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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 121

JERRY WATKINS,

Appellant.

20 Eagle Street
Albany, New York
November 20, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: People v. Watkins.

2 MS. YOON: Good afternoon, Your Honors. May it
3 please the court. Jane Yoon for Jerry Watkins. May I
4 reserve four minutes for rebuttal?

5 CHIEF JUDGE WILSON: Yes.

6 MS. YOON: Where Mr. Watkins had already
7 surrendered to a police officer, was seated in the snow,
8 with his hands empty by the time Ofc. Santiago caught up to
9 him, it was unreasonable for Ofc. Santiago at that time to
10 then yell at Mr. Watkins to roll over, handcuff him behind
11 his back - - -

12 JUDGE TROUTMAN: What about the circumstances
13 that took place prior to the actual encounter of the
14 defendant, hearing of shots?

15 MS. YOON: Well, that was appropriate to consider
16 for purposes of whether the pursuit was lawful, and we're
17 not contesting that because it's our - - - we understand
18 that's outside of the scope of this court's review. But
19 that does not rise to the level of probable cause. If it
20 did, the suppression court as well as the Appellate
21 Division, I believe, would have said so. So under these
22 circumstances, I think everyone agrees that there wasn't
23 enough probable cause, and that the probable cause never
24 happened until the officers recovered the gun.

25 JUDGE GARCIA: But your argument in the

1 suppression court was that they lacked probable cause or
2 reasonable suspicion to stop. That's the language in your
3 motion. So it seemed that argument was aimed at the
4 lawfulness of the stop, not the level of the stop.

5 This seems to be a different argument you're
6 making?

7 MS. YOON: Well, the motion papers actually
8 articulated that defendant was challenging that the police
9 did not have probable cause for the arrest or reasonable
10 suspicion for the - - - the - - - the stop and seizure - -
11 - stop and search, which would be the level 3.

12 In addition to which, defense counsel set forth
13 in his motion - - -

14 JUDGE GARCIA: So you're conceding, or you're not
15 contesting, as I understand it, that they had enough for a
16 level 3 stop, a Terry stop?

17 MS. YOON: We did in the lower court. We
18 understand that there is a reading of the facts of this
19 record that would support the suppression court's finding
20 of that.

21 JUDGE GARCIA: And I thought you also said it
22 wasn't preserved in your brief here, but I might have that
23 wrong. So you're saying it in this stage, that they
24 unlawfully arrested him at the time he was stopped, rather
25 than a level 3 Terry stop?

1 MS. YOON: Yes. And we also argue that in the
2 trial court. Again, I would go back to what - - - this is
3 preserved for two reasons. I understand the court is
4 looking to see, first, if this argument has been preserved.
5 And in addition to the motions, I would remind the court
6 that the suppression court actually did decide the issue.

7 But going back to the motions, defense counsel
8 set forth - - - you know, we're challenging - - -

9 JUDGE GARCIA: I read, though, that the
10 suppression court motion is saying once they found the gun,
11 they had probable cause to arrest, right?

12 MS. YOON: That's correct.

13 JUDGE GARCIA: So if the Terry stop is lawful and
14 the pat-down on the Terry stop is lawful - - - and I
15 understand you're not challenging that - - - I don't see
16 how that preserves this issue?

17 MS. YOON: Well, I would like to address two
18 parts of that because I think there's actually two
19 questions in that, and I think - - - when the suppression
20 court ruled that there was probable cause once the gun was
21 found, the suppression court necessarily ruled that the gun
22 was found pursuant to some sort of proper - - -

23 JUDGE GARCIA: Stop, right.

24 MS. YOON: - - - level 3 stop. The problem with
25 that is the record doesn't support that conclusion. We

1 don't actually know if this was a Terry stop or a frisk or
2 some other reason that - - -

3 JUDGE GARCIA: But I thought you weren't arguing
4 - - -

5 MS. YOON: - - - the gun was discovered.

6 JUDGE GARCIA: - - - that here? I - - - I
7 thought you were arguing that he was unlawfully arrested
8 when they stopped him?

9 MS. YOON: That's correct, Your Honor. And
10 that's because the court's ruling that the probable cause
11 did not occur until after the arrest, necessarily means
12 that the court found there was no arrest. In which case -
13 - -

14 JUDGE GARCIA: But you never challenged it on
15 that ground. You weren't challenging that the stop was an
16 arrest at that time. You were arguing they had no lawful
17 reason, either reasonable suspicion justifying a Terry stop
18 or probable cause justifying an arrest. The court decided
19 that, saying there's reasonable suspicion to justify a
20 Terry stop, got the gun, then they could arrest him. But I
21 don't see anywhere in the record where you made an argument
22 about the circumstances of his custody, initially, being an
23 arrest. There's no probing on that guns were drawn in
24 here. None of that is in - - - in the suppression
25 argument.

1 MS. YOON: Well, I would disagree that it's not
2 in the suppression argument. It is set forth in defense
3 counsel's motion. I understand that at the hearing there
4 was a different focus at the hearing. But in the motions,
5 defense counsel said that Mr. Watkins did not match the
6 general description that came over the 911 call, that Mr.
7 Watkins was then chased, after a short chase was stopped at
8 gunpoint. And that the gun was not discovered until he was
9 seated at - - - on the ground. So I think there he does
10 challenge that.

11 I understand the focus of the hearing was
12 slightly different, but that doesn't mean that the - - -
13 the argument wasn't made. The people - - - defense counsel
14 was kind of constrained by the people's proof at the
15 hearing. But the people were also on notice that defense
16 counsel was challenging whether or not there was probable
17 cause for the arrest.

18 So the people then had an initial burden to
19 establish the legality of each step.

20 JUDGE GARCIA: But again, your challenge seems to
21 me to be a challenge that there was neither probable cause
22 nor reasonable suspicion to make a stop, right? That seems
23 a clear reading of your papers. Which is the alternative,
24 right?

25 So once they showed there was a reasonable

1 suspicion justifying a stop - - - a frisk, which we've said
2 - - - then they've answered that challenge.

3 MS. YOON: Well, I - - -

4 JUDGE GARCIA: There never was any articulation
5 of a theory that the circumstances of the stop itself was
6 an arrest.

7 MS. YOON: Well, I would disagree with that in
8 the fact that defense counsel, I understand, focused his
9 cross-examination and his questioning based on the proof
10 the people provided. But defense counsel made the argument
11 initially. And the defense counsel's burden was never
12 triggered to establish the ultimate burden of persuasion
13 because the people never established that beyond the - - -
14 beyond the level 3 stop, that the level 4 stop, if there
15 was one, was appropriate.

16 Because the people at the time they were
17 presenting their proof at hearing - - -

18 JUDGE GARCIA: Well, they established that once
19 they found the gun, they could arrest your client.

20 MS. YOON: But we don't know how the gun was
21 found. The people chose not to produce Ofc. Thomas knowing
22 that - - -

23 JUDGE GARCIA: But that's not an arrest question.
24 That, to me, seems like your argument you made in the
25 Appellate Division that this gun - - - they didn't prove

1 this gun was found as a result of a Terry stop. That what
2 - - - they didn't show it came out of his pocket, they
3 didn't show it came out of the hoodie. That argument which
4 I take your brief to have abandoned at this point as
5 unpreserved, is different than, when you stopped my client
6 he was under arrest.

7 MS. YOON: Well, he was under arrest at that
8 point. Because based on the proof that was provided at the
9 hearing, the undisputed proof including the body-worn
10 camera of Ofc. Santiago, what we see is Mr. Watkins seated
11 on the ground with his hands displayed to the police. He's
12 not running. They don't - - - there's no testimony or
13 evidence that he had thrown anything, that there was any
14 bulge. And to the extent that there may have been factors
15 that the court considered as to whether or not this was an
16 appropriate level 3 pursuit, it doesn't rise to the level
17 of probable cause at that point, for Ofc. Santiago to then
18 say, roll over - - - turn him over on his stomach so that
19 he's facedown in the snow, handcuffing him. That was not
20 reasonable under the circumstances of this case. And I - -
21 - I don't know how else you're not challenging that that
22 was not an arrest? That was a - - - you know, on the facts
23 of this case, as a matter of law, that was an arrest.
24 Which is not supported - - - which - - - which means that
25 the court's decision to find that the arrest didn't occur

1 until they found the gun is not supported. Because all
2 that activity happened before the gun was discovered.

3 A reasonable person in Mr. Watkins' circumstances
4 at that point would not feel free to leave the situation.
5 So the court's decision preserved this issue - - -
6 expressly decided this issue, because the only - - - the
7 only interpretation of the court's decision, which decided
8 that probable cause comes after the gun was found, was that
9 this wasn't an arrest. But Mr. Watkins challenged that his
10 arrest was done without probable cause.

11 So you can't have the finding of the gun to
12 support the arrest.

13 JUDGE RIVERA: Except, if I'm understanding this
14 line of questioning, it's whether or not the argument was
15 that they could even look for the gun?

16 MS. YOON: I'm sorry?

17 JUDGE RIVERA: Whether or not there was a - - - a
18 legal basis to look for the gun?

19 MS. YOON: We don't know that on this record.
20 You know, we know that they had some information to justify
21 the pursuit, as found by the Appellate Division. As - - -
22 as this court knows, we - - - we don't agree with that
23 decision, but we understand it's outside of the scope of
24 this court's review.

25 But by the time Ofc. Santiago reached Mr. Watkins

1 he was already in a position of submission. So Ofc.
2 Santiago's actions at that point became unreasonable.

3 JUDGE GARCIA: So just so I'm understanding this
4 argument. It is that at the time he's restrained after the
5 chase and he's sitting down, that is an arrest, right at
6 that point?

7 MS. YOON: Yes, Your Honor.

8 JUDGE GARCIA: Okay.

9 CHIEF JUDGE WILSON: And at that point, you had -
10 - - the police had no basis to look for a gun?

11 MS. YOON: At that point, no. Because Mr.
12 Watkins had already submitted to Ofc. Thomas. We don't
13 know what Ofc. Thomas saw because he didn't testify. The
14 prosecution chose not to call him, even though knowing that
15 his body-worn camera was unavailable. All we know at that
16 point is that Mr. Watkins had already given up in
17 submission.

18 JUDGE GARCIA: But - - -

19 MS. YOON: There was nothing in his hands.
20 There's no testimony that there was a bulge in his pocket,
21 that he disposed of anything during the very short - - -

22 JUDGE SINGAS: Well, there is testimony that when
23 he was running he was holding onto - - - in his sweatshirt,
24 he was holding onto something on his side, as he was
25 running, right?

1 MS. YOON: Correct. But that was not - - - that
2 doesn't rise to the level of probable cause. Because if it
3 rose to the level of - - -

4 JUDGE SINGAS: But it goes to the reasonableness
5 of what they could do once he stopped, doesn't it?

6 MS. YOON: I would disagree with that. Because
7 if it was, then I think the court would have found there
8 was probable cause to then arrest him - - - for Ofc.
9 Santiago to then arrest him at the time he approaches him.

10 JUDGE GARCIA: But we do have cases that say when
11 you make a Terry stop you can restrain, especially if you
12 think they have a gun, there's information giving you that
13 reasonable suspicion, then you can do a pat-down search in
14 the area that he's holding because you think there might be
15 a gun there, right?

16 MS. YOON: But there's no evidence that there was
17 a pat-down search. There was no evidence - - - we - - - we
18 don't know how the gun was found. We just know that Ofc.
19 Santiago handcuffed Mr. Watkins after he ordered him to
20 roll over on his stomach and walked away.

21 JUDGE GARCIA: Your argument now, that doesn't
22 matter. Because I think your argument now is that as soon
23 as they approach him and restrain him, he's arrested at
24 that point and it's unlawful.

25 MS. YOON: When Ofc. Santiago catches up to them,

1 yes, Your Honor. Thank you.

2 CHIEF JUDGE WILSON: Thank you.

3 MR. MCCARTHY: Good afternoon. Marty McCarthy
4 for the people.

5 This argument was not preserved. You can start
6 with the motion papers. The motion papers were very
7 barebones, and they refer to probable cause. So when they
8 litigate the hearing, the focus is on the pursuit. The
9 initial approach and the pursuit.

10 CHIEF JUDGE WILSON: Well, let me ask you about
11 the motion papers. Paragraph 37 in particular says, "Under
12 the circumstances the police lacked either probable cause
13 to arrest the defendant or reasonable suspicion to believe
14 the defendant was engaged in or about to engage in criminal
15 activity."

16 MR. MCCARTHY: Yes.

17 CHIEF JUDGE WILSON: That looks like preservation
18 of the question of whether there was probable cause to
19 arrest?

20 MR. MCCARTHY: If you - - - if - - - if you look
21 at what he said at the close of the hearing, though. He
22 says at the close of the hearing that he is focused on the
23 encounter at its inception.

24 CHIEF JUDGE WILSON: Well, there - - - there's
25 language in De Bour that suggests that what you say at the

1 oral hearing doesn't vitiate - - - unless you expressly
2 disclaim it, I think - - - it - - - an argument that you
3 preserved in your papers?

4 MR. MCCARTHY: I'm sorry. Can you - - -

5 CHIEF JUDGE WILSON: Sure. I mean, I - - - look
6 - - - you can take a look at De Bour. I think De Bour has
7 some paragraph in it that says, somebody made an argument
8 in the motion papers. They didn't make that argument at
9 the - - - orally. But that doesn't mean the issue is not
10 preserved. Now, it's a different thing if they say, I
11 expressly waive it, that - - - that's not addressed in that
12 case. But it seems to me there's - - - you know, the fact
13 that you didn't raise it orally, but if you did raise it in
14 the papers, I think De Bour says that's okay?

15 MR. MCCARTHY: So you - - - you have to start
16 with preservation.

17 CHIEF JUDGE WILSON: Yeah.

18 MR. MCCARTHY: But then you also have to look at
19 the issue of the fact that the - - - there - - - there's
20 the defendant's burden of persuasion. So - - - so if you
21 want to look at it either as a preservation issue or as the
22 defendant's burden of persuasion. Here, when you talk
23 about the defendant's burden of persuasion, the argument
24 that they're trying to persuade you now that when - - -
25 when they got - - - when they caught up to him and they

1 asked him to - - - they told him to roll over and they
2 handcuffed him, that was an arrest. They never made that
3 argument below. That argument was never made.

4 So when you talk about - - -

5 JUDGE CANNATARO: And that argument's not covered
6 by the language that was just quoted to you, that there was
7 no probable cause for an arrest?

8 MR. MCCARTHY: Because again, we're - - - if you
9 want - - - if you want to say, okay, that's preservation,
10 you still have the burden of - - - you still have the
11 burden of - - -

12 JUDGE CANNATARO: Yes. I agree that there's a -
13 - - there's a logical issue that I think Judge Garcia was
14 alluding to. That once you make the finding that there was
15 reasonable suspicion justifying a De Bour 3 stop - - - a -
16 - - a Terry stop, the - - - the question of whether there
17 was probable cause for an arrest is immaterial, so that - -
18 - you - - - you know, you don't have to go on. But on
19 preservation alone, had you failed at level 3, the court
20 could have then gone on to look at whether there was
21 reasonable - - - probable cause?

22 MR. MCCARTHY: But I would also direct you to
23 some of this court's precedents. So for example, in
24 Miranda, 2016. That was a suppression motion. So the
25 issue was, is whether the proper - - - the - - - the

1 defendant argued, in his motion papers, whether the seizure
2 of property taken from his person should have been
3 suppressed. They litigate the hearing. They don't focus
4 on search incident to arrest. The defendant does not focus
5 on that question. The judge alludes to it in his decision.
6 It goes up to the Appellate Division. The Appellate
7 Division affirms. He comes to this court - - - Court of
8 Appeals. Court of Appeals says that argument is not
9 preserved for us under CPL 470.05 because the defendant did
10 not focus on that at the hearing.

11 So in the - - - the - - - although the judge
12 decided the search incident to arrest, the defendant didn't
13 focus on it. And as a result, it wasn't preserved for the
14 court's review. So the court said it lacked the ability.
15 It lacked the ability under the law and the Constitution to
16 review the question because the defendant didn't litigate
17 the issue at the hearing.

18 They did that again - - - you did that again in
19 Wallace in 2016. You did that again in Passino in 2009.
20 And in 2019 you did it in Britt. Where the issue there was
21 De Bour, as to whether that was a proper level 3 De Bour
22 encounter.

23 They never argued at the trial level that a open
24 container would never justify a level 3 encounter because
25 it's a violation that you can't go to jail for. Never

1 argued that below. But at the Court of Appeals, Court of
2 Appeals - - - you said, sorry, you didn't argue that below,
3 we can't reach it. It's not preserved.

4 So just because you are - - - just because you
5 use a general title, I - - - there was no probable cause.
6 That's not sufficient. Very similar to making a general
7 trial order of dismissal under Gray. You have to
8 articulate the bases.

9 Never articulated this particular basis that
10 they're doing now. They never - - - when - - - when they
11 were prompted to say, okay, what's your argument? Why
12 should I suppress this evidence? He focuses on the stop at
13 its inception. When they bring this case to the - - - the
14 Appellate Division, they focus on the stop at its inception
15 as well.

16 They also raise this second issue, the one that
17 was never argued below. The Appellate Division correctly
18 determined that there was reason, under the circumstances,
19 to believe that there was a gun and that the police
20 officers were justified in chasing this defendant. They
21 then decided the particular circumstances surrounding the
22 search were not preserved because the defendant didn't
23 argue them below. That was not the focus of the hearing.

24 CHIEF JUDGE WILSON: So when he's on the ground
25 handcuffed before they found the gun, is he under arrest?

1 MR. MCCARTHY: I - - - well, he might be, and he
2 might not be. And I'll point your - - - your attention to
3 People v. Allen, where the use of restraint doesn't
4 necessarily dictate whether somebody's under arrest or not.

5 Allen, you had a very similar circumstance where
6 the police had every reason to believe that defendant was
7 armed, and he was in a dark alley at the time. So what
8 they did is they handcuffed him, and then they - - - they
9 conducted a search. So the use of handcuffs alone isn't
10 indicative of whether there's an arrest or not. So I - - -
11 I would point your attention to that.

12 Now, here, what's the - - - what is the proof of
13 whether this defendant may be armed? Well, it wasn't just
14 the 911 calls - - - the two 911 calls they received of
15 gunshots. The - - - these police officers were one block
16 away. They heard the gunshots, right? So much like a
17 firefighter that runs into a burning building, these
18 officers actually do know that what they're doing is
19 they're running into a scenario where there is - - - there
20 - - - there is somebody who may have a gun, right? They
21 did that.

22 They saw this defendant holding something. He
23 was - - - he had his hands in his waistband or his - - -
24 his - - - his pocket. And when he was running, he was
25 holding that waistband area. They had every reason to

1 believe that he was the one with the gun, he was the one
2 that did the shooting. Which is why they were justified to
3 take those protective measures to ensure that he - - -
4 whether he did or didn't have a gun. And it turned out he
5 did.

6 So if there are no other questions, I rest on my
7 brief.

8 CHIEF JUDGE WILSON: Thank you.

9 MS. YOON: I could address the handcuffing
10 question first. Here we have more than just handcuffing,
11 and we don't have the factors that existed in Allen. If we
12 did, the people didn't present that at the hearing. Here
13 we have handcuffing plus gun drawn. So this is more than
14 just Allen. This is more than just Chestnut, which is a
15 gunpoint - - - gunpoint interrogation that they found was
16 appropriate and not an arrest.

17 And I think the delineation - - - because I know
18 that this court, and all criminal defense practitioners,
19 criminal prosecutor practitioners, love De Bour and all the
20 different delineations in - - - in the levels. But we have
21 - - -

22 JUDGE RIVERA: They do?

23 MS. YOON: - - - we still have these levels.

24 JUDGE RIVERA: They do? You sure?

25 MS. YOON: That's my understanding of the



1 precedent. That's my reading, anyway.

2 But we still have these levels. And if probable
3 cause was appropriate for a level 3, then I think we
4 wouldn't be having this question. But we know from De
5 Bour, we know from - - - you know, all the cases, that you
6 need - - - before you arrest someone, you need probable
7 cause.

8 In this case, the - - - the court decided there
9 was no probable cause until the gun was found.

10 JUDGE SINGAS: But in this case, the courts also
11 below didn't make any factual findings concerning the gun
12 drawn or the handcuffs, right?

13 MS. YOON: I would disagree. If the court - - -
14 if this court looks at the court's decision in its factual
15 findings, the court sets out the - - - the factual - - -

16 JUDGE SINGAS: But its decision doesn't mention
17 it in the way that you just did. So does that undermine
18 your preservation argument?

19 MS. YOON: I would say no. I would say that
20 because the court, when they - - - the court sort of set it
21 up as these are my factual findings, these are the legal
22 conclusions. And the court sets out - - -

23 JUDGE SINGAS: This is my decision?

24 MS. YOON: Right. The court sets up - - - you
25 know, he was - - - he was chased. He was - - - he was - -

1 - he - - - he - - - they - - - he doesn't call it an
2 arrest, obviously, but he does say the gun was found and
3 that gave rise to the probable cause. So I - - - I believe
4 the court's express decision is actually that.

5 JUDGE SINGAS: No. I'm talking about the
6 handcuffing and the - - - and Santiago's gun?

7 MS. YOON: He's - - - he says - - - the court
8 said - - - he - - - "Ofc. Santiago chases Mr. Watkins. He
9 comes upon defendant seated on the ground in the driveway."
10 Oh, I'm sorry.

11 JUDGE SINGAS: It's okay. I don't want to ruin
12 your track of thought.

13 JUDGE GARCIA: Counsel, could I - - -

14 MS. YOON: I believe the chronology that the
15 court sets out, though, is that he was - - - he was chased.
16 He was then stopped at gunpoint. I think the court
17 actually does recognize that he was chased and stopped at
18 gunpoint and that their probable cause didn't follow until
19 they found the gun.

20 But we don't know how the gun was found, and
21 that's extremely problematic here because that's a huge
22 piece of whether the police conduct for the encounter was
23 appropriate.

24 JUDGE GARCIA: Yeah, but again, it doesn't seem
25 to go to what you're arguing here. You argued that in the

1 Appellate Division, but I thought you weren't arguing that
2 here. What you're arguing here is, it doesn't matter how
3 they found the gun because they found it once they arrested
4 him, and they didn't have probable cause to arrest him?

5 MS. YOON: That's correct, Your Honor. They
6 didn't have probable cause to arrest him. And Officer - -
7 - it's Ofc. Santiago's conduct that was the arrest. And
8 the court's decision is that it was after Ofc. Santiago's
9 conduct. So I believe that is - - - has been decided by
10 the court. Thank you.

11 CHIEF JUDGE WILSON: Thank you.

12 (Court is adjourned)

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Jerry Watkins, No. 121 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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