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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 7

MIKAL SMITH,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
January 7, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 7, People v.  
2 Smith?

3 MR. LEVENSON: Your Honor, I'd - - - if the  
4 court would please, I'd like to reserve two minutes  
5 of rebuttal.

6 CHIEF JUDGE LIPPMAN: Two minutes, you've  
7 got it.

8 MR. LEVENSON: Thank you.

9 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

10 MR. LEVENSON: If the court please, my name  
11 is Leonard Levenson. I represent the appellant here.  
12 This is a matter of a relatively simple issue, in  
13 theory, but in application it's quite complicated.  
14 It's a question of what constitutes force or the  
15 threat of force in a robbery statute.

16 CHIEF JUDGE LIPPMAN: If there's - - - if  
17 it's a trick, is it your position that that's not  
18 force? Does implied force because you're tricking -  
19 - -

20 MR. LEVENSON: If you trick, it's - - -

21 CHIEF JUDGE LIPPMAN: - - - the victim?

22 MR. LEVENSON: - - - it's larceny by trick.

23 CHIEF JUDGE LIPPMAN: Say again?

24 MR. LEVENSON: It's larceny by trick.

25 CHIEF JUDGE LIPPMAN: Why isn't it implied

1 force? Why isn't it that, in effect, if you don't go  
2 along with what I'm doing, you're going to get hurt?

3 MR. LEVENSON: If he says, if you don't go  
4 along - - -

5 CHIEF JUDGE LIPPMAN: Why do you have to  
6 say it?

7 MR. LEVENSON: Because there's - - -

8 CHIEF JUDGE LIPPMAN: Why isn't there - - -

9 MR. LEVENSON: - - - there's an - - -

10 CHIEF JUDGE LIPPMAN: I guess my question  
11 is, why is it not implicit in this situation?

12 MR. LEVENSON: Because what you're assuming  
13 in that situation is that every time you are  
14 confronted by a police officer, if you don't do what  
15 the police officer says, you're going to be met with  
16 force, and that's not true.

17 JUDGE PIGOTT: Well - - -

18 JUDGE SMITH: Well - - - well, not every  
19 time you're confronted, but every - - - but when a  
20 police - - - when you're in a - - - the - - - the  
21 stairway of an apartment building, and a police  
22 officer says to you, get against the wall, and you  
23 say, no, thank you; I'm comfortable where I'm  
24 standing, you don't think he's going to push you?

25 MR. LEVENSON: Well, it's - - - it's

1 possible, but there is this Florida - - - Florida  
2 case, which says, there's no assumption that every  
3 time you're in police custody, you're going to be met  
4 with violence.

5 JUDGE PIGOTT: Wouldn't it be - - -

6 JUDGE GRAFFEO: But why doesn't this - - -  
7 why doesn't this - - -

8 JUDGE RIVERA: But that's not violence,  
9 that's just responding to the - - - to the scenario  
10 when - - - when the cop says, as Judge Smith says, up  
11 against the wall - - -

12 MR. LEVENSON: Well - - -

13 JUDGE RIVERA: - - - and - - - and the  
14 person says, no. The cop is just going to walk away?

15 MR. LEVENSON: Well, what we have here is a  
16 purported police officer - - - two purported police  
17 officers telling a - - - an individual, we're  
18 investigating something, get up against the wall, can  
19 I see some identification?

20 JUDGE RIVERA: Well, he gets up against the  
21 wall, and then they pat him down. You still don't  
22 think there's any force involved in that?

23 MR. LEVENSON: No, there's no - - -

24 JUDGE RIVERA: What's the pat and frisk - -  
25 - what - - - what is that about?

1 MR. LEVENSON: I'm sorry?

2 JUDGE RIVERA: Is that not force, the  
3 patting down and the "up against the wall"?

4 MR. LEVENSON: Well, actually they didn't  
5 pat him down. They asked for identification. He  
6 took out his wallet, gave it to the police officers,  
7 the police officers looked in the wallet, gave it  
8 back to him, took money out. The force, or the  
9 threat - - -

10 JUDGE RIVERA: And they told him to turn  
11 back around when he was trying to turn around? You  
12 don't think there's any suggestion there of force if  
13 you don't comply?

14 MR. LEVENSON: The threat of force - - -  
15 the threat of force in a robbery situation, it seems  
16 to me, would have to require that the victim at least  
17 believes that he's being robbed. He didn't even know  
18 he was being robbed until after the police left the  
19 scene.

20 JUDGE GRAFFEO: Why shouldn't the analysis  
21 that we used in the Woods case apply here?

22 MR. LEVENSON: The Woods case you're  
23 talking about, the nineteenth century case where a  
24 person took a watch from an individual - - -

25 JUDGE GRAFFEO: No, this is a 1977 case

1 from our court.

2 MR. LEVENSON: I'm sorry?

3 JUDGE GRAFFEO: It's a 1977 case from our  
4 court.

5 MR. LEVENSON: I'm - - -

6 JUDGE GRAFFEO: That's okay. All right. I  
7 guess it's a question - - - in the Woods case, we  
8 looked at that you didn't need to say threatening  
9 words; that you could look at the circumstances of  
10 the situation and claim that it's a threat. And I  
11 don't see why that doesn't apply to this fact  
12 pattern.

13 MR. LEVENSON: Well, certainly - - -

14 JUDGE GRAFFEO: I mean, isn't that why they  
15 were impersonating police officers? They wanted to  
16 have that sense of intimidation over whoever they  
17 were intending to - - -

18 MR. LEVENSON: Well, I - - -

19 JUDGE GRAFFEO: - - - take something from?

20 MR. LEVENSON: I submit that it was just  
21 the opposite of what they want - - - if they - - - if  
22 they really intended to use force or the threat of  
23 force, they would have pulled out a gun and said,  
24 give me your money, or they would have just - - -

25 CHIEF JUDGE LIPPMAN: Why isn't it up to

1 the jury? Why isn't it up to the jury whether - - -

2 MR. LEVENSON: Well, there's a - - -

3 there's a - - -

4 CHIEF JUDGE LIPPMAN: You're saying it's a  
5 trick exclusive of force? If they're doing a trick,  
6 there can't be force involved?

7 MR. LEVENSON: Well, because there's a  
8 certain minimum element of force required before it  
9 can go to a jury. I mean, we're - - - what we're  
10 talking about is - - - is - - - is a matter of law,  
11 whether or not - - -

12 CHIEF JUDGE LIPPMAN: What law do you have  
13 that supports your position? What's your best case?

14 MR. LEVENSON: Well, there's the Chessman  
15 case, where an individual was seeking to - - - to  
16 pickpocket a purse of a woman, he accidentally fell  
17 and knocked the woman to the floor, and the court  
18 said, incidental violence is not necessarily force  
19 and it's subjective in the mind of the - - - of the  
20 appellant, the defendant.

21 In other words, what was in the mind of the  
22 defendant at the time that this thing went on?

23 CHIEF JUDGE LIPPMAN: What was in the mind  
24 of these - - - this defendant when - - - when he put  
25 this - - - this - - -

1 MR. LEVENSON: Yeah.

2 CHIEF JUDGE LIPPMAN: - - - this victim  
3 against the wall? What was in his mind?

4 MR. LEVENSON: What he had in mind was he  
5 wanted to avoid, at all cost, any violence. He was -  
6 - - he - - - he did not want violence.

7 CHIEF JUDGE LIPPMAN: So your argument is  
8 that - - - that if he wanted violence, he would have  
9 been more explicit? And here, through slight of  
10 hand, he wanted to get whatever he was going to get?  
11 Is that the thought?

12 MR. LEVENSON: Let me call the court's  
13 attention to an 1802 case where the court tried to  
14 explain the whole purpose of the robbery statute.  
15 And they said the heinousness of the robbery statute  
16 is the fear and intimidation that it imposes on the  
17 victim, and - - - and the possibility of injury that  
18 flows therefrom.

19 We're talking about a statute that carries  
20 a fifteen-year penalty. What we have in this  
21 particular situation imposed no fear, no intimidation  
22 on the part of the defendant - - -

23 JUDGE PIGOTT: It seems - - -

24 MR. LEVENSON: - - - other than the concern  
25 that he might be arrested if he didn't obey the law.



1                   JUDGE PIGOTT: It seems to me that it's a  
2 close case in that regard. But if they were - - - if  
3 they were dressed as police officers and came around  
4 and said, we're collecting for the PBA, and we'd like  
5 a contribution, and they gave him sixty bucks, I  
6 would think that's trickery. But it would seem to me  
7 that if - - - if the implied use of force, even  
8 though it's not there, would nevertheless constitute  
9 the necessary mens rea for robbery. What's the flaw  
10 in my reasoning?

11                   MR. LEVENSON: Well, the only - - - the  
12 only thing I can point to is - - - is the Flynn case,  
13 which has been cited in California and Connecticut  
14 and in federal courts. It's only a Supreme Court  
15 case, seven-page decision. It carried great weight  
16 insofar as what constituted force and didn't  
17 constitute force.

18                   It - - - the judge - - - I think it was  
19 Judge Levy who rendered the decision - - - analogized  
20 this particular type of situation, where the police  
21 act as - - - or individuals act as police, is nothing  
22 - - - nothing more than a trickery, and consequently  
23 under the circumstances found that there was no - - -  
24 thank you - - - there was no force here.

25                   JUDGE RIVERA: But again, counsel,



1 with authority. If you walk into a courtroom, and  
2 they say, give up your cell phone, you give up the  
3 cell phone, not because you're concerned that you're  
4 going to be beaten up, if you don't. If you hear a  
5 police siren down the street, you pull over to the  
6 side, not because you're afraid that if the police -  
7 - - if - - - if you don't, the police are going to  
8 stop you and they're going to - - - they're going to  
9 arrest you.

10 JUDGE RIVERA: But that's not - - - that's  
11 fine, but not what went on here. So he's - - - he's  
12 being patted down. Let - - - let's say for one  
13 moment the pat down doesn't satisfy force, but is  
14 that not at least the threat that if - - - if he had  
15 objected or physically tried to remove himself from  
16 this pat down, that there - - - there would be the  
17 threat of the use of force to accomplish the pat  
18 down?

19 MR. LEVENSON: Well, do we know? I mean,  
20 if he had said, look, I don't want you to pat me  
21 down, what - - - what are the possibilities that the  
22 police officer might have used force or might have  
23 said, well, you're right, I have no right to pat you  
24 down.

25 JUDGE RIVERA: Do you think it's

1 unreasonable to conclude that that - - - that there's  
2 the threat of the use of the force if you refuse to  
3 comply with a pat down in process?

4 MR. LEVENSON: I - - - I would submit that  
5 if I'm walking down the street and a police officer  
6 came over to me, and said, get up against the wall, I  
7 want to pat you down, and I said, look, I don't want  
8 to be patted down, I don't think the police would hit  
9 me over the head with a bludgeon.

10 CHIEF JUDGE LIPPMAN: Okay, counsel.  
11 You'll have your rebuttal. Let's hear from your  
12 adversary.

13 Counsel?

14 MS. HALLIGAN: Chief Judge Lippman, may it  
15 please the court, Caitlin Halligan for the People. I  
16 believe this is a straightforward case. As the  
17 Appellate Division recognized, there is both physical  
18 restraint here, as well as the criminal impersonation  
19 which compels the defendant to submit - - - the  
20 victim, pardon me - - - to submit to the pat down.  
21 As - - -

22 CHIEF JUDGE LIPPMAN: What about your  
23 adversary's argument that - - - that a pat down in  
24 itself is not threatening, that maybe the police  
25 officer says, oh, you don't want to be patted down;

1           that's okay, too.

2                       MS. HALLIGAN: We are not suggesting that  
3 any interaction that a police officer might have with  
4 an individual in the street necessarily creates an  
5 implied threat of force. For example, the  
6 hypothetical that Judge Pigott set forth, I think,  
7 would constitute larceny by trick and not a threat of  
8 force. Here - - -

9                       CHIEF JUDGE LIPPMAN: So you - - - you - -  
10 - you - - - you would argue that trickery can have  
11 force or cannot have force? It's not exclusive of  
12 force - - -

13                      MS. HALLIGAN: They are surely not mutually  
14 exclusive - - -

15                      CHIEF JUDGE LIPPMAN: Right.

16                      MS. HALLIGAN: - - - categories. And this  
17 case demonstrates that. Because here what you have  
18 is - - - and Woods was very clear that you have to  
19 look at the surrounding circumstances; the court said  
20 the myriad of facts and circumstances. What you have  
21 here is a young man coming into a building at 3:30 in  
22 the morning, by himself. He is approached by two  
23 individuals who order him to stop. He continues;  
24 they order again that he stop. The transcript is  
25 very clear. There is a frisk. It's at page A-8 of

1 the - - - of the appellant's appendix.

2 JUDGE GRAFFEO: Before the frisk, would you  
3 have force here? Or do you need him put against the  
4 wall in the - - - in the frisk?

5 MS. HALLIGAN: Under those circumstances, I  
6 think that you probably would, given what sounded  
7 like a very commanding tone from the - - - from the  
8 two individuals and the fact that there's a shield.  
9 But there could be other circumstances where there is  
10 some interaction that falls short of that. Not just  
11 the PBA hypothetical, but for example, you could  
12 imagine a circumstance on the street where an officer  
13 approaches an individual and engages in, what's  
14 basically, a Level 1 inquiry, a request for  
15 information. In that circumstance, I think it would  
16 be very difficult, perhaps, depending on the facts,  
17 but it would be very difficult to argue that there  
18 there is an implied threat of force if the individual  
19 not comply with whatever the officer requests.

20 CHIEF JUDGE LIPPMAN: You could impersonate  
21 a police officer and not use force?

22 MS. HALLIGAN: We're not arguing that - - -  
23 that - - -

24 CHIEF JUDGE LIPPMAN: In and of itself,  
25 impersonating a police officer isn't enough.

1 MS. HALLIGAN: Not necessarily, and the PBA  
2 hypothetical, I think, proves that point.

3 JUDGE PIGOTT: Mr. Levenson points to  
4 People v. Flynn, which seems to be on all fours with  
5 this case. Do you have a thought with respect to  
6 that?

7 MS. HALLIGAN: Yeah, several thoughts, Your  
8 Honor. First of all, I think there the degree of  
9 physical intrusion that was exercised by the  
10 defendants there was less, the degree of - - - of  
11 control that was exerted. And to the extent that  
12 Flynn could be read as suggesting, and I believe Mr.  
13 Levenson is indicating this, that somehow criminal  
14 impersonation of a police officer exempts a defendant  
15 from a robbery charge, I think that would just be  
16 incorrect.

17 In fact, it's the - - - the notion that the  
18 authority is lawful that really induces the  
19 submission here. It's because a person - - -  
20 certainly this particular victim - - -

21 JUDGE SMITH: But the - - - if people  
22 submit to lawful authority without necessarily being  
23 - - - expecting the immediate use of force, if you -  
24 - - you - - - when - - - when the - - - in Mr.  
25 Levenson's example, you say to the driver, give me

1           your license and registration, he gives it to you.  
2           It's not because he thinks he's going to be  
3           handcuffed if he doesn't; it's because he thinks  
4           he'll get in trouble.

5                       MS. HALLIGAN: Well, I think here, as you  
6           suggested yourself, Judge Smith, this is a stop and  
7           frisk. And in that context, I think the only  
8           reasonable conclusion that someone would draw is that  
9           if they do not comply, that that would be met with  
10          some force, whether that's to put the person in the  
11          position against the wall, to allow them to - - - to  
12          engage in the pat down, and in any event, that is  
13          certainly an inference that the jury could have drawn  
14          here.

15                      CHIEF JUDGE LIPPMAN: Counsel, stop and  
16          frisk is always force? You know, very much in the  
17          news today, stop and frisk, force, no matter  
18          whatever?

19                      MS. HALLIGAN: I'm not saying that stop and  
20          frisk is force. I am saying that I can't think of a  
21          circumstance in which it wouldn't be reasonable for a  
22          jury to infer - - -

23                      CHIEF JUDGE LIPPMAN: Okay.

24                      MS. HALLIGAN: - - - that noncompliance  
25          with an order to stop and frisk - - -



1 CHIEF JUDGE LIPPMAN: Right, in this  
2 context, force.

3 MS. HALLIGAN: In this context - - -

4 CHIEF JUDGE LIPPMAN: Or in this - - -

5 MS. HALLIGAN: - - - and in particular in  
6 this context.

7 CHIEF JUDGE LIPPMAN: - - - context, force,  
8 a jury could reasonably decide that.

9 JUDGE SMITH: And stop and frisk implicitly  
10 carries with it the threat of force.

11 MS. HALLIGAN: It - - - it certainly does.  
12 It implicitly carries it with it. And that need not  
13 be violence, which - - - which I think is a red  
14 herring. But some force to compel submission to the  
15 - - - to the stop and the pat down, which is what  
16 took place here.

17 Just briefly to touch on - - - on the  
18 question of whether that purpose element of the  
19 statute was fulfilled here. I think that - - - that  
20 the appellant misstates, or doesn't fully state, in  
21 any event, what the statute includes here. The  
22 statute includes the threat of physical force for the  
23 purpose, not just of overcoming resistance, but  
24 preventing resistance as well, and compelling the  
25 owner of property to deliver it up.

1                   That's certainly what took place here, and  
2                   it was certainly reasonable for the jury to conclude  
3                   that the purpose of the criminal impersonation and  
4                   the order to get up against the wall was to allow  
5                   them to do exactly what they did, which was to reach  
6                   into the defendant's pocket, take out his wallet, and  
7                   - - - and take the cash, and do so without immediate  
8                   detection.

9                   If the court has no further questions - - -

10                  CHIEF JUDGE LIPPMAN: Thank you, counsel.

11                  MS. HALLIGAN: - - - I'm happy to - - -

12                  CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

13                  MR. LEVENSON: Yes, briefly. Judge Rivera,  
14                  you mentioned a pat down that took place. I think if  
15                  you take a look at the record, and I think it's at  
16                  Appendix A-13, you'll see that the defendant turned  
17                  over his wallet to the - - - not the defendant; the  
18                  victim turned over this wallet to the defendant. It  
19                  wasn't a pat down. It was a voluntary turning over  
20                  of the - - -

21                  JUDGE SMITH: You're not - - - you're not  
22                  saying the pat down didn't happen; you're saying that  
23                  the - - - that the pat down wasn't what led to the  
24                  turning over of the wallet.

25                  MR. LEVENSON: There - - - I don't think

1           there was a pat down. I think they just asked for  
2           identification.

3                     JUDGE SMITH: He said he frisked - - - he  
4           said they frisked me as if they were police officers.  
5           Isn't that a pat down?

6                     MR. LEVENSON: I don't see it in the  
7           record. I see the asking for identification. The  
8           victim apparently took out his wallet, handed it to  
9           the police officers. The police officers looked  
10          through it, took out some money while he was facing  
11          the wall. If you look at A-13 - - -

12                    JUDGE SMITH: Well, let me - - - let me - -  
13          - let me look - - - look for a minute at A-8, which  
14          was what Ms. Halligan just referred to. "He walked  
15          towards me, and then another person came in. Between  
16          the two of them, they frisked me, as if they were  
17          officers". Isn't that - - - is that the use of  
18          force?

19                    MR. LEVENSON: Well, I - - - I wouldn't - -  
20          - I wouldn't think that is sufficient force to  
21          elevate this from a petty larceny to a - - - to a  
22          robbery. A mere, incidental touching does not  
23          constitute force.

24                    CHIEF JUDGE LIPPMAN: Well, the question  
25          is, what could a jury make of all of this? Do you

1 think it's so benign that it's impossible for the  
2 jury to have - - -

3 MR. LEVENSON: I don't - - -

4 CHIEF JUDGE LIPPMAN: - - - to have found  
5 that there was a use of force here or a threat of  
6 force?

7 MR. LEVENSON: I don't believe that the  
8 jury had sufficient evidence to convict in a  
9 situation such as this. I think it's a matter of law  
10 as to whether or not that this type of situation  
11 constitutes force or the threat of force,  
12 particularly in view of the fact that the defendant  
13 wasn't even aware that there was a robbery taking  
14 place.

15 Any submission to the police was not out of  
16 fear that the property would be taken from him. He  
17 was submitting because he is a law-abiding citizen.  
18 There's submission to authority. Police, fire,  
19 courts - - -

20 CHIEF JUDGE LIPPMAN: Okay.

21 MR. LEVENSON: - - - judges, are people - -  
22 - are people - - - are people in authority who people  
23 submit to that.

24 CHIEF JUDGE LIPPMAN: Okay, counsel.

25 Thanks, counsel.

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MR. LEVENSON: Thank you.

CHIEF JUDGE LIPPMAN: Thank you both.

Appreciate it.

(Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Mikal Smith, No. 7 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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