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COURT OF APPEALS

STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 27

NICHOLAS HILL,

Appellant.

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20 Eagle Street  
Albany, New York  
March 20, 2019

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

Appearances:

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1 CHIEF JUDGE DIFIORE: The third and final appeal  
2 on this afternoon's calendar is the People of the State of  
3 New York v. Nicholas Hill.

4 MS. EPSTEIN: Good afternoon.

5 CHIEF JUDGE DIFIORE: Good afternoon, coun - - -

6 MS. EPSTEIN: My name is Susan Epstein from the  
7 Legal Aid Society, and I represent Mr. Nicholas Hill.

8 The question is this case - - -

9 CHIEF JUDGE DIFIORE: Counsel, would you like to  
10 reserve any rebuttal time?

11 MS. EPSTEIN: Oh, my gosh, yes.

12 CHIEF JUDGE DIFIORE: Of course.

13 MS. EPSTEIN: I'd like to reserve one minute.

14 CHIEF JUDGE DIFIORE: Of course.

15 MS. EPSTEIN: The question is this case is  
16 whether Mr. Hill was seized when the police took his photo  
17 identification away from the scene of the encounter to  
18 conduct their investigation.

19 JUDGE GARCIA: Counsel, is it your position that  
20 that alone, that scenario, you know, he's waiting there;  
21 they go take the license, and they do whatever they do with  
22 it in this investigation, that alone is a seizure? Or is  
23 it combination with the other circumstances here?

24 MS. EPSTEIN: I think that alone is a seizure.  
25 And that's - - - that's the threshold issue of law that's



1 presented in this case, is that a seizure.

2 JUDGE WILSON: Do the other circumstances make a  
3 difference, and particularly, he was told stand here?

4 MS. EPSTEIN: Well, those are sort of icing on  
5 the cake. I think even if he wasn't - - - I mean, yes,  
6 those are circumstances you can - - - you can add on to the  
7 whole situation, and certainly there are cases where courts  
8 look at all the circumstances. But I think and - - -  
9 without anything else, if they say, can - - - who are you,  
10 do you have any identification, can I see your ID, and then  
11 they retain that identification - - -

12 JUDGE STEIN: What if it's - - - what if the  
13 identification is a library card? Does - - -

14 MS. EPSTEIN: Well - - -

15 JUDGE STEIN: Does that make any difference?

16 MS. EPSTEIN: You know, I think nobody's going to  
17 - - - I guess with a library card - - -

18 JUDGE STEIN: Well, if it had a picture, and it's  
19 - - - you know, and then that's - - - they're trying - - -  
20 supposedly, the - - - the - - - the purpose is to bring it  
21 up to the - - - the resident and say, do you know this  
22 person. So if there's a picture, it looks just like him,  
23 and it's on a library card - - -

24 MS. EPSTEIN: Well, there's a benefit to having a  
25 library card. And I guess it's for this court to draw the



1 line as to what type of id - - - identification would - - -

2 JUDGE STEIN: Well, would - - - but would - - -  
3 would the - - - would the per - - - temporary taking of  
4 that card lead someone to feel that they couldn't leave,  
5 that's the question.

6 MS. EPSTEIN: I think so. I mean, if it's a card  
7 that gives them a benefit that they care about, they're  
8 going to feel - - -

9 JUDGE STEIN: But they could - - - he could - - -  
10 they could replace that kind of card. I mean, it seems to  
11 me that, you know, if you have a driver's license or  
12 something, then - - - you know, that - - - that's different  
13 because maybe you can't go get in your car and leave,  
14 because they have your driver's license or your Social  
15 Security card or something like that, which you know, so -  
16 - -

17 JUDGE RIVERA: Let me ask it a slightly different  
18 way. What if - - -

19 MS. EPSTEIN: Sure.

20 JUDGE RIVERA: What if you have several IDs?

21 MS. EPSTEIN: Well - - -

22 JUDGE RIVERA: You work for the government. You  
23 may have several. You may have the driver's license. You  
24 may have the governmentally issued ID to get in the  
25 building. You may have some other kind of ID. And you



1           only turn over either the library card, that perhaps is not  
2           as important to your work, to driving, or you turn over one  
3           of these and you still have other ID?

4                   MS. EPSTEIN: Well, I haven't had a library card  
5           in a long time, and there weren't any photos on it then.

6                   JUDGE RIVERA: I don't know that they had library  
7           card - - -

8                   MS. EPSTEIN: I don't know if they have - - -

9                   JUDGE RIVERA: But let's go with it. You get the  
10          point.

11                   MS. EPSTEIN: But with any kind of an ID, let's  
12          assume that an identification with a photo on it, generally  
13          in our society, is used to obtain some benefit, to obtain  
14          some access. It requires - - -

15                   JUDGE RIVERA: Yes, but the question then is  
16          whether or not, if - - - if you have other IDs, that allow  
17          you to, at least for the next forty-eight hours, to  
18          function, is it really - - -

19                   MS. EPSTEIN: No, I - - -

20                   JUDGE RIVERA: - - - a seizure - - -

21                   MS. EPSTEIN: I think so.

22                   JUDGE RIVERA: - - - if you could probably get  
23          that ID that was taken within forty-eight hours?

24                   MS. EPSTEIN: Why would you - - -

25                   JUDGE RIVERA: Or less.



1 MS. EPSTEIN: - - - why - - - why would you want  
2 to have to be - - - I can't imagine any situation - - - I  
3 mean, I could - - - if I was at Macy's and they were  
4 holding my Macy's card, I think I'd want to get my Macy's  
5 card back before I left. Sure, I can call and say cancel  
6 it; somebody took it; I don't have it; I need a new Macy's  
7 card. But why should I? That's my property. And my  
8 instinct is going to be to say, I want to remain until I  
9 get my property back.

10 JUDGE WILSON: But in that example, you know  
11 you're free to walk away. You can come back an hour later,  
12 right?

13 MS. EPSTEIN: Sure, free to walk away, but - - -

14 JUDGE RIVERA: But that's the question.

15 MS. EPSTEIN: The question is whether a  
16 reasonable person would feel free to walk away, and in  
17 this, we're in a police-versus-citizen encounter, okay.  
18 And that's - - - that's - - - that's what the Fourth  
19 Amendment is all about. It's not about - - -

20 JUDGE GARCIA: So what if - - -

21 CHIEF JUDGE DIFIIORE: So counsel, how does the  
22 defendants' testimony, if it does at all - - - I want - - -  
23 I want your view on this - - - at the suppression hearing,  
24 that he offered to accompany the police officers upstairs.  
25 How does that play into our analysis of the De Bour



1 analysis?

2 MS. EPSTEIN: Well, the court discredited his  
3 testimony and just didn't believe any of that. I don't  
4 think - - -

5 CHIEF JUDGE DIFIORE: Oh, right.

6 MS. EPSTEIN: I don't think that that plays into  
7 anything, because the fact is, this - - - this is - - -  
8 this is a very narrow question. The only question which  
9 was preserved by counsel at the hearing, whether he was  
10 restrained by the police when they took his ID and actually  
11 removed it from the scene. We don't know if it was a  
12 driver's license. We - - - we can tell it was a photo  
13 identification, because the officer who brought it to the  
14 apartment actually said, do you recognize this person?

15 In all of the cases that we've seen around the  
16 country, it's never been specified what exactly - - -  
17 sometimes it's a driver's license, but it's just generally  
18 been an ID, and identifications you - - - exist for a  
19 reason. They're important to you for certain - - - certain  
20 benefits that you enjoy or certain rights you want to  
21 exercise.

22 JUDGE WILSON: Does the duration of the removal  
23 or the purpose of the removal or both or neither matter?

24 MS. EPSTEIN: The - - - the duration does matter  
25 and the purpose, yes, absolutely. I mean, this was a level



1 one. And in level one, you're allowed to request  
2 information, ask nonthreatening questions. What's your  
3 identity? What address do you live at? Where are you  
4 going?

5 CHIEF JUDGE DIFIORE: If this were a level two,  
6 would the police have been allowed to take the  
7 identification?

8 MS. EPSTEIN: I think that once it turns into - -  
9 - once they're retaining it - - - the - - - the fact is,  
10 from the identification, what are they going to get besides  
11 your name, your address, maybe your driver's license  
12 number. Once they're holding that, it's just like holding  
13 an extension of the person. The person - - -

14 JUDGE STEIN: But - - - but you just said that  
15 how long they have it matters, so - - -

16 MS. EPSTEIN: Yes, it does.

17 JUDGE STEIN: So then how is it a per se rule?  
18 Just - - - is it a five-second rule? Is it a - - - if they  
19 walk out of your eyesight rule? What is - - - what is the  
20 rule that you're asking us - - -

21 MS. EPSTEIN: I think the rule is that they're  
22 allowed to use it for the purpose in which it's being  
23 offered, which is to identify the person. I think once  
24 they've had it long enough to say, yeah, that's looks like  
25 you; did - - - have you dyed your hair?



1 JUDGE STEIN: Well, how long is long enough,  
2 though? So - - - so is it exact - - -

3 MS. EPSTEIN: Well, one court, actually I think  
4 it was the Tenth Circuit, found after five minutes they  
5 really didn't need it anymore to ascertain he was the  
6 person they were talking to.

7 JUDGE STEIN: Well - - - well, here the court  
8 said it was brief. And we don't know how long it was. So  
9 how - - - how can we - - -

10 MS. EPSTEIN: Well, we know it was several  
11 minutes. I mean, they had to take it up into the building,  
12 on the elevator, up to the eleventh floor, talk to  
13 somebody, then take the elevator, assuming it came right  
14 away, down, and come back over. That's - - - that's - - -

15 JUDGE STEIN: So how many minutes does it take to  
16 - - - to be a seizure?

17 MS. EPSTEIN: I think - - - I think it's, you  
18 know - - I think if it's going to take more than five  
19 minutes for them to look at the ID and say, that's you, and  
20 I know everything I need to know about you.

21 JUDGE STEIN: So it's five minutes and ten  
22 seconds then - - - then it's a seizure, but if it's not,  
23 then - - - then it's not a seizure?

24 MS. EPSTEIN: Let's just say, retain longer than  
25 necessary to identify the person, which is what it's being



1 used for.

2 JUDGE RIVERA: Well, in - - - in - - - in this  
3 case, there's an indeterminacy, really, because the officer  
4 could - - - I think it's Ofc. Eng (ph.) goes up, and he may  
5 have to do more than just go to that one apartment - - -

6 MS. EPSTEIN: True.

7 JUDGE RIVERA: - - - that he's been designated to  
8 go to. He may make some discretionary determination that  
9 he needs to knock on some other doors. He runs into - - -  
10 there - - - he may get distracted.

11 MS. EPSTEIN: True.

12 JUDGE RIVERA: There may be an emergency in the  
13 building, unlike when you stop the car, which is a seizure  
14 anyway - - - you stop the car - - -

15 MS. EPSTEIN: Right, that's a seizure.

16 JUDGE RIVERA: - - - you go back to the police  
17 car, and you're checking the license. There's a certain  
18 finite amount of time.

19 MS. EPSTEIN: It's open-ended in this case. It  
20 was open-ended.

21 JUDGE FAHEY: Well, you - - - you could - - - you  
22 could apply some objective reasonable - - - reasonableness  
23 standard, I think, though, it - - - as far as the time  
24 goes. We - - - we didn't have to get bogged down then.  
25 And I guess what I wonder is, if we apply that, are we into



1 the mixed question of law and fact territory?

2 MS. EPSTEIN: No, I don't - - - I - - - we're - -  
3 -

4 JUDGE FAHEY: Now let me just finish my thought,  
5 okay?

6 MS. EPSTEIN: Sure, I'm sorry, Your Honor.

7 JUDGE FAHEY: No, it's - - - it's okay. And - -  
8 - and the reason I - - - I asked that that way is, is  
9 because - - - in other words, I'm really asking, is this  
10 beyond our power to review this in the reasonableness of  
11 the action? Go ahead.

12 MS. EPSTEIN: No, I don't think it's beyond this  
13 court's power to review. It's not a mixed question,  
14 because it's presenting a threshold legal issue about  
15 whether a seizure has occurred. And there's no support in  
16 the record below for the court's finding that this was not  
17 a seizure.

18 JUDGE FAHEY: See, I guess, analytically, what I  
19 - - - what I'm concerned with is the identification versus  
20 the investigation problem.

21 MS. EPSTEIN: Um-hum.

22 JUDGE FAHEY: And so there's certainly enough  
23 period of time that's reasonable to allow for  
24 identification and even maybe some modest investigation  
25 link, if you can call it, saying that's the person in the



1 ID; that's an investigation. How far does that go is a  
2 legitimate question to ask for any attorney. The question  
3 for us is, is that a mixed question or not? Or is there -  
4 - - and what objective standard would we apply to determine  
5 when it is, and when it isn't?

6 MS. EPSTEIN: Well, I think, with all the legal  
7 rules and tests that I've seen, there's a certain vagueness  
8 involved. And I think saying that retention of an ident -  
9 - -

10 JUDGE FAHEY: What your test would be?

11 MS. EPSTEIN: My test would be retention of  
12 identification longer than necessary to ascertain the  
13 person's identity. By looking at them and checking their  
14 name, is too long.

15 JUDGE FAHEY: I see.

16 MS. EPSTEIN: I think that once you're doing  
17 that, the person - - - as long as that officer - - - even  
18 if, you know, really - - -

19 JUDGE RIVERA: But how is the officer here going  
20 to be able to confirm that Brown - - - sorry - - - that Mr.  
21 Hill - - -

22 MS. EPSTEIN: Mr. Hill.

23 JUDGE RIVERA: - - - excuse me; excuse me. A  
24 lot of Browns, apparently. That Mr. Hill indeed knew  
25 someone in the building, because that's what he was



1           arguing. His grandmother lives there; he has a key, right,  
2           whatever. His girlfriend is there. How - - - how else to  
3           do that without - - - if this is a picture ID, show the  
4           picture and not just the name - - -

5                       MS. EPSTEIN: Well - - -

6                       JUDGE RIVERA: He could be using someone else's  
7           name.

8                       MS. EPSTEIN: Well, the great thing is we live in  
9           the age of the cell phone. And I think just about every  
10          police officer has a cell phone, and if they don't, they -  
11          - - they probably should be given them officially. And all  
12          you have to do is take a picture of that ID, take it on  
13          your phone, and go up and ask the person. But the problem  
14          with what happened here is, while they conducted their  
15          investigation, he had to wait. He did not feel he could  
16          leave. And as long as he's being made to - - -

17                      JUDGE STEIN: Did he say - - - ever say that?  
18          Did he ever - - - did - - - in - - - in any of the  
19          hearings, in a - - - any of the - - - the legal  
20          proceedings, has he ever said that he did not feel that he  
21          - - - he was able to leave?

22                      MS. EPSTEIN: He wasn't asked, so I - - - I - - -  
23          I think that's - - - that's one thing. But we're saying  
24          the hypothetical reasonable person, because it's not a  
25          subjective test.



1 JUDGE RIVERA: Well, if - - - if - - -

2 MS. EPSTEIN: It's based on a reasonable person -  
3 - -

4 JUDGE RIVERA: If he felt he could, he would have  
5 gone up the steps, right?

6 MS. EPSTEIN: Well - - -

7 JUDGE RIVERA: Wouldn't he - - - wouldn't he have  
8 gone with the officer, showed them the apartment?

9 MS. EPSTEIN: He probably would have said give me  
10 I - - - my ID back; you can't take it upstairs; I'm leaving  
11 now.

12 JUDGE RIVERA: Right, or - - -

13 MS. EPSTEIN: But - - -

14 JUDGE RIVERA: Or he could have gone with them.

15 MS. EPSTEIN: Or he could have gone with them.

16 JUDGE RIVERA: If he really thought he could have  
17 left.

18 MS. EPSTEIN: But you know what? It - - - the -  
19 - - the question of - - - the question that we're presented  
20 with is whether holding onto this identification, and in  
21 this case, if you want to make it this narrow, removing it  
22 from the scene constituted a seizure. He wasn't even in  
23 the position to say, give it back to me, because it wasn't  
24 even there anymore. So he - - - it was just this, well,  
25 when is my ID coming back? I mean, if you want to make it



1           that narrow.

2                         But what about a situation where you're standing  
3           there with a few officers, and, okay, I got your ID; I'm  
4           going to go back to the car and I'm going to run a check on  
5           this. He's waiting there. As long as you're holding it in  
6           that car, he has to wait. That's - - - that's the reality  
7           of modern life. That's the - - - that's - - - that's how  
8           important ID is in modern life.

9                         And nobody wants to relinquish their  
10          identification. Everybody's worried about identity theft.  
11          You just going to leave your identification floating around  
12          somewhere? You know, it's - - - the - - - the  
13          identification was just for a level one inquiry. And what  
14          really happened is, he was coerced into waiting there, by  
15          them holding on to it, and taking it away from him.

16                         JUDGE WILSON: If he reviews - - - if the - - -  
17          if the officer radios in the name to see if there's an  
18          outstanding warrant, that's a seizure?

19                         MS. EPSTEIN: No, I think if he's holding onto  
20          the ID the whole time, he's doing it. Take a picture with  
21          your cell phone, go back to the car, and - - -

22                         JUDGE WILSON: Well, if he's - - - if he's - - -  
23          if he takes the ID, holds onto the ID, and has a handheld  
24          radio, let's say, and radios that in. That's a seizure of  
25          the person?



1 MS. EPSTEIN: Well, he - - - it's - - - it's - -  
2 - it's sort of interesting, because isn't he doing an  
3 investigation at that perp - - - at that point?

4 JUDGE WILSON: That's why I was asking about the  
5 duration or the purpose.

6 MS. EPSTEIN: Well, in that sense, I think once  
7 you've gone beyond ascertaining that's - - - that's Mr.  
8 Nicholas Hill; this is exactly what he looks like. Once  
9 you start doing other things, give him back the ID, and  
10 then do your investigation, because as long as you're  
11 holding that card, he can't leave. And you're now  
12 extending it into an investigation that may grow even  
13 longer. He doesn't have the freedom to leave, and that's  
14 all - - - he is supposed to have the freedom to leave at a  
15 level one, and he's just being compelled to stay there.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 MS. EPSTEIN: Thank you.

18 CHIEF JUDGE DIFIORE: Counsel?

19 MR. HUGHES: May it please the court, John Hughes  
20 for the People. Good afternoon, Your Honors.

21 JUDGE STEIN: Counsel, why aren't - - - why isn't  
22 - - - why aren't we talking about level two here?

23 MR. HUGHES: Well, Your Honor, again, so even in  
24 De Bour itself, and - - - and People v. Hollman, as well,  
25 this court held that police can ask for identification as a



1 part of a level one inquiry. And of course, here - - -

2 JUDGE STEIN: It seems to me this went a bit  
3 beyond that. I mean, it - - - clearly, they were doing  
4 some investigation into criminality and - - - and you know,  
5 so - - -

6 MR. HUGHES: Well, Your Honor, I'd say in the  
7 first place, defendant's claims have always only been  
8 focused on level three, and whether or not this constituted  
9 seizure or not. But here, I would note too, that the  
10 police - - - they never asked the kind of accusatory, you  
11 know, threatening questions that normally implicate a level  
12 two analysis under De Bour. Again, defense claim here,  
13 too, is also - - - has also always been based on their  
14 level three.

15 But I - - - I'll also argue - - - I'll also note  
16 too, you know, the Pe - - - the prosecutor did argue that,  
17 you know, when the defendant is giving his answers to the  
18 officers' requests for information under level one, she did  
19 argue that those answers did elevate the level of  
20 suspicion, and then justified the officers going and  
21 verifying the defendant's claim with the identification.

22 Now, again, she's - - - she's making these  
23 arguments in - - - in a more general sort of - - - under  
24 the general De Bour analysis of, you know, was this  
25 reasonable, whether an action is justified and everything.



1 But I think the fact that - - -

2 JUDGE STEIN: Well, it seems that - - - that they  
3 were - - - they were - - - they were asking, you know - - -  
4 they were trying to gain explanatory information, and you  
5 know, that it was more than just your name, address, and,  
6 you know, what are you doing here.

7 MR. HUGHES: Well, respectfully, Your Honor, I  
8 think under People v. Hollman and De Bour, as well, you  
9 know, this court has made that the police can ask what  
10 someone's reason for being in an area, you know, where are  
11 they going, what's their destination, and then also asking  
12 for ID. And this is all completely proper under level one  
13 of De Bour.

14 JUDGE STEIN: Well, if we disagree with you, do  
15 we have to then send it back for a determination because  
16 that determination was never made as to whether the  
17 requisite level of suspicion was present for a level two,  
18 right?

19 MR. HUGHES: Well, Your Honor, again, in the  
20 first place, I would say, you know, defendant never argued  
21 that, you know, at the point when Ofc. Eng is taken the  
22 identification upstairs, you know, defendant never argued  
23 that if that did require founded suspicion, that the police  
24 didn't have it. So that's the first thing I would say.

25 But again, also, I think - - - I think the



1 prosecutor - - - I think this court could affirm on that  
2 basis, because the prosecutor did argue that, you know, in  
3 response to these level one questions, defendant answered -  
4 - - defendant's answers elevated the amount of suspicion.  
5 And she does say it at one point. And so I think, you  
6 know, obviously, if you're at level one, and a level of  
7 suspicion is elevated, where - - - where do you go from  
8 there? You go to level two.

9 But also, more generally as well, I think all the  
10 court's questions thus far really illustrate how much of a  
11 very fact-specific issue this is. We're not disputing that  
12 the retention of identification is a factor that the  
13 hearing court can consider in these kinds of cases.

14 JUDGE WILSON: And you're not disputing the fact  
15 that Mr. Hill was told "stand right here"?

16 MR. HUGHES: Well, Your Honor, I - - - I think if  
17 you look at the - - - all of the record around this - - -  
18 the issue of - - - about him standing by the gate, even  
19 defendant in his own testimony, when he describes it, he  
20 says, oh, and you know, I got up from where I was sitting,  
21 and I was just - - - I was standing next to a gate when I'm  
22 talking to the officers. You know, even defendant himself  
23 didn't characterize this as, you know, him being ordered to  
24 stand by the gate.

25 JUDGE WILSON: Well - - -



1 MR. HUGHES: Also - - -

2 JUDGE WILSON: But to stay - - - to stay in  
3 place. Not necessarily to move to the gate, but I think  
4 the officer said, I told him to stay there.

5 MR. HUGHES: With respect to Your Honor, I - - -I  
6 don't think that was quite how they phrased it. You know,  
7 at one point, Ofc. Aguilar (ph.), I believe, said, yeah, I  
8 - - - I believe we, you know - - - we - - - you brought him  
9 over to the gate. Said something along those lines.  
10 Again, the testimony was somewhat equivocal, but Ofc.  
11 Aguilar also specifically testified at this point,  
12 defendant could do whatever he wanted, and was free was  
13 leave. And - - - and so, and given that both Ofc. Aguilar  
14 and even defendant in his own testimony, you know, they  
15 aren't really characterizing this as, you know, him being  
16 ordered.

17 But also, you know, with all these individ - - -

18 JUDGE RIVERA: It sounds like that would have  
19 escalated a little suspicion if he actually tried to leave  
20 at that point. I'm - - - I'm not sure I'm understanding  
21 that part of your argument, but let me ask you something  
22 else. Let's say he did leave.

23 MR. HUGHES: Yes.

24 JUDGE RIVERA: What - - - what information did he  
25 have, so that he would know how to get his - - - his



1 identification? Get it back.

2 MR. HUGHES: Well - - -

3 JUDGE RIVERA: You know, he's left, an officer  
4 has it, and an officer has left with it. What - - - how  
5 would get that back?

6 MR. HUGHES: Well, Your Honor - - -

7 JUDGE RIVERA: What would he have to do?

8 MR. HUGHES: I think he'd go to the local  
9 precinct, for instance, and say, oh, hey, you know, I was  
10 in this this encounter, but I had to leave; do they have my  
11 identification? Can I get that back?

12 JUDGE FAHEY: Isn't there an air of unreality to  
13 - - - to - - - to these arguments, sort of? I mean,  
14 nobody's going to go and get their - - - if you stop a kid  
15 in - - - in - - - in front of a housing project in New  
16 York, and you take his license away from him or some form  
17 of ID, and then he takes off on you. He's not going to go  
18 to the police station to pick it up later. That - - -  
19 there's just kind of an air of unreality that the law  
20 engages in here too, and that may be why sometimes we're  
21 forced to rely on a mixed question of law and fact, because  
22 the practical realities are somewhat different.

23 It - - - what I'm wondering about is, they took  
24 the ID his identification. Now - - - but it seems that the  
25 ID was then used to confirm his reason for being on the



1 property. Would you say that that's an accurate rendition  
2 of the facts?

3 MR. HUGHES: Yes, yes, when Ofc. Eng takes the ID  
4 upstairs, it's to verify his explanation for why he's  
5 there.

6 JUDGE FAHEY: So when he takes the ID, does that  
7 cross over then into that line of investigatory/we're-  
8 detaining-you?

9 MR. HUGHES: No, Your Honor.

10 JUDGE FAHEY: And - - - and why not?

11 MR. HUGHES: Well, because he can still - - - he  
12 can still walk away at any point, if he chooses to do so.

13 JUDGE FAHEY: That's where you're entering into  
14 an air of unreality for me. Is - - - isn't a more  
15 realistic response is that part of identifying him is  
16 seeing if what he says is true? Was the reason I'm here is  
17 I'm going to visit someone. They went to 11-B, and the  
18 person might have lived in 11-A, whatever. You - - - you  
19 see what I'm saying?

20 MR. HUGHES: In what sense, Your Honor?

21 JUDGE FAHEY: Well, what I want to know is, is it  
22 still within the identification realm, or is it moved into  
23 the investigatory realm? That's what I want to know.

24 MR. HUGHES: Well, at this point, certainly when  
25 - - - when they're taking ID upstairs, it is not just to



1 verify, you know, who this person is. It is - - - it is  
2 pretty clearly to verify whether or not he's actually a  
3 guest here, or whether or not he's trespassing.

4 JUDGE FAHEY: But does that level - - - does that  
5 change the level of the De Bour analysis then?

6 MR. HUGHES: Oh, not necessarily, Your Honor.

7 JUDGE FAHEY: Why - - - why not?

8 MR. HUGHES: Well, it - - -

9 JUDGE FAHEY: Was that acting on a founded  
10 suspicion?

11 MR. HUGHES: Well - - - well, in this case, Your  
12 Honor, again, if it's - - - if it's possible to request ID  
13 as part of a level one, I think that certainly implies - -  
14 -

15 JUDGE FAHEY: You're totally right. We - - - we  
16 all agree with you on that. Okay. But to the next level,  
17 which is Judge - - - what Judge Stein's point was. Isn't  
18 this - - - is - - - aren't we really moving into the realm  
19 of founded suspicion here?

20 MR. HUGHES: Well, again, Your Honor, just  
21 because level two so often in - - - involves these more  
22 accusatory questions - - -

23 JUDGE FAHEY: Um-hum.

24 MR. HUGHES: - - - that you really didn't have  
25 anything like that here. And again, as - - - and as the

1 Appellate Division says in - - - pointed out below, it's  
2 clear from context what's going on at every point. It's -  
3 - - it's clear - - - you know, it's clear to all of the  
4 police and defendant what they're doing with this  
5 identification, and still, you know, defendant isn't  
6 objecting to this - - -

7 JUDGE WILSON: They're trying - - - they're  
8 trying to determine whether he's a trespasser or invitee,  
9 right?

10 MR. HUGHES: Yes, that's why the ID is being  
11 brought upstairs.

12 JUDGE WILSON: Right.

13 MR. HUGHES: Yes, to very quickly verify whether  
14 or not he's actually a - - - he's actually a - - - is he  
15 trespassing or not.

16 JUDGE GARCIA: Counsel, could you speak to the  
17 suppression issue? I know you make that point in your  
18 brief. So let's say this is an improper seizure. And then  
19 later they have probable cause to arrest. What's the  
20 effect on the drugs that he has on him in terms of the  
21 seizure - - - in terms of suppression? I'm sorry.

22 MR. HUGHES: Absolutely, Your Honor. So here, it  
23 - - - just the mere fact the defendant may be waiting  
24 outside in the interim, that outside - - - that doesn't  
25 change the fact that Ofc. Eng gets upstairs and discovers



1 that, you know, defendant - - -

2 JUDGE GARCIA: And let's say that's an improper  
3 seizure, does that change the facts? Assume that for now.  
4 It's improper seizure. They go up; they do this  
5 independent investigation. They get probable cause to  
6 arrest; they come down; they arrest.

7 MR. HUGHES: Well, the officers who were standing  
8 outside with defendant in the interim, you know, just while  
9 he was standing out there, they don't really produce any  
10 other incriminating evidence.

11 JUDGE GARCIA: Right, no statement. There's  
12 nothing like - - -

13 MR. HUGHES: Right, there's no other statement.

14 JUDGE GARCIA: Okay.

15 MR. HUGHES: So they don't get any other  
16 incriminating evidence from just the mere fact that he's  
17 sitting there and waiting outside.

18 And also, more broadly, I think it's important to  
19 note, too, that the police conduct here was very  
20 reasonable. And that's really the crucial factor in any De  
21 Bour analysis. Because here, you know, based on all of the  
22 police's initial observations, and based on defendant's  
23 react - - - answers to these questions under level one of  
24 De Bour, you know, the police - - - you know, I - - - I  
25 think the police would have been justified in seizing him



1 immediate - - - immediately, but they didn't.

2 They didn't frisk him. They didn't jump to  
3 conclusions. They didn't immediately arrest him. Instead,  
4 they took this minimally intrusive step of asking for  
5 identification. Defendant agreed to give it to them, and  
6 then they took it upstairs very briefly, just to verify his  
7 reason for being there.

8 So this is, you know - - - this is a really a  
9 case where the police are acting exactly how we would want  
10 them to do.

11 JUDGE RIVERA: But let - - - let me ask - - - and  
12 I don't remember the record, so I'm asking this question -  
13 - -

14 MR. HUGHES: Sure.

15 MR. HUGHES: - - - of you in - - - in that light.  
16 When they ask for the ID, is it obvious that they're going  
17 to walk away with it?

18 MR. HUGHES: I - - - I think at the very least -  
19 - -

20 JUDGE RIVERA: Is that his understanding? Have  
21 they communicated to him, we want because we're going to go  
22 and check?

23 MR. HUGHES: I think perhaps when they first re -  
24 - - request it, it might be unclear, but I think it very  
25 quickly becomes apparent why - - - why he's doing that.



1 JUDGE RIVERA: But it's after he's turned it  
2 over, correct?

3 MR. HUGHES: Well, the police have been asking  
4 him about, you know, oh, are you - - - are you visiting  
5 someone here?

6 JUDGE RIVERA: Right.

7 MS. EPSTEIN: And then - - - and then - - - and  
8 then soon after that they do take it upstairs. So and  
9 again, the police may have - - - not have been, like, very  
10 explicit with that, but this Appellate Division recognized,  
11 based on the surrounding circumstances, I think any  
12 reasonable person would understand exactly what was going  
13 on.

14 JUDGE RIVERA: That when I - - - when I - - -  
15 when they stop me and say, what are you doing here? And  
16 there's more conversation, and I turn over my ID, that - -  
17 - that he understood that or a reasonable person under  
18 those circumstances would understand that the police are  
19 now going to take this ID away from that scene, for who  
20 knows how long, to go into the building. Do you think  
21 that's what he understood?

22 MR. HUGHES: Well, at - - -

23 JUDGE RIVERA: Or someone would understand that?

24 MR. HUGHES: At - - - at the initial request for  
25 identification - - -



1 JUDGE RIVERA: Yeah.

2 MR. HUGHES: - - - that - - - that might not have  
3 been entirely clear right away, but - - -

4 JUDGE RIVERA: But that's the point, right? That  
5 - - - that even - - - even if - - - if we go with your  
6 suggestion here, that it's voluntarily turned over, which  
7 it is, it's for that purpose. It may not necessarily be  
8 for every other purpose.

9 MR. HUGHES: Oh, again, but you know, defendant,  
10 like - - - defendant ne - - - even in his own testimony,  
11 you know, he - - - he never, you know - - - he never  
12 claimed that them taking it upstairs, because of that, he  
13 felt like he couldn't leave, you know, in the first place.

14 But also, when the ID is being taken upstairs, I  
15 think it is readily apparent what's going on. And again,  
16 at that point, he doesn't object, and he doesn't say, oh,  
17 wait, actually, I need to go; can I please have my ID back.  
18 And - - - and - - - and just - - - and just broadly  
19 speaking as well, even though, if someone's being  
20 interviewed in a police precinct, for instance - - -

21 JUDGE RIVERA: Did he need to do all those  
22 things? What if he's - - - what if he's told, stay up  
23 against the fence, and he just - - - he doesn't say  
24 anything. He's afraid to say anything.

25 MR. HUGHES: Well, again, Your Honor, you know,



1 the whole point of level one and level two under De Bour,  
2 is that, you know, just - - - you know, of course, there's  
3 always some intimidation inherent in any police encounter.  
4 But you know, level one and - - - level one and two of De  
5 Bour exist, so that - - - so that under the assumption of a  
6 reasonable person, you know, can say yes or no to various  
7 police requests. And that they can agree or not agree to  
8 do certain things.

9 And so you know, here - - - you know, even if,  
10 you know, because of social pressure or some other reason  
11 someone, you know, might agree to whatever the police are  
12 doing, that doesn't necessarily mean that a reasonable  
13 person wouldn't have felt like they couldn't leave if they  
14 chose to do so.

15 I see that my time is up, and thank you very  
16 much.

17 CHIEF JUDGE DIFIORE: Thank you, Mr. Hughes.

18 Ms. Epstein?

19 MS. EPSTEIN: You know, I think it - - - maybe it  
20 would be helpful to think about this outside the public  
21 housing context. Let's say, you know, one of you is  
22 walking down the street, and it turns out unbeknownst to  
23 you, there's been a burglary in the building you're just  
24 happening to pass by, as somebody described wearing a black  
25 robe.



1           So the police come up to you and say, excuse me,  
2           what's your name? Oh, okay. May I see some ID? Okay,  
3           thanks, okay. Joe, go upstairs and see if what they have  
4           to say about this. Now you're standing there, okay. How  
5           long are you standing there waiting - - - are you going to  
6           leave? You - - - it's just you. It's not a person in a  
7           housing project.

8           This is a very basic question. It's about police  
9           seizing somebody by taking their property, a property that  
10          has some significance, and retaining it, without really  
11          forcing the person to say, I want that back.

12          JUDGE WILSON: In that circumstance, I'd  
13          definitely hand over my judicial ID and not my library  
14          card.

15          MS. EPSTEIN: Okay. And then you'd be okay. But  
16          you know, it's - - - it's - - - it's troubling, you know.  
17          It's one thing when you look at this in the house - - - in  
18          the housing project context, but when you look at - - -  
19          this could happen to anybody at any time. This could  
20          happen with your driver's license. And really nobody is  
21          going - - - nobody - - - anybody you ask on the street, is  
22          going to say, oh, yeah, I have no problem if they took my  
23          driver's license; I - - - I'd leave. Who needs that?

24          You're not going to leave. You're going to stay  
25          there until you get your license back. And you might be



1           intimidated into saying, can I please have my license back  
2           now? It's - - - it's a tough question to ask. And it's -  
3           - - we - - - we have to look at it beyond just this  
4           context, because it can occur in a variety of contexts and  
5           - - -

6                           CHIEF JUDGE DIFIORE: Thank you, Ms. Epstein.

7                           MS. EPSTEIN: You're welcome. Thank you very  
8           much.

9                           (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 The People of the State of New York v. Nicholas Hill, No. 27 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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