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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 51

BOBBY WALLACE,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
March 22, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
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  
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Meir Sabbah  
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Number 51 on the  
2 calendar, People v. Bobby Wallace.

3 Counsel.

4 MS. FELL: Good afternoon, Your Honors, and  
5 may it please the court. My name is Katherine Kelly  
6 Fell from the law firm of Paul Weiss, and I represent  
7 defendant-appellant Bobby Wallace. I would like to  
8 reserve two minutes for rebuttal.

9 CHIEF JUDGE DIFIORE: Certainly.

10 MS. FELL: I'd like to address our custody,  
11 public safety and O'Rama issues today, time  
12 permitting, but I'll start with the custody argument.  
13 We are asking the court to formally recognize that a  
14 person who admits to police that they have committed  
15 criminal wrongdoing does not feel free to leave that  
16 encounter with police.

17 JUDGE RIVERA: Was that argument presented  
18 to the judge? Was that particular argument  
19 presented?

20 MS. FELL: At the suppression court?

21 JUDGE RIVERA: Yes.

22 MS. FELL: The argument at the suppression  
23 court - - - trial counsel's argument was slightly  
24 different, but it was about custody, and the relevant  
25 facts were referenced in the argument, and

1           importantly the trial court, also in making its  
2           decision on custody, found the relevant facts here  
3           are the statements that are at issue.

4                   JUDGE GARCIA:  But are you asking for a  
5           different rule than all the facts and circumstances  
6           to determine if a reasonable person believes they are  
7           free to leave or, you know, the standard, or, you  
8           know - - - and this is one factor, which then I think  
9           your preservation argument has more merit, but - - -  
10          or are you asking for a different rule, that once you  
11          confess to a crime, it's over.

12                   MS. FELL:  It's about an acknowledgement  
13          that a confession specifically rises above.  So if -  
14          - - if a defendant confesses criminal wrongdoing to  
15          an officer, it doesn't matter whether that defendant  
16          is in the street or in the police station; if he  
17          confesses criminal wrongdoing, he's not going to feel  
18          free to leave.

19                   JUDGE ABDUS-SALAAM:  Is that - - -

20                   JUDGE GARCIA:  It's per se rule that you're  
21          not - - - a reasonable person would not feel free to  
22          leave at that point.

23                   MS. FELL:  That's right.  And you do see  
24          Appellate Divisions applying this rule in Ripic, in  
25          the Third Department, and Davis and Paulman - - -

1                   JUDGE GARCIA: But is it - - - would it be,  
2                   again going to the reasonable person standard, who is  
3                   making the decision on whether you confessed to a  
4                   crime? In some places it may be clear, but in some  
5                   you may be thinking, this is a great story, I'm out  
6                   of here. But technically, you have confessed to a  
7                   crime; so how would you apply your rule in that case?

8                   MS. FELL: I think it has to be in the - -  
9                   - at the view of the officer, if an officer believes  
10                  - - - reasonably believes that the person confessed  
11                  to a crime, and then he would have to then and  
12                  thereafter administer Miranda warnings.

13                  JUDGE GARCIA: So it would not have  
14                  anything to do with what the person making the  
15                  subsequent statements reasonably believed.

16                  MS. FELL: Well, this is an interesting  
17                  situation with confession here. Because here, you  
18                  don't really have a question; in some other  
19                  circumstances you say, well, the defendant might  
20                  suspect that there is evidence against him, but  
21                  that's not necessarily enough. Here, you have the  
22                  defendant supplying a significant piece of evidence;  
23                  the defendant knows what they've told the officer and  
24                  the officer knows what the defendant is telling them,  
25                  so it's a unique set of circumstances.

1 JUDGE ABDUS-SALAAM: Who is the "they" that  
2 you are - - -

3 MS. FELL: I'm sorry?

4 JUDGE ABDUS-SALAAM: You just said that the  
5 defendant knows what they told the officer.

6 MS. FELL: Right.

7 JUDGE ABDUS-SALAAM: Who is the "they" that  
8 you are referring to?

9 MS. FELL: Himself.

10 JUDGE ABDUS-SALAAM: Oh.

11 MS. FELL: So if you take this for example,  
12 Mr. Wallace said, I hit him with my hand. At that  
13 point, Mr. Wallace is confessing to a criminal  
14 wrongdoing; there is a - - -

15 JUDGE PIGOTT: What's the crime?

16 MS. FELL: Well, that he hit the victim. I  
17 mean, in context - - -

18 JUDGE PIGOTT: Is that a crime?

19 MS. FELL: In context here, I think it's  
20 clear that it is.

21 JUDGE PIGOTT: That's what I don't know.  
22 The context, you know, as I looked at it, you know,  
23 you got two people fighting over empty cans - - -

24 MS. FELL: Sure.

25 JUDGE PIGOTT: - - - and putting them in,

1           you know - - - it's conceivable the police officer  
2           could say, you know, this is similar to a domestic  
3           dispute - - - I don't know who is right who is wrong  
4           here, who was trying to put what where, you know, I'm  
5           just trying to get to the bottom of this. And if we  
6           then say, well, once somebody says something,  
7           everything else stops, and somebody has got to go to  
8           jail, it seems to me you're defeating what the police  
9           sometimes try to do, which is to ameliorate  
10          situations.

11                       MS. FELL: Sure. Well, in context here,  
12           the police had some information about the crime  
13           before they arrived. They are questioning Mr.  
14           Wallace on the block just four or five buildings from  
15           where - - -

16                       JUDGE PIGOTT: But you said - - - you said  
17           it depends - - -

18                       MS. FELL: - - - this victim is being  
19           treated for injuries.

20                       JUDGE PIGOTT: I'm sorry, you said your  
21           rule was it should be looked at from the point of  
22           view of the officer.

23                       MS. FELL: Well, that's what the officer is  
24           going to look at when he's looking to administer  
25           Miranda warnings; that was my point there.

1                   JUDGE PIGOTT: But if you look at it from  
2 the point of view of the officer, didn't he do what  
3 he thought was right here?

4                   MS. FELL: Well, I mean, officers assumedly  
5 try to do the right thing. That question, it has to  
6 be the point of the officer, that's about when to  
7 apply the Miranda warnings. When an average person  
8 says, you know, to an officer, I hit him, or, yes, I  
9 shot him, that sort of thing, they know that they are  
10 confessing to criminal wrongdoing.

11                  JUDGE PIGOTT: Is it conceivable that, you  
12 know, you've got the situation, he makes a judgment  
13 with respect to the two complainants here. All he  
14 knows is, you know, somebody has got a stick,  
15 somebody has got something, I'm going to remove it  
16 from the scene, and then I don't care what they do  
17 with their cans or what - - - where they go after  
18 that, I certainly don't intend to arrest anybody.  
19 But wait a minute, the Court of Appeals just said if  
20 I do this, if I just take away the weapon, I've got  
21 to take somebody downtown, I've got to get - - - I've  
22 got to Mirandize him, and I've got to ship him.

23                  MS. FELL: Well, the important - - - the  
24 important question for custody is when does the  
25 suspect - - - does the suspect feel free to leave.

1 CHIEF JUDGE DIFIORE: So counsel, are you  
2 suggesting that when the police respond to a street  
3 encounter, as in this case, the first question out of  
4 the box converts this on-the-scene quest for  
5 knowledge about what's happening immediately into a  
6 custodial police-dominated situation?

7 MS. FELL: Not in every instance.

8 CHIEF JUDGE DIFIORE: In this case.

9 MS. FELL: In this case, the custody  
10 occurred when Mr. Wallace incomla - - - said that he  
11 hit Mr. Flores (ph.).

12 CHIEF JUDGE DIFIORE: Was that at the - - -  
13 was that at the first question? Was that in response  
14 to the very first question?

15 MS. FELL: That was not the response to the  
16 first question. They were couple of initial  
17 questions, what happened up the block, that kind of  
18 thing. Then they said, where is the weapon, and in  
19 response he said, I hit him with my hand.

20 JUDGE STEIN: Didn't we - - - didn't we  
21 implicitly reject the rule that you're asking us to  
22 make in - - - I can't pronounce it - - - Bongarzone-  
23 Suarrcy? I mean, isn't that some - - - where  
24 somebody walks into a police station and says, I  
25 killed my husband, and we didn't hold that she had to



1 be Mirandized then.

2 MS. FELL: If I'm - - - if I'm remembering  
3 that case correctly, I think that the issue was  
4 whether or not it was permissible to ask a few  
5 follow-up questions to determine the veracity of the  
6 confession and place it into context.

7 JUDGE STEIN: Well, but under your theory,  
8 as soon as she said that, she was in custody. So - -  
9 -

10 MS. FELL: There - - -

11 JUDGE STEIN: - - - no further questions  
12 without Miranda.

13 MS. FELL: There may be room for follow-up  
14 questions to determine, you know, what is - - - are  
15 you confessing.

16 JUDGE STEIN: So it's not a - - - it's not  
17 a - - -

18 MS. FELL: That kind of thing. Well, it  
19 would be aimed at determining whether the person had  
20 just confessed. But what happened here was  
21 different; they continued to interrogate about the  
22 location of the weapon until they found the weapon.

23 JUDGE RIVERA: You mean the question about  
24 the weapon itself assumes that there has been some  
25 kind of action, that - - - that's a criminal action;

1 is that what you're trying to say? Or is just the  
2 point in where you say - - - where he says, the  
3 defendant says, I hit him, that that's the point?

4 MS. FELL: That is the point that we're  
5 arguing where custody occurs.

6 JUDGE RIVERA: And then the question about  
7 the weapon is, I think you're arguing, the officer's  
8 recognition that that is an incriminating statement  
9 because they are going further in asking about a  
10 weapon involved in this assault; is that what you are  
11 trying to say?

12 MS. FELL: No, I am saying that when he  
13 said I hit him with my hand, that that was the thing  
14 created custody because he was admitting to an  
15 officer that he committed a crime.

16 JUDGE PIGOTT: But switch it around a  
17 little, let's assume - - - let's assume it's a  
18 domestic, it's a husband and wife situation, they are  
19 arguing in the car because they were at some Stop &  
20 Shop - - - this all happened at a grocery store - - -  
21 and she gets mad, gets out of the car, does  
22 everything that happened here, and the officer says  
23 to her, what happened. She goes, well, I slapped the  
24 son of a - - - well, the guy. Now she is in custody.  
25 There's an assumption that because she hit him, that

1 she is not the victim, she is now the defendant in a  
2 criminal case, and is entitled to Miranda warnings.

3 MS. FELL: There would have to be an  
4 assessment based on all the circumstances there to  
5 determine whether that statement was a - - - can be  
6 reasonably viewed as a confession to criminal  
7 wrongdoing.

8 And here, it's more clear because the  
9 defendant was on the block being treated for  
10 injuries, the officer had some knowledge about this  
11 crime already, so it was clear that he was confessing  
12 to criminal wrongdoing.

13 JUDGE FAHEY: Well, you can see, though,  
14 the - - - in your case, it might work, but there are  
15 all these variations that the court's pointed out to  
16 you that for a mandatory arrest rule would create  
17 enormous problems and eliminate any basic  
18 investigatory questions that the officers could make,  
19 that nine times out of ten in police work, result in  
20 some - - - nobody being arrested.

21 MS. FELL: Well, there may - - - in each  
22 circumstance, there may have to be some judgment  
23 applied to determine whether or not there was a  
24 confession to criminal wrongdoing, but what we are  
25 arguing here is, this is separate and apart from the

1           totality of the circumstances analysis, because it  
2           was in fact a confession to wrongdoing, it doesn't  
3           matter if it's made on the street or in police  
4           stations; the person would not reasonably feel free  
5           to leave.

6                         JUDGE ABDUS-SALAAM: Don't the police have  
7           to do something or say something that suggests that  
8           the defendant doesn't feel free to leave? It's not  
9           the defendant's subjective belief about whether he  
10          can walk away or not, right?

11                        MS. FELL: Well, it's a reasonable person  
12          standard, but I disagree that it's limited to just  
13          what the police do. You do see Appellate Divisions  
14          applying this rule in finding that just a confession  
15          is enough, even where there are indicia of custody,  
16          so those - - - those are the Ripic, Davis, and  
17          Paulman cases, where the circumstances were notably  
18          non-confrontational; it was confession in the home,  
19          confession in a hospital but with - - - under very  
20          non-confrontational circumstances.

21                        JUDGE STEIN: Isn't that under the totality  
22          of the circumstances rule rather than based just on  
23          the initial - - -

24                        MS. FELL: Well, in those cases, those  
25          courts were applying totality of the circumstances,

1 but the confession was the only factor. And what you  
2 don't see in the cases is you don't see courts  
3 saying, yes, there was a confession to criminal  
4 wrongdoing but they were on the street, or they  
5 weren't handcuffed, so there's no custody here;  
6 that's why this rises above.

7 CHIEF JUDGE DIFIORE: Thank you.

8 MS. FELL: Thank you.

9 CHIEF JUDGE DIFIORE: Counsel.

10 MS. FRIEDMAN: May it please the court. My  
11 name is Ellen Friedman, representing the People.

12 Your Honors, to begin, this case presents a  
13 classic mixed question of law and fact. To start with  
14 custody, whether a situation is custodial requires looking  
15 at the totality of the circumstances in every case. And  
16 to get around that, the defense tries to recast that  
17 question as some kind of legal threshold, whether in any  
18 situation, any kind of inculpatory statement transforms by  
19 itself necessarily a non-custodial situation to a  
20 custodial one.

21 JUDGE STEIN: But you agree that it could,  
22 in and of itself.

23 MS. FRIEDMAN: I do not agree with that.

24 JUDGE STEIN: Never.

25 MS. FRIEDMAN: You have to look at the

1 circumstances in the context - - -

2 JUDGE STEIN: Well, you know, what if - - -  
3 what if they - - - you know, instead of the person,  
4 the call being somebody just hit somebody with a  
5 pipe, okay, somebody just shot somebody, and the  
6 police show up and the witness says, that's the guy  
7 right over there, and they walked over to him and he  
8 says, I confess, I killed her.

9 MS. FRIEDMAN: I see what you're saying.

10 JUDGE STEIN: Okay. At - - - that in  
11 itself, in that situation, would you agree would be  
12 enough to say once he said that, he's - - - a  
13 reasonable person isn't going to think that they're  
14 free to leave.

15 MS. FRIEDMAN: That in - - - not that in  
16 itself; that in itself, in its context, and looking  
17 at all the other circumstances, might be the case.  
18 But it's not the case that any kind of inculpatory  
19 statement automatically transforms a situation to a  
20 custodial one; you have to look at the circumstances  
21 when the crime occurred, where the officer is, what  
22 the officer said, what the person he's - - - or she  
23 is speaking to said, the timing of all that, and of  
24 course, the fair inferences that you can draw. And  
25 again, all of that is a mixed question of law and

1 fact, and there is ample support for this carrying  
2 court's ruling.

3 In this case, the context is really important  
4 because the officer said, seeking to - - - looking for  
5 safe - - - public safety, where is the weapon? And it was  
6 in that context that Mr. Wallace said, I hit him with my  
7 hand. That was not a confession to the crime.

8 JUDGE PIGOTT: Well, then he said these  
9 Mexicans keep coming over here - - -

10 MS. FRIEDMAN: Then he said, these Mexicans  
11 keep coming over here and taking our jobs.

12 JUDGE PIGOTT: You finished my sentence for  
13 me.

14 MS. FRIEDMAN: I'm sorry.

15 JUDGE PIGOTT: And at some point, doesn't -  
16 - - doesn't it reach where it's kind of obvious that,  
17 you know, something has got to be done here; I mean,  
18 it's not because they were fighting over the bottle,  
19 it's because, you know, you got one party who is  
20 anti-immigrant, or anti-Mexican, and at that point,  
21 doesn't - - - shouldn't the officer do something?

22 MS. FRIEDMAN: The officer said - - -

23 JUDGE RIVERA: We have a witness who  
24 identified him.

25 MS. FRIEDMAN: He didn't know who the

1 witness was at that point, he hadn't spoken - - - he  
2 hadn't seen - - - even seen the victim, much less  
3 spoken to the victim, and he was getting mixed  
4 information when he - - - the defendant was  
5 minimizing his conducts.

6 JUDGE RIVERA: I'm sorry, what's the mixed  
7 information? You got a 911, two different calls, one  
8 says there is a weapon - - -

9 MS. FRIEDMAN: One call.

10 JUDGE RIVERA: - - - you got the ID from a  
11 witness on the street, he goes up exactly to the  
12 person the witness has ID'd - - - what's mixed, what  
13 did I miss? And then he asked, what happened, and  
14 eventually the guy says, I hit him - - - admits to  
15 being involved in, obviously, some kind of  
16 altercation.

17 MS. FRIEDMAN: The police officer was  
18 taking a very measured approach. He didn't jump the  
19 gun, he was trying to keep the situation calm, he  
20 wanted to - - - he hadn't seen or spoken to the  
21 victim, he was trying to see or speak to this person  
22 to see what happened, and Mr. Wallace was trying to  
23 minimize his conduct. His statement, "I hit him with  
24 my hand" was - - - even the defense counsel at the  
25 suppression hearing seemed to categorize that as a



1 denial. He was trying to get himself out of being  
2 arrested with that statement.

3 JUDGE GARCIA: Counsel, let's say the  
4 police officer does all these things, goes up to talk  
5 to this person, but before he gets to the person, he  
6 has enough on his own mind to arrest him.

7 MS. FRIEDMAN: Uh-huh.

8 JUDGE GARCIA: He doesn't want to do that  
9 yet, so he just approaches this defendant on the  
10 street and says, what happened?

11 MS. FRIEDMAN: Right.

12 JUDGE GARCIA: Can he do that?

13 MS. FRIEDMAN: He can, yeah. This court  
14 has held for decades and decades that just because -  
15 - - that there can be probable cause to arrest but  
16 that doesn't create a custodial situation in terms of  
17 Miranda, unless the officer conveys that.

18 JUDGE STEIN: But he didn't say, what  
19 happened; he said, where's the weapon.

20 MS. FRIEDMAN: The first thing he said was  
21 what happened. The second thing he said was where is  
22 the weapon. But that itself doesn't transform a  
23 situation to a custodial one.

24 JUDGE RIVERA: But isn't that eliciting  
25 exactly the kind of incriminating information that -

1 - - that - - - if there is some doubt - - -

2 MS. FRIEDMAN: Right.

3 JUDGE RIVERA: - - - about someone saying  
4 I hit him, once you ask, where is the weapon, you  
5 must have in your mind that this person has committed  
6 some kind of act, and now you are soliciting,  
7 eliciting, trying to get him to tell you where is  
8 that weapon that's going to connect him to this  
9 crime.

10 MS. FRIEDMAN: Well, I have two answers to  
11 that; the first has more to do with custody, and the  
12 second gets a little bit more into the interrogation  
13 prong of the question.

14 JUDGE RIVERA: Either way, how about an  
15 answer? Go ahead.

16 MS. FRIEDMAN: The first answer is that,  
17 this court has held time and time again that just  
18 because a police officer suspects that somebody has  
19 committed a crime, does not create a custodial  
20 situation. The question is whether a reasonable  
21 person, in the defendant's situation, would believe  
22 that he is in a situation akin to a formal arrest.

23 So treating somebody as a suspect does not  
24 create a custodial situation, and actually, the  
25 defendant has abandoned that argument here claiming

1           that custody didn't attach until after - - - not when  
2           the officer said where is the weapon, after that,  
3           when - - - what Mr. Wallace said, I hit him with my  
4           hand.

5                         JUDGE RIVERA: But he kept asking him about  
6           the weapon after that; you agree, right?

7                         MS. FRIEDMAN: He did ask again. And so,  
8           that brings me into the interog - - - into the  
9           interrogation prong.

10                        Of course, the defendant has to show not  
11           only that he was in custody, but also that the police  
12           questions about the location of the weapon  
13           constituted interrogation requiring Miranda warnings.  
14           And custodial questions prompted - - - even if it was  
15           custody - - - prompted by a concern for public safety  
16           or for his or her own safety, don't require Miranda  
17           warnings. That's the classic case of a question that  
18           does not require a Miranda warning, you know, in - -  
19           - when the question is just minutes after a just-  
20           reported crime with that weapon.

21                        JUDGE ABDUS-SALAAM: Well, this weapon,  
22           counsel, you know, isn't the typical gun, knife or  
23           other kind of weapon, you know, a piece of glass, or  
24           something like that, that would be - - - one would  
25           consider a dangerous weapon, right. We don't know

1 exactly - - - I couldn't figure out exactly whether  
2 it was a pipe or something else, it seemed like - - -

3 MS. FRIEDMAN: Uh-huh.

4 JUDGE ABDUS-SALAAM: - - - it might have  
5 been a piece of aluminum or something.

6 MS. FRIEDMAN: Right.

7 JUDGE ABDUS-SALAAM: Why would that be  
8 considered a dangerous weapon?

9 MS. FRIEDMAN: Well, it's what the police  
10 didn't know at the time. They knew that it was an  
11 assault with a metal stick; they didn't know the  
12 dimensions, they didn't know how sharp it was, they  
13 didn't know it was a size that the defendant could be  
14 hiding that could be within his reach.

15 CHIEF JUDGE DIFIORE: Has the court ever  
16 accepted - - - expanded, excuse me - - - the narrow  
17 public safety exception to a pipe?

18 MS. FRIEDMAN: No, but - - - it hasn't.  
19 But the question isn't whether a pipe falls under the  
20 public safety exception. The question is, in this  
21 case, did the questions - - - did the questions  
22 constitute public safety questions. And for all this  
23 police officer - - - all he knew was that there was  
24 an assault with a metal stick. For all he knew, it  
25 was a sharp stick that the defendant could still

1 reach, that an accomplice could reach and use - - -

2 JUDGE RIVERA: Did he take any ac - - -

3 MS. FRIEDMAN: - - - he knew that this  
4 defendant was still very agitated.

5 JUDGE RIVERA: Did he take any action to  
6 try and contain the situation then, other than to ask  
7 where is it?

8 MS. FRIEDMAN: He tried to keep the  
9 defendant calm. I think that that was one of his  
10 main goals.

11 JUDGE RIVERA: By continuing to ask him  
12 where is it, when the defendant seems to be  
13 particularly incensed about the person he just  
14 attacked taking all the jobs?

15 MS. FRIEDMAN: Well, he did want to find  
16 it, he did - - - he thought it was very important to  
17 find the weapon that was just used as quickly as  
18 possible.

19 JUDGE RIVERA: Yes, so then where - - - so  
20 let me ask you about the public safety and security.  
21 Then why allow the defendant to go get this weapon?

22 MS. FRIEDMAN: They didn't just allow the  
23 defendant to go and get it; it was a very controlled  
24 situation.

25 JUDGE RIVERA: They followed him and they

1 let him go down several steps, did they not?

2 MS. FRIEDMAN: They did, and they were  
3 right there, in control the entire time.

4 JUDGE RIVERA: Would they not be worried  
5 maybe he's got a gun or something else, and he's  
6 going to kill us or someone else?

7 MS. FRIEDMAN: They were in control of the  
8 situation. I'm sure that they had many ways that  
9 they would deal with that situation. The fact that  
10 they didn't automatically handcuff him, arrest him, I  
11 think is commendable in this situation. They took  
12 the reason - - - a reasonable measured approach that  
13 we want police officers to take. They kept control  
14 over the situation, they were looking to keep the  
15 public and themselves safe. That's - - - the kind of  
16 questions they asked were the kinds of questions that  
17 this court has ruled are not - - -

18 JUDGE RIVERA: I understand your point - -  
19 -

20 MS. FRIEDMAN: - - - the kind that require  
21 Miranda warnings.

22 JUDGE RIVERA: I think there's much to be  
23 said about your point. I'm just - - - I'm not  
24 understanding the response to my last question about  
25 basically letting the defendant go on his own - - -

1 granted, I agree - - - of course the record  
2 establishes the police officers are with him and  
3 following him, but basically let him reach down and  
4 didn't know what he was reaching for until he came up  
5 with the stick.

6 MS. FRIEDMAN: Your Honor, I don't think  
7 the record is very clear exactly what safety measures  
8 they themselves took to keep themselves safe. But -  
9 - -

10 JUDGE RIVERA: Was that the People's burden  
11 to establish that at the hearing?

12 MS. FRIEDMAN: I don't believe so. I think  
13 it was the defendant's burden to establish that they  
14 were the kind of questions that need to have Miranda  
15 warnings given. But what the police officers - - -  
16 there is ample support in the record that what the  
17 police officers did they - - - was investigating when  
18 they said what happened, they were determining  
19 whether there was probable cause, and they were  
20 looking out for the public safety and for their own  
21 safety.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 MS. FRIEDMAN: Thank you.

24 CHIEF JUDGE DIFIORE: Counsel.

25 MS. FELL: Thank you. I'd like to address

1 the public safety argument that we were just  
2 discussing. Put simply, as this court noted, this is  
3 the broadest application of the public safety  
4 exception that an Appellate Division has ever  
5 applied. The People would like this court to  
6 immunize every question about the location of the  
7 weapon, but that's not the exception; there has to be  
8 a reasonable concern for the public safety as a  
9 result of the missing weapon, and here, there is no  
10 such concern about a pipe because it's - - - like  
11 many other objects, it doesn't pose a particular  
12 danger.

13 JUDGE STEIN: Did they actually know that  
14 it was a pipe? They didn't really know what it was.  
15 They - - - I mean, it could have been - - - it could  
16 have been - - - it could've been a metal gun, right?

17 MS. FELL: Well, they received information  
18 about a metal stick or a pipe over the radio call,  
19 and there is nothing on the record to indicate that  
20 they thought it was anything else or anything  
21 unusually dangerous, as this court said - - -

22 JUDGE RIVERA: But what - - - is it not  
23 possible that in this kind of street encounter, that  
24 a police officer certainly might - - - not knowing  
25 exactly, as Judge Stein has pointed out, really what



1 is the nature of this weapon, just that there is a  
2 weapon; you have some idea, but you really don't know  
3 much more than the little bit about it, it's got some  
4 metal aspect to it - - - that that indeed might  
5 establish that this is a dangerous situation?

6 MS. FELL: Well, the case law says that you  
7 have to look to whether or not there was a reasonable  
8 concern. And when you look at the entire encounter  
9 here, you see that the officers were not concerned,  
10 and a reasonable officer wouldn't be concerned.

11 They continued to question him, and then,  
12 as this court noted, they escorted him to pick up the  
13 weapon, they let him go and retrieve it himself; they  
14 were clearly not concerned that this was a gun or  
15 some sort of object, they were not concerned that he  
16 had it on his person, they didn't frisk him, that  
17 kind of thing.

18 JUDGE RIVERA: Was he cuffed when they - -  
19 -

20 MS. FELL: No, he was not, he was not  
21 cuffed, he was - - - and this was all said in the  
22 suppression hearing, no pepper spray, batons weren't  
23 produced, no weapon of any sort. The - - - he was  
24 permitted to, escorted by police, collect the weapon  
25 himself, which suggests no reasonable concern for the

1 public safety.

2 JUDGE GARCIA: But doesn't it also suggest  
3 he was free to leave in his own mind? I mean, if  
4 they had such a high suspicion of this person that  
5 it's near arrest, why would they let him do that?  
6 Doesn't your argument on this undercut your - - - you  
7 know, your custody argument?

8 MS. FELL: Well, to be clear, when they had  
9 him go collect the weapon, he was escorted, he was  
10 not free to leave; that's clear from the testimony.  
11 But the custody was created when Mr. Wallace admitted  
12 to the criminal wrongdoing, which, you know, as we  
13 discussed, is very persuasive, that the psychological  
14 effect of someone confessing to an officer is not  
15 going to render that person - - - they're not going  
16 to feel that they can just go and leave after telling  
17 someone they committed a crime, go get a cup of  
18 coffee, that kind of thing.

19 CHIEF JUDGE DIFIORE: Thank you, counsel.

20 MS. FELL: Thank you.

21 (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Bobby Wallace, No. 51 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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