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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 49

STANLEY HARDEE,

Appellant.

20 Eagle Street
Albany, New York
March 29, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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1 CHIEF JUDGE DIFIORE: The next case on this
2 afternoon's calendar is appeal number 49, the People of the
3 State of New York v. Stanley Hardee.

4 MS. GOLDBERG: Good afternoon, Your Honors.
5 Rachel Goldberg on behalf of Mr. Stanley Hardee. I'd like
6 to reserve two minutes for rebuttal.

7 CHIEF JUDGE DIFIORE: Two minutes, Ms. Goldberg?

8 MS. GOLDBERG: Yes. Thank you.

9 There is no - - -

10 JUDGE RIVERA: Counsel, why isn't it a mixed
11 question?

12 MS. GOLDBERG: Because there's no record support
13 for the Appellate Division's finding that the search was
14 reasonable. There was absolutely no indication of a weapon
15 here.

16 JUDGE ABDUS-SALAAM: So you agree it's a mixed
17 question; you're just saying that there's no record support
18 for the finding.

19 MS. GOLDBERG: That is - - - that is the
20 argument. The - - - there is - - - there was no indication
21 of a weapon, no indication that Mr. Hardee was going to use
22 it. So the question is, in a rout - - - totally routine
23 traffic stop where - - -

24 JUDGE FAHEY: But was it - - - was it routine?

25 One of the things that struck me in comparing this case to

1 other cases is - - - is the fighting that took place, the
2 struggling over handcuffing him. That seemed to have
3 elevated it.

4 Because it seems in Mundo and Carvey, the other
5 cases seem to specifically have used the phrase, the police
6 acted in - - - in a situation without incident. The
7 "without incident" phrase comes up a number of times. And
8 so here, there was incident. There was a struggle going
9 on.

10 Now, the record is a little unclear, and when I
11 looked at the trial court's decision, it seemed like the
12 discovery of the gun took place almost simultaneously as
13 the struggling was taking place with the other two
14 officers. But then it took three officers to subdue him.
15 So wouldn't that be enough; wouldn't this elevate it then?

16 MS. GOLDBERG: Well to start, nobody ever
17 claimed that the handcuffing had begun before the search.
18 In fact - - -

19 JUDGE FAHEY: I didn't say before; I said
20 simultaneously.

21 MS. GOLDBERG: So if - - -

22 JUDGE FAHEY: So let's - - - so let's talk about
23 the scenario that I presented to you. Is this without
24 incident; is the struggle without incident?

25 MS. GOLDBERG: Mr. Hardee was acting in a way

1 that could ro - - - raise the suspicions of the police
2 officer. But there was still nothing to indicate a weapon
3 in the car. And that is what's critical - - - that is
4 what's critical.

5 JUDGE STEIN: What - - - what did he have to do
6 to indicate a weapon? I mean, you know, in a lot of these
7 circumstances, I think that the same conduct could be
8 indicative of drugs or, you know, other illegal things in -
9 - - in - - - contraband, or a gun. So how - - - how do you
10 make that distinction? How - - - how - - - what - - - what
11 does it have to be to show that - - - that there may be a
12 gun?

13 MS. GOLDBERG: So something about - - - so the -
14 - - so the Appellate Division here focused on Mr. Hardee
15 looking into the back. And so there had to be something
16 indicating something dangerous. There was nothing like
17 that here. In - - - in - - - in Carvey, there was a - - -

18 JUDGE FAHEY: The problem is, is that the cases
19 seem to fall on the spectrum - - - you know, it's easy when
20 somebody has a bulletproof vest on, I forget what - - - you
21 can tell that there's maybe a gun involved if there's a
22 bulletproof vest. But in other instances, it isn't quite
23 that clear.

24 So - - - and it's inherently a subjective
25 analysis that a police officer is making. It's - - - it's

1 confined to them reacting to an emotional situation, also
2 with the accused party all simultaneously. And that's why
3 once we move to incident, where there's some incident
4 taking place, it's tough to see how this isn't a mixed
5 question.

6 MS. GOLDBERG: Because - - - so Sergeant Siani
7 and Kailor did exactly the right thing.

8 JUDGE FAHEY: Um-hum.

9 MS. GOLDBERG: They ordered Hardee out of the
10 car, and then they frisked him, and they brought him around
11 to the back to protect their safety. And so there has to
12 be - - - the law is very clear, in order to go back into
13 that car after he's been removed, he's three feet away,
14 there's - - - there's nothing in his grabbable area - - -

15 JUDGE GARCIA: But you have another person
16 involved in this case, right, you have the fiancée who is
17 also being taken out of the car at the same time.

18 MS. GOLDBERG: There was no suggestion or
19 argument that she posed any kind of danger.

20 JUDGE GARCIA: But to judge - - - but this is the
21 reaction. It's not, now we can say, you know, she didn't
22 pose any danger, it wasn't a gun, it was a gun. At that
23 time, they have someone who is engaged in odd behavior who
24 they take out of the car, as you say, legitimately, who at
25 some point, and it's not clear, but it certainly is an

1 inference that it's simultaneous, starts to struggle and
2 resist while you're taking another person out of the car.
3 And what it - - - as Judge Fahey is saying, what's not a
4 mixed question about whether or not they were justified
5 then to look for the gun?

6 MS. GOLDBERG: Because the belief that there was
7 a weapon in the car is - - - is completely unreasonable. I
8 mean, there was no concrete indicia of a weapon here
9 whatsoever. Even if he thought - - - even if it was reason
10 - - -

11 JUDGE GARCIA: Perhaps in a bulletproof vest, the
12 example we have, what would that be?

13 MS. GOLDBERG: So in Mundo, we had somebody who
14 was using his car to - - - as a weapon to evade police,
15 almost hit somebody - - -

16 JUDGE GARCIA: But a weapon in the car - - -

17 MS. GOLDBERG: - - - stashed with something.

18 JUDGE GARCIA: - - - what would that be if you're
19 not wearing a bulletproof vest?

20 MS. GOLDBERG: So it - - - trying to hide
21 something in a conjunction with really dangerous behavior -
22 - -

23 JUDGE GARCIA: But that could be drugs.

24 MS. GOLDBERG: It could be. But coupled with
25 this other extremely dangerous behavior, it is subst - - -

1 it is substantially likely; it's reasonable.

2 JUDGE FAHEY: You know - - - you know what I
3 worry, is that the substantial likelihood test becomes
4 basically a plain view test. Then they have to actually
5 see either a weapon or some - - - some other accoutrement
6 that's - - - that's used with a weapon, something that's
7 used with a weapon. And - - - and that can't be the test.
8 That would be far too narrow. I don't think you're really
9 arguing for that.

10 MS. GOLDBERG: Right.

11 JUDGE FAHEY: You're really arguing, and as I
12 understand it, that - - - that under the totality of
13 circumstances, this didn't meet a minimum legal standard.
14 And so - - - and that's doesn't require the scene of a gun
15 or the viewing of the gun; it requires a - - - an analysis
16 of a series of factors, and then the court has to determine
17 on whether or not a basic evidentiary level has been met
18 here.

19 And so it's slightly different, because if you
20 were to argue for the scene of the gun, there would be no
21 stop, or no search, or whatever, be justified.

22 MS. GOLDBERG: Well, we have Carvey and Mundo as
23 examples.

24 JUDGE FAHEY: Right.

25 MS. GOLDBERG: I mean, nobody saw a gun there, or

1 a knife, or any other kind of a weapon. But - - - but what
2 they did have was and obvious secretion of something that
3 the person didn't want police to find, coupled with really
4 dan - - - actual specific moves that the person made that
5 were really dangerous, in Mundo, for example. So - - - so
6 there, there were much more concrete things than this sort
7 of mushy nervousness or - - -

8 JUDGE STEIN: Well, there - - - there's a little
9 bit more than nervousness here. I mean, he - - - he was
10 looking - - - he kept looking in the back of the seat. I
11 mean, that's certainly indicative that there's something
12 there that he's worried about being there.

13 MS. GOLDBERG: But - - -

14 JUDGE STEIN: So what more does he have to do to
15 indicate? Is it because he didn't - - - he didn't show a
16 disregard for the safety of others; is is that what your -
17 - -

18 MS. GOLDBERG: That's a big - - - that's a big
19 part of this court's rule in the line of cases, is an
20 actual demonstration that you were willing to use a weapon.
21 Here, you know, he was - - -

22 JUDGE RIVERA: Use a weapon, or, as Judge Stein
23 is saying, disregard for the safety of security of others.
24 Because don't you satisfy that here because the reasoning
25 stopped, as he's speeding, whatever it is, thirty - - -

1 thirty miles above the speed limit in a residential area of
2 Manhattan - - -

3 MS. GOLDBERG: But we - - -

4 JUDGE RIVERA: - - - late at night.

5 MS. GOLDBERG: But we already allow police
6 officers to order people out of the car in a recognition
7 that, you know, somebody who is violating the Traffic Law,
8 police need to be able to see - - - to see their body.

9 JUDGE RIVERA: No, I understand. But there might
10 be a difference between going through a stop sign at the
11 regular speed limit, or making a right on red when you're
12 not allowed to do so, and - - - and speeding for several
13 blocks thirty miles above the speed limit, which I think
14 you would agree is particularly dangerous to pedestrians,
15 and anybody else, and drivers, and anyone else on that
16 road.

17 MS. GOLDBERG: But it doesn't show willingness to
18 break the law in conjunction with all these other things
19 that are required like, you know, some indication - - -

20 JUDGE RIVERA: You mean it doesn't suggest
21 violence - - -

22 MS. GOLDBERG: Ex - - - right.

23 JUDGE RIVERA: - - - is that what you mean?

24 MS. GOLDBERG: Right.

25 JUDGE FAHEY: You know what - - - you know what

1 strikes me, though, in the sequence of events and - - - and
2 it - - - it's - - - the record isn't entirely clear, I
3 think you're right about that. But that he doesn't begin
4 to struggle until, I guess it's Officer - - - begins with
5 an L, Loud, begins to remove the other lady out of the car.

6 So as one police officer gets closer to where the
7 gun is, that's when the struggle starts to take place. I
8 don't know if it was a fight, I think it was more of a
9 struggle over a cuffing. And - - - and that would be, I
10 think, a normal reaction if - - - if the police officers
11 are getting closer to the gun. That seems to be logical.

12 MS. GOLDBERG: It could - - - it was - - - but we
13 don't - - - there was no testimony that anybody thought he
14 was going back into the car - - -

15 JUDGE FAHEY: Um-hum.

16 MS. GOLDBERG: - - - which is the standard. And,
17 the - - - you know, even if - - -

18 JUDGE ABDUS-SALAAM: So if he was not going back
19 into the car, or there was testimony though, that it looked
20 like he was trying to map out a route to flee, or possibly
21 make a break, and who knows, get back into the car because
22 he was looking at various corners or something like that,
23 that was the testimony, as I recall.

24 MS. GOLDBERG: But that's the theoretical test
25 that this court rejected in Torres because there was

1 nothing specific to tell the police that there was a gun in
2 the car, that the person was going to - - - or any kind of
3 weapon. I mean - - -

4 JUDGE RIVERA: The officer who searched, who
5 actually searched for the gun, what - - - what did he
6 testify was the reason that he went to search? Did he say
7 it was because he saw the defendant resisting arrest; what
8 - - - what did he say?

9 MS. GOLDBERG: I'm sorry, the person who went
10 back into the car?

11 JUDGE RIVERA: The person who actually searched
12 the bag.

13 MS. GOLDBERG: He said it was because the - - -
14 Mr. Hardee was frisked. Because he was looking around the
15 car and initially refused to get out of the car.

16 JUDGE RIVERA: Did he say anything about the
17 resisting arrest, the handcuffing, the movement during the
18 handcuffing?

19 MS. GOLDBERG: He said movements in the back of
20 the car, looking to the - - - looking into the back.

21 JUDGE RIVERA: But not anything related to the
22 cuffing - - -

23 MS. GOLDBERG: No.

24 JUDGE RIVERA: - - - or the resisting.

25 MS. GOLDBERG: In fact, he said if he saw a

1 struggle, he wouldn't have searched the car; he would have
2 come to help his fellow officers.

3 CHIEF JUDGE DIFIORE: Thank you, Ms. Goldberg.

4 MS. GOLDBERG: Thank you.

5 CHIEF JUDGE DIFIORE: Counsel.

6 MS. OLIVE: May it please the court. Jessica
7 Olive on behalf of the People. This case presents a
8 standard mixed question of law and fact that is beyond this
9 court's review because there is ample record support for
10 the lower court's decisions. Specifically - - -

11 JUDGE STEIN: Well, first if we start with
12 assuming, which I don't know if this is the case, but if we
13 start with assuming that the question isn't about the
14 minimum standard, which of course would take it out of - -
15 - of that mixed question rubric, but what specifically do
16 the People point to in showing this - - - this specific
17 reason to suspect that there's a weapon of the - - - in the
18 car?

19 MS. OLIVE: Absolutely, Your Honor. There is - -
20 - this case clearly meets the minimum threshold for this
21 legal standard based on the totality of the circumstances,
22 if I may go through those facts.

23 You start before they even pull him over. It's
24 in the middle of the night, he's going almost double the
25 speed limit, he's "flying down the street", he's - - -

1 JUDGE STEIN: There's no - - - there's - - -
2 there's no testimony that there were people in the street,
3 or that anybody was in danger.

4 MS. OLIVE: Well, actually, the officers
5 testified that he's weaving in and out of traffic. So
6 therefore, you can infer that there are, in fact, other
7 cars on the road at that time. And at the point that they
8 pull him over - - -

9 JUDGE RIVERA: So everybody who is speeding - - -

10 MS. OLIVE: I'm sorry?

11 JUDGE RIVERA: Everybody who is speeding, you get
12 to check everything inside their car?

13 MS. OLIVE: No, Your Honor. This isn't assessed
14 - - - this is assessed under a totality of the
15 circumstances. That is one factor among many others that
16 justified the search here.

17 JUDGE RIVERA: The other factors here are?

18 MS. OLIVE: Once they pulled over the car,
19 defendant was wide-eyed, animated, one of the officers
20 thought he was high, his head is spinning around the car,
21 he's looking to the back of the vehicle two to four times.
22 And Officer Loud testifies that when he leans down to look
23 into the car, he sees that defendant is looking over his
24 right shoulder, behind the front passenger seat at a
25 shopping bag.

1 JUDGE WILSON: Can I just ask you about Torres
2 for a minute? Because in Torres, we said, "A police
3 officer acting on reasonable suspicion that criminal
4 activity is afoot", that's the first part of it.

5 What was the reasonable suspicion that the police
6 had here, of criminal activity?

7 MS. OLIVE: Well, Your Honor - - -

8 JUDGE WILSON: Because isn't there testimony from
9 the record that they would not actually have arrested him,
10 that was not their plan at the time they took him out of
11 the car?

12 MS. OLIVE: Well, Your Honor, the officers don't
13 require reasonable suspicion to stop a car. They can - - -

14 JUDGE WILSON: I understand that.

15 MS. OLIVE: - - - stop the car for traffic
16 violations.

17 JUDGE WILSON: This - - - this is from - - - this
18 is from Torres about the circumstances in which you can
19 search a vehicle incident to a stop.

20 MS. OLIVE: Yes, Your Honor.

21 JUDGE WILSON: Was - - - was there - - -

22 MS. OLIVE: Torres - - -

23 JUDGE WILSON: - - - a suspicion of - - - of
24 criminal activity? Did the officers have that at that
25 time, and if so, what was it?

1 MS. OLIVE: Well, Your Honor, based on the
2 totality of the circumstances, they had reason to believe
3 that there was a weapon in the car that was presenting a
4 danger to the officers. And that is the standard that
5 Torres eventually set forth.

6 JUDGE WILSON: That's the second part of the
7 test, right?

8 MS. OLIVE: The - - -

9 JUDGE WILSON: That they have to have some
10 concern for their safety.

11 MS. OLIVE: Torres set forth a distinct test for
12 protective searches of vehicles compared to people. It
13 first laid out the test for a protective search of a
14 person. And in that context, you have to stop the person
15 based on reasonable suspicion, and then have reason to fear
16 of your safety.

17 The court in Torres said, well, actually, for
18 searches of cars, we're going to require probable cause
19 unless you can show a risk of a weapon in the car that
20 presents an actual and specific danger to the officers.

21 So Torres was rejecting the theoretical basis
22 test that was set forth in Michigan v. Long. They're
23 saying, we need more, we need something more than just the
24 idea that he could gain entry - - - or gain access to a
25 weapon upon reentry to his car.

1 JUDGE ABDUS-SALAAM: What was the "more" here,
2 counsel? You mentioned him looking over his shoulder, back
3 at that pass - - - at the back of the passenger seat. Is
4 that it? Is that the "more", or is it the resisting
5 arrest, is it also - - -

6 MS. OLIVE: It's - - - it's the totality of the
7 circumstances analysis. But the fact that he repeatedly
8 looked into the car and he actually disregarded the
9 officer's orders three to four times to stop looking
10 around, and stop moving, he disregarded their orders to get
11 out of the car, and continued to look behind his front
12 passenger seat and into the back of the car. It's - - -
13 it's analyzing all of these.

14 JUDGE STEIN: And eventually, he came out
15 peacefully, right? He came out peacefully.

16 MS. OLIVE: The officers had to tell him to get
17 out of the car - - -

18 JUDGE STEIN: Three times.

19 MS. OLIVE: - - - three times.

20 JUDGE STEIN: Right. And he - - - he didn't - -
21 - he didn't argue with them; he just didn't do it until the
22 third time. And then he got out - - -

23 MS. OLIVE: He got - - - yes.

24 JUDGE STEIN: - - - and - - - and they chose to
25 bring him around to the back bumper of the car, right?

1 MS. OLIVE: That's correct.

2 JUDGE STEIN: Is there any indication in the
3 record that they couldn't have brought him further away
4 from the car to question him if they were concerned about a
5 weapon?

6 MS. OLIVE: They would have certainly been
7 entitled to take that safety measure, but - - -

8 JUDGE STEIN: But can they created this need for
9 a safety measure of searching the car by keeping him close
10 to the car where - - - where that - - - where that risk is?

11 MS. OLIVE: Well, Torres actually is - - - it
12 sets forth a standard that is "notwithstanding his
13 inability to gain immediate access to that weapon ". The
14 whole concept is that there is an articulable facts that
15 you can point to that once the investigatory stop is
16 terminated, once the traffic stop is terminated, that he's
17 a dangerous individual, and he may go back into that car
18 and gain entry to a weapon. So - - -

19 JUDGE STEIN: What if - - - what if the record
20 shows that - - - that Officer Loud was already in the
21 process of - - - simultaneously in the process of searching
22 this car, and looking into this bag, at the same time as
23 the defendant starts resisting the handcuffing? If you
24 can't consider the handcuffing as part of this - - -

25 MS. OLIVE: Um-hum.

1 JUDGE STEIN: - - - does that end - - - end the
2 case there?

3 MS. OLIVE: No, Your Honor. There - - - there's
4 still a variety of factors that justify the search here.
5 Even once he's out of the car and they - - - they frisked
6 him, so clearly, they - - - they sensed some danger at
7 which - - - and defense counsel is not contesting that that
8 wasn't justified. He also continued to look into the car
9 after he's out of the car.

10 JUDGE STEIN: That - - - that seems to be one of
11 the major factors that - - - that everybody is relying on
12 here, is the looking around. So what that leads me to, and
13 I - - - I think I asked defense counsel this as well, is
14 how do we - - - how do you distinguish between - - - I
15 mean, somebody may be nervous and looking around the car
16 for a lot of reasons.

17 This person had an open container of alcohol in
18 the front, which apparently, he was nervous about, right?
19 And - - - and maybe he had more alcohol in the back, maybe
20 he had drugs, maybe he had stolen property. It could be
21 any number of things. What is it that rises to the level
22 of articulable suspicion that there is actually a weapon
23 there? Is it just that he's looking nervously around in
24 the car and in the back seat?

25 MS. OLIVE: Well, Your Honor - - -

1 JUDGE RIVERA: If I can add also because the cop
2 who is closest to him says he thought he was high. And
3 that might be a reason for the jitteriness.

4 MS. OLIVE: Well, Your Honor, his preoccupation
5 with a specific area in the vehicle, that's analogous to
6 the - - - this very well-established case law that - - -
7 where a defendant is shown hiding something in the car.
8 And it's the same exact thing, because it's an indication
9 that he's concealed potentially dangerous contraband in
10 that area.

11 JUDGE ABDUS-SALAAM: If we were looking at the
12 trunk of the car which was closed, instead of the back - -
13 - into the back of the car, would the police be able to
14 lift that trunk up because they think there might be a - -
15 - no, they wouldn't, right?

16 MS. OLIVE: No. No, that wouldn't fall under the
17 Carvey/Mundo exception, Your Honor.

18 JUDGE RIVERA: Where - - - where was the bag?
19 Where's the bag?

20 MS. OLIVE: Where was the bag? It was a - - -

21 JUDGE RIVERA: Where's the bag?

22 MS. OLIVE: It was on the floor behind the front
23 passenger seat. And that - - - and he - - -

24 JUDGE RIVERA: Does anyone say he's looking at
25 the floor, at the bag, before they decide to search for the

1 bag?

2 MS. OLIVE: Officer Loud testified, and it's on
3 page 142 of the appendix, that, "It appeared to me he was
4 looking at that bag."

5 And if you read pages - - -

6 JUDGE RIVERA: At what point did it appear to him
7 that the defendant was - - -

8 MS. OLIVE: When he - - -

9 JUDGE RIVERA: - - - looking at the bag?

10 MS. OLIVE: The second time, he stoops down - - -
11 he's a very tall officer. He stoops down two times.

12 JUDGE RIVERA: Yes.

13 MS. OLIVE: First time, he sees the officer
14 looking over his right shoulder, into this area, in the
15 back of the vehicle. The second time, he says, I saw him
16 do that "again, and at that point, I noticed the bag."

17 JUDGE RIVERA: What's - - - what's the point of
18 bending down and going in? Is he already intending to
19 search?

20 MS. OLIVE: No, Your Honor. He is concerned
21 because the defendant is not getting out of the car, he's
22 not listening the Officer Kailor, Officer Kailor's tone of
23 voice alerted Officer Loud that something was going on, and
24 he just wanted to bend over - - -

25 JUDGE RIVERA: You're saying, he - - - he says

1 that he suspected he was - - - he thought he was looking at
2 the car while the defendant is in the car.

3 MS. OLIVE: I'm sorry?

4 JUDGE RIVERA: Is that - - - is that what you - -
5 - I'm sorry, am I misunderstanding what you say the record
6 is?

7 MS. OLIVE: While the defendant is still in the
8 car - - -

9 JUDGE RIVERA: The car.

10 MS. OLIVE: - - - yes.

11 JUDGE RIVERA: This detective says, I saw him
12 looking at the bag.

13 MS. OLIVE: "It appeared to me he was looking at
14 that bag."

15 JUDGE RIVERA: At the bag.

16 MS. OLIVE: That's a direct quote.

17 JUDGE RIVERA: Not the area, at the bag - - -

18 MS. OLIVE: Yes.

19 JUDGE RIVERA: - - - itself. Okay.

20 MS. OLIVE: That's correct, Your Honor.

21 JUDGE RIVERA: Thank you.

22 MS. OLIVE: And that's consistent with the lower
23 court's findings. The trial court found that, and the
24 Appellate Division's findings of fact were absolutely
25 consistent with that.

1 And the facts in this case are very comparable to
2 People v. Mundo. You have the same type of traffic
3 infractions that are demonstrating dangerousness to
4 civilians who - - -

5 JUDGE RIVERA: What would not have been enough in
6 this case; what would not have been enough to do the
7 search?

8 MS. OLIVE: Well, Your Honor, you would have to -
9 - - it's - - - it's based on the totality of the
10 circumstances.

11 JUDGE RIVERA: I understand. What - - - what
12 would reduce this below that threshold? Which of the
13 factors you've outlined?

14 MS. OLIVE: If he - - - you would have to have a
15 lack of an indication that a weapon is present in the
16 vehicle.

17 JUDGE RIVERA: What - - - what would that mean in
18 this case?

19 MS. OLIVE: In this case, that would mean that he
20 wasn't looking around the car, he wasn't looking at - - -

21 JUDGE RIVERA: So he's got to look straight ahead
22 or look at the officer.

23 MS. OLIVE: Not necessarily, Your Honor, but he's
24 repeatedly looking at the same area of the car in which
25 contraband could be concealed, in the back seat of the car.

1 So that would - - - that would change the analysis.

2 CHIEF JUDGE DIFIORE: Thank you, Ms. Olive.

3 MS. OLIVE: Thank you.

4 CHIEF JUDGE DIFIORE: Ms. Goldberg.

5 MS. GOLDBERG: This was a - - - this was a
6 routine traffic stop. My adversary pointed out that in
7 Torres - - -

8 JUDGE RIVERA: Did - - - did - - - did the
9 officer say, I saw him looking at the bag while he was - -
10 - while - - - while defendant was seated in the car?

11 MS. GOLDBERG: The full context of that quote is
12 somewhat ambiguous. He says, I saw him looking in the
13 backseat, and I saw - - - and I saw the bag, and I thought
14 he was looking at the bag. So - - - but we have - - -

15 JUDGE RIVERA: Why doesn't that give you record
16 support?

17 MS. GOLDBERG: Well, because looking at a bag in
18 the - - - a plain plastic bag in the back of your car, like
19 Judge Stein said, could be anything. It could be something
20 he's embarrassed for the police to find, not even
21 contraband. It could be his life savings.

22 JUDGE FAHEY: Isn't - - - is the question really,
23 whether the behavior would make a police officer
24 suspicious. It - - - it doesn't say objectively that it
25 has to - - - they have to - - - you have to be able to see

1 the gun. What you have to say is, is this behavior enough
2 to make me think that there's a dangerous weapon, that
3 there's - - - there's something here.

4 MS. GOLDBERG: More than suspicious. I mean - -
5 -

6 JUDGE FAHEY: Um-hum. Okay.

7 MS. GOLDBERG: - - - Carvey said, specifically -
8 - -

9 JUDGE FAHEY: It's fine. That's fine.

10 MS. GOLDBERG: - - - it has to be substantial
11 likelihood.

12 JUDGE FAHEY: Fine. You're correct. So how are
13 we to evaluate what a police officer thinks is a
14 substantial likelihood of there being a dangerous weapon in
15 the car in this context then? Tell me - - - tell me what
16 factor you say is essential in that evaluation.

17 MS. GOLDBERG: Something concrete that would
18 objectively show that this was a weapon. This wasn't; this
19 was a bag. That's all it was, it was a bag; that's all
20 anybody could say.

21 JUDGE FAHEY: So you - - - under that theory
22 then, you wouldn't be able to use the behavior in the
23 process of interviewing the Defendant?

24 MS. GOLDBERG: Well, we have a - - - a second
25 piece. The requirement is substantial likelihood of a

1 weapon that - - - that poses specific danger.

2 JUDGE FAHEY: Okay. Well, let's just say - - -

3 MS. GOLDBERG: So that's - - -

4 JUDGE FAHEY: Stay with the question I asked you.

5 MS. GOLDBERG: Sure.

6 JUDGE FAHEY: Would you be able to use the
7 behavior of the defendant in evaluating that objectively?

8 MS. GOLDBERG: In this particular case, it's not
9 - - - not enough.

10 JUDGE FAHEY: No, in any case.

11 MS. GOLDBERG: For - - - for the weapon, sure.

12 Yeah. I mean, I think - - -

13 JUDGE FAHEY: You don't have to see the weapon.

14 If - - - it can be in a bag, and the behavior of the - - -
15 of a particular party could indicate that it exists, right?

16 MS. GOLDBERG: Yes.

17 JUDGE FAHEY: And you'd be relying, I'm assuming,
18 by your experience and training as a police officer to make
19 that evaluation.

20 MS. GOLDBERG: Yes. But just looking isn't - - -
21 isn't the kind of behavior that would - - -

22 JUDGE FAHEY: No, I agree with you. Just looking
23 isn't enough.

24 MS. GOLDBERG: - - - indicate it's a weapon.

25 JUDGE FAHEY: I guess it's - - - it's difficult

1 that the Court of Appeals has to judge it, but it's the
2 repetitive look, and the nature of it, and - - - and it's
3 that factual evaluation that - - - it - - - it's an
4 imperfect approach.

5 MS. GOLDBERG: But I think - - - I think - - -

6 JUDGE RIVERA: Would - - - would it have been
7 enough, under your analysis, of what you're arguing, if
8 they had observed him, as they're coming up to the car, try
9 to push the bag under the seat?

10 MS. GOLDBERG: I think that would - - -

11 JUDGE RIVERA: Work into the cases - - -

12 MS. GOLDBERG: - - - push it closer to - - -

13 JUDGE RIVERA: - - - you're talking about - - -

14 MS. GOLDBERG: - - - Mundo and Carvey.

15 JUDGE RIVERA: - - - you're trying to conceal the
16 bag?

17 MS. GOLDBERG: I think that would push it closer
18 to Carvey and Mundo.

19 JUDGE RIVERA: How is that more about concealing
20 a weapon than concealing anything else? We're kind of back
21 to this line.

22 MS. GOLDBERG: Well, because I - - - it goes to
23 Judge Wilson's question about reasonable suspicion and what
24 this case is in - - - and the wrong standard by the
25 Appellate Division that - - - that there was - - - that

1 would have given them indication of criminality, not just
2 nervousness.

3 JUDGE RIVERA: Well, I guess what I - - - well,
4 what I'm concerned with is if it's the totality of the
5 circumstances that you talking about, well, if the push the
6 bag, now - - - now, it's enough, right? I thought your
7 argument was, it might have only been enough, given
8 everything else that has gone on.

9 So if he's stopped at a stop sign, or didn't stop
10 at the stop sign, excuse me, it wasn't sort of the speeding
11 or something that's dangerous that way, assuming going
12 through the stop sign didn't risk someone in the moment,
13 and - - - and he pulls over without any way struggling or
14 fighting, obeys the police's, you know, sirens to pull
15 over, demand to pull over, but he starts pushing the bag
16 under - - -

17 MS. GOLDBERG: And - - -

18 JUDGE RIVERA: - - - would you still feel the
19 same?

20 MS. GOLDBERG: That's certain - - - that is
21 definite - - - that would not be enough to search the car,
22 not even close.

23 CHIEF JUDGE DIFIORE: Thank you, Ms. Goldberg.

24 MS. GOLDBERG: Thank you.

25 (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. Stanley Hardee, No. 49 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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