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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 79

RAKEEM DOUGLAS,

Appellant.

20 Eagle Street
Albany, New York
September 14, 2022

Before:

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

Appearances:

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Jaymi D. Castleberry
Official Court Transcriber



1 ACTING CHIEF JUDGE CANNATARO: Our next appeal is
2 Number 79, People v. Rakeem Douglas.

3 MR. STROTHER: Good afternoon, Your Honors.
4 Steven Strother from the Office of the Appellate Defender
5 on behalf of Rakeem Douglas.

6 I'd like to reserve three minutes for rebuttal,
7 if possible.

8 ACTING CHIEF JUDGE CANNATARO: You have three
9 minutes, Mr. Strother.

10 MR. STROTHER: This court should reverse Mr.
11 Douglas' conviction because the inventory search in this
12 case was carried out pursuant to a facially
13 unconstitutional inventory search procedure.

14 JUDGE GARCIA: And that - - - I just want to be
15 clear. That is your claim, it's a facial claim - - -
16 facial unconstitutionality of the guide - - - police
17 guidelines.

18 MR. STROTHER: Of the - - - yes, verbal argument
19 that Section 218-13 is - - - does not satisfy
20 constitutional parameters.

21 ACTING CHIEF JUDGE CANNATARO: And what is - - -

22 JUDGE GARCIA: And I take - - - I'm sorry.

23 ACTING CHIEF JUDGE CANNATARO: It's all right.

24 JUDGE GARCIA: And to just take a line from your
25 reply brief, you said your core claim is that,



1 "Constitutionally sufficient inventory search protocol must
2 create a procedure for securing property during any delays
3 in the inventory process"; is that your core claim?

4 MR. STROTHER: Our core claim - - - yes. But it
5 - - - a quick explanation, in this - - - in People v.
6 Galak, this court held that inventory search procedure has
7 to ensure - - - has to serve the purposes of inventory
8 search and limit discretion. Those purposes are to secure
9 property and prevent against claims of loss or theft. So
10 if the procedure, as this one does, undermines one of those
11 purposes, it's not serving it and therefore it can't
12 justify its search.

13 JUDGE GARCIA: And the deficiency, facial
14 deficiency, in this procedure is it doesn't provide for
15 securing the property during delays in the inventory
16 process?

17 MR. STROTHER: That and also - - - I think it's
18 also important to point out that it provides officers with
19 unfettered discretion to do whatever they want with the
20 property between the time they seize and when they make the
21 voucher.

22 JUDGE GARCIA: It's a variation on that?

23 MR. STROTHER: Yes.

24 JUDGE GARCIA: Thank you.

25 MR. STROTHER: And of course that time limit is -



1 - - is unlimited. It could be - - -

2 JUDGE WILSON: So what is the minimum that you
3 could add to make this procedure valid?

4 MR. STROTHER: I believe the NYPD, because they
5 have - - - it's clear they know how to secure to property,
6 right? They have other provisions that requires different
7 points of time. I think this court would have to hold that
8 a - - - an inventory search procedure must make some
9 provision - - -

10 JUDGE WILSON: No, I'm asking you something
11 different. You get to take a pen to their policy. What -
12 - - what's the minimum you could add for us to be able to
13 say this is okay?

14 MR. STROTHER: I believe it would have to tell
15 officers to either make a contemporaneous list of the
16 property as they seize it, which is pretty standard in some
17 other jurisdictions, or tell them to put the property in a
18 secure location, and probably define what that is, while
19 there's going to be a wait before the voucher. This isn't
20 an onerous thing on the police department. They - - - it's
21 very common for them to do stuff like this in other
22 circumstances.

23 JUDGE RIVERA: So it - - - under what - - - this
24 suggestion that you just - - - or your response to Judge
25 Wilson, if they had put everything in the bag, not made a



1 list at that time, perhaps not even other than the gun,
2 really focus specifically on what's there, and then brought
3 that bag into the precinct? Did they immediately need to
4 do something? Or could they have, let's just say, put it
5 in a secure location and come to it, for the moment we'll
6 just say, an hour later. Let's make it easy.

7 MR. STROTHER: If the - - -

8 JUDGE RIVERA: Would that have been okay?

9 MR. STROTHER: If the protocol says put it in a
10 secure location and say, provides some examples of what
11 those are and it goes there - - -

12 JUDGE RIVERA: Yeah.

13 MR. STROTHER: - - - and that is a place where
14 the property is safe, that's fine. That's just - - -

15 JUDGE RIVERA: How long - - - how long could it
16 be in that secure location before they actually - - - under
17 the hypothetical I gave - - - before they actually make a
18 list, voucher, whatever they're going to do to now go
19 through what they took out of that car and have some kind
20 of inventory done?

21 MR. STROTHER: As long as the property is secure,
22 in a secure - - - like, nothing's going to happen to it - -
23 -

24 JUDGE RIVERA: Yeah.

25 MR. STROTHER: I mean, you know, they could take



1 the time they need to take. And I don't - - - I wouldn't
2 want to - - -

3 JUDGE TROUTMAN: So is your complaint here that
4 it's the combination of a lack of securing and the
5 unlimited time together?

6 MR. STROTHER: Yeah, because in those
7 circumstances - - - this gets at what the Supreme Court was
8 trying to get at in Illinois v. Lafayette - - - is that in
9 the absence of that - - - when that big long time period is
10 there and there's no provision for doing anything with the
11 property, that's how property gets lost, stolen, or
12 contaminated.

13 JUDGE GARCIA: Let's say there's a list. And
14 it's says, you know, I have this shirt, it's striped; I
15 have this pair of pants, they're khakis, I label the size;
16 and I have this, you know, pair of shoes, size 9, the type;
17 and I have a gun. And that's my list, but I don't - - -
18 well, I probably would secure the gun - - - but let's say
19 that I have this list and I don't secure it. But I have
20 this list and here's the property. Why isn't that an
21 inventory?

22 MR. STROTHER: You mean that you have that list
23 at the time you seize it, you make it at that time?

24 JUDGE GARCIA: Well, I make it within a - - - you
25 know, as I'm doing it and a couple hours go by but I make



1 this list up and it's here are the four things I took out
2 of the car, and they're listed on here, and I give three of
3 them back and I keep one.

4 MR. STROTHER: So --

5 JUDGE GARCIA: And I have a record I gave you
6 three back and I kept one. Why isn't that an inventory
7 search?

8 MR. STROTHER: The reason why that - - - because
9 if a protocol - - - if a procedure doesn't tell you to do
10 anything with the property during that time that you're
11 waiting, this is where things can happen to property. The
12 whole point of it - - - that it provides the officers with
13 the discretion to sort of do what they want, right? They
14 could, as in this case, throw it in a garbage can. They
15 could toss it under a desk. They could leave it in a
16 corner. If it's in a garbage bag, a janitor could think
17 it's trash and throw it away. Someone could plant evidence
18 inside of it. Someone could steal something from it. And
19 if there's no list in front of it that they made when they
20 did the search, they're not going to know that the property
21 changed during that time.

22 JUDGE GARCIA: What our test seems to be from
23 Galak is, is the procedure so unrelated to the underlying
24 justification for an inventory search, right? Those are
25 the factors they were looking at, time, what they were



1 doing with it. But is the procedure as written here - - -
2 as written because it's a facial challenge - - - is the
3 procedure as written here so unrelated to the underlying
4 purpose of an inventory search as to render it - - - any
5 inventory search done under that procedure invalid?

6 MR. STROTHER: I believe so, yes, because - - -
7 because inventory searches are not investigative searches.
8 The entire purpose of them is to make sure property is
9 secured. If there's no time limit on when they have to
10 actually make a voucher, and there's completely unfettered
11 discretion - - - which, of course, is the thing they're
12 support to prevent - - - to officers to just do what they
13 want with the property in the interim, what that looks like
14 then is, find the incriminating evidence; do something with
15 that; but the rest of it can just sit there and whatever
16 happens to it, happens to it; and I'll get around to the
17 list at some point. At that point it doesn't really look
18 like that they're actually trying to secure property. It
19 looks like - - -

20 JUDGE RIVERA: Looks like, okay. So when you
21 responded earlier that as long as it's secured, they can
22 take as long as they need to, what - - - what would be the
23 outer limits of that?

24 MR. STROTHER: I mean, I have to be honest - - -

25 JUDGE RIVERA: I mean, there'll always be



1 competing demands on an officer's time. We understand
2 that.

3 MR. STROTHER: So I don't think I could give an
4 exact number, right? And I don't think this court actually
5 has to either. I think - - - I will say, you know, the
6 eleven hours in this case is very long, right? And that's
7 much longer than this court authorized in Galak. And I've
8 actually not found a case where eleven hours is justified
9 solely based on ordinary arrest stuff that this officer is
10 doing. There's nothing - - -

11 JUDGE RIVERA: So it's supposed to be a
12 reasonable time?

13 MR. STROTHER: What's that?

14 JUDGE RIVERA: I said it's supposed to be a
15 reasonable time.

16 MR. STROTHER: It's supposed to be a reasonable
17 time. But under the Supreme Court's case law, they say
18 with - - - that's - - - it's within a reasonable amount of
19 time.

20 JUDGE TROUTMAN: Would saying "as soon as
21 practicable" if they can then explain at hearing what they
22 were doing during that time satisfy it?

23 MR. STROTHER: It could if - - - I want to say
24 though, I'm not a hundred percent comfortable with
25 practicable including this situation because in this - - -



1 every single arresting officer has to do this stuff that
2 Officer Borgos had to do in this case: fill out paperwork,
3 complaint reports and make phone calls. If that's the
4 justification, there will always be a reason to have a long
5 delay.

6 ACTING CHIEF JUDGE CANNATARO: But this officer
7 had to call in a special unit to inspect the gun, didn't
8 he?

9 MR. STROTHER: Yes, but he didn't finish the
10 inventory until seven hours after that was done wither.

11 JUDGE SINGAS: Well, suppose it's a small
12 department and then there's a shooting and five cars go out
13 but you only have five cars in the department and they
14 don't get to it until ten hours later?

15 MR. STROTHER: I think, legally, that's a
16 separate scenario, there's a emergency situation where
17 courts have looked at this differently if there's an
18 emergency, of course, officers can respond to the emergency
19 first. We're talking about delay as a result of ordinary
20 police work - - -

21 JUDGE SINGAS: But aren't - - -

22 MR. STROTHER: - - - which is what - - -

23 JUDGE SINGAS: But then aren't we delving into
24 micromanagement that we said we don't want to do?

25 MR. STROTHER: I don't think so. I mean, courts



1 make - - - courts have numerous cases where the police are
2 allowed to do certain things because of emergencies but
3 they're not in other circumstances. The distinction
4 between emergencies and ordinary police work is pretty
5 easily understandable. One is a shot - - - a shooting.
6 The other one is "I got to fill out a complaint report for
7 an arrest I just made". That's not an emergency, that's
8 just ordinary arrest work.

9 But the point being, as soon as - - -

10 JUDGE RIVERA: What if they've got to fill out
11 the paperwork for a mass shooting?

12 MR. STROTHER: If you got to fill out paperwork
13 for a mass shooting then you need to - - -

14 JUDGE RIVERA: But that's different from - - -
15 not to, of course, disparage the loss of life, I'm not
16 suggesting that in any way - - - but in terms of the volume
17 of the work that an officer might have to go through and
18 the timing, you would agree yes, it would be different if
19 it's mass shooting perhaps with many complexities attached
20 to that? Maybe the shooter is still out there and one
21 person dead, perhaps you've got the shooter?

22 MR. STROTHER: I think if this court - - - if you
23 create a flexible standard that says as soon as practicable
24 and you're allowed to take into those circumstances, those
25 cases could be decided. However, the property is - - - is



1 if it's actually secured and not going to be lost,
2 contaminated, or stolen, that serves the purpose of the
3 inventory search. That's what's - - -

4 JUDGE WILSON: That's how - - -

5 MR. STROTHER: - - - missing from the protocol.

6 JUDGE WILSON: That's how I took your earlier
7 answer, is if we imagine - - - this wouldn't happen - - -
8 but if we imagined that the department had individual
9 locked safes for each inventory search; and it was
10 procedure to immediately, you know, take the property and
11 put it there; and only one officer, you know, or two had
12 the ability to get that; and you had to log it; and imagine
13 whatever safety procedures you want, you wouldn't care so
14 much about time?

15 MR. STROTHER: No, because I mean, you think
16 about it like - - - we look at Section 218-01 which the
17 prosecution offered in this case. That has nothing to do
18 with what happens to property before it's vouchered, which
19 is what we - - - what we're claiming. But they make a
20 provision for after it's vouchered, right? It goes to a
21 desk clerk, they hold it there until someone comes and
22 picks it up. They have ways of doing this. They just
23 don't make anyone do it for the - - -

24 JUDGE RIVERA: Like a - - - put in a locker and
25 leave it for a week?



1 MR. STROTHER: As long as it's locked and nobody
2 can get into it - - -

3 JUDGE RIVERA: Oh, right.

4 MR. STROTHER: - - - and it's safe? That's fine
5 because the whole point is it's not supposed to be lost,
6 stolen, or - - -

7 JUDGE TROUTMAN: So is it akin to, like, chain of
8 custody in a drug case? You put it in - - - you can - - -
9 so you know it's secured because you can establish where
10 it's been from the time it was picked up until the time
11 it's retrieved - - -

12 MR. STROTHER: Yes. That - - -

13 JUDGE TROUTMAN: - - - from the secure location?

14 MR. STROTHER: That would be a good example of
15 it. And you know, the reason that you need this stuff is
16 because if a protocol's not doing that, if it's not
17 actually securing property for hours and hours and hours -
18 - - I mean, that's the whole point of an inventory search.
19 That's - - -

20 JUDGE RIVERA: But it does strike me as at odds
21 with the Supreme Court. The Supreme Court has said it's
22 got to be within a reasonable time, no you can't keep that
23 thing for five, six, seven, eight days just because.

24 MR. STROTHER: Oh, I mean, I think - - - I think
25 that there's got to be an outer limit to which it's



1 unreasonable, of course.

2 JUDGE RIVERA: That was my - - -

3 MR. STROTHER: But I - - -

4 JUDGE RIVERA: I was asking that.

5 MR. STROTHER: I just don't know if I could - - -
6 I don't know if I could tell you when that would be. I
7 mean, I think, you know, you would have to go through - - -

8 JUDGE RIVERA: Well, I think you have suggested
9 it's a reasonable time, assuming no exigent circumstances.

10 MR. STROTHER: Yes. And they have - - -

11 JUDGE RIVERA: And a reasonable time, if I'm
12 understanding you correctly, excludes time on routine,
13 administrative matters.

14 MR. STROTHER: Yeah, I don't think you can spend,
15 you know, a half-day or a day or two days saying well, I
16 have to do every single other thing.

17 JUDGE RIVERA: But see, this is the conversation
18 I think some of the judges are concerned about, right?
19 That - - - that this is about what the NYPD might think is
20 within their discretion about what needs to be done in a
21 particular priority. And if it's cured - - -

22 MR. STROTHER: And that's why - - -

23 JUDGE RIVERA: - - - going back to your point,
24 then what's the harm?

25 MR. STROTHER: And that's why I've suggested to



1 the court that if a protocol makes a provision for
2 security, you don't really have to worry about the time too
3 much beyond, say - - - you know, it has to be within a
4 reasonable time, as the Supreme Court said. You could
5 adjudicate that case-by-case as long as the property is
6 secure because then - - -

7 ACTING CHIEF JUDGE CANNATARO: Thank you,
8 Counsel.

9 MR. STROTHER: - - - nothing's going to happen.

10 JUDGE SINGAS: Can I just ask one more question?

11 ACTING CHIEF JUDGE CANNATARO: Sure.

12 JUDGE SINGAS: But what about vouchering? You
13 mentioned vouchering. Why isn't vouchering securing?

14 MR. STROTHER: Because nothing - - - because
15 there can be, right now, an indefinite period of time
16 before it's vouchered.

17 JUDGE SINGAS: Okay. So what is it, the time?
18 Or is it the security? I guess that's what we need to
19 know.

20 MR. STROTHER: It's a combination of the two. If
21 it - - - without security, the time becomes a problem,
22 right? Because then the property - - - at that point, the
23 police have - - - they can do whatever they want. They
24 could leave it sitting anywhere. It could be lost. It
25 could be stolen. If they vouchered immediately - - - and



1 of course, then there are other parts of the patrol guide
2 that take over and provide for security after it's
3 vouchered.

4 But until it's vouchered, there's nothing in this
5 protocol about what happens to this property. Cops can do
6 whatever they want with it. At that point, that's when
7 things can go wrong. That's when it could get stolen,
8 lost. I mean, we could - - - you know - - - a cop could
9 plant evidence, a janitor could throw it away, someone
10 could accidentally lose something. And we wouldn't know.
11 There'd be no way to know what - - - that that's what
12 happened. That's the opposite of what an inventory per
13 search procedure supposed to make happen. It's supposed to
14 secure the property.

15 ACTING CHIEF JUDGE CANNATARO: Thank you.

16 MR. STROTHER: Yeah.

17 MR. KRESS: Good afternoon. And may it please
18 the court, Stephen Kress on behalf of the People.

19 The first thing I want to address is
20 preservation. It's a threshold, jurisdictional question.
21 The defendant's facial challenge to the NYPD's inventory
22 search protocol is just not preserved. He simply never
23 made this argument below.

24 In fact, he actually made it - - - he made a
25 facial challenge, but on different grounds. And I'll - - -



1 I'll direct the court to page 133 of the appendix where he
2 says the NYPD's inventory search protocol is facially
3 unconstitutional because it gives police officers too much
4 discretion in how they actually conduct the search. He
5 just never raised this argument.

6 And as my adversary told the court in his opening
7 argument, the lynchpin of his claim is, I think, this idea
8 that the policy doesn't speak to securing property which I
9 don't necessarily agree with. But that is - - - that's the
10 crux of his claim. And that's - - -

11 JUDGE RIVERA: But - - - but his point - - - if
12 I'm understanding, and he'll correct me if I'm wrong when
13 he's gets up on rebuttal - - - is that if you don't give
14 guidance or say specifically it has to be secured and then
15 give guidance on how to - - - how one would do that, that
16 leaves it to the unfettered discretion of the officer? Why
17 isn't that then preserved?

18 MR. KRESS: I'm sorry. What was the last part of
19 your question?

20 JUDGE RIVERA: Why isn't that then preserved?

21 MR. KRESS: Are you - - - his - - - I don't think
22 it's enough - - -

23 JUDGE RIVERA: I mean, the point is that it's not
24 giving guidance and can lead to the discretion of the
25 officer, right?



1 MR. KRESS: I just don't think it - - - that it's
2 not specifying enough - - - it's - - - excuse me - - - it's
3 not specific enough to say well this policy gives police
4 officers too much discretion. In what way does it give it
5 too - - - does the policy give them too much discretion.
6 He's saying it's because it allows them to do whatever they
7 want with the property. Which again, I don't agree with
8 that. But he actually made a different argument, which was
9 it gives them too much discretion in how they actually are
10 physically searching the car, and not what they're doing
11 with the property after it's been recovered. So I just
12 don't think it's been preserved.

13 And I know on reply, defense counsel said well,
14 you know, I would have raised this argument but the court
15 cut me off. But I think the records undercuts that claim.
16 Again, if you look at page 133 of the transcript, Counsel
17 was undeterred by the court's comment. I mean, yes, the
18 court did say we're not going to have a referendum on the
19 constitutionality of the patrol guide. But Counsel then
20 raised a facial challenge to it. So I don't think it's a
21 fair reading of the record to say that the court cut him
22 off.

23 And in any event, I would also cite to People v.
24 Keschner, which is 25 NY3d 704. And in that case, this
25 court applied the preservation requirement - - -



1 JUDGE RIVERA: So let me ask you this, if the
2 court had cut him off and Counsel then didn't say anything
3 at all, preserved?

4 MR. KRESS: No, Your Honor. That's Keschner.
5 And so in that case, defense counsel had made an argument
6 and the court said okay that's fine. And then counsel said
7 "secondly" and the court cut him off and said, I think,
8 exactly, "No, we heard this argument". And defense counsel
9 then didn't go on to say anything else about it. And this
10 court said no, it's unpreserved. It wasn't enough in that
11 case because you just - - - you never raised the issue.

12 And the court expressly distinguished Resek,
13 which is a case that defendant cites in his brief, where,
14 you know, the defendant had - - - had raised a claim over
15 and over again. And eventually the court said enough is
16 enough, I don't want to hear this anymore. And - - - and
17 that - - - in that case, the court said well, it was
18 preserved, you did raise it.

19 JUDGE RIVERA: Uh-huh.

20 MR. KRESS: And they made it - - - and the court
21 made a reference to, you know, you don't have to keep
22 trying the court's patience here.

23 JUDGE RIVERA: So your position is if a court
24 puts your - - - and it's here, we're not going to have a
25 discussion about the facial constitutionality - - - has - -



1 - has removed from counsel's strategic arguments this one
2 argument, that counsel nevertheless has to say I'm ignoring
3 the court's directive, I'm going to move forward. That's
4 the only way they would preserve it; is that your view?

5 MR. KRESS: Well, they - - - I guess I think - -
6 -

7 JUDGE RIVERA: It - - - and assuming the court
8 doesn't cut them off again.

9 MR. KRESS: Right. Right. Or I guess, the court
10 could - - - it could theoretically ultimately decide the
11 issue, which is, I know, another - - -

12 JUDGE RIVERA: Yeah.

13 MR. KRESS: - - - another argument - - -

14 JUDGE RIVERA: Yes.

15 MR. KRESS: - - - that they raised.

16 JUDGE RIVERA: Yes.

17 MR. KRESS: That could be a potential way.

18 JUDGE RIVERA: Decide the issue without having
19 heard the argument?

20 MR. KRESS: I mean, I think if it had been
21 potentially raised. Like, for example, if - - - if during
22 cross-examination during the suppression hearing if counsel
23 had been teasing out facts to try to set up this argument,
24 I think the court might have been aware okay, well, I think
25 this is where he's going with that. And the court might



1 address it. I think that's happened - - -

2 JUDGE RIVERA: Yeah.

3 MR. KRESS: - - - in other cases.

4 JUDGE RIVERA: Yeah. I mean, it doesn't address
5 when it's the first opportunity to make the argument but -
6 - - I mean, but fair enough. I'm not going to say
7 otherwise to you.

8 It is a bit odd that, in part, the preservation
9 rule exists to allow, right, the court to address the issue
10 and perhaps to avoid an appealable issue. And if the
11 court, the judge themselves says I don't want to hear it,
12 we're not going to have - - - I'm not going to allow that
13 argument to be made, that defendant's - - - has the door
14 closed on him, the appellate door, closed on him, it does
15 seem a bit odd, no?

16 MR. KRESS: I - - - I mean, I don't know if it's
17 - - - if it's odd or not. I mean, I think it's ultimately
18 - - - it's the defendant or the appellant's obligation to
19 create a record that's reviewable for appeal. And so I
20 think whether the court is trying to cut you off - - - I
21 mean, it's ultimately you - - - I think you can say that in
22 response. And say, judge, look I have an obligation to
23 make a record for review on appeal.

24 JUDGE RIVERA: Uh-huh.

25 MR. KRESS: And I'm going to do that. And I



1 understand - - -

2 JUDGE WILSON: But there is a - - -

3 MR. KRESS: - - - that's a challenge.

4 JUDGE WILSON: There is a point at page 139 of
5 the appendix where the colloquy suggest a complaint about
6 the timeliness. And the court responds to that and says I
7 don't think it's unusual for these things to take a lot of
8 time. Does that preserve it?

9 MR. KRESS: I don't think it preserves his whole
10 claim because he's not just challenging the timing of it,
11 as I think defense counsel was pointing out. It's - - -
12 it's really has, sort of, three pillars to his argument.
13 It's - - - and they all turn on the security problem
14 because, I think, he's saying well, if it's unsecured, then
15 you either need a contemporaneous list or you need some
16 sort of, you know, time restriction on it.

17 ACTING CHIEF JUDGE CANNATARO: Is he challenging
18 the timeliness? Again, he can clarify at rebuttal. But
19 what I understood the argument to be is that if you
20 provided for securing of the property, that how much time
21 it takes thereafter to create the list isn't as urgent - -
22 -

23 MR. KRESS: Yes, I - - -

24 ACTING CHIEF JUDGE CANNATARO: - - - in the
25 analysis?



1 MR. KRESS: I agree. I agree. I think that's -
2 - - I think that is the claim here, that if you have the
3 property secured, then the timing aspect becomes less
4 important. And I think the same thing with the
5 contemporaneous list.

6 ACTING CHIEF JUDGE CANNATARO: So it's - - -
7 what's wrong with that argument? You know, secure the
8 property in a safe location so that it's not subject to
9 theft or accidental loss or destruction. And then you can
10 go ahead and apply the policy as written without
11 constitutional infirmity. What the missing piece in that
12 argument?

13 MR. KRESS: Well, I don't know if I'm not sure I
14 understand your question, Your Honor. I mean, I think this
15 protocol - - - I - - - there's nothing wrong with requiring
16 - - -

17 ACTING CHIEF JUDGE CANNATARO: And the question
18 is why shouldn't there be a requirement that property
19 that's not inventoried yet needs to be secured?

20 MR. KRESS: I see. I think that - - - I think
21 there could be a requirement. And I think this - - - this
22 policy satisfies that. I mean, I think you could say yes,
23 property has to be secured until it's - - - until it's
24 properly inventoried.

25 And this policy actually the very first thing



1 that is says, if you're looking at Section 20 - - - 218-13,
2 it says the purpose of this policy is to protect property.
3 And actually, testimony of the two officers in this case, I
4 think, makes clear they understood that to impose an
5 obligation on them to secure property. And that's actually
6 what they did.

7 JUDGE WILSON: I have to say I'm a little - - -

8 JUDGE TROUTMAN: Was that in the record?

9 JUDGE WILSON: - - - skeptical about that when
10 one of the things that the policy instructs the officers to
11 search are the air vents of a car, which people don't
12 usually put property, other than maybe contraband, in the
13 air vents of their car. Do they?

14 MR. KRESS: I think it's - - - the policy
15 authorizes the search or anywhere where there could be
16 valuables. I'm not a - - - you know, to borrow a - - -

17 JUDGE WILSON: What do you have in your air
18 vents, right now?

19 MR. KRESS: So I was just about to say, Your
20 Honor, I - - - I'm not the - - - I'm not a Mona Lisa veto
21 here. I'm not a car expert. But I don't know. I guess
22 maybe something could get stuck in there. Maybe something
23 could get sucked in - - - a valuable could get sucked in
24 there. I - - - I'm not sure.

25 JUDGE GARCIA: Wasn't there a case involving



1 speakers where they took the speakers out and they looked
2 there? I - - - or am I making that up? But they - - -

3 MR. KRESS: No, that - - -

4 JUDGE GARCIA: I thought there was one.

5 MR. KRESS: No - - - no, Your Honor. I - - -
6 that - - - that is - - - that is one of this court's cases.
7 I believe it is Padilla - - -

8 JUDGE RIVERA: Yeah, it's called a - - -

9 JUDGE TROUTMAN: Does the record here clearly
10 support that the property was secured?

11 MR. KRESS: I believe it does, Your Honor, yes.
12 I believe that Officer Borgos' testimony established that.

13 JUDGE RIVERA: What - - - what did he say to
14 establish that, because you're saying it's only the
15 testimony, correct?

16 MR. KRESS: No - - -

17 JUDGE RIVERA: Nothing but his testimony? That's
18 what we're measuring this by because he's the one who
19 described the policy and what he did?

20 MR. KRESS: Well, I - - - both officers described
21 the policy. But I think if you turn - - - if you're
22 talking about in terms of actually securing this property
23 in this case, it's Borgos' testimony.

24 JUDGE RIVERA: So do you think the other officer
25 added something regarding the policy that Borgos' testimony

1 does not already present and clarify?

2 MR. KRESS: Yes, I - - - I do.

3 JUDGE RIVERA: Okay. All right. Yeah.

4 MR. KRESS: And so the second officer, Baksh, he
5 can't speak to the specific facts of - - - of the securing
6 in this case because he said I had - - - I had left for the
7 night. But he does testify about how it was view that this
8 inventory search protocol imposed an obligation on the
9 officers to safeguard items recovered from the car. So I
10 think that's where he - - - he adds something.

11 JUDGE RIVERA: So then it's not Borgos'
12 testimony?

13 MR. KRESS: Well, Borgos says that as well.

14 JUDGE RIVERA: Okay.

15 MR. KRESS: But Borgos' testimony goes
16 specifically to was this property, in fact, secured in this
17 case. And so - - -

18 JUDGE RIVERA: And he said?

19 MR. KRESS: And so he starts off by saying, look
20 we - - - when we find the gun, the gun has to stay where it
21 is, I can't pick it up, I can't bring it away.

22 JUDGE RIVERA: Uh-huh.

23 MR. KRESS: And so I think, then he goes on to
24 say that - - - he goes on to say that, look one of my
25 duties is to - - - is to safeguard the evidence in the



1 case. That would include the gun.

2 JUDGE RIVERA: Uh-huh.

3 MR. KRESS: And he can't actually start the
4 inventory process until evidence collection comes and
5 finishes what they're doing.

6 And so I think the fair reading of all of that is
7 that he's outside in the parking lot with the gun for four
8 hours. And given his testimony, which is on pages 18 and
9 19 of the appendix, where he says look, the reason why
10 we're bringing this car is to safeguard the defendant's
11 property, that's the whole point of this. I don't think it
12 was a - - - it would be a fair inference to say that while
13 he's outside the other property from the car - - -

14 JUDGE RIVERA: But would that - - -

15 MR. KRESS: - - - which includes other arrest
16 warrants - - -

17 JUDGE RIVERA: But it's your burden - - - not
18 yours, obviously, my apologies - - - the prosecutor's
19 burden, right, to have established that he meant the
20 protocol and that's a constitutional inventory search? And
21 it's hard to conclude this officer's just standing around
22 in a parking for four hours and doing nothing else but
23 watching the bag?

24 MR. KRESS: I - - - well, he's watching the gun,
25 Your Honor. And - - - remember, this is a loaded - - -



1 JUDGE RIVERA: Well, okay. So when - - - now
2 where's the bag? Let me try it that way.

3 MR. KRESS: So I think the bag is also outside
4 there with him.

5 JUDGE RIVERA: Okay.

6 MR. KRESS: And I still - - - I - - - yes, it is
7 our burden. I think we established it here. And then
8 after evidence collection is finished - - -

9 ACTING CHIEF JUDGE CANNATARO: So you're saying
10 that's the credited testimony about the securing, that he
11 stayed with the car - - - well, he didn't say he stayed
12 with the car for four hours, did he?

13 MR. KRESS: He doesn't expressly say that, no. I
14 - - - I think that's - - - I think that's the only
15 reasonable inference you can draw from the things that he
16 does say, which is that the gun had to be kept outside, I
17 have to watch it, it's my responsibility as the
18 investigating officer.

19 JUDGE RIVERA: Never had to go to the bathroom?
20 Never went inside?

21 MR. KRESS: I - - - I don't - - -

22 JUDGE RIVERA: Never had a call, never had an
23 emergency? All right? Didn't have someone come and stand
24 there while - - - while he goes - - -

25 MR. KRESS: There's nothing in the record that



1 would indicate that those things happened.

2 JUDGE RIVERA: Okay.

3 ACTING CHIEF JUDGE CANNATARO: Thank you,
4 Counsel.

5 MR. STROTHER: I'd like to address both
6 preservation and then this last point about the record in
7 the case.

8 This claim is preserved. The - - - I want to
9 make two points as to why. For one thing, my adversary's
10 summary of what counsel argued is not quite correct. The
11 first thing he does, it's on page 128, he cites Galak, the
12 case we rely on most heavily. Then he argues that the
13 protocol provides too much discretion to the officers, it
14 doesn't achieve its goals, which the other major, of
15 course.

16 Then the court jumps in and says "We're not
17 having this referendum. We're not doing this".

18 Counsel says, "I'm disappointed."

19 A few pages later, in the middle of arguments
20 challenging actually how the search is conducted, he just
21 drops a couple of sentences on the facial challenge. He
22 says that, "The protocol does not sufficiently control the
23 officers' conduct and gives too much discretion to the
24 officers to do whatever they want". So pretty close to
25 what we're arguing here.



1 JUDGE RIVERA: Right but he doesn't explain what
2 the - - - the do whatever they want. As in, you know - - -
3 the point, I think, is well-taken as in, you know, secure
4 it or do a contemporaneous list, or if you spend too much
5 time waiting before you voucher it.

6 MR. STROTHER: This - - -

7 JUDGE RIVERA: This doesn't drill down that way.

8 MR. STROTHER: This gets into why we cited the
9 Finch case, right? Because the - - - the Finch case is
10 pretty clear.

11 And I also want to mention this Keschner case
12 decided that's not - - - it's not the holding of the case
13 that it was not preserved because of the issue with being
14 interrupted. The holding of that case is that it involved
15 a legal issue that it was actually defense's burden to make
16 a record on, not the prosecution's. And they made no
17 record on it. So that's why the claim was kicked out, not
18 because it's not preserved.

19 The rule is still when the court says I'm not
20 entertaining this, you don't have to go any further.

21 And I want to mention, page 167 of the court's
22 decision, the court decides that, "The protocol offered
23 into evidence was guided - - - they were guided by a set of
24 policy and procedure guidelines which eliminated their
25 discretion and fulfilled the purposes of a lawful inventory



1 search".

2 Under 470.05, this court can decide that when the
3 judge says exactly the thing that we're challenging. We're
4 arguing it doesn't fill the purposes of the inventory
5 search and it doesn't cap an officer's discretion. At that
6 point, the issue is before the court.

7 Now, the second thing I want to mention is this
8 idea of officers - - -

9 JUDGE RIVERA: But there's some issue whether or
10 not it's been secured. That's not brought to the court's
11 attention so the court didn't say I find it was secured or
12 I find it wasn't secured but it doesn't matter.

13 MR. STROTHER: Right.

14 JUDGE RIVERA: You don't have any of that.

15 MR. STROTHER: So it's true that counsel doesn't
16 make the argument that - - - doesn't get a chance, really,
17 to make the argument that - - - about security because the
18 court lets him say two sentences about it. And then at
19 that point, it's - - - he throws a couple of sentences in,
20 but he's already been told it's not going to be decided,
21 I'm not addressing it.

22 And then, I think, you know, this gets to the
23 other point about counsel saying, like, there's no
24 sufficient record, there's nothing asked about stuff here.

25 JUDGE GARCIA: First, before we get to that - - -



1 I guess on that point - - - is - - - your argument is a
2 facial argument. And maybe I just have this wrong, but
3 isn't your argument because it isn't in the policy - - -

4 MR. STROTHER: Yes.

5 JUDGE GARCIA: - - - it doesn't matter what they
6 did here?

7 MR. STROTHER: Our argument - - -

8 JUDGE GARCIA: Let's say they secured it here.
9 In order to make a facial challenge, it has to be bad in
10 any application, so the policy itself has to be bad. And I
11 thought your argument because the policy doesn't require
12 it, what does it matter what they do here.

13 MR. STROTHER: Yeah, that's actually was going to
14 be where I was going because it's that - - -

15 JUDGE GARCIA: I cut you off.

16 MR. STROTHER: Yeah. Is that - - - is that we're
17 raising a facial challenge because Galak holds that unless
18 the protocol as written is constitutional, you cannot have
19 a lawful inventory search, because as this court has held,
20 and the Supreme Court, the protocol is the warrant
21 substitute. It would be like having an unlawful warrant
22 and then saying well, they did still a lawful search, so
23 it's fine. You can't actually have that in the inventory
24 search process.

25 And this is the explicit holding of Galak,



1 explaining the law that applies to that case. In that
2 Galak case, there was never actually any argument that the
3 search performed in that case was unlawful, pretextual, or
4 anything. The point was that the protocol was unlawful.
5 That was all - - -

6 JUDGE SINGAS: They barely had a protocol in
7 Galak so that was the issue. I mean, here the patrol guide
8 is in evidence. It talks about removing all valuables from
9 the vehicle and invoicing, on a separate property clerk
10 invoice. It talks about property of little value that is
11 left inside the vehicle, should, within reason, be listed
12 in the uniform members activity log and cross-referenced.
13 Like, what about this policy specifically makes it
14 unconstitutional?

15 MR. STROTHER: The specific thing that makes it
16 unconstitutional is that there is this unregulated period
17 of time where officers could do whatever they want with the
18 property. And because the - - - the policy also has no
19 temporal controls, who knows what might happen to it.

20 I mean, it did - - - I think we cited - - - and I
21 know this court isn't bound by it, but we cited a supreme
22 court of Alabama case that explained this pretty well.
23 That in these circumstances where there's this big time gap
24 and there's no security, this is when property gets stolen
25 or lost or tampered with, which is the very thing it's



1 supposed to prevent.

2 And I just want to say one last thing. Officer
3 Borgos saying - - - all he actually said was "I have to
4 secure evidence". For one thing, just saying "I have to
5 safeguard something" is not a standard. The Supreme Court
6 has said many times it requires a standardized procedure.
7 One officer's idea of what safeguarding evidence could be
8 is very different from another.

9 The second thing is he's not talking about the
10 property seized during the inventory search. He's talking
11 about evidence and creating a chain of custody for a
12 criminal case - - -

13 JUDGE RIVERA: So - - - so it - - -

14 MR. STROTHER: - - - which is not what an
15 inventory search is about.

16 JUDGE RIVERA: So if the policy said you have to
17 secure the contents, is that enough without explaining - -
18 -

19 MR. STROTHER: No.

20 JUDGE SINGAS: - - - how one secures?

21 MR. STROTHER: I do think that it would have to
22 say something about how it's secured to ensure that is
23 actually is because the point of the policy is it has to
24 actually achieve its goals.

25 JUDGE SINGAS: CounselOR, he said, and I'm



1 reading from page 22,

2 "Question: What did you do with the items
3 recovered from the vehicle?"

4 "Answer: We placed them in a plastic bag and
5 brought them into the precinct to create an itemized list."

6 MR. STROTHER: Yeah, so the - - - the problem is
7 that that's not the full record. He's actually asked by
8 defense counsel at a later point - - - and I would do a
9 very - - - defense counsel actually asks a lot of questions
10 about the - - - the what happened to this property. He
11 actually asked him, "So you just threw it all in a garbage
12 bag, right?" And he says - - - or garbage can. He says
13 yes. He said, at that point you think an inventory ends?
14 And he said yes. He said, and then at some point you
15 voucher? He said, at some point.

16 The point is that, yeah, he put it in a garbage
17 can and brought it into the precinct and then eleven hours
18 passed. The waiting with the gun is four hours. There's
19 still seven hours of unaccounted time there where the - - -
20 who knows what's happened. It is sitting just - - -

21 JUDGE RIVERA: Do you agree the only inference,
22 reasonable inference, is that he waited outside for four
23 hours with the bag?

24 MR. STROTHER: No, I don't think that's the only
25 reasonable inference. He had a partner. I doubt he just



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stood next to the car for four uninterrupted hours.

But regardless, the other seven hours, which is longer than this court - - -

JUDGE RIVERA: Uh-huh.

MR. STROTHER: - - - was comfortable with in Galak for one thing - - - that property's just in there in a garbage can. Who knows if it's secured, if it's tied up, who's tampered with it? There is no way to know.

Inventory search polices have to account for that time or they're not doing what an inventory search is there to do, which is to secure property from being lost or stolen.

ACTING CHIEF JUDGE CANNATARO: Thank you, Counsel.

MR. STROTHER: Thank you all.

(Court is adjourned)



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

I, Jaymi D. Castleberry, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Rakeem Douglas, No. 79 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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