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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 23

CHARLES SMITH,

Appellant.

20 Eagle Street
Albany, New York
February 9, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The first matter on today's
2 calendar is appeal number 23, People of the State of New
3 York v. Charles Smith.

4 Counsel.

5 MR. STEWART: Thank you, Your Honor; may it
6 please the court, my name is Craig Stewart. I'm
7 representing the defendant-appellant Charles Smith. I'd
8 like to reserve two minutes.

9 CHIEF JUDGE DIFIORE: You may, sir.

10 MR. STEWART: Thank you. The issue presented by
11 this appeal is whether the passive placement of a hand out
12 of sight satisfies, by itself, the display element of Penal
13 Law 160.15(4).

14 JUDGE STEIN: Well, you - - - you phrase it as
15 being passive, but is that one of the things that we have
16 to look to the record for is if there is evidence that, in
17 fact, is wasn't just passive by - - - by the victim's
18 testimony, for example?

19 MR. STEWART: Yes, Your Honor. I mean that - - -
20 that is what I think the court needs to do is look at the
21 record at - - -

22 JUDGE STEIN: Okay. So it - - - so if it's more
23 than just he walks in, his hands are under his sweatshirt,
24 and he says I've got a gun and I want you to give me - - -
25 give me your money, if it's just that, it - - - it's not

1 displayed, right?

2 MR. STEWART: That's right.

3 JUDGE STEIN: Okay. But if it's more than that
4 and - - - and the question that we're looking at is how
5 much more than that is necessary. Would you agree with
6 that's what our question - - -

7 MR. STEWART: I - - - I think that's right, Your
8 Honor.

9 JUDGE STEIN: Okay.

10 MR. STEWART: I think that that is the question
11 that the court needs to look at.

12 JUDGE FAHEY: Well, are you - - - aren't you, in
13 essence, asking us to overturn Lopez?

14 MR. STEWART: Absolutely not. I'm asking you to
15 reaffirm Lopez. If you look at Lopez and Mendez, the court
16 in Lopez was clear - - - and when I say Lopez, in this
17 instance, I'm referring to the written decision which
18 encompasses, obviously, the two companion cases.

19 JUDGE FAHEY: Right. I - - - we understand.
20 Yeah.

21 MR. STEWART: It was clear that a volitional act
22 needed to occur. In Lopez, the defendant announces this is
23 a stickup, and as announcing it, puts his hand into his
24 vest as if he had a gun. In Mendez, by contrast, the man
25 on the stoop has his hand under his shirt, his right hand

1 under his shirt, which is the testimony here, and the court
2 says that's not enough.

3 JUDGE ABDUS-SALAAM: Well, the man in - - - the
4 other man in Mendez was another man, right? That was - - -
5 and the problem there was the court found there was no
6 accomplice liability. Your client was the only person in
7 this cash register place - - - cash checking place.

8 JUDGE FAHEY: But - - - and we have - - - we have
9 facts, too, that are - - - are a little bit different. The
10 statements are more informative. He says he has a gun.
11 He's going to shoot her. The cashier says he says that two
12 times. Also, he's holding his hands under a - - - a hooded
13 sweatshirt, and she characterized this like he has
14 something there.

15 MR. STEWART: He - - - well, let - - - let me, if
16 I might, take both - - -

17 JUDGE FAHEY: Well, and - - - but just following
18 it all the way through, the language in Lopez doesn't seem
19 to - - - the way I get it, it doesn't seem to really - - -
20 it says it - - - it refers to "an object need not to
21 closely resemble a gun, a firearm, or a distinctive shape,
22 and it may be a hand consciously concealed in clothing."
23 And isn't that we have here?

24 MR. STEWART: We don't have a hand consciously
25 concealed in clothing that is linked to the statement. And

1 that is what's critical in Lopez, that linkage. In Lopez,
2 he announces a stickup and at that time sticks his hand in
3 his vest. In this case, he simply happens to have his hand
4 under his sweatshirt. In fact, Your Honor - - -

5 JUDGE FAHEY: I'm sorry. Didn't he say, "I have
6 a gun"?

7 MR. STEWART: He - - - he doesn't say anything
8 about where his gun is.

9 JUDGE FAHEY: I see.

10 MR. STEWART: He doesn't gesture. He doesn't
11 point at it. He doesn't look at it. And - - -

12 JUDGE FAHEY: So you're saying there has to be a
13 - - - a volitional act?

14 MR. STEWART: Exactly. That links it to the
15 statement, the threat, which this court has held is
16 insufficient.

17 JUDGE ABDUS-SALAAM: So can - - -

18 MR. STEWART: And in this record, and this is
19 fascinating in a way, she is asked what happened. If you
20 look at 32 and 33 of the appendix, the prosecutor says what
21 happened. And she gives a long, sort of a - - - kind of a
22 monologue that's uninterrupted by questions. There's an
23 objection, and the judge intervenes. But it goes on for,
24 really, two pages. She recites the - - - the entirety of
25 the interaction. Not once does she mention the placement

1 of his hand. Not a sing - - -

2 JUDGE STEIN: But doesn't she say - - - doesn't
3 she say, "I didn't see the gun, but he was doing this,"
4 indicating. And of course, we weren't in the courtroom, so
5 we don't know what that is. But - - -

6 MR. STEWART: Well, we do know - - -

7 JUDGE STEIN: Can - - - can a jury infer that he
8 was doing something?

9 MR. STEWART: Well, and in fact, we know what he
10 was doing because the trial judge said - - - describe for
11 the record what - - - exactly what he was doing. And his -
12 - - and then he describes it. Her hand is underneath her
13 shirt in - - - at her waist. On cross-examination, she is
14 asked by defense counsel and then he reached under his
15 hoodie. She says, no. No. His hand was like this. She
16 said he was - - -

17 JUDGE STEIN: But she said his - - - he showed me
18 like this.

19 MR. STEWART: Yeah. But that's a - - - Your
20 Honor, respectfully, that's a language issue. She said
21 like he got something in there and then if he showed me
22 like this. That when she is asked to describe exactly what
23 he was doing and when the judge and prosecutor recite that,
24 they do not say he moved his hand, he turned, there's none
25 of that. They recite only that her - - -

1 JUDGE STEIN: Well, that would be easy. I mean
2 if - - - if she said those things. But - - - but we're
3 looking at the record that we have.

4 MR. STEWART: Right.

5 JUDGE STEIN: And the question is, is there
6 legally sufficient evidence.

7 MR. STEWART: And respectfully - - -

8 JUDGE STEIN: Could a jury from this testimony
9 have - - - could a reasonable jury have - - - have reached
10 this conclusion, have - - -

11 MR. STEWART: We - - - and that's exactly the
12 question. And we should not be left on this thin of a
13 record trying to reach that conclusion. We are all, then,
14 if we're doing that, imparting to the record testimony that
15 is not there.

16 JUDGE GARCIA: But, counsel, doesn't she also say
17 this witness, she thought she saw him holding something?

18 MR. STEWART: She said like he got something in
19 there. He was holding like he got something. But the
20 court says - - - because there's clearly an issue with the
21 way she's using the language. And the court said describe
22 exactly what he was doing, and the judge at the end of the
23 case says we tried to verbalize what she showed. What did
24 the judge say then? The judge said - - -

25 JUDGE FAHEY: Well - - -

1 MR. STEWART: - - - her hand was under her shirt.

2 And - - -

3 JUDGE FAHEY: So - - - so let me ask you this.
4 So would you say, then, that it boils down to our view of
5 whether the - - - it would be reasonable for the cashier to
6 think that he had a gun?

7 MR. STEWART: No. Well, yes, in the sense that
8 that is the holding of Lopez.

9 JUDGE FAHEY: Um-hum.

10 MR. STEWART: No in the sense that there is
11 nothing in the record - - -

12 JUDGE FAHEY: Well, you're saying that the record
13 doesn't support that, but that's the question, wasn't it?

14 MR. STEWART: That is the question.

15 JUDGE FAHEY: All right. So - - -

16 MR. STEWART: But under the circumstances - - -

17 JUDGE FAHEY: So - - - so it's the reasonableness
18 of objectively - - -

19 MR. STEWART: - - - there must - - - there - - -

20 JUDGE FAHEY: - - - let me just finish.

21 MR. STEWART: I'm sorry.

22 JUDGE FAHEY: Objectively - - - that's okay.
23 Objectively, you know, the objective man standard, whether
24 or not it would be objectively reasonable for her to think
25 that that person had a gun.

1 MR. STEWART: If - - - and there'd have to be, to
2 do that, to satisfy that standard, there must be a
3 volitional act and linkage to the threat. And that is not
4 present. And I want to go back to a question I got asked
5 earlier about the Mendez case because I think it's
6 important. Mendez was not just about accomplice liability.
7 The court did focus on that but also said and he did not
8 conspicuously consciously display. There seems little
9 doubt that in Mendez had that man on the stoop moved his
10 hand or taken an action, the court would have found - - -

11 JUDGE RIVERA: So does - - - does your rule boil
12 down to if - - - if the perpetrator has their hand on - - -
13 has a hand under a shirt, jacket, sweatshirt, whatever it
14 is that is otherwise to the extent that someone could see
15 the hand underneath even if they've not seen what they may
16 or may not be holding, right. If - - - if you walk up to
17 the person you're going to threaten that doesn't your rule
18 boil down to having to say I have a gun in my hand, which
19 is exactly what we said you don't have to have in these
20 cases?

21 MR. STEWART: You do not have - - - you do have
22 to do two things. There needs to be a threat. There needs
23 to be a volitional action, something, and that needs to be
24 linked to the threat.

25 JUDGE RIVERA: Well, I'm saying the - - - but the

1 volitional action could have occurred. And to the extent
2 that you're arguing that there's got to be some movement
3 that could have occurred before you show up, right.

4 MR. STEWART: But doesn't - - -

5 JUDGE RIVERA: But place the gun or the weapon
6 firmly under the - - - let's just say a shirt, under the
7 shirt and then you approach the person.

8 MR. STEWART: Then it's not - - -

9 JUDGE RIVERA: Then not move. Now you're just
10 going to make the threat verbally.

11 MR. STEWART: Then it's not objectively
12 reasonable. The display needs to take place in the
13 presence - - - -

14 JUDGE RIVERA: That's what I'm saying. Isn't
15 your rule then that in that kind of a case, the perpetrator
16 has to say I have a weapon or I have a gun or I'll shoot
17 you, something like that?

18 MR. STEWART: The perpetrator needs to say that
19 and needs to do something. There needs to be - - -

20 JUDGE RIVERA: So if the - - - if the perpetrator
21 says I'll shoot you?

22 MR. STEWART: That's not enough. That's a - - -
23 that's a threat. And in fact, that's something the court
24 specifically addressed in Lopez by saying it may be just as
25 frightening, but that's not enough.

1 JUDGE ABDUS-SALAAM: So would it be enough for
2 the person, if they had a weapon in the waistband, to pull
3 the shirt up a little and kind of show - - -

4 MR. STEWART: Yes. That would be - - -

5 JUDGE ABDUS-SALAAM: That would be enough?

6 MR. STEWART: - - - a volitional act linked to
7 the threat.

8 JUDGE RIVERA: Well, that's clearly a display,
9 right?

10 MR. STEWART: And that is a display. Here - - -

11 JUDGE STEIN: What if he - - - what if he has his
12 hand under and he just kind of, you know, moves it to show
13 - - -

14 MR. STEWART: That - - - the courts have held and
15 that is enough. That's an action linked. That's your - -
16 - that's your test.

17 JUDGE STEIN: What if he just looks down with his
18 hand?

19 MR. STEWART: That could be enough depending on,
20 obviously, the facts because, you know, if it's a random
21 movement of the head, but if he does it in such a manner as
22 to call attention to the weapon, then, perhaps, yes.
23 That's an action.

24 JUDGE GARCIA: But isn't it then coming back to
25 if you don't have to reach your hand in, we don't have a

1 reaching-in rule, and we have testimony here, which you
2 describe as a language problem, where she says on the
3 record he was holding something. We're going to parse that
4 out and reevaluate it and say no reasonable jury listening
5 to that and hearing the judge's rendition of it could
6 conclude that that was some type of act, a pointing of
7 something, that gave the impression he was holding
8 something with his hand in his waistband saying I have a
9 gun. That wasn't legally sufficient?

10 MR. STEWART: Your Honor, the fortuity, his hand
11 - - - why - - - we don't know why his hand's in his - - -
12 under his sweatshirt. He's homeless. It's November. He
13 walks in his hand is there. He doesn't move it. There is
14 no testimony to that effect. And so we're left - - -

15 JUDGE GARCIA: But we don't really have a moving-
16 the-hand rule nor, I think, would we want a moving-the-hand
17 rule. So if the - - -

18 MR. STEWART: Well, then - - -

19 JUDGE GARCIA: - - - testimony is - - - because
20 clearly if I have my hand in the vest and it's pointing and
21 I don't put my hand in to point it you but it looks like
22 there's something pointy in there and I say I have a gun,
23 that would be enough?

24 MR. STEWART: If you're pointing then that is a
25 volitional act. You don't - - -

1 JUDGE GARCIA: So are we parsing that down - - -

2 MR. STEWART: - - - have a volitional act here.

3 JUDGE GARCIA: - - - now to I thought he was
4 holding something, he had his hand in his waistband and he
5 said he had a gun, but there is no what there that the jury
6 can find?

7 MR. STEWART: That's precisely why the court said
8 the standard is not primarily subjective because there
9 needs to be more. That is why - - -

10 JUDGE GARCIA: She says he was holding - - - I
11 saw him holding something.

12 MR. STEWART: Like he got something in there.

13 JUDGE GARCIA: But that's a part of - - -

14 MR. STEWART: And then the court - - -

15 JUDGE GARCIA: - - - I believe what she said.

16 MR. STEWART: But the court described what she
17 testified to. Exact - - - described exactly what she's
18 saying she saw the judge says, and they describe it. And
19 what they describe is the hand is underneath her shirt at
20 her waist. And when you go to cross-examination, she
21 reaffirms that testimony. The leading question is and then
22 he reached under his hoodie, and she says no. She says no.
23 She says the hoodie covered his hand. She's not describing
24 a motion. We should not - - - this court should - - -

25 JUDGE RIVERA: So what - - - what is the import

1 of this testimony she's giving about the hand?

2 MR. STEWART: That there's no volitional act,
3 that the record lacks that. And we should not, to go back
4 to Judge Garcia's question, be left with a record like this
5 as a basis for affirming. It's one thing to say it's a
6 reasonable inference in Lopez because while the stickup is
7 announced the hand's placed in the vest. It's another
8 thing to say that the hand is simply under the shirt, and
9 we don't know why and there's no testimony and no questions
10 were asked about this.

11 CHIEF JUDGE DIFIORE: Thank you, counsel.

12 MR. STEWART: Thank you.

13 CHIEF JUDGE DIFIORE: Mr. Branigan. What about
14 counsel's argument that there's no volitional act?

15 MR. BRANIGAN: William Branigan for the People,
16 Your Honors. Good afternoon. Your Honor, there is a
17 volitional act. The defendant is holding or creating the
18 appearance that he's holding something under a sweatshirt
19 at his waistband where people are known to carry guns. So
20 when he does that, we're also informed by the fact that he
21 repeatedly threatens to shoot the - - - the victim. So
22 when she has, as she perceives, that he has a gun, it's
23 reasonable. And what he's doing demonstrates that what
24 he's doing is a conscious effort to show her that he has a
25 gun.

1 JUDGE RIVERA: But if the placement of his hand
2 is where one might place one's hand, not for purposes of
3 holding or carrying a gun, how does that affect the
4 analysis in this case?

5 MR. BRANIGAN: Your Honor, we look to - - - to
6 the circumstances. So - - -

7 JUDGE RIVERA: I know. But I put my hand on my
8 hip and people carry guns on their hips, right? That
9 doesn't necessarily mean I have a gun or I'm displaying a
10 gun.

11 MR. BRANIGAN: No, Your Honor. But under the
12 circumstances here, he has his hand under a sweatshirt at
13 his waist. He's threatening to shoot the victim. He's
14 walked into check cashing case (sic) demanding - - - place
15 demanding money. Under those circumstances, the - - - the
16 reasonable view of the evidence is that - - - that he was,
17 in fact, displaying a gun and that was his - - - his
18 intent.

19 JUDGE ABDUS-SALAAM: Well, counsel, he was there
20 for a few minutes, right? I - - - I think there was some
21 dispute about how long, maybe ten or fifteen minutes? Is
22 that - - - is that correct, a few minutes?

23 MR. BRANIGAN: She said fifteen minutes. It
24 might have been shorter. We don't - - -

25 JUDGE ABDUS-SALAAM: Okay. So in that ten or

1 fifteen minutes, the witness doesn't say anything about his
2 hand moving other than what she demonstrated and he's just
3 standing there with a hand by the waistband for that long.
4 Does that suggest that there was a weapon?

5 MR. BRANIGAN: Yes, Your Honor. Again - - -

6 JUDGE ABDUS-SALAAM: Without moving at all?

7 MR. BRANIGAN: You don't need to move when you -
8 - - when you display a weapon like that. I think it's - -
9 - it's commonly known. He's showing her that he has a gun.
10 He's threatening to shoot her. And again, she's working -
11 - - you know, she's working at her job. She's going
12 through papers that morning. So I - - - I don't know what
13 - - - you know, who knows what he was doing when he came
14 in. But having that rule, meaning that they had to watch
15 this man the entire time to see exactly when he - - - you
16 know, exactly when he put his hand in there would really
17 disrupt the - - - the purpose of the display statute.

18 JUDGE WILSON: But what is the purpose of the
19 display statute?

20 MR. BRANIGAN: The purpose of the display statute
21 is to recognize that when somebody displays what appears to
22 be the weapon, one, it places the - - - the victim in an -
23 - - in an enhanced level of fear; and, two, it's impossible
24 in the end, to - - - to demonstrate what he actually had
25 under there. So those are the two purposes of the display

1 statute. And when you look at the facts here and you
2 listen to the - - - the testimony, she did not know if she
3 would go home to see her children. That - - - that meets
4 the purpose of the statute.

5 JUDGE WILSON: I mean to ask you specifically
6 whether you've looked at the legislative history for the
7 enactment of the display requirement in 1969?

8 MR. BRANIGAN: I have not, Your Honor. I - - -
9 I'm quoting from Lopez.

10 JUDGE WILSON: Okay.

11 CHIEF JUDGE DIFIORE: Continue, counsel.

12 MR. BRANIGAN: Your Honor, again, we're - - -
13 we're informed not only by the - - - the placement of his
14 hand but also by the - - - his statement that he has a gun
15 and by his threats to shoot. So under all these
16 circumstances, there's a reasonable view of the evidence
17 that - - - that he displayed what appeared to be a firearm,
18 and this court should affirm the decision of the - - - the
19 Second Department.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 MR. BRANIGAN: Thank you.

22 CHIEF JUDGE DIFIORE: Mr. Stewart.

23 MR. STEWART: Just to go back to one point that
24 was just raised about the length of time that Mr. Smith was
25 said to be in the check-cashing store. That was ten to

1 fifteen minutes, including five minutes after Ms. Almeida,
2 who was the employee of the cash-checking store who was
3 present, pressed an alarm on the counter, a silent alarm.
4 So he's standing there for five minutes after that when he,
5 according to her testimony, notices that she's not going to
6 give him anything and walks out of the store, empty-handed,
7 no gun ever recovered. He is there for ten or fifteen
8 minutes. He's there as long as - - - as long as I was up
9 here before, and he utters four times give me money and
10 twice I have a gun and I'll shoot. That took thirty
11 seconds to say.

12 What's going on for the rest of the time? We
13 don't know. The record is completely silent on that. When
14 she's asked what happened, as I said before, she recites
15 all kinds of things but does not mention a weapon. She's
16 finally - - - that's on A-32 and 33 of the record. When
17 she is asked about the - - - what he was doing with his
18 hands, she said like he holding something, like he got
19 something in there. And the judge says describe exactly
20 what he was doing, and the testimony is her hand is under
21 her shirt at her waist. As I said, she says the same thing
22 on cross-examination.

23 That is exactly the situation in Mendez. It is
24 exactly the situation. The only distinction in Mendez is
25 that in Mendez it's a different person who says, you know,

1 I have a gun or robs and then says don't show him the gun.
2 In fact, this is a more compelling case. Mendez is a more
3 - - - this is a more compelling case for reversal than
4 Mendez because in Mendez, he's at least referring to a gun
5 which is hidden. And I - - - there can be little doubt if
6 you read that decision, you read Lopez and Mendez, that had
7 there been movement of the hand by the man on the stoop,
8 Mendez' conviction would have been affirmed, and it wasn't
9 because there was no motion.

10 This is that situation. And accordingly, as in
11 Mendez, this court should reverse the conviction for first
12 degree armed robbery - - - first-degree robbery - - -
13 attempted first-degree robbery, excuse me, substitute a
14 conviction for attempted robbery in the third degree, and
15 remand for resentencing. Thank you, Your Honor.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Charles Smith, No. 23 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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