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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 125

LESTER Q. JONES,

Appellant.

20 Eagle Street
Albany, New York 12207
May 28, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

MATTHEW L. MAZUR, ESQ.
OFFICE OF THE APPELLATE DEFENDER
Attorneys for Appellant
11 Park Place
Suite 1601
New York, NY 10007

GRACE VEE, ADA
THE NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
One Hogan Place
New York, NY 10013

David Rutt
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Lester Q. Jones.
2 Counselor.

3 MR. MAZUR: Good afternoon. May it please the
4 court, Matthew Mazur for appellant Lester Jones. If I
5 could reserve two minutes for rebuttal, Your Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes. Sure. Go
7 ahead.

8 MR. MAZUR: Your Honors, the lineup
9 identification in this case was obtained by exploitation
10 of an illegal arrest, and the evidence of threats to a
11 prosecution witness were admitted in violation of this
12 court's ninety-year-old precedent in People v. Buzzi.

13 With respect to the lineup identification, the
14 Supreme Court found that the purpose of the illegal arrest
15 was to conduct further investigation into the officer's
16 suspicion that Mr. Jones was the perpetrator.

17 JUDGE SMITH: Grant - - - granted that it was -
18 - - it was illegal and for an improper purpose. Wasn't it
19 a - - - didn't - - - didn't the fact that they happened to
20 have probable cause that the officer didn't know about,
21 doesn't that attenuate the - - - the illegal arrest from
22 the lineup?

23 MR. MAZUR: Well, Your Honor, two things. First
24 after all, they didn't have probable cause and neither did
25 the detective who acted independently of the sergeant.

1 JUDGE SMITH: I guess my point is, at the point
2 where - - - I - - - I get the - - - I lose the names, but
3 Miller is the guy who makes the arrest?

4 MR. MAZUR: Correct.

5 JUDGE SMITH: And some Suczek (ph.) or something
6 like that is the guy who actually had a picture of the
7 defendant on his desk. Once Miller found out what was on
8 Suczek's desk, could he have let the guy go and rearrested
9 him and solve the whole problem?

10 MR. MAZUR: No, Your Honor.

11 JUDGE SMITH: Why not?

12 MR. MAZUR: The reason is because what Detective
13 Suczek had was - - - as what he communicated to Mr. --
14 Sgt. Miller was, I have a picture of a suspect. That does
15 not communicate any facts as to how he developed that
16 suspect. It doesn't communicate a direction to arrest.

17 CHIEF JUDGE LIPPMAN: So there's never probable
18 - - - there's never probable cause here?

19 MR. MAZUR: No, not until after the lineup
20 identification.

21 But I think, Judge Smith, what you're
22 getting at is - - -

23 JUDGE GRAFFEO: Well, how were they going to put
24 him in a lineup if they couldn't have rearrested him for -
25 - -

1 MR. MAZUR: They did not have probable cause to
2 put him in a lineup. What Detective Suczek said he was
3 going to do was show the photograph to the complainant in
4 a photo array. If that had happened, which it didn't, and
5 if the complainant had picked his photograph out, they
6 might have had probable cause.

7 JUDGE RIVERA: What about the witness who
8 originally told him - - - that - - - that calls him up and
9 says, he's here?

10 MR. MAZUR: That witness - - -

11 JUDGE RIVERA: Why isn't that, with the picture,
12 enough?

13 MR. MAZUR: There is no evidence in the record
14 of that witness's basis of knowledge, and the People and
15 both lower courts agree that that communication to Sgt.
16 Miller did not establish probable cause; it was an illegal
17 arrest.

18 JUDGE SMITH: Well, but you did have - - - you
19 did have the witness, who later turned out to be not the
20 world's greatest witness, but you did have the guy, Vega
21 (ph.), who says "Iz did it" or "I saw Iz in the hall".
22 And they check out Iz, and they get - - - and it turns out
23 Iz is your man. How - - - why isn't that probable cause?

24 MR. MAZUR: Well, the problem is that there is
25 no evidence in the record of the reliability of the link

1 between the name "Iz" and my client. There is this
2 anonymous link, the Gang Intelligence Unit, without any
3 evidence of the reliability of that tip. It could - - -
4 it could be - - -

5 JUDGE SMITH: So they just - - - so it could
6 have been a different Iz who just happened to meet the
7 description?

8 MR. MAZUR: The description is about the vaguest
9 description you could imagine: a six-foot-tall black man
10 in Harlem with a large nose in his mid-thirties. It is
11 not the kind of description that could form the basis for
12 probable cause or even get you very far along the way.
13 But more importantly, Your Honor, you can't excise Sgt.
14 Miller from this - - - this case. What happened, Sgt.
15 Miller, for the purpose of conducting an investigation,
16 went to the police station. He made a phone call. He
17 found a photograph. He compared the photograph to the
18 person he had in the cell. He's the active party here.
19 Detective Suczek was a - - - was at home asleep. You
20 can't - - - you cannot take the facts that Det - - - Sgt.
21 Miller obtained - - -

22 JUDGE SMITH: All right. So - - - so let - - -
23 let me make up facts that would be much stronger for the
24 People, but I want her to get the principle. Miller makes
25 an illegal arrest, puts the guy in a cell, then does a

1 little investigation of his own and finds fingerprints
2 that conclusively show that your guy was in that place at
3 that time. Would that be attenuation?

4 MR. MAZUR: No. If Miller, the person who
5 brought him to the police station for the illegal purpose
6 of making his life easier, his investigation easier, is
7 the person who obtained the fingerprints as a result of
8 that arrest, no.

9 JUDGE SMITH: Wait a minute. Why do you - - -
10 why do you say it's as a result of the arrest? He could
11 have obtained the fingerprints without the arrest.

12 MR. MAZUR: I'm not sure what that - - - I - - -

13 JUDGE SMITH: Or maybe my hype - - -

14 MR. MAZUR: Maybe what you were saying is that
15 he - - -

16 JUDGE SMITH: - - - my hypothetical is
17 confusing, but - - - say he makes an illegal arrest, then
18 he does completely independent investigation which does
19 not depend on the arrest, and he gets probable cause.
20 Does that attenuate the - - - the illegal arrest from the
21 lineup?

22 MR. MAZUR: Well, I guess it's - - - it could,
23 Your Honor, I guess, but here - - -

24 JUDGE SMITH: So - - - so then, as I understand
25 it, the issue for us really is whether the - - - whether

1 the Suczek investigation gave - - - independently gave
2 probable cause.

3 MR. MAZUR: I - - - I don't think it is because
4 no matter what the Suczek investigation showed, the
5 information was never communicated to Miller.

6 CHIEF JUDGE LIPPMAN: What's - - - what
7 significance is the conversation? What happened at the
8 conversation between Miller and Suczek?

9 MR. MAZUR: That was Miller's investigation.
10 That was his illegal investigation.

11 CHIEF JUDGE LIPPMAN: So is that totally
12 irrelevant, that conversation late at night?

13 MR. MAZUR: It certainly didn't give Miller
14 probably cause because - - -

15 CHIEF JUDGE LIPPMAN: What did it do for Miller?
16 What - - - what did Suczek tell him that - - - of
17 relevance to what Miller was trying to find out?

18 MR. MAZUR: It was leading him towards more
19 evidence connecting Mr. Jones to the robbery. And what -
20 - - the problem is that he - - - he did it for the purpose
21 of making his life easier. If he had left Mr. Jones - - -

22 JUDGE GRAFFEO: Well, the - - - the robbery
23 victim wasn't tainted by any of this. She hadn't seen the
24 photograph. She just showed up at the lineup, correct?

25 MR. MAZUR: Your - - - Your Honor, yes. And

1 there's a case of this court, the Pleasant case, that
2 involves precisely that circumstance, where the officers
3 who did the illegal arrest were not involved in
4 investigating the case and delivering the defendant to the
5 police department that did. It was Suffolk County Police,
6 and the Bronx police were acting totally separately.

7 JUDGE GRAFFEO: But there were some other
8 witnesses here that provided further - - -

9 MR. MAZUR: They - - -

10 JUDGE GRAFFEO: - - - a further basis - - -

11 MR. MAZUR: They did, but - - -

12 JUDGE GRAFFEO: - - - for presuming that he was
13 the individual that was engaged in the robbery.

14 MR. MAZUR: We - - - we're not claiming that
15 Detective Sucek's independent investigation was tainted.
16 What we're saying is that when you arrest somebody for the
17 purpose of conducting investigation, the investigation
18 that you conduct, the phone call, the discovery of the
19 photograph, comparing the person you have in custody in
20 the jail cell with the photograph, all of those are the
21 fruits of the investigation; they are not - - -

22 JUDGE GRAFFEO: So you can never have
23 attenuation then. It's a - - -

24 MR. MAZUR: You could.

25 JUDGE GRAFFEO: It's a useless theory.

1 MR. MAZUR: No. You could have it the way you
2 have it in the Pleasant case, if it was truly different.
3 If - - -

4 CHIEF JUDGE LIPPMAN: Could there have been a
5 conversation between Miller and Suczek more extensive than
6 what they had that would have provided attenuation here?

7 MR. MAZUR: No. I think what - - - what might
8 provide attenuation is if Sgt. Miller arrested Mr. Jones,
9 truly believing, by the way, that he committed disorderly
10 conduct for - - - for standing on the sidewalk and then
11 left for the night and Detective Suczek walked in the next
12 day and saw a person in custody - - -

13 CHIEF JUDGE LIPPMAN: So then, in answer to
14 Judge Graffeo's question, once it's pretextual, you can't
15 really have attenuation?

16 MR. MAZUR: Once it's pretextual, that officer -
17 - -

18 CHIEF JUDGE LIPPMAN: There's nothing they could
19 have said to each other that could have provided probable
20 cause - - -

21 MR. MAZUR: If - - -

22 CHIEF JUDGE LIPPMAN: - - - what Miller spoke to
23 Suczek?

24 MR. MAZUR: If Suczek had said to Miller, arrest
25 that man, then Miller totally - - -

1 CHIEF JUDGE LIPPMAN: But once he was already
2 under arrest.

3 MR. MAZUR: Hold him overnight for a lineup.

4 CHIEF JUDGE LIPPMAN: Okay. I got it.

5 MR. MAZUR: All right. He - - - that's not what
6 happened here. What happened here was - - -

7 CHIEF JUDGE LIPPMAN: But if that had happened -
8 - - but I guess what I'm saying - - - if that had
9 happened, if they'd arrest that man - - - they had
10 extensive conversation - - - arrest that man or hold him
11 overnight, there could be attenuation?

12 MR. MAZUR: It would be a harder - - -

13 CHIEF JUDGE LIPPMAN: - - - depending on what
14 had gone on between the two detectives?

15 MR. MAZUR: It would be a harder case because
16 then it wouldn't be the officer who had arrested Mr. Jones
17 for the purpose of conducting an investigation, the one -
18 - - being the one who delivered him to the lineup, which
19 is what happened here.

20 And if I could just briefly address the evidence
21 of threats that came in at this trial. This court has
22 stated there needs to be evidence, if a third party makes
23 a threat, that the defendant either directed or authorized
24 those threats.

25 JUDGE GRAFFEO: Pretty significant that he was

1 seen handing the list to his wife, isn't it - - -

2 MR. MAZUR: Your Honor, it is - - - it is the
3 most - - -

4 JUDGE GRAFFEO: - - - in the court - - - in the
5 courtroom?

6 MR. MAZUR: Your Honor, it is the most routine
7 thing in the world, when you're on trial for your life, to
8 let a loved one know what is going on in your trial; a
9 loved one wants to know. And furthermore, as a defense
10 attorney, I would want my client's family to know who the
11 witnesses are in case they had evidence of - - - that
12 could be impeach - - -

13 JUDGE GRAFFEO: The court is - - - the court is
14 not - - -

15 MR. MAZUR: - - - impeaching.

16 JUDGE GRAFFEO: - - - not supposed to be
17 concerned that there were - - - that several times the
18 storeowner here was threatened?

19 MR. MAZUR: It is truly concerning. It is
20 alarming. It is precisely why a jury, hearing that
21 evidence, is likely to be inflamed. It is - - -

22 JUDGE PIGOTT: Well, is there a limiting
23 instruction given?

24 MR. MAZUR: The limiting instruction said, if
25 you can attribute it to the defendant, without saying what

1 this court has said, he has to be - - - you have to find
2 that he either directed or authorized the threats. And
3 then, in summation, the prosecutor said, hey, this really
4 shows the defendant's character as a thug and a goon. He
5 didn't say this shows the defendant's consciousness of
6 guilt. It is terribly prejudicial evidence in the absence
7 of evidence that the defendant either directed or
8 authorized the threat.

9 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank you.

10 MR. MAZUR: Thank you.

11 CHIEF JUDGE LIPPMAN: Counsel?

12 MS. VEE: May it please the court, my name is
13 Grace Vee. I'm here on behalf of the People.

14 CHIEF JUDGE LIPPMAN: Counsel, where's your
15 probable cause here? That conversation between Suczek and
16 Miller was probable cause?

17 MS. VEE: Well, the People's position is that
18 both courts below found that Detective Suczek did have
19 probable cause to arrest - - - to - - - to believe that
20 the defendant was the person who robbed Ms. - - - Ms.
21 Zakova (ph.).

22 CHIEF JUDGE LIPPMAN: Did that conversation
23 provide probable cause after a pretextual arrest?

24 MS. VEE: Yes, it did. While - - -

25 CHIEF JUDGE LIPPMAN: How so?

1 MS. VEE: Okay.

2 CHIEF JUDGE LIPPMAN: What in that conversation

3 - - -

4 MS. VEE: Well, because what it was is that at
5 the point in time that Det - - - sorry - - - Sgt. Miller
6 brought the defendant into the precinct - - - first of
7 all, I would just like to remind this court that both
8 courts below found, and the evidence supports this, that
9 Sgt. Miller had reason to believe the defendant was a
10 suspect in a robbery.

11 CHIEF JUDGE LIPPMAN: Yeah, but we're trying to
12 figure out, as a matter of law, is there attenuation here.

13 MS. VEE: There is. Absolutely, there is
14 attenuation.

15 CHIEF JUDGE LIPPMAN: Yeah. So why? Why is
16 there?

17 MS. VEE: Because Detective Suczek, at the point
18 in time, had a photograph in his case file, and he had a
19 photograph of the suspect, and he had probable cause to
20 believe that the defendant was - - - was a - - - was the
21 person who had robbed Ms. Zakova.

22 JUDGE SMITH: You - - - you said Suczek - - -

23 MS. VEE: And his - - -

24 JUDGE SMITH: You said Suczek, based on no more
25 than what he had, could have arrested Mr. Jones?

1 MS. VEE: Oh, he could have, absolutely. I
2 mean, his intention was - - - is when he had that photo -
3 - -

4 JUDGE SMITH: Does - - - does the case turn on
5 that?

6 MS. VEE: Well, it - - - it's a very important
7 element, the fact that - - - that Detective Suczek had
8 probable cause.

9 JUDGE SMITH: We think - - - if we think that
10 what Suczek had fell short of probable cause, does that
11 mean that the - - - the ID would have to be suppressed?

12 MS. VEE: If you - - - if this court were to
13 find that there was less than probable cause, then that
14 would be problematic for the People, I would submit, but
15 that's not what the courts have all found.

16 CHIEF JUDGE LIPPMAN: So what did he have? So
17 what did Suczek have?

18 MS. VEE: Suczek had - - - what he had was is
19 that shortly - - - within two or three hours after the
20 crime, he spoke to Ms. Zakova. He obtained a detailed
21 description of the suspect. He then also spoke to a
22 Warnell Vega (ph.), who was an eyewitness to the crime,
23 who also know - - - knew the defendant, who also provided
24 - - -

25 CHIEF JUDGE LIPPMAN: He's a little bit of a

1 dubious eyewitness, right?

2 MS. VEE: Well, I mean, in the sense that he - -
3 - I mean, both defendant and Vega both seemed to
4 acknowledge that they knew each other. Vega says, I saw
5 the defendant, or I saw the robber rob the suspect, attack
6 Ms. Zakova and steal her pocketbook. He gave a
7 description of - - - of defendant that matched Zakova's
8 description. And in addition, he - - - he pointed out a
9 distinctive facial feature, the fact that the defendant
10 had an - - - a very large nose and also that he had - - -
11 he went by the street name Iz.

12 Suczek, based on that, contacted Manhattan data
13 - - - the gang database unit and was able to find that the
14 street name "Iz" was used by a man named Michael Wright.
15 He then found out that Michael Wright, by - - - by
16 obtaining Michael Wright's rap sheet, was able to find
17 that Michael Wright's description, and in fact, matched
18 the description of the suspect in this case. And he
19 obtained a photograph, and there's no dispute that the
20 photograph of Michael Wright - - - who, by the way, also,
21 his rap sheet showed that he was also known at Lester
22 Jones - - - there's no dispute that that photograph was a
23 photograph of the defendant. So that's the photograph.
24 That's the mug shot that we're talking about that was in
25 Detective Suczek's file. He had intended to - - - to show

1 a - - - to conduct a photo array and show that to Ms.
2 Zakova, but before he ever had a chance to do that, the
3 defendant is picked up about two weeks after the - - - the
4 robbery by Miller who - - - Miller, based on his
5 conversations with Zubeide (ph.) - - - Mr. Zubeide, has
6 reason to believe that - - - that - - -

7 CHIEF JUDGE LIPPMAN: And then Miller's
8 conversation with Suczek gives - - - gives probably cause?

9 MS. VEE: Correct, because what it is is that
10 Detective Suczek says, look in my case file, I - - - that
11 is - - - that - - - that photograph is - - - is the - - -
12 is a photograph of - - - of the suspect who basically he's
13 a person he has reason to believe is the person - - - is
14 the robber in this case.

15 JUDGE PIGOTT: What do we do - - - what do we do
16 about the fact that this is a pretty specious arrest?
17 Wouldn't you agree? I mean, blocking a sidewalk at 2
18 o'clock in the morning and charging him with disorderly
19 conduct and take him to - - -

20 MS. VEE: Not at all. I mean, that was one of
21 the bases for the reason why the defendant was stopped on
22 May 31st. But, you know, to the extent that - - - and the
23 defendant does this again on appeal for this court. He,
24 for the third time - - - he did this before the hearing
25 court, before the Appellate Division, and now once again

1 before this court. He wants to suggest that - - - that
2 Detective Miller - - - excuse me, Sgt. Miller stopped the
3 defendant merely because he thought he was committing a
4 disorderly conduct for blocking pedestrian traffic.

5 JUDGE PIGOTT: I think he said - - - I think he
6 wants to say it's - - -

7 MS. VEE: - - - and that's not the case.

8 JUDGE PIGOTT: I think he wants to say it's
9 pretextual, that there was no - - - there was no basis to
10 arrest him at that point.

11 MS. VEE: Correct, that there was no basis to
12 arrest him. But, in fact, that's not what - - -

13 JUDGE SMITH: But wouldn't you - - - wouldn't it
14 look a little better in hindsight if he had arrested him
15 for the robbery, even if he fell short of probably cause?
16 Arresting him for the - - - arresting him for disorderly
17 conduct makes it look like he's trying to - - - to do
18 something phony.

19 MS. VEE: No, not at all. No, no. I would just
20 direct this court's attention to the - - - to Miller's
21 transcript, in particular pages 23 to 24, 27, 79, and 81
22 to 83 of the transcript, page 15 of the People's brief.
23 Miller made very clear that even regardless of whether or
24 not the defendant was - - - was also committing disorderly
25 conduct, this defendant was not free to go because he was

1 a suspect in a robbery case who was ID'd at the scene and
2 that he was bringing him to the station house for further
3 investigation - - -

4 JUDGE SMITH: It sounds as though - - -

5 MS. VEE: - - - to make sure that he was, in
6 fact, the robber.

7 JUDGE SMITH: But it sounds as though Mr. Miller
8 either - - - or Sgt. Miller either didn't understand or
9 did understand that you can't arrest someone just on
10 suspicion, so he decided he'd use disorderly conduct to
11 get around that.

12 MS. VEE: No, not at all. I don't think - - - I
13 think that the disorderly conduct arrest was beside the
14 point. It's irrelevant, and it's certainly irrelevant to
15 what - - -

16 JUDGE PIGOTT: Well - - -

17 JUDGE SMITH: Then why did he do it?

18 JUDGE PIGOTT: Yeah, why - - - I mean, the - - -
19 the Supreme Court said it's - - - it's an invalid stop,
20 you should - - - you can't do that.

21 MS. VEE: Yeah, I mean - - -

22 JUDGE RIVERA: It's awfully convenient.

23 MS. VEE: Excuse me. I'm sorry.

24 JUDGE RIVERA: It's awfully convenient.

25 MS. VEE: Not at all. I don't think so at all;

1 no. He made it clear - - - as I said, Sgt. Miller made it
2 very clear that the defendant was being brought in - - -
3 the primary basis why he's being brought to the precinct
4 is, I think I got the guy who robbed Ms. Zakova, I want to
5 make sure, let's do further investigation. And he did
6 that. He promptly, within thirty minutes, he finds out
7 that the lead detective is - - -

8 JUDGE PIGOTT: All of that is great. It - - -
9 it goes back, I guess, to what Judge Smith is saying. If
10 he'd done that, you know, said I - - - you know, we're
11 arresting you under suspicion of robbing the grocery store
12 or the lady in the elevator, that's fine. But, I mean,
13 when you start hauling people in saying you're blocking a
14 sidewalk at 2:30 in the morning, and we're going to charge
15 you with disorderly conduct, people get nervous.

16 MS. VEE: Once again, I - - - I just have to
17 stress, the primary basis for why the Det - - - excuse me
18 - - - Miller was bringing the defendant in - - - into the
19 precinct was to further the investigation regarding the
20 robbery.

21 JUDGE PIGOTT: Right. Well, so when the Supreme
22 Court said that this was - - - that this violated Hicks,
23 they - - - that was - - - that's all extraneous, in your
24 view?

25 MS. VEE: No, I -- I don't believe so the

1 hearing court ever said that there was - - - he said that
2 there wasn't - - - to the extent that the People below had
3 said, oh, this is what he - - -

4 JUDGE PIGOTT: "Actions taken by the police
5 can't be justified under People v. Hicks. Nothing in the
6 record to support the People's pos - - - assertion that at
7 the time of the stop the police had a reasonable belief
8 that they were taking the defendant to a place where - - -
9 where a prompt ID procedure would take place."

10 MS. VEE: Correct. I mean, because it couldn't,
11 because at that point in time, Miller, in his mind, he
12 doesn't know that there's going to be an identification
13 procedure that might be taking place imminently at the - -
14 - at the station house. At that point in time, he thinks,
15 you know what, he may very well have thought, I have
16 probable cause to arrest this defendant. And he may have
17 been wrong - - - he was wrong on that but - - - although I
18 would submit, as the Appellate Division found here, he was
19 just short of probable cause, not much, just short of
20 probable cause. I would submit that that's true.

21 So he at that point in time is bringing the
22 defendant in. And it's true; it's not a Hicks - - - it's
23 not a Hicks stop because he doesn't know that there's
24 going to be an actual identification procedure that will
25 be taking place.

1 JUDGE PIGOTT: That's right.

2 MS. VEE: But what he does think is - - -

3 JUDGE PIGOTT: I guess my point is we - - - that
4 - - -

5 MS. VEE: - - - I want to find out if this guy
6 is, in fact - - -

7 JUDGE PIGOTT: I'm almost done. I might - - -
8 the point is we don't want to write a decision that says
9 this type of conduct is all right, that you can - - - that
10 you can pretextually arrest someone - - - you know, it's
11 almost like, you know, detention for purposes of further
12 investigation, right?

13 MS. VEE: Well, I would submit both the hearing
14 court and the - - - the Appellate Division found that
15 there was no improper conduct on the part of Miller. They
16 found that he acted in good faith in doing what he did. I
17 would - - -

18 JUDGE PIGOTT: Based on attenuation?

19 MS. VEE: Correct. And I would submit that this
20 court - - - this is - - - and that's why also this
21 presents a classic question of mixed fact - - - mixed law
22 and fact, that I would submit that this court is bound to
23 find also - - - that - - - that, in fact, attenuation
24 applies here.

25 CHIEF JUDGE LIPPMAN: Yeah, but you - - -

1 MS. VEE: There's a basis in the record for
2 that.

3 CHIEF JUDGE LIPPMAN: But we could find, as a
4 matter of law, that there's no attenuation given - - -

5 MS. VEE: You could - - -

6 CHIEF JUDGE LIPPMAN: - - - the circumstances of
7 this case.

8 MS. VEE: - - - if you found that - - - that the
9 findings below that were made by - - - by the courts below
10 were unreasonable as a matter - - - as a matter of law and
11 that there was no inferences that could be drawn and that
12 there was attenuation that applied here, I suppose. I
13 would submit that that's not the case.

14 JUDGE SMITH: Well, suppose - - - suppose this
15 was the worst arrest ever made. Suppose Miller was - - -
16 was - - - yeah, was acting on nothing but a hunch, but you
17 still have - - - by sheer coincidence, it turns out that
18 there is probable cause to arrest the guy. Is that
19 attenuation?

20 MS. VEE: Yes, I would submit that there is,
21 exactly. There is, right. And he acquired that probable
22 cause. And in this case, that probable cause, we'd
23 submit, was from what Suczek knew.

24 CHIEF JUDGE LIPPMAN: He acquired it from the
25 conversation with Suczek late at night; that's what gave

1 him the probable cause?

2 MS. VEE: Right, the information that he
3 obtained from Suczek, that Suczek had a photograph of the
4 - - - of the robber, and that that photograph - - - as I
5 said, no dispute - - - that photograph is a photograph of
6 the defendant, and he has the defendant right before him.
7 Bingo, there we go, there we have it; the defendant is the
8 robber.

9 CHIEF JUDGE LIPPMAN: That's enough?

10 MS. VEE: That's enough.

11 CHIEF JUDGE LIPPMAN: Go look at the picture,
12 it's in my file. Enough?

13 MS. VEE: It was, go look at the picture in my
14 file, and he sees that - - - Miller sees that it matches,
15 that it is the defendant, and the only reasonable
16 inference can be drawn from this record is, is that the -
17 - - that Suczek then says, now hold him, hold him for the
18 lineup, I'm coming in, and we - - - and the lineup was, in
19 fact, held several hours later, later that morning. I
20 mean, it wouldn't make any sense of why the defendant was
21 placed in the lineup, and there was probable cause to put
22 him in that lineup - - -

23 CHIEF JUDGE LIPPMAN: Okay, counsel.

24 MS. VEE: - - - based on the fact that it was
25 his photograph.

1 CHIEF JUDGE LIPPMAN: Okay. Thanks, counsel.

2 MS. VEE: I see - - - I see that my time is
3 expired.

4 CHIEF JUDGE LIPPMAN: Thank you.

5 Counselor, rebuttal?

6 MR. MAZUR: Yes. Thank you, Your Honor.

7 What happened here is that Sgt. Miller took a
8 shortcut. If he had left Mr. Jones on the corner and gone
9 to the police station and made the phone call and found
10 the photograph and gone back and arrested Mr. Jones, we
11 wouldn't be talking about an arrest that was for the
12 purpose of conducting further investigation.

13 CHIEF JUDGE LIPPMAN: Your adversary says, oh,
14 that wasn't - - - the pretextual thing, that wasn't really
15 what it was all about. He was just short of probable
16 cause, is what your adversary says.

17 MR. MAZUR: I'm going to read from the portion
18 of this, Your Honor.

19 CHIEF JUDGE LIPPMAN: Yes, please do.

20 MR. MAZUR: I think it's right where Just - - -
21 Judge Pigott was reading from, very close to it. "Mr.
22 Jones was clearly taken into custody by Sgt. Miller, at
23 best, in the hope that further investigation would confirm
24 his suspicion that Mr. Jones was the perpetrator."

25 In other words, what he did is he brought him

1 there for the purpose of investigation. He thought it
2 would be easier to conduct his investigation with the guy
3 sitting in a jail cell rather than having him out on the
4 corner where he was free to leave, and it would be
5 rewarding that kind of conduct to say that the - - - when
6 you investigate in that manner, if you get evidence, here
7 the lineup invest - - - lineup identification, it can come
8 into evidence. The whole purpose of the exclusionary rule
9 is to force the police - - -

10 CHIEF JUDGE LIPPMAN: A conversation - - -

11 MR. MAZUR: - - - to do it right.

12 CHIEF JUDGE LIPPMAN: - - - between the two of
13 them, that's of no great significance?

14 MR. MAZUR: That was - - - that was initiate - -
15 - that was the investigation. That was initiated by Sgt.
16 Miller as part of his investigation. The conversation was
17 merely, I have a - - - on Suczek's side was, I have a
18 photograph of a suspect in my file. He did not say,
19 arrest that man, hold him for a while.

20 JUDGE PIGOTT: He makes - - - he makes the point
21 though that if he'd had ID, you would let him go.

22 MR. MAZUR: If he - - - there's lots of ways to
23 verify identification. That's - - - that's not what was
24 going on here. The other guy on the street corner wasn't
25 hailed in.

1 JUDGE PIGOTT: One thing that you didn't want
2 your client to do is be identified.

3 MR. MAZUR: Well, but there's two guys on the
4 street corner, Your Honor.

5 JUDGE PIGOTT: True.

6 MR. MAZUR: The - - - you know, the idea that he
7 was at all in - - - under suspicion of - - - of disorderly
8 conduct for standing on the sidewalk - - - I mean, one of
9 the things the detective says - - - the sergeant says is,
10 if a pedestrian had come along, they would have had to
11 step in the street. Well, how do you know Mr. Jones
12 wouldn't have stepped aside and let the person walk by?
13 It's nonsense. It is a pretextual arrest as clear as day,
14 and the Supreme Court found that, and this court is bound
15 by that finding.

16 JUDGE SMITH: Is - - - is your contention that
17 the case would be different if when Suczek gets the phone
18 call he says to Miller, sit down, don't do anything, I'm
19 coming in. Suczek comes in. He looks at the photograph.
20 He looks at the guy. He - - - and he arrests him? Is
21 that a different case?

22 MR. MAZUR: It is a different case, Your Honor -
23 - -

24 JUDGE SMITH: Why?

25 MR. MAZUR: - - - because it's not Sgt. Miller's

1 pretextual investigation.

2 JUDGE SMITH: So you're - - - you're saying that
3 once Miller - - -

4 MR. MAZUR: It is - - -

5 JUDGE SMITH: - - - once Miller has made a - - -
6 a pretextual arrest, Miller is forever tainted; somebody
7 else has to do the rest of the investigation?

8 MR. MAZUR: Well, in some senses, yes. It's not
9 for - - - maybe not forever, but we're talking about - - -

10 JUDGE SMITH: For - - - for the rest of the day?

11 MR. MAZUR: For the rest of the night when - - -
12 when - - -

13 CHIEF JUDGE LIPPMAN: Until after the lineup?
14 Is that what you're saying?

15 MR. MAZUR: Look, I mean, this is so closely
16 tied to what Miller did. He - - - he brought him - - -
17 within thirty minutes, he's conducting the investigation
18 that he came there to do. That is not attenuated from the
19 illegal arrest. It's - - - it can't be the intervening
20 circumstance that attenuates.

21 CHIEF JUDGE LIPPMAN: Okay, counsel.

22 MR. MAZUR: Thank you, Your Honor.

23 CHIEF JUDGE LIPPMAN: Thank you. Thank you
24 both.

25 (Court is adjourned)

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

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Lester Q. Jones, No. 125 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street

Suite # 607

New York, NY 10040

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