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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 96

JOSHUA MESSANO,

Appellant.

92 Franklin Street
Buffalo, NY
November 16, 2023

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

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1 CHIEF JUDGE WILSON: The last case on today's
2 calendar is People v. Messano.

3 MS. GOLDFARB: Good afternoon, Your Honors, and
4 may it please the court. Sara Goldfarb, on behalf of Mr.
5 Joshua Messano. I'd like to reserve two minutes for
6 rebuttal, please.

7 CHIEF JUDGE WILSON: Yes.

8 MS. GOLDFARB: Where police officers do not
9 witness a hand-to-hand transaction or observe an individual
10 engage in furtive behaviors, they do not have reasonable
11 suspicion to believe that a drug transaction is in
12 progress. Here, as in People v. Johnson, which this court
13 recently decided in May, police merely observed a series of
14 innocuous actions readily susceptible of an innocent - - -

15 JUDGE RIVERA: So you may be right if you
16 compartmentalize each of those moments, but the standard is
17 totality of the circumstances. So why isn't an officer who
18 observes all of these occurrences, right, the - - - the
19 incidences - - - incidences on the road, the driving
20 wildly, the other car coming by, then going to a parking
21 lot where no businesses are open, the exchange through the
22 door, even if nothing is viewed, the texting, the looking
23 around, and then someone else arriving who the officer
24 knows has some history when it comes to drug possession.
25 Why isn't it all of that together enough?

1 MS. GOLDFARB: That's correct, Your Honor. We do
2 have to view it all as a totality of the circumstances, but
3 I think all of those factors, those are just innocent and
4 innocuous behaviors, you know, driving, committing traffic
5 infractions, speeding, that's not an indicator of an intent
6 to buy or sell drugs. Similarly, just pulling into a
7 parking lot, even though, yes, it is for a closed business,
8 that doesn't necessarily indicate somebody is intending to
9 buy or sell drugs. These two men were conversing back and
10 forth. They could have just, you know, come across each
11 other and decided to pull off into the parking lot to
12 either make a plan to meet up somewhere else later or just
13 to have that conversation in a more - - -

14 JUDGE RIVERA: Yes, I think you're right up to
15 that point. And certainly the - - - the - - - the riding
16 back and forth on the road is not the defendant's conduct;
17 it's someone else's conduct. So I get your point there.
18 But then - - - then things take a bit of a turn. It's not
19 just talking to one another in and out of the door. It's
20 the - - - the use of the phone, it's looking around, or at
21 least this is what the officer says they observe, and then
22 it's someone else appearing that, again, they have some
23 information about that person being involved with drugs,
24 and then everybody's waiting around.

25 MS. GOLDFARB: Right. So I guess to talk about

1 Mr. Susco's arrival, the third man, his - - - that he has a
2 history of - - - a prior history of arrests for drug
3 possession doesn't indicate his intent to commit another
4 drug offense or that he's in the process of doing one. And
5 then similarly, the behavior that Mr. Messano engaged in,
6 you know, talking to his friend through the window of the
7 car, sending a text message, looking around the parking
8 lot, that's also consistent with the innocent behavior of
9 just the way someone would act if they were waiting on a
10 friend to arrive at this parking lot, not necessarily to
11 buy or sell drugs, but just to - - - just waiting on a
12 friend. Those are not behaviors that are indicative of - -
13 -

14 JUDGE CANNATARO: Counsel, the part of the
15 observation by the detective that I found interesting was
16 the putting - - - putting hands in the car while the - - -
17 while the person in the car stayed, I think the term was
18 concealed within the passenger compartment, which - - -
19 which, based on his experience, he found indicative of a
20 certain kind of drug transaction, hand-to-hand drug
21 transaction. Is there an innocent explanation for that as
22 well?

23 MS. GOLDFARB: Well, so Officer Hart testified
24 that he saw Mr. Messano poke his head through the window.
25 He didn't see any hand-to-hand transaction or an exchange

1 of anything.

2 JUDGE CANNATARO: But he saw behavior with what -
3 - - behavior consistent with what he knew to be a hand-to-
4 hand transaction.

5 MS. GOLDFARB: That's what he said. But that
6 seems to just be a whim that he thought maybe that's what
7 was going on.

8 JUDGE GARCIA: That whim language is from a case
9 where the person's back was to the officer, right, so they
10 couldn't really see. And I think the court said that's
11 whim, that's speculation. But here, it's well lit, it's -
12 - - he sees the car, he sees the back and forth. He
13 doesn't see drugs, but he sees the actions Judge Cannataro
14 describes. So I think it's different than the whim case,
15 right?

16 MS. GOLDFARB: Even if that's true - - -

17 JUDGE HALLIGAN: Does anything - - - does the
18 record suggest that anything was inserted in the car other
19 than his head?

20 MS. GOLDFARB: No, I don't believe there's
21 anything in the record about whether his hands were in the
22 car. The officer did say, you know, it seemed to be
23 consistent with a hand-to-hand transaction. So that might
24 have happened - - -

25 JUDGE CANNATARO: I'm sorry, I missed that.

1 Could you repeat that? The officer said what?

2 MS. GOLDFARB: The officer said he saw Mr.
3 Messano poking his head through the window. I don't
4 believe there was any language about him putting in his
5 hands.

6 JUDGE CANNATARO: Hands.

7 MS. GOLDFARB: He did say it was consistent with
8 a hand-to-hand transaction, so perhaps that's what he saw.
9 But that is not what was testified to at the hearing.

10 JUDGE HALLIGAN: Can you read from - - - can you
11 address the connection, in your view, between the detention
12 at the back of the vehicle and the vantage point through
13 which the officer saw the substance on the passenger seat?

14 MS. GOLDFARB: Right. So I think that that - - -
15 the detention at the back of the vehicle is integral to - -
16 -

17 JUDGE HALLIGAN: How do we know from the record
18 that the fact that it was at the back of the vehicle
19 somehow influenced or was dispositive of the officer's
20 vantage point around the car?

21 MS. GOLDFARB: So I think had the officer been
22 able to see into the car from, you know, the start of the
23 encounter before the pat frisk, before detaining him at the
24 back of the vehicle, the officer would have - - - would
25 have said something and then would have placed him under

1 arrest right away. I think because we had those - - -
2 those separate actions, we had first the pat frisk, and
3 then we had the direction of Mr. Messano to the back of the
4 car. And it was only until those two things happened that
5 the officer looked into the car.

6 JUDGE RIVERA: But the gentleman, the defendant
7 walks up - - - gets up out of the car, walks towards the
8 officers, and the officer focused - - - I thought that was
9 testimony - - - focused on him as he's coming at him and
10 does pat frisk for safety reasons. So in that moment, the
11 officer's focused on that because I thought - - - I may
12 have misunderstood you. I thought your point was, no, no,
13 no. If the officer could have seen from that moment the
14 drugs in the seat, they would have immediately arrested
15 him.

16 MS. GOLDFARB: Right. So I think - - - so
17 certainly the officer was focused on the pat frisk, but
18 even after the pat frisk, when he saw that there was no
19 weapons on Mr. Messano and that Mr. Messano did not pose a
20 risk to him, he still went ahead and said, okay, now I'm
21 going to direct you to stand back there.

22 JUDGE HALLIGAN: He could have still walked
23 around the car, could he not? I just don't understand
24 exactly what the connection is between where he puts Mr.
25 Messano, and what I take it that you're arguing, which is

1 that somehow it's only by doing that that the officer is
2 able to see what's in the seat.

3 MS. GOLDFARB: So the problem is that he - - -
4 the officer elevated the encounter to a level three
5 seizure. He could have certainly walked around the car.
6 The other officer who was with him, his - - -

7 JUDGE CANNATARO: How exactly did he elevate it
8 to level three? It - - - was it - - -

9 MS. GOLDFARB: By conducting the pat frisk.

10 JUDGE CANNATARO: Right. But I don't - - - I
11 don't know if this relates to the question Judge Halligan
12 just asked. I think it might. But what happened first is
13 when the officer began to move in the direction of the car,
14 defendant opened the door and got out of the car, right?

15 MS. GOLDFARB: Correct.

16 JUDGE CANNATARO: And - - - and I think this goes
17 to the issue of what then could be seen on this - - - on
18 the seat of the car because something was on the seat of
19 the car. That has nothing to do in my mind with the
20 seizure, with the - - - with the pat because getting out of
21 the car happened before the seizure. So is - - - I may be
22 misunderstanding the - - - the - - - the lack of a
23 connection here, but I don't see that one has anything to
24 do with the other.

25 MS. GOLDFARB: Well, so the problem is - - - so

1 Mr. Messano did get out of his car. And had the officer
2 seen it right then when the door was open, that would be
3 fine.

4 JUDGE GARCIA: But what's the causal - - -

5 JUDGE CANNATARO: But that fact that he - - -

6 JUDGE GARCIA: - - - connection between - - -
7 let's assume they didn't have the requisite level of
8 suspicion to detain him in the back of the car. What is
9 the causal connection, if any, between that detention and a
10 plain view seizure?

11 MS. GOLDFARB: I think the causal connection is
12 that but for this detention of Mr. Messano, he could have
13 simply had that conversation with the officer, resolved
14 whatever concerns the officer had, gotten in the car and
15 drove away.

16 JUDGE GARCIA: But while he was talking, another
17 officer could have just walked up to the car and looked in.

18 MS. GOLDFARB: Correct.

19 JUDGE GARCIA: So I don't understand what's the
20 connection between - - - because there has to be some
21 connection. Otherwise, you know, if the car was parked
22 down the block and he was having this encounter and gets
23 legally detained and another officer looked in, it would be
24 fine. So what's the causal connection between - - - we'll
25 call it for the hypothetical, an illegal detention at the

1 back of the car and an officer walking up and looking in
2 the vehicle? I think it would have to be something like he
3 would have been sitting in there if you hadn't arrested
4 him, or detained him, I'm sorry. And there's nothing in
5 the record to support that. You know, while he's standing
6 at the back of the car, the officer can see into the
7 compartment and there's nothing to suggest that he wouldn't
8 have been able to if they hadn't have detained him.

9 MS. GOLDFARB: There's nothing to suggest that he
10 wouldn't have, but there's also - - - the People had the
11 burden of showing that he would have been able to see into
12 the car from the vantage point. And that's not what - - -
13 what came out at the hearing.

14 JUDGE GARCIA: But which - - -

15 JUDGE TROUTMAN: Can we really know that since he
16 was out, he walked away from?

17 MS. GOLDFARB: Can we know what?

18 JUDGE TROUTMAN: That they - - - if he had
19 returned to the car that the officer still couldn't have
20 seen what he saw? How do we know what the officer could
21 see or what the - - - whether defendant was going to go
22 away from the car or back to the car?

23 MS. GOLDFARB: Right. We don't know that.
24 Again, it was the People's burden to show what the officer
25 would have been able to see. But also, I think had the

1 officer been able to seen it - - - see into the car sooner
2 in the interaction, he would have said something. He would
3 have placed Mr. Messano under arrest.

4 JUDGE SINGAS: The officer might have been able
5 to do that, but the defendant got out of his car and
6 approached the officer, which, you know, when we look at
7 behavior of what's innocuous and whatnot, most people,
8 unless they're in distress, are not walking over to a
9 police officer unless they know each other and they're
10 going to engage. So clearly, he's getting out of his car
11 and sort of leaving it behind and walking toward the
12 officer so that the officer won't make his way to the car.
13 So - - - and he did see it when he got close to the car in
14 plain view. So do we even have to engage in a reasonable
15 suspicion analysis of everything that went on before
16 because the drugs were in plain view? It's different if
17 they had removed him from the car and he was sitting on the
18 drugs, then that action, that connection, we'd have to
19 analyze. But at this point, why isn't it just as if they
20 were walking on the street and saw a car and looked inside?
21 They could do that, right?

22 MS. GOLDFARB: Certainly, they could. I think
23 here, first, I wouldn't say that it would raise any sort of
24 suspicion that Mr. Messano got out of his car and
25 approached the officer. It's not like this was, you know,

1 a traffic stop on the side of the road. This was he was
2 sitting there talking to his friends, and then he saw the
3 officer come and chose to get up to address whatever the
4 officer's concerns were. I think that's an appropriate
5 reaction.

6 JUDGE CANNATARO: Well, you could disagree on
7 whether that's a suspicious act, but it doesn't change the
8 fact that it left what was in the seat in plain view; does
9 it?

10 MS. GOLDFARB: Correct. It was still in plain
11 view, but the officer - - -

12 JUDGE TROUTMAN: And so was the officer not
13 allowed to just walk over once the defendant walked away?

14 MS. GOLDFARB: He is allowed to do that, Your
15 Honor. But that's not what happened here. What happened
16 here is the officer elevated the situation to a level three
17 seizure by conducting the pat frisk and then by extending
18 it and directing Mr. Messano to the back of his vehicle.

19 JUDGE CANNATARO: So it sounds like your - - -
20 your argument assumes that defendant was going to go right
21 back to the car and resume his seat after whatever his
22 purpose may have been for getting out of the car and
23 approaching the officer; is that fair to say?

24 MS. GOLDFARB: Correct. And I think his purpose
25 in getting out of the car was just to address whatever

1 concerns the officer had. And had he resolved those
2 concerns, he could have gotten into the car and driven
3 away.

4 JUDGE TROUTMAN: Does the record establish that?

5 MS. GOLDFARB: No, but that's the People's burden
6 to prove that something else would have happened otherwise.

7 JUDGE TROUTMAN: These are all speculations,
8 right?

9 MS. GOLDFARB: Right, exactly.

10 JUDGE HALLIGAN: Can you remind me whether the
11 record establishes that the drugs were on the passenger
12 side or the driver's side?

13 MS. GOLDFARB: They were on the driver's side,
14 the front seat.

15 JUDGE HALLIGAN: So they were where he was
16 sitting?

17 MS. GOLDFARB: Correct.

18 JUDGE RIVERA: Door open, closed, window up,
19 down?

20 MS. GOLDFARB: So when the officer approached
21 him, he was sitting in the car with the door open and then
22 I believe the window was down. And then he got out of the
23 car and closed the door and then went to speak with the
24 officer.

25 JUDGE RIVERA: So the door's closed with the

1 windows down?

2 MS. GOLDFARB: I believe so, yes.

3 CHIEF JUDGE WILSON: Thank you.

4 MS. GOLDFARB: Thank you.

5 MR. OASTLER: Good afternoon, Your Honors. Brad
6 Oastler for the People. I think we have two separate
7 issues to discuss. I'll start with the reasonable
8 suspicion aspect here. And again, the standard specific
9 and articulable facts, along with any reasonable deduction,
10 that's the basis for a reasonable - - - reasonable
11 suspicion on which this officer could approach and detain,
12 or in this case, frisk. As I think a number of - - - of
13 the members of this panel have pointed out, there were
14 several different factors that the officers were able to
15 observe. And they did that by simply standing back at a
16 distance of fifty yards or so and being patient to see what
17 developed.

18 When we talk about limiting police intrusion and
19 protecting people's privacy, I think what the officers did
20 here is exactly what we would sort of hope would happen in
21 most instances. They observed from a distance, did not
22 interfere. And not until there was a number of factors
23 that - - - that, I think, you know, let alone a 16-year
24 veteran detective, but most people would see as - - - as
25 suspicious. That is the point when they approached.

1 JUDGE CANNATARO: Can you be more specific about
2 which factors most people would think were suspicious?
3 Because there's obviously an argument here that everything
4 is susceptible of a perfectly innocent interpretation.

5 MR. OASTLER: Sure. And obviously, I'm you know,
6 as the court knows, we're going to look at it ultimately in
7 the totality. But I think, number one, we have the erratic
8 driving through traffic. Now, obviously, I know the
9 defendant was not the - - - the driver who performed that,
10 but he then went - - -

11 JUDGE TROUTMAN: So why does that matter if he
12 wasn't the driver of that vehicle?

13 MR. OASTLER: I think he - - - he has essentially
14 associated himself with the driver who did that. And by
15 doing so, but not simply by, you know, stopping - - - or
16 remaining at the traffic light or stop sign where - - -
17 where the shouted conversation occurred, but by turning
18 then into a parking lot of a closed business.

19 CHIEF JUDGE WILSON: Why isn't that just I see my
20 friend driving a pretty distinctive car? He's ahead of me
21 - - - I cut - - - I make an illegal traffic maneuver to cut
22 up to him, say, hey, you want to pull over somewhere, I got
23 to talk to you. And you know, that happens.

24 MR. OASTLER: It may, but that wasn't the end of
25 it because they then sat in the parking lot.

1 CHIEF JUDGE WILSON: Yeah, but I mean,
2 eventually, if we're adding a bunch of zeros together, we
3 get zero. So we need these things to at least have some
4 weight. And that one doesn't strike me as having a lot of
5 weight.

6 MR. OASTLER: Well, it may not have a lot, but
7 I'd submit it has some, along with all of the other factors
8 that - - - that then - - -

9 JUDGE CANNATARO: Is there another one that has
10 more weight than that one? What's your number one factor?

11 MR. OASTLER: Well, I think the number one factor
12 is - - - well, I'm going to put two on the same point, Your
13 Honor.

14 JUDGE CANNATARO: Okay.

15 MR. OASTLER: And I would say it's the staying in
16 the - - - the - - - the parking lot of the closed business
17 for a greater length of time than just a conversation to
18 say, oh, let's meet up or what are you doing.

19 JUDGE CANNATARO: On a nice warm summer day on
20 the weekend?

21 MR. OASTLER: Sure. And I grant that the weather
22 was nice, so I'm not sure that that's - - -

23 JUDGE TROUTMAN: What does that mean, more than a
24 short time? What's wrong with if the business is closed,
25 it's not blocking the business's traffic or anything.

1 What - - - what - - - what was wrong with that? Isn't that
2 equally consistent with innocent behavior? I want to catch
3 up with my friend I haven't seen for a long time.

4 MR. OASTLER: I would disagree. I just - - - I
5 think that sitting in a closed parking lot for a length of
6 time and then as the you know, they clearly did interact to
7 the extent - - -

8 JUDGE TROUTMAN: Well, that's a conclusion that
9 you reach. But you're not saying that it is not possible
10 for someone for innocent reasons - - - teenagers meeting
11 the girlfriend, boyfriend in a parking lot. They sit in
12 parking lots because they want to hang out. It may be
13 trespassing, but what's suspicious about that?

14 MR. OASTLER: Well, again, I would not say that
15 any single individual factor, and I recognize the zero plus
16 zero argument, but it's - - - it's - - -

17 JUDGE TROUTMAN: That's an important argument.

18 MR. OASTLER: Well, I recognize that. But none
19 of these - - - I wouldn't - - -

20 JUDGE TROUTMAN: Well, you started with someone
21 else is driving erratically. I agree it's not him, but he
22 turns into a parking lot, and then he sits for a while.
23 I'm still not there yet.

24 MR. OASTLER: Well, of course. But then we have
25 more.

1 JUDGE CANNATARO: You said you had another one.
2 What's the other - - - what's the other big one?

3 MR. OASTLER: The other one is the - - - the
4 observation the officer made of the - - - what he believed
5 to be a hand-to-hand transaction.

6 JUDGE TROUTMAN: And what exactly did he see?

7 MR. OASTLER: So he expressed - - - my reading of
8 the testimony is that he, the defendant, placed his head
9 into the, you know, through the window, into the passenger
10 compartment of the other individual's vehicle, and then
11 enough of the rest of him, certainly his hands and some
12 portion of his arms, such that, although the detective had
13 to admit that he did not directly witness a hand - - -
14 hand-to-hand transaction, he believed that's what occurred,
15 which I think sort of directly implies the fact that some
16 other - - -

17 JUDGE TROUTMAN: Say they're playing loud music
18 and he wanted to hear better.

19 MR. OASTLER: Well, if that was the testimony, I
20 suppose that would be one thing, but there wasn't. In
21 fact, from - - - from where the detective - - -

22 JUDGE TROUTMAN: Whose burden is - - - again, so
23 you're saying all these little things add up to more than
24 zero?

25 MR. OASTLER: It's certainly our burden,

1 ultimately. I do agree with that. But again, all of
2 these - - -

3 JUDGE TROUTMAN: And it is your insistence that
4 none of these things are innocent - - - could be equally
5 consistent with innocent behavior?

6 MR. OASTLER: Any - - - any one single one on its
7 own might be. But I don't think when we put the several
8 observations that the detective made together, that - - -
9 that can have an equally innocent versus suspicious
10 connotation.

11 CHIEF JUDGE WILSON: Do we know that the
12 detective - - - does the record show the detective was in a
13 position where he could have seen the defendant's hands go
14 into the car?

15 MR. OASTLER: He - - - I don't know if it's - - -
16 I don't know if it goes into quite that amount of - - -

17 CHIEF JUDGE WILSON: So we're kind of making an
18 inference about what he meant when he said it was
19 characteristic of a hand-to-hand transaction.

20 MR. OASTLER: Right. I - - - I - - - I - - -

21 CHIEF JUDGE WILSON: It could be that he just
22 saw - - - he was at an angle where he could see the head go
23 in. He didn't know what happened to the hands. But people
24 don't sit there like that in his experience without this
25 being a drug transaction?

1 MR. OASTLER: Right. I mean, we're certainly
2 reliant on his - - - his experience and having observed
3 hand-to-hand transactions over the years.

4 JUDGE HALLIGAN: The suppression court simply
5 says this person then stuck his head through the passenger
6 window. That's it. Not - - - not the rest of his body,
7 not enough of the rest of his body that it could have been
8 his hands but he didn't see it. Is there anything more
9 than that?

10 MR. OASTLER: Well, I believe the suppression
11 court did find that - - - I believe it took - - - made note
12 of the suspicion of a - - - or a what appeared to be a
13 hand-to-hand transaction. But so I think in that - - -

14 JUDGE HALLIGAN: I thought that was the
15 conclusion. But in terms of exactly what was observed - -
16 -

17 MR. OASTLER: Correct. Correct. Factually.

18 JUDGE HALLIGAN: - - - was simply sticking your
19 head through, which presumably anybody could do to hear
20 someone better.

21 MR. OASTLER: Correct. I agree.

22 JUDGE HALLIGAN: Or to see something in the car
23 that they were pointing to.

24 MR. OASTLER: Yes. However, I - - -

25 JUDGE HALLIGAN: What was on the playlist, or

1 whatever?

2 MR. OASTLER: I would say that I don't think
3 it's, you know, a possibility within reason to say that
4 what would be consistent with a hand-to-hand transaction
5 would simply be putting one's head through a window because
6 you have a hand-to-hand transaction.

7 JUDGE RIVERA: So - - - so - - - so let's go to
8 the question Judge Singas asked before, and I think Judge
9 Garcia perhaps in part was trying to get to. Why does any
10 of that matter if we're talking about is contraband that's
11 observed in plain view? Say all of that - - - let's say
12 all of that doesn't add up to enough to justify watching
13 them, calling up the other cops, and then starting the
14 approach.

15 MR. OASTLER: I'm not sure that it does in the
16 end, because I don't think it's in dispute that the
17 officers would have had the right to approach the three - -
18 - now three vehicles parked in the parking lot to simply
19 ask, hey, what are you doing. Why are you in this closed
20 parking lot? Maybe some other questions, but certainly
21 that one. And the defendant by, as the suppression court
22 decision referred to it, abandoning the property, that - -
23 -

24 JUDGE RIVERA: It's in his car. I don't know if
25 he's abandoning property that's in his car. But let's put

1 that one aside.

2 MR. OASTLER: True, and I - - -

3 JUDGE RIVERA: He gets up, he walks out.

4 MR. OASTLER: And I think that's part of why I -
5 - - I would - - - I would suggest that it's at least as
6 susceptible an argument to say that it was sort of an
7 inevitable discovery of the officers, inasmuch as they
8 were - - - they would have been entitled to simply just
9 walk up to the car. And once the defendant removed
10 himself - - -

11 JUDGE TROUTMAN: Do you have to make assumptions
12 that it would, in fact, have been inevitably discovered
13 here?

14 MR. OASTLER: Not - - - not any that, that I
15 think prevent finding that conclusion, inasmuch as once the
16 defendant was out of the vehicle, and I would agree the
17 door was closed, window down after that point, they were
18 just plainly visible on the - - -

19 JUDGE TROUTMAN: If he went back and sat in the
20 car, if he wasn't directed to the back, would you be able
21 to see if he's sitting where they were found?

22 MR. OASTLER: That I don't know.

23 JUDGE TROUTMAN: Correct.

24 MR. OASTLER: However, I - - - I - - - I think
25 it's a - - - it would be a - - - I think it's a logical

1 stretch to say that the defendant who got out of his car
2 was going to just simply get back into it upon the approach
3 of the officer.

4 JUDGE RIVERA: Is there anything in the record
5 about how far he is from that door?

6 MR. OASTLER: I don't - - - it's not - - - it's
7 not entirely clear.

8 JUDGE RIVERA: It's not about how far - - - is
9 there anything in the record about how far the officer is
10 from the seat, the door, when the officer says I could look
11 right through?

12 MR. OASTLER: I don't know that he specified a
13 specific distance.

14 JUDGE RIVERA: Did he walk towards the door - - -

15 MR. OASTLER: I - - - I - - -

16 JUDGE RIVERA: - - - after he told him to move to
17 the side?

18 MR. OASTLER: The officer?

19 JUDGE RIVERA: The rear - - -

20 MR. OASTLER: Yes. I mean, I think he - - - I
21 think he went right up to the door in order to look down.
22 I mean, we know he did say look down onto the driver - - -

23 JUDGE RIVERA: Yeah, well, because of the - - -

24 MR. OASTLER: - - - so he's got to have enough of
25 an angle to be able to do that.

1 JUDGE RIVERA: Yeah.

2 CHIEF JUDGE WILSON: So let me - - - let me ask
3 you to assume two facts and then tell me what you think the
4 result is. So fact one is that as soon as the defendant
5 leaves the car, the drugs on the seat are visible to
6 anybody who happened to be walking by. And that remains
7 true up until the time the pat frisk is concluded. That's
8 number one. And number two, I want you to assume that if
9 the defendant had been released essentially right after the
10 pat frisk was concluded, he would have walked straight back
11 to the car, sat down, and nobody would have seen the drugs.
12 What's the result if we assume both of those things?

13 MR. OASTLER: I guess I - - - I - - - it's hard
14 to say because I don't know exactly what it would have
15 still been visible or not on - - -

16 CHIEF JUDGE WILSON: After he sat down.

17 MR. OASTLER: After he sat down.

18 CHIEF JUDGE WILSON: So let me fill that fact in
19 too. After he sat down, there's nothing visible. But
20 there was a period of time when anybody could have walked
21 up and seen the drugs on the seat.

22 MR. OASTLER: True.

23 CHIEF JUDGE WILSON: So in that circumstance,
24 what happens? That is what - - - what - - - a different
25 way to ask is what matters, the ability of somebody to see

1 it or the fact that they actually did.

2 MR. OASTLER: I don't think we can ignore the
3 ability, certainly, because that, you know, there's - - -
4 there's any amount of litigation on can an officer simply
5 look into a vehicle and observe and - - - and to - - - to
6 what extent can - - - can they use a flashlight? Can - - -
7 do they have to rely on daylight? Whatever the case may
8 be. So the ability matters. I don't think there's any
9 question in this circumstance about the ability, and I
10 don't think there's any question about the - - - their
11 legal ability to essentially stand right outside the car to
12 be able to make that observation.

13 CHIEF JUDGE WILSON: Right. So if defendant's
14 best argument is that, by happenstance, nobody saw it when
15 they could have, and it's only the fact that the detention
16 proceeded longer than it should have that the drugs were
17 observed, then what's the result? Is that a good enough
18 argument to win?

19 MR. OASTLER: I would - - - I would dispute the
20 detention lasting longer than it should have.

21 CHIEF JUDGE WILSON: No, I said that's their best
22 argument.

23 MR. OASTLER: But - - - but sure, I understand
24 that. I mean, if that is the case, if the - - - if the - - -
25 - if the pat frisk and the detention that came from there

1 directly led to the discovery of the drugs, and I think the
2 only way that inference can be - - - or that connection can
3 be made is that by directing him to the back of the car
4 enabled the police to find the drugs. I think that would
5 become a problem if there wasn't reasonable suspicion upon
6 their approach. I would say, though, in terms of that
7 interpretation of the facts, I would disagree that - - -
8 that the detention exceeded any sort of reasonable time,
9 that the officers couldn't have pat frisked him for weapons
10 in this particular situation.

11 CHIEF JUDGE WILSON: Well, I assume they could
12 have pat frisked him, but it's the point in time after the
13 pat frisk ends.

14 MR. OASTLER: Right. And I - - - it's - - - I
15 can't say that that, you know, that they would have not - -
16 - that they would have still been able to see it had he
17 been able to sit down. But based on the, you know, the - -
18 - the - - - the reason the police were approaching, I think
19 that is again, what justified the pat frisk for weapons,
20 and then - - - and to their credit I think they did it as -
21 - - as minimally and - - - and as - - - as un-intrusively
22 as possible.

23 JUDGE RIVERA: So - - - so not the exit from the
24 car? That isn't what justifies a pat frisk?

25 MR. OASTLER: Oh, yeah, it's part of it. It's -

1 - -

2 JUDGE RIVERA: He gets up. He's gets - - - he's
3 coming towards him.

4 MR. OASTLER: I think that's - - - that's
5 certainly part of it. I think that's what - - - if he had
6 remained seated, I don't think the officers were in a
7 position to say, hey, come out, I want to - - - I want to
8 frisk you right now. But him getting out and that's, I
9 think in the officer's experience was an unusual situation,
10 not what they were expecting, it would appear.

11 JUDGE RIVERA: Does it matter for purposes of the
12 analysis, as the dissenters below noted, that the officer,
13 I think on cross, says that he didn't feel threatened by
14 defendant. Does that matter at all for this analysis?

15 MR. OASTLER: I don't know that it does, because
16 the - - - his view of the scenario in that - - - in that -
17 - - in this particular circumstance was that they were
18 going into, they believe, to possibly be a drug
19 investigation, and the association of the guns and the
20 drugs is common. And in light of the - - - that unusual
21 approach, I think that - - - that was a reasonable
22 conclusion or concern for the officer to have. And
23 granted, he may not have been immediately threatened in
24 that instance, but I don't think that means that he - - -
25 he has to ignore what he would otherwise reasonably

1 conclude might be a danger to his safety.

2 JUDGE HALLIGAN: If we think that the pat frisk
3 was permissible because of the approach, as you argue, but
4 that the further detention was not, and on this record,
5 what result and why?

6 MR. OASTLER: Well, I would first say that if the
7 pat frisk is justified, I think the detention also has to
8 be justified because those are tend - - - those - - -

9 JUDGE HALLIGAN: Well, maybe assume otherwise.

10 MR. OASTLER: Well, if that is the case - - -

11 JUDGE HALLIGAN: One could - - - one could take a
12 view that the pat frisk specifically was justified because
13 of the approach, period.

14 MR. OASTLER: Sure. Absolutely. And so if we -
15 - - if we take that scenario, I think the defendant has
16 still, as county court noted in its suppression decision, I
17 think the defendant has - - - and I - - - and again, I do
18 hesitate to use the term abandoned just because it is still
19 his vehicle. But he has - - - he has relinquished sort of
20 immediate possession, I guess, of - - - of the contraband
21 that was readily visible and allowed the police to be in
22 that position to observe it in plain view.

23 JUDGE HALLIGAN: So is that - - - so that's a
24 plain view argument?

25 MR. OASTLER: Well, true. I mean, if it had

1 been - - - if nothing had been openly visible in the car, I
2 don't know that the officers would have had a reason to go
3 rifle through the - - - the, you know, the glove
4 compartment or the center console. But the - - - once they
5 saw what they did in plain view, that that justified the
6 further search. But - - -

7 JUDGE GARCIA: Let me ask this - - -

8 MR. OASTLER: - - - I think in plain view does
9 matter.

10 JUDGE GARCIA: - - - one last variation on this,
11 I hope. Let's say the police pull over a vehicle, and as
12 they can, when they make a traffic stop, they ask the
13 driver to step out of the car. They look in the seat and
14 they see drugs just like you did here. It turns out there
15 was no reason to - - - valid reason to stop the vehicle.
16 Can you get a plain view exception there?

17 MR. OASTLER: Not when the ultimate discovery is
18 directly triggered by the initial police action.

19 JUDGE GARCIA: And why isn't that the case here?

20 MR. OASTLER: Because the police did not pull the
21 defendant out of the car. And I think that's an important
22 piece - - -

23 JUDGE GARCIA: I guess the argument would be they
24 prevented him from getting back in.

25 MR. OASTLER: That - - - I understand that aspect

1 of it, but I don't think that's controlling here because I
2 don't think the police, you know, I use the term leverage.
3 I don't think the police leveraged their approach or their
4 pat frisk in order to find the drugs. It'd be different
5 if, as you know, there are case examples of a police
6 encounter, an improper questioning, and then the defendant
7 admits something that triggers the search. We don't have
8 that here. The defendant voluntarily exited the vehicle,
9 and the police only did what was necessary to ensure their
10 own safety after that point.

11 CHIEF JUDGE WILSON: Thank you.

12 MR. OASTLER: Thank you.

13 MS. GOLDFARB: So I just want to quickly address
14 the comment about Officer Young's testimony that he did not
15 feel threatened by Mr. Messano's approach. I think we have
16 to take Officer Young at his word that he did not feel
17 threatened. If he did feel threatened because he was going
18 into a situation, you know, of a suspected drug
19 transaction, then he would have said so. But I think given
20 that this was just three people and Mr. Messano's approach
21 was not threatening, that's what he said, we have to take
22 the officer at his word for that. Additionally, I just
23 want to touch on respondent's comments - - -

24 JUDGE RIVERA: Did he say the approach was not
25 threatening?

1 MS. GOLDFARB: He said there was - - -

2 JUDGE RIVERA: I didn't read that in the
3 testimony, but perhaps I missed it.

4 MS. GOLDFARB: Well, he said there was nothing
5 threatening about Mr. Messano's behavior.

6 JUDGE RIVERA: But at the same time, he said he -
7 - - he frisked him for safety purposes.

8 MS. GOLDFARB: Yes, he did say he frisked him for
9 safety purposes, but he said, you know, from the - - - I
10 guess as he was approaching, he did not find Mr. Messano
11 threatening. He didn't particularly say whether the
12 approach was, you know, not threatening. But in general,
13 his demeanor. And then second, just to touch on
14 respondent's comments about inevitable discovery. The
15 trial court did not rule on that basis. And so that's
16 barred by Concepcion. And then also, it's not something
17 that they raised below either. And if this Court has no
18 other questions, then I rest on my brief for all other
19 arguments.

20 CHIEF JUDGE WILSON: Thank you.

21 MS. GOLDFARB: Thank you.

22 (Court is adjourned)

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

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Messano (Joshua), No. APL-2023-98 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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