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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 36

KEVIN CLEVELAND,

Appellant.

92 Court Street
Binghamton, New York 13901
March 12, 2025

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:

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1 CHIEF JUDGE WILSON: The last case on this
2 morning's calendar is People v. Kevin Cleveland.

3 MR. KEEM: Good morning. May it please the
4 court. Brad Keem. If I could, three minutes for rebuttal?

5 CHIEF JUDGE WILSON: Yes.

6 MR. KEEM: Thank you. Reasonable suspicion is
7 not static. Here, law enforcement has observed a woman
8 throw a bottle at a car. Mr. Cleveland then exit his car,
9 stop it in the middle of the road, approach her with a
10 clenched fist in - - - in an aggressive manner. But then -
11 - - then - - -

12 JUDGE SINGAS: At that point, did they have
13 reasonable suspicion to believe a crime is about to be
14 committed?

15 MR. KEEM: We would argue in our brief that she -
16 - - they did not.

17 JUDGE RIVERA: Okay.

18 MR. KEEM: But - - -

19 JUDGE RIVERA: But why not?

20 CHIEF JUDGE WILSON: Why not?

21 JUDGE RIVERA: Why not?

22 MR. KEEM: Why not is because - - -

23 JUDGE RIVERA: I mean, look, it's a dangerous
24 enterprise. You've had - - - you've had a bottle thrown at
25 you. You're - - - you're going to get out and now confront

1 the individual. How is that not the - - - the - - - one
2 can infer that you're not merely just going to stand there.
3 You're actually going to take some action.

4 MR. KEEM: So I - - - I think if - - - if we say
5 there was reasonable suspicion there, then throughout New
6 York City, every time two people are arguing on the street,
7 then police officers could come approach them - - -

8 JUDGE TROUTMAN: But shouldn't they - - -

9 JUDGE HALLIGAN: He leaves his car - - -

10 JUDGE TROUTMAN: - - - at times?

11 JUDGE SINGAS: Is that a bad rule?

12 JUDGE TROUTMAN: To - - - to approach if - - - if
13 the officer kept driving on and she was assaulted, shot,
14 stabbed, then there would be outrage.

15 MR. KEEM: Your Honor, I don't think we get that
16 far in that - - - in this case because we don't have any -
17 - -

18 JUDGE TROUTMAN: Because the police officer
19 stopped.

20 MR. KEEM: Well, we don't have any evidence in
21 this record how close he got to her or - - -

22 JUDGE HALLIGAN: But there - - -

23 JUDGE TROUTMAN: It was interrupted - - -

24 JUDGE HALLIGAN: - - - was more than that, wasn't
25 there? That the car - - - he - - - he left the car, I

1 think, just in the middle of the road. That's pretty
2 unusual and not just two individuals facing off against
3 each other.

4 MR. KEEM: It is unusual and - - -

5 JUDGE TROUTMAN: And when you get out of a car
6 and you leave it running with the door open, that's not a
7 person stopping and being calm; I just want to have a chat.
8 That - - - that is an indication that perhaps things may
9 escalate, causing a police officer to take appropriate
10 action. Why - - - why is it wrong for the - - - the
11 officer to act in that manner?

12 MR. KEEM: So from the - - - the questions the
13 court is giving me, and because none of the Appellate
14 Division Justices agreed with me either, I would like to
15 pivot to when we have the - - - the - - - these secondary
16 actions, okay? Reasonable suspicion, like I said, is not
17 static. It evaporated.

18 CHIEF JUDGE WILSON: I'm not sure - - - yes. So
19 I'm not sure you can pivot that quickly.

20 MR. KEEM: Okay.

21 CHIEF JUDGE WILSON: Because if we assume that
22 the officer had reasonable cause to detain because the
23 officer believed that your client was about to commit a
24 crime, right, an assault, and it's the officers'
25 intervention that stopped that from happening, at that

1 point, does the officer lose the ability to detain?

2 MR. KEEM: I think that when - - - when Mr.
3 Cleveland stopped and left, he ran away, that at that
4 point, reasonable suspicion or reasonable cause evaporated.

5 CHIEF JUDGE WILSON: So I'm a police officer. I
6 see somebody about to commit a crime. I say, hey, wait a
7 minute, stop. The person stops, and then we let them go.

8 MR. KEEM: We also have a woman that committed a
9 crime by throwing a bottle - - -

10 CHIEF JUDGE WILSON: Yeah. Okay.

11 MR. KEEM: - - - at the car.

12 CHIEF JUDGE WILSON: The police don't arrest
13 everybody maybe that they should.

14 MR. KEEM: Certainly. But the more prudent
15 action would have been to let him go because they have his
16 car, potentially, they have the woman.

17 CHIEF JUDGE WILSON: They don't even know it's
18 his car.

19 MR. KEEM: It's possible. I mean, the - - - the
20 car did disappear by the time they were back.

21 JUDGE RIVERA: Would - - - would - - - would you
22 - - - would you have a different argument if - - - if they
23 detained her and pursued him?

24 MR. KEEM: Potentially because - - -

25 JUDGE RIVERA: I know you spend a - - - a great

1 deal of time in the brief, and I appreciate it, that there
2 is a person who obviously did commit an offense, who seemed
3 to still be there at the time but had left by the time they
4 got back with the defendant.

5 MR. KEEM: Potentially, Your Honor, especially if
6 she was able to provide more insight and information as to
7 what was actually transpiring here, which I think there are
8 a lot of unanswered questions.

9 JUDGE SINGAS: So if you assume that there was
10 level 3 up until the point that he starts running, are you
11 suggesting that a suspect could flee a - - - a reasonable
12 level 3 stop by running away from the police? Is that a
13 rule that we should - - -

14 MR. KEEM: No.

15 JUDGE SINGAS: - - - adopt?

16 MR. KEEM: Certainly not in all cases. But I
17 think in this case, when he stopped, turned around, and ran
18 away, that there was no crime and no crime about to be
19 committed and - - -

20 JUDGE TROUTMAN: How do you know?

21 JUDGE SINGAS: Well, why - - - why can't we say
22 that that running then - - - if you're suggesting it wasn't
23 enough to get to level 3 before, that the running away
24 certainly tips it to a level 3 now, once they decide to
25 take off?

1 MR. KEEM: I don't think that it tips to
2 reasonable suspicion - - -

3 CHIEF JUDGE WILSON: On foot without his car.

4 MR. KEEM: Right. Right.

5 CHIEF JUDGE WILSON: Pretty unusual.

6 MR. KEEM: It is unusual, Your Honor. But I
7 think the more prudent choice, and that's what we want to
8 encourage - - -

9 JUDGE TROUTMAN: So are you saying that even if
10 they had reasonable suspicion before - - - because the
11 defendant stops engaging in that the - - - that which gave
12 them that reasonable suspicion or appears to have - - -
13 let's try appears to have, the officers are supposed to
14 accept that and just let him go about his way?

15 MR. KEEM: I believe that's the more prudent
16 choice when they just - - -

17 JUDGE GARCIA: The officers stay at the scene
18 then, though? I mean, how long do they have to stay?

19 MR. KEEM: They could - - - if the car was truly
20 abandoned, then they could have conducted an investigation
21 with the car and with the woman - - -

22 JUDGE GARCIA: But - - - and then - - -

23 MR. KEEM: - - - who was left behind and then
24 potentially have gotten him in a much safer manner.

25 CHIEF JUDGE WILSON: Let me ask you this.

1 Suppose - - - suppose I'm driving down the street in my
2 car, and there happen to be some officers in an unmarked
3 car behind me. I don't know that. I get out of my car,
4 leave it running in the middle of the street and either
5 walk off or run off. Let's just walk off. I just leave.
6 Can the officers follow me?

7 MR. KEEM: I would say no. I would say that they
8 would have a public - - - public safety would demand that
9 they investigate the car as opposed to you. It is your
10 choice to abandon a car. You are not committing a crime.

11 CHIEF JUDGE WILSON: In the middle of the street?

12 MR. KEEM: The car is the issue. I think that -
13 - -

14 JUDGE RIVERA: Do - - - do they have some
15 discretion to determine what might be the best act to
16 pursue given the public safety?

17 MR. KEEM: Absolutely. And I think in this case,
18 the public safety part of it would be to have let him run
19 and then continue their investigation in a safe manner.

20 JUDGE CANNATARO: But Counsel, doesn't discretion
21 imply that they could choose to do one or the other as long
22 as there were reasons for making that choice?

23 MR. KEEM: Certainly within the context of
24 reasonable suspicion, which we assert wasn't present at the
25 time of - - -

1 CHIEF JUDGE WILSON: What if somebody drives a
2 semi in front of a childcare center in Oklahoma City and
3 walks off. The police can't follow him? You got to stay
4 with the truck?

5 MR. KEEM: Your Honor, certainly, that is a
6 difficult - - -

7 CHIEF JUDGE WILSON: Yeah.

8 MR. KEEM: - - - hypothetical. But we would
9 maintain that this was not a truck in front of the Oklahoma
10 City safety building - - -

11 JUDGE GARCIA: So - - -

12 MR. KEEM: - - - and that the case then - - -

13 JUDGE GARCIA: - - - where do you draw the line?

14 MR. KEEM: - - - is different.

15 JUDGE GARCIA: To the Chief Judge's question,
16 where would they draw the line?

17 MR. KEEM: Certainly, that would be a difference
18 in - - -

19 JUDGE GARCIA: What if someone looks like they're
20 breaking in a building? It's night, they look like they're
21 breaking into a residence.

22 MR. KEEM: Right.

23 JUDGE GARCIA: The police come up, guy runs. Can
24 they follow him or not?

25 MR. KEEM: I would think - - - I would say the

1 line is this case. The line is - - -

2 JUDGE GARCIA: Why? Why is that different than
3 the person breaking into a building?

4 MR. KEEM: Because you have a secondary - - - a
5 crime. If they look like they're breaking into a building,
6 then the reasonable suspicion calculus is much different.

7 JUDGE GARCIA: But they run away. They're not
8 breaking in the building anymore. Isn't that the same?

9 MR. KEEM: I guess I misunderstood your
10 hypothetical then because - - -

11 JUDGE GARCIA: They're - - - they're - - - by
12 window, it looks like they're - - - you know, they could be
13 doing something to get into this building. It's night.
14 There's nobody in the building. Police see that. They
15 pull up - - -

16 MR. KEEM: Again, if they - - -

17 JUDGE GARCIA: - - - the police get out. The
18 person runs.

19 MR. KEEM: - - - if they look like they're
20 looking inside of a window in a suspicious manner, I think
21 that's different than simply turning and running.

22 JUDGE GARCIA: But - - - no. No. Here the
23 threat was assault, right? They had reasonable suspicion
24 that this person was going to assault someone else. And it
25 seems to me in the dissent, at least, that that no longer

1 applies because the person isn't about to assault anyone
2 anymore. So on that logic, why wouldn't that apply to
3 somebody who moves away from the window? They're no longer
4 about to break into a building.

5 MR. KEEM: Oh, okay. So you're saying, he looks
6 in the window and then runs away upon saying, stop?

7 JUDGE GARCIA: And say you have reasonable
8 suspicion to believe they may be about to commit a
9 burglary.

10 MR. KEEM: Right. And I - - - I suppose that's
11 how close we want to get to predictive criminality. And I
12 think that would fall into - - -

13 JUDGE GARCIA: Okay. What does that mean here?
14 Is this predictive criminality or not? I mean, why would
15 that burglary case be different? There is also suspicion
16 of committing burglary. Why is that different than this
17 one?

18 MR. KEEM: I think because the anger, which was
19 the focus of the assault, had dissipated by him running and
20 moving away.

21 JUDGE GARCIA: Well, my intent to steal something
22 maybe has dissipated now by my running away too.

23 CHIEF JUDGE WILSON: Maybe the anger dissipated
24 because the police showed up.

25 MR. KEEM: It's certainly possible. I would note

1 that the police did not - - - they made themselves known.
2 They didn't say - - -

3 JUDGE RIVERA: So - - - so is part of what you're
4 arguing that it's, at best, from your viewpoint, an
5 attempt, and the person hasn't taken enough conduct to
6 cross the line of an attempt, let's say, in this case, an
7 assault? Is that - - -

8 MR. KEEM: I - - - I - - - Your Honor, I think
9 that - - -

10 JUDGE RIVERA: - - - part of what you're trying
11 to argue?

12 MR. KEEM: - - - that's very close to - - -

13 JUDGE RIVERA: It may be different from someone,
14 actually, perhaps at a door with a screwdriver or something
15 like that?

16 MR. KEEM: Correct. And I think it would fall on
17 the facts.

18 JUDGE RIVERA: But again, isn't that then a mixed
19 question of law and fact?

20 MR. KEEM: I think the mixed question of law and
21 fact is incredibly interesting here because the trial court
22 used the wrong language. It said probable cause. So I
23 don't think that we can rely on the mixed question of law
24 and fact based on the trial court's decision here because
25 that's not - - - certainly, not what we have here, probable

1 cause.

2 JUDGE SINGAS: We - - - we also have more in this
3 case because it's not him just taking off and running.
4 It's him taking off and running and making motions to his
5 waistband, which might indicate a weapon. And if the
6 police thought that he was - - - had a weapon, that's a
7 continuous crime, that possession of that weapon. So even
8 if the danger dissipated toward the person who threw the
9 bottle, if he had a weapon, that's a danger to the public
10 at large.

11 MR. KEEM: The motion to the waistband is - - -
12 is not helpful for reasonable suspicion here because the
13 officers admitted they could only see him from the back,
14 and his - - -

15 JUDGE SINGAS: But they - - - they said they - -
16 -

17 MR. KEEM: - - - hands were moving - - -

18 JUDGE SINGAS: - - - they saw him going - - -
19 yeah. From the back, you're right, but motions to his
20 waistband. So I don't think we can just forget it because
21 that's what was - - - that's what they testified to. And -
22 - - and to your point that everything is static, I mean,
23 we're looking at the totality the circumstances of an
24 encounter. And I - - - I don't think we can ignore that in
25 this encounter.

1 MR. KEEM: I - - - I - - - I understand not
2 ignoring it, and maybe I misspoke. I just don't think that
3 it is a very strong factor in the - - - in the reasonable
4 suspicion determination.

5 JUDGE CANNATARO: Doesn't it fall under the mixed
6 question issue? I mean, I think the officer's testimony
7 was that the motions toward the waistband raised in their
8 mind the notion that defendant might have a weapon on him,
9 which was in turn credited by the courts below. Do we - -
10 - can we now revisit whether that should be credited or
11 not?

12 MR. KEEM: Again, I would say that, yes, it can,
13 because the trial court used the wrong language, probable
14 cause, so - - -

15 JUDGE CANNATARO: I - - - I understand they used
16 the - - -

17 MR. KEEM: Okay.

18 JUDGE CANNATARO: - - - wrong standard. I agree
19 with you. But this is just a - - - a factual issue that
20 was resolved below. Whether it amounts to probable cause
21 or amounts to reasonable suspicion is a separate legal
22 question.

23 MR. KEEM: Correct. And I think because there's
24 not probable cause, this court should then decide - - -

25 CHIEF JUDGE WILSON: Well, the Appellate Division

1 used the right standard, right?

2 MR. KEEM: Correct. They did.

3 CHIEF JUDGE WILSON: So why doesn't that take
4 care of it?

5 MR. KEEM: I think that this court should still
6 review from the trial court's perspective. I think that
7 should be - - -

8 JUDGE TROUTMAN: Why?

9 MR. KEEM: I think that that would be the best -
10 - - for the - - - this court to have a final say - - -

11 CHIEF JUDGE WILSON: What is it that - - - what
12 is it - - -

13 MR. KEEM: - - - on the issue would be helpful
14 for the - - -

15 JUDGE RIVERA: But it benefits the defendant,
16 right?

17 MR. KEEM: It - - -

18 JUDGE RIVERA: A higher standard.

19 MR. KEEM: It could, yes. It could depending on
20 - - - yes. Yes, Your Honor. You're right.

21 CHIEF JUDGE WILSON: Thank you.

22 MR. KEEM: Thank you.

23 MR. MCCARTHY: Good morning. Martin McCarthy,
24 for the People. This question - - - this case really does
25 present the classic mixed question of law and fact. The



1 questions that you're asking - - -

2 JUDGE TROUTMAN: What - - - what about the
3 argument, turned, he left. It's over.

4 MR. MCCARTHY: You mean the dissipation?

5 JUDGE TROUTMAN: Yes.

6 MR. MCCARTHY: You've never held that before.
7 You've never held that you can dissipate a level 3
8 encounter in that fashion.

9 JUDGE TROUTMAN: It's your argument there clearly
10 was a level 3?

11 MR. MCCARTHY: Yes.

12 JUDGE TROUTMAN: And because there was a level 3,
13 the officer had what authority at that point?

14 MR. MCCARTHY: As the Appellate Division pointed
15 out, they had stop and frisk and they have the ability to
16 pursue. This was not a - - - a case where they pursued
17 him, they caught him, they searched him and found
18 contraband. This was an abandonment case. So in the
19 course of the pursuit, he - - - he abandoned the drugs. So
20 we don't reach that subsequent, they stop him, and that
21 they exceed the scope of a permissible search in that
22 scenario.

23 CHIEF JUDGE WILSON: So why is the evidence
24 before the officer sufficient to get you a level 3?

25 MR. MCCARTHY: You - - - you mean going back to

1 the - - - the initial encounter?

2 CHIEF JUDGE WILSON: Yeah. Yeah. Going back to
3 the beginning. That seems to be the - - - the harder
4 question.

5 MR. MCCARTHY: I don't - - - I don't know if I
6 agree with that. But when you consider what - - - when you
7 look at the totality of the circumstances, what happened
8 here, the police were - - - they were just on routine
9 patrol. They were paying no attention - - - no particular
10 attention to the vehicle in front.

11 CHIEF JUDGE WILSON: We don't know that actually,
12 right?

13 MR. MCCARTHY: They just said that they were
14 driving, so - - -

15 CHIEF JUDGE WILSON: Right. They were driving,
16 and they were behind his car.

17 MR. MCCARTHY: Yeah. But they - - - they didn't
18 testify that - - -

19 CHIEF JUDGE WILSON: They don't say they were - -
20 -

21 MR. MCCARTHY: - - - they were behind this car
22 for any reason.

23 CHIEF JUDGE WILSON: Right. And they didn't say
24 that they weren't?

25 MR. MCCARTHY: Yes.

1 CHIEF JUDGE WILSON: We just don't know.

2 MR. MCCARTHY: In that sense, we don't know.

3 CHIEF JUDGE WILSON: Okay.

4 MR. MCCARTHY: But the point is, what they
5 observed - - -

6 CHIEF JUDGE WILSON: They see a woman throw a
7 bottle and hit the car.

8 MR. MCCARTHY: Correct.

9 CHIEF JUDGE WILSON: They see a man get out and
10 leave the car running, I guess. And he is angry, and he
11 has clenched fists, and he starts approaching the woman?

12 MR. MCCARTHY: Correct. And - - - and all that
13 happens as - - -

14 CHIEF JUDGE WILSON: Is that enough to conclude
15 that a crime was about to be committed?

16 MR. MCCARTHY: When you factor in the - - - it
17 wasn't just that - - - as - - - as you pointed out, it
18 wasn't just that he - - - he got out of the car. He pulled
19 the car over to the side of the road. He left the car in
20 the middle of the road.

21 CHIEF JUDGE WILSON: Yeah.

22 MR. MCCARTHY: Right?

23 CHIEF JUDGE WILSON: And how does that increase
24 the likelihood a crime was going to be committed?

25 CHIEF JUDGE WILSON: Because you're looking at

1 the precipitous nature in which he acted.

2 CHIEF JUDGE WILSON: Well, the precipitous thing
3 that happened was a bottle hit his car.

4 MR. MCCARTHY: Correct. But - - - and if you
5 want to say that that was an assumption of risk, that she
6 assumed the risk that she was - - -

7 CHIEF JUDGE WILSON: No, no, no, no. Not at all.

8 MR. MCCARTHY: - - - going to get approached - -
9 -

10 CHIEF JUDGE WILSON: I'm just - - - no. I'm - -
11 - I'm going back to why is that enough to conclude that a
12 crime was about to be committed?

13 MR. MCCARTHY: Because that was an aggressive act
14 on - - - let's say it's - - - let's credit it for what it
15 was. That was an aggressive act on her part, right? She
16 engaged in aggressive act, maybe even a crime. I don't
17 know if the - - - it may have been an attempt to criminal
18 mischief.

19 JUDGE TROUTMAN: So what about the argument that
20 it is she who the focus should have been on and not him?

21 MR. MCCARTHY: Well, you had - - - you had the
22 fact that they observed what could have been a crime that
23 she committed, and then, as a result of that, it appears
24 he's angry, right? So he is angry - - -

25 CHIEF JUDGE WILSON: Victims of crime are usually

1 angry - - -

2 MR. MCCARTHY: Absolutely.

3 CHIEF JUDGE WILSON: - - - in the moment.

4 MR. MCCARTHY: But angry in the sense of somebody
5 could just be mad that somebody hit - - -

6 JUDGE RIVERA: Well, what - - - what if he
7 stopped the car suddenly, opened the door, left the car
8 running, stood by the door, turned, and yelled at her?

9 MR. MCCARTHY: Can I - - -

10 JUDGE RIVERA: Could that be enough? Could the
11 cops at that point - - -

12 MR. MCCARTHY: Can I - - -

13 JUDGE RIVERA: - - - approach him and - - - and
14 try to detain him?

15 MR. MCCARTHY: Can I just - - -

16 JUDGE RIVERA: Didn't move. Just - - -

17 MR. MCCARTHY: No. No.

18 JUDGE RIVERA: - - - exactly what I'm describing
19 - - -

20 MR. MCCARTHY: I just want to - - - I just want
21 to know the stop in the middle or stop on the side?

22 JUDGE RIVERA: No. I said, stop exactly where he
23 stopped.

24 MR. MCCARTHY: Okay.

25 JUDGE RIVERA: I haven't changed anything other

1 than he stayed by the door.

2 MR. MCCARTHY: If he stayed by - - -

3 JUDGE RIVERA: Did not get out around and start
4 walking towards her - - -

5 MR. MCCARTHY: If he stayed by the - - - if he
6 stayed by the - - -

7 JUDGE RIVERA: - - - and - - - and yelled to her.

8 MR. MCCARTHY: If he stayed by the door and he
9 yelled - - -

10 JUDGE RIVERA: Yes.

11 MR. MCCARTHY: - - - that might be a different
12 story. And the reason why that might be a different story
13 is all he's done at that point is commit a traffic
14 infraction. He stopped his car in the middle of the road,
15 and he got out.

16 JUDGE HALLIGAN: What if he had parked the car
17 and then got out and the - - - and the actions were the
18 same, clenched his fist and walked towards her, but parked
19 the car, shut the door?

20 MR. MCCARTHY: I believe that might be a closer
21 case in terms of reasonable suspicion. I still think that
22 - - -

23 JUDGE RIVERA: So - - - so is what the - - -

24 JUDGE HALLIGAN: So what is the - - -

25 JUDGE RIVERA: - - - is it what turns this for -



1 - - from the prosecutor's perspective, the fact that he
2 exits the car and makes an approach? Obviously, in a - - -
3 in a - - - as the officer describes it, this aggressive,
4 angry manner, but it's his approach that makes this
5 difference.

6 MR. MCCARTHY: Yes.

7 JUDGE RIVERA: And when he's just by the door,
8 well, maybe - - - maybe he's not really going to attack
9 her. He's angry, screaming at her. Anyone might.

10 MR. MCCARTHY: That would be - - - yeah. And
11 that - - - and that's - - - and that's part of the issue,
12 right? Like, would you say it would be reasonable to
13 assume that - - - that the defendant was about to commit a
14 crime in that scenario if he just stayed by his car?

15 CHIEF JUDGE WILSON: So would - - -

16 MR. MCCARTHY: It's his actions that's reveal - -
17 -

18 CHIEF JUDGE WILSON: Would his - - - would his
19 behavior have been enough to charge him with attempted
20 assault?

21 MR. MCCARTHY: That - - - we don't - - - that's
22 not required because there's reasonable - - -

23 CHIEF JUDGE WILSON: No. But I'm asking - - -

24 MR. MCCARTHY: - - - reasonable suspicion, but -
25 - -

1 CHIEF JUDGE WILSON: It may not be required. I'm
2 just asking.

3 MR. MCCARTHY: The question becomes whether in -
4 - - in terms of charging an attempt, whether he came
5 dangerously near to committing a crime. Here, it - - - it
6 appears that the police intervened before he raised his
7 fist, if you will, right? And that may have been enough to
8 be - - -

9 CHIEF JUDGE WILSON: Well, he's got clenched
10 fists, so I guess we don't know if they're raised or not.

11 MR. MCCARTHY: He's got clenched fists. We don't
12 know if they're raised or not, yes. And - - -

13 JUDGE SINGAS: How about all the activity after?
14 So they're running away and the reaching for the waistband.
15 Is that extraneous?

16 MR. MCCARTHY: No. God, no.

17 JUDGE SINGAS: Because your position is that you
18 get to reasonable cause to believe a crime is about to be
19 committed before all of that takes place?

20 MR. MCCARTHY: Correct. And even if you didn't,
21 you certainly get there after, right? Because you - - - he
22 left - - - he - - - he continued to - - - you - - - you
23 can't flee a traffic stop either. That's the other thing.
24 If - - - if you are committing a traffic offense, you can't
25 flee a traffic offense.

1 JUDGE RIVERA: So then the Appellate Division
2 made an erroneous determination as a matter of law on that?
3 Because they agreed with the defendant that merely
4 observing the waistband that that was not going to be good
5 enough.

6 MR. MCCARTHY: No. I don't know if they - - -
7 they - - -

8 JUDGE RIVERA: Well, I'm looking right at it.
9 Maybe I'm misreading it, but - - -

10 MR. MCCARTHY: I - - - I don't know if I agree
11 with the way you're characterizing what they did because
12 what they were focusing on was - - -

13 JUDGE RIVERA: We agree with defendant that his
14 arm movements directed at his waistband and his flight
15 would not, without more, justify police pursuit.

16 MR. MCCARTHY: Correct. Without more.

17 JUDGE RIVERA: Without more.

18 MR. MCCARTHY: And this is - - - and then they
19 continue to go on to say - - -

20 JUDGE RIVERA: So what is the more?

21 MR. MCCARTHY: The more is everything - - -

22 JUDGE RIVERA: What came before or what came
23 after?

24 MR. MCCARTHY: Both.

25 JUDGE RIVERA: Well, you're already in pursuit.

1 So how is the after going to help you?

2 MR. MCCARTHY: Because once he - - - once he runs
3 - - -

4 JUDGE RIVERA: Yes.

5 MR. MCCARTHY: - - - again, he's running away
6 from a scenario where he's left his car in the middle of
7 the road, right? So what possible conclusion - - -

8 JUDGE RIVERA: So is the car in the middle of the
9 road not what appears to be some aggressive - - - perhaps
10 an attempt at some aggressive act towards a woman, or at
11 least approaching her?

12 MR. MCCARTHY: It's all - - - it's all the - - -
13 it's - - - it's - - - when you add - - - because, again,
14 you're focusing on the totality - - -

15 JUDGE RIVERA: So getting back to my hypo; if he
16 had been at the door, just yelled, cops come and say, hey,
17 stop, or whatever they want to say there, and he runs.
18 Could they follow him then?

19 MR. MCCARTHY: If he was in the middle of the
20 road, he'd be - - - he'd be fleeing a traffic infraction,
21 and I believe they could pursue him - - -

22 JUDGE RIVERA: They could pursue him.

23 MR. MCCARTHY: - - - in that scenario.

24 JUDGE RIVERA: So let's take Judge Halligan's
25 hypothetical. He first parks the car and then - - -

1 MR. MCCARTHY: Yes.

2 JUDGE RIVERA: - - - opens the door and starts
3 yelling, but doesn't approach, and then - - - and then even
4 walks away. Forget the run.

5 MR. MCCARTHY: Yeah.

6 JUDGE RIVERA: Walks away from the officers and
7 not towards the woman who has thrown the bottle.

8 MR. MCCARTHY: If you have no other facts, I
9 don't think they could.

10 JUDGE RIVERA: If they what? I'm sorry.

11 MR. MCCARTHY: If you had no other facts, I don't
12 think they could. And the reason - - -

13 JUDGE SINGAS: Does it matter - - - does it
14 matter at all that the root basis for the police officer
15 changes? In other words, initially, in the initial
16 approach, they think an assault is about to be committed,
17 but then it sort of changes because once flight happens and
18 the reaching to the waistband, then they might be concerned
19 about a weapon or drugs. Does that matter?

20 MR. MCCARTHY: It - - - it only adds. It doesn't
21 subtract. And it doesn't - - - it - - - it doesn't - - -
22 it doesn't sort of take the place of because the encounter
23 is the encounter from its inception to its conclusion.

24 JUDGE RIVERA: Do we rely on an officer's
25 subjective belief?

1 MR. MCCARTHY: I don't - - - well, you - - - you
2 mean in terms of whether he believed that - - -

3 JUDGE RIVERA: Yes.

4 MR. MCCARTHY: - - - a - - - a crime was about to
5 be committed?

6 JUDGE RIVERA: Yes.

7 MR. MCCARTHY: I think you have to look at the
8 objective facts as well. And the objective facts here
9 would support that conclusion. So if - - - if he had just
10 parked his car on the side of the road, maybe those - - -
11 those objective facts are very different. But what is an
12 officer supposed to do in that scenario?

13 JUDGE GARCIA: Counsel, it seems here you're
14 arguing that the fact that he left the car in the middle of
15 the road, traffic infraction, is sufficient to stop him
16 here when he starts to flee. Is that your argument here?

17 MR. MCCARTHY: It - - - it would be an
18 independent basis, yes. But there's more - - -

19 JUDGE GARCIA: Did you argue that below?

20 MR. MCCARTHY: What's that?

21 JUDGE GARCIA: Did you argue that in the trial
22 court - - -

23 MR. MCCARTHY: I'm not - - - they didn't - - -

24 JUDGE GARCIA: - - - as an independent - - -

25 MR. MCCARTHY: - - - they - - -

1 JUDGE GARCIA: - - - basis?

2 MR. MCCARTHY: The court found it as a fact.

3 JUDGE RIVERA: And do you get that - - - are you
4 saying that gets you a level 3 - - -

5 MR. MCCARTHY: In terms - - -

6 JUDGE RIVERA: - - - under DeBour - - -

7 MR. MCCARTHY: If we're just talking - - -

8 JUDGE RIVERA: - - - under DeBour?

9 MR. MCCARTHY: If we're just talking about the
10 fact he leaves his car in the middle of the road - - -

11 JUDGE RIVERA: Yes, yes, yes.

12 MR. MCCARTHY: - - - and doesn't do anything else
13 and just - - -

14 JUDGE RIVERA: Correct. Correct.

15 MR. MCCARTHY: Okay. I believe under this
16 court's case law, you can't flee a traffic infraction. So
17 if you were to get out of - - - if you were to commit a
18 traffic infraction and then get out and run away - - -

19 JUDGE RIVERA: Because the fleeing is then not an
20 infraction? Because level 3 is about misdemeanors and
21 felonies. It's not - - -

22 MR. MCCARTHY: Correct.

23 JUDGE RIVERA: - - - about infraction.

24 MR. MCCARTHY: Yes.

25 JUDGE RIVERA: Okay.

1 JUDGE CANNATARO: Is - - - is that the law that
2 you can't flee a traffic infraction, or you can't flee a
3 stop for a traffic infraction? And - - - and - - - and are
4 you making an argument that the police officer was stopping
5 him - - -

6 MR. MCCARTHY: No.

7 JUDGE CANNATARO: - - - to give him a citation
8 for leaving his car in the middle of the road?

9 MR. MCCARTHY: No. But we're - - - we're talking
10 about the totality of the circumstances.

11 JUDGE CANNATARO: Okay. So have you - - -
12 because my understanding of the record, and you know, we
13 can all have different views of it, was that what justified
14 the stop was the police officers' apprehension credited by
15 the court, I think, that he was about to commit the crime
16 of assault.

17 MR. MCCARTHY: Correct.

18 JUDGE CANNATARO: So - - -

19 MR. MCCARTHY: And part of that conclusion was
20 the precipitous nature in which he stopped, leaving his car
21 in the middle of the road, leaving it under - - -
22 unattended to approach this woman in an aggressive manner
23 and yelling at her.

24 JUDGE CANNATARO: Right. So I get that. There
25 are two aspects to - - - to stopping the car. One is, it's

1 illegal to stop a car in the middle of the road. You could
2 get a ticket for that. But the other one is, it was very
3 precipitous and - - -

4 MR. MCCARTHY: Yes.

5 JUDGE CANNATARO: - - - sort of angry, like, you
6 know, you picture something like the brakes screeching and
7 he just opens the door and runs out of the car?

8 MR. MCCARTHY: Yes.

9 JUDGE CANNATARO: But this is more about the - -
10 - the latter and not the former. Am I - - - in your view,
11 or - - - or am I misunderstanding your argument?

12 MR. MCCARTHY: I - - - I believe - - - I believe
13 what we're - - - what I'm trying to say is, it's all of it
14 because, again, it's a totality analysis. So you have to -
15 - - when you're talking about how - - - how were we able to
16 - - - to - - - to read the officer's mind and to make that
17 conclusion, this is an element of it. It wasn't just a
18 controlled stop to the side of the road. And it wasn't
19 just him standing at the side of the car. It was the
20 nature in which he exited the car. It was the nature in
21 which he - - - he did that despite the fact that they were
22 - - - there was a car behind him. He leaves the car. He
23 runs to the side of the - - - he - - - he - - - I keep
24 saying run. I don't know if he - - - it's run. He
25 approaches aggressively quickly the woman on the side of

1 the road who threw the bottle. I don't know what the
2 officers are supposed to do in that scenario. They
3 certainly had justification to believe that he was about to
4 commit a crime. That's what the court - - - the trial
5 court found. The Appellate Division affirmed on that. And
6 I would look at that as being the mixed question of law and
7 fact. There are no other questions?

8 CHIEF JUDGE WILSON: Thank you.

9 MR. KEEM: Your Honors, just briefly, there was
10 discussion about the approach and - - - and a hypothetical
11 about - - - about staying by the door. But this record
12 doesn't reflect how close Mr. Cleveland ever got to this
13 woman. So I - - - I think that the idea that she is - - -
14 that he is two, three feet away from her about to punch
15 her, whatever, is - - - is just not on this record. And I
16 think that does support our argument of a lack of
17 reasonable suspicion, unless there are - - -

18 JUDGE RIVERA: Well, that - - - that might - - -
19 that might - - - that might be of some interest if all he
20 did was get up out of the car, walk - - - there had been no
21 bottle thrown, get up out of the car, and he's walking
22 towards someone on the street, yes, maybe that appears so
23 benign and innocent that it's hard to say that would give
24 an officer reasonable suspicion or even pause about what
25 might be a - - - a very dangerous situation. But it is his

1 reaction - - - again, it - - - it - - - I'm not saying it's
2 not a human reaction. Please do not misunderstand me. But
3 nevertheless it seems to - - - as the officer described it,
4 a very aggressive reaction that perhaps put other people in
5 danger, not just the person he might have been going
6 towards, right? He's in the middle of the road. Maybe
7 other people are involved in this. Who knows what's going
8 on?

9 MR. KEEM: Potentially. But again, it could be
10 fifteen feet away, and that's - - - that's, I guess - - -

11 JUDGE RIVERA: The officer should lay back and
12 wait till he's about three feet away?

13 MR. KEEM: I think that there is a - - - a moment
14 where he has to use his discretion, and that fifteen feet
15 may be too far to know what is - - - exactly is going to
16 happen in this situation.

17 JUDGE RIVERA: Well, what - - - you've stopped
18 the car in the middle of the road, left it running, left
19 the door open, you're yelling. You look angry. You've got
20 your fist clenched. You're not just - - - again, as I said
21 before, it's a dangerous enterprise.

22 MR. KEEM: So - - -

23 JUDGE RIVERA: You're not just, you know, going
24 to stand there and do nothing, right?

25 MR. KEEM: I understand Your Honor's point.

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JUDGE RIVERA: At least it's reasonable for someone to assume that you might take some other action if - - - if you've gone that far.

MR. KEEM: I - - -

JUDGE RIVERA: Because he's put himself in danger, has he not? She already threw one bottle; she could throw another.

MR. KEEM: It's possible. And - - - and I understand Your Honor's point. But we maintain our contentions in our brief. Thank you.

CHIEF JUDGE WILSON: Thank you.

(Court is adjourned)

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

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Kevin Cleveland, No. 36 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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