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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF NEW YORK,

Respondent,

-against-

NO. 50

SAMUAL NEKTALOV,

Appellant.

20 Eagle Street
Albany, New York
April 17, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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1 CHIEF JUDGE WILSON: Good afternoon, everyone. I
 2 wanted to welcome our colleagues, Justice Llinet Rosado,
 3 and Marsha Michael, who brought with them students from the
 4 Bronx High School of Law and Government. We're delighted
 5 to have you here. Thank you for coming. We know you can't
 6 stay the whole time. Please stay as long as you can.

7 First case on the calendar is People v. Nektalov.

8 MS. PECKER: Good afternoon, Your Honor. And may
 9 it please the court. Rachel Pecker of the Legal Aid
 10 Society on behalf of Mr. Nektalov. I'd like to reserve two
 11 minutes for rebuttal, please.

12 CHIEF JUDGE WILSON: Yes.

13 MS. PECKER: I won't raise all the issues as I
 14 briefed them. But I would like to make sure to get to two
 15 issues: the entire basis of the stop, as well as the 30.30
 16 motion here today.

17 So taking it from the beginning, the entire basis
 18 for the stop here was the alleged excessive tint of the car
 19 windows in which Mr. Nektalov was merely a passenger. At
 20 the suppression hearing, the testimony of the arresting
 21 officer was that he stopped the car because "it had
 22 excessively tinted windows." That is a completely
 23 conclusory assertion. He didn't provide one other word,
 24 not one description, articulable fact, or basis for - - -

25 JUDGE TROUTMAN: With respect to the word

1 "excessive"?

2 MS. PECKER: Yes?

3 JUDGE TROUTMAN: Is that not describing what the
4 officer saw in his belief and basis for - - -

5 MS. PECKER: No - - -

6 JUDGE TROUTMAN: - - - stopping the car?

7 MS. PECKER: No, Your Honor. And that's for two
8 reasons. One, Your Honor, the word "excessive" is a
9 subjective word. And the word "excessive" means different
10 things in different states.

11 The legal tint in New York, what is excessive in
12 New York, is very different than what's excessive in other
13 states.

14 JUDGE TROUTMAN: But you can't even determine
15 what is invalid or illegal amount of tint until you
16 actually stop a car and use a tintometer; correct? Or
17 something like that?

18 MS. PECKER: To know the exact number? That's
19 correct. But I would not agree with I think the
20 presumption of your question. And I'm going to go back and
21 answer the second part of your first question and then get
22 to the second part which is that "excessive" is not enough
23 for the same reason that saying a knife is a gravity knife
24 isn't enough. Because saying - - -

25 JUDGE HALLIGAN: So, what - - - what would be

1 enough?

2 MS. PECKER: Great question. So what would be
3 enough? So based on this court's jurisprudence, in People
4 v. Smalls and in People v. Thiam, the court indicated that
5 a police officer saying only that an officer had experience
6 and training on its own would not necessarily be enough.

7 But even if this court said experience and
8 training were enough, that the officer had experience and
9 training and identified excessively tinted - - -

10 JUDGE CANNATARO: Is that in - - -

11 MS. PECKER: - - - windows in New York - - -

12 JUDGE CANNATARO: - - - the conjunctive
13 experience and training? So I've - - - I've taken a class
14 on excessive tinting. And I have a notion of what that is.
15 And I've stopped twelve cars and six were extensive and six
16 - - - or excessive, and six weren't, so now I know the
17 difference. You need all that?

18 MS. PECKER: No. I think it's an "or", Your
19 Honor. Experience or training. And the court has
20 indicated that wouldn't be enough. But even here we don't
21 have even that. So going back to Judge Halligan's
22 question, let's say what would you need then? An officer
23 could testify about his experience or his training and some
24 description or some basis for how the officer reached the
25 conclusion that he did.

1 And this goes back to Judge Troutman's question.
2 What would that look like? To wit, the windows were so
3 dark I could barely see through them. They were so tinted
4 I couldn't see the driver. They were pitch black. And I
5 couldn't see through at all. That's what - - -

6 JUDGE SINGAS: What if they had - - -

7 MS. PECKER: - - - numerous cases have said - - -

8 JUDGE SINGAS: - - - what if they had a
9 tintometer at the scene after? Would that be sufficient?

10 MS. PECKER: So Your Honor - - -

11 JUDGE SINGAS: And it said - - - and it showed
12 that it was excessive. So in other words, corroborating
13 his "excessive" testimony?

14 MS. PECKER: That also is better than what we
15 have here. And I think it would be up to the suppression
16 court. So often the suppression - - - although we judge
17 the police officer's belief at the time that he made it,
18 suppression hearings are inherently retrospective. And the
19 prosecution - - -

20 JUDGE TROUTMAN: Well, what about the fact - - -
21 did - - - did he have to be correct by using the tintometer
22 that it was in violation of the vehicle and traffic law?
23 Or did that merely have to be the valid, objective reason
24 that the stop was, in fact, made?

25 MS. PECKER: No, Your Honor. He didn't have to

1 be correct. This court has held clearly that if an officer
2 has a reasonable belief even if it's a mistake of law, that
3 doesn't undermine the probable cause in the first place.

4 The problem here is that a court, the neutral
5 factfinder, had no way to know how the officer formed his
6 belief. And just as saying that a gravity knife is a - - -
7 a knife is - - -

8 JUDGE HALLIGAN: So if he - - -

9 MS. PECKER: - - - a gravity knife tracks - - -
10 sorry, Your Honor.

11 JUDGE HALLIGAN: No. Go ahead. Finish.

12 MS. PECKER: Just as saying a knife is a gravity
13 knife tracks the definition of gravity knife and saying a
14 window is excessively tinted, which "excessive" isn't used
15 in the law, but a window is tinted in excess, you could
16 cite the law, that wouldn't be enough because the officer -
17 - - excuse me, the court would still not know how this
18 officer formed his belief.

19 JUDGE TROUTMAN: So your argument is that the
20 people - - - it - - - it was their burden to establish that
21 there was a valid reason for the stop? They didn't meet
22 the burden by simply offering the term "excessive"?

23 MS. PECKER: Correct, Your Honor. It's a
24 conclusory statement.

25 JUDGE TROUTMAN: But if one said - - - if one



1 believed that they had met the burden at that point it
2 would have been on the defense to show that it wasn't a
3 legally valid reason that they were in fact stopped.

4 The burden would have shifted at some point?

5 MS. PECKER: Right but here we're just - - - the
6 burden's on the prosecution. I mean, for forty-four years
7 since People v. Belton, this court has said - - -

8 JUDGE TROUTMAN: No. I - - -

9 MS. PECKER: - - - that the prosecution - - -

10 JUDGE TROUTMAN: That is clear the burden is on
11 them.

12 MS. PECKER: Yeah.

13 JUDGE TROUTMAN: But your premise is they never
14 met their burden initially?

15 MS. PECKER: They didn't - - -

16 JUDGE TROUTMAN: So the - - -

17 MS. PECKER: They didn't - - -

18 JUDGE TROUTMAN: - - - defense - - -

19 MS. PECKER: Correct.

20 JUDGE TROUTMAN: - - - could simply sit on their
21 hands? Because here there was no cross-examination;
22 correct?

23 MS. PECKER: Correct, Your Honor. This was in -
24 - - the entire suppression hearing was ten pages. That's
25 unheard of. It is the prosecution's burden to elicit

1 testimony, and they simply did not do that here. And their
2 duty to elicit this testimony and the court's ability to be
3 the final arbiter so that it is the court and not the
4 police deciding whether a police intrusion is justified is
5 all the more important in the excessively tinted windows
6 context.

7 JUDGE HALLIGAN: But just to be clear about your
8 position - - -

9 MS. PECKER: Sure.

10 JUDGE HALLIGAN: - - - if I can.

11 MS. PECKER: Yes.

12 JUDGE HALLIGAN: So it sounds to me from what
13 you've told us that if the officer had testified both that
14 she had experience, she'd stopped X number of cars that
15 were excessively tinted, or training - - - on other words
16 she took a - - -

17 MS. PECKER: Um-hum.

18 JUDGE HALLIGAN: - - - class on what that looks
19 like. And secondly, she said something however brief
20 describing what she saw in the moment, I could only see the
21 outline of the driver's face, couldn't see anything - - -
22 that would be sufficient?

23 MS. PECKER: Absolutely, Your Honor. If that - -
24 - I mean, we don't know the other facts before the
25 suppression court. So let's say it was really dark out and

1 there was no street lighting. A suppression court may
2 decide - - - take that as he will or depending on the race
3 of the driver.

4 But yes. Under what we would expect that that
5 would be enough. It's not an onerous requirement. They
6 just have to give some basis.

7 JUDGE SINGAS: What about when an officer says I
8 was following a car and I saw it swerving and I pulled it
9 over? Isn't the - - - isn't swerving a conclusory
10 statement? And we've said that that's okay.

11 MS. PECKER: No, Your Honor. Because there are
12 certain acts that objectively on their face violate - - -
13 are a VTL violation. If an officer sees someone run
14 through a red light, if they see them fail to signal, if
15 they see them go over a yellow line swerving, that - - -
16 the fact in itself is the violation.

17 But if a car - - - if - - - if you're saying a
18 subjective, a conclusory statement, only that the windows
19 were excessively tinted, we don't know how this officer
20 concluded these windows were excessively tinted under the
21 law. And in New York City, stops for excessively tinted
22 windows now far exceed stop-and-frisks. And that is
23 relevant to this court's weighing in here to say that the
24 prosecution has always had a burden to state how the
25 officer has reached the conclusion that he has because just

1 - - - because tinted windows are now a leading basis for
2 police-citizen interaction. And just as stop-and-frisks
3 were, tinted windows are a way that police are - - -

4 JUDGE TROUTMAN: So going forward - - -

5 MS. PECKER: - - - fishing for more serious
6 crime. Yes?

7 JUDGE TROUTMAN: So - - - so you acknowledge that
8 they can be stopped for tinted windows. But it would be
9 your rule that excessively tinted is not enough for the
10 people to meet their burden at the suppression hearing?
11 That they have to establish the basis of the conclusion.
12 Because unlike a stop sign or the double yellow line, which
13 is what it is, there is some subjectivity involved in it?

14 MS. PECKER: Yeah. And I would say that's not my
15 rule, Your Honor. It's going off this court's precedence
16 under Dumas, saying a substance is marijuana is not enough.
17 A conclusory statement in Dreyden or Brannon at a
18 suppression hearing that a knife is a gravity knife is not
19 enough. It would never be enough for an officer to say I
20 arrested him for a DWI because he was impaired, period.
21 The court has to have a basis to know how this office - - -
22 officer concluded that there was probable cause that - - -
23 for the stop.

24 So there was many ways for the burden to be met
25 here. The prosecution has had that burden for a long - - -

1 JUDGE TROUTMAN: My question to you is - - -

2 MS. PECKER: Yes?

3 JUDGE TROUTMAN: - - - if I say to you, I'm the
4 police officer, the windows were excessively tinted, and
5 then at the hearing it is elicited that I could not see the
6 driver or I had difficulty seeing the driver, or I used in
7 addition the words "pitch black," et cetera, so that is
8 what I'm asking you about.

9 Because you - - - you clearly acknowledge that it
10 is a violation of the Vehicle and Traffic Law to have a
11 certain percentage. It varies from state to state. No one
12 expects officers to know what it is for other - - - because
13 there are instances where it could be legal in one state
14 but not in another. Correct?

15 MS. PECKER: Yes. And the examples that you just
16 repeated are - - - that's pretty strong proof that the
17 statute here has been violated because the whole point of
18 the statute in New York State is that we want the police
19 officers to be able to see into cars. So when they say
20 they're having trouble seeing into cars, that's pretty
21 strong proof that there is a violation of the statute.

22 JUDGE TROUTMAN: So they should just say it?
23 They should say how they - - -

24 MS. PECKER: They should say how they concluded.
25 Yes. That it was too dark - - - seventy percent.

1 And just - - - sorry, going back to your - - - I
2 never answered your question about the tintometer, often at
3 suppression hearings the prosecution enters evidence that
4 was acquired after the effective arrest to provide
5 corroboration, context, or to provide information to the
6 court on why this officer's belief was reasonable at the
7 time even though it's after the fact. And that's what a
8 tintometer - - -

9 JUDGE CANNATARO: Can I ask - - -

10 MS. PECKER: - - - that's what pictures do.

11 JUDGE CANNATARO: - - - you a question about how
12 you articulate this rule? Assume we want to adopt your
13 rule or our rule? What - - - what - - - wherever it comes
14 from. We know that we can have this to use your word
15 conclusory statement that the windows were excessively
16 tinted. But there's a plus that - - - that you say needs
17 to be there. What is the nature of that additional
18 statement regardless of what it is? Can you describe - - -
19 does it have to be based on verifiable criteria? Or
20 measurable something - - - or really, can it be anything
21 that adds to the - - - to confidence in the statement about
22 it being excessive?

23 MS. PECKER: It's - - - it's - - - under this
24 court's holdings, it's - - - the prosecution has to put
25 forth sufficient evidentiary facts for a court to determine

1 how the police officer reached the conclusion that he did.

2 JUDGE CANNATARO: So it doesn't necessarily have
3 to be a tintometer reading?

4 MS. PECKER: No. That's just one way. And the
5 cases on page 29 of my brief outline all the ways that one
6 could get to the burden here and they simply just didn't
7 elicit any testimony.

8 JUDGE RIVERA: If I - - - if I can take it from
9 another direction?

10 MS. PECKER: Sure.

11 JUDGE RIVERA: Let's say that the officer had not
12 said "excessively tinted windows" but instead said a
13 violation of whatever provision it was because I couldn't
14 see through the window? You would say that's okay;
15 correct?

16 MS. PECKER: I think that's pretty - - - it would
17 be up to the suppression court. But I think that's pretty
18 strong proof of what the - - - of what the - - -

19 JUDGE RIVERA: You're citing to the - - -

20 MS. PECKER: - - - of a violation of what the - -
21 -

22 JUDGE RIVERA: - - - law and you're citing - - -

23 MS. PECKER: - - - statute was intended - - -

24 JUDGE RIVERA: - - - and you're saying what the
25 problem was. And that of course is - - -



1 MS. PECKER: And that's - - - that's - - -

2 JUDGE RIVERA: - - - the tinted windows.

3 MS. PECKER: - - - clearly, I couldn't see
4 through them is how he reached the conclusion that he - - -
5 that we had a violation on his hands.

6 JUDGE RIVERA: Because you can have tinted
7 windows.

8 MS. PECKER: You can have tinted windows, Your
9 Honor. Yes. You just can't have seventy percent.

10 JUDGE RIVERA: Correct.

11 MS. PECKER: Not thirty - - - more than thirty
12 percent tinted.

13 JUDGE RIVERA: Correct. Correct.

14 CHIEF JUDGE WILSON: So it seems like the rule
15 has relative - - - I'm sorry - - - has relatively broad
16 implications which may not be bad ones. But for example,
17 if an officer says I stopped the person because the person
18 was driving recklessly, that wouldn't be enough under your
19 rule; right?

20 MS. PECKER: It's never been enough - - -

21 CHIEF JUDGE WILSON: Yeah.

22 MS. PECKER: - - - under this court's rule.

23 CHIEF JUDGE WILSON: Yeah.

24 MS. PECKER: That's correct.

25 CHIEF JUDGE WILSON: You would need to say

1 "recklessly" because and then give some reasons that you
2 observed?

3 MS. PECKER: Absolutely. And that's what this
4 court - - -

5 CHIEF JUDGE WILSON: Um-hum.

6 MS. PECKER: - - - has always held.

7 JUDGE HALLIGAN: And how exactly do you
8 articulate the distinction between driving recklessly and
9 swerving? Is it because swerving is a sort of physical,
10 you know, path that we all objectively appreciate in the
11 same way and recklessness might be different? Or what's
12 the - - -

13 MS. PECKER: Sorry.

14 JUDGE HALLIGAN: - - - distinction?

15 MS. PECKER: I don't know if - - - I'm - - - I -
16 - - this is my - - - I don't know that swerving is a VTL
17 violation, but it might be. I apologize if it is. So I
18 guess I was - - - when the - - - when the judge said
19 swerving I was - - -

20 JUDGE HALLIGAN: I don't know why there actually
21 - - -

22 MS. PECKER: - - - thinking about going over a
23 yellow line. But absolutely. If swerving were a
24 subjective - - -

25 JUDGE HALLIGAN: Let's say going over a yellow

1 line.

2 MS. PECKER: So yellow - - - yellow line is an
3 objective violation on the face. But if it were swerving
4 or reckless, that have definitions and meanings, then the
5 officer would have to describe them. If I could just turn
6 to the 30.30 motion and the appellate bill - - -
7 appealability - - - excuse me - - - of 30.30 Subsection 6,
8 first I want to say, Your Honors, is that this is not about
9 retroactivity and the prosecution's use of that word is a
10 misnomer.

11 This is about the prospective application of a
12 statute that conferred jurisdiction at - - - to appellate
13 courts as of the effective date. And the prosecution says
14 that 30.30(6) should apply prospectively and we say
15 absolutely. Because the plain language of 30.30 Subsection
16 6 is that 30.30 denials shall be reviewable on appeal as of
17 the effective date. And the legislature could have said
18 30.30s shall be reviewable only for convictions entered
19 into after the effective date. But they didn't say that.

20 JUDGE TROUTMAN: And his guilty plea does not
21 foreclose?

22 MS. PECKER: His guilty plea does not foreclose
23 this. No, Your Honor. In Landgraf, the Supreme Court
24 undertook an analysis on when to - - - how you decide when
25 a statute is genuinely retroactive and when it's

1 presumptively prospective. And the court said that a
2 statute is retroactive only when it impacts a substantial
3 right and adds new, unforeseeable penalties, impositions,
4 obligations.

5 And in contrast to that, a statute is
6 presumptively prospective only when it confers or ousts
7 jurisdiction and changes which tribunals have the power to
8 hear a case, whether or not the Appellate Court had the
9 jurisdiction to hear the case when the case commenced. And
10 the court in holding that - - - making that distinction
11 pointed out as is relevant here that a statute is not
12 retroactive merely because it applies to cases arising from
13 conduct that antedated the statute. It is not - - -

14 JUDGE RIVERA: What - - - what if it - - - what
15 if it revives the right that you've forfeited or waived?

16 MS. PECKER: Reliance interest. I actually think
17 that is not actually applicable here because the Supreme
18 Court said that a statute is similarly not retroactive
19 merely because it except - - - upsets expectations based on
20 prior law.

21 And so, if you look at what this court did in
22 Galindo with 1(e), the court said Subsection 1(e) impacts
23 substantive rights. It adds time frames to traffic
24 infractions that the court held the prosecution could not
25 have known it would have and could not foresee, and

1 therefore it would not apply retroactively.

2 However, Subsection 6 is not retroactive. It
3 confers jurisdiction to the appellate courts and the
4 prosecution had the same obligations all along. Under the
5 old law and on appeal if this court looks at the merits of
6 the 30.30 motion, the prosecution's actions are viewed
7 under the same law under 30.30(1)(b) all along at the trial
8 level and on appeal. He had thirty days to prosecute the
9 case.

10 And I think if I may take a moment to point out
11 Slack v. McDaniel which was raised by the amicus in their
12 brief, because in Slack v. McDaniel, the Supreme Court
13 applied Langraf to reach essentially the exact same
14 question that this court is grappling with here regarding
15 1(e) versus Subsection 6. That is when there are two parts
16 of the statute, and one is directed backwards at trial
17 court proceedings and the other is directed at appellate
18 jurisdiction and going forward.

19 So in Slack, the court was considering AEDPA.
20 And it affirmed that the first portion of the first AEDPA
21 statute, 2254, was directed at trial court proceedings.
22 And therefore, it would not apply retroactively. It would
23 apply prospectively, and on appeal any petitions that were
24 filed before AEDPA went into effect would be governed under
25 the pre-AEDPA law. And that is exactly what this court

1 held in Galindo with - - - vis-a-vis 1(e).

2 And the court then went to the second part of the
3 AEDPA statute. And the second part, 2253, was about
4 appellate jurisdiction. And the court said this provision
5 two applies prospectively to any appeal taken after the
6 effective date because it was only conferring jurisdiction.
7 And the court held, which is the same here, that Congress
8 made no indication that it intended the right to appeal of
9 AEDPA to apply only to cases initiated in the trial court
10 after the effective date.

11 And therefore the plain stat - - - the plain
12 words of the statute said the appellate provision applies
13 as of - - - as of the effective date and so it must be so.
14 The same is true here. The plain words say that the
15 appellate provision goes into effect on the effective date
16 that they did not indicate they would go into effect only
17 for convictions secured after the effective date and that
18 is also what the appellate divisions held in Sullivan and
19 Rosen regarding the predecessor to CPL § 710.70, the
20 appellate provisions, the - - - the amendments that allowed
21 appellate courts to review motions to suppress - - -
22 denials of motions to suppress notwithstanding a guilty
23 plea.

24 The prosecution - - - the appellate divisions
25 there said there is nothing in the plain words of those

1 statutes that indicate that the legislature wanted this
2 appellate review power to apply to future convictions after
3 the effective date only. And the appellate divisions
4 reached that without dispute and the prosecution never
5 sought - - -

6 CHIEF JUDGE WILSON: Counsel, your red light's -
7 - -

8 MS. PECKER: - - - leave to this court.

9 CHIEF JUDGE WILSON: - - - been on for a while.
10 And you have - - -

11 MS. PECKER: Okay. Thank you very much.

12 CHIEF JUDGE WILSON: Yep. Thank you.

13 MR. DIPIETRO: May it please the court, Joseph
14 DiPietro on behalf of District Attorney Melinda Katz.

15 JUDGE TROUTMAN: With respect to this case, the
16 defense indicates that unlike a stop sign, a red light, or
17 the double yellow line, whether or not a window is
18 excessively tinted requires some subjectivity. Therefore,
19 in order for the people to have met their initial burden
20 simply saying "excessively tinted" was insufficient.

21 Why do you - - - what do you say to that?

22 MR. DIPIETRO: Well, Your Honor, I would first
23 begin with what the people have to establish at the
24 suppression hearing. They have to establish that the
25 officer "reasonably believed that the windows were

1 over-tinted." That's the exact language is - - -

2 JUDGE TROUTMAN: But if you simply - - - the
3 argument is if you simply use the word "excessively", what
4 is your basis for that? And how could the reviewing court
5 make a determination that it was in fact a reasonable
6 belief?

7 MR. DIPIETRO: Well, at any probable cause
8 hearing it's always going to be a fact-specific inquiry.
9 And it's those - - - those facts are always going to arise
10 out of the nature of the crime.

11 JUDGE SINGAS: What facts were elicited here in
12 this hearing to make a determination about the
13 reasonableness of the illegality of the tint?

14 MR. DIPIETRO: So there's - - - there's one
15 relevant fact. It's the detective's testimony. And he
16 said that he observed a car traveling with excessively
17 tinted windows.

18 JUDGE GARCIA: Counsel, I - - -

19 JUDGE SINGAS: That's excessive - - -

20 JUDGE GARCIA: I'm sorry.

21 JUDGE SINGAS: - - - correct?

22 MR. DIPIETRO: I'm sorry, Your Honor?

23 JUDGE SINGAS: That's it. The word "excessive"
24 is the - - -

25 MR. DIPIETRO: That's correct.

1 JUDGE SINGAS: - - - the culmination of the facts
2 in this case.

3 MR. DIPIETRO: That's correct.

4 JUDGE GARCIA: Counsel, I'm sorry. I was trying
5 to - - - along the lines of this back-and-forth on, you
6 know, right turn without signaling or a failure to come to
7 a complete stop where that's an obvious violation, you
8 know, you say I saw the person come to the stop sign. And
9 they didn't come to a complete stop.

10 I was trying to think of an analogy to this and I
11 thought about before radar guns; right? And you pulled
12 people over for speeding what did you need to show; right?
13 And I actually found a case that's from 2022, believe it or
14 not, and they had a radar gun but the officer didn't have
15 one. And he testifies the person was going at an excessive
16 speed. In fact, he said I think they were going eighty-two
17 miles an hour in a sixty-five-mile-per-hour zone.

18 And the Fourth Department says the people failed
19 to establish the officer's training and qualifications to
20 support the officer's visual estimate. Isn't this the same
21 case? I mean, excessive is a visual estimate. And what
22 supports the visual estimate here?

23 MR. DIPIETRO: Well, I - - - I - - - I think in
24 the case of window tints, they're rather unique among all
25 of the Vehicle and Traffic Law violations that an officer

1 might encounter while he's looking at cars on the road.

2 It's a rather irreducible analysis, unlike the
3 case of speeding where in order to establish speeding a car
4 is traveling in motion. So the question is not is it
5 stationary or is it moving? The question is how fast is
6 it moving.

7 JUDGE GARCIA: Right.

8 MR. DIPIETRO: That's quite distinct - - -

9 JUDGE TROUTMAN: But with respect to the window,
10 it would not have required much for the officer to simply
11 state objectively what he witnessed at - - - in order to
12 form the basis of that conclusion that the tinting was in
13 fact excessive?

14 MR. DIPIETRO: Yes, Your Honor. There's - - -
15 there's no dispute that, you know, the officer could have
16 been more verbose in his description.

17 JUDGE TROUTMAN: Wasn't that the prosecutor's
18 responsibility to bring out?

19 JUDGE RIVERA: Going past - - -

20 MR. DIPIETRO: Your Honor - - -

21 JUDGE RIVERA: - - - one word is not quite about
22 verbosity. But thank you for that.

23 MR. DIPIETRO: Yes, Your Honor.

24 JUDGE RIVERA: All right. All right.

25 MR. DIPIETRO: The question of course before this

1 court is whether it was legally sufficient, not whether it
2 should be a case study in the elicitation of testimony with
3 respect to window tints. And here, the officer used the
4 word "excessive", which is important as Your Honors have
5 previously discussed with my opponent. The - - - a certain
6 degree of window tint is lawful. And the - - -

7 JUDGE RIVERA: Let me ask this. Does the law
8 permit some of the windows not to be tinted?

9 MR. DIPIETRO: Yes, Your Honor.

10 JUDGE RIVERA: Yes? Okay? So it's only
11 particular windows that cannot be "excessively" tinted?

12 MR. DIPIETRO: That's correct.

13 JUDGE RIVERA: Thirty percent line? Okay. Did
14 the officer ever indicate which windows were excessively
15 tinted?

16 MR. DIPIETRO: No. He did not.

17 JUDGE RIVERA: Well, why isn't that - - - forget
18 the excessively tinted then. Why isn't that the problem?

19 MR. DIPIETRO: I think, Your Honor, in this case
20 the suppression court credited the officer's testimony and
21 made inferences in the people's favor which were reasonable
22 that by - - - by using the word "excessive," the officer
23 was both: 1, implicitly referring to the statute by saying
24 "excessive" means exceeding the legal threshold; and then
25 2, by saying "windows," the court could have reasonably

1 inferred that he was referring to the front windows because
2 those only - - -

3 JUDGE TROUTMAN: Why?

4 MR. DIPIETRO: Your Honor, because those are the
5 only windows that are covered by the statute. It would
6 have - - -

7 JUDGE TROUTMAN: So you're saying the court
8 should assume, speculate, as opposed to having the officer
9 articulate what he actually saw or didn't see?

10 MR. DIPIETRO: It's - - - it's - - - I think,
11 Your Honor, it would be a reasonable inference for the
12 suppression court to make.

13 JUDGE TROUTMAN: That is a lot of inferences.

14 MR. DIPIETRO: It - - - it's an inference,
15 however, that's informed by the statute. The statute is
16 omnipresent and - - -

17 JUDGE TROUTMAN: But again, there was discussion
18 earlier about even if you want to call it a hearing. It
19 minimal. They - - - there wasn't much effort put forth.
20 Or do you disagree with that?

21 MR. DIPIETRO: No. I - - - I agree with Your
22 Honor that it - - - certainly more could have been said.

23 CHIEF JUDGE WILSON: Let me go back to Judge
24 Singas' question. Suppose this is legally sufficient. How
25 does an appellate court review that?

1 MR. DIPIETRO: Well, the Appellate Court first
2 makes, you know, deference to the suppression court's
3 credibility determinations. Here, the officer said that he
4 saw an excessively tinted window.

5 CHIEF JUDGE WILSON: So there would be no way to
6 review that? That would be unreviewable?

7 MR. DIPIETRO: Yes, Your Honor. In Shabazz, the
8 2003 case from this court, the court held that the legality
9 of a motor vehicle stop is a mixed question of law and
10 fact. And such questions ordinarily are subject - - -
11 subject to deference - - -

12 JUDGE HALLIGAN: But how would - - - how would
13 the appellate division even review that with simply the
14 single word?

15 MR. DIPIETRO: I - - - I think the appellate
16 division would look at whether the suppression court, 1,
17 credited the officer's testimony which it did here; and
18 then, 2, drew inferences - - - reasonable inferences from
19 that testimony.

20 JUDGE HALLIGAN: But the word "excessive". What
21 I'm grappling with is this. I have some very rough sense
22 of what excessive tinting might be. But having had no
23 experience stopping a car or training and what crosses the
24 line laid out in the statute, I - - - I couldn't tell you
25 whether something was excessively tinted as set forth in



1 the statute or not.

2 And it seems to me like, like - - - the reviewing
3 court should be able to know that the officer making the
4 stop has - - - is better equipped to do that than I would
5 be. But with that one word, we have no insight into that.
6 Nor does the appellate division, I think.

7 MR. DIPIETRO: It is a difficult position for the
8 appellate division even on a perfect suppression record to
9 make that review because if an officer uses a tintometer to
10 determine the exact level of tint, that's really irrelevant
11 to the analysis of whether the court - - -

12 JUDGE TROUTMAN: But it's agreed that the officer
13 didn't have to be correct in the assessment that it was
14 excessive tint. The question is how did the - - - how can
15 one judge whether it was a reasonable conclusion, and
16 you're saying that there are all of these inferences that
17 the court's simply supposed to make. The officer doesn't
18 indicate what he observed. He just uses the one word.

19 The circumstances - - - I would agree with you
20 credibility is a part of it if the officer even took time
21 to explain how long he drove, what the lighting was like,
22 what he could or could not see. It's just a few more
23 words. But that's not here.

24 MR. DIPIETRO: The - - - Your Honor, I would note
25 that the officer before going into his observations about

1 the window tint, he described his experience. He said he
2 was a police officer with the NYPD for seven years. He
3 said that he had two years of experience in the Narcotics
4 Bureau.

5 JUDGE CANNATARO: Was anything - - -

6 JUDGE TROUTMAN: Okay.

7 JUDGE CANNATARO: - - - about tint stops?

8 JUDGE TROUTMAN: Yes.

9 MR. DIPIETRO: No, Your Honor.

10 JUDGE TROUTMAN: See, you're saying - - - and I
11 get what - - - he's a police officer, he's a narcotics
12 officer, one can infer that he's had training, he's had
13 experiences. Maybe he did. Maybe he didn't. He could
14 have been assigned elsewhere. How long was he in
15 narcotics? And how did he - - - did he pull people over
16 based upon tinting, and how did he make those conclusions?
17 We don't have that in the record; do we?

18 MR. DIPIETRO: I think, Your Honor. I think it's
19 - - - it's - - - while it's important that he testified
20 about his experience as a police officer, that's not even -
21 - - even the - - - the kind of primary inquiry. I think
22 most people who have any interaction with cars on the road
23 can tell with zero training or experience that either a
24 window is entirely opaque - - -

25 JUDGE TROUTMAN: And I - - - and I would agree

1 with you there. That - - - but I would say "excessively
2 tinted", I was unable to discern if it was a male or female
3 driver. I'm giving a basis of what some would say is
4 subject - - - is subjective. One person may say it's not
5 excessive. It's just stylistic.

6 But if there's no light going through, all of the
7 things that would help to see if it's reasonable, if the -
8 - - the thing that I'm grabbling with and - - - and you see
9 - - - i was just as determined in my questioning with
10 respect to the defense, but the objectivity. How do you
11 review it? If I just have a word when it's not like a red
12 light, it's one color or another color, it's a double
13 yellow line - - - or it's not a line?

14 MR. DIPIETRO: Your Honor, I would like to
15 mention in response to your question, I would like to draw
16 the court's attention to Bouton, the 1980 case which my
17 opponent relies on in - - - in her brief, which discusses
18 what constitutes conclusory testimony.

19 There, a police officer said that he was familiar
20 with the case, that he was familiar with the content of a
21 radio transmission, and the - - - the probable - - -
22 probable cause existed. That's the kind of testimony that
23 this court has held to be conclusory because it all comes
24 back to the central inquiry of the standard that people are
25 held to at the suppression hearing.

1 JUDGE RIVERA: Well, the - - - it does seem I - -
2 - certainly from some of the questions to both sides here,
3 that what the jurisprudence and what the questions have led
4 to is it's not - - - there's not much more that needed to
5 be said. It's not a - - - an overly burdensome standard.
6 Would you agree to that?

7 MR. DIPIETRO: It - - - it wouldn't be especially
8 burdensome.

9 JUDGE RIVERA: Okay. So then contrast that with
10 the potential for pretextual stops, and the great danger
11 that is involved in - - - in such a stop. Doesn't it make
12 sense to follow the case law as it exists and to expect the
13 officers to very easily comply with those requirements and
14 just put a few words more?

15 MR. DIPIETRO: It - - - it would constitute just
16 a few more words. However, this court has - - -

17 JUDGE RIVERA: To avoid the potential for the
18 pretextual stops?

19 MR. DIPIETRO: Yes, Your Honor. But this court
20 has expounded on that same notion - - -

21 JUDGE RIVERA: Yes.

22 MR. DIPIETRO: - - - in the context of controlled
23 substances in Dumas.

24 JUDGE RIVERA: Yeah.

25 MR. DIPIETRO: Where the court said that it's not

1 necessary, that once an officer establishes training and
2 experience in the identification of controlled substances
3 then it's - - - it's not necessary to supply in this
4 court's words a few extra words that of substance - - -

5 JUDGE RIVERA: Yeah, but I - - - again, you
6 missed the beginning of the premise there that you started
7 with, which is what's your training, what's your
8 experience? You've got to say something.

9 MR. DIPIETRO: Well you - - -

10 JUDGE RIVERA: You've got to say something. The
11 officer could have said something. This is not a - - - a -
12 - - such a demanding standard that we make it impossible
13 for officers to do their job.

14 MR. DIPIETRO: I - - - I think here the officer
15 did establish his training and experience. He said that he
16 was a police officer for seven years, and which is
17 important not - - - not to be overlooked is that - - -

18 JUDGE SINGAS: Can I - - - can I just take you
19 another way?

20 MR. DIPIETRO: Yes, Your Honor.

21 JUDGE SINGAS: If we find - - - if we agree with
22 you and find that this was sufficient to establish
23 excessive tinting, what do you think would be insufficient
24 to establish insufficient testing. In other words, are we
25 - - - if we agree with you are we just rubberstamping these

1 stops?

2 MR. DIPIETRO: I - - - I think if the officer had
3 said that he observed tinted windows, which there is case
4 law in the appellate division regarding, that is certainly
5 inadequate because tinted windows are not illegal. So - -
6 -

7 CHIEF JUDGE WILSON: Well, why can't we make the
8 same inference you were talking about before? Which is the
9 officer knows the statute and if he's stopping a car for
10 tinted windows it implicitly means excessively tinted.

11 MR. DIPIETRO: If an officer says only that he
12 observed tinted windows, that doesn't even begin to allege
13 any criminal activity. Tinted windows are not - - - don't
14 violate the Vehicle and Traffic Law. Only excessively
15 tinted windows - - -

16 JUDGE CANNATARO: No, I think the point the Chief
17 was making was a short time ago you told us that based on
18 the bare words, "excessive tinting", a number of
19 permissible inferences were made by the suppression court
20 here, that it was the right windows, that it was the right
21 amount of tint, and et cetera.

22 Why - - - why couldn't we do the same thing with
23 - - - an officer just says "tinting"?

24 MR. DIPIETRO: I - - - I think it's because any
25 inference that is to be drawn can only be drawn from

1 testimony that actually alleges facts that support any kind
2 of allegation of criminal activity. That's all - - -
3 that's ultimately the question of whether the officer had
4 probable cause. So if an officer simply states that he saw
5 tinted windows, he has no probable cause that any VTL
6 violation has occurred. Whereas if he says there is
7 excessively tinted windows, then that implicit - - -

8 JUDGE RIVERA: Yeah, but see that's the problem.
9 "Excessively tinted windows." Because you can have some
10 tint - - - it doesn't really set out that there is a
11 violation of VTL.

12 MR. DIPIETRO: And Your Honor, I think implicitly
13 by stating that the windows were excessively tinted it's in
14 reference to the statute.

15 JUDGE RIVERA: What if he said "heavily tinted"?

16 MR. DIPIETRO: I - - - I think that's
17 functionally analogous to excessively - - -

18 JUDGE RIVERA: What if he said they're too
19 tinted? T-O-O.

20 MR. DIPIETRO: I - - - I think that's getting
21 closer to simply tinted, but it still probably would
22 suffice.

23 JUDGE RIVERA: What if he said they were
24 "problematically tinted"?

25 MR. DIPIETRO: I - - - I think no. I - - - I

1 think that's entirely - - -

2 JUDGE RIVERA: Problematic. I know. Okay.

3 MR. DIPIETRO: Your Honors, if you have no
4 further questions with regard to the tint, I'd like to
5 address the 30.30 retroactivity question. There's no
6 question here that constructing the statute in the way that
7 my opponent desires would implicate retroactivity concerns.
8 The - - - the recent case of this course, Regina Metro from
9 2020, makes very clear that statutes, absent the
10 unambiguous statement of the legislature that it should be
11 construed retroactively, should not be when they would
12 upset reliance interests.

13 JUDGE RIVERA: So what was missing in the statute
14 in your opinion. What - - - what would have the - - - what
15 should the legislature put in to make it clear that indeed
16 they intended it to have retroactive application the way
17 you've defined?

18 MR. DIPIETRO: I think two things. One would be
19 first removing something from the statute which is the fact
20 that it delayed the implementation of the statute by eight
21 months - - - which there is ample case law from this court
22 that that's indication that the legislature did not intend
23 it to apply retroactively. And then the second point is
24 very simple. The legislature could have said that this
25 embraces all cases currently pending on appeal. There's

1 nothing that prevented the legislature from saying that
2 unambiguous statement of retroactivity, which is what this
3 court has repeatedly found to be necessary for retroactive
4 construction.

5 Here, the reliance interests are well established
6 and invade every single guilty plea. The people have a
7 strong interest in the prospective certainty and the
8 retrospective finality of plea agreements. When the people
9 enter into a plea agreement they do so for the precise
10 purpose of one, ending - - -

11 JUDGE RIVERA: But there's - - - there's always
12 the possibility that on appeal an appellate court might
13 decide that the plea is involuntary; correct?

14 MR. DIPIETRO: Of course, Your Honor. There are
15 exceptions that this court and the legislature have found
16 removing for public policy reasons the extinguishment of
17 appellate rights. However, the statute here was
18 unambiguously not one of those. In *People v. Taylor*, it
19 was well-established by this court that - - -

20 JUDGE RIVERA: Well, I'm saying the fact that
21 there's a plea doesn't mean that the plea is going to
22 survive an appellate challenge. That's all I'm saying.

23 MR. DIPIETRO: Yes, Your Honor. A plea itself
24 could be challenged on appeal. But the rights extinguished
25 by that plea under case law or decisional law or the

1 statutory law - - - those generally speaking do not survive
2 a guilty plea. And Taylor unambiguously established that
3 here.

4 The defendant had absolutely no expectation that
5 he would have the right to appeal the speedy-trial - - -
6 the statutory speedy-trial claim here when he entered into
7 the guilty plea. And for that reason, the court should not
8 construe 30.30 to extinguish the people's expectations and
9 bestow on the - - - the defendant a right that he did not
10 expect to have survive the guilty plea.

11 So if Your Honors have no further questions then
12 the people rely on their brief. Thank you.

13 CHIEF JUDGE WILSON: Thank you.

14 MS. PECKER: I'd like to just say a few very
15 brief points. For the reasons that the Chief Judge and
16 Justice Halligan mentioned and as held by Justice Weston in
17 her dissent, even if the police officer was completely
18 credible, everything he said was credible at the
19 suppression hearing, the court, whether the Appellate Court
20 or the suppression court itself, simply had no way to
21 independently evaluate how the police officer reached the
22 conclusion here.

23 And he didn't talk about his experience and
24 training because he never even mentioned whether he's had a
25 car stop before. His experience and training was in

1 narcotics, not in rules of the road and car stops. And we
2 have never presumed that probable cause exists simply
3 because a police officer says so and the same is true here.

4 As for the retroactivity conversation,
5 retroactivity again is a misnomer. And for that reason
6 Regina's analysis doesn't apply here. The plain words of
7 the statute say the appellate provision went into effect on
8 the effective date. And the legislature - - - the - - -
9 the interests, Landgraf said, that even when there are
10 reliance interests in the prospectivity analysis, they're
11 diminished. And here there is no strong interest in trying
12 to insulate a time-barred prosecution and a meritorious
13 30.30 denial from review.

14 It's simply the - - - the expectation - - -
15 diminished expectation lines are simply not relevant. The
16 legislature wanted 30.30 denials to be heard by the
17 Appellate Court and to be reviewed and they - - - and they
18 wanted that to happen as - - - as of the effective date.
19 And as for the rest of the issues, we rely on our briefs.

20 CHIEF JUDGE WILSON: Thank you.

21 MR. DIPIETRO: Thank you.

22 (Court is adjourned)

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

I, Saira Khan, certify that the foregoing transcript of proceedings in the Court of Appeals of People of New York v. Samual Nektalov, No. 50 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Saira Khan

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