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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 171

HARVERT STEPHENS,

Appellant.

Appellate Division, Fourth Department
The Hon. Samuel L. Green Courtroom
50 East Avenue
Rochester, New York 14604
October 14, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The next and final
2 case on today's calendar is appeal number 171, the
3 People of the State of New York v. Harvert Stephens.

4 MS. MCDERMOTT: May it - - -

5 CHIEF JUDGE DIFIORE: Counsel?

6 MS. MCDERMOTT: May it please the court,
7 Kristin McDermott, on behalf of Harvert Stephens.
8 Can I please have three minutes for rebuttal?

9 CHIEF JUDGE DIFIORE: Three minutes?

10 MS. MCDERMOTT: Yes.

11 CHIEF JUDGE DIFIORE: You may.

12 MS. MCDERMOTT: The Syracuse noise
13 ordinance is very, very similar to the Poughkeepsie
14 noise ordinance that was struck down by this court
15 over thirty years ago in People v. Trap Rock.

16 JUDGE PIGOTT: How would you make it so
17 that it wasn't? What should they have done?

18 MS. MCDERMOTT: Well, I think, one thing
19 that they could do to fix it, is to take out the
20 blanket, general prohibition contained in 40-4, and
21 just stick to the fourteen specifically enumerated
22 acts, so that instead of just having this very broad,
23 vague provision that any type of unnecessary noise
24 could fall into, give people actual guidance of the
25 types of that can fall into the ordinance.

1 JUDGE RIVERA: Yeah, the - - - the
2 unnecessary noise is capped, right? It's not - - -
3 it doesn't just say unnecessary noise? It is capped.

4 MS. MCDERMOTT: There - - - it's - - - it's
5 defined in the statute with an extremely broad
6 definition that the Trap Rock court said was
7 permeated with vagueness.

8 JUDGE FAHEY: But there's a big difference,
9 isn't there, between Trap Rock and this case, in
10 terms of the "reasonable person" standard? What - -
11 -

12 MS. MCDERMOTT: That is correct. That's
13 the big difference, but the Supreme Court looked at
14 this and found that that one difference wasn't enough
15 to take this statute out of the reach of Trap Rock,
16 and it still failed the "void for vagueness" test.

17 JUDGE GARCIA: But isn't there - - - to me,
18 it seems there's a two-part issue. That is clearly a
19 big difference, but also with Trap Rock, isn't it
20 that if you violated a specific provision, under the
21 terms of that statute, you automatically violated the
22 general provision? And so in this case, the
23 indictment reads - - - it's only charged as
24 Subsection 16, right?

25 MS. MCDERMOTT: The indictment did only

1 refer to 40-16(b), but I would disagree that that's
2 not a - - - violating a general provision. The lower
3 court looked at the entire statute together, because
4 the way the statute's written, the fourteen
5 subsections are declared to be prima facie evidence
6 of a violation of this article, not distinct
7 prohibitions in and of themselves.

8 JUDGE GARCIA: Right, but it is a little
9 bit - - - and I agree, that is a difference. It is
10 different, though, than the Trap Rock statute, where
11 you were automatically found to have violated the
12 general provision. So isn't it really, as applied in
13 this case, they did what you're saying they should
14 do, which is specify the specific conduct within the
15 subsection as the violation of the noise ordinance?

16 MS. MCDERMOTT: Well, even to the extent
17 you only look at 40-16(b), that Mr. Stephens was
18 specifically charged with, that section still
19 references "unnecessary noise". So that still
20 requires a reference back to 40-3(u), when you have
21 to look at the definition of unnecessary noise.

22 JUDGE GARCIA: But then you're getting to
23 the - - - Judge Fahey's point, which is it's defined
24 as a reasonable person standard, so you get rid of
25 the first com - - - let's say, Trap Rock - - - issue,

1 right? It's really the second one then, which is, is
2 it a violation of that general provision, which there
3 were issues with in Trap Rock. And here, you - - -
4 it seems to me, you can read this not to have that.

5 MS. MCDERMOTT: I - - - I do - - - I do
6 think - - - it's pretty much the same in both
7 statutes. I mean, I - - - I do understand the
8 distinction, but I still think that the blanket
9 prohibition, it was violated here.

10 But in any case, the - - - even the
11 reasonable person standard doesn't help with the
12 definition of unnecessary noise very much, because
13 you've got the ten standards that you're suppose - -
14 - or the eleven standards, rather, that you're
15 supposed to look to, to see if noise is unnecessary,
16 and look - - - ten of those are the very same
17 standards that Trap Rock said were nothing but
18 abstract lines of inquiry, that didn't provide any
19 guidance. Those are inherent - - -

20 JUDGE PIGOTT: But didn't you just say when
21 I - - - when I asked you, you said if you get rid of
22 the - - - of the unnecessary noise thing, then it's
23 fine. Because I said, how would you fix it, and you
24 said, well, you get rid of that general provision.

25 MS. MCDERMOTT: I think that would be one

1 way to. I mean, you would still have to - - -

2 JUDGE PIGOTT: And then it's fixed?

3 MS. MCDERMOTT: I'm sorry.

4 JUDGE PIGOTT: I apologize. Is it then
5 fixed?

6 MS. MCDERMOTT: No, you would still have to
7 go into 40-16(b) and take out the word "unnecessary",
8 because that's what's adding the vagueness in that
9 specific provision. So you would still - - - I mean,
10 once you - - - in 40-16(b), first the noise has to be
11 heard fifty feet from a car. Then there has to be a
12 separate look at, is it unnecessary noise.

13 JUDGE PIGOTT: Right, so if you've got a
14 volunteer fire - - - fireman, who's, you know, going
15 to a fire, and he's got his siren on, and it - - - it
16 may - - - it may - - - it's necessary, you know, to -
17 - - so that would be okay?

18 MS. MCDERMOTT: I think that would be fine
19 under the statute, but I - - - I think that most - -
20 - this mostly refers to music coming out of car
21 radios, and so people would have to - - - we don't
22 know what music coming out of car radios is necessary
23 or unnecessary, because the statute just has these
24 eleven vague, subjective guidelines for us to look
25 at, and - - - and people don't know how to tailor

1 their behavior.

2 JUDGE RIVERA: But the point is the noise
3 level, right?

4 MS. MCDERMOTT: That's only - - -

5 JUDGE RIVERA: Isn't the point is the noise
6 level - - - that that's what disruptive? Or am I
7 missing something?

8 MS. MCDERMOTT: The noise level can - - -
9 is only part of it. It can't be the entire
10 determination. So once you hit the fifty feet,
11 that's not the end of the story. Then you have to
12 say, is this unnecessary? So - - -

13 JUDGE FAHEY: So it - - - you're back to
14 what Judge Pigott just said, which is the firefight -
15 - - a fire alarm versus somebody who's in a library,
16 you know, there's - - - there's - - - the standard
17 would be different.

18 But the problem is, you - - - the - - -
19 when you're in the second part of the analysis here,
20 which is whether or not the specificity of the
21 statute is sufficient so that someone would know how
22 they're supposed to behave in a particular place, it
23 seems that you're really pointing us towards a
24 requirement to have a decibel level standard, say.
25 Are you?

1 MS. MCDERMOTT: I think that would be one
2 option. I don't think it's necessary. I think that
3 - - -

4 JUDGE FAHEY: Because that's never been
5 required.

6 MS. MCDERMOTT: Right. I - - - I know that
7 some noise ordinances do have decibel levels just to
8 provide that kind of objectivity, and I think that
9 would be a - - - a good option. But there are other
10 options. You can have just distance requirements or
11 time requirements or just any sort of objective
12 measure where people can look and tailor their
13 behavior to know whether their noise is violating
14 statute, rather than just, well, would a reasonable
15 person think that this music was unnecessary in this
16 situation.

17 JUDGE GARCIA: But didn't we say in - - -
18 I'm not pronouncing this right, I'm sure - - -
19 Bakolas, that case, that you can define unreasonable
20 noise?

21 MS. MCDERMOTT: Bakolas is different, just
22 because that - - - that's a disorderly conduct
23 statute, and it didn't just rely on the objective
24 standard. It also - - - there was also an intent
25 requirement in that case, which we don't have here,

1 and - - - and the case itself said that it's distinct
2 from Trap - - - Trap Rock, because all of the acts
3 prescribed by the section are publicly offensive,
4 which has a narrowing effect.

5 So yes, there are some circumstances in
6 which you can define unreasonable noise, but this - -
7 - this is a - - - this is a vague statute that
8 doesn't fit into that - - - Bakolas.

9 JUDGE GARCIA: Okay. It seems the federal
10 courts have found this to be defined
11 constitutionally, right? This type of definition of
12 unnecessary noise.

13 MS. MCDERMOTT: Well, I would - - - I would
14 just point out that Marcavage itself was a case on a
15 motion for a preliminary injunction.

16 JUDGE GARCIA: Right.

17 MS. MCDERMOTT: But, yes, Marcavage does -
18 - - I - - - I think there's just a - - - a difference
19 between the federal courts and the state courts in
20 this area. I would just point out that Marc - - -
21 Marcavage refers to its own precedent of Howard Opera
22 House v. - - - v. Urban Outfitters - - -

23 JUDGE GARCIA: Right.

24 MS. MCDERMOTT: - - - and in that case,
25 that actually is just directly in conflict with Trap

1 Rock, because that's not an objective standard. That
2 case defines unreasonable noise as "that which
3 disturbs, injures, or endangers the peace or health
4 of another." So that case would have the same
5 problem that Trap Rock had that you could have the
6 boiling point of a particular person or a
7 cantankerous neighbor, which Trap Rock said was
8 unconstitutional. But the federal courts have said
9 that's okay.

10 So I think that the state courts are just
11 applying more protective due process laws in this
12 area and that this court should follow its own
13 precedent of Trap Rock, rather than those federal - -
14 -

15 JUDGE ABDUS-SALAAM: But I - - - I - - - I
16 still go back to the reasonable person standard,
17 counsel. And Trap Rock was decided over thirty years
18 ago, and things have - - - you know, technologically
19 things have advanced in thirty years, and the - - -
20 the noise, as you've mentioned, comes out - - - it's
21 usually directed to music coming out of cars. But
22 now that, you know, cars can be sort of tricked out
23 with huge stereo systems and all, you don't really
24 need, you know, a decibel standard or almost anything
25 else to say this is unnecessary noise.

1 I don't know - - - I don't know if this
2 happens in Rochester, but I live in Manhattan, and
3 you know, from my house, I can hear people going up
4 and down the streets with their - - - their stereo
5 systems blaring. I don't - - - I wouldn't care if it
6 was opera. I wouldn't care what they were playing.
7 It's just noise. It's - - - it's really unnecessary
8 if you're in your house. So why isn't - - - why is
9 that so vague when you have a reasonable person
10 standard?

11 MS. MCDERMOTT: Well, because I think
12 everything that Your Honor just referenced was just
13 volume. So if they had just said, fifty feet from a
14 car, that's not vague at all. That's - - - that's
15 something people could clearly follow - - - follow
16 and you don't need a decibel standard. But they
17 didn't. They added this - - - they injected this
18 vagueness into it, by having an unnecessary noise
19 requirement in addition to that. And - - -

20 JUDGE PIGOTT: I'm surprised you make that
21 argument. I - - - in other words, the police officer
22 can say, I heard your - - - your car radio fifty feet
23 away; I'm arresting you for a violation of an
24 ordinance. I - - - it just seems to me that by - - -
25 by arguing this objective standard, you're - - -

1 you're making it harder - - - making the ordinance
2 tougher in - - - in terms of enforcement and its
3 purpose.

4 MS. MCDERMOTT: Well, in some ways that's
5 true, but the point of the "void for vagueness" test
6 is can police officers apply this fairly, and can
7 people know how to tailor their behavior. So even if
8 it's a tougher law, I mean that would be up to the
9 Syracuse legislature of how tough should their law
10 be, but even if it's a tougher law for defendants, at
11 least they'll know how to follow it. At least
12 they'll know how to tailor their behavior.

13 JUDGE PIGOTT: So if a baby's crying and
14 it's fifty feet from the car, and you say, I hear the
15 baby crying; I'm - - - I'm giving you a ticket, it -
16 - - under your - - - under your new ordinance of
17 fifty feet, it's - - -

18 MS. MCDERMOTT: I don't think - - -

19 JUDGE PIGOTT: - - - it's a clear
20 violation.

21 MS. MCDERMOTT: I think that it has to be
22 sound coming from the car itself.

23 JUDGE PIGOTT: So I'm - - - I'm asking you
24 for your ordinance, and you said your ordinance says
25 that if it's noise fifty feet from the car.

1 MS. MCDERMOTT: I mean, that wouldn't be my
2 - - - I wouldn't pass that law as a legislator.

3 JUDGE PIGOTT: Okay.

4 MS. MCDERMOTT: But - - - but I would - - -
5 I would have either a decibel standard, a distance
6 standard or something clear that - - -

7 JUDGE STEIN: But how do you - - - then how
8 do you differentiate between the siren on the
9 emergency vehicle and the baby crying or, you know,
10 some other thing?

11 MS. MCDERMOTT: I mean, there's - - -
12 there's specific exceptions put into - - -

13 JUDGE STEIN: Right, but can you capture
14 all of the nuances that way?

15 MS. MCDERMOTT: I think that you can. I
16 think - - - I think you can capture - - - I think you
17 can capture what you need to. The - - - the - - -
18 even to the extent that that would be difficult, I
19 don't think that the answer is to just throw up your
20 hands and put an incredibly vague statute out there
21 that's very difficult for people to tailor their
22 behavior to.

23 JUDGE ABDUS-SALAAM: How - - - how is it -
24 - - how is it difficult to tailor your behavior when
25 you know your sharing your music, whatever it is,

1 with the rest of anybody who's traveling - - - whose
2 neighborhood you're traveling through? I mean, I - -
3 - I don't - - - unless you're absolutely deaf, you
4 have to know that the sound that you're making is
5 traveling far beyond your car.

6 MS. MCDERMOTT: But again, you can't just
7 look at volume. We have - - - there has to be some
8 factor in addition to volume. So you could say, I
9 know my - - - my car radio has to stay beyond - - -
10 below this volume, but there's a second part of this
11 here that none of us really know what it means of, is
12 it unnecessary. And - - - and so we can't just look
13 at how far is the noise traveling.

14 JUDGE ABDUS-SALAAM: But when would it ever
15 - - - that's what I'm saying - - - when would it ever
16 be necessary to share your music with the entire
17 neighborhood? When is that necessary?

18 MS. MCDERMOTT: I don't think it's ever
19 necessary to play your car radio in the first place,
20 I mean, it - - - none of this is necessary, strictly.
21 The question is, how do you know if you're violating
22 the law?

23 CHIEF JUDGE DIFIORE: Thank you, Ms.
24 McDermott.

25 MS. MCDERMOTT: Thank you.

1 CHIEF JUDGE DIFIORE: Counsel?

2 MR. MAXWELL: May it please the court,
3 James Maxwell for the People asking you to affirm the
4 statute. And I - - - my view is - - - is proper, and
5 I - - - I ask you to uphold it.

6 One case I want to mention along with
7 Bakolas, that - - - that Judge Garcia mentioned, is
8 an older case, People v. Byron, which talks about a -
9 - - an adequate muffler V&T statute, and in that
10 case, your - - - this court wrote that that was - - -
11 that the statute was okay, and it's common knowledge
12 how much noise is too much noise, and I think that
13 helps us as well.

14 JUDGE RIVERA: So what's the - - - the
15 point of "unnecessary"? She says it means more than
16 just the volume. Is it to carve out for emergencies
17 or what - - -

18 MR. MAXWELL: Yes.

19 JUDGE RIVERA: It seems obviously
20 nonsensical to apply this kind of ordinance to - - -

21 MR. MAXWELL: Right.

22 JUDGE RIVERA: - - - a baby crying.

23 MR. MAXWELL: Yes. I - - - I think - - -

24 JUDGE RIVERA: What - - - what is - - -

25 MR. MAXWELL: I think it's - - - I think

1 unnecessary is necessary, because it makes the
2 statute work; it makes it cogent. You're not going
3 to arrest the firefighter for blaring the horn to go
4 respond to a fire. You're not going to arrest the -
5 - - the mother or father of a scr - - - a - - - a
6 child who's - - - who's crying.

7 But I think overall, the objective - - -
8 the - - - the statute is written, and two - - - two
9 things that help it distinguish it from Trap Rock.
10 The - - - this particular subdivision or this
11 particular part of it that we're using goes to in
12 cars. It goes to as to the fifty feet, and the
13 disturbing a person of - - - of reasonable, normal
14 sensibilities. I think that all goes to that. I - -
15 -

16 JUDGE RIVERA: Does that part of the
17 reasonable person of normal sensibilities address the
18 - - - your opponent's claims that this just gives too
19 much discretion to the officer who may not like the
20 kind of music that's being played?

21 MR. MAXWELL: I believe it does, and the -
22 - - the kind of music I don't think matters. I mean,
23 it could be NPR, especially if they're in fundraising
24 drive time. But - - - but nevertheless, the - - -
25 the eleven standards that are listed. They're not a

1 must. They're there. They're not particularly
2 helpful, perhaps, but they're there.

3 But I was looking at Trap Rock, and I could
4 see where the court landed. There was a business, a
5 crushed rock business, and for reasons unknown, they
6 built residences right near there, and I - - - I
7 think that the - - - there was - - - was the general
8 and specific part of that statute that - - - or an
9 ordinance that was involved. And so I - - -

10 JUDGE PIGOTT: A police officer in
11 Syracuse, New York, if there's a - - - an impromptu
12 parade down Salina Street celebrating the fact that
13 unbelievably the Syracuse University football team
14 beat Notre Dame or something. You'd let that go. If
15 on the other hand, it's the same parade, only they're
16 celebrating the New England Patriots defeating the
17 Buffalo Bills, they would all be under arrest,
18 because that is wholly unnecessary. Do you - - - you
19 see the - - - I mean, you - - - you have some play in
20 there that may not be, I think, counsel's point.

21 MR. MAXWELL: I - - - I think that there's
22 an acceptable amount of play. There is some
23 discretion in police work, but they also have a duty
24 to enforce the law, and an ability to enforce the
25 law. And - - - so I think that that - - - that

1 carries over.

2 JUDGE RIVERA: So what - - - what if your -
3 - - what if you happen to be in a hotel parked across
4 the street from a construction site, and construction
5 vehicles are on the public highway and they are quite
6 loud, and your room just happens to be, let's say
7 actually, fifty feet away. I can't imagine where I'm
8 getting this hypothetical this morning. Does it fall
9 under this ordinance?

10 MR. MAXWELL: You stayed - - - never mind.

11 JUDGE RIVERA: Don't ask; don't tell.

12 MR. MAXWELL: Okay. But again, going back
13 to this statute, it's particular to cars on the - - -
14 on the - - - on the roadway, and a - - - a decibel
15 level I don't think would be practical either,
16 because unlike, let's say, tint on the windows which
17 is constant, the note - - - the noise level isn't
18 constant.

19 JUDGE FAHEY: Some - - - some
20 municipalities have put them in.

21 MR. MAXWELL: Yeah, I - - - I - - -

22 JUDGE FAHEY: We struggle with that. You
23 know, I - - - it comes up in the context, I think, of
24 bars near residential neighborhoods and how to
25 measure the sound at various times. For instance,

1 what's reasonable, a person may think is okay at 10
2 o'clock at night, at 4 in the morning, it may not be.
3 That - - - that's where those kind of standards come
4 in. So they - - - some have used them.

5 MR. MAXWELL: If I - - -

6 JUDGE RIVERA: I'm sorry. Let me just go
7 back to the hypothetical. Are you saying that my
8 example of the vehicle that's - - - that's parked in
9 this construction site would not fall under this,
10 because the motor vehicle is applying to what?

11 MR. MAXWELL: Well - - -

12 JUDGE RIVERA: I'm mean, is motor - - - I'm
13 sorry. Did I miss it as motor vehicles defined - - -

14 MR. MAXWELL: No, no, there's motor vehicle
15 in the statute on the public highway.

16 JUDGE RIVERA: No, no, but is it defined?

17 MR. MAXWELL: If he's on - - - if he's on
18 the construction beyond the - - - the highway.

19 JUDGE RIVERA: No, but on the road?

20 MR. MAXWELL: On the road, yes.

21 JUDGE RIVERA: They're doing construction
22 at, let's say, a building.

23 MR. MAXWELL: Yes.

24 JUDGE RIVERA: They're re - - - you're
25 building a building.

1 MR. MAXWELL: Yes.

2 JUDGE RIVERA: Again, I don't know where
3 I'm getting that hypothetical, but the - - - the
4 construction vehicle is on - - - parked on the street
5 - - - on the road, excuse me.

6 MR. MAXWELL: Well, it kind of - - -

7 JUDGE RIVERA: And it's really loud.

8 MR. MAXWELL: It seems kind of like that's
9 - - - that's closer to Trap Rock, because that was a
10 commercial setting, but I still think the statute
11 here is going to be applied fairly, that the police
12 will know what - - - what they're dealing with,
13 they're knowing when the noise is just - - -

14 JUDGE RIVERA: So I guess - - -

15 MR. MAXWELL: - - - sensitive.

16 JUDGE RIVERA: - - - well, that's what I'm
17 saying. Let's say you've got the construction
18 vehicle that's making - - -

19 MR. MAXWELL: It - - - it - - -

20 JUDGE RIVERA: - - - as I say, very loud.
21 There's no doubt. Very loud.

22 MR. MAXWELL: Right.

23 JUDGE RIVERA: That's the way that vehicle
24 works. To do this construction - - -

25 MR. MAXWELL: Right, right.

1 JUDGE RIVERA: - - - it's going to make
2 this noise.

3 MR. MAXWELL: And right next to it, you
4 have the car that's parked playing - - - take NPR, it
5 doesn't matter to me, the radio similarly just as
6 loud.

7 MR. MAXWELL: Right. Well, again, that - -
8 - to go full circle on our argument, that might is -
9 - - illustrate the necessary right there. How are we
10 going to get this construction debris away from this
11 site? It's necessary. It's maybe short term.

12 JUDGE FAHEY: Mr. - - - Mr. Maxwell - - -

13 MR. MAXWELL: Sorry.

14 JUDGE FAHEY: - - - can I go to just one
15 other point. It - - - it hasn't been brought up yet,
16 and they - - - then counsel will be able to respond
17 to it then, but the third point I think that's raised
18 about the defendant's failure to be present at the
19 suppression hearing. That seems odd. There's a fair
20 amount of case law, and it - - - it seems to be
21 against you on that.

22 MR. MAXWELL: Well, I - - - I think if - -
23 - a fair application of Dokes would help here,
24 because it's factual, yes, but is it a fact that the
25 defendant has any knowledge or ability to contribute

1 to. Somewhat similar to if you're up at the bench
2 trying to decide whether to keep a juror in with the
3 - - - maybe the juror's up at the bench, and is
4 talking about personal commitments and this and that
5 and the other thing.

6 JUDGE FAHEY: Well, it's - - - it's - - -
7 you know, it's - - - that's the argument that the
8 defendant's present - - - presence wasn't necessary,
9 but you could pretty much apply that rationale to - -
10 - to - - - to any situation then where testimony is
11 being given. It's much, much different when you're
12 making a procedural determination like scheduling,
13 you know, that - - - that kind of thing, where it's
14 easy for us to see that. But how a defendant's
15 present wouldn't be necessary in the context of
16 testimony, you don't know until the person testifies,
17 I guess, is the problem with that analysis.

18 MR. MAXWELL: True enough, but in this
19 particular case, at - - - in the previous proceedings
20 with the defendant there, this was discussed that
21 we're going to have to have Detective - - -

22 JUDGE FAHEY: No, I understand, and this -
23 - - this guy was out anyway, and - - - and so on, and
24 - - - I do understand that. But the problem is, is
25 the rule we're making here, it's applying to the

1 whole state in this circumstance then. And it's - -
2 - it's hard for me to see - - - I can see a rational
3 argument from it, but how do we distinguish the
4 necessary presence here from some other case with an
5 entirely different factual circumstance?

6 MR. MAXWELL: I think not so much
7 distinguishing, but looking at Dokes and talking
8 about, does this defendant have anything to offer on
9 this? He kind of showed us he didn't by not showing
10 up, but also it's a very peculiar question about what
11 was the knowledge of Detective Ballagh, and in the
12 defendant's brief, you suggest, well, what if the
13 defendant had overheard him talking about the
14 provision or something.

15 I think those examples are farfetched and I
16 think this is just a clear example of - - - there's -
17 - - there's nothing he had to add, nothing he had to
18 contribute, and his decision to stay away shouldn't -
19 - - shouldn't trouble the court to say we got to send
20 this back for another five minutes with Detective
21 Ballagh in front of the trial court.

22 I have - - - again, I don't really know how
23 to go any further with it, because I think - - - I
24 think Dokes, if you look at the language of Dokes and
25 the meaning of Dokes, I think that controls. If - -

1 -

2 JUDGE GARCIA: Was this argument made in
3 the Appellate Division?

4 MR. MAXWELL: No. The third point, it was
5 not.

6 JUDGE FAHEY: Well, it's - - - it's - - - I
7 understand Judge Garcia's point. The problem is, is
8 it's either an error, more of a proceedings error,
9 it's not. It's - - - present - - - this issue comes
10 to us, I think we're kind of stuck with it.

11 MR. MAXWELL: Yeah.

12 JUDGE FAHEY: We haven't - - - we can't
13 avoid it all - - -

14 JUDGE PIGOTT: Well, counsel didn't
15 complain, and - - - and I - - - I think at a
16 subsequent hearing, the defendant didn't bring it up
17 that he was not there.

18 MR. MAXWELL: Well, you know, and along
19 those lines, I think there's one case, where
20 defendant's there for the morning of a hearing, and
21 doesn't come back for the afternoon, and I think that
22 was upheld. This is a - - - this is a different day,
23 but it is a continuation of a hearing, and the judge,
24 with the defendant there the previous time, says this
25 is only going to take ten minutes; we're going to do

1 it at noon, between other things I got to do, and the
2 lawyer says, well, I think I told him he didn't have
3 to be here, and - - -

4 JUDGE PIGOTT: But the lawyer was there.

5 MR. MAXWELL: But the lawyer was there.

6 And next appearance, they continue on from there.

7 And the lawyer could have said, Judge, we want to

8 have - - - we have to have Detective Ballagh back; my

9 - - - my - - - my client just told me a great cross-

10 examination question. That didn't happen.

11 JUDGE RIVERA: Did the - - - did the court

12 at some point prior to all these proceedings inform

13 defendant that of course, he could be present at the

14 proceedings?

15 MR. MAXWELL: Your Honor, I don't remember

16 if he - - -

17 JUDGE FAHEY: He hasn't - - - he didn't

18 give him Parker warnings, and say, well - - -

19 MR. MAXWELL: No, it is not a Parker

20 warning situation, and I'm not saying that you can't

21 reach it because it wasn't brought up in the

22 Appellate Division.

23 If I may have just have another few

24 seconds?

25 CHIEF JUDGE DIFIORE: Yes.

1 MR. MAXWELL: I - - - very fitting to me
2 personally that we're here in this building and the
3 court's here today, because this is where I first
4 encountered Judge Pigott, and be this - - - this is
5 my last chance to argue in front of him, I appreciate
6 all the courtesy you've always shown me.

7 JUDGE PIGOTT: Nature Finch, Mr. Maxwell.
8 I keep hearing about Nature Finch.

9 MR. MAXWELL: I'll - - - we'll - - -

10 JUDGE PIGOTT: We'll talk about it - - -

11 MR. MAXWELL: Next year we'll get together
12 and talk about it.

13 CHIEF JUDGE DIFIORE: Counsel?

14 MR. SICKINGER: Good afternoon, Your
15 Honors. John Sickinger on behalf the City of
16 Syracuse. I guess I come full circle from what Mr.
17 Maxwell said, Judge Pigott. You swore me in twelve
18 years ago, so.

19 As I think Mr. Maxwell touched upon, the
20 City's ordinance contains the objective reasonable
21 person's standard. And that is - - - it's just black
22 and white. That's what separates it from Trap Rock,
23 that's what separates it from the other instances
24 which the appellant contends are applicable here,
25 where noise ordinance statutes have been found

1 unconstitutional. It - - - because we noted in our
2 brief, quite simply, based on common life experience,
3 a person can determine what's reasonable and what's
4 not. You just - - -

5 JUDGE RIVERA: So in my hypothetical, is
6 the construction company liable under this ordinance
7 for that noise?

8 MR. SICKINGER: If a reasonable person
9 would find that that noise was unnecessary, yes. And
10 again, it - - - you know, a reasonable person would
11 take into account the - - -

12 JUDGE RIVERA: Well, no, no. Unnecessary
13 noise means "any excessive or unusually loud sound or
14 any sound which annoys." So now we're - - - now
15 we're just annoyed, and it's a reasonable person with
16 - - - with - - - what did you use - - - normal
17 sensibilities, understood - - - but let's say that
18 constructions truck - - - that truck that's even
19 louder than the car next to it that's already very
20 loud in playing the music very loud.

21 MR. SICKINGER: Well, I think - - -

22 JUDGE RIVERA: Are they liable?

23 MR. SICKINGER: If you turn to the eleven
24 factors that the ordinance enumerates, and then you
25 determine that a reasonable person with normal

1 sensibilities, which again, goes back to the common
2 life experience, if you can determine under that
3 rubric, that the person has created that noise, then
4 yes, potentially they are.

5 But again, you know, common life experience
6 would say if you're going to do that at 5 in the
7 morning, it's very different from doing it at 2 in
8 the afternoon. And again, that's where the common
9 life experience comes in to delineate those - - -

10 JUDGE RIVERA: So it can be - - -

11 MR. SICKINGER: - - - and apply those
12 eleven factors.

13 JUDGE RIVERA: It can be at any decibel, as
14 long as it's not at 5 in the morning?

15 MR. SICKINGER: Well, no, certain - - -
16 certainly not, but it just - - - it - - - at 5 in the
17 morning, there's probably a - - - what would be
18 reasonable at 2 in the afternoon is not likely to be
19 reasonable at 5.

20 JUDGE RIVERA: Well, I'm just not
21 understanding why the construction company or - - -
22 or - - - or the person driving, I guess, the truck,
23 doesn't have some accountability under this statute,
24 but the individual who is playing very loud noise - -
25 - the radio very loudly in the car is. I'm just not

1 understanding the distinction.

2 MR. SICKINGER: Well - - -

3 JUDGE RIVERA: I'm not understanding why
4 you're trying to make a distinction. It sounds to me
5 like they fit.

6 MR. SICKINGER: I - - - I think it would.
7 And I think it would also - - -

8 JUDGE RIVERA: Then it doesn't matter.
9 What I'm saying doesn't matter. 5 a.m. may matter
10 under certain circumstances, but - - -

11 MR. SICKINGER: Certainly.

12 JUDGE RIVERA: - - - but not for that
13 construction, right - - -

14 MR. SICKINGER: No, I - - -

15 JUDGE RIVERA: - - - at 2 in the afternoon.

16 MR. SICKINGER: - - - I don't believe it
17 would. I also would think that you would, again, get
18 into what's necessary and not necessary, but I don't
19 think you need to go that far in your - - -

20 JUDGE RIVERA: Well, no - - - well, I want
21 to clarify that. I got - - - yes, the - - - the
22 category or the - - - the phrase is "unnecessary
23 noise" but as defined, it says "or any sound" - - -
24 I'm just picking one of them - - - "annoys", annoys.
25 Right?

1 Again, with - - - with - - - with the
2 qualifier, agreed, on a reason - - - a reasonable
3 person of normal sensibilities, but a reasonable
4 person of normal sensibilities could certainly - - -
5 annoyed, by a construction truck that is at a hundred
6 decibels, right?

7 MR. SICKINGER: Certainly, but if you
8 include the reasonable person standard, I think that
9 specifically has been addressed in prior case law,
10 because if you look at, I think, in - - - in Bako - -
11 - Bakolas, if I'm pronouncing that correctly, which
12 was talked about earlier, they analyze Trap Rock, and
13 they specifically found that it was unconstitutional
14 because the ordinance in that case rested upon the
15 malice or animosity of a cantankerous neighbor or the
16 boiling point of a particular person. And then when
17 you include the reasonableness requirement in the
18 Syracuse ordinance, you take that sort of - - -

19 JUDGE RIVERA: So - - - yeah.

20 MR. SICKINGER: - - - situation - - -

21 JUDGE RIVERA: So I think you're getting
22 back to - - - to the prior argument, unnecessary is
23 necessary. In - - - in this example, construction is
24 required, and so, it - - - maybe that's your
25 argument. But we as reasonable people might say,

1 well, you got to do construction. Construction is a
2 little loud; we're going to have to deal with it for
3 a period of time, until the construction is
4 completed.

5 MR. SICKINGER: Correct.

6 JUDGE RIVERA: Versus someone sitting in
7 their car blasting their radio.

8 MR. SICKINGER: Correct.

9 JUDGE GARCIA: Can we look at this as just
10 the charge of Section 16, other than in Trap Rock,
11 where you had to by nature of the statute, look at it
12 as a violation of the general provision?

13 MR. SICKINGER: To look at the particular
14 violation of one of the enumerated instances of - - -

15 JUDGE GARCIA: Right, 16 here.

16 MR. SICKINGER: - - - how necessary - - -

17 JUDGE GARCIA: Right.

18 MR. SICKINGER: - - - the violation was as
19 a whole? Yes. I mean, it's not like Trap Rock,
20 where if you violate one, you automatically violate
21 the statute as a whole. These are, you know, factors
22 to be considered, as specifically noted in the
23 ordinance.

24 JUDGE GARCIA: And the issue I have with
25 that, though, and I see it - - - and it's the way

1 it's charged, though, they are just prima facie
2 examples or prima facie violations of the statute.
3 So is it really that clean, is - - - is the issue I'm
4 having with that. Is it really that clean that
5 you're charging only the 16 subdivision, which has
6 these specific factors in it, or necessarily are you
7 charging essentially the general provision here?

8 MR. SICKINGER: Well, we're indicating
9 certain circumstances which would be considered,
10 which I guess would give guidance to any person who's
11 going to create noise within the city of Syracuse,
12 that these are eleven enumerated factors which would
13 contribute to that. But I think you - - -

14 JUDGE GARCIA: Not those, though. The - -
15 - the provision you're looking at here; that was
16 charged in the indictment, with being on a public
17 vehicle and however far it is. That provision's very
18 specific. And are we looking at that, in terms of
19 constitutionality, or are we looking at the entire
20 scheme here?

21 MR. SICKINGER: In terms of looking at the
22 statute as a whole or then the unnecessary noise at
23 fifty feet from a vehicle requirement? Well, I don't
24 know that - - - I don't know that you would necessary
25 need to distinguish the two to find that the

1 ordinance itself is still constitutional, because if
2 you're going to - - - again, if you put in the
3 qualifier of unnecessary noise, you can determine
4 then, on that basis, again through common life
5 experience and a reasonableness standard, what would
6 be necessary versus unnecessary. So I don't know
7 that you have to parse it down that - - - into that
8 small a category.

9 JUDGE GARCIA: Well, is it almost, though,
10 like a definition? You have specific violations and
11 you're using the definition of unnecessary noise in
12 Section 16, right, because you still need unnecessary
13 noise in whatever the situation is there. Is it more
14 like that's a definition you're incorporating in
15 Section 16 or are you violating the general
16 provision?

17 MR. SICKINGER: No, it would be - - - I
18 think it would be more of a definition. You're - - -
19 you're giving, I would say, guidance, as to what the
20 - - - the conduct to be proscribed would be. So I
21 think that's - - - that's the way, I - - - I believe
22 the City would interpret.

23 Again, just to summarize, the clear
24 difference in these two, comes down to, again, the
25 reasonable person standard. It's - - - it's very

1 simply a matter of Trap Rock in the ordinance in the
2 City of Poughkeepsie did not contain that standard.
3 In the City of Syracuse, it does. And I think
4 everything else is subject to that particular
5 argument, and I think it - - - within itself makes
6 the ordinance constitutional.

7 CHIEF JUDGE DIFIORE: Thank you, Mr.
8 Sickinger.

9 MR. SICKINGER: Thank you, Your Honor.

10 CHIEF JUDGE DIFIORE: Ms. McDermott, do you
11 care to address Mr. Maxwell's argument with respect
12 to the presence of defendant at the reopened
13 suppression hearing?

14 MS. MCDERMOTT: Yes, thank you.

15 The - - - the defendant's presence was
16 required here. This was a factual suppression
17 hearing. He had the right to be present. It's a
18 constitutional right. Any waiver has to be judged on
19 constitutional standards and there was no waiver.
20 There was no inquiry as to why he wasn't there.
21 There were no Parker warnings given. There was no
22 explanation.

23 JUDGE PIGOTT: What did his lawyer say?

24 MS. MCDERMOTT: His lawyer said I spoke to
25 him this morning; I may have alluded to him that his

1 presence wasn't necessary, but he didn't tell me
2 whether or not he was planning on coming.

3 JUDGE PIGOTT: And then in the - - - in the
4 subsequent proceedings he was present and he didn't
5 object to the fact that he wasn't there on - - - on
6 this occasion.

7 MS. MCDERMOTT: That is correct, but this
8 isn't - - -

9 JUDGE PIGOTT: So at what point does the
10 court have to say, I don't care that you didn't care
11 to come. I don't care that your lawyer was there and
12 said what he said, and I don't care that you're here
13 saying that you don't care that you were - - -
14 weren't there, I'm going to have to start all over.
15 I don't - - - it seems to me, we're - - - we're
16 really into a preservation issue here, you know.
17 It's - - - if he didn't object, why are we - - - why
18 are we complaining about this?

19 MS. MCDERMOTT: I think it's well
20 established that this is a mode of proceedings error,
21 that an objection isn't required. I mean, there are
22 any number of reasons why maybe later he - - - he
23 wouldn't have objected. Maybe he just didn't know
24 that that was something that he could do. He might
25 have thought, oh, I missed the hearing, you know,

1 that's just too bad for me. Maybe that's what his
2 lawyer told him. But in any case, preservation isn't
3 required to reach this issue.

4 Really, the error was made at the time of
5 the hearing. The court could have simply said to
6 counsel, I'm going to recess for fifteen minutes; can
7 you call your client back and ask if he wants to be
8 here, and gotten waiver. And - - - and the court
9 acknowledged on the record that at that point,
10 counsel couldn't waive her client's presence, because
11 she didn't have that from him.

12 JUDGE GARCIA: That would be enough? If
13 they went to the phone and came back in and said to
14 the judge, I talked to my client on the phone and he
15 doesn't want to be here?

16 MS. MCDERMOTT: It - - -

17 JUDGE GARCIA: That's enough?

18 MS. MCDERMOTT: It may have been. I know
19 there are cases where counsel can waive her client's
20 presence, if she has an actual statement from him
21 that he doesn't want to be there. Here, she didn't
22 have that. It might have been enough, if she had
23 some actual directive from him, you know, please have
24 the hearing without me; I don't want to be there.
25 But we - - -

1 JUDGE RIVERA: So if we agree with you,
2 does that incentivize defendants not to show up?

3 MS. MCDERMOTT: I don't think so.

4 JUDGE RIVERA: To create an appealable
5 issue?

6 MS. MCDERMOTT: I don't think so, because I
7 think if this is done correctly, they would have been
8 given Parker warnings, and then there's no problem,
9 because then they would have been told that the
10 hearing can go forth in their absence.

11 JUDGE GARCIA: If - - - if we agree with
12 you on this issue, but disagree on the other two
13 issues, on - - - on the constitutionality, if we
14 reach that, we don't have to reach the other, it
15 would go back, right?

16 MS. MCDERMOTT: Correct.

17 JUDGE GARCIA: And then your client would
18 be in a position of looking at this case with no deal
19 and an open docket, right?

20 MS. MCDERMOTT: Correct. Before the
21 suppression decision was made, he would be starting
22 from scratch.

23 If I could also just distinguish Byron very
24 quickly. That was a muff - - - a muffler case. That
25 is the kind of case where a reasonable person

1 standard should be applied because we all understand
2 what - - - what - - - how much noise a muffler should
3 make. We don't all understand what type of noise
4 should come out of a car radio. It's just very, very
5 different.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 MS. MCDERMOTT: Thank you.

8 (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. Harvert Stephens, No. 171, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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