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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 123

ANTHONY BARKSDALE,

Appellant.

20 Eagle Street
Albany, New York 12207
September 8, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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1 CHIEF JUDGE LIPPMAN: Number 123, People v.
2 Barksdale.

3 Counselor, do you want any rebuttal time?

4 MS. HOTH: Two minutes, please, Your Honor.

5 CHIEF JUDGE LIPPMAN: Two minutes, go
6 ahead; you're on.

7 MS. HOTH: Thank you. Good afternoon, Your
8 Honors. Jan Hoth for appellant, Anthony Barksdale.
9 Appellant's mere presence in the lobby of a TAP
10 building did not justify the police actions here.

11 CHIEF JUDGE LIPPMAN: Let's talk about what
12 a TAP building means and how that interfaces as an
13 idea of presence. What does it mean when you're a
14 TAP building?

15 MS. HOTH: According to the police
16 precincts, buildings' landlord/owner can enroll a
17 building in TAP, merely by signing an affidavit that
18 the building is - - -

19 CHIEF JUDGE LIPPMAN: And once you enroll
20 it in TAP, what does it mean?

21 MS. HOTH: It means that it gives the
22 police permission to enter and patrol, where they
23 otherwise would not be permitted to do; but it no way
24 diminishes a person's right to be free from
25 unreasonable search and seizures. If we're talking

1 about - - -

2 CHIEF JUDGE LIPPMAN: So - - - so all it -
3 - - in practical terms, it says to keep an eye on our
4 building, because we have problems?

5 MS. HOTH: Yes. Well, in practical terms,
6 that's what, at the time the affidavit is being
7 signed, the landlord is affirming; but in
8 practicality there is no systematic guidelines or
9 procedures that even ensure that that is, in fact,
10 the truth. Landlords can enroll buildings in TAP
11 when their buildings are not suffering from crime at
12 all.

13 CHIEF JUDGE LIPPMAN: So in your view, it
14 do - - - it doesn't mean that much, is that - - - is
15 that what you're saying, that you're a TAP building?

16 MS. HOTH: What it means is that the - - -

17 CHIEF JUDGE LIPPMAN: It means that - - -
18 that - - -

19 MS. HOTH: It means that the - - -

20 CHIEF JUDGE LIPPMAN: - - - the landlord
21 unilaterally says, gee, come in and - - -

22 MS. HOTH: What - - - what it's done is
23 give the police the authority to patrol buildings the
24 same way they have the authority to patrol NYCHA
25 buildings which are public, and they are the people

1 who patrol it. So here we have private buildings and
2 the landlord is saying, I want the police to come in
3 and patrol.

4 CHIEF JUDGE LIPPMAN: How does that affect
5 the tenants in the building?

6 MS. HOTH: Well, it's very significant that
7 it's the landlord who is making this decision, and he
8 apparently can make it unilaterally. There's nothing
9 in any record submitted anywhere, particularly not in
10 this case, that would suggest that the tenants are
11 even asked whether this is something they're
12 interested in.

13 JUDGE RIVERA: So the landlord is
14 authorizing police to go to any part of the building
15 that the landlord could go to? Is that - - - in
16 terms of the common areas? Is that - - -

17 MS. HOTH: I believe so. Typically
18 speaking, what - - - what the police do under this
19 authorization is conduct vertical patrols.

20 JUDGE RIVERA: So then what the landlord
21 has done is - - - is basically made those private
22 common areas a functional equivalent of the street
23 that's open to the public, in the sense of what the
24 cops can do, which is they can enter and look around
25 and walk around freely?

1 MS. HOTH: Exactly, Your Honor. In respect
2 to police actions. I - - - I wouldn't say they've
3 made it the equivalent of the street in terms of - -
4 -

5 JUDGE RIVERA: No, not anyone can walk in;
6 but for purposes for what the police can do?

7 MS. HOTH: Exactly, Your Honor, because
8 it's not even clear on this record how the police
9 entered this building. They're supposed to be, under
10 TAP, given keys so that they can enter. But here,
11 the officer involved had no idea how he entered the
12 building. He - - -

13 JUDGE RIVERA: So - - - so - - - so if De
14 Bour level one is - - - is - - - is the minimal basis
15 by which a - - - a police officer can make an inquiry
16 - - - it's not probable cause; it's not some higher
17 threshold - - - why isn't the TAP understanding or
18 agreement, certification, whatever you want to call
19 it, enough?

20 MS. HOTH: Well, there's two reasons. One,
21 although the court below treated this as a level-one
22 inquiry and most courts historically have been
23 treating it as a level one, put in context, it may
24 amount to a level two, but it's certainly more
25 intrusive than a level one.

1 JUDGE STEIN: But you didn't argue that.
2 That wasn't argued in either of the courts below, was
3 it?

4 MS. HOTH: Counsel argued that - - -
5 counsel argued that the police did not have a
6 Constitutional basis to stop, inquire, and question.
7 Nobody anywhere argued level one, level two. The
8 court below said this was a level one.

9 CHIEF JUDGE LIPPMAN: What if you have a -
10 - - a TAP building, like in your building, and then
11 you have the no trespassing sign. And you're beyond
12 the no trespassing sign. In combination, is that
13 enough?

14 MS. HOTH: It's not, Your Honor, because
15 there's - - -

16 CHIEF JUDGE LIPPMAN: Why not?

17 MS. HOTH: - - - there's nothing inherently
18 suspicious about simply standing in the common area
19 of a building even if tres - - -

20 JUDGE FAHEY: How else, though, do you
21 determine a trespass? Be - - - you've referred to it
22 as mere presence, but a trespass is presence. That's
23 what it is. You're in a space that you shouldn't be
24 in. It's - - - it's nothing but presence. So - - -
25 so the logic of that is, how else can you determine

1 that, except to say: do you live here? How else
2 would you make that determination?

3 MS. HOTH: Well - - -

4 JUDGE FAHEY: Besides the basic - - - some
5 sort of basic inventory question.

6 MS. HOTH: Well, I - - - I would first say
7 that a police officer in uniform approaching somebody
8 in the lobby of a building is not unobtrusive.
9 They're approaching because - - -

10 JUDGE FAHEY: But that I don't - - -
11 honestly, it's irrelevant whether - - - at this
12 point, if it's unobtrusive. My question is whether
13 or not it's a proper question. And I - - - I just
14 can't figure out how else you would determine a
15 trespass is taking place unless you ask someone, do
16 you live here?

17 MS. HOTH: I - - - Your Honor, first of
18 all, what that means is that the police would then be
19 authorized to ask everyone they encountered - - -

20 JUDGE PIGOTT: No, stop, stop.

21 JUDGE FAHEY: No, no - - -

22 JUDGE PIGOTT: I understand - - - pardon
23 me.

24 JUDGE FAHEY: Go ahead, I'm sorry.

25 JUDGE PIGOTT: I was - - - I was just going

1 to piggyback on that. Let's assume for a minute, not
2 your defendant, but a defendant is a - - - is an
3 upset husband or boyfriend of someone in the
4 building, and he's going there with the specific
5 purpose of doing something bad. The police see
6 somebody in the building and they want to know who he
7 is. What should they do?

8 MS. HOTH: Well, what are they witnessing?
9 Are they witnessing him simply standing there, or are
10 they witnessing presence plus something?

11 JUDGE PIGOTT: No, there's - - -

12 MS. HOTH: Something that would give them
13 an objective, credible reason to approach.

14 JUDGE FAHEY: There is no "plus" in a
15 trespass charge. The - - - the mere presence is the
16 trespass. So - - - so there doesn't need to be
17 something else. If you're in a place that you're not
18 supposed to be in legally, that's the trespass.

19 MS. HOTH: But again - - -

20 JUDGE RIVERA: But isn't your argument that
21 someone who - - - who would lawfully have the right
22 to be present will be do - - - will be conducting
23 themselves in the exact same way?

24 MS. HOTH: Exactly.

25 JUDGE RIVERA: So you can't base in on mere

1 presence.

2 CHIEF JUDGE LIPPMAN: So the - - - so - - -

3 JUDGE RIVERA: It's got to have something
4 else.

5 MS. HOTH: Exactly, Your Honor.

6 CHIEF JUDGE LIPPMAN: So what is it, then?
7 There has to be a particularized reason to go over to
8 the - - - to the - - -

9 MS. HOTH: Your Honor, there has to be an
10 objective, credible reason.

11 CHIEF JUDGE LIPPMAN: Yeah, yeah. How - -
12 - how do you get there?

13 MS. HOTH: Well, they could have simply - -
14 -

15 CHIEF JUDGE LIPPMAN: What - - - what - - -
16 give us some examples of where, let's say for the
17 sake of argument, that you're right, that - - - that
18 you can't tell one person from the other, and it's a
19 TAP building; but does that apply to every person
20 who's present? So what beyond that do you have to
21 have? Mere presence, we understand is your argument.
22 What particular things would - - - would warrant
23 asking?

24 MS. HOTH: An ex - - - an example in the
25 past is that when upon seeing the police, they act

1 very suspiciously. They - - - I don't know what that
2 would entail - - - or somebody's seen in the lobby
3 and they stand there for fifteen minutes. They don't
4 talk to anybody. They don't move. The officers here
5 approached immediately. They could have stopped and
6 watched for a bit. An invited guest - - -

7 JUDGE PIGOTT: If they had - - -

8 MS. HOTH: - - - would be called upstairs.

9 JUDGE PIGOTT: If they had stopped and
10 watched for a bit, would then that be okay?

11 MS. HOTH: If - - - if Mr. Barksdale had
12 continued to stand there and do absolutely nothing,
13 five minutes may be not enough, but after fifteen,
14 why is he still standing in the lobby. That might be
15 enough.

16 JUDGE ABDUS-SALAAM: So what if this - - -
17 this building was unstaffed obviously, right? But if
18 someone came into the building, or there had been
19 some new employee who didn't know the residents of
20 the building, and somebody came into the building and
21 asked, then - - - and the new employee asked why are
22 you here? Would that be something bad that you
23 couldn't do?

24 MS. HOTH: Well, I think that - - -

25 JUDGE ABDUS-SALAAM: If this were a staffed

1 building - - -

2 MS. HOTH: I - - -

3 JUDGE ABDUS-SALAAM: - - - are you saying
4 that you couldn't ask somebody that the employee
5 didn't recognize, even if it were a resident, but the
6 employee's new, doesn't recognize that person - - -
7 are you're saying that question couldn't be asked,
8 who are you, and what are you doing here?

9 MS. HOTH: I think the difference there,
10 Your Honor, is that the residents in staffed
11 buildings, have opted to live in a staffed building.
12 And there is a big difference between being
13 approached by a doorman, new or old - - -

14 JUDGE ABDUS-SALAAM: They can afford to
15 live in a staffed building, but some people can't.
16 And so if they can't, then they're not entitled to
17 find out who's in their building?

18 MS. HOTH: But there are locked doors and
19 buzzers. These buildings are not completely without
20 security. So the question is, is being approached by
21 your doorman that you've opted to live in the
22 building and opted to have someone monitor who's
23 coming and going, is that approach different than
24 being approached by a policeman in full uniform who -
25 - -

1 JUDGE PIGOTT: Well, some people - - -

2 JUDGE RIVERA: So let's say - - - so let's
3 say the - - - the landlord takes a vote, sends
4 everybody a letter: do you want to be part of TAP?
5 And everybody signs on. Now, can the police just
6 stop and ask anybody?

7 MS. HOTH: Well --

8 JUDGE RIVERA: Because now the tenants have
9 agreed that not only the door person but someone else
10 or an employee can come and ask - - -

11 MS. HOTH: I would argue - - -

12 JUDGE RIVERA: - - - anybody in the lobby?

13 MS. HOTH: I would argue that even though
14 De Bour would say that it's not permissible, if the
15 tenants are voting that they don't mind having their
16 everyday lives disrupted, but - - - because they're
17 merely stand - - -

18 JUDGE STEIN: But how does that affect the
19 rights of this person who is not a tenant? How - - -
20 how can the tenants voting to have the police be
21 there make any difference to - - - aren't the rights
22 of this nontenant the same whether the tenants vote
23 one way or another? I - - - I'm not - - - I don't
24 understand that.

25 MS. HOTH: Well, I'm saying, Your Honor,

1 person standing in a privately owned building - - - a
2 private building. He's - - - this per - - - a
3 trespass is just mere presence, as you say. I - - -
4 I accept that, but I would just call it presence in a
5 space where you're not entitled to be. How is that
6 not a trespass? And the second question, of course,
7 is how do you determine if that's a trespass, except
8 by asking the person?

9 MS. HOTH: And I say that what the police
10 have to do if they enter a building and they see
11 somebody standing there, they can watch. Wa - - -

12 JUDGE FAHEY: That's - - - I understand
13 that's the approach.

14 MS. HOTH: Monitor the behavior.

15 JUDGE STEIN: So the rule that you're
16 asking - - -

17 JUDGE FAHEY: But what about the - - -

18 JUDGE STEIN: - - - us to - - - to make is
19 that it's okay if the person's standing there for
20 twenty minutes or fifteen minutes or ten minutes.
21 Where - - - where do we draw that line - - -

22 MS. HOTH: I'm say - - -

23 JUDGE STEIN: - - - if that's the rule?

24 MS. HOTH: My rule is that there has to
25 presence plus something.

1 CHIEF JUDGE LIPPMAN: Okay, counselor.

2 MS. HOTH: Thank you, Your Honor.

3 CHIEF JUDGE LIPPMAN: Thank you.

4 Counselor?

5 MS. BAUTISTA: Good afternoon, Your Honors,
6 may it please the court, my name is Sheila Bautista,
7 and I represent the People in this case.

8 CHIEF JUDGE LIPPMAN: Counsel, as - - - is
9 your position that we can presume that everyone who's
10 in a TAP building is a trespasser?

11 MS. BAUTISTA: Absolutely not, Your Honor.

12 CHIEF JUDGE LIPPMAN: So how do - - - so if
13 that's not the answer, where do you disagree with
14 your adversary is saying, it has to be more than mere
15 presence. That TAP building, fine, but the landlord
16 can't give away everybody else's rights. So if
17 you're there and you haven't done anything - - - she
18 called it "plus" - - - there isn't anything more;
19 you're just there, can we presume that you're a
20 trespasser and - - - and start asking well, what - -
21 - what are you doing here? Are you visiting someone?
22 What - - - what's going on? Answer that. I think
23 that's the nub of really what we're dealing with
24 here.

25 MS. BAUTISTA: Your Honor, the question

1 doesn't presume that a person's necessarily a
2 trespasser. Level-one questions can be asked absent
3 any indication of criminality.

4 CHIEF JUDGE LIPPMAN: So - - - so you can
5 do no - - - so mere presence in a TAP building is
6 enough.

7 MS. BAUTISTA: In this case, yes. The of -
8 - -

9 CHIEF JUDGE LIPPMAN: Why in this case?
10 Tell me.

11 MS. BAUTISTA: In this case, because the
12 defendant was just standing in the lobby where it was
13 unlawful for him to be. These police officers - - -
14 there's something key about TAP buildings - - -

15 CHIEF JUDGE LIPPMAN: So anyone - - - I
16 come back to my question to you. Anyone standing in
17 the lobby who is present in the lobby, we can come
18 and ask what are you doing here?

19 MS. BAUTISTA: Yes, because the police
20 officers have been asked to address the crime that
21 could be committed by being in the lobby - - -

22 CHIEF JUDGE LIPPMAN: Uh, uh, uh, no, no.
23 No, no, but the police - - -

24 MS. BAUTISTA: - - - in the lobby without
25 authorization.

1 CHIEF JUDGE LIPPMAN: - - - the police
2 officer is asked by the landlord under this TAP.

3 MS. BAUTISTA: Because the building - - -

4 CHIEF JUDGE LIPPMAN: The tenants - - -
5 remember we went through this whole thing with your
6 adversary - - - the tenants haven't voted for that.
7 The - - - the landlord can't give away everybody's
8 rights.

9 MS. BAUTISTA: Your Honor, TAP - - -

10 CHIEF JUDGE LIPPMAN: So - - - so the
11 designation of a TAP building means automatically you
12 can come in because the landlord has asked. You can
13 ask anyone there, presume that they might be
14 trespassing, let's put it that way, and ask whatever
15 questions you want. De Bour one, whatever. Why is
16 that appropriate?

17 MS. BAUTISTA: Your Honor, TAP buildings -
18 - -

19 CHIEF JUDGE LIPPMAN: The usual test - - -
20 I guess this is what I'm driving at. The usual test
21 is some kind of conduct, some tip that would lead you
22 to believe that there may be an issue here. Just get
23 me around that. That's what I want you to answer.

24 MS. BAUTISTA: Your Honor, TAP buildings
25 started because drug dealers were taking their

1 business from street corners into people's
2 residential buildings. They were taking them into
3 the lobbies. They were dealing drugs from the
4 lobbies.

5 CHIEF JUDGE LIPPMAN: Do you agree with her
6 statement that the landlord can just say, I want you
7 patrolling my building?

8 MS. BAUTISTA: Your Honor, this is a case
9 where the officers - - -

10 CHIEF JUDGE LIPPMAN: Yes or - - - yes - -
11 -

12 MS. BAUTISTA: - - - were asked to just - -
13 -

14 CHIEF JUDGE LIPPMAN: Yes or no? Do you
15 agree with that?

16 MS. BAUTISTA: Yes, the officers were asked
17 by the landlord to - - -

18 CHIEF JUDGE LIPPMAN: Yeah, yeah, I - - - I
19 get it. So, okay, that's a given. A TAP building,
20 the landlord says I want you in there.

21 MS. BAUTISTA: Because - - -

22 CHIEF JUDGE LIPPMAN: Can the landlord take
23 away everyone else's rights?

24 MS. BAUTISTA: The landlord is authorizing
25 police to provide the security that these residents

1 don't have.

2 JUDGE FAHEY: But your - - - your response
3 is that that the landlord cannot take away other
4 people's rights; the question is whether or not
5 that's happening here? Isn't that - - - isn't that
6 really correct?

7 MS. BAUTISTA: Correct, Your Honor. There
8 are situations where a person can be present in a
9 lobby of their own home - - -

10 JUDGE RIVERA: Okay, so, counsel, let's - -
11 - let's get to your point that the mere designation
12 of a building under TAP satisfies De Bour one's
13 objective credible reason requirement.

14 MS. BAUTISTA: Yes, it - - -

15 JUDGE RIVERA: How does it satisfy that
16 requirement?

17 MS. BAUTISTA: It - - -

18 JUDGE RIVERA: That - - - that struck me as
19 a requirement about individual conduct.

20 MS. BAUTISTA: Your Honor, there is - - -

21 JUDGE RIVERA: TAP is about a broad sweep
22 in your building.

23 MS. BAUTISTA: TAP - - - a TAP building
24 indicates two things. It indi - - - indicates that
25 the building has suffered a history of crime by

1 trespassers. That's how the - - - that's how the
2 program originated. Also - - -

3 JUDGE STEIN: But we - - - we've held that
4 - - - that the fact that it's an area that is known
5 for criminality isn't enough.

6 MS. BAUTISTA: In McIntosh that was the
7 case, because the entire City of New York was a high
8 crime area. In this - - -

9 JUDGE RIVERA: But isn't the point that
10 you're looking at the individual, because it's the
11 individual's Constitutional rights we're talking
12 about.

13 MS. BAUTISTA: We're talking about the
14 individual's const - - -

15 JUDGE RIVERA: What has this individual
16 done that provides the credible - - - objective
17 credible reason for the officer to ask them anything?

18 MS. BAUTISTA: His behavior is consistent
19 with the crime that the officers have been asked to
20 address.

21 JUDGE RIVERA: Well, what's - - - what - -
22 - the behavior of standing in a lobby is consistent
23 with - - -

24 MS. BAUTISTA: This is - - -

25 JUDGE RIVERA: - - - trespass?

1 MS. BAUTISTA: This is a restricted area.

2 JUDGE PIGOTT: Well, can we back up on
3 that?

4 JUDGE RIVERA: So, again, doesn't - - -
5 don't we get back to the Chief Judge's question?
6 That means everybody is subject to questioning.
7 There's not one person being excluded, maybe the
8 person who's got the key who's opening the door.

9 MS. BAUTISTA: Exactly. If there's a
10 person - - -

11 JUDGE RIVERA: But otherwise anyone else -
12 - - I'm standing in the lobby waiting for my friend.

13 MS. BAUTISTA: That's possible; but that's
14 - - - that's the nature of every level-one encounter,
15 because - - -

16 JUDGE PIGOTT: But let's - - - let's - - -

17 MS. BAUTISTA: - - - a level-one encounter
18 allows the question - - -

19 JUDGE RIVERA: Only if you - - - only if
20 you say standing in the lobby - - -

21 JUDGE PIGOTT: I'll get there.

22 JUDGE RIVERA: - - - and doing nothing else
23 is enough, which I think is the question we're
24 asking.

25 MS. BAUTISTA: In this case, yes. The

1 person's just standing in the lobby. His behavior is
2 consistent with the crime the officers have been
3 asked to address. Given - - -

4 CHIEF JUDGE LIPPMAN: Judge Pigott.

5 MS. BAUTISTA: - - - sorry, Judge Pigott.

6 JUDGE PIGOTT: That's all right. Let's
7 back up a little bit, though. Judge Fahey raises the
8 point that at some point you got to be able to ask
9 some questions. Now in this particular case, not
10 only is it a TAP building, but does - - - does TAP
11 buildings require this - - - there was a "no
12 trespassing" sign?

13 MS. BAUTISTA: There was a - - - there was
14 a bi - - - there was a sign in that lobby - - -

15 JUDGE PIGOTT: No, let me - - - that was
16 only - - -

17 MS. BAUTISTA: - - - that said that, yes.

18 JUDGE PIGOTT: - - - that was a preamble to
19 my question.

20 MS. BAUTISTA: Okay, sorry.

21 JUDGE PIGOTT: That - - - and as I
22 understand it there's a - - - there's a foyer, then
23 there's the locked door, and then there's where this
24 particular person was questioned.

25 So when the officer was asked, you know,

1 at - - - I'm look - - -

2 MS. BAUTISTA: He may not have remembered
3 exactly what it looked like but - - -

4 JUDGE PIGOTT: I'm looking at 20, line 1.
5 It says, "As I recall I saw a sign. I can't recall
6 if it was posted inside the - - - inside the lobby or
7 in the front of the building or exactly where."

8 MS. BAUTISTA: But - - - but he recalled
9 that there was a sign in the lobby and that's - - -

10 JUDGE PIGOTT: And in 17, he says "I don't
11 know if the building was part of TAP until I spoke
12 with the dis - - - the district attorney" - - -

13 MS. BAUTISTA: Your Honor, he was on - - -

14 JUDGE PIGOTT: - - - "after the arrest."

15 MS. BAUTISTA: Your Honor, he was on an
16 impact post. He was - - - he was on a particular
17 patrol to address - - -

18 CHIEF JUDGE LIPPMAN: Counsel, does that
19 give him unlimited discretion? How is this different
20 then like the roadblock cases, you know, where you
21 can do everyone or you get unlimited discretion? The
22 - - - that's the question. Does - - - does this sign
23 that he's not even sure exactly where he saw it or
24 what it is, we're not sure whether the door is open
25 or not, does he have unlimited discretion? That's -

1 - - that's what my - - - what troubles me. Can he -
2 - - anybody, anything - - - do we know here that that
3 gives him that right?

4 MS. BAUTISTA: Your Honor, if the person
5 used a key to get into the building, if they were
6 using a key to get their mail - - -

7 CHIEF JUDGE LIPPMAN: If he thinks that he
8 may be trespassing - - - go ahead.

9 MS. BAUTISTA: If the person was using
10 their key to get their mail and it's - - - his - - -
11 his behavior is more consistent with a resident's - -
12 -

13 JUDGE STEIN: What if the resident - - -
14 he's waiting for their friend?

15 MS. BAUTISTA: - - - then it wouldn't be -
16 - - it might not be as reasonable. Sorry?

17 JUDGE STEIN: What if the resident is just
18 waiting for their friend?

19 MS. BAUTISTA: If the resident's just
20 waiting - - - their friend then - - -

21 JUDGE STEIN: I mean, in the lobby.

22 MS. BAUTISTA: - - - then - - - then it's
23 permissible for the police officer to ask the
24 question.

25 JUDGE RIVERA: Well, it sounds like your

1 rule turns De Bour and the law on its head, right.
2 Your - - - your rule is, if you conduct yourself in a
3 way that appears that you're not committing a crime,
4 you don't have to be asked, which is not our law.
5 Our law is you have to have some kind of conduct or
6 something that suggests to the officer.

7 MS. BAUTISTA: Here the objective credible
8 reason, absent necessarily criminality, is that the
9 police officer is trying to make sure that everyone
10 who's in the lobby, belongs in the lobby - - - is - -
11 - is lawfully in the lobby, because this is a
12 building that has suffered crime by trespassers - - -

13 JUDGE RIVERA: But what I'm saying is that
14 - - - that your rule is that everybody fits that
15 category unless they show otherwise, which turns our
16 law on its head. Because there's no way to know that
17 until you ask and perhaps they answer, but - - -
18 which leads me to my next question.

19 Let's say the officer goes - - - the
20 officer goes up and asks; and he says I don't have to
21 talk to you; I'm not answering your question.

22 MS. BAUTISTA: In that - - -

23 JUDGE RIVERA: Now what?

24 MS. BAUTISTA: In that case, the po - - -
25 the officer can try to take reasonable steps to

1 ensure that he lives in the building. The officer
2 can explain, look - - -

3 JUDGE RIVERA: I understand. Doing what?

4 MS. BAUTISTA: The officer - - -

5 JUDGE RIVERA: The person says I don't want
6 to talk to you and I don't have to speak to you - - -

7 MS. BAUTISTA: The officer can say - - -

8 JUDGE RIVERA: - - - go and leave me alone,
9 or - - - or starts walking away.

10 MS. BAUTISTA: If the off - - - if the
11 person - - - if the person ad - - - refuses to answer
12 the officer's question, that could reasonably raise
13 the officer's level of suspicion, because this is a
14 building that can be - - - that can be - - - that be
15 committed by mere presence in the building. And if
16 the person doesn't want - - -

17 CHIEF JUDGE LIPPMAN: Counsel, let - - -
18 let me - - - let me - - -

19 JUDGE FAHEY: That - - - that goes back to
20 the basic elements of trespass, which are, of course,
21 you're in a place where you're not legally implied to
22 be. Now just - - - I know your red light is on, but
23 I've got a - - - a hypothetical.

24 I - - - I don't get to the City as often as
25 I should, but I guess the Sherry Amsterdam (sic) is

1 one of the biggest hotels there now right, still.
2 And over the summer I grew a beard to the
3 consternation of many of my colleagues, and if I was
4 standing - - -

5 CHIEF JUDGE LIPPMAN: Not true, not true,
6 but go ahead.

7 JUDGE FAHEY: If I was standing in the
8 lobby of the Sherry Amsterdam and the doorman came up
9 to me and said, why are you here, because he didn't
10 like the way I looked, and - - - and I would say, I'm
11 waiting for my sister, that'd be a perfectly
12 legitimate response, right? Now if a police officer
13 came and asked me that same question in a private
14 building, why are you here, and I say, I'm waiting
15 for my sister, perfectly fine. And he said, uh, I'm
16 just waiting for somebody and he says, who? And I
17 can't respond. The doorman say are you staying here?
18 No, I can't respond to him. Is it any different if
19 it's the Sherry Amsterdam than if it's a - - - than
20 if it's a - - - it's a housing unit with - - - with
21 600,000 people in it, like in Queens somewhere?

22 MS. BAUTISTA: Your Honor, you have a right
23 to be in the Sherry Amsterdam. People don't have a
24 right to be in a building with no trespassing signs,
25 locks, buzzers, a history of crime.

1 JUDGE FAHEY: So - - - so the difference is
2 the affidavit, right?

3 MS. BAUTISTA: That's - - - that's what
4 makes this different is that - - -

5 JUDGE FAHEY: Okay. And so - - - so this -
6 - - so then we get - - - of course, in the Sherry
7 Amsterdam, everybody wouldn't have to agree to have
8 some doorman come up and ask me that question. And
9 now the - - - you haven't really responded to the
10 question of whether or not people are giving up some
11 right by saying you can't illegally trespass in my
12 building, right? You need to respond to that.

13 MS. BAUTISTA: Your Honor, it's the nature
14 of a level-one question. The - - - a level-one
15 question is allowed to be asked - - -

16 JUDGE FAHEY: And that's because it's only
17 - - - the - - - the element of the crime of trespass
18 is simply the presence in a place where it's not
19 legal. You're not - - - you don't have a legal right
20 to be there.

21 MS. BAUTISTA: Correct, Your Honor.

22 JUDGE RIVERA: But isn't that true of any
23 crime which is currently being committed but it's not
24 obvious from its face? I'll give you an example,
25 weapons possession. I've got a gun in my back

1 pocket. You can't see it, but I'm obviously
2 committing the crime, equivalent to the trespass that
3 Judge Fahey is talking about.

4 MS. BAUTISTA: But the - - -

5 JUDGE RIVERA: What's the difference?

6 MS. BAUTISTA: The officer may not be able
7 to see any sign - - -

8 JUDGE RIVERA: Correct.

9 MS. BAUTISTA: - - - that the - - - that
10 there's a weapon. But in this case, being just
11 present and - - - and just standing in the - - - in
12 the lobby of that building, that's constitutes that
13 crime.

14 CHIEF JUDGE LIPPMAN: Counsel, one - - -
15 one last question. Your rule really is - - - and I'm
16 not saying judgmentally either way - - - once it's a
17 TAP building, that's the end of the story. You can -
18 - - you can come in and question, mere presence.
19 It's the TAP building that's really - - - that's
20 really your test, right?

21 MS. BAUTISTA: Just standing, in this case.
22 But if there were other residents who - - - who - - -
23 who are apparently a resident, using keys, carrying
24 groceries, et cetera, then maybe it may not be as
25 reasonable.

1 CHIEF JUDGE LIPPMAN: All right, but - - -

2 JUDGE STEIN: Would your answer be the same
3 if there was no sign posted? It was just a TAP
4 building. Is that enough, or does there have to be a
5 sign posted so that somebody coming in would - - -
6 would know that they - - - they shouldn't be there?

7 MS. BAUTISTA: Your - - - Your Honor, the
8 sign helps, but it's not - - - it's not the - - - the
9 key here. There is the fact that the building is
10 locked. There's a buzzer system which indicates - -
11 -

12 CHIEF JUDGE LIPPMAN: Okay, counsel.

13 MS. BAUTISTA: - - - you're not allowed in
14 this building unless you live here.

15 CHIEF JUDGE LIPPMAN: Let's - - -

16 JUDGE RIVERA: I'm sorry, I just - - -

17 CHIEF JUDGE LIPPMAN: One last question,
18 Judge Rivera.

19 JUDGE RIVERA: So I just want to
20 understand. If someone is approached by a police
21 officer in the lobby and the person refuses to give
22 them an answer, under your rule, how far can the
23 officer go after that to try and determine whether or
24 not indeed this individual is a trespasser?

25 MS. BAUTISTA: Your Honor, if the person

1 refuses to answer?

2 JUDGE RIVERA: Absolutely refuses, says I
3 don't want to talk to you.

4 MS. BAUTISTA: After - - - after the
5 officer's good faith efforts - - -

6 JUDGE RIVERA: Yes, please.

7 MS. BAUTISTA: - - - then that would - - -
8 that could raise the officers' level of suspicion
9 because this is a crime that a person - - -

10 JUDGE RIVERA: I understand. But then what
11 would - - - my question is what would the officer
12 then do? Is the officer - - - would the officer then
13 be authorized to frisk the individual, to arrest the
14 individual? What is the next step?

15 MS. BAUTISTA: The officer could try to
16 explain - - - I'm - - - I'm - - - I'm - - -

17 JUDGE RIVERA: Right, and the person again
18 says, I don't want to talk to you.

19 MS. BAUTISTA: Then - - - then - - -

20 JUDGE RIVERA: Um-hum.

21 MS. BUATISTA: - - - - then perhaps the
22 officer could ask the person to leave the building,
23 because only people who are allowed to be in the
24 building according to the sign are residents or their
25 authorized guests.

1 JUDGE RIVERA: And must - - - and must the
2 person leave the building upon direction by the
3 officer?

4 MS. BAUTISTA: Well, it - - -

5 JUDGE RIVERA: It may - - - - may be in
6 their best interest to do so.

7 MS. BAUTISTA: It may be in their best
8 interest to do so.

9 CHIEF JUDGE LIPPMAN: Okay, counsel.

10 JUDGE RIVERA: Thank you.

11 MS. BAUTISTA: Thank you.

12 CHIEF JUDGE LIPPMAN: Thank you.

13 Rebuttal, counsel?

14 MS. HOTH: Your Honors, practically
15 speaking, an encounter between the police and someone
16 in the lobby of a TAP building ends in one of three
17 ways. First they produce valid identification to
18 prove that they actually live in the building. Then
19 they're allowed to go upon their way.

20 Second they name the person that they're
21 visiting, and the police go and knock on the
22 apartment door, and say, is this per - - - has this
23 person been visiting you? Are you expecting them?
24 If they get corroboration from the person who answers
25 the door, you're allowed to go on your way.

1 If none of those things happen, you're
2 arrested for trespass. If you refuse - - -

3 JUDGE PIGOTT: Are there requirements in -
4 - - in a TAP building once the affidavit is signed,
5 to post trespassing signs?

6 MS. HOTH: It's part of the TAP program
7 that signs are supposed to be posted. But the police
8 operate in TAP buildings whether or not the signs are
9 posted.

10 JUDGE PIGOTT: Right, but I - - - what I
11 mean is, if it's a TAP building and they're supposed
12 to put up the signs and they don't, I would think
13 it's a different - - - different situation.

14 MS. HOTH: Right. We're not challenging
15 here whether the sign was posted or not. We're
16 assuming for the sake of argument that there was a
17 sign, and we're merely saying that standing in the
18 lobby alone - - -

19 JUDGE PIGOTT: Well, let me - - - well,
20 there's one thing in between there. If - - - if - -
21 - if there's a sign that says no trespassing, and
22 this person, for the sake of argument, is not
23 supposed to be in the building, there's still the
24 locked door. There's - - - there's the foyer and
25 then - - - then the locked door that gets you into

1 the lobby.

2 MS. HOTH: Again, on this record we don't
3 know if the door was locked.

4 JUDGE PIGOTT: Right. That - - - that's
5 why I was asking the question. I - - - I don't know
6 if that's in the - - - if all TAP buildings require
7 that, so that if the cops see somebody who's gone
8 through the locked door and is what - - - in their
9 view - - - is loitering, do they have the right to
10 ask if he's in fact trespassing?

11 MS. HOTH: Well, going through a locked
12 door would be the plus that I was suggesting before -
13 - -

14 JUDGE PIGOTT: So you're answer is no.

15 MS. HOTH: - - - and I - - - I think my
16 rule would - - -

17 JUDGE RIVERA: Well, unless someone is just
18 walking out the door and you go right in. It's not
19 indicating that you would have otherwise
20 independently been able to go in the door - - -

21 MS. HOTH: Right.

22 JUDGE RIVERA: - - - which is I think is
23 really what Judge Pigott is asking you.

24 MS. HOTH: I - - - I think that if the
25 police observe you piggybacking into somebody through

1 a locked door, that - - - that might be the plus.

2 JUDGE RIVERA: Yeah, there's - - - there's
3 some case law on that.

4 MS. HOTH: It - - - but it may not be.

5 JUDGE RIVERA: Did you have - - - what - -
6 - what - - - what's your answer to my question to
7 your adversary. The - - - the individual who refuses
8 to respond to the police officer. What could - - -

9 MS. HOTH: They're going to get arrested.

10 JUDGE RIVERA: - - - a police officer after
11 that?

12 MS. HOTH: They're going to get arrested
13 for trespassing.

14 JUDGE RIVERA: No, but whether they can or
15 - - - my question is, what, under your understanding
16 of De Bour, is the officer authorized to do, arrest
17 them?

18 MS. HOTH: Under my understanding of De
19 Bour - - -

20 JUDGE RIVERA: Your argument.

21 MS. HOTH: - - - the officer wasn't
22 permitted to go and question the person unless there
23 was something more than standing in the lobby. If
24 I'm standing - - -

25 JUDGE RIVERA: Let's say we ruled against

1 you on that, but the person takes the position I
2 don't have to answer you. We've said in the past,
3 you don't have to speak to an officer. Doesn't
4 answer the officer.

5 MS. HOTH: Correct. I believe then the
6 officers can do no - - - under my rule, the officers
7 can do nothing but watch you. If you're a legitimate
8 tenant, you're going to go to your apartment.

9 JUDGE PIGOTT: Well, no, I mean, they could
10 - - - they could call the landlord. They could - - -
11 you know, they could call back for instructions.
12 They could - - - I mean, there are a number of
13 options that they have. I mean, they don't have to
14 just walk away, right?

15 MS. HOTH: No, I wasn't suggesting that
16 they had to walk away. I was su - - - I was
17 suggesting the most obvious, if you're - - - if you
18 think the person doesn't belong there and you
19 continue to watch them, a tenant will either go to
20 their apartment, or a visitor will buzz up and go to
21 an apartment, or their friend will come down, or they
22 simply live - - - leave the building.

23 Some - - - a trespasser isn't going to
24 continue to stand there while the police are
25 watching. I think the police watching would

1 illuminate the situation - - -

2 JUDGE RIVERA: Or as Judge Pigott suggests,
3 the police do something else that's not intrusive to
4 the individual in terms of physically or otherwise.

5 MS. HOTH: Um-hum.

6 JUDGE RIVERA: But if they can try and
7 confirm - - -

8 MS. HOTH: Same thing.

9 JUDGE RIVERA: - - - that you're authorized
10 to be there.

11 MS. HOTH: Same thing.

12 JUDGE RIVERA: And again, it may be the
13 wiser course to leave if you're not authorized to be
14 there.

15 CHIEF JUDGE LIPPMAN: Okay, counsel.

16 MS. HOTH: Thank you.

17 CHIEF JUDGE LIPPMAN: Thank you both,
18 appreciate it.

19 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Anthony Barksdale, No. 123, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: September 15, 2015