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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 49

STANLEY HARDEE (Reargument),

Appellant.

20 Eagle Street
Albany, New York
October 11, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The first matter on this
2 afternoon's calendar is appeal number 49, The People of the
3 State of New York v. Stan - - - Stanley Hardee.

4 MS. GOLDBERG: May it please the court. Rachel
5 Goldberg on behalf of Stanley Hardee. I'd like to reserve
6 two minutes for rebuttal, please.

7 CHIEF JUDGE DIFIORE: You may, Ms. Goldberg.

8 MS. GOLDBERG: Thank you. In order for police to
9 search a car after a stop for a traffic infraction, under
10 People v. Torres, police must have both reasonable
11 suspicion of a crime and a sub - - - there must be a
12 substantial likelihood that there's a weapon that poses an
13 actual and specific danger.

14 JUDGE FEINMAN: So Ms. Goldberg, if I can
15 interrupt. Before we get into a discussion of whether
16 Torres is applicable here or not, why is this even
17 reviewable? Why is this not a mixed question of law and
18 fact where our review is somewhat limited?

19 MS. GOLDBERG: So putting aside whether the - - -
20 the Appellate Division used the wrong standard under
21 Torres, the facts don't meet the minimum standard for a
22 legal car search, in the first instance, which takes this
23 case out of mixed question and into a question of law under
24 Bigelow. So there was no - - - the facts don't meet the
25 minimum standard for a car search because there was no



1 substantial likelihood of a weapon that posed an actual or
2 specific danger.

3 As an - - - as a threshold matter, there was no
4 reasonable suspicion of a crime after a traffic infraction.
5 The police pulled Mr. Hardee over for speeding and changing
6 lanes without signaling, bad driving, to be sure, but no -
7 - - no crime had been committed, and nothing he did after
8 that point gave the police reasonable suspicion that he had
9 - - -

10 JUDGE FAHEY: Well - - -

11 MS. GOLDBERG: - - - committed a crime.

12 JUDGE FAHEY: - - - slow down. When they pulled
13 him over, there were two drinks with alcohol in the front
14 seat, right?

15 MS. GOLDBERG: That's correct; those are traffic
16 violations.

17 JUDGE FAHEY: Right. And then there was also a -
18 - - he was asked to step out of the car three times.

19 MS. GOLDBERG: Correct.

20 JUDGE FAHEY: He didn't step out the first time
21 when - - - when he was asked. He didn't respond to the
22 request from the officer. And then finally, there's, I
23 think, the more fact - - - factually problematic question
24 of resisting arrest when the officers were putting cuffs on
25 him in the back of the vehicle. I think it's fair to say



1 I'm not sure if the record is entirely clear as to when
2 that happened in relationship to the search of the back.

3 MS. GOLDBERG: Sure. So Officer Loud
4 specifically testified that the struggle had not begun when
5 he searched the car. And in fact he said - - - this is on
6 page A66 in - - - and A170 of the record - - - that he
7 would not have searched the car if - - - if the struggle
8 had begun. So, you know, at the time that - - - that
9 Officer Loud searched the car there was no - - - no crime
10 and no - - - no reason for him to - - -

11 JUDGE FAHEY: So is it your position that this
12 struggle took place before or after the search?

13 MS. GOLDBERG: At best, contemporaneously, but
14 certainly not before, which would - - -

15 JUDGE FAHEY: All right. And then so - - - so
16 but you would say that if it was either simultaneously or
17 before, then clearly it meets the legal standard - - -

18 MS. GOLDBERG: If it - - -

19 JUDGE FAHEY: - - - because this was not a case
20 of there being no incident. This was not without incident
21 in - - - in the terms of our case law.

22 MS. GOLDBERG: Officer Loud, the reason that he
23 searched the car, and what he - - - the reason he said he
24 searched the car was because of Mr. Hardee looking in the
25 back seat and refusing to get out of the car, and the fact



1 that one of the other officers frisked him. So the - - -
2 the struggle in the back of the car had nothing to do with
3 the search, and that - - - that's what courts have to
4 review is whether or not at the time of the search there
5 was legal reason to do so. So, you know, if - - - if Mr.
6 Hardee had begun resisting arrest or struggling before the
7 search and that's - - - that was part of the search, it
8 still wouldn't have met the standard.

9 JUDGE GARCIA: Isn't that part of what's so hard
10 for us to review here? Because this is clearly, I think as
11 Judge Fahey is saying, an escalating situation. They pull
12 him over. As you said, it's a signal or whatever. There's
13 alcohol, there's this interaction where they finally have
14 to get him out of the car after a couple of times. He's in
15 the back. That's escalating. There's somebody else in the
16 car. They have these other indicators. And we're looking
17 at this record as when exactly does this happen. So what
18 split second was he resisting and - - - or could this other
19 officer have gone into the car when there was another
20 passenger, and there's someone who, at best, is about to
21 get into this altercation in the back of the car. How do
22 we parse that record to come up with, as a matter of law,
23 this was a violation of our standard?

24 MS. GOLDBERG: Because the court's job is to - -
25 - is to do - - - is to look at all of the facts and choose



1 - - - and decide when it would have been appropriate for
2 the police to - - -

3 JUDGE GARCIA: But I don't think that's the
4 court's job, isn't to look at all of the facts. The
5 court's job here is to look at whether they applied the
6 right standard here. And we certainly can't get into the
7 facts.

8 MS. GOLDBERG: But given those facts - - -

9 JUDGE GARCIA: So based on this record, which - -
10 - and the question is is this a mixed question of law and
11 fact, are we going to say, as a matter of law, this
12 decision is wrong?

13 MS. GOLDBERG: The facts are - - - are clear. I
14 mean, all Mr. Hardee was doing were - - - was looking into
15 the back seat where there was a bag, where Officer Loud saw
16 a bag. He refused to get out of the car three times, but
17 then he got out voluntarily. He - - - he - - - in the
18 words of the police, he was compliant during the frisk. He
19 was at the back of the car. His companion had already been
20 brought to the back of the car. So - - -

21 JUDGE FAHEY: See, it's - - -

22 MS. GOLDBERG: - - - at that point - - -

23 JUDGE FAHEY: To follow up on it, it's the
24 ambiguity in the facts because you certainly have not
25 misstated the facts; I don't mean that. But there are



1 other things that the officers said, like they thought he
2 was looking around and planning on running. Siani or - - -
3 Siani, one of the officers said something like that. And
4 that's what led to the cuffing, and I guess it's the
5 ambiguity in the facts that make this a particularly
6 difficult case.

7 JUDGE STEIN: Would - - - if - - - if he was
8 looking to run, if in fact they thought he was looking to
9 run, would that provide a basis, under the correct
10 standard, to search the vehicle?

11 MS. GOLDBERG: No. This is a very narrow
12 standard; this is an exception to an exception. So there -
13 - - you need reasonable suspicion of a crime and a
14 substantial likelihood of a weapon. So somebody who's been
15 taken out of the car and frisked, with no weapons, who runs
16 from police, you know, there's - - - that doesn't give any
17 indication that there's a weapon in that car. And that's
18 what this is about is about - - -

19 JUDGE WILSON: For the purposes of applying the
20 standard, do we care about what the officers who were
21 present knew, collectively, or what the officer who
22 conducted the search knew?

23 MS. GOLDBERG: So here it's whether the search
24 was objective based on the officer's knowledge.

25 JUDGE WILSON: But the officers, collectively, or



1 - - -

2 JUDGE GARCIA: The searching officers?

3 JUDGE WILSON: - - - officers - - -

4 MS. GOLDBERG: The searching officers, yes.

5 JUDGE WILSON: Searching officers.

6 MS. GOLDBERG: Yes. And - - - and from - - - you
7 know, Officer Loud did not have the predicate to search the
8 car. And, you know, there was no - - - there was no reason
9 for him to believe that there was anything in that bag that
10 was a contraband much less a weapon. So - - -

11 JUDGE STEIN: But doesn't it also have to be not
12 just that there's a weapon in the car but that - - - that
13 there's - - - there's a danger that that weapon is going to
14 be accessed or used?

15 MS. GOLDBERG: That's right. That's right. And
16 it can't just be theoretical. I mean, this court has
17 clearly rejected that test. It has to be both.

18 JUDGE FAHEY: How do you reconcile this case with
19 Mundo?

20 MS. GOLDBERG: So in Mundo it was a traffic stop
21 and the - - - the driver repeatedly tried to flee from
22 police playing this dangerous cat-and-mouse game. So the
23 police would - - - he would slow down, the police would get
24 out of their car, he would flee. He almost ran over a
25 pedestrian. He was seen stashing something under the seat.



1 So there he clearly was, you know, potentially setting a
2 trap for police officers. He likely had a weapon in the
3 car. So - - - so in this case there was nothing like that.
4 Mr. Hardee pulled over. The police testified that - - -

5 CHIEF JUDGE DIFIORE: Well, don't we have police
6 patrolling in an area where there's a reported spike in
7 crime? This guy, the police officer testifies, goes flying
8 by at fifty miles an hour, he's weaving in and out of
9 traffic, he's not signaling that he's moving. He disobeys
10 two commands of the police officer. He's nervous. He's
11 looking around. He keeps looking into the back of the car.
12 He gets out of the car. He's not - - - I wouldn't say he's
13 resistant, initially, but he's giving the police cause for
14 concern.

15 MS. GOLDBERG: Right.

16 CHIEF JUDGE DIFIORE: Is the - - - what's the - -
17 - is the only thing missing that he makes a furtive
18 movement under the - - -

19 MS. GOLDBERG: No, but we already have - - - so
20 police are allowed to order people out of the car and, you
21 know, the legality of the frisk wasn't litigated, but they
22 had - - - they frisked Mr. Hardee. So they are allowed to
23 take these steps in recognition of the inherent
24 dangerousness of police work. And yes, there was a spike
25 in crime which is exactly why there were more patrol



1 officers there pulling people over for traffic infractions.

2 But - - -

3 CHIEF JUDGE DIFIORE: Exactly.

4 MS. GOLDBERG: - - - you know, that doesn't - - -
5 that doesn't give the officers, in this particular case,
6 reasonable suspicion and substantial likelihood of a
7 weapon.

8 JUDGE FAHEY: It seems you have four factors here
9 that distinguish this case from Torres: nervousness,
10 number one; refusal to get out of the car; the looking
11 around. The officer characterized it as looking to where
12 he was going to run. Who knows? That's the third factor.
13 And then of course fighting with the officers, which is
14 clearly a matter of - - - clearly an incident, though I
15 think there's a fair imputation that we're not sure what
16 the timing of that was. But those four factors seem to
17 take it way beyond Torres.

18 MS. GOLDBERG: Well, Torres is actually - - - is
19 - - - is helpful. Torres was - - - this was a murder
20 suspect. The police got a predictive tip that this murder
21 suspect was going to be at a location driving a specific
22 car with a gun in a shoulder bag. And sure enough, he
23 pulled up, the same guy, in the same car, with those
24 shoulder bags. So there the police had reasonable
25 suspicion that this person had committed a homicide and



1 substantial likelihood of a weapon in the car. But they
2 didn't - - - they still couldn't search the car. So I
3 think - - - I think Torres is actually helpful here because
4 - - -

5 CHIEF JUDGE DIFIORE: Was that based on an
6 anonymous tip?

7 MS. GOLDBERG: It was based on an anonymous
8 predictive tip. So the - - - it was presumed reliable.
9 And you know, so - - - so in this case it was - - - it was
10 a traffic violation. This wasn't police pulling over a
11 murder suspect. And there needs to be real protections for
12 people who speed or run a tra - - - or run a - - - run a
13 Stop sign, and the police pull them out of the car, frisk
14 them. And we have a high bar for going into their car.

15 Thank you.

16 CHIEF JUDGE DIFIORE: Thank you, Ms. Goldberg.
17 Counsel?

18 MS. OLIVE: Good afternoon. Jessica Olive on
19 behalf of the People. May it please the court.

20 This case presents a standard mixed question of
21 law and fact that is beyond this court's review because
22 there is ample record support for the lower court's
23 decision. And defendant's new argument for a change in the
24 legal standard, by requiring reasonable suspicion of a
25 crime, is unreserved and entirely meritless.



1 First, this is a mixed question of law and fact.

2 JUDGE STEIN: Well, you agree that there have to
3 be an actual and specific danger of a weapon in - - - in
4 the car, correct?

5 MS. OLIVE: That's correct, Your Honor.

6 JUDGE STEIN: Okay. So I think one of the - - -
7 the questions is is do you have - - - do you have to - - -
8 how do you distinguish between whether there's a weapon in
9 the car or maybe some other type of contraband? So here
10 you have somebody, he's looking around, he seems to be
11 nervous, he's got some alcohol in the front seat. But
12 what, if anything, is there to tell the officers that there
13 may be a - - - not that there may be, that there's a
14 likelihood that what's in that car is a weapon?

15 MS. OLIVE: So Your Honor, first of all, we do
16 not need to establish that the presence of a weapon was the
17 only conclusion to be drawn from the circumstances. We
18 don't even need to show that it was more likely than not
19 because the standard is less than probable cause. And here
20 the substantial likelihood of a weapon present is shown
21 most prominently by the fact that he's repeatedly looking
22 at a shopping bag.

23 JUDGE STEIN: Yeah, but how would - - -

24 MS. OLIVE: Well - - -

25 JUDGE STEIN: Then in every single case, no



1 matter what the contraband is, that would apply, right?

2 MS. OLIVE: The officers do not need to rule out
3 that the item that the occupant of the car is preoccupied
4 with is - - - could be something more innocent such as
5 drugs or alcohol.

6 JUDGE STEIN: But the standard doesn't say
7 substantial likelihood that there's contraband in the car;
8 it says a weapon. So there has to be something to
9 distinguish.

10 MS. OLIVE: Well, it's the - - - it's the
11 occupant's preoccupation.

12 JUDGE STEIN: So for example, if he was wearing a
13 bullet-proof vest, we've already recognized there's a
14 substantial likelihood. Maybe that's a little bit to the -
15 - - you know, to the end of the spectrum there, but it
16 seems to me that there has to be something.

17 MS. OLIVE: Well, this case is very factually
18 similar to People v. Mundo where the occupant of the car is
19 seen stashing something in the back seat. That shows a
20 preoccupation with an item in the vehicle that could be a
21 weapon. And similarly here, we have a preoccupation with
22 an item in the vehicle that could be a weapon. These
23 officers are faced with this uncontrollable dangerous
24 situation. We cannot require them to eliminate all
25 innocent possibilities.



1 JUDGE STEIN: But isn't that partly of their own
2 doing? The - - - the defendant was removed from the car,
3 okay, and haven't we said that, you know, if there's an
4 alternative, like if you're afraid there's a weapon in the
5 car, you've got him out of the car, move him further from
6 the car so he can't access it. Why - - -

7 MS. OLIVE: We're looking - - -

8 JUDGE STEIN: Why couldn't that have been done
9 here, and - - - and why isn't that relevant?

10 MS. OLIVE: Because officers are faced with
11 making split-second decisions in a very uncontrollable
12 situation. So - - -

13 JUDGE STEIN: But that's why they get to remove
14 him from the car.

15 MS. OLIVE: Absolutely. We're looking at what
16 the protective measures that the officers did take, whether
17 those actions were in fact reasonable, not whether they
18 could have taken less intrusive measures.

19 JUDGE WILSON: But there is language exactly like
20 what Judge Stein is describing from Torres which says
21 exactly that. I mean, do you read that as dicta, or how do
22 you - - - how do you distinguish that from what happened
23 here, because I read that passage and it sounds exactly
24 like what happened here: bag in the car, occupants out of
25 the car, and the court says if the - - - if the officers

1 were worried, they could just move the people away.

2 MS. OLIVE: Well, in Torres the occupant and the
3 - - - the defendant in that case was not acting nervously,
4 was not potentially high, was not refusing to get out of
5 the car three times, was not ignoring - - -

6 JUDGE WILSON: But we're talking about the point
7 where they're already - - - both of the occupants are out
8 of the car, right? They're already out of the car before
9 Officer Loud goes in to conduct the search, yes?

10 MS. OLIVE: That's correct.

11 JUDGE WILSON: Okay.

12 MS. OLIVE: But all of the defendant's behavior
13 before the search was indicative of a danger to the
14 officer's safety. He's speeding down the highway, he's
15 weaving in and out of traffic, he's not listening to the
16 officers, he's refusing to get out.

17 JUDGE WILSON: The point is once they're removed
18 from the car, where is the danger, and can't that danger be
19 ameliorated by saying could you move forward, move away
20 from the car?

21 MS. OLIVE: The Torres/Carvey/Mondo test is
22 looking at whether there's a risk of a weapon in the
23 vehicle, notwithstanding the suspect's in a - - -

24 JUDGE WILSON: A risk of a weapon in the vehicle
25 or a risk to the officers?



1 MS. OLIVE: It's whether there's a likelihood of
2 a weapon present in the vehicle that presents a risk to the
3 officers. But the test is not notwithstanding the
4 suspect's inability to gain immediate access to the weapon.
5 The question is whether, in the course of the officers
6 conducting their lawful duties during a lawful stop,
7 whether the defendant, if he was somehow able to escape
8 from the officers, or whether the other occupant of the car
9 would be able to gain access to a weapon within the
10 vehicle. So the question is - - -

11 JUDGE WILSON: Isn't that - - - isn't that
12 exactly what - - - what we sort of rejected in Torres by
13 saying the hypothetical or theoretical possibility that
14 when a stop is concluded the occupants get back in the car
15 and then turn around and shoot the officers is not
16 something we're prepared to - - - to - - -

17 MS. OLIVE: This is not based on a theoretical
18 possibility; it's based on a the - - - the suspect's
19 behavior throughout, before, during and after the stop.
20 And in addition, you have this other - - -

21 JUDGE RIVERA: But doesn't it matter - - -
22 doesn't it matter that the officers themselves say he's
23 compliant? He's compliant at some point. When he's
24 removed, he's outside, he's now compliant.

25 MS. OLIVE: Well, the defense is asking - - -



1 JUDGE RIVERA: Does that in any way vitiate
2 whatever happened before?

3 MS. OLIVE: No, Your Honor, because while the
4 officers are telling the defendant to get out of the car,
5 he's almost immediately looking behind his right shoulder
6 at a shopping bag that's in the back seat. He's shaking
7 his head no; I'm not getting out of the car. He's looking
8 at the officers. He's looking at his passenger.

9 JUDGE RIVERA: Yeah, but once he's out of the car
10 - - -

11 MS. OLIVE: Once he's - - -

12 JUDGE RIVERA: - - - did they not say he's
13 compliant at that point?

14 MS. OLIVE: He was not compliant. He continued
15 looking over his left shoulder now, into the back seat of
16 the car, at least two times, even though the officers are
17 telling him: stop looking back, stop looking back. And
18 he's looking - - -

19 JUDGE FAHEY: Doesn't it, ultimately, though,
20 taking it a step further, go down to - - - I think it was
21 Carvey that used the language did the arrest or did the
22 stop take place - - - the search, excuse me, take place
23 without incident. And so the question really comes down to
24 whether we could characterize this stop as without
25 incident. And it wasn't without incident. There - - -



1 there was - - - it took three officers to subdue this
2 defendant to - - - and so the question really then - - - so
3 since there was incident, that's - - - this is not just
4 somebody who's complying with every police officer request,
5 the question is the timing of that incident and if that's a
6 mixed question of law and fact or whether or not it
7 occurred so clearly after that it can't be right.

8 MS. OLIVE: That's correct, Your Honor, and this
9 is clearly a mixed question of law and fact because the
10 defense is asking this court to draw contrary inferences
11 from the facts.

12 JUDGE STEIN: Where is there proof in the record
13 that - - - that Officer Loud knew that there was some
14 scuffle going on in the back of the car at the time that he
15 began the search?

16 MS. OLIVE: One, when the - - - when Officer Loud
17 began the search, that would be, at most, contemporaneous
18 with the handcuffing. Prior to that, though, he was still
19 - - -

20 JUDGE STEIN: We're guessing on the time.

21 MS. OLIVE: Yes.

22 JUDGE STEIN: But what evidence is there he knew
23 that that was going on?

24 MS. OLIVE: The - - -

25 JUDGE STEIN: Is there any evidence in the record



1 to support that?

2 MS. OLIVE: The time that Loud conducted the
3 search was sometime between the frisk and the handcuffing,
4 or, at most, contemporaneous with the handcuffing. It's
5 not the People's position that he began conducting the
6 search after the defendant was already resisting
7 handcuffing. But it does appear that it was most
8 simultaneously with that. But prior to him resisting
9 arrest, he's already not listening to the officers, he's
10 already - - -

11 JUDGE STEIN: No, but isn't the question his
12 knowledge? So regardless of the exact moment or what he
13 was doing or what - - - you know, or whether it was without
14 incident, doesn't the searching officer have to know about
15 the incident before - - -

16 MS. OLIVE: He - - -

17 JUDGE STEIN: - - - before he or she searches the
18 vehicle?

19 MS. OLIVE: He's already - - - this incident - -
20 - or this car stop was already without incident. He was
21 already, you know, planning his escape route, not listening
22 to the officers. He's preoccupied with an item behind the
23 front passenger seat that Officer Loud sees him looking at
24 while he's still in the car. The fact that his suspicions
25 were borne out by the fact that the defendant ends up



1 resisting arrest and it takes three officers to subdue him
2 only makes his actions even more reasonable.

3 JUDGE WILSON: But isn't the record unequivocal
4 that Officer Loud kneels on the front passenger seat, looks
5 in the back, and at that point in time he doesn't know
6 there's a scuffle going on. He looks into the bag, he sees
7 another bag inside the bag, he sees a butt of a
8 semiautomatic weapon sticking out of that bag, and then he
9 starts leaving the car to say gun or the code word for gun,
10 and that's when he sees the scuffle. Isn't that,
11 unequivocally, the evidence?

12 MS. OLIVE: That's correct, Your Honor. He
13 performs a limited search of the bag that he saw the
14 defendant looking at earlier.

15 JUDGE WILSON: Before he knew there was a
16 scuffle.

17 MS. OLIVE: Yes, Your Honor, that's correct.

18 JUDGE FEINMAN: Well, does he feel the bag first?

19 MS. OLIVE: Yes, he does.

20 JUDGE FEINMAN: And what does he feel?

21 MS. OLIVE: He feels a - - - a weight that would
22 be consistent with a weapon.

23 JUDGE FEINMAN: All right. So he does that
24 before he actually opens the bag and looks in it?

25 MS. OLIVE: That's correct, Your Honor. And he's



1 only looking at this one area behind the front passenger
2 seat which is where he saw the defendant looking. It was a
3 limited search and it was reasonable under the
4 circumstances. We ask that you affirm. Thank you.

5 CHIEF JUDGE DIFIORE: Thank you.

6 Ms. Goldberg?

7 MS. GOLDBERG: Your Honors, Mr. Hardee did - - -
8 was not acting in any way that would show a disregard for
9 safety or that indicated an actual and specific danger of a
10 weapon in the car. Even if there was a scuffle - - -

11 CHIEF JUDGE DIFIORE: Can the police take into
12 account his speeding and his weaving and his disobeying of
13 the police command?

14 MS. GOLDBERG: Well, that's why they pulled him
15 over for a traffic infraction.

16 CHIEF JUDGE DIFIORE: Um-hum.

17 MS. GOLDBERG: And they - - - and then that was -
18 - -

19 CHIEF JUDGE DIFIORE: And then what do they do,
20 they excise that consideration?

21 MS. GOLDBERG: Well, no, but - - - but you need
22 much more to escalate - - -

23 CHIEF JUDGE DIFIORE: Understood - - -

24 MS. GOLDBERG: - - - into a search.

25 CHIEF JUDGE DIFIORE: - - - but can they consider



1 that as part of the equation?

2 MS. GOLDBERG: Yes, I think it doesn't - - - it
3 doesn't add much to their concerns. You know, he was doing
4 what lots of bad drivers do. He was speeding and changing
5 lanes without traffic. There was no - - - nothing in the
6 record to indicate that the police believed he was - - -
7 we're going to charge him with reckless driving or - - - or
8 anything like that.

9 CHIEF JUDGE DIFIORE: What about the reported
10 spike in violent crime in that community? Does that go
11 into the mix? Is that permissible?

12 MS. GOLDBERG: The test here is whether there's
13 reasonable suspicion of a crime and substantial likelihood
14 of a weapon that posed a danger. The spike in crime in the
15 area, you know, doesn't - - - doesn't factor in at all, or
16 at least very minimally into this particular case in these
17 circumstances here. There was no - - - you know, they
18 weren't - - - the police weren't responding to a call about
19 a - - - about a - - - about a crime. You know, they - - -
20 you know, unlike Mundo, Mr. Hardee was not actively putting
21 anybody at risk.

22 JUDGE GARCIA: Counsel, I know your time is
23 almost up.

24 MS. GOLDBERG: Sure.

25 JUDGE GARCIA: Judge Wilson was asking a scenario



1 here, the searching officers in the car are leaning over
2 the seat. There's the person in the back who's being
3 cuffed and looking out, not yet resisting. Clearly, if
4 that officer - - - there's another passenger on the side,
5 the officer sees this altercation or resisting arrest,
6 they'd look in the bag. Do you agree with that?

7 MS. GOLDBERG: Actually, so the scuffle alone is
8 not enough, under our law, because there's no substantial
9 likelihood of a weapon.

10 JUDGE GARCIA: Scuffle with four passengers now
11 on the side of that car.

12 MS. GOLDBERG: But there's - - -

13 JUDGE GARCIA: Is that enough?

14 MS. GOLDBERG: There's nothing that says there's
15 a weapon in the - - -

16 JUDGE GARCIA: Everything they have so far, with
17 all the looking and the - - - so they have to wait and
18 determine - - - and it could be - - - you know, it's not
19 going to be a bullet-proof vest in most of the cases. So
20 that would pretty much make it you never know it's a
21 weapon. I mean, somebody could be looking for heroin, have
22 a heroin kilo in the back of the car. You could always say
23 that. It's heroin; it's a kilo.

24 JUDGE FEINMAN: Or in this case a vodka bottle.

25 JUDGE GARCIA: Right.



1 MS. GOLDBERG: Well - - -

2 JUDGE GARCIA: So that can't be the test. I
3 mean, if you have to see the butt of the gun, you're
4 already there. So what's the test then? If it isn't a
5 bullet-proof vest and it isn't the butt of the gun sticking
6 out of the bag, what's your test for there's a weapon?

7 MS. GOLDBERG: So there - - - so for example, in
8 Mundo and Carvey, the person was trying to hide something
9 which indicates that it's contraband of some kind.

10 JUDGE GARCIA: You can hide a kilo.

11 MS. GOLDBERG: Sure, but - - -

12 JUDGE GARCIA: It's contraband.

13 MS. GOLDBERG: But here, just looking at a bag,
14 and not trying to hide it from police, it could have been
15 something he didn't want his girlfriend to find.

16 JUDGE GARCIA: So it's the hiding that then gets
17 you a gun?

18 MS. GOLDBERG: In - - - in conjunction with
19 actively endangering other people and showing - - - showing
20 a willingness to endanger other people.

21 JUDGE GARCIA: But you're saying the resisting,
22 which some might say shows a willingness to endanger other
23 people, wouldn't be enough on these facts then because you
24 don't know it's contraband.

25 MS. GOLDBERG: But Mr. Hardee - - - I mean, the



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search happened before - - -

JUDGE GARCIA: No, but I asked you in the hypothetical, if he looks out the window and he sees that scuffle going on, you said still not enough; he doesn't know it's a gun.

MS. GOLDBERG: I think under those facts there's no indication that there's a weapon. But in these - - - given these facts, it doesn't meet the minimum threshold for a legal search. Thank you.

CHIEF JUDGE DIFIORE: Thank you, Ms. Goldberg.

(Court is adjourned)



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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Stanley Hardee v. People of the State of New York, No. 49, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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