Not at all. And that's the
13 - - - the - - - exactly what happened - - -

14 CHIEF JUDGE LIPPMAN: So what's the
15 difference here? Because - - -

16 JUDGE GRAFFEO: How are you meeting the
17 public harm element?

18 MR. RIVELLESE: Well - - -

19 JUDGE GRAFFEO: I'm - - - I'm missing - - -

20 MR. RIVELLESE: Because - - -

21 JUDGE GRAFFEO: It sounds extremely thin.

22 MR. RIVELLESE: May I answer first - - -

23 JUDGE GRAFFEO: Yes, I'm sorry.

24 MR. RIVELLESE: - - - because I think it
25 might answer both, but - - -

1 CHIEF JUDGE LIPPMAN: Go ahead.

2 MR. RIVELLESE: Because you're not arrested
3 for blocking the door. You're arrested because when
4 you're blocking the door, and a police officer says
5 move along, you don't. So - - - so that's the real
6 gravamen here.

7 CHIEF JUDGE LIPPMAN: So what about me?
8 Let's say he said it to me?

9 MR. RIVELLESE: If you're blocking the - -
10 -

11 CHIEF JUDGE LIPPMAN: Assume I'm not a gang
12 member.

13 MR. RIVELLESE: Yes. And in fact, you're a
14 little bit more comparable to the lawyer in the old
15 Galpern case that's been cited again, you know, since
16 - - - it's a very old case. But, it was the lawyer
17 who was told to move along and said I don't have to
18 and was arrested for disobeying that order. It
19 wasn't for having been there in the first place, it
20 was for disobeying the order to move.

21 Because the police are not only responding
22 to crimes and offenses, they're also just maintaining
23 public order.

24 JUDGE SMITH: But they have to - - - he has
25 to disobey the order to move with the intent to cause

1 public inconvenience, annoyance, and alarm. What
2 proves - - - what proves that Mr. Johnson had that
3 intent?

4 MR. RIVELLESE: Well, it's interesting. It
5 doesn't have to be proven. It has to be shown that
6 the police had reason to believe that he disregarded
7 - - -

8 JUDGE SMITH: What is the probable cause to
9 believe that his intention was to cause public
10 inconvenience, annoyance, or alarm.

11 MR. RIVELLESE: Or that he was reckless
12 about it. And the - - -

13 CHIEF JUDGE LIPPMAN: He was reckless about
14 it? Was that your answer?

15 MR. RIVELLESE: Yes, because the intent
16 does not have to be that he intends to cause public
17 inconvenience, it has to be that he either intends or
18 - - -

19 JUDGE SMITH: Or he recklessly created a -
20 - -

21 MR. RIVELLESE: - - - is reckless.

22 JUDGE SMITH: - - - risk of public - - -
23 okay.

24 MR. RIVELLESE: Right. So - - -

25 JUDGE SMITH: What - - - what proves that?

1 MR. RIVELLESE: Well, the fact that he's
2 congregated in a place with gang members - - - that's
3 relevant - - - it's not the only thing that matters -
4 - - with gang members, and that when the police tell
5 them to move, five times - - -

6 CHIEF JUDGE LIPPMAN: Why is that reckless?
7 Because it's the five times?

8 MR. RIVELLESE: Well, the five - - -
9 because they're continuing telling them to move - - -

10 CHIEF JUDGE LIPPMAN: If it's one time it's
11 not reckless, right?

12 MR. RIVELLESE: That would be factually a
13 better case for the defense - - -

14 JUDGE RIVERA: What - - -

15 MR. RIVELLESE: - - - I don't know what the
16 conclusion - - -

17 JUDGE RIVERA: What's the relevance - - -

18 MR. RIVELLESE: - - - would be.

19 JUDGE RIVERA: - - - of the gang
20 affiliations of the others to his recklessness or
21 risk of creating - - - I don't understand that.

22 MR. RIVELLESE: Because if they're all
23 congregating together - - -

24 JUDGE RIVERA: Um-hum.

25 MR. RIVELLESE: - - - in front of a place

1 of business, where the owner has a right to expect
2 people to come in and out, and the people may be
3 intimidated by the gang members that are there, who
4 the police knew, and the defendant knew were gang
5 members, even assuming defendant's not, he's there
6 with the gang members - - -

7 JUDGE RIVERA: And a few of them are his
8 friends?

9 MR. RIVELLESE: And they're his friends.
10 And - - -

11 JUDGE RIVERA: He's talking to them?

12 MR. RIVELLESE: And there was evidence that
13 the gang members would only associate with each other
14 in that area as well, which the court credited. But
15 even assuming the defendant's not, he's with the gang
16 members; that could be an intimidated presence that
17 can block people from coming into the store, dissuade
18 them, or intimidate them from coming into the store -
19 - -

20 JUDGE ABDUS-SALAAM: Do we have to know,
21 counsel, whether the passersby know whether these
22 people were gang members?

23 MR. RIVELLESE: Well, you don't, because -
24 - -

25 JUDGE ABDUS-SALAAM: Is that - - -

1 MR. SINAIKO: - - - it's just the risk.
2 It's the risk of public harm.

3 But even if you look at the defendant's
4 testimony, he said that everyone knew that there were
5 a lot of gang members in that development right there
6 by that corner. So it wasn't any reason to think
7 that people wouldn't know that they were gang
8 members.

9 The officers also knew. They knew them
10 intimately. Three of them had been arrested before.

11 JUDGE SMITH: Isn't it - - - isn't it
12 necessary to your case - - - I mean, you say that he
13 disobeyed the order. But he had - - - but the first
14 time the order was given, did he have - - - he had an
15 obligation to obey it. If he didn't, then - - - then
16 disobeying it can't be a problem, right?

17 MR. RIVELLESE: Well, and it shows how
18 reasonable the police were, because they kept - - -
19 they gave them a chance - - -

20 JUDGE SMITH: Well, no, no, no, no. What's
21 the - - -

22 MR. RIVELLESE: Okay.

23 JUDGE SMITH: - - - answer to the question?
24 Did he - - - did - - - is it essentially your case
25 that you show he had an obligation to move when they

1 told - - - the first time they told him to move?

2 MR. RIVELLESE: Well, he did. But he added
3 more to it by - - -

4 JUDGE SMITH: Okay.

5 MR. RIVELLESE: - - - not - - - yes.

6 JUDGE SMITH: And you say he did have that
7 obligation. And if he didn't, you lose the case,
8 don't you?

9 MR. RIVELLESE: If he didn't move the first
10 time?

11 JUDGE SMITH: Isn't that what - - - yeah -
12 - - no. If he didn't have any obligation to move?
13 If he has - - - if he has a perfect right to stand
14 there and say I'm sorry, officer, I like it where I
15 am, I'm not moving; if he has the right to do that,
16 then he hasn't disobeyed a lawful order.

17 MR. RIVELLESE: Oh, that's correct. If the
18 order's unlawful - - - I think you're saying - - -
19 the same as saying the order was unlawful. If the or
20 - - - if the order was not lawful to move along and
21 he disobeys it - - -

22 JUDGE SMITH: Okay, and he - - - so I
23 guess, doesn't the question then become, when a guy
24 of bad reputation stands in the middle of a street,
25 is it - - - and an officer tell him to move, does he

1 have to move?

2 MR. RIVELLESE: Well, the middle of the
3 street might be too general.

4 JUDGE SMITH: Okay, the middle of a
5 sidewalk?

6 MR. RIVELLESE: What about middle of the
7 sidewalk in front of a store where people are
8 possibly trying to get in and out and might be
9 intimidated from - - -

10 JUDGE SMITH: Okay, okay - - -

11 MR. RIVELLESE: - - - going? It's a little
12 more detailed.

13 JUDGE SMITH: - - - and the answer - - -
14 and the answer is yes. But - - - but if you or I
15 were standing there, do we have to move too?

16 MR. RIVELLESE: Like the attorney in
17 Galpern, perhaps if we're partly blocking the door
18 and the officers ask us to move along, it - - - it's
19 going to be factual in every case.

20 JUDGE SMITH: Or I'm - - - but - - - yeah.
21 I know it's factual, but let's take exactly these
22 facts. I'm standing with three of my friends, Judges
23 Rivera, Graffeo and Lippman near - - - near a store.
24 Judge - - - I'll blame it on Judge Rivera. She's
25 partially blocking the door.

1 MR. RIVELLESE: Okay.

2 JUDGE SMITH: All I'm - - - all I'm doing
3 is standing there. An officer comes up and says move
4 along. I say no thank you, officer, I like it here.
5 Can - - - have I disobeyed a lawful order?

6 MR. RIVELLESE: If you - - - if you can say
7 that you were congregating - - - assume that you were
8 all talking to each other - - -

9 JUDGE SMITH: The only - - - what I'm - - -
10 the only difference between the case I put and this
11 case is you've got four judges instead of four gang
12 members. Does that make a difference?

13 MR. RIVELLESE: It might make a difference
14 as to whether the officers had probable cause that
15 you were being reckless about public inconvenience,
16 annoyance, or alarm.

17 JUDGE PIGOTT: Well, that's the point here,
18 isn't it? It's probable cause, it's not whether
19 they're guilty or not?

20 MR. RIVELLESE: Right.

21 JUDGE PIGOTT: In other words, once you
22 arrest them, and Judge Smith goes to trial, and
23 everyone sees his erudition and his demeanor, then he
24 walks out of the court being found not guilty. But
25 that doesn't address the issue of whether there was

1 probable cause to arrest him in the first place.

2 MR. RIVELLESE: Right. Which is a lesser
3 standard. The police don't need quite as much in
4 order to have probable cause as they do for beyond a
5 reasonable doubt.

6 CHIEF JUDGE LIPPMAN: But - - - but you're
7 inferring a certain class of people, gang members in
8 this case, had certain conduct or certain intentions
9 as opposed to another class of people, judges, who
10 maybe we're not inferring those bad intentions.

11 MR. RIVELLESE: Possibly - - - possibly
12 yes. But - - - but it's not directly that being the
13 gang member is problem. It's that the police,
14 knowing that they're gang members, have reason to
15 interpret their conduct - - -

16 CHIEF JUDGE LIPPMAN: No, but I understand
17 that. That's just, you know, common sense that there
18 are troubles caused by gangs or sometimes act out.
19 But in its most basic form, it's kind of a - - - some
20 broad information about gangs, and you know, those
21 guys have to move where some of the broader
22 information about judges maybe isn't so damning, and
23 they don't really have to move.

24 So how do you - - - how do you distinguish
25 between - - - what's the - - - the distinction that

1 allows you to tell this defendant or these gang
2 members to move and that really, I gather from your
3 answers, maybe you think the judges really don't have
4 to?

5 MR. RIVELLESE: No, it's - - - they do have
6 to move if they're blocking the door, and if the
7 police think that that's possibly going to create
8 public inconvenience.

9 CHIEF JUDGE LIPPMAN: Even if Judge Smith
10 lives above the - - - the store fifty feet from the
11 entrance - - -

12 MR. RIVELLESE: Yes.

13 CHIEF JUDGE LIPPMAN: - - - to the - - - to
14 that store, and he's just standing there minding his
15 own business, and he's got to move too, and he's a
16 perfectly, apparently, respectable citizen?

17 MR. RIVELLESE: He doesn't have to move too
18 far. The police have some policing ability beyond
19 just responding to offenses. They can direct
20 traffic. Nobody's committing an offense when they go
21 through a green light, but if the police says stop,
22 you have to stop at this light, you've got to stop.
23 And if you don't, you're disobeying. So it's not
24 always about a crime. This is just congestion. It's
25 - - -

1 JUDGE SMITH: But, I mean - - - look, most
2 normal people, if a police officer says, would you
3 please move from where you're standing you move. I
4 mean, nothing - - - but - - - but don't we - - -
5 isn't it important to preserve the idea that you have
6 a right to say no, thank you, officer, I like it
7 here, and if you're not doing anything wrong, you can
8 do that?

9 MR. RIVELLESE: Probably, but not in front
10 of a store where the business can't go on normally.

11 And it doesn't have to be coming to
12 fruition that there is a pro - - - you don't have to
13 show the customers said I won't go in there now.
14 It's only the risk. So if you've got - - -

15 CHIEF JUDGE LIPPMAN: Yeah, but your - - -
16 but your contention about the store not being able to
17 function, in this case the facts - - - I think
18 someone used the word "thin" before - - - really not
19 that readily apparent what was going on here - - -

20 MR. RIVELLESE: Because - - -

21 CHIEF JUDGE LIPPMAN: - - - some kind of
22 great threat to the public - - -

23 MR. RIVELLESE: Because - - -

24 CHIEF JUDGE LIPPMAN: - - - was there?

25 MR. RIVELLESE: Because that wasn't the

1 litigation below. The litigation below was the
2 defense presenting a case that the cop was lying,
3 testifying and saying I didn't block the door and
4 nobody blocked the door either.

5 JUDGE GRAFFEO: Well - - -

6 MR. RIVELLESE: They were telling us
7 nothing - - -

8 JUDGE GRAFFEO: - - - to follow up on that.
9 I'm looking at the Appellate Division decision.
10 There's no reference here at all to blocking the
11 door.

12 MR. RIVELLESE: In - - -

13 JUDGE GRAFFEO: So - - -

14 MR. RIVELLESE: - - - well, they - - - they
15 affirmed the findings - - -

16 JUDGE GRAFFEO: - - - you - - - you keep
17 mentioning not only that they were congregating - - -
18 they only talk about congregating and the fact that
19 they're gang members.

20 MR. RIVELLESE: Well, the place - - -

21 JUDGE GRAFFEO: So I take it, if we were to
22 agree with you, you want us to say something
23 different than the grounds that the Appellate
24 Division did?

25 MR. RIVELLESE: Well, I think the Appellate

1 Division didn't say every single word that they
2 could've said, but they could - - - because they
3 credited the facts that the - - -

4 CHIEF JUDGE LIPPMAN: Okay, but - - -

5 MR. RIVELLESE: - - - trial court - - -

6 CHIEF JUDGE LIPPMAN: - - - gang - - - but
7 the point is, gang membership is not alone enough?

8 MR. RIVELLESE: Not alone, certainly not.
9 Certainly not.

10 CHIEF JUDGE LIPPMAN: Okay. Okay, thanks,
11 counsel.

12 MR. RIVELLESE: Thank you.

13 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

14 MR. SINAIKO: Thank you, Your Honors. Just
15 - - - just to be clear about it, you know, the record
16 here - - - to call the record here "thin" is actually
17 quite charitable.

18 JUDGE PIGOTT: Well, what - - - what do you
19 think of Mr. Rivellese's suggestion of traffic cop
20 telling you to stop at a green light?

21 MR. SINAIKO: I think the ability of a - -
22 - the ability of a police officer to direct traffic,
23 that is, to tell somebody to stop briefly at a green
24 light while something has happened - - - while
25 presumably something else is happening on the street,

1 is very different from approaching four people in
2 their neighborhood and telling them you can't stand
3 on this corner, you have to leave.

4 So I would say - - - I would say that
5 that's - - - you know, that's sort of interesting,
6 but not necessarily relevant.

7 JUDGE PIGOTT: You're just saying it's not
8 - - - it doesn't match the facts in this case?

9 MR. SINAIKO: It doesn't match the facts of
10 this case at all.

11 JUDGE PIGOTT: But if they said that - - -
12 because you're blocking the door and you had to move?

13 MR. SINAIKO: Well - - -

14 JUDGE PIGOTT: Aren't we into the same
15 situation where one - - - one party says I have a
16 right to stand here and he doesn't have any right to
17 tell me, and the other one's saying, yes I do, under
18 these circumstances, for the reasons that I stated?

19 MR. SINAIKO: Well - - -

20 JUDGE PIGOTT: Why should we get into a
21 who-struck-John on that?

22 MR. SINAIKO: I think - - - I think it
23 comes back a little bit to the record in this case,
24 which, as I said, is extraordinarily thin. There's
25 no record that these four men, before or after they

1 were ordered - - - there's no record of what they
2 looked like.

3 JUDGE PIGOTT: So they would have been
4 acquitted. But the question is whether there was - -
5 - whether the police were acting reasonably in
6 telling them to move, and whether then - - - when
7 they refused, whether they were refusing a reasonable
8 request of an officer? I - - -

9 MR. SINAIKO: Well - - -

10 JUDGE PIGOTT: - - - maybe they're
11 innocent. It happens.

12 MR. SINAIKO: There - - - there are - - -
13 there are cases - - - there certainly are cases in
14 which the refusal of what is unquestionably a lawful
15 order of a police officer is not enough to support a
16 disorderly conduct - - - a disorderly conduct charge,
17 because of the absence of public harm. And Jones is
18 the perfect example.

19 At 2 o'clock in the morning, the pedestrian
20 is standing - - - or the person is standing in the
21 middle of the sidewalk. The officer - - - the
22 officer, in that case, did say move, and this court
23 said not only - - - not only was that not enough, but
24 it wasn't enough to esta - - - you know, it was such
25 that the information in that case didn't establish

1 probable cause to believe that the offense had
2 occurred.

3 So the mere fact of - - -

4 JUDGE RIVERA: So it's a case about your
5 defendant - - - if - - - if the officer had said move
6 - - - your client is not blocking the door, someone
7 else is - - - let's just assume for the moment they
8 are - - - the others move away, but your client does
9 not, would they have probable cause to arrest him?

10 MR. SINAIKO: No, I don't think they do
11 have probable cause to arrest. I think the - - - I
12 think the order to - - - I think the order to
13 disperse has to have been a lawful order in the first
14 instance.

15 JUDGE RIVERA: No, no. But I'm saying the
16 others do move, but your client stays?

17 MR. SINAIKO: No, that's - - - that's
18 right. Because in that - - - certainly, in that
19 case, the disobedience of the order couldn't possibly
20 be said to have been with intent to cause.

21 JUDGE SMITH: Well, they - - - they did
22 disperse. Just he dispersed by staying in the same
23 place.

24 MR. SINAIKO: Well, the - - - whatever - -
25 - or alternatively - - - or alternatively, Judge

1 Smith, the - - - the disobedience of the order to
2 disperse lacked the intent to cause public
3 inconvenience, annoyance, or alarm, which, by the
4 way, was the exact - - - the exact situation in
5 People v. Smith, another case that we cited in our
6 papers. There - - -

7 JUDGE RIVERA: I guess I was thinking that
8 if his argument had - - - as I thought the Chief
9 Judge was asking him before - - - is your client - -
10 - the conduct of the others being imputed to your
11 client to the extent that someone else, not your
12 client, is the one who's - - - let's just say for the
13 moment - - - blocking the door, if then the person
14 who's blocking the door actually complies, what's the
15 grounds - - - if your client stays - - - to actually
16 arrest him?

17 MR. SINAIKO: I think there is no ground,
18 because again, the disobedience of the order, even if
19 - - - assuming for a moment that the order is lawful,
20 which we don't concede - - - the disobedience of the
21 order lacked the - - - you know, lacked the intent
22 that the public harm element under the statute
23 requires. So there would be no ground for an arrest
24 there.

25 CHIEF JUDGE LIPPMAN: Okay. Thanks. Thank

1 you both.

2 MR. SINAIKO: Thank you, Your Honors.

3 CHIEF JUDGE LIPPMAN: Appreciate it.

4 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Todd Johnson, No. 43 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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