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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 9

DOUGLAS MCCAIN,

Appellant.

20 Eagle Street
Albany, New York
January 4, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next matter on the
2 calendar is appeal number 9, People v. Douglas McCain.

3 MS. DONNER: One moment, Your Honor. I think
4 that argument went quicker than I expected when I saw all
5 those parties up there, so I apologize. I should be a
6 little bit more on it. Sorry about that. Okay.

7 May it please the court, my name is Amy Donner,
8 and I represent appellant Douglas McCain. This case - - -

9 CHIEF JUDGE DIFIORE: Ms. Donner, do you care to
10 reserve any rebuttal time?

11 MS. DONNER: Yes, Your Honor. Thank you. I
12 would like to reserve two minutes' rebuttal thank you very
13 much, Your Honor.

14 CHIEF JUDGE DIFIORE: Of course.

15 MS. DONNER: Okay. The case - - - this case
16 presents a question of whether a defendant's possession of
17 a lawful knife can be transformed into an A misdemeanor by
18 a statement of lawful intent. He is - - -

19 JUDGE FEINMAN: This is the - - - the one about
20 the razor knife, right?

21 MS. DONNER: Yes, Your Honor.

22 JUDGE FEINMAN: All right. How does the
23 statement evince - - - evince in any what that he intended
24 to use it as a tool as opposed to a weapon? Do you
25 understand what I'm asking you?



1 MS. DONNER: I believe so, Your Honor, but
2 correct me if I'm - - - if I'm not getting it, please.
3 Well, basically, under McManus I mean it's - - - it's
4 protected. I mean self-protection is what he was saying.
5 It's for my protection.

6 JUDGE FEINMAN: You can't protect yourself if
7 it's not a weapon and you can't protect yourself if it's a
8 knife that isn't dangerous, it seems to me. I mean, you
9 know, the - - - to survive this motion or facial
10 sufficiency analysis just have to be reasonable cause,
11 right?

12 MS. DONNER: Right, which is more probable than
13 not, probable cause. I don't mean to interrupt Your Honor,
14 but more likely than not. Yes.

15 JUDGE FEINMAN: So why doesn't that statement
16 establish that it's more likely than not that it's both
17 dangerous and a knife?

18 MS. DONNER: Well, be - - - for a few reasons,
19 Your Honor. Under - - - I mean McManus justified - - -
20 justified use of force is not - - - is never a crime and
21 self-defense cannot be a crime.

22 JUDGE FEINMAN: That's a trial issue about
23 whether it's justified.

24 MS. DONNER: But - - - but under facial
25 sufficiency, they still have to prove basically reasonable



1 cause, probable cause, more likely than not. And this is a
2 statement of lawful - - - intent to use unlawfully. Self-
3 protection is intent - - - is not intent to use unlawfully.

4 JUDGE FEINMAN: Intent to - - - yeah, okay. Go
5 on.

6 MS. DONNER: Okay. So that's - - - I mean
7 concerning that, I mean - - -

8 JUDGE GARCIA: But I mean - - - Judge Feinman, if
9 I could take a shot at this?

10 JUDGE FEINMAN: Sure.

11 JUDGE GARCIA: Is if he had been arrested and
12 said I was opening boxes at the store with this knife,
13 that's a lawful use and, you know, I don't think we would
14 be here, at least on this issue. So he didn't - - - he
15 said he intended to use it for his purpose as a weapon.
16 Now he's characterizing that as a defensive weapon, but his
17 idea of defensive may be guys looking at me the wrong way
18 on a subway. I mean that's a triable issue of fact.

19 MS. DONNER: Your Honor - - - Your Honor - - -
20 oh, sorry.

21 JUDGE GARCIA: The key point, though, I think
22 that we're trying to get at is his statement, though, isn't
23 I'm using it to open boxes, it's I'm using it as a weapon,
24 I'm using it as a weapon in my mind for defensive purposes
25 but it's not the - - - it's a common purpose I - - - I'm -



1 - - I install tile I'm using this.

2 MS. DONNER: Okay. Well, the razor knife in this
3 situation, the statement that they have to prove - - - I
4 mean it has to be more probable than not that he - - - not
5 - - - that he intended to use this unlawfully. It's for my
6 - - - I mean it's for my protection just because it has to
7 be a statement of - - -

8 JUDGE FEINMAN: But - - - but if it's a dangerous
9 instrument, that's one thing, right? This is charged as a
10 dangerous knife, and they get the benefit of - - - of the
11 presumption and then whether that presumption is rebutted
12 seems to me becomes a trial issue.

13 MS. DONNER: Well, under - - - I mean under - -
14 under Jamie D., the only way - - - knives are not - - - I
15 mean knives are not unlawful per se. It has to be if it's
16 a dangerous - - - if it has to be that it's a dangerous
17 knife, and under Jamie D., there were different ways you
18 could do it. One, if it's by its inherent characteristics.
19 Second definition, if it's modified for use that makes it
20 dangerous, you know, the piece of wood sharpened; into a
21 spear. The - - -

22 CHIEF JUDGE DIFIORE: What about the language
23 that it's an instrument of offensive or defense combat?

24 MS. DONNER: Well, but that comes from the first
25 definition - - -



1 JUDGE FEINMAN: That's also in Jamie D.

2 MS. DONNER: - - - whether it's inherent by its
3 characteristics a weapon like the other - - - it's like
4 most of the other instruments that are mentioned in (2)
5 which is what we're charged with. And specifically - - -

6 JUDGE STEIN: So are you saying there has to be
7 something - - - are you saying that Jamie D. is - - -
8 stands for the proposition that there has to be something
9 more than just the subjective view? So if - - - if the
10 defendant views it as a weapon, the People are saying
11 that's enough. And are you saying that there has to be
12 something more than that? Is that your point?

13 MS. DONNER: Well - - - well, one of my points is
14 that he doesn't have to - - - yes, well, there has to be -
15 - -

16 JUDGE STEIN: Because if that's enough - - -

17 MS. DONNER: Okay.

18 JUDGE STEIN: - - - then the - - - then the
19 instruments should - - - are fine here.

20 MS. DONNER: No, because there has - - - there
21 has to be an - - - a statement - - - it can't be imminent
22 use. You have to look at - - - under Jamie D. the third
23 definition, there has to be essentially that it - - - that
24 the knife primarily intended for utilitarian use under the
25 circumstances of its possession has to be looking at the



1 behavior of the possessor, it has to be essentially a
2 weapon rather than a utensil.

3 JUDGE WILSON: Why - - - why - - -

4 MS. DONNER: Now just - - - I'm sorry.

5 JUDGE WILSON: Why isn't this a dangerous knife
6 simply because the officer has a statement that: "He
7 activated the knife to open and locked position through the
8 force of gravity," which makes it a gravity knife, which
9 under the - - - which under the statute you don't need
10 intent for at all. So doesn't that at least get you to
11 dangerous knife?

12 MS. DONNER: Well, no, Your Honor, not at all
13 because they didn't charge it as a gravity knife.

14 JUDGE WILSON: Understand - - They didn't charge
15 that but doesn't - - - doesn't the fact that under the
16 statute here the officer's statement here about what he did
17 demonstrates that it is a gravity knife make it at least a
18 dangerous knife?

19 MS. DONNER: No, Your - - - okay. No, Your
20 Honor, respectfully. Because it's - - - first of all, it's
21 - - - there are - - - there are differences. First of all,
22 we don't have a whole lot of information, and it doesn't -
23 - - a lot is embellished by the prosecutor. All we know is
24 that it's a razor knife. Now razor, by the way, is
25 explicitly excluded from that presumption of intent to use

1 unlawfully, and all we have here is a razor knife. Now - -
2 -

3 JUDGE WILSON: We don't have a statement.

4 MS. DONNER: It's different if you're - - -
5 excuse me.

6 JUDGE WILSON: We don't have - - - we don't have
7 a statement, sworn statement, from the officer that he
8 activated it to an open and locked position through the
9 force of gravity?

10 MS. DONNER: But that's not enough to make it a
11 gravity knife. First of all, they had to charge it as a
12 gravity - - -

13 JUDGE FEINMAN: Well, that may be why they didn't
14 charge it as a gravity knife and charged it as a dangerous
15 knife. I mean this is not a - - -

16 MS. DONNER: Right.

17 JUDGE FEINMAN: - - - complaint where there's
18 absolutely no facts describing the knife.

19 MS. DONNER: Well, Your Honor, I would say that
20 there's insufficient facts to make it more - - - well,
21 first of all, they would have - - - I mean officers know
22 what gravity knives look like. Yet, this officer said
23 twice it's a razor knife, so - - - and he said based on his
24 training he knows it's a razor knife.

25 JUDGE STEIN: But I think what - - - I think what



1 my colleagues are getting at it is the - - - the
2 characteristics of it, even if it's not a gravity knife,
3 the fact that it could be activated in the way that the
4 officer did makes it inherently a dangerous knife subject
5 to rebuttal.

6 MS. DONNER: Well, the - - - I mean, first of
7 all, gravity works on everything. It - - - and there are
8 things that I mean - - - a lot - - - it doesn't - - - Sans
9 said it was locked automatically in place, so this is
10 different than People v. Sans which I think is what's being
11 alluded to. And - - -

12 JUDGE FEINMAN: Well, but if it - - - again, if
13 it did have that additional thing that made out all the
14 factors in People v. Sans, it would have been charged as a
15 gravity knife. But why isn't this enough to at least make
16 out a dangerous knife?

17 MS. DONNER: Because - - - because it's - - - all
18 that we have, we're limited to the factual allegations in
19 the complaint. And all we have there is that it's a razor
20 knife and that it doesn't say that there's a - - - that
21 it's - - - that it locks in automatically or it's a device,
22 it doesn't say how the officer opened it so you don't - - -
23 and everything works on gravity. You can't just throw in
24 the word gravity and say, oops, gravity knife. I mean you
25 have to have more here, and they would - - - I mean if it



1 was then they would have charged it as such.

2 But I'd like to also address some other things.
3 There is - - - I mean what's - - - one of the things about
4 this case is that they're saying that the statement isn't
5 that I'm going - - - the statement is that in some - - - an
6 awareness that in some circumstance this tool, which is
7 just clipped to his belt, and that's - - - we really don't
8 know much based on the complaint because a lot is what the
9 People are embellishing, you know, the whole one-handed use
10 and stuff like that. Okay. So that's - - -

11 JUDGE FEINMAN: And we know that - - -

12 MS. DONNER: If I could - - - I'm sorry.

13 JUDGE FEINMAN: - - - 11:18, 11:20 at night in
14 the back of a residential building and - - - and it's not
15 like he's standing outside, you know, the stockroom of
16 Costco where he's been opening boxes.

17 MS. DONNER: Okay. People - - - first of all,
18 people work at night, and what I'd like - - - what I'd - -
19 - I mean what I really wanted to say is that he's not - - -
20 this is very different than Jamie D. This is not - - -
21 he's not threatening it. All he's doing is wearing it. If
22 you look at the time of the arrest, he's just wearing it.
23 In Jamie D., he's been - - -

24 JUDGE RIVERA: But - - - but that's of course why
25 the statute only says "possess," right?



1 MS. DONNER: With intent to use unlawfully.

2 JUDGE RIVERA: Yeah, but he is expressing what -

3 - -

4 MS. DONNER: It - - -

5 JUDGE RIVERA: - - - he'll - - - what he's going
6 to do with the knife.

7 MS. DONNER: But it's self - - - but it's - - -
8 but under McManus, it's - - - it's - - - you have a right
9 to use it for protection. An awareness that, yes, this
10 thing can be - - - it has other uses besides - - - that
11 this razor knife has other uses and let's say, you know - -
12 -

13 JUDGE RIVERA: But, counsel, what you're - - -
14 you're missing is that several members are asking you why
15 that question as to whether or not that is indeed his
16 intent to use it in a way that is permissible by law is a
17 question for the jury to decide if he chooses to go to
18 trial.

19 MS. DONNER: Because they - - -

20 JUDGE RIVERA: Because it's just putting him on
21 notice.

22 MS. DONNER: But they have to still - - - it
23 still is more probable than not that this was - - - and
24 it's not saying that it's a weapon. It has to be he's not
25 using it, he's threatening it. He's not using, he's not



1 threatening. It's very different than Jamie D. where they
2 specifically say under the - - - Your Honors - - - the
3 court specifically said that it's - - - I'm sorry that he
4 demonstrated - - - you know, that he under the
5 circumstances, you have no circumstances here. You have
6 this - - - you have this - - - and this statement - - - I
7 mean the court is - - - I mean they have to have more
8 probable than not that it was going to be used - - - that
9 it was going to be used in that way.

10 I mean getting to -- - okay, let's say an - - -
11 an art student - - - I mean you can - - - purchases a
12 knife, purchases an X-ACTO knife. Now he's aware and the
13 storekeeper says to him in the art store, you know, if
14 you're trapped and it's - - - you know, if it's late - - -
15 you know, if you're in your studio and somebody breaks in,
16 you might use this X-ACTO knife thing to - - - you know, if
17 someone's attacking you to defend yourself. So you don't
18 have to intent to use it unlawfully but he's aware of it -
19 - -

20 JUDGE RIVERA: Yeah, but the case is about what
21 he said. He said what his intended use was going to be.

22 MS. DONNER: But the art studio - - -

23 JUDGE RIVERA: He said I carry it around for
24 other purposes and by the way, it's late at night, I'm
25 behind the building, and, you know, if it gets a little

1 dangerous I might use it to protect myself. That's not
2 what he said.

3 MS. DONNER: Well, but if they're going to use a
4 statement and all the statement is is that it's for - - -
5 is that it's for my protection, I don't see - - - and the -
6 - - I don't see where that becomes an - - - a statement of
7 unlawful intent. I mean it's not - - - it's his future - -
8 - in - - - in the event that the situation arose. But - -
9 - and it has to be essentially a weapon and - - -

10 CHIEF JUDGE DIFIORE: Thank you, Ms. Donner.
11 Thank you.

12 Counsel.

13 MS. DONNER: Okay.

14 MS. WHETSTONE: May it please the court, Kayonia
15 Whetstone for the People of Queens County. Your Honors,
16 here we have a facially sufficient accusatory instrument.

17 JUDGE FEINMAN: So what's a razor knife?

18 MS. WHETSTONE: A razor knife is what the officer
19 described. It is a knife that has a razor blade, and this
20 particular knife opens and locks - - -

21 JUDGE FEINMAN: Does he says he has a razor blade
22 in here?

23 MS. WHETSTONE: No, however, where you don't have
24 a definition in the Penal Law, you look to the common - - -
25 the common and usual definition of - - -



1 JUDGE FEINMAN: So - - - so we should assume that
2 this is a knife with a razor - - -

3 MS. WHETSTONE Yes.

4 JUDGE FEINMAN: - - - because he used the word
5 "razor knife."

6 MS. WHETSTONE: Razor knife.

7 JUDGE STEIN: Counsel, if subjective intent to -
8 - - to carry some object for protection that could be used
9 as a weapon renders that instrument a weapon, okay, is
10 there anything that - - - that an ordinary citizen can
11 carry around with them for self-defense other than, say, a
12 licensed firearm with a concealed carry permit?

13 MS. WHETSTONE: For self-defense?

14 JUDGE STEIN: Yeah, for self-defense.

15 MS. WHETSTONE: We believe that this does not
16 impend - - - does not impede on the right to bear arms.

17 JUDGE STEIN: Okay. So under what - - - under
18 what circumstances could - - - what kind of object could a
19 person carry around for self-defense that - - - that he or
20 she believed subjectively would - - - would be used as a
21 weapon in case they were attacked? Can you give me any
22 examples?

23 JUDGE WILSON: Can I - - - can I give my
24 thirteen-year-old daughter a spray can of mace and say you
25 travel on the subway by yourself sometimes if you need to

1 defend yourself you can use this? And she's stopped by the
2 police and says I have mace and I'm going to use it for my
3 defense. Is it a weapon? Does she have an intent to use
4 it unlawfully?

5 MS. WHETSTONE: We don't know that at the
6 pleading stage, and that's where we are. Right - - - right
7 here we're at - - -

8 JUDGE STEIN: So anybody can then be arrested for
9 and charged with this no matter whatever they may have if
10 it - - - if it could be considered a weapon, a dangerous
11 weapon, if used for self-protection?

12 MS. WHETSTONE: Possibly, but here what we have
13 is not just his statement. It's also the circumstances.
14 These two go together. They go hand-in-hand.

15 JUDGE STEIN: What are - - - what are the
16 circumstances?

17 MS. WHETSTONE: The - - - the circumstances here
18 is 11:00 - - - after 11:00 p.m. in public. He has this
19 clipped to his pants pocket. This is not something that he
20 has to fish for in his pockets if he needs to use it for
21 defensive or offensive purposes. It's - - -

22 JUDGE RIVERA: What - - - what about his
23 statement at least I'm not carrying a gun?

24 MS. WHETSTONE: Well, that speaks to - - - it
25 speaks volumes as to what he believed it to be by comparing it



1 to a firearm.

2 JUDGE FAHEY: Isn't the core of your - - - isn't
3 the core of your argument really that context matters?
4 Burglary tools, a crowbar is a burglary tool. Someone's
5 leaving someone else's house with a pile of someone else's
6 property and they're carrying a crowbar you'd call that a
7 burglary tool. But if you're using a crowbar to, you know,
8 tear down a wall or something else - - - it's the context
9 that matters.

10 MS. WHETSTONE: Right.

11 JUDGE FAHEY: And - - - and so isn't the core of
12 your argument here that the police officer is required to
13 lay out his context in order for this to be considered an
14 offense or a crime?

15 MS. WHETSTONE: Yes, it - - - he is and in this
16 case, they haven't - - -

17 JUDGE FAHEY: You know, it's interesting there's
18 - - - and I'm not even sure if it's still good law.
19 There's a case, the Matter of Ricci, R-I-C-C-I. I - - - I
20 can't give you the cite. It's a '74 Court of Appeals case.
21 But in that case, a hunting knife was found not to be a
22 dangerous instrument.

23 MS. WHETSTONE: Yes.

24 JUDGE FAHEY: So how would we distinguish that
25 between this?



1 MS. WHETSTONE: Circumstances. And - - -

2 JUDGE FAHEY: So it would be purely - - - so the
3 statement - - - it's not the presumption but the statement
4 that would be dispositive here. Is that what you would
5 argue?

6 MS. WHETSTONE: I'm arguing that it's the
7 combination - - -

8 JUDGE FAHEY: I see.

9 MS. WHETSTONE: - - - of the circumstances with
10 the statement that - - -

11 JUDGE RIVERA: So - - - so if somebody walks out
12 of the stock exchange, say, a broker walks out of the stock
13 exchange and has this razor knife on them and says the
14 exact same thing.

15 MS. WHETSTONE: We would still - - -

16 JUDGE RIVERA: You can charge them? What's the
17 circumstances there?

18 MS. WHETSTONE: Well, you have - - -

19 JUDGE RIVERA: It's not late at night. It's not
20 behind a building.

21 MS. WHETSTONE: And where is he carrying it? Is
22 it - - - is it in his hand?

23 JUDGE RIVERA: Exactly where - - - every other
24 fact is the same except the location, date, and the
25 profession.



1 MS. WHETSTONE: Then that might be questionable.
2 Does he also have the statement that he's using it to
3 protect - - -

4 JUDGE RIVERA: Again, exactly the same. I have
5 changed nothing else in the hypo.

6 MS. WHETSTONE: Then that case might not be as
7 strong as this one but in this - - - in these factual - - -

8 JUDGE RIVERA: Because of - - - because of the
9 individual, the individual's profession - - -

10 MS. WHETSTONE: No, no.

11 JUDGE RIVERA: - - - and the building they're
12 working out of?

13 MS. WHETSTONE: Because of the circumstances.

14 JUDGE RIVERA: Well, the - - - that's what I've
15 changed.

16 MS. WHETSTONE: Yes.

17 JUDGE RIVERA: Okay. But what makes those
18 circumstances different?

19 MS. WHETSTONE: What makes the - - -

20 JUDGE RIVERA: I'm asking you.

21 MS. WHETSTONE: What makes the circumstances
22 different?

23 JUDGE RIVERA: Yes.

24 MS. WHETSTONE: The circumstances are different
25 just because he's not using it as - - - given the lateness



1 of the hour. He - - -

2 JUDGE RIVERA: But he says the exact same thing.

3 MS. WHETSTONE: Yes, I understand that. But
4 given you said it's not late at night - - -

5 JUDGE RIVERA: No, but he's told you the exact
6 same thing.

7 MS. WHETSTONE: Right.

8 JUDGE RIVERA: Isn't that the intent to use it as
9 a weapon? Exact same thing.

10 MS. WHETSTONE: The circumstances - - -

11 JUDGE RIVERA: Walks out of the stock exchange at
12 10:00 a.m.

13 MS. WHETSTONE: Yes. That - - - that does - - -

14 JUDGE RIVERA: Dressed in a suit.

15 MS. WHETSTONE: Yeah, the suit or not, it - - -
16 the fact is he's not cutting tile, he's not - - - he's not
17 - - -

18 JUDGE RIVERA: Well, neither is the defendant
19 here. There's nothing in - - - right, there's nothing in
20 the instrument that says anything about that.

21 MS. WHETSTONE: Right. So if he has it clipped
22 on his pocket, is easily accessible, there is something
23 inherently dangerous about this knife. I'm not - - -

24 JUDGE RIVERA: I'm just not getting - - - I don't
25 understand why you're not charging the individual in my



1 hypothetical.

2 MS. WHETSTONE: I'm charging - - - I'm charging -
3 - -

4 JUDGE RIVERA: I understand your position.

5 MS. WHETSTONE: I'm charging - - - I'm charging -
6 - -

7 JUDGE RIVERA: Well, you said it was different.

8 MS. WHETSTONE: I'm saying that case might not be
9 as strong because it's during the day. Maybe. But - - -

10 JUDGE RIVERA: But you mean it might not be as
11 strong if the individual goes to trial?

12 MS. WHETSTONE: Right, trial.

13 JUDGE RIVERA: But not for the charging purpose.

14 MS. WHETSTONE: But for the pleading stage - - -

15 JUDGE RIVERA: For the pleading - - -

16 MS. WHETSTONE: - - - that's where we are.

17 JUDGE RIVERA: So they - - - these two are
18 similarly situated?

19 MS. WHETSTONE: Yes, they are similarly situated.

20 JUDGE RIVERA: So - - - so since I've changed
21 nothing but the context, I'm not sure what your answer to
22 Judge Fahey means.

23 MS. WHETSTONE: What - - - what I mean to say is
24 this. In this circumstance because of the circumstances of
25 possession the way that the accusatory instrument is worded



1 to describe the knife, that it is something that opens and
2 locks by the force of gravity combined with the defendant's
3 statement that he himself believes it to be a weapon gets
4 us to dangerous instrument. The fact that it happened at
5 11:00 p.m. at night, the fact that he's standing out on a
6 public street - - -

7 JUDGE FEINMAN: So - - - so I want to be clear
8 because you just said gets us to a dangerous instrument.
9 Are you - - -

10 MS. WHETSTONE: A dangerous knife, excuse me.

11 JUDGE FEINMAN: - - - saying it's a dangerous
12 instrument or a dangerous knife?

13 MS. WHETSTONE: A dangerous knife.

14 JUDGE FEINMAN: Because those are two very
15 different things.

16 MS. WHETSTONE: Your Honor, I misspoke. I am
17 speaking about a dangerous knife.

18 JUDGE FEINMAN: Okay. I just want to be clear
19 about that.

20 JUDGE STEIN: And - - - and if he said - - - the
21 exact same circumstances, 11:30 at night, behind, you know,
22 a residential building, whatever, didn't say a word at all,
23 is that enough?

24 MS. WHETSTONE: Yes, possibly. Yes. Because
25 we're - - - we're talking about the circumstances of the



1 possession as well. If you look at Antwaine T. - - -

2 JUDGE STEIN: And so nighttime is distinguishable
3 from daytime, right? Is - - - is that what you're saying?

4 MS. WHETSTONE: I'm saying nighttime might make
5 it a stronger case as in most people are not cutting tiling
6 at 11:00 p.m.

7 JUDGE STEIN: So for - - - for charging purposes
8 - - -

9 MS. WHETSTONE: For charging purposes.

10 JUDGE STEIN: For charging purposes it's not
11 11:00 in the morning and he's standing behind this
12 residential building with this razor knife clipped to his
13 belt, and he says nothing when he's approached or when
14 asked.

15 MS. WHETSTONE: For charging purposes it does not
16 make a difference. We are at the pleading stage where the
17 standard is reasonable cause. This is a permissive
18 presumption that gets us to the trier of fact where - - -

19 JUDGE STEIN: So - - - so - - -

20 MS. WHETSTONE: - - - that can be the - - -

21 JUDGE STEIN: - - - if I'm in my house and I'm
22 opening boxes and I stick the knife right in my pocket and
23 then I get a phone call and I go outside next door to my
24 next-door neighbor's house and this thing is in my pocket
25 and - - - and police happen to be walking by and they see



1 it sticking out of my pocket, is that enough?

2 MS. WHETSTONE: This razor knife?

3 JUDGE STEIN: Yes.

4 MS. WHETSTONE: Yeah.

5 JUDGE WILSON: So you've essentially removed the
6 intent requirement entirely, so this is now just like a
7 gravity knife, right?

8 MS. WHETSTONE: No. No, Your Honor. This is - -
9 -

10 JUDGE WILSON: Because you're saying if I'm on a
11 public street with this instrument, I don't have to say
12 anything, it could be night or day, I could be going to my
13 neighbor's house, if police see me they have enough to stop
14 me, arrest me, and charge me?

15 MS. WHETSTONE: What I'm saying is there is a
16 formula. To use the presumption which we are using here
17 you have to establish a dangerous knife. Now I'm saying
18 that combined this gives you more than enough to show a
19 dangerous knife that triggers the presumption that gets you
20 past what we need to have shown. Now - - -

21 JUDGE FAHEY: Sometimes in these things you got
22 to take a step back. By presumption, you mean the
23 presumption of intent - - -

24 MS. WHETSTONE: Of intent.

25 JUDGE FAHEY: - - - to do - - - to use



1 unlawfully.

2 MS. WHETSTONE: Yes.

3 JUDGE FAHEY: So his statement doesn't really
4 matter if you trigger the presumption.

5 MS. WHETSTONE: Right.

6 JUDGE FAHEY: Is that correct? So you don't need
7 the - - - that would be a separate proof of intent.

8 MS. WHETSTONE: Yes.

9 JUDGE FAHEY: So we can just set the statement
10 aside and just start with the intent. We really - - - it
11 just comes down to whether or not the razor knife is a
12 dangerous knife. Then the presumption triggers in. That
13 satisfies the intent requirement, and you're legally
14 sufficient. Isn't that the - - - the logic steps that you
15 go through here?

16 MS. WHETSTONE: Those are the logical steps.

17 JUDGE FAHEY: So - - - so you don't need the
18 statement. So the statement's kind of irrelevant. What he
19 says one way or the other doesn't really matter. All that
20 - - - all that really matters is you're carrying a
21 dangerous knife, boom, that's it.

22 MS. WHETSTONE: Yes. It - - -

23 JUDGE WILSON: Which is exactly the same for a
24 stiletto, which doesn't have the intent requirement.

25 MS. WHETSTONE: Excuse me?



1 JUDGE WILSON: It's exactly - - - then - - -
2 you've then merged the rule for dangerous knives, right,
3 which requires intent with the separate rule for things
4 like stilettos and switchblades which doesn't require
5 intent because if you have it on your purpose on the street
6 that's it.

7 JUDGE FEINMAN: Dangerous knife is listed with
8 dirk, razor, and stiletto so the answer is right there in
9 the statute.

10 MS. WHETSTONE: The statute allows for - - - the
11 statute - - -

12 JUDGE FAHEY: Presumption, the statute allows for
13 presumption.

14 MS. WHETSTONE: The presumption, yes.

15 JUDGE FAHEY: Right.

16 MS. WHETSTONE: With dangerous knives. And if
17 you look at Jamie D. there are all of these prescriptions
18 as to what gets you to a dangerous knife. Now we could be
19 hypothetically talking about circumstances where a
20 statement wasn't made, but in the facts - - - under the
21 facts of this case we have both circumstance as to where
22 the knife was positioned, the fact that he wasn't using it
23 for a utilitarian purpose, the fact that he - - - in - - -
24 in combination with all of those circumstances, he also
25 states hey, I have this for my protection.



1 CHIEF JUDGE DIFIORE: Thank you, counsel. We
2 understand the point. Thank you.

3 Ms. Donner.

4 MS. DONNER: Thank you. Not all knives - - -
5 knives are by themselves lawful. Only dangerous knives are
6 what's unlawful. And - - - and dangerous knives with
7 intent to use unlawfully. And a razor is specifically
8 excluded from the presumption of a - - -

9 JUDGE FAHEY: Well, stop - - - stop a second,
10 ma'am. We're not - - - they're - - - razors are precluded.
11 Razor knives are not the same as razors. I think there's a
12 distinction there in the statute. Tell me why a razor
13 knife isn't a dangerous knife. Assume - - - because we're
14 really dealing here primarily with the presumption. I want
15 to deal - - - focus on that.

16 MS. DONNER: Razor knife is not defined - - -
17 razor knife is not defined, so you have to - - - so a razor
18 knife can be - - - when you - - - I mean when you Google it
19 basically it's going to be art knives or it's going to be -
20 - -

21 JUDGE FAHEY: My question is - - - my question is
22 - - - I know what they look like. We all know what they
23 look like. I understand that. But what - - - what I want
24 to know is why a razor knife can't be considered a
25 dangerous knife. Is there case law. Is there a statutory



1 law? What specifically would you say we should look at to
2 make that determination?

3 MS. DONNER: Well - - - well, it's a third
4 definition, it's - - - of Jamie D. that under the
5 circumstances of its use it had to be essentially a weapon.
6 And by the way, the DA is sort of cherry-picking which
7 parts it likes of - - -

8 JUDGE FAHEY: Just stay with my question.

9 MS. DONNER: Yes.

10 JUDGE FAHEY: Okay. Why is a - - - why is a
11 razor knife not a dangerous knife?

12 MS. DONNER: Because we don't have enough
13 information as to what - - - as to what this razor - - - as
14 to what this razor knife is, and it can be a tool. You're
15 wearing it on your belt. By the way, the fact that he had
16 it out just means - - - I mean that one has a clip. How
17 else are you going to wear it? You would - - - why would
18 you advertise you were carrying a weapon if you were
19 carrying it - - - if - - - why would you advertise that if
20 you were going to - - - if you had intent to use it
21 unlawfully?

22 JUDGE GARCIA: But if it's a dangerous knife, do
23 you need the intent to use it unlawfully?

24 MS. DONNER: Yes.

25 JUDGE GARCIA: So under this statute, 265: "You



1 possess a dagger, a dangerous knife, or any other
2 dangerous, deadly instrument with intent to use it
3 unlawfully," right. So you need - - - even if it's a
4 dangerous knife, but then you get the presumption of the
5 intent which is I think what Judge Fahey's saying, right?

6 MS. DONNER: Because it would - - - oh, I'm
7 sorry. I don't mean to interrupt, Your Honor.

8 JUDGE GARCIA: So a dangerous knife gives you
9 presumption of intent to use it unlawfully?

10 MS. DONNER: It - - -

11 JUDGE GARCIA: Just forget your facts. Under the
12 statute - - -

13 MS. DONNER: Yes, but it can be rebutted, and you
14 don't have a working presumption.

15 JUDGE GARCIA: Understood. Understood.
16 Understood.

17 MS. DONNER: Okay.

18 JUDGE GARCIA: So the question of whether or not
19 it's a dangerous knife giving you the presumption, I think
20 the argument of the People is you look at all these
21 circumstances. So it isn't that this defendant is saying I
22 intend to use it unlawfully because I'm saying I intend to
23 use it lawfully. It's that statement indicating that the
24 intent is not to use it as a box cutter but to use it as
25 some form of weapon combined with the time of the offense



1 at night, the location of the offense, and I think as Judge
2 Wilson was saying, the description of the knife is given by
3 the police officer. All of those things go to creating the
4 presumption because they go to creating this, labeling
5 this, as a dangerous knife. So why isn't that right?

6 MS. DONNER: Because it's - - - you - - - a
7 statement - - - he never - - - a statement of intent for
8 lawful use, self-protection under McManus, is not unlawful.
9 It says that.

10 JUDGE GARCIA: But forget - - - forget that as
11 the intent - - - what we're just talking about is I think -
12 - -

13 MS. DONNER: But - - - so - - -

14 JUDGE GARCIA: - - - Judge Fahey's trying to get
15 at is the presumption. So to get to the presumption, you
16 just have to get to dangerous knife, and that intent - - -
17 not going intent to lawful, unlawful, but intend to use a
18 weapon rather than as a tool goes to the circumstances
19 creating the label dangerous knife giving you the
20 presumption.

21 MS. DONNER: You have to - - - I'm sorry. You
22 have - - -

23 JUDGE GARCIA: Unless - - - am I misunderstanding
24 - - -

25 MS. DONNER: I'm sorry. Could you - - - I guess



1 I'm not - - - could - - - could Your Honor - - - I'm sorry.

2 JUDGE GARCIA: No, no. I may be confusing the
3 question here. To me under this statute, and I think what
4 Judge Fahey's questioning was getting at, if you have
5 enough to show that this is a dangerous knife, you get a
6 presumption of intent to use it unlawfully, just under the
7 statute. Forget the facts here. You agree with that?

8 MS. DONNER: If you have a dangerous knife?

9 JUDGE GARCIA: Right.

10 MS. DONNER: Okay.

11 JUDGE GARCIA: And their argument isn't the
12 statement showed an intent to use is unlawfully. I believe
13 the People's argument is the statement and the other
14 circumstances go to show that this is dangerous knife
15 giving you a presumption of using it unlawfully.

16 MS. DONNER: Because it's not - - - I guess
17 because it's not an - - - it's an irrational presumption
18 under these circumstances when under McManus self-
19 protection - - -

20 JUDGE GARCIA: As a matter of law you're saying
21 it's irrational to conclude that given the description of
22 the knife, the time and place of the arrest, and his
23 statement that he intended to use it as a weapon, albeit
24 defensively, is irrational to find the standard for a
25 pleading?



1 MS. DONNER: Under these circumstances, yes.
2 It's - - - yes, and it's over - - - it is an overbroad
3 thing. And other - - - and you don't have a grand jury
4 misdemeanor - - - with misdemeanors so therefore if the
5 People aren't specific then you can just tell them Judge
6 Wilson's daughter with the - - - you know, could be - - -
7 you know, as Your Honor was saying could - - - anything
8 could be considered a dangerous instrument.

9 JUDGE FEINMAN: Well, the mace wouldn't - - -
10 wait a minute, the mace wouldn't be a dagger, dangerous
11 knife, dirk, you know, et cetera, stiletto or imitation
12 pistol or a Kung Fu star.

13 MS. DONNER: But the - - -

14 JUDGE FEINMAN: With Judge Wilson's daughter you
15 would have to get into whether it's a dangerous instrument
16 and you wouldn't have the benefit of the presumption so - -
17 -

18 MS. DONNER: But when you consider that knives
19 are not - - - are not necessarily dangerous knives, knives
20 are lawful. Why does a statement that's protected under
21 McManus - - - how does that - - - People - - - how does
22 that then somehow - - -

23 JUDGE FEINMAN: So - - - so your problem is that
24 they haven't alleged enough to make this dangerous?

25 MS. DONNER: Yes, and that - - - and that in any



1 event, it's - - - it's not a working presumption. It
2 disappears. It would be irrational. You can't - - -
3 they're the ones who are introducing the state - - - the
4 statement and the statement is I'm using it for self-
5 protection which is protected under McManus. So then to
6 have to - - - so then to say, well, it's good enough to be
7 intent to use unlawfully when it's saying I'm not using it
8 unlawfully, I don't have an intent to do that. Under these
9 circumstances - - -

10 CHIEF JUDGE DIFIORE: Thank you, Ms. - - - thank
11 you, Ms. Donner.

12 MS. DONNER: - - - it would be irrational. Thank
13 you.

14 CHIEF JUDGE DIFIORE: Thank you.

15 (Court is adjourned)

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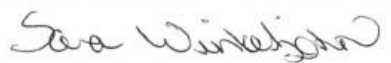
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Douglas McCain, No. 9 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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