

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

ODDO,

Respondent,

-against-

No. 9

QUEENS VILLAGE COMMITTEE FOR MENTAL HEALTH FOR JAMAICA
COMMUNITY ADOLESCENT PROGRAM, INC.

Appellant.

20 Eagle Street
Albany, New York 12207
January 10, 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

Appearances:

AMY S. WEISSMAN, ESQ.
MARSHALL CONWAY & BRADLEY, P.C.
Attorneys for Appellant
45 Broadway
Suite 740
New York, NY 10006

BRIAN J. ISAAC, ESQ.
POLLACK, POLLACK, ISAAC & DECICCO, LLP
Attorneys for Respondent
225 Broadway
Suite 307
New York, NY 10007

Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The next matter on
2 the calendar is appeal number 9, Oddo v. Queens
3 Village Committee for Mental Health for Jamaica
4 Community Adolescent Program.

5 MS. WEISSMAN: May it please the court. My
6 name is Amy Weissman, I represent Queens Village
7 Committee for Mental Health for Jamaica Community
8 Adolescent Program. We request two minutes for
9 rebuttal, please.

10 CHIEF JUDGE DIFIORE: Two minutes, Ms.
11 Weissman?

12 MS. WEISSMAN: Yes.

13 CHIEF JUDGE DIFIORE: Very well.

14 MS. WEISSMAN: Thank you.

15 Queens Village, if it's all right, I'll call
16 them that, owed no duty to Mr. Oddo at the time of this
17 assault. Queens Village's duty was extinguished when it
18 terminated the perpetrator, Mr. Velentzas, from its
19 program, and handed him off to the police.

20 JUDGE RIVERA: Can - - - can Mr. Velentzas
21 - - -

22 CHIEF JUDGE DIFIORE: How did he come to be
23 placed there?

24 MS. WEISSMAN: He's placed there by a
25 program called TASC. And it's one of the several

1 units that place de - - -

2 CHIEF JUDGE DIFIORE: Was he convicted and
3 sentenced there, or was he sent there as a condition
4 of some plea deal; what - - - what were the
5 parameters of his place - - - actual placement?

6 MS. WEISSMAN: He is sent there before any
7 kind of plea deal or conviction. He is sent there as
8 an alternative to incarceration, where he can go,
9 rehabilitate himself, and then after he completes the
10 program is when he would go before the court for any
11 type of sentencing, conviction, or whatever they're
12 going to do with whatever he was charged with at that
13 time.

14 JUDGE RIVERA: So there's no determination
15 of criminal liability when he's placed?

16 MS. WEISSMAN: That's correct. He's been
17 arrested, but they haven't made any determinations as
18 to his guilt.

19 JUDGE RIVERA: Okay. Can he walk out the
20 door?

21 MS. WEISSMAN: He can walk out the door,
22 but then he will be discharged from our program. We
23 - - -

24 JUDGE ABDUS-SALAAM: And how does that
25 occur, counsel, the discharge?

1 MS. WEISSMAN: The discharge from our
2 program is, we notify TASC, because that was the
3 referring agency, and we let them know - - - he is
4 made aware, upon orientation, that he has to report
5 to TASC the following business day, depending on what
6 day it is, if it was a weekday, then it would be that
7 day.

8 CHIEF JUDGE DIFIORE: But what's your
9 process when someone is terminated from the program?

10 MS. WEISSMAN: Because this was a TASC
11 program, our process would be to terminate him, kick
12 him out, he would then have to report to TASC, and we
13 would, of course, notify TASC immediately that he has
14 been discharged from the program.

15 CHIEF JUDGE DIFIORE: But what are your
16 requirements to - - - to accomplish that termination
17 of your relationship with him?

18 MS. WEISSMAN: We let him know, you have
19 been terminated from the program.

20 CHIEF JUDGE DIFIORE: And do you fill out
21 paperwork, do you report to the court, do you report
22 - - -

23 MS. WEISSMAN: Ordinarily, we would fill
24 out paperwork that would be faxed over to TASC, as
25 well as a phone call to TASC. This situation was a

1 little bit different because it occurred on a
2 weekend, and Mr. Velentzas had violated not one, but
3 two of our cardinal rules, which means automatic
4 termination. He had been drinking, and then he was
5 involved in an altercation.

6 Before the altercation, we attempted to
7 send him to the faith intermission - - - the mission,
8 which, because it was a weekend, and TASC was not
9 open, and he had been drinking, but that - - - when
10 he got into an altercation, we notified - - - we
11 called 911, and he was taken by the police and
12 removed from our property.

13 JUDGE STEIN: So - - - so the understanding
14 is, is someone is discharged on a weekend, TASC is
15 not informed until the following Monday, say - - -

16 MS. WEISSMAN: That's correct, Your Honor.
17 If it's a weekend, TASC would be informed 9 a.m.
18 Monday morning.

19 JUDGE STEIN: And that's the understanding
20 of the court, and probation, and everybody else, that
21 even though they're not supposed to leave, if they
22 leave or if they are discharged for any reason,
23 that's - - - that's - - - the beginning and the end
24 of your duty is to tell them to report, and to notify
25 TASC on the following Monday.

1 MS. WEISSMAN: Yes. But in this situation,
2 we went above and beyond our duty, because we
3 contacted 911, like any agency or individual is
4 permitted to do, and handed him over to the police
5 who removed him.

6 JUDGE RIVERA: I'm sorry, I thought you
7 were waiting to send him somewhere else.

8 MS. WEISSMAN: We were - - -

9 JUDGE RIVERA: You were in the process of
10 doing that. Isn't that your policy?

11 MS. WEISSMAN: We were in the process of
12 removing him someplace else, just because he had been
13 drinking.

14 JUDGE RIVERA: Um-hum.

15 MS. WEISSMAN: We could have allowed him to
16 go on his own, but because he had been drinking, we
17 were notifying the Interfaith Mission. But when he
18 got into the altercation, we called 911.

19 JUDGE RIVERA: I'm sorry, just to clarify,
20 so you're saying he was drunk at the time he got into
21 the altercation - - -

22 MS. WEISSMAN: Yes. He - - -

23 JUDGE RIVERA: - - - or he had just been
24 drinking?

25 MS. WEISSMAN: He had been drinking. We

1 don't - - -

2 JUDGE RIVERA: So it's your position if he
3 was drunk, and he walked out the door, you wouldn't
4 have done anything until Monday and informed TASC
5 that he was drunk and walked out the door?

6 MS. WEISSMAN: That is how it works, yes.

7 JUDGE FAHEY: This is - - - was - - - this
8 was a - - - this is an OR release, right, in criminal
9 court, drug court, OR release, and this is a
10 condition of his release, that he participate in the
11 TASC program. That's what we're talking about here -
12 - -

13 MS. WEISSMAN: Absolutely.

14 JUDGE FAHEY: - - - right?

15 MS. WEISSMAN: If he doesn't participate,
16 then he is a subject to whatever the - - -

17 JUDGE FAHEY: But my point is, it's an OR
18 release for somebody who's committed a criminal act,
19 so that means they're on their own recognizance, and
20 then they agree to a contract, in essence, with TASC,
21 and the court, and the drug - - - and the court, and
22 they say, I'll participate in this, and then when - -
23 - after you finish, then you'll come back, and if you
24 successfully completed it, then the court will
25 consider that, and usually you get a reduced sentence

1 to either violation, of misdemeanor, or something.

2 Is it - - -

3 MS. WEISSMAN: That is a hundred percent
4 correct; that's how it works.

5 JUDGE FAHEY: That's - - - so that's what
6 we got here.

7 MS. WEISSMAN: Yes.

8 JUDGE FAHEY: So - - - so this person isn't
9 a prisoner.

10 MS. WEISSMAN: Correct.

11 JUDGE FAHEY: Right. He's just like
12 everybody else on OR release. If they're not a
13 prisoner, they - - - they've assumed this condition
14 though on their release, like any other condition on
15 your release, like say, you can't go out at night, or
16 any other normal kind of bail condition that might be
17 - - -

18 MS. WEISSMAN: You have to abide by the
19 rules - - -

20 JUDGE FAHEY: Right.

21 MS. WEISSMAN: - - - participate in the
22 programs that are offered, attend counseling,
23 whatever the - - -

24 JUDGE FAHEY: So leaving the prisoner
25 question aside, and really, we're focusing on the

1 gaps in the program referral system, when something
2 happens on the weekend. You see what I'm saying,
3 from - - -

4 MS. WEISSMAN: I do see what you are
5 saying.

6 JUDGE FAHEY: - - - from a liability point
7 of view.

8 MS. WEISSMAN: But my client has their
9 marching orders, and they did that, and they took it
10 one step further and called 911, and he was removed
11 from our property from the police. And all of the
12 case law cited by the lower courts and - - - the
13 lower court, the Appellate Division, and the
14 respondent, for example, Fox v. Marshall, and Rivera
15 v. New York City Health, there is - - - they are
16 distinguishable from this case in that one, you're
17 dealing with medical facilities, and you're dealing
18 with medical doctors who have evaluated the patient,
19 and who have engaged them in conversation.

20 You're also dealing with individuals who
21 are under their control in the sense that they
22 haven't been discharged from the facility that
23 they're at, whether they are treating outpatient or
24 inpatient, some of these cases rely on day passes,
25 where a doctor said, it's okay to give them a day

1 pass, and they can go out, and - - - and they kill
2 somebody, which is not the situation here. Okay.
3 There was no day pass, he had been terminated from
4 the program.

5 Nor was there a doctor. These are
6 counselors that are in alternative to incarceration.
7 There was no doctor providing any kind of
8 professional judgment; the duty was extinguished. As
9 soon as 911 was called, he was terminated from our
10 program, and he was removed from our property.

11 JUDGE ABDUS-SALAAM: You mentioned earlier,
12 I think in response to a question by Judge Stein,
13 that he - - - or maybe Judge Rivera - - - that he
14 could walk out the door. In other words, he could go
15 AWOL.

16 MS. WEISSMAN: Correct.

17 JUDGE ABDUS-SALAAM: And what - - - and you
18 would follow the same, I guess, protocol of, you've
19 already told this person that when they leave the
20 program, however they leave the program, if they're
21 leaving it permanently, that they have to report the
22 next business day to TASC, and then you would - - -
23 you would inform TASC about that.

24 MS. WEISSMAN: Correct. They're - - -
25 they're made aware, upon their initiation into the

1 program, that if they leave, then they're subject to
2 whatever that criminal judge may do. They've lost
3 their chance for an alternative to incarceration.

4 JUDGE ABDUS-SALAAM: But you're no longer
5 responsible for them, is what you're - - -

6 MS. WEISSMAN: Correct. If we - - - if - -
7 - to put the onus on my agency to follow up with
8 every single individual who, you know, walked out of
9 the facility, or who was released to the police, or
10 was released to another - - - it would be an
11 impossible task. Where would - - -

12 JUDGE STEIN: But isn't it your position
13 that you don't have any right or authority to keep
14 them from walking out the door?

15 MS. WEISSMAN: We do not. They could walk
16 out the door, and our - - - our duty is to notify the
17 agency who sent them, in this case, it would be TASC,
18 and let them know.

19 Thank you very much.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 Mr. Isaac.

22 MR. ISAAC: Good afternoon. My name is
23 Brian Isaac - - - sorry. I represent the plaintiff
24 respondent.

25 If I can, I - - - I just want to give you -

1 - -

2 JUDGE RIVERA: How do they have any
3 control, if - - - if the person who is on - - - in
4 the facility can just walk out the door?

5 MR. ISAAC: Well - - - I - - - I don't - -
6 -

7 JUDGE RIVERA: And they can't stop them.
8 That's it. They're not - - - they have no authority
9 to do so.

10 MR. ISAAC: Judge Rivera, I'm happy you
11 brought that, because I don't agree with that. So
12 let me - - - let me deal directly with that, if I
13 can, and let me give you the page references as well.

14 JUDGE RIVERA: Um-hum.

15 MR. ISAAC: Okay. Page 83 of the record,
16 paragraph 23. This is Mr. Cottingham. Now, Mr.
17 Cottingham had very, very limited knowledge of what
18 was transpiring, if you read his deposition, which I
19 know you did. He answered "I don't know" more than
20 he answered "I know", probably 70 times, but we'll
21 leave that alone.

22 "Q. Are they free to leave the facility at
23 any time?

24 "A. No."

25 Carry over to page 87. Then they go into

1 the particulars. Paragraph 4.

2 "Q. The one exit that is not - - -

3 And this gets to my adversary's point too,
4 so I'll deal with both of them.

5 - - - "The one exit that is not an
6 emergency or fire exit, is there somebody posted at
7 that exit to prevent residents from walking out?

8 "A. When you say prevent, what do you
9 mean? Define prevent for me.

10 "Q. Control access of getting in or
11 getting out of a residence.

12 "A. No, no one can physically control
13 anyone entering or leaving the building.

14 "Q. Are residents allowed to leave the
15 building through that main entrance or exit?

16 "A. Only with staff approval."

17 Now, I will absolutely agree - - -

18 JUDGE RIVERA: Yes, but that would mean
19 they wouldn't be discharged. Right. Isn't - - -
20 isn't that that, yes, the only way they can do that
21 is if we approve it. But once they walk out without
22 our approval, they're - - - they're out of the
23 program, and we don't have control. At least that's
24 what I thought I heard counsel explain.

25 MR. ISAAC: And - - - and - - - and I

1 understand the point.

2 JUDGE RIVERA: And why isn't that aligned
3 with what you've just read in the record?

4 MR. ISAAC: Because - - - because when - -
5 - when they're saying that they can walk out, this is
6 an alternative - - - as Judge Fahey said, this is an
7 alternative to prison. What we're doing is we're
8 taking younger people with substance abuse, and by
9 the way, he failed TASC twice before.

10 We're trying to make sure they're not
11 hardening criminals. There's no bar there, there's
12 no gun there, there's no person there who's going to
13 shoot somebody, but they're not free to leave. It's
14 the same thing as the federal prison system, where
15 they talk about - - -

16 JUDGE RIVERA: Well, they're not free to
17 leave without consequences.

18 MR. ISAAC: Correct.

19 JUDGE RIVERA: The question is whether or
20 not they can stop them. And their position is - - -

21 MR. ISAAC: And - - - and - - -

22 JUDGE RIVERA: - - - we can't stop them.
23 There are consequences if they leave without
24 permission.

25 MR. ISAAC: That's true. And my argument

1 is not that they should supplant the police. I know
2 the Judge Saxe, in his decision, went a little far
3 and said it's almost a plaintiff's recovery, and I
4 know my adversary had said that - - - that's not my
5 position at all.

6 My position is that you should do here what
7 you did in the Davis case. This is a question of
8 when they come, and I'm not saying they don't have
9 the right - - -

10 JUDGE STEIN: But in Davis - - - at least
11 in Davis, we know who had to be warned; it was the
12 patient who had to be warned. And as you know, I
13 didn't agree with Davis - - -

14 MR. ISAAC: Yes. I know.

15 JUDGE STEIN: - - - but that's - - - that's
16 the law.

17 MR. ISAAC: I read your - - -

18 JUDGE STEIN: But - - - so we knew who had
19 to be warned. Here, if we were to accept your
20 argument, how - - - wouldn't the - - - whoever had to
21 be warned depend on the circumstances of the moment?
22 In this case, you say it should be the police. What
23 if the police weren't called?

24 And - - - and are we imposing a duty when
25 the police are involved, but when the police aren't

1 involved, I mean, it - - - to me - - -

2 MR. ISAAC: No, it's - - -

3 JUDGE STEIN: - - - it seems like it - - -

4 it's - - -

5 MR. ISAAC: Judge Stein, if I can - - -

6 JUDGE STEIN: - - - there's just no limit

7 to this.

8 MR. ISAAC: If I can, I can even use - - -

9 using Judge Saxe's dissent, which I - - - I didn't -

10 - - actually, I should have read the page a little

11 better for you. It's a very limited duty. Tell the

12 police, this is a person who is here, this is our - -

13 - this is our system, we take him to - - -

14 JUDGE STEIN: Okay.

15 MR. ISAAC: - - - emission - - -

16 JUDGE STEIN: But that's - - - but he - - -

17 MR. ISAAC: - - - they didn't do that.

18 JUDGE STEIN: But here, the police were

19 called. But - - - but wouldn't we discourage them

20 from calling the police if we imposed a duty when

21 they called the police, but not other - - - if - - -

22 if he walked out the door, who are we going to warn,

23 but if we called the police because we're concerned

24 about something, then we have this additional duty.

25 It just doesn't make sense to me.

1 MR. ISAAC: Yeah, but, they - - - they said
2 what the duty is, not me. Brian Isaac doesn't - - -
3 I don't even do criminal work. They said it. If you
4 look at their - - -

5 JUDGE STEIN: They said the duty was to
6 notify TASC - - -

7 MR. ISAAC: They - - -

8 JUDGE STEIN: - - - on the next business
9 day. And just to follow up on Judge Fahey's
10 question, what we have here is a person that was
11 released by the court, and presumably, the court took
12 into consideration his background, that he had failed
13 TASC before, whatever he was charged with, whatever
14 his criminal background was, and said, you know what,
15 we're confident enough that this guy is going to play
16 by the rules, so we're releasing him, and - - - but
17 he's got this duty.

18 How is this any different from somebody in
19 his position, who is told to abide by a curfew of his
20 parents? I mean, what - - - you know.

21 MR. ISAAC: Let - - - let me - - - that me
22 ask it both - - - let me deal with both ways. The
23 police, which you're concerned about, and the
24 nonpolice, which you're also concerned about, and you
25 should be.

1 When the police come, the police get a 911
2 call. They have absolutely no idea who Mr. Velentzas
3 is, and the argument below, as adumbrated in Judge
4 Sweeny's decision, was that they should have none.

5 JUDGE STEIN: What if the police took him
6 into custody, took him into custody, and then decided
7 to release him an hour later. Then - - -

8 MR. ISAAC: I have - - -

9 JUDGE STEIN: - - - then was the
10 obligation?

11 MR. ISAAC: We have never said, and I am
12 not saying that JCAP has the authority or the duty to
13 override the police; that was never our claim. The
14 claim - - -

15 CHIEF JUDGE DIFIORE: So if the police were
16 to - - - to come, and they were to tell him there was
17 evidence that they told the police officer, he's in
18 violation, he's being discharged. What's the
19 authority of the police?

20 MR. ISAAC: Well - - - well, all you would
21 have to do, all JCAP would have to do to satisfy
22 their duty was to say, very simply, this is a person
23 who is out on this program, he was - - - he violated
24 the conditions of the program, our - - - our position
25 is that we would take him to this intermediary faith

1 mission - - -

2 JUDGE ABDUS-SALAAM: Where does that duty
3 come from, though, Mr. Isaac?

4 MR. ISAAC: Sorry?

5 JUDGE ABDUS-SALAAM: I'm trying to figure
6 out where that duty comes from.

7 MR. ISAAC: Well, it's simple. Actually,
8 it comes directly from the Davis decision. Let me
9 read to you. I mean, it's almost the same thing.

10 Quote - - - this is at 26 N.Y.3d 577.

11 "Defendants are the only ones who could
12 provide the proper warning." In this case, JCAP is
13 the only one - - -

14 JUDGE FAHEY: Yeah, you know, the only
15 problem is - - - is - - - I don't know if I'm reading
16 Davis the same way you are, Mr. Isaacs. You know,
17 let me - - -

18 MR. ISAAC: Well, I got a problem - - - I
19 got a problem then, Judge Fahey - - -

20 JUDGE FAHEY: Yeah, yeah - - -

21 MR. ISAAC: - - - because you wrote it.

22 JUDGE FAHEY: I think you do, because in
23 fairness to you, I - - - I didn't want to sit here
24 and not say anything, but I - - - I don't remember if
25 I'm reading it the same way you are. And let me tell

1 you why, anyway.

2 First, I see Davis as a duty to warn
3 patients - - -

4 MR. ISAAC: Um-hum.

5 JUDGE FAHEY: - - - who injure a third
6 party of the effects on medication, and secondly,
7 specifically in Davis, we say there is no duty to
8 prevent the patient from leaving the hospital.

9 And that, the language that you're quoting
10 talks about the development of duty, and that's true,
11 and I stand quite strongly behind that in the
12 development of this duty, but we try to be quite
13 careful in distinguishing and limiting Davis to a
14 particular circumstances and particular set of
15 relationships.

16 These are not - - - this is not a medical
17 relationship; they don't have that kind of
18 relationship here. And so I - - - I don't think
19 Davis provides the grounding that you need.

20 When I'm looking here, I think I - - - I -
21 - - the question ask myself is, what duty is the
22 Appellate Division attempting to impose here. First,
23 are they attempting to impose the duty that Velent -
24 - - to hold Velentzas in custody, that can't be doing
25 that, because - - -

1 MR. ISAAC: No, I don't - - - I don't think
2 so.

3 JUDGE FAHEY: - - - there's - - - and you
4 are not arguing with that.

5 MR. ISAAC: I am not.

6 JUDGE STEIN: No. And so, the second point
7 is - - - is, are they - - - do they have a duty to
8 tell the police that he's in TASC, and that he has
9 either got to be detained or transferred to another
10 facility. Well, that's a closer question, I - - - I
11 think that's where you would land. Am I right about
12 that?

13 MR. ISAAC: Hundred percent.

14 JUDGE FAHEY: Okay. Go ahead and make your
15 argument then.

16 MR. ISAAC: And I'd like - - - and - - -
17 and I - - -

18 JUDGE FAHEY: Because it's hard for me to
19 see what legal authority they'd have at all here to
20 hold Velentzas against his will.

21 MR. ISAAC: It's - - -

22 JUDGE FAHEY: They have no legal authority.

23 MR. ISAAC: It's - - -

24 JUDGE FAHEY: So the only question is if
25 there's a civil duty. So - - -

1 MR. ISAAC: Right. And - - - and actually,
2 it's not just me, it's Mr. Cottingham. Look at what
3 he says at 133, paragraph 9, of his affidavit. I
4 didn't say it. "JCAP was under the impression", I
5 don't think you can get summary judgment under the
6 impression, but leave that alone.

7 JUDGE FAHEY: Um-hum.

8 MR. ISAAC: "That Mr. Velentzas would be
9 taken to the police station until such time as his
10 probation and TASC officer were notified of the
11 situation." That's a straight duty to warn.

12 Also, Judge Saxe referred to a piece of
13 paper that was a TASC form - - -

14 JUDGE ABDUS-SALAAM: I - - - I'm sorry, Mr.
15 Isaac, I'm back to - - -

16 MR. ISAAC: Yes.

17 JUDGE ABDUS-SALAAM: - - - warning the
18 police what - - - that this person is in TASC, or
19 that he - - - they already know why they're there.
20 They were called - - - the police were called because
21 he violated the rules of this facility. And you're
22 saying that once the police arrive, that the facility
23 had to say, you know, this person is in TASC, so you
24 have to do something with him. I - - -

25 MR. ISAAC: No, not just - - - not that

1 he's in TASC, even more specific. Look, let me - - -
2 if - - - if I can - - -

3 JUDGE ABDUS-SALAAM: Why - - -

4 MR. ISAAC: - - - Judge Abdus-Salaam, you
5 know, we keep talking about this as being kind of a
6 minor thing. He was - - - he - - - he is in TASC the
7 third time for something that's not too minor, at
8 least to my way of thinking, put a gun to someone's
9 head and say, get me money or I'm going to blow your
10 head off, that's not a minor thing.

11 So all that they had to say was, he's in
12 TASC, we have this procedure, and if you look at 387
13 and 389, they don't say he's not dangerous, they say
14 he is dangerous, and his danger is augmented when
15 he's drunk. So let's - - - let - - - let me give you
16 a ridiculous - - -

17 JUDGE RIVERA: And then what's the point,
18 they're - - -

19 MR. ISAAC: Let me - - -

20 JUDGE RIVERA: - - - they're going to take
21 him to the precinct, what - - -

22 MR. ISAAC: Just to tell - - -

23 JUDGE RIVERA: - - - what are they going to
24 do?

25 MR. ISAAC: To tell them, either take him

1 to precinct, or contact TASC, or cont - - - or take
2 him to Faith Mission. It's a very limited duty.

3 JUDGE RIVERA: If this had happened on the
4 Monday - - -

5 MR. ISAAC: Excuse me?

6 JUDGE RIVERA: Let me try it a different -
7 - - if this had happened on a Monday, and they - - -
8 and they discharged him, and he walks out the door -
9 - -

10 MR. ISAAC: Um-hum.

11 JUDGE RIVERA: - - - and the called TASC,
12 is it your position that they also had to call the
13 police?

14 MR. ISAAC: No. No. If it was a Monday,
15 they didn't. The police are involved because it's a
16 weekend. So that's an unfort - - -

17 JUDGE RIVERA: So they called TASC on
18 Monday, it would be - - -

19 MR. ISAAC: Right. And - - -

20 JUDGE RIVERA: - - - it would be fine.

21 MR. ISAAC: That's right. But that - - -
22 that's in accordance, if I can, Judge Rivera, with
23 their own duties. Look at 316 of the record. This -
24 - -

25 JUDGE STEIN: But if it was a Monday, and -

1 - -

2 MR. ISAAC: Sorry?

3 JUDGE STEIN: If it was a Monday, and your
4 argument is that this happened within a half an hour
5 of his leaving, then how would this - - - how would -
6 - - having warned the police or - - - if it was
7 Monday, you say they don't have to warn the police,
8 they just have to call TASC. So how would that have
9 prevented this from happening?

10 MR. ISAAC: Because this notion that he can
11 - - - if - - - if - - - even if I lose the case, I
12 don't want to lose it on this fact. The notion that
13 he's just free to go out, and he gets a free pass
14 till Monday, isn't in accordance with the record.

15 TASC gets notified. Let's say that this
16 person didn't have a home, he just can't walk out and
17 go anywhere. If he was in prison, and he committed a
18 crime - - -

19 CHIEF JUDGE DIFIORE: So what should they
20 have done, counselor?

21 MR. ISAAC: They should have given a note -
22 - - they should have told the police, he's in the
23 program, he's a potential danger, we would've taken
24 him to Faith Mission or contacted TASC. That's all
25 they had to do.

1 JUDGE FAHEY: But what - - - what basis
2 would the police have - - -

3 MR. ISAAC: And - - -

4 JUDGE FAHEY: - - - listen, normally, what
5 can the police do? They can either arrest you - - -

6 MR. ISAAC: Um-hum.

7 JUDGE FAHEY: - - - nobody's bringing
8 charges against them, they're just saying, get him
9 off this facility. So they're not doing that. So
10 they could detain you, but that - - - how - - - on
11 what basis with they detain him? They have no right
12 to detain anybody. The police can't just say, you
13 can't even force him to maintain - - - to keep him in
14 the wrong facility under the OASAS regs, so how could
15 the police detain the kid in any way?

16 So in that context, basically, what they
17 can do is remove him from the scene, unless they see
18 a criminal act in front of them.

19 MR. ISAAC: But there was a report. I
20 mean, there was a 911 report that he was involved in
21 a fight, and he was drinking. So that's not legal,
22 and - - -

23 JUDGE FAHEY: But - - - but nobody said - -
24 - nobody signed any complaint for any criminal
25 charges.

1 MR. ISAAC: No, I'm not suggesting that
2 they were, but that's not the point. JCAP shouldn't
3 be able to - - - I'm sorry. I see my time is up, but
4 can I answer Judge Fahey's question?

5 JUDGE FAHEY: No - - -

6 CHIEF JUDGE DIFIORE: You may.

7 MR. ISAAC: JCAP - - -

8 JUDGE FAHEY: I'll let you answer it, but
9 you see what I'm saying. What you're saying is, you
10 want the police to determine there's been a violation
11 of his bail conditions.

12 MR. ISAAC: I just want the police to do
13 exactly what JCAP would have done for the protection
14 of the public for someone who would otherwise
15 probably be in jail.

16 JUDGE FAHEY: I see.

17 MR. ISAAC: Because the in - - - the public
18 is still innocent, and they still have a right to be
19 protected.

20 And I get that it's a very, very good
21 thing, and I believe in it, that you shouldn't try to
22 make young people hardened criminals, but there's a
23 corresponding duty to the public who is sitting out
24 there, not doing anything wrong, not to give someone
25 a free pass in something like this.

1 And an oral modification that you take - -
2 - an oral warning that could take twenty-five
3 seconds, I don't think it's too - - - is too great a
4 leap to have.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 MR. ISAAC: Thank you.

7 CHIEF JUDGE DIFIORE: Ms. Weissman.

8 MS. WEISSMAN: May it please the court.

9 Respondent can't have it both ways. If
10 this had been a Monday, and we discharged him, and
11 didn't call the police, we'd have to notify TASC;
12 who's to say that this wouldn't happen? But then our
13 duty would be extinguished. We went above and
14 beyond; we notified the police, and didn't just
15 discharge him to the public - - -

16 JUDGE ABDUS-SALAAM: Well, you had a duty
17 to notify the police, didn't you?

18 MS. WEISSMAN: We had a - - - no. Our duty
19 was to discharge him from the program, and our duty
20 was to notify TASC, and in this case, it would've
21 been the next business day.

22 JUDGE ABDUS-SALAAM: But did - - - did you
23 have some internal rule that if somebody breaks a
24 cardinal rule of your program, that they get
25 discharged, but if he assaulted one of your

1 participants, co-participants, would you call the
2 police?

3 MS. WEISSMAN: Well, in this situation, he
4 didn't - - - he got into an altercation - - -

5 JUDGE ABDUS-SALAAM: I see.

6 MS. WEISSMAN: - - - is what he did. And
7 that is why we called the police. But our rule,
8 whether you break a cardinal rule or you're
9 discharged for another reason, it's - - it's
10 discharge, and you notify TASC. So if this had
11 happened on a Monday, and we didn't call the police,
12 counsel is arguing that our duty would have been
13 extinguished. But here, because it happens on a
14 weekend, we didn't just disch - - -

15 JUDGE RIVERA: What if he's on the
16 premises, he violates you rules, he's on the prem - -
17 - he says, I don't want to go.

18 MS. WEISSMAN: Then you would - - -

19 JUDGE RIVERA: Do you call in the police to
20 have him removed or arrested, because now he's
21 trespassing, because he's broken one of the rules,
22 and he no longer is able to be on the premises?

23 MS. WEISSMAN: Potentially. But if this
24 was a weekday, TASC would be open - - -

25 JUDGE RIVERA: So what was the 911, if not

1 to have him removed?

2 MS. WEISSMAN: The 911 was to have him
3 removed from the premises - - -

4 JUDGE RIVERA: To have him removed - - -

5 MS. WEISSMAN: - - - in this situation.

6 JUDGE RIVERA: - - - because he was tres -
7 - - at that point, I assume you're arguing he's
8 trespassing.

9 MS. WEISSMAN: Of course. And also because
10 he had engaged in an altercation with somebody else,
11 and we felt that it was better to call the police in
12 an emergency like any other homeowner or agency would
13 do in a situation that was similar.

14 Also, Mr. Cottingham's intent has nothing
15 to do with this. Mr. Cottingham wasn't there that
16 day, and whether he believed he was going to be in
17 police custody or escorted off the premises doesn't
18 matter, because as Judge Saxe said in his dissent,
19 what authority does Queens Village JCAP have in
20 telling the police what to do. The police are
21 trained, they're responding to a 911 call at a
22 facility that's an alternative to incarceration.

23 Even if we had given instruction, who says
24 that - - -

25 JUDGE RIVERA: What's in the record to

1 clarify, or what's in the record that demonstrates
2 what you call - - - the reason you call 911, what the
3 police did, that they took him into custody. Where -
4 - - where is that established by the record?

5 MS. WEISSMAN: In the incident report, it
6 says the police - - - 911 was notified, the police
7 came, and they escorted him off the premises, are the
8 exact words - - -

9 JUDGE RIVERA: In other words, the
10 escorting is the equivalent of they then took - - -
11 the police were then responsible for him, because
12 they're physically removing him from the property.

13 MS. WEISSMAN: Exactly. They removed him -
14 - -

15 JUDGE RIVERA: Which is what he wanted.

16 MS. WEISSMAN: They removed him from the
17 property. So what Mr. Cottingham's intent was is
18 absolutely no merit here, whatsoever.

19 Thank you, Your Honors.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 (Court is adjourned)

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Queens Village Committee for Mental Health for Jamaica Community Adolescent Program v. Oddo, No. 9 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 352 Seventh Avenue
Suite # 604
New York, NY 10001

Date: January 12, 2017