

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

COURT OF APPEALS

STATE OF NEW YORK

-----

PEOPLE,

Respondent,

-against-

No. 205

GRAHAM REID,

Appellant.

-----

20 Eagle Street  
Albany, New York 12207  
November 18, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

ANTONIO J. PEREZ-MARQUES, ESQ.  
MARC J. TOBAK, ESQ.  
DAVIS POLK & WARDWELL LLP  
Attorneys for Appellant  
450 Lexington Avenue  
New York, NY 10017

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

Sara Winkeljohn  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 205, People v. Reid.  
2 Counselor, you want any rebuttal?

3 MR. PEREZ-MARQUES: Yes, three minutes,  
4 please, Your Honor.

5 CHIEF JUDGE LIPPMAN: Three minutes, go  
6 ahead.

7 MR. PEREZ-MARQUES: May it please the  
8 court, Antonio Perez-Marques, Davis Polk & Wardwell,  
9 for the appellant Graham Reid. With me is my  
10 colleague Marc Tobak.

11 CHIEF JUDGE LIPPMAN: Sure, go ahead,  
12 counselor.

13 MR. PEREZ-MARQUES: There is no exception  
14 to the warrant requirement for - - - for searches  
15 pursuant to probable cause. The court below  
16 erroneously held that where the facts create probable  
17 cause to arrest, a search must be permissible.

18 JUDGE SMITH: Well there - - -

19 MR. PEREZ-MARQUES: That is not the law.

20 JUDGE SMITH: There was - - - there was a  
21 contemporaneous search here.

22 MR. PEREZ-MARQUES: There was an arrest  
23 after the - - - the search.

24 CHIEF JUDGE LIPPMAN: Is that the key to  
25 this case, that the arrest - - -

1 MR. PEREZ-MARQUES: That is - - -

2 CHIEF JUDGE LIPPMAN: - - - was after; is  
3 that your argument?

4 MR. PEREZ-MARQUES: The key to this case is  
5 that at the time of the search, there was no arrest.  
6 There had not been an arrest. There was no arrest  
7 unfolding.

8 JUDGE SMITH: Well, but the - - - the law  
9 is clear that you can - - - if - - - as long as they  
10 are substantially contemporaneous, the - - - the - -  
11 - the arrest doesn't have to come first.

12 MR. PEREZ-MARQUES: The law provides that a  
13 formal arrest may come after the search, but an  
14 arrest, for constitutional purposes must have  
15 occurred prior to the search.

16 CHIEF JUDGE LIPPMAN: So there's got to be  
17 some kind of an arrest even if it's not called an  
18 arrest?

19 MR. PEREZ-MARQUES: That is exactly right,  
20 Your Honor. The formalities can come later, but  
21 there must be an arrest for Constitutional purposes.

22 JUDGE RIVERA: Well, I'm - - - I'm sorry.  
23 I'm not clear. What - - - what - - - what are these  
24 formalities you're talking about that are different  
25 from what you are saying is some Constitutional



1 intended arrest.

2 JUDGE SMITH: If that testimony had never  
3 been given the case would be the same?

4 MR. PEREZ-MARQUES: The case would be the  
5 same, Your Honor, because there was no - - -

6 JUDGE SMITH: What - - - yeah, but - - -

7 MR. PEREZ-MARQUES: - - - arrest at the  
8 time of the search.

9 JUDGE SMITH: - - - what about a case like  
10 Rawlings against Kentucky where they say if - - - you  
11 know, does - - - does - - - it doesn't matter what  
12 the order was?

13 MR. PEREZ-MARQUES: In Rawlings the suspect  
14 had been in custody for forty-five minutes before he  
15 was searched. Immediately - - - he had been read his  
16 rights. Before - - - immediately before the  
17 challenged search he had acknowledged ownership of a  
18 large quantity of drugs. An arrest - - - he was  
19 under the custody of the State, and an arrest was  
20 unfolding, an arrest was imminent.

21 JUDGE SMITH: So - - - so let me - - - so  
22 let me - - - so let me give you these facts: an  
23 officer sees an - - - a - - - a vehicle weaving on  
24 the street, stops the car, sees open containers in  
25 the car, finds the driv - - - that the driver is

1 bloodshot and is not giving sensible - - - has  
2 bloodshot eyes and is not giving sensible answers to  
3 his question, decides to arrest him, searches him  
4 first, and then arrests him. You're saying that's a  
5 bad search?

6 MR. PEREZ-MARQUES: That search would not  
7 be lawful. The arrest must be - - - have occurred at  
8 the time of the search. That search would be lawful  
9 if - - -

10 JUDGE SMITH: When - - - and what - - -  
11 what - - - what case says that?

12 MR. PEREZ-MARQUES: The search would be  
13 lawful if, at the time of the search, you found that  
14 the arrest was happening simultaneously.

15 JUDGE SMITH: Well, what - - - what - - -  
16 what - - -

17 MR. PEREZ-MARQUES: The arrest cannot come  
18 after.

19 JUDGE SMITH: What - - - what - - - what  
20 case says that the - - - that on the - - - on the  
21 facts I've described the search is bad?

22 MR. PEREZ-MARQUES: People v. Diaz, Your  
23 Honor. In People v. Diaz this court considered and  
24 rejected exactly the rule being urged by the  
25 prosecution here. In the - - - in Diaz the dissent

1 argued that if the arrest is contemporaneous, nearly  
2 contemporaneous with the search and there was  
3 probable cause at the time of the search that is  
4 sufficient. This court disagreed. It rejected that  
5 argument on the clearest grou - - - grounds possible  
6 saying, "It is clear this search does not come within  
7 the search incident to arrest distinction; defendant  
8 was arrested after the search." It was on that very  
9 clear timing basis that this court rejected the  
10 applicability of the search incident doctrine.

11 CHIEF JUDGE LIPPMAN: And the federal  
12 precedents in this area?

13 MR. PEREZ-MARQUES: The federal precedents  
14 in this area, Your Honor, to the extent that they  
15 advocate a rule - - - the - - - the rule urged by the  
16 prosecution, they are inconsistent with the law of  
17 this court in Diaz. What the - - -

18 CHIEF JUDGE LIPPMAN: Well, I agree, but -  
19 - - but to the extent - - - put that aside; what do  
20 the federal precedents show?

21 MR. PEREZ-MARQUES: Many of those cases  
22 involve cases where the suspect was in custody at the  
23 time of the search.

24 JUDGE READ: What about Knowles?

25 MR. PEREZ-MARQUES: Knowles is directly on

1 point. Knowles, the facts are very similar to ours.  
2 It was a traffic stop then a search that prompted a  
3 subsequent arrest. Under their proposed rule,  
4 Knowles would have to come out the other way, and  
5 what the Supreme Court held in Knowles is that the  
6 ability to effect a lawful arrest, probable cause,  
7 does not permit a search incident.

8 CHIEF JUDGE LIPPMAN: What exactly - - -  
9 your view of Knowles is right on point - - -

10 MR. PEREZ-MARQUES: That is - - -

11 CHIEF JUDGE LIPPMAN: - - - with Diaz,  
12 yeah?

13 MR. PEREZ-MARQUES: That is correct, Your  
14 Honor, Knowles, Diaz, and Erwin.

15 JUDGE SMITH: Knowles - - - in Knowles the  
16 officer had already issued a citation before he  
17 searched him.

18 MR. PEREZ-MARQUES: Demonstrating - - -

19 JUDGE SMITH: So there - - - thereby  
20 essentially forgoing the option of arrest.

21 MR. PEREZ-MARQUES: Demonstrating the  
22 absence of an intent to arrest. He had the authority  
23 to arrest but had demonstrated the lack of an  
24 intention to arrest.

25 JUDGE SMITH: And - - - well, yeah, let me



1 go back to Diaz for a minute. Wasn't it in - - - in  
2 Diaz it didn't look to me like the - - - like the  
3 officer even had probable cause before he touched  
4 those vials.

5 MR. PEREZ-MARQUES: The - - - the dissent  
6 argued that there was probable cause at the time of  
7 the search based on the feeling of the vials in the  
8 suspect's - - -

9 JUDGE SMITH: Defense argues?

10 MR. PEREZ-MARQUES: The dissent, excuse me.  
11 The dissent - - -

12 JUDGE SMITH: Oh, the dissent, okay.

13 MR. PEREZ-MARQUES: - - - argued that there  
14 - - - opined that there was probable cause at the  
15 time of the search. The majority, in rejecting the  
16 argument that the search incident doctrine applied,  
17 did not address whether the probable cause existed,  
18 because they disposed of the argument on the clear  
19 basis that there was no arrest.

20 And it's the same in People v. Erwin,  
21 which, again, is very analogous facts. In Erwin  
22 there was a traffic stop. The person was - - - the  
23 suspect was searched at a time that the officer had  
24 not arrested him and testified that he did not intend  
25 to arrest him. And again, this court said the search

1 incident doctrine does not apply because there was no  
2 arrest and no intention to arrest.

3 JUDGE SMITH: Is it - - - can it ever be  
4 the case that the officer's subjective intention  
5 whether to arrest or not is dispositive?

6 MR. PEREZ-MARQUES: It - - - it - - - there  
7 are - - - could be cases where the subjective  
8 intention is - - - is dispositive, Your Honor, and  
9 the reason is that the Constitutional justifications  
10 for a search incident flow from the fact that a  
11 formal arrest, if it hasn't already occurred, is  
12 about to occur. If you have only custodial arrest,  
13 there has to be a formal arrest unfolding, because  
14 the justifications are to disarm the suspect as part  
15 of putting him into prolonged custody and to preserve  
16 evidence for use at trial. So if there's no  
17 intention to effect a formal arrest, if there's  
18 intention to have prolonged custody or to have a  
19 trial, those justifications don't arise.

20 JUDGE SMITH: I may - - - I may be  
21 repeating a question, but let me be sure I understand  
22 your position. The judge asked the - - - the officer  
23 did you intend to arrest him, and the officer said  
24 no, I didn't. Suppose he had said, instead, yes, I  
25 did. I was all set to arrest him. I just thought I

1 better check - - - I - - - I - - - I better pat him  
2 down first.

3 MR. PEREZ-MARQUES: If - - - if the pat-  
4 down was part of the arrest process - - -

5 JUDGE SMITH: Well, yeah, but that's - - -  
6 that's a conclusion; isn't it?

7 MR. PEREZ-MARQUES: It - - - no, it's a  
8 question because their - - - their view of this is  
9 that it's permissible effectively as an exploratory  
10 search, that you should be permitted to search - - -

11 JUDGE SMITH: Well, okay, what's the answer  
12 to my question? If - - - yeah, if - - - if - - - if  
13 the - - - if the officer had said yes, I was planning  
14 to arrest him. I just postponed - - - I - - -  
15 suppose he says I just postponed that formality for a  
16 few minutes. Does that change the result in this  
17 case?

18 MR. PEREZ-MARQUES: If - - - if it led to a  
19 finding that the arrest was happening at the time of  
20 the search - - -

21 JUDGE SMITH: Well, you say a finding but  
22 there's - - -

23 MR. PEREZ-MARQUES: - - - that would show  
24 that there was - - -

25 JUDGE SMITH: - - - I mean, that's just a

1           characterization of facts I've given you. You can't  
2           - - - you know, you - - - you - - - you're fighting  
3           the hypothetical.

4                       MR. PEREZ-MARQUES: You - - - you would  
5           have to have a different analysis of the facts at the  
6           time of the search. The search cannot come - - - the  
7           arrest cannot come after the search.

8                       JUDGE SMITH: Okay, but the - - - I - - -  
9           but you keep saying you've got to have another  
10          analysis. I've given you all the facts. Go ahead  
11          and analyze them. Is the search good or bad?

12                      MR. PEREZ-MARQUES: The - - - you do not  
13          know enough to know whether the search is good or  
14          bad.

15                      JUDGE SMITH: Well - - - well, yeah - - -  
16          what's a - - - how - - - how - - - what's a judge  
17          supposed to do?

18                      MR. PEREZ-MARQUES: You would have to have  
19          an analysis of what was happening at the time of the  
20          search. If the suspect was being arrested - - -

21                      JUDGE SMITH: I - - - I'm - - - I'm trying  
22          to give you a hypothetical where there are no other  
23          facts in the record. You're telling me I can't  
24          decide the case if there are no other facts?

25                      MR. PEREZ-MARQUES: If the suspect is being

1 arrested at that time, then the search would be  
2 valid, because it was with the arrest.

3 JUDGE SMITH: Judges - - - and the court  
4 has to decide whether he's being arrested at that  
5 time or not.

6 MR. PEREZ-MARQUES: That is exactly right.

7 JUDGE SMITH: And if there are no other  
8 facts than the ones I've given you, what does the  
9 judge decide?

10 MR. PEREZ-MARQUES: That the search was not  
11 valid.

12 JUDGE SMITH: Why?

13 MR. PEREZ-MARQUES: Because the suspect was  
14 not in custody. The problem with the - - - there's a  
15 policy problem with the rule that the prosecution  
16 proposes, as well, which is that it encourages  
17 searches that they acknowledge are unconstitutional.  
18 Their argument is if they - - - the premise of their  
19 policy argument is if you allow the search to come  
20 first, some percentage of those people searched will  
21 not be arrested. The problem is all those people who  
22 are searched and then not arrested have had their  
23 rights violated.

24 JUDGE PIGOTT: Yeah, but - - -

25 MR. PEREZ-MARQUES: Because - - -

1                   JUDGE PIGOTT: - - - can't you do that? In  
2 oth - - - in other words, let's assume that you - - -  
3 you have probable cause to make an arrest, and you  
4 chose not to. The - - - the - - - the violation for  
5 which you're pulling somebody over is minor compared  
6 to what, you know, you find a - - - a weapon and now  
7 you want to charge him with a weapon. Are you saying  
8 you have to charge him with a minor one in order to  
9 justify the subsequent search and - - - and - - - and  
10 arrest for the first?

11                   MR. PEREZ-MARQUES: It's - - - it's not a  
12 matter of which crime you charge. It's a question of  
13 whether, when you did the search, it was as part of  
14 the arrest, whether there was an arrest at that  
15 moment.

16                   JUDGE PIGOTT: Well, let's assume for a  
17 minute - - -

18                   MR. PEREZ-MARQUES: You cannot - - -

19                   JUDGE SMITH: - - - that you've got a  
20 college bumper sticker on your car, which is a  
21 violation of the vehicle traffic law, and you get  
22 pulled over for that. Now, they take you out to  
23 search you and - - - incident to that arrest and they  
24 find this weapon; is that okay?

25                   MR. PEREZ-MARQUES: If they were arresting

1 me when they searched me then, yes.

2 JUDGE PIGOTT: Okay.

3 MR. PEREZ-MARQUES: But they can't search  
4 me as part of deciding whether to arrest me.

5 JUDGE PIGOTT: So what - - - so what he - -  
6 -

7 MR. PEREZ-MARQUES: That's the problem with  
8 their position.

9 JUDGE PIGOTT: So what this - - - what this  
10 officer's - - - his mistake was, I was going to  
11 arrest him for DWI and - - - and then I decided not  
12 to. If he'd said that this would have been a good  
13 search?

14 MR. PEREZ-MARQUES: There - - - there - - -  
15 there is the possibility of a catch-and-release.  
16 There isn't going to be a rule that prevents any  
17 possibility of abuse. The problem with their rule is  
18 that it actively encourages searches that are  
19 unconstitutional, searches that are done prior to an  
20 arrest that then don't lead to an arrest.

21 CHIEF JUDGE LIPPMAN: Counsel, but the  
22 bottom line is probable cause is not enough?

23 MR. PEREZ-MARQUES: That is the bottom  
24 line, Your Honor. Probable cause is not enough. The  
25 court below said probable cause is enough. That is

1 wrong. And if you look at the facts that existed at  
2 the time of the search, the only justification is  
3 probable cause. That is not enough under the law of  
4 this court, and it's not enough under Knowles v.  
5 Iowa.

6 CHIEF JUDGE LIPPMAN: Okay, thank you,  
7 counsel.

8 Counselor, if probable cause is not enough,  
9 how does it impact on the facts of this case?

10 MR. NAHAS: People v. Evans, when there's a  
11 search incident to arrest and the search occurs  
12 before the arrest, probable cause is not sufficient.  
13 What the - - - the - - - the construct for search  
14 incident to arrest where the search occurs before the  
15 arrest is that there be probable cause, there be an  
16 arrest, and that the search is contemporaneous with  
17 the - - -

18 CHIEF JUDGE LIPPMAN: Yeah, yeah, but - - -  
19 but what about the - - -

20 MR. NAHAS: That's certainly what happened  
21 here.

22 CHIEF JUDGE LIPPMAN: Yeah, but what about  
23 probable cause, no arrest, don't intend to arrest,  
24 you lose?

25 MR. NAHAS: No, because that requires



1 looking at the intent of the police officer and  
2 underwriting - - -

3 CHIEF JUDGE LIPPMAN: He even says I don't  
4 intend to arrest him.

5 MR. NAHAS: Well, in this case he didn't  
6 say that, Judge. In this case he was ask - - - in  
7 this case he was asked by the judge, when you asked  
8 him to step out of the car, did you intend to arrest  
9 him at that time, and he said at that time, no.

10 CHIEF JUDGE LIPPMAN: So your  
11 interpretation of this case is that he intended to  
12 arrest him despite that - - - that statement that he  
13 didn't - - -

14 MR. NAHAS: I don't think we need - - -

15 CHIEF JUDGE LIPPMAN: - - - intend to  
16 arrest him then?

17 MR. NAHAS: I don't think we need to look  
18 at intent, and I don't think we should look at it.

19 CHIEF JUDGE LIPPMAN: So what do we look  
20 at? If probable cause is not enough, and we're not  
21 looking at intent, and there's no arrest, what do we  
22 look at?

23 MR. NAHAS: There is an arrest  
24 contemporaneous. It just happened to come  
25 afterwards.

1 CHIEF JUDGE LIPPMAN: You're saying that we  
2 should interpret the record that there's an arrest  
3 here going on?

4 MR. NAHAS: That the - - - that there was  
5 an arrest at what point, Your Honor?

6 JUDGE PIGOTT: Are you talking about the  
7 weapons arrest?

8 MR. NAHAS: I'm talking about the weapons  
9 arrest. It was - - -

10 JUDGE PIGOTT: Well, doesn't that - - -  
11 doesn't that mean that the - - - the police can just,  
12 you know, kind of walk down the street and search you  
13 and search me and search somebody else and let us all  
14 go, but then when he finds somebody that's - - - that  
15 - - - or she finds somebody that's got drugs or a  
16 weapon they can arrest them and say the search is  
17 incident to the arrest?

18 MR. NAHAS: Well, I'm - - - I'm not - - -  
19 I'm not saying that the rule, which is - - - which is  
20 a solid rule and which been the rule in this state  
21 for about forty years, might not lead to some abuse  
22 where, in fact, the police decide to - - - it's a - -  
23 - it's a catch-and-release situation. That doesn't  
24 mean that the rule itself is wrong as generally  
25 applied.

1                   JUDGE RIVERA: Well, why wouldn't it mean  
2 the rule is wrong? Why - - - why would we - - - why  
3 would we sanction a rule that results in  
4 unconstitutional conduct by the police in violation  
5 of Constitutional rights?

6                   MR. NAHAS: Is it - - - is it - - - is it  
7 unconstitutional?

8                   JUDGE RIVERA: Well, I - - - I - - - I'm  
9 just following exactly what you just said.

10                  MR. NAHAS: Okay, then let's - - - let's go  
11 back to basics here, and - - - and let's look at  
12 exactly what happened here.

13                  JUDGE RIVERA: Um-hum.

14                  MR. NAHAS: Is there anything that the  
15 police officer did in this case that was  
16 unreasonable? There was no question here that he had  
17 probable cause to arrest the - - - the defendant per  
18 DWI. Having probable cause to arrest, he certainly  
19 had the authority, at that point, to do less than the  
20 arrest. What he did here was exactly that. Rather  
21 than immediately cuffing Mr. Reid, he decided to  
22 investigate. He asked him a question. The - - - he  
23 asked him to step out of the car. When he stepped  
24 out of the car, he - - - he asked him do you have any  
25 weapons? He said no. At that point he frisked him,

1 found the weapon. At each stage here, what he did  
2 was entirely reasonable.

3 JUDGE RIVERA: Let me ask you this: What -  
4 - - what if he - - - he pulls him over. Let's say,  
5 you're right, he's got probable cause to arrest him,  
6 and he looks at him and he says you know what, it's  
7 your lucky day. You can leave. And he starts to  
8 leave, and he says you know what? Stop, get out, and  
9 searches him. I mean it's clear that, in my example,  
10 he - - - he's made the decision I'm not going to  
11 arrest you. Does that - - - does that change the  
12 analysis?

13 MR. NAHAS: It doesn't change the - - -

14 JUDGE RIVERA: Why not?

15 MR. NAHAS: Because you have to look at the  
16 policeman's attempt there. The only thing you look  
17 at - - -

18 JUDGE RIVERA: Well, what - - - what's the  
19 intent the second time around? Once he's decided I'm  
20 not going to arrest you, have a good day and he says  
21 you know what, come back.

22 MR. NAHAS: Oh, then we're actually - - -  
23 we're - - - we're in the - - - in the Knowles-type  
24 situ - - - situation here.

25 JUDGE RIVERA: Um-hum.

1 MR. NAHAS: It's analogous to that, okay?

2 JUDGE RIVERA: Um-hum.

3 MR. NAHAS: And by the way, I don't believe  
4 that Knowles is apposite at all or has any relevance  
5 here at all. Just briefly, in Knowles the - - - the  
6 court was facing the question can we consider a  
7 citation situation the same as an arrest situation.  
8 It only resolved that particular question. It never  
9 analyzed the situation in terms search, arrest or  
10 arrest or search, never went there.

11 JUDGE SMITH: Well, let me - - - let me  
12 read you the - - - the - - - the - - - the - - - this  
13 - - - this question and answer. The court - - - so  
14 this is to - - - to the officer, "So it's only  
15 because you ultimately found the switchblade that you  
16 arrested him?" The witness: "Yes, ma'am." In light  
17 of that testimony, how can you say the search was  
18 incident to the arrest? He - - - he - - - she - - -  
19 he said the arrest was a consequence of the search.

20 MR. NAHAS: But he - - - he said at that  
21 point he has - - - he has probable cause to arrest  
22 for - - - for DWI, and he has, in hand, a  
23 switchblade. He's asked at that point - - -

24 JUDGE SMITH: Well he - - - well, he - - -  
25 he has the switchblade in hand, but that's what



1 - very fact that you and I can disagree about exactly  
2 what this means, what its import is, and precisely  
3 what was in his mind when he said that - - -

4 CHIEF JUDGE LIPPMAN: Counsel, what has to  
5 be - - - counsel, what has to be clearer? I mean  
6 you're putting subjective - - - you're putting a  
7 different slant on something that is crystal clear in  
8 front of us. It - - - it - - - how do you determine  
9 any case on the record when you look at it and he  
10 says, is black white; the answer is yes, black is  
11 white? That's what they're saying. How do you - - -  
12 how do you - - -

13 MR. NAHAS: When you say black and white,  
14 Your - - - Judge Lippman, you're referring to the  
15 statement about ultimately found the switch - - -  
16 switchblade?

17 CHIEF JUDGE LIPPMAN: Yeah, he's say - - -  
18 he's saying what could be clearer. Let's not put  
19 black as white. White - - -

20 MR. NAHAS: What - - -

21 CHIEF JUDGE LIPPMAN: - - - is white? He  
22 says yeah, white is white. And you're saying nope,  
23 he didn't really mean white is white. What - - - I  
24 don't understand what you're saying.

25 MR. NAHAS: If - - - what I'm saying,

1 Judge, is why are even looking - - -

2 CHIEF JUDGE LIPPMAN: You're saying that if  
3 the record goes against you, you interpret it some  
4 other way? I don't understand anything - - -

5 MR. NAHAS: No, Judge.

6 CHIEF JUDGE LIPPMAN: - - - that you're  
7 saying.

8 MR. NAHAS: I'm - - - I'm saying that this  
9 particular statement about when he's asked why, which  
10 is what was your motivation, what was your intention,  
11 is irrelevant here.

12 CHIEF JUDGE LIPPMAN: He's asking, is that  
13 the only reason you arrested him? Yes, that is the  
14 only reason I arrested him. What - - - what can be  
15 clearer than that?

16 MR. NAHAS: What if he'd said well, I'd  
17 arrested him because - - - really because I didn't  
18 like the color of his shirt?

19 JUDGE SMITH: Well, but your - - - your - -  
20 - your - - - your - - - your argument is - - - isn't  
21 that it's unclear. Your argument is it's irrelevant.

22 MR. NAHAS: My argument is exactly that,  
23 Your Honor. It's irrelevant.

24 JUDGE SMITH: Yeah, and I mean both - - -  
25 both your adversary and you seem to resist this, but



1           it seems to me that this whole case turns on whether  
2           that question and answer are relevant or not.

3                     MR. NAHAS:  Precisely.

4                     JUDGE SMITH:  If it's relevant, you lose.  
5           If it's irrelevant, you win.  That's all there is to  
6           it.

7                     MR. NAHAS:  Prec - - - prec - - -

8                     JUDGE SMITH:  Or what am I - - - is - - -  
9           isn't that what the case is about?

10                    MR. NAHAS:  Precisely, Judge.  That's the  
11           only thing which is sort of unusual in this case.  
12           You actually have a police officer talking about he  
13           thinks he's doing at that particular moment.  If he  
14           had not said anything like that - - - if - - -

15                    JUDGE SMITH:  If - - - if he had said no,  
16           ma'am, I decided to arrest him before I found - - -  
17           found - - - found the switchblade, you win the case.

18                    MR. NAHAS:  Or - - - or what if he had said  
19           I was sixty percent sure that I was going to.  Is  
20           that enough?  What if he said well, eighty percent?  
21           Is that enough?

22                    JUDGE SMITH:  Well, you're - - - you're  
23           making - - - that - - - that's - - - what you're  
24           making now are relevancy arguments.  You're saying if  
25           you start - - -

1 MR. NAHAS: Exactly, exactly, Your Honor.

2 JUDGE SMITH: - - - considering intent  
3 you're going to get into this morass.

4 CHIEF JUDGE LIPPMAN: So it never matters  
5 what the cop says? Is that your argument? It never  
6 matters as to what - - -

7 MR. NAHAS: It's different - - - different  
8 - - -

9 CHIEF JUDGE LIPPMAN: - - - the - - - the  
10 officer is saying as to why - - - whether he was  
11 going to arrest, not arrest, in the process of  
12 arrest, none of that matters. What does matter?

13 MR. NAHAS: Whether, from the objective  
14 circumstances the - - - there as a search incident to  
15 arrest and to determine that we look at the facts.  
16 And the rule that say - - - you - - - you - - - this  
17 court set forth as evidence.

18 CHIEF JUDGE LIPPMAN: Even if the officer  
19 says it was not a search incident to arrest, I - - -

20 MR. NAHAS: What if he had said it was,  
21 Judge? Would we - - - would we simply go home today?  
22 We don't care what - - -

23 CHIEF JUDGE LIPPMAN: Well, it certainly -  
24 - -

25 MR. NAHAS: We don't - - -

1 CHIEF JUDGE LIPPMAN: It - - - it certainly  
2 - - - we would look at it if he said yeah, I was in  
3 the processing of arresting. What you're saying all  
4 of that is irrelevant.

5 MR. NAHAS: I'm saying if - - - if - - -

6 CHIEF JUDGE LIPPMAN: We just make a  
7 determination - - -

8 MR. NAHAS: On the grounds - - -

9 CHIEF JUDGE LIPPMAN: - - - from - - - from  
10 the circumstance, we look at it say that's got to be  
11 a search incident to arrest?

12 MR. NAHAS: I'm not saying that, Your  
13 Honor.

14 JUDGE READ: Are you saying this - - -

15 MR. NAHAS: You have said that.

16 JUDGE READ: You - - - you've got this - -  
17 -

18 MR. NAHAS: Every single court that has  
19 considered search incident to arrest has said that -  
20 - -

21 JUDGE READ: Are you considering what - - -

22 MR. NAHAS: - - - if you look at the  
23 objective circumstances.

24 JUDGE READ: Are you con - - - are you  
25 saying that the key thing is whether or not there was

1           probable cause at that point?

2                   MR. NAHAS: That's an essential element, of  
3           course, followed by an arrest, which is the Evans  
4           rule.

5                   CHIEF JUDGE LIPPMAN: Yeah, but you agree  
6           probable cause if not enough, right?

7                   MR. NAHAS: Of course. Of course the  
8           evidence - - -

9                   CHIEF JUDGE LIPPMAN: And - - - and Diaz?

10                  MR. NAHAS: Diaz is not relevant at all.

11                  CHIEF JUDGE LIPPMAN: Not relevant.

12                  MR. NAHAS: In Diaz, as Judge Smith - - -

13                  CHIEF JUDGE LIPPMAN: Why is it not  
14           relevant?

15                  MR. NAHAS: As Judge Smith pointed out, the  
16           real issue in Diaz is that there was no probable  
17           cause for any arrest at all. The only reason that  
18           the - - - the cop said I - - - I pulled the guy in  
19           was because I knew he had drugs. How did he know he  
20           had drugs, because of the field test, and this court  
21           has said that's - - - that's not enough.

22                  CHIEF JUDGE LIPPMAN: Counsel, the rule - -  
23           - the rule is, in your mind, it's okay if it's  
24           incident to arrest, and we - - - for other cases,  
25           it's okay if it's an inc - - - incident to arrest.

1 It doesn't matter what the officer says. If we look  
2 at it and think it's incident to arrest then it is,  
3 and that's the rule? If the court may say, in your  
4 view, objective determination as to whether it's  
5 incident to arrest?

6 MR. NAHAS: Whren v. United States, People  
7 v. Robinson.

8 JUDGE SMITH: That - - - that's a yes?

9 MR. NAHAS: That's a yes. That's an  
10 emphatic yes, yes. That's why I find it  
11 extraordinary that Mr. - - - Mr. Perez and the amicus  
12 would make this case turn on intention and that the  
13 amicus brief focused on that without even citing  
14 Robinson and Whren. That's settled law. It was  
15 settled in 2002 in Robinson. We do not look at the  
16 intention.

17 If the officer's incorrect, do we say well,  
18 it was a bad arrest? If he says oh, I knew exactly  
19 what I was doing and gives a ridiculous explanation  
20 do we say that's okay? Do we really want to decide  
21 Constitutionally based on the education of a  
22 particular officer, especially in particularly  
23 complicated situations? No.

24 All we need to look at here, we co - - -  
25 always have to come back to the basics. Was there

1 anything unreasonable about the intrusion here?

2 CHIEF JUDGE LIPPMAN: That's the test, was  
3 the officer reasonable?

4 MR. NAHAS: It's the test for every Fourth  
5 Amendment analysis.

6 JUDGE SMITH: Well, but it's not  
7 freestanding - - - I mean the - - - the - - - the- -  
8 - the arrest in Evans was reasonable enough, but it -  
9 - - it wasn't incident to arrest.

10 MR. NAHAS: Well, I - - - I think - - -

11 JUDGE SMITH: The - - - the - - - the - - -

12 MR. NAHAS: - - - actually, the import of  
13 Evans, Judge Smith, is that it was not  
14 Constitutional. It was - - - it was ultimately not  
15 reasonable because it allowed that huge gap between  
16 the search and the arrest. It was not reasonable.  
17 It - - - it was - - - it's unconstit - - -

18 JUDGE SMITH: Well, but is - - - but isn't  
19 - - - I mean we - - - we don't - - - we - - - we  
20 don't just take searches one at a time and say this  
21 one looks reasonable this one doesn't. We have a  
22 rule that if it's incident to an arrest, it's  
23 considered reasonable even if - - - yeah - - - yeah -  
24 - - eve - - - eve - - - even if, in fact, there was  
25 no - - - you were not - - - you were not going to

1 find anything particular, even if the arrest was for  
2 a traffic violation.

3 MR. NAHAS: Ex - - - exactly, Your Honor -  
4 - - Your Honor, because the basic principle that  
5 makes a search incident to arrest Constitutional and  
6 an exception to the search warrant requirement is  
7 that you have probable cause. The probable cause  
8 permits the arrest. If you have those - - - those  
9 two elements, it's a search incident to arrest. When  
10 you have the sequence reversed, you add something.

11 CHIEF JUDGE LIPPMAN: Whenever it's  
12 probable cause you have a search incident to arrest?

13 MR. NAHAS: Upon probable cause.

14 CHIEF JUDGE LIPPMAN: Whenev - - - whenever  
15 there's probable cause - - -

16 MR. NAHAS: You have the authority - - -

17 CHIEF JUDGE LIPPMAN: - - - there is - - -  
18 there is a search incident to arrest?

19 MR. NAHAS: No, no, there's authority to  
20 arrest.

21 CHIEF JUDGE LIPPMAN: That's the rule?

22 MR. NAHAS: No, Judge. There is always - -  
23 - if there's probable cause, there is authority to  
24 arrest.

25 JUDGE SMITH: The - - - you - - - you - - -

1           you're saying - - -

2                       MR. NAHAS:  If there was - - -

3                       JUDGE SMITH:  - - - if there's an arrest  
4 based on probable cause then you have - - - then - -  
5 - then you can search.

6                       MR. NAHAS:  Absolutely, that's - - - that's  
7 the - - -

8                       JUDGE SMITH:  And - - - and - - - and they  
9 - - - and they don't have to be in that order as long  
10 as they're contemporaneous.

11                      MR. NAHAS:  That's right.  The - - - the  
12 order is irrelevant, and - - - and - - - common sense  
13 tells - - - tells us that.  If - - - let's say a  
14 case, an easy case, the police see somebody take a  
15 brick, throw it through the window.  They go up to  
16 the man.  They arrest him then they search him.  
17 Exactly the same situation, but they go up to the  
18 man, they search him and then arrest him, and the  
19 difference is a couple of seconds.  Is one reasonable  
20 and the other not reasonable?

21                      JUDGE RIVERA:  Yes, sure because the arrest  
22 is illusory.  No - - - and you're never going to  
23 arrest.  There's never going to be an arrest.

24                      MR. NAHAS:  Judge, I - - -

25                      JUDGE RIVERA:  What - - - the only reason



1 for the arrest is what you find pursuant to the  
2 search, so there - - - in your example that arrest is  
3 illusory.

4 MR. NAHAS: It's not an - - - it's - - -

5 JUDGE SMITH: Well, now - - - now, in your  
6 hypothetical, as I understood it, they would have  
7 arrest - - - they - - - they found nothing in the  
8 search but they arrested the guy anyway.

9 MR. NAHAS: That's right, if they find  
10 something and then you can complicate the situation,  
11 but that's the basic framework. But that - - - in  
12 other words, the sequence doesn't affect the  
13 Constitutionality. Some other things might happen  
14 which might cause us to look at it a bit more deeply,  
15 but that basic principle is perfectly fine. And - -  
16 -

17 JUDGE RIVERA: Well, let me - - - is it - -  
18 - is it your position that then this arrest is based  
19 on probable cause because he's a drunk driver as  
20 opposed to an arrest for probable cause based on  
21 carrying a weapon?

22 MR. NAHAS: I'm saying the - - -

23 JUDGE RIVERA: Does it matter - - - does it  
24 matter the basis for the arrest may be different pre  
25 and post the search?

1 MR. NAHAS: Absolutely not.

2 JUDGE RIVERA: Okay, why not?

3 MR. NAHAS: Because you - - - you work  
4 through the sequence. The authority to arrest came  
5 from having probable cause. The probable cause - - -

6 JUDGE RIVERA: Probable cause based on - -  
7 - in this - - - in this case?

8 MR. NAHAS: Not the DWI. Not - - -

9 JUDGE RIVERA: Yeah, okay.

10 MR. NAHAS: - - - on - - - on suspicion of  
11 DWI.

12 JUDGE RIVERA: Yes.

13 MR. NAHAS: It could be on - - - on  
14 anything.

15 JUDGE RIVERA: Yes.

16 MR. NAHAS: At that point, the police  
17 officer had the authority to arrest him. He chose to  
18 do less.

19 JUDGE SMITH: Well, just out of curiosity,  
20 why would any police officer not want to arrest  
21 somebody he thought was driving drunk? He's going to  
22 let them drive away?

23 MR. NAHAS: He didn't say he was going to  
24 let him go, Judge. He said at that point.

25 JUDGE SMITH: Okay.

1                   MR. NAHAS: He wanted - - - and - - - and  
2 he said - - - he was asked by - - - by - - - during  
3 cross, at that point, "You asked him to step out of  
4 the car and you did that based on his watery eyes and  
5 he had one beer after work." Yeah, the police  
6 officer wanted to do an investigation. This is a  
7 police officer who's not really trained in DWI. The  
8 last time he had training was at the police academy  
9 ten years earlier.

10                   CHIEF JUDGE LIPPMAN: Counsel, are we  
11 leaving ourselves open to excess by law enforcement  
12 in taking the tack that you are, that it - - - the  
13 sequence doesn't matter, nothing matters other than  
14 he has probable cause and we know that probable  
15 cause, from the precedents, is not enough. If you  
16 say that, well, probable cause is not enough but if  
17 you have probable cause it doesn't matter what  
18 happens, aren't we leaving ourselves open to the - -  
19 - there are no rules and that it doesn't matter if  
20 people's Constitutional rights are implicated?

21                   MR. NAHAS: There are rules, Your Honor.

22                   CHIEF JUDGE LIPPMAN: No, no, but I'm  
23 saying under the - - - the - - - the proposal that  
24 you make as to how we decide this case or any other  
25 case, doesn't it leave ourselves open to a situation

1 where there - - - really, there are no protections  
2 for anybody?

3 MR. NAHAS: The protection here comes from  
4 the fact that there was probable cause, which  
5 permitted the intrusion in the first place.

6 CHIEF JUDGE LIPPMAN: So again, isn't your  
7 argument really, in effect, probable cause is enough?  
8 And isn't that contrary to what the precedents say?

9 MR. NAHAS: No, probable cause is enough in  
10 a time sequence to take the first step. But since  
11 probable cause incident to an arrest is a legal  
12 construct, you need more. You need to satisfy all  
13 those elements.

14 CHIEF JUDGE LIPPMAN: But - - -

15 MR. NAHAS: But in the street - - - in the  
16 street, first thing that comes up is there probable  
17 cause. Then move - - - we move on through the  
18 sequence.

19 CHIEF JUDGE LIPPMAN: Okay, counselor,  
20 understand your argument. Thank you.

21 Let's hear your rebuttal.

22 MR. NAHAS: Thank you, Your Honor.

23 CHIEF JUDGE LIPPMAN: Counsel, what's wrong  
24 with your adversary's premises to how we should  
25 decide this case?

1 MR. PEREZ-MARQUES: What's wrong with his  
2 position is that the core of their position is that  
3 probable cause is enough, the same position that they  
4 say is clearly wrong. He said this - - - in this  
5 case the officer had probable cause to arrest so  
6 clearly, he had the right to do less. That is  
7 plainly wrong. That is the position this court  
8 rejected.

9 JUDGE SMITH: I - - - I - - - I got your  
10 adversary to acknowledge, after a little pushing,  
11 that the case turns on whether that question and  
12 answer is, "Only because you ultimately found the  
13 switchblade that you arrested him?" "Yes, ma'am,"  
14 whether that's relevant. Do you agree with him that  
15 that's - - -

16 MR. PEREZ-MARQUES: I absolutely agree it's  
17 relevant; the - - - in fact it is dispositive.

18 JUDGE SMITH: No - - - no - - - you - - -  
19 no, the - - - the - - - you - - - he - - - he says  
20 it's irrelevant, you think it's relevant?

21 MR. PEREZ-MARQUES: It is relevant.

22 JUDGE SMITH: Okay.

23 MR. PEREZ-MARQUES: It is relevant.

24 JUDGE SMITH: Is - - - isn't that the  
25 ballgame? Isn't everything else a distraction here?

1                   MR. PEREZ-MARQUES: That - - - that is the  
2 ball - - -

3                   JUDGE SMITH: If you're right, you win, if  
4 you're - - - if you're wrong, you lose?

5                   MR. PEREZ-MARQUES: That - - - that is part  
6 of the ballgame.

7                   JUDGE SMITH: Now wait a minute.

8                   MR. PEREZ-MARQUES: The - - - the fact that  
9 the officer testified I did not intend to arrest him  
10 is dispositive. It shows that there was no arrest at  
11 the time of the search and that is it.

12                   JUDGE SMITH: If you're right, you win, if  
13 you lose, you change the subject.

14                   MR. PEREZ-MARQUES: That - - - that - - -  
15 the - - - it shows the absence of an arrest at the  
16 time of the search and it is dispositive. Now he  
17 made a few references to reasonableness and as, Judge  
18 Smith, you pointed out, reasonableness is not an  
19 unconstrained facts and circumstances test. The  
20 Supreme Court just said in Riley a - - - a  
21 warrantless search is reasonable only if it falls  
22 within one of these established exceptions.

23                   JUDGE SMITH: Okay, but I mean doesn't - -  
24 - doesn't he have a point? Look, in this case you've  
25 got this incredibly clear testimony that he arrested

1 him only because he found the switchblade. But what  
2 - - - but yeah - - - but he could have also have said  
3 yeah, I'm not so sure. Maybe I would, maybe I  
4 wouldn't. I don't really remember what I was  
5 thinking at the time.

6 Doesn't - - - doesn't he have a point that  
7 we shouldn't get into that stuff? We should just  
8 look at the sequence of events and say if he could  
9 have made a good arrest, we're going to assume he did  
10 make a good arrest. So as long as the search is  
11 contemporaneous - - - you know, I understand problems  
12 with the logic, but there been - - - there've been  
13 problems with the logic in this area for a long time.  
14 We have an - - - we have a rule that we can follow.  
15 What's wrong with that?

16 MR. PEREZ-MARQUES: The - - - the problem  
17 is that the intent is relevant. The intent is  
18 directly linked to the constitutional justifications  
19 for this doctrine, which is that you're dealing with  
20 someone who's in the process of being subjected to  
21 the prolonged custody of - - -

22 JUDGE SMITH: Yeah, but the - - -

23 MR. PEREZ-MARQUES: - - - of the State.

24 JUDGE SMITH: - - - but the - - - but the  
25 doctrine, to some degree, has - - - has been unmoored

1 from its constitutional justifications for a long  
2 time. I mean back in United States against Robinson  
3 the minority was trying to say well, you can't have a  
4 search incident to arrest unless you're really going  
5 to serve the purpose of the doctrine, and the  
6 majority said no, nonsense. I don't care whether  
7 we're serving the purpose of the doctrine. We've got  
8 a rule.

9 MR. PEREZ-MARQUES: That - - -

10 JUDGE SMITH: Why shouldn't we be saying  
11 again, no, we've got a rule? Don't bother me with  
12 logic; we've got a rule.

13 MR. PEREZ-MARQUES: That is a critical  
14 point, Your Honor, and the reason is the prosecution  
15 completely ignores that the search incident doctrine  
16 is a bright-line rule. It is applied on a bright-  
17 line basis to searches that come after the arrest.

18 JUDGE SMITH: Yeah, but if you're going to  
19 start looking at the officer's state of mind, isn't  
20 your bright-line going to get fuzzy?

21 MR. PEREZ-MARQUES: No, Your Honor, the  
22 problem is that the - - - the doctrine cannot be  
23 applied on a bright-line basis to any search that  
24 comes before a lawful arrest, because the net effect  
25 is any search undertaken with probable cause is going



1 to be deemed valid. The exclusionary rule - - -

2 JUDGE SMITH: But the - - - wait - - - wait

3 - - -

4 MR. PEREZ-MARQUES: - - - never has an  
5 opportunity to work.

6 JUDGE SMITH: Does - - - but does - - -  
7 doesn't Rawlings in Kentucky say in so many words the  
8 opposite of what you just said? It is unimportant  
9 that the search preceded the arrest?

10 MR. PEREZ-MARQUES: The formal arrest; not  
11 arrest, formal arrest, and it's the same point that  
12 this court made in Evans. It's okay a formal arrest  
13 comes second, and the case they cite for that  
14 position is Sibron.

15 JUDGE SMITH: Well, it obv - - - well, I  
16 don't know if you had formal arrest. Obviously, this  
17 guy had been deprived of his liberty. He was pulled  
18 out of his car and then he was patted down.

19 MR. PEREZ-MARQUES: Temporary physical  
20 restraint does not trigger the justifications for a  
21 search incident. It's the prolonged custody that  
22 arises from the arrest coupled with the need to  
23 preserve evidence for use at trial. Absent intent to  
24 arrest, absent an actual arrest, those justifications  
25 do not exist, and the doctrine does not apply.

1                   JUDGE SMITH: I still - - - I still think  
2                   that inten - - - you're - - - you're saying intent is  
3                   decisive.

4                   MR. PEREZ-MARQUES: Intent is dispositive.  
5                   The absence of intent is dispositive in this case,  
6                   and we win on that basis.

7                   CHIEF JUDGE LIPPMAN: Okay, thank you both;  
8                   appreciate it.

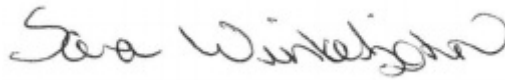
9                   (Court is adjourned)

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Graham Reid, No. 205 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

Date: November 23, 2014