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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 108

CLINTON BRITT,

Appellant.

20 Eagle Street
Albany, New York
November 21, 2019

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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1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 108, The People of
3 the State of New York v. Clinton Britt.

4 (Pause)

5 MS. WU: Good afternoon, Your Honors. Jenny Wu,
6 co-counsel with Legal Aid Society, here representing
7 appellant, Mr. Clinton Britt. I'd like to reserve two
8 minutes for rebuttal.

9 CHIEF JUDGE DIFIORE: You may, Ms. Wu.

10 MS. WU: On the issue of legal sufficiency, this
11 case has already been decided ten years ago, by this court,
12 in Bailey. Bailey remains good law. The prosecution does
13 not dispute that Bailey remains good law. Given that,
14 Bailey requires reversal of this case, because there is no
15 meaningful distinction between that case and this case.

16 There are clear parallels between the two cases.

17 JUDGE RIVERA: Are you saying there's no
18 circumstantial evidence by which a jury could have
19 reasonably concluded that, indeed, he had the intent - - -

20 MS. WU: That's correct, Your Honor.

21 JUDGE RIVERA: - - - to defraud?

22 MS. WU: That is our position, that there is no -
23 - - that the totality of the evidence that was presented by
24 the People at trial did not give rise to - - -

25 JUDGE FEINMAN: So assume that we accept that



1 Agt. Helm's testimony is properly admitted - - - I know you
2 don't necessarily agree with that, but assume that we think
3 it's properly admitted, why doesn't that distinguish this
4 from Bailey?

5 MS. WU: That's because - - - that fact of
6 separation does - - - only gives rise to speculation about
7 the significance of the separation of the bills. Right,
8 that - - - so what the - - -

9 CHIEF JUDGE DIFIORE: Well, I assume that your
10 opponent is going to argue that the opposite inference can
11 be drawn, right, from the separation of the bills. And
12 under our standard of review, aren't we obligated to draw
13 the inference in favor of the People, even in the face of a
14 competing inference?

15 MS. WU: Yes, but that - - - there are limits to
16 that. And those limits have been crossed in this case, in
17 that the fact - - -

18 CHIEF JUDGE DIFIORE: Limits - - - I'm sorry?

19 MS. WU: There - - - there are limits to those -
20 - - to that deference that's giving to the fact-finding
21 below by the jury. And those limits have been crossed in
22 this case.

23 And that's because here the fact of the
24 separation of the bills only gives rise to speculation as
25 to the meaning of that separation. It could mean, as the



1 People have argued, that there was an intent to use the
2 bills that had been wadded up tightly with a rubber band.
3 But it's equally consistent with an inference that having
4 those bills tightly wadded up in a rubber band - - -

5 JUDGE STEIN: But if the jury - - -

6 MS. WU: - - - means - - -

7 JUDGE STEIN: - - - found the expert's testimony
8 credible that this is a common thing that people who intend
9 to use - - - fraudulently use counterfeit instruments do,
10 then that gives them something from which they can decide,
11 well, okay did it or didn't it. You know? Do we believe -
12 - -

13 MS. WU: Yeah.

14 JUDGE STEIN: - - - you know, do we believe this
15 expert?

16 MS. WU: So first of all, as we have argued, that
17 particular expert testimony was inadmissible because it
18 lacked foundation.

19 But setting that aside, the fact of the matter
20 is, is that looking at the testimony that Agt. Helm gave,
21 he didn't have the necessary qualification, skill, or
22 experience to provide a reliable opinion on that - - -

23 JUDGE FAHEY: But aren't these arguments - - -

24 MS. WU: - - - it happen - - -

25 JUDGE FAHEY: - - - excuse me. Aren't these



1 arguments really weight arguments, not sufficiency
2 arguments?

3 MS. WU: No, this is about whether or not the
4 evidence was suffi - - - was such that it could make a - -
5 -

6 JUDGE FAHEY: Well, let me back up - - -

7 MS. WU: - - - inference - - -

8 JUDGE FAHEY: - - - a second. Assuming
9 possession does not equal intent - - - I agree with you
10 about that; all right - - - so let's say that's what the
11 statute says. No argument about that. Then we're really
12 down to is the evidence in the record sufficient.

13 And you have a statement. You have - - - and you
14 have a - - - you have the statement of the defendant and
15 the statement of the expert - - - getting past your
16 foundation argument. That being the case, I'm having a
17 hard time seeing why it isn't legally sufficient.

18 I understand that as a weight argument. But as a
19 basic sufficiency argument, with - - - going back to the
20 Chief Judge's question - - - aren't we kind of really bound
21 on the sufficiency question?

22 MS. WU: No, Your Honor. Because here, taking
23 the points in turn, the statement given by the defendant
24 only goes towards knowledge.

25 JUDGE FAHEY: Um-hum.



1 MS. WU: It's not intent. And knowledge and
2 intent have to be proven separately, beyond a reasonable
3 doubt. That's what Bailey says.

4 JUDGE GARCIA: Yeah, but can't the same proof be
5 used for both? I mean, it's a separate proof - - -

6 JUDGE FAHEY: It's a separate element, but it's
7 the same proof.

8 MS. WU: Yes, but only if a rational inference
9 can be drawn for that particular piece of evidence.

10 JUDGE FAHEY: Yeah, getting that. But - - - but
11 the argument is presented - - - just like Judge Garcia was
12 saying, the argument is being presented like you have to
13 have proof other than the proof of possession. You don't.
14 You have the same proof and it goes to a different element.

15 MS. WU: That can happen if it's the basis for a
16 rational inference - - -

17 JUDGE FAHEY: Um-hum.

18 MS. WU: - - - and if - - - and with respect to
19 intent, that evidence, if it's going to be supportive of a
20 finding of intent beyond a reasonable doubt, must be
21 specific to the intent that's associated with the crime
22 that is charged.

23 Here that's the - - - to the extent what we're
24 talking about is the statement of the defendant to the
25 police, that was about knowledge, pure and simple. It had



1 nothing to do with intent.

2 JUDGE WILSON: So when you're saying the
3 defendant says "you got me", right, it might mean you got
4 me intending to pass counterfeit money or it might mean you
5 got me with counterfeit money, and we can't draw any
6 inference if it's one or the other; is that what you're
7 saying?

8 MS. WU: Well, here, in this case, the statement
9 that was provided by the defendant to the police was that -
10 - - let me talk to a detective. I'm willing to make a
11 deal. And I will tell you who I got the counterfeit money
12 from if you make the drug charges go away.

13 That statement, at best, indicates knowledge, but
14 not an intent to defraud. Also with respect to the
15 testimony that the Secret Service agent provided, that too,
16 also cannot go to intent, because it was not based on
17 anything. There was no foundation, and it could just - - -
18 and it was improperly admitted, because it provided a false
19 sense of authority - - -

20 JUDGE STEIN: Well, when was the - - - when was
21 the first time that defense counsel made an objection to
22 that foundation known to the court?

23 MS. WU: The first time that objection was made
24 was when the testimony was provided.

25 JUDGE STEIN: So when he - - - when - - - I don't



1 remember if it was he or she - - - when - - - when counsel
2 said "objection"?

3 MS. WU: Correct, Your Honor. Yes.

4 JUDGE STEIN: Okay. Is that enough to preserve
5 that argument?

6 MS. WU: Here it was. If you look over the
7 course of what happened at trial - - -

8 JUDGE STEIN: How - - - how would the - - - how
9 would the court have known that that was the particular
10 objection?

11 MS. WU: Well, first of all, at that very moment
12 in time, there was very specific and discrete testimony
13 that was being provided by the Secret Service agent. It
14 was purely and solely directed to the question of how do
15 people who are caught passing counterfeit bills at the
16 street level commonly behave?

17 And so there could have only been one reason for
18 the objection that defense counsel lodged at that very
19 moment. But further, if you look over the course of what
20 happened at trial, in response to the ju - - - to the trial
21 judge inviting counsel to provide exceptions to the jury
22 charge provided, defense counsel made very clear on the
23 record that the reason for the objection at that time was
24 because of the Secret Service agent's lack of
25 qualifications for being able to opine on how those who



1 pass street level - - - who - - - those who are passing
2 counterfeit currency at the street level would typically
3 behave. That's very clear on the record. He says that's
4 part of the reason why I made the objection.

5 I see that my time is up.

6 CHIEF JUDGE DIFIORE: Thank you, Counsel.

7 Counsel?

8 MS. BAUTISTA: Good afternoon, Your Honors, may
9 it please the court. My name is Sheila Bautista, and I
10 represent the People in this case.

11 Your Honors, multiple factors supported the
12 jury's rational conclusion supporting the defendant's
13 intent to defraud with the counterfeit money that he
14 possessed in this case.

15 JUDGE RIVERA: Would the evidence be sufficient
16 without the agent's testimony?

17 MS. BAUTISTA: Yes, Your Honor.

18 JUDGE RIVERA: Okay. What's the other - - -
19 assuming the agent's testimony is out, what's the other
20 evidence that supports that reasonable inference by the
21 jury?

22 MS. BAUTISTA: Your Honor, the agent testified
23 that it was common for people to separate the money. In
24 this particular instance, the jury could still consider
25 that this individual defendant wrapped the money in a



1 rubber band so that he could feel it in his pocket and
2 distinguish it from the real money in his - - - in his
3 pocket.

4 There is the fact that he had seventeen
5 counterfeit - - -

6 JUDGE WILSON: So if he were - - - he were trying
7 not to pass counterfeit money, but you possessed it, how
8 would you keep it?

9 MS. BAUTISTA: You - - - you could - - - you
10 could - - -

11 JUDGE WILSON: Would you mix it with your regular
12 money?

13 MS. BAUTISTA: No - - - no, you wouldn't, Your
14 Honor. But - - -

15 JUDGE WILSON: So why is there any probative
16 value to the fact that he separated it? If it's - - - if
17 what we're trying to determine is does he have an intent to
18 spend it - - -

19 MS. BAUTISTA: Correct.

20 JUDGE WILSON: - - - and whether he intends to
21 spend it or he doesn't intend to spend it, he's going to
22 keep it separately, why can we draw any inference from the
23 fact he kept it separately?

24 MS. BAUTISTA: You - - - you - - - you could - -
25 - you could draw either inference. Either inference could



1 be rational. What the - - -

2 JUDGE WILSON: Couldn't you draw no inference
3 from that fact?

4 MS. BAUTISTA: Uh - - -

5 JUDGE WILSON: If two things are equally possible
6 from a fact, how can you draw either inference from it?
7 You're saying you can draw both, but - - - but there are -
8 - - there are facts that are probative of nothing, right?

9 MS. BAUTISTA: I - - - I can't think of one right
10 now. The jury - - - the jur -- - we know what the jury
11 inferred in this case. We know what the jury inferred in
12 this case, and it was a rational inference. It was a
13 reasonable inference.

14 JUDGE WILSON: So your view is even if - - -

15 JUDGE FEINMAN: Given the standard of having to
16 look at this in the light most favorable to the People,
17 they're entitled to that inference?

18 MS. BAUTISTA: They're entitled to that
19 inference.

20 JUDGE RIVERA: Yeah, but my - - - again, my
21 question was, if we take out the agent's testimony - - -

22 MS. BAUTISTA: Correct.

23 JUDGE RIVERA: - - - which she - - - she
24 disputes, what is left?

25 MS. BAUTISTA: We have seventeen bills - - -



1 seventeen counterfeit bills, amounting to 300 dollars.

2 JUDGE FEINMAN: So - - - so is there something
3 magical about the number seventeen as opposed the three
4 bills that's in Bailey or - - - you know, like - - -

5 MS. BAUTISTA: It's - - - it's more than the
6 bills in Bailey. There were three ten-dollar bills in
7 Bailey. Seventeen counterfeit bills, amounting to 300 - -
8 -

9 JUDGE STEIN: But there are other cases where way
10 more than that has been held not to be sufficient, right?

11 MS. BAUTISTA: Well, cor - - - correct, but in
12 this situation, the - - - the - - - the quantity of the
13 bills demonstrates that this was not an accidental pot - -
14 - possession of the money; it was a purposeful possession.

15 He did not receive seventeen bills amounting to
16 300 dollars - - -

17 JUDGE RIVERA: But - - - no, but I'm not asking
18 about the possession, I'm asking about the intent.

19 MS. BAUTISTA: Correct. So - - -

20 JUDGE RIVERA: Or the fraud. Where - - - where
21 is that?

22 MS. BAUTISTA: It shows that the - - - the
23 possess - - - the number of the bills shows that the
24 possession is purposeful. The purpose of it is to use the
25 money. And based on the purpose - - - given - - - given



1 the number of bills the - - - the - - - given his purpose
2 in wanting to use that money, that is probative of this
3 intent to defraud.

4 JUDGE STEIN: Does it have to be a purpose to use
5 that money in - - - in close temporal proximity to when it
6 was discovered? In other words, does - - - does it have to
7 be intent to use it, you know, that evening or whatever?

8 MS. BAUTISTA: It - - - it's - - -

9 JUDGE STEIN: Or can it be anytime?

10 MS. BAUTISTA: It -- - it can be anytime, as
11 long as there is - - - there is intent. And in this cir -
12 - - and he was in a circumstance where he had opportunity
13 to use that money. He was in a - - - he was in a place - -
14 - he was in Times Square (sic).

15 JUDGE RIVERA: Well, you do seem to be collapsing
16 the possession and intent; because he could be just
17 carrying it to give it to somebody else - - - not - - - not
18 for purposes of fraud. Someone who would realize it's
19 counterfeit. He's going to give it to them. They're part
20 of some counterfeit scheme. Who knows?

21 MS. BAUTISTA: But that -- - that's not - - -
22 that - - - that's a possibility, but that's not what this
23 jury concluded. The jury made that rational conclusion,
24 based on the separation, based on the number of bills,
25 based on the denomination of the bills. The denomination



1 of the bills is also supportive of his intent to defraud,
2 because they're tens and twenties. Those are subject to
3 less scrutiny. And given this combin - - -

4 JUDGE RIVERA: So what are - - - under what - - -
5 under what circumstances, would someone who's in possession
6 of counterfeit bills not - - - not - - -

7 MS. BAUTISTA: Not intending to defraud.

8 JUDGE RIVERA: - - - he's got possession, right?

9 MS. BAUTISTA: Correct.

10 JUDGE RIVERA: Not - - - not be able - - - the
11 People could not proceed to show intent?

12 MS. BAUTISTA: Well, there's Bailey, the three
13 ten-dollar counterfeit bills. If Bailey - - - if - - - if
14 a person had, you know, a few one-dollar bills mixed up
15 with - - - maybe he had three one-dollar bills mixed up
16 with a hundred dollars in their wallet. Maybe that's money
17 that was accidentally acquired by the person. And in that
18 situation that - - -

19 JUDGE RIVERA: That means you have possession
20 without - - -

21 MS. BAUTISTA: - - - would be harder - - -

22 JUDGE RIVERA: - - - knowledge of the counterfeit
23 bill?

24 MS. BAUTISTA: Right. But - - - or - - -

25 JUDGE RIVERA: Let's say someone who has



1 knowledge that they have counterfeit money on them?

2 MS. BAUTISTA: Per - - - perhaps someone got the
3 counterfeit money in change during a transaction and wants
4 to go back to that person and say, hey, look, this is - - -
5 this is fake money. They separate it from the real money
6 and say this is fake money.

7 But this money couldn't have been cau - - -
8 acquired in exchange. It's 300 dollars. It's 300 dollars.
9 There's no exchange where you would get 300 dollars in
10 change wadded up in a - - - in a rubber band. So based - -
11 - based on - - -

12 JUDGE FAHEY: Not - - - not from a drug
13 transaction?

14 MS. BAUTISTA: Uh - - -

15 JUDGE FAHEY: He's found with drugs.

16 MS. BAUTISTA: He - - - he's found with drugs.

17 JUDGE FAHEY: People don't buy 300 dollars of
18 drugs in cash in New York City?

19 MS. BAUTISTA: Cor - - - right, but - - - but - -
20 - there - - - that's not - - -

21 JUDGE FEINMAN: He could also be using it to make
22 change for the drug transactions he's carrying out. But -
23 - - but we don't know any of that.

24 I have a - - - a question on the - - - the issue
25 of how they actually get to him. I just want to be clear.



1 Your position is that it's a mixed question - - -

2 MS. BAUTISTA: Mixed question of law and fact,
3 yes, Your Honor.

4 JUDGE FEINMAN: - - - of law and fact.

5 MS. BAUTISTA: Supported by the record.

6 JUDGE FEINMAN: But is there actually - - - I - -
7 - I guess I'm just troubled by this notion that because you
8 see something in a brown paper bag that that somehow allows
9 you to start pursuing this person.

10 MS. BAUTISTA: Well, in - - -

11 JUDGE FEINMAN: And - - - and - - - yeah, why
12 don't you - - -

13 MS. BAUTISTA: Based on the officer's experience,
14 the reason people drink - - - drink beverages out of a
15 brown paper bag is to conceal the fact that they're
16 violating the open-container law. And based on that, an
17 officer has a right to approach and - - - approach and
18 inquire.

19 In this situation, the def - - - the - - - the
20 police officer tried to approach the defendant, but he - -
21 - he ran away. And - - - and so the - - - so to inquire of
22 this defendant, the police officer had to pursue, and
23 that's what happened in this case.

24 JUDGE FEINMAN: Well - - -

25 JUDGE RIVERA: But did he - - - did he run away?



1 JUDGE FEINMAN: Did he run - - - yeah?

2 JUDGE RIVERA: Did he run away?

3 MS. BAUTISTA: Yes. According to - - -

4 JUDGE RIVERA: I don't mean once he's in ti - - -
5 inside the building, I mean did he run away the moment he
6 saw the officer? Is that - - -

7 MS. BAUTISTA: When the off - - -

8 JUDGE RIVERA: - - - the beginning trot?

9 MS. BAUTISTA: - - - when the officer made a
10 U-turn in his - - - in his marked police vehicle, the
11 defendant - - - on page 62 of the appendix - - - ran up the
12 stairs. The police officer - - -

13 JUDGE RIVERA: Was he already inside, or do you
14 mean external stairs?

15 MS. BAUTISTA: He's outside - - - I - - - I don't
16 know where the stairs are. But he - - - he's run - - - it
17 sounds like he's running up the stairs into the haunted
18 house to get away from the - - -

19 JUDGE RIVERA: Well, I thought you just said you
20 don't know - - -

21 MS. BAUTISTA: - - - police officer.

22 JUDGE RIVERA: - - - where the stairs are?

23 MS. BAUTISTA: It - - - it sounds like he's
24 running up the stairs into the - - - into the - - - he was
25 on the sidewalk, and he was running up the stairs.



1 JUDGE RIVERA: Sounds like, but there's not
2 particular language you want to point to that makes it
3 clear?

4 MS. BAUTISTA: It's on page - - - it's on page 62
5 of the record that the defendant runs up the stairs into
6 the haunted house.

7 JUDGE FEINMAN: So you're - - - you're saying
8 that he didn't have a right to - - - when he sees the
9 officer - - - just walk away? I mean, it's not like the
10 officer ever said stop, I want to talk to you about your
11 beer or Lima-a-Rita.

12 MS. BAUTISTA: Well - - - well - - - well, given
13 - - - sorry. Sorry. Could you rephrase the question,
14 please?

15 JUDGE FEINMAN: Sorry. What - - - what I'm
16 getting at is, you know, you're partially relying on the
17 flight. And you know, there's a lot of cases about the
18 sort of equivocal nature of flight evidence. So - - - so
19 I'm not - - -

20 MS. BAUTISTA: Well, flight - - - but it is - - -
21 it is this court's standard - - - well-settled standard
22 that suspicious circumstances, when combined with - - -
23 with flight, can support a level 3 encounter. And in this
24 situation, the police officer testified, that based on his
25 experience - - - and according to the judge, based on his -



1 - - on - - - on common knowledge everyday experience and
2 plenty of case law throughout the country - - -

3 JUDGE RIVERA: So before - - -

4 MS. BAUTISTA: - - - in the Second Circuit - - -

5 JUDGE RIVERA: - - - the flight - - -

6 MS. BAUTISTA: Before the - - -

7 JUDGE RIVERA: - - - before the flight, what
8 level is it?

9 MS. BAUTISTA: Before the flight, it's - - - it's
10 level 3. There's the brown paper bag.

11 JUDGE RIVERA: Before the flight?

12 MS. BAUTISTA: Before the flight.

13 JUDGE RIVERA: We don't need the flight?

14 MS. BAUTISTA: We - - - we - - - we don't need
15 the flight. But even without the flight, it - - - let's
16 say - - - let's say that the brown paper bag - - - drinking
17 out of the brown paper bag, let's say that's level 2, that
18 - - - let's say that gives the officer the right to
19 inquire. In this situation, the officer didn't have an
20 opportunity to inquire, because the defendant ran up the
21 stairs.

22 And I would also like to point out that in my
23 adversary's reply brief on page 27, they cite that the
24 defendant was walking down the hallway. That is from the
25 trial testimony. That is not from the suppression hearing.



1 So there is no evidence from the suppression hearing that
2 the defendant didn't flee. There's on page 62 that he ran
3 up the stairs, page 72, that he was - - -

4 JUDGE RIVERA: May - - - may I ask you exactly
5 what is it that the - - - the People's argument - - -

6 MS. BAUTISTA: Correct.

7 JUDGE RIVERA: - - - what is it that the
8 defendant is doing that triggers that idea, oh, I think
9 they're violating the law? Is it that it's a paper bag?

10 MS. BAUTISTA: He's drink - - -

11 JUDGE RIVERA: If it was a plastic bag - - -

12 MS. BAUTISTA: - - - he's drinking out of - - -

13 JUDGE RIVERA: - - - it would not be the same?

14 MS. BAUTISTA: - - - he's drinking out of a bag
15 that is concealing what he is drinking. And the reason
16 people conceal what they are drinking is because they want
17 to hide the fact that they're violating - - -

18 JUDGE RIVERA: So as long as it's opaque. Paper,
19 plastic, it doesn't matter, as long as you cannot see
20 through it to identify - - -

21 MS. BAUTISTA: It's the - - -

22 JUDGE RIVERA: - - - what someone is consuming?

23 MS. BAUTISTA: - - - it's - - - it's the
24 concealment. It's the concealment of the violation of the
25 - - - of the - - -

1 JUDGE FEINMAN: So if you have - - -

2 MS. BAUTISTA: - - - open-container law.

3 JUDGE FEINMAN: - - - your drink in a - - - what
4 do they call those - - - cozies - - - I'm not a beer
5 drinker, so I don't know. You know, what do people put
6 their - - -

7 MS. BAUTISTA: Well, that - - - that's - - -
8 that's - - -

9 JUDGE FEINMAN: - - - drinks in?

10 MS. BAUTISTA: - - - most - - - that is usually,
11 my understanding is for - - - they cover drinks - - -
12 alcoholic beverages. It doesn't conceal - - -

13 JUDGE FEINMAN: Keep them cold.

14 MS. BAUTISTA: - - - the fact that they're
15 drinking an alcoholic beverage.

16 If I could say one thing about the expert
17 testimony? That was under - - -

18 JUDGE RIVERA: But - - - but if - - - since
19 they're not concealing an alcoholic beverage, because it is
20 an alcoholic beverage; is that what you're trying to say?

21 MS. BAUTISTA: My understand - - -

22 JUDGE RIVERA: It's obvious that it is an
23 alcoholic beverage?

24 MS. BAUTISTA: Correct.

25 JUDGE RIVERA: So if I - - - if I'm a police



1 officer, and I see someone with one of these cozies - - - I
2 don't drink either, I'm not sure exactly what we're going
3 to, but - - -

4 MS. BAUTISTA: I - - -

5 JUDGE RIVERA: - - - let's say - - - you seem to
6 know; everyone else seems to know. I'm an officer, I can
7 just go right up to them, if I see the cozy?

8 MS. BAUTISTA: Well, the - - -

9 JUDGE RIVERA: It's equivalent to seeing this
10 opaque bag?

11 MS. BAUTISTA: If - - - if the person - - - if
12 the officer sees the cozy the - - - if it's obviously a - -
13 - an alcoholic beverage, then that's probable cause - - -

14 JUDGE RIVERA: No, I assume the question was that
15 somehow it's covered, and you can't really see what is
16 within the cozy?

17 MS. BAUTISTA: Well, then - - - then - - - then
18 it's equivalent to the brown paper bag that's concealing
19 what that person is drinking. And the person - - - reason
20 why a person would conceal it is - - -

21 JUDGE RIVERA: If they drank with a straw?

22 MS. BAUTISTA: You're still concealing - - -
23 still concealing the beverage. It's - - -

24 JUDGE WILSON: And if it's a water bottle that
25 you can buy at a store - - - not a - - - not a Poland

1 Spring bottle, but one of those reusable ones that is
2 opaque, and I'm drinking out on the street?

3 MS. BAUTISTA: If it's - - - if it's not - - - if
4 it's not covered by a brown paper bag. Like that - - -
5 that's not - - -

6 JUDGE WILSON: Well, you can't tell - - - you
7 can't tell what's inside.

8 MS. BAUTISTA: - - - that's not a - - - it's not
9 a - - - it's not - - - if it's not a common - - - in this
10 officer's experience, it was what a person - - - it's what
11 people commonly do to conceal their alcoholic beverages.

12 In these - - - in that situation, I don't believe
13 that that's something that a person would commonly do to
14 conceal an alcoholic beverage. But in this situation, you
15 had the police officer's testimony.

16 If I could say one thing about the ex - - -

17 JUDGE RIVERA: Can I - - - can I just ask you for
18 a moment? Let - - - since you said it's not a level 3, so
19 the officer sees this. Let's say the defendant didn't
20 move, stayed there. Stopped drinking out of it - - -

21 MS. BAUTISTA: Right.

22 JUDGE RIVERA: - - - but didn't drop it, just
23 stood there - - -

24 MS. BAUTISTA: Sure.

25 JUDGE RIVERA: - - - didn't do a thing.



1 MS. BAUTISTA: Yeah.

2 JUDGE RIVERA: The officer comes up. The officer
3 asks whatever the officer asks.

4 MS. BAUTISTA: Sorry?

5 JUDGE RIVERA: The officer comes up - - -

6 MS. BAUTISTA: Okay.

7 JUDGE RIVERA: - - - and asks perhaps a series of
8 questions, but let's say one of them is are you drinking
9 alcohol, and the person says no, and the officer cannot see
10 inside the bag. Now what happens?

11 MS. BAUTISTA: Then I - - - I think that - - -
12 that perhaps that encounter might have to end. But that -
13 - - that pers - - -

14 JUDGE RIVERA: So the People's position - - -
15 just the bag that suggests that you're concealing based on
16 the training of the officer, common sense, you're
17 concealing alcoholic beverages, all it allows is to
18 inquire?

19 MS. BAUTISTA: You can stop and - - - stop and
20 ask - - - stop and ask him - - -

21 JUDGE RIVERA: Yes. You can inquire, but you
22 can't do anything else?

23 MS. BAUTISTA: In - - - in this - - - you can
24 stop and ask in this situation - - -

25 JUDGE RIVERA: If they say no, there's nothing



1 else you can do, unless you smell alcohol. Take out all of
2 those things, that there's nothing else that suggests
3 there's alcohol in the can you can't see?

4 MS. BAUTISTA: (No verbal response)

5 JUDGE RIVERA: Is that a no?

6 MS. BAUTISTA: (No verbal response)

7 JUDGE RIVERA: If you're having that much
8 difficulty, I assume that the police and the individual
9 would also.

10 JUDGE FEINMAN: Okay.

11 CHIEF JUDGE DIFIORE: Counsel, do you care to
12 finish your thought on the - - -

13 MS. BAUTISTA: On the expert testimony?

14 CHIEF JUDGE DIFIORE: Yes.

15 MS. BAUTISTA: Yes, Your Honor. That was
16 unpreserved. It was unelaborated at the time that the - -
17 - that the expert was on the stand. And when the - - -
18 when - - - by the time it was elaborated more, it was well
19 after he had left the stand.

20 There was an opportunity to elicit any of the
21 qualifications. The evidence had closed. There had
22 already been summations.

23 And also, I'd like to point out that the NYPD
24 officer testified on page 137 that it's standard operating
25 procedure for the NYPD to contact the Secret Service about



1 counterfeit money cases, because they're the experts on
2 counterfeit money cases.

3 This expert had three years of experience as an -
4 - - as a Secret Service agent in the Counterfeit Money
5 Squad. Based on his knowledge of how people make money and
6 what they do to pass off money as - - - as - - - as real,
7 that gave him - - - that gave him the qualifications to
8 provide the testimony that he provided in this case.

9 Thank you, Your Honors.

10 CHIEF JUDGE DIFIORE: Thank you, Counsel.
11 Counsel?

12 MS. WU: I'll pick up where Counsel just last
13 left off with respect to the expert testimony. The - - -
14 the objection to the expert testimony being admitted into
15 evidence was indeed - - - was indeed preserved in that
16 defense counsel provided a specific objection explaining
17 that there was no foundation for being able to testify
18 about how people pass counterfeit currency at the street
19 level, in response to trial cou - - - trial court's
20 invitation to provide exception to the jury charge.

21 But setting aside whether the issue is preserved
22 and whether or not the Secret Service agent's testimony was
23 properly admitted, the fact of the matter is that there was
24 a complete lack of foundation for the expert's testimony,
25 and therefore - - - and it only highlighted the



1 insufficiency of the prosecution's case with respect to
2 intent. And for that reason, we ask this - - - and all the
3 other reasons that were provided in our briefing, we ask
4 that this court reverse.

5 JUDGE RIVERA: Counsel, can I just ask you to
6 address the De Bour issue?

7 MS. WU: Yes. With respect to the De Bour issue,
8 you know, last night I ordered a burrito for dinner and
9 actually it showed up in a brown paper bag a bottle-sized
10 brown paper bag, right?

11 So let's say I had decided to go out and eat that
12 burrito late at night outside of my hotel room, because I
13 wanted some fresh air. So if you take the People's
14 position to its logical conclusion, what that means is,
15 very - - - it very well may be that an officer passing by
16 would then be able to physically tackle me in order to
17 figure out what's in that brown paper bag.

18 That just cannot be the law.

19 JUDGE STEIN: You mean if - - - you're talking
20 about if you're just walking along and carrying the bag,
21 not - - -

22 MS. WU: No, had I been taking a bite from the
23 burrito with it still in that bottle-sized brown paper bag,
24 right?

25 JUDGE STEIN: Okay, but not - - -



1 JUDGE FEINMAN: So - - -

2 JUDGE STEIN: - - - not if you're drinking? What
3 if you're drinking?

4 MS. WU: Okay, let's say - - -

5 JUDGE STEIN: Is that different?

6 MS. WU: - - - I was drinking a can of soda that
7 had been wrapped up in a brown paper bag by the bodega that
8 I purchased it from.

9 JUDGE STEIN: Right, so - - - so the question
10 really is is the fact that the officer may have been wrong,
11 does that go to - - - to his - - - his right to inquire,
12 because of his experience that that's often what happens in
13 certain circumstances?

14 MS. WU: Well, in that instance, then he probably
15 - - - he may have been able - - - may have been within his
16 right to make an inquiry. What he was not within his right
17 to do was to basically go from zero to sixty, right, to go
18 and follow somebody and then escalate - - -

19 JUDGE STEIN: Unless the - - - the fleeing gave -
20 - - increased the level of suspicion, right?

21 MS. WU: But that - - - but the flight here
22 cannot be - - - that - - - that - - - the defen - - - Mr.
23 Britt's choice to avoid a police encounter in these - - -
24 under these circumstances, in this case, cannot be
25 sufficient to raise the level of suspicion and the



1 justification for the police encounter here, which was an
2 immediate escalation and physically aggressive.

3 JUDGE FEINMAN: But do you agree that we have to
4 look at this as a mixed question of law and fact, and if
5 the answer is yes, how do we get beyond what the Appellate
6 Division's findings were?

7 MS. WU: Here - - -

8 JUDGE FEINMAN: Or conclusions were?

9 MS. WU: Here the analysis doesn't involve a
10 mixed question of law and fact, because there was no
11 minimum showing made. There is no record support for the
12 finding that there was - - - you know, that - - - that
13 there was an increase in the level of suspicion that would
14 have justified a level 2 contact and raised it to a level 3
15 contact.

16 The fact of the matter is, the - - - these facts
17 were very thin. The People have not cited to a single case
18 where, you know, the mere presence, the mere use of a brown
19 paper bag could justify a level 3 intrusion.

20 JUDGE RIVERA: But - - - but do you agree it's a
21 level 2?

22 MS. WU: At most - - -

23 JUDGE RIVERA: Before - - - before the defendant
24 leaves?

25 MS. WU: Perhaps, at most, it could have been a



1 level 2.

2 JUDGE RIVERA: What was preserved below? What's
3 the argument below?

4 MS. WU: The argument below that was made was
5 that at most, it would have been a level 2 intrusion. And
6 here, that - - - even if that were the case, though, there
7 were no additional circumstances or observations made by
8 the police officer that would have justified raising the -
9 - - a level 2 intrusion to a level 3 intrusion.

10 You know, there - - - there was nothing su - - -
11 there was nothing to suggest that the defendant had been
12 engaging in any kind of public inebriation, other than the
13 fact of the brown paper bag. But there is no case - - -
14 there has been no case cited, and there cannot, because it
15 doesn't make any sense - - - where just purely looking at
16 the brown paper bag would give you justification - - -

17 JUDGE RIVERA: Was - - - was there any evidence
18 as to whether or not anyone else in the area was also
19 holding a brown paper bag?

20 MS. WU: There was absolutely none of that, Your
21 Honor. And to that end, there was nothing to suggest - - -
22 you know, there was no slurring, there is no stumbling.
23 There was no indication whatsoever of what was in the bag.

24 And in fact, the officer conceded during his
25 testimony that he had no idea what the - - - he had no idea



1 whether it was a bottle or it was a can that was in that
2 brown paper bag.

3 And I see that my - - -

4 CHIEF JUDGE DIFIORE: Thank you, Counsel.

5 MS. WU: - - - time is up. Thank you.

6 CHIEF JUDGE DIFIORE: Thank you.

7 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Clinton Britt, No. 108 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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