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COURT OF APPEALS

STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 79

EVERETT D. BALKMAN,

Appellant.

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20 Eagle Street  
Albany, New York  
October 14, 2020

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first appeal on this  
2 afternoon's calendar is appeal number 79, the People of the  
3 State of New York v. Everett Balkman.

4 Counsel?

5 MS. SOMES: Thank you. My name is Janet Somes.  
6 I represent Mr. Balkman, and I'd like to reserve two  
7 minutes for rebuttal.

8 CHIEF JUDGE DIFIORE: You may.

9 Counsel, I have a question before you start. Are  
10 you arguing that the police can't stop a driver based on a  
11 DMV similarity hit, or are you arguing that there was a  
12 failure of proof on the part of the People?

13 MS. SOMES: There was a failure of proof on the  
14 part of the People here.

15 CHIEF JUDGE DIFIORE: Thank you.

16 MS. SOMES: Sustaining the stop in this case,  
17 under the facts of this case, ceded determination of  
18 reasonable suspicion to a computer program about which we  
19 know nothing except that somehow it uses a name, date of  
20 birth, and aliases to issue some sort of notice about the  
21 similarity between the registered owner of a car and a  
22 wanted person. It also - - -

23 JUDGE RIVERA: Just to - - - I'm sorry; I'm over  
24 here. I know it's difficult. Just to clarify, on this  
25 point that you're making right now, is it that you're



1 saying that the prosecutor had to put in proof about how  
2 this system works or just what was visible to the officer?

3 MS. SOMES: I think that the prosecution could  
4 have done either, but they did neither, and therefore we  
5 don't have objective facts on the record from which a  
6 review - - -

7 JUDGE RIVERA: Well, if it's just how it works,  
8 it doesn't tell you what the officer actually saw.

9 MS. SOMES: We need what the officer saw.

10 JUDGE RIVERA: Right.

11 MS. SOMES: I assume that if the officer - - -

12 JUDGE RIVERA: So do you really need to know how  
13 the whole system works if all you really want to know is  
14 what did this officer see at the time they made the choice  
15 to stop the car?

16 MS. SOMES: I think that what the officer saw is  
17 one way. I think that if there was proof about how the  
18 system worked then possibly, if the officer here had said  
19 that he assumed there was a warrant based on the similarity  
20 hit, or that he believed there was a warrant, then there  
21 might be some proof in the record to support his belief.  
22 But we don't have that here.

23 JUDGE WILSON: Do you need something about the  
24 accuracy, the rate of false positives, something like that?

25 MS. SOMES: Certainly that would be one way that



1 they could also establish the reasonableness of the  
2 officer's belief, if he had such a belief, because here he  
3 didn't say he believed that. But we have no idea what the  
4 accuracy rate is. We don't know if it's one in a thousand  
5 returns an - - - an actual warrant. Is it one in five  
6 hundred? We have no idea, on the basis of this record,  
7 whether or not there is any likelihood or what the  
8 likelihood might be that the warrant is actually for the  
9 registered owner of the car.

10 So this - - - this record, we don't know the name  
11 of the person with the warrant. We don't know the name of  
12 the registered owner. We don't know what the supposed  
13 similarity was. We don't know what he saw on the screen.  
14 But what we do know is that he had, literally, at his  
15 fingertips, the means to find out whether or not there was  
16 a warrant for the registered owner of the car. But he  
17 didn't look at that information.

18 Now, the People indicate - - - they argue that  
19 it's not safe for him to do so while driving. He didn't  
20 have to do so while driving. He could have radioed to  
21 someone and asked for help in - - - in ascertaining whether  
22 there was a warrant. He could have followed the car for a  
23 while.

24 JUDGE GARCIA: Wouldn't that also go, I mean, I  
25 think, to Judge Rivera's point? It really would depend on



1 - - - let's say they did come in and say, look, there was a  
2 warrant out, same name, bank robber, you know, five minutes  
3 ago. Would you really have to go check or in that  
4 situation could you just pull - - - pull the person over?  
5 I mean, wouldn't it really depend on what's on the screen?

6 MS. SOMES: I think it does depend on what's on  
7 the screen, yes. Yes.

8 JUDGE GARCIA: And I mean, I take your point that  
9 pretty much we don't know anything about what was on the  
10 screen here except maybe, I think, that the warrant was out  
11 of Rochester, right?

12 MS. SOMES: There was a warrant that was out of  
13 Rochester, yes. That - - - that's about all we know.

14 JUDGE STEIN: What if the police officer stopped  
15 him, then went and looked, read what was on the screen, saw  
16 that it didn't seem to be a - - - a match, wouldn't that  
17 officer either have a responsibility to or at least be able  
18 to walk over to the car and explain why they were stopped,  
19 and maybe apologize or, you know, whatever. And then - - -  
20 then doesn't the plain view doctrine jump in here and - - -  
21 and so are - - - I guess my question with that is is that  
22 are you - - - is your argument here - - - does that put  
23 limitations on the - - - on the availability of the plain  
24 view doctrine?

25 MS. SOMES: I don't believe so. First of all, I



1 think that if he - - - if he pulled over the car, and then  
2 he checks and finds out there isn't a warrant, he has no  
3 obligation to go over to the car. That almost turns into,  
4 you know, an unreasonable stop at that point.

5 JUDGE STEIN: Well, let me ask - - -

6 MS. SOMES: You know, he already know - - -

7 JUDGE STEIN: - - - you something different.  
8 What if - - - what if the police officer saw something, a  
9 problem with the car that maybe the - - - the owner wasn't  
10 - - - the driver wasn't aware of and - - - and wanted to  
11 make a safety stop? Then - - - then the stop is okay,  
12 right? So are - - - are you suggesting that you can't do  
13 that?

14 MS. SOMES: I'm suggesting that once he realized  
15 that there is no warrant, he has - - - he has no reason to  
16 continue to seize that car, and he can very easily drive  
17 by, wave, get on his loudspeaker, say, hey, have a good  
18 day, whatever it is. But once he knows - - -

19 JUDGE STEIN: So at that point it would be  
20 improper for him to even walk over to the car to - - -

21 MS. SOMES: I believe it would be improper for  
22 him because that is a seizure that is then continuing, and  
23 he has no basis to continue that seizure. What the officer  
24 did here, though, was takes it almost into Ingle territory  
25 where he kind of nosed around the car, he was checking the



1 registration, checking the inspection to make sure it was  
2 all legit, and there was no basis to do that.

3 JUDGE RIVERA: So I know you're taking the  
4 position, as you've already responded to the Chief Judge's  
5 question, that it was a failure of proof here. But is  
6 there, from your perspective, a minimum? Is there a - - -  
7 a floor, at least?

8 MS. SOMES: Is - - -

9 JUDGE RIVERA: Or it's always a case-by-case  
10 determination? Is there something that, from your  
11 position, you would argue, look, that's the minimum, you've  
12 got to have that. If you have more, that's a different  
13 story.

14 MS. SOMES: I think that, at a minimum, when it  
15 comes to the reasonable suspicion issue, at a minimum,  
16 there has to be evidence in the record from which a  
17 reviewing court can take a look and make a determination as  
18 to whether or not the - - - the officer reasonably believed  
19 what he - - - what he claimed to have believed, which  
20 again, he didn't even believe. He didn't even say that he  
21 believed there was a warrant here. So yes, I think that  
22 there is a minimum, and - - - and again, we don't have it  
23 here.

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 Counsel?



1 MS. GRAY: May it please the court. Lisa Gray  
2 for the People. Good afternoon, Your Honors.

3 In this case, the police officer presented  
4 specific and articulable facts at the hearing to establish  
5 that there was a similarity hit for the registered owner of  
6 the vehicle, out of the city - - -

7 JUDGE FEINMAN: So what are the specific facts  
8 that you believe the evidence showed?

9 MS. GRAY: Well, he had information that the  
10 warrant was a localized warrant out of the city of  
11 Rochester. He had the make and model of the vehicle. He  
12 knew that the registered owner was a male and that that  
13 vehicle associated with the warrant was being operated in  
14 the jurisdiction out of which the warrant was issued.

15 JUDGE GARCIA: But was the vehicle - - - I'm  
16 sorry, was the vehicle associated with the warrant? I  
17 thought it was a similarity on the name.

18 MS. GRAY: The police officer ran the plate  
19 through his MDT and revealed the registered owner of the  
20 vehicle as being similar to somebody with a warrant out of  
21 the city of Rochester.

22 JUDGE GARCIA: Right, but there's no connection  
23 to - - -

24 JUDGE FEINMAN: How does the reviewing court test  
25 that when you don't even know what the names are? You





1 know, one of the reasons I use my middle initial is because  
2 there's a lawyer who practiced in the same jurisdiction  
3 that I practiced with exactly the same name. The only  
4 difference is our middle name. We don't know any of that  
5 information here, do we?

6 MS. GRAY: Well, the police officer did explain  
7 during the hearing that oftentimes these similarity hits do  
8 come from far-flung jurisdictions, Texas, California. In  
9 this particular case, not only was it narrowed down to the  
10 county of Monroe, it was narrowed down to the city of  
11 Rochester. And as he explained to the court, that gave him  
12 heightened attention to do his duty, which was to  
13 investigate that potential warrant of the operator of that  
14 vehicle or one of it - - - or one of the occupants of that  
15 car.

16 JUDGE STEIN: Well, you gave, for example, the  
17 fact that it was out of - - - out of the city of Rochester  
18 and the registered owner was a male. That's - - - that's  
19 pretty broad. So how do we know that the - - - that the  
20 requirements for having a similarity hit, DMV's  
21 requirements aren't unreasonably broad so that it would  
22 capture, you know, many, many people that - - - that it  
23 didn't apply to? How - - - how would we know that? And  
24 don't we need to know that?

25 MS. GRAY: Well, I think we do know that from the



1 hearing, and that is that the DMV - - - the triggering  
2 mechanisms that the officer testified to include name, date  
3 of birth, aliases from, perhaps, previous arrests.

4 JUDGE STEIN: But we don't know how similar the  
5 names are. I mean, maybe the names had the same first  
6 letter of the first name and the last name, and that was  
7 it, and then names were completely different.

8 MS. GRAY: And in this case the police officer  
9 was reasonable in pulling over that car in order to  
10 investigate that equivocal fact situation.

11 JUDGE GARCIA: But how do we know that, I guess,  
12 is the point Judge Stein's trying to make. We don't know  
13 what the similarity was. We don't know if it was off by a  
14 letter, if it was a full name with an initial, if it was an  
15 age and date of birth match. We - - - we don't know any of  
16 that.

17 MS. GRAY: But we do know that it was a localized  
18 warrant out of the city of Rochester that had potential  
19 similarity to the registered owner of the vehicle. And it  
20 was reasonable for that police officer to pull the car over  
21 in order to - - -

22 JUDGE FEINMAN: So why couldn't he, when he pulls  
23 the car over, though, do exactly what I think was discussed  
24 by one of my colleagues earlier, which is, okay, you pulled  
25 the car over, the car is pulled over, there's no indication



1 the car is fleeing. Now read it and take a look at it, you  
2 know, because he didn't want to do it while he was driving.

3 MS. GRAY: Because at that point the seizure has  
4 already happened. The seizure has already happened. So  
5 whether or not the police officer sits in his car and - - -

6 JUDGE FEINMAN: Yes, but it would dissipate - - -

7 MS. GRAY: - - - reads through information and  
8 synthesizes it - - -

9 JUDGE FEINMAN: - - - either or raise, you know,  
10 perhaps the quantum of information, wouldn't it?

11 MS. GRAY: It would - - - that would be no - - -  
12 no less of an intrusion on the operator -- occupant of that  
13 car because at that point - - -

14 JUDGE RIVERA: But it's more intrusive to  
15 actually go over, right? I mean, yes, of course - - -

16 MS. GRAY: In fact - - -

17 JUDGE RIVERA: - - - you've got the stop because  
18 you've stopped the car. No one's disagreeing with you.  
19 But isn't it even a heightened level of intrusion to  
20 actually get up, walk over to the car?

21 MS. GRAY: Respectfully, I would disagree,  
22 because in this case the police officer told the court that  
23 it was between twenty and thirty seconds by the time he  
24 observed that loaded gun between the appellant's feet,  
25 whereas if he - - -



1 JUDGE RIVERA: No, but that's - - -

2 MS. GRAY: If he - - -

3 JUDGE RIVERA: - - - already going to the car. I  
4 think the point was once you make the stop, why not then  
5 look at the screen or do whatever other search you can to  
6 get a better sense of whether or not there is a basis for  
7 the stop?

8 MS. GRAY: He would be prolonging that detention  
9 of the occupants by looking through twenty-five pages of  
10 MDT material, synthesizing it, assimilating it. I - - - I  
11 think he said it took - - - I - - - maybe about twenty  
12 seconds per page. So he would have been sitting there for  
13 about five minutes trying to figure out.

14 JUDGE WILSON: But we can't even evaluate that  
15 claim, because that's not in the record, right? I mean, he  
16 could have printed the thing out and put it - - - do you  
17 know why it's not in the record?

18 MS. GRAY: He - - - he testified at the hearing  
19 that I believe there were about twenty or twenty-five pages  
20 of information that he would have had to read and  
21 synthesize and assimilate and then make a determination all  
22 while driving and keeping the suspect car in view, and he -  
23 - - he told the hearing court that - - - that even doing  
24 that - - - that would be - - - that would have been  
25 difficult. This was a limited intrusion, a twenty-to-



1 thirty second interaction with the driver, and he - - - and  
2 he tells the driver, listen, I'm - - - the registered owner  
3 of the car may have a warrant. And she informs him that  
4 it's her brother who's the registered owner. He also knows  
5 that there's an adult male in that car.

6 JUDGE RIVERA: Isn't he more likely to get  
7 untainted information by looking at those pages - - -

8 MS. GRAY: I mean, not necessarily. I mean - - -

9 JUDGE RIVERA: - - - as opposed to what someone  
10 may or may not tell him?

11 MS. GRAY: Not necessarily. We - - - we  
12 certainly know that there are cases out there where police  
13 officers have relied on MDT information that turns out to  
14 be stale, or resolved information that the DMV just hasn't  
15 updated in their computers, but that - - - that isn't the  
16 case here. So it was in his - - - in his discretion to - -  
17 - to do a limited intrusion of a - - - of a - - - a quick  
18 car stop, much like a showup procedure.

19 JUDGE RIVERA: The similarity could be stale too,  
20 right?

21 MS. GRAY: I'm sorry, Your Honor?

22 JUDGE RIVERA: The similarity hit could be stale  
23 too?

24 MS. GRAY: In this case, it wasn't. He was able  
25 to determine that the registered owner did not have a



1 warrant.

2 JUDGE RIVERA: But it could be.

3 MS. GRAY: But the warrant - - -

4 JUDGE RIVERA: Sort of following your analysis of  
5 a case, it could be.

6 MS. GRAY: Yes, but in this case - - - but that's  
7 not in this case. I mean, there was a warrant; it just  
8 wasn't for the registered owner of the vehicle.

9 JUDGE RIVERA: Let me ask you this. If you do  
10 that, just that similarity hit, maybe all you realize at  
11 once is that the owner is male. Okay?

12 MS. GRAY: Yeah.

13 JUDGE RIVERA: You stop the car, you start  
14 walking, you see that the driver's female, alone. I know  
15 in this case there were two other men. What - - - what  
16 should the officer do?

17 MS. GRAY: Well, again, I think that goes back to  
18 my previous point that at that point the limited seizure  
19 has happened, he's allowed to address the driver. He has  
20 that short conversation with her. Those are reasonable  
21 steps to investigate this particular warrant and where - -  
22 - where that wanted suspect is, whether or not it's the  
23 operator --

24 JUDGE RIVERA: But learning what?

25 MS. GRAY: -- or the occupant.



1 JUDGE RIVERA: I mean, doesn't the officer have  
2 to confirm that indeed the warrant is for the owner of that  
3 car?

4 MS. GRAY: Yes, he does. And he did that in this  
5 case.

6 JUDGE RIVERA: But what I'm saying is - - -

7 MS. GRAY: And in fact, it wasn't.

8 JUDGE RIVERA: - - - how is he going to get that  
9 from her? So what's the point of asking her, in my  
10 hypothetical?

11 MS. GRAY: Because he had a duty to investigate  
12 that warrant. So she's the operator of that vehicle. He -  
13 - - he immediately tells her, listen, you're not the  
14 subject of the warrant. I know - - - you know, I know it's  
15 a man. And she - - - then she volunteers information about  
16 the registered owner. So - - - so he - - - he is in  
17 furtherance of his duty to - - - to do that investigation.

18 JUDGE RIVERA: And if she doesn't want to talk to  
19 him, what happens next? She says I don't have to talk to  
20 you.

21 MS. GRAY: Then I - - - I think that at that  
22 point he could perhaps ask for identification of the other  
23 people in the vehicle.

24 JUDGE RIVERA: No, in my hypothetical where she's  
25 alone and obviously is not the owner because the owner's



1 identified as male.

2 MS. GRAY: I think under that hypothetical, if  
3 she's alone in the vehicle - - -

4 JUDGE RIVERA: Yes.

5 MS. GRAY: - - - and he knows that the registered  
6 owner is a male, then prob - - -

7 JUDGE RIVERA: Yes.

8 MS. GRAY: - - - then at that point probably he  
9 could say have a nice night and be on your way, female  
10 operator. But that's not what happened in this case.

11 JUDGE RIVERA: No, I understand.

12 MS. GRAY: So - - -

13 JUDGE STEIN: So what would happen if in that  
14 very, very brief period of time he looked down on the floor  
15 and saw a firearm?

16 MS. GRAY: I'm sorry, Your Honor, what - - -

17 JUDGE STEIN: So what would happen if, in that  
18 very brief period of time in which he - - -

19 MS. GRAY: Again, I think the analysis is still  
20 the same. It's still - - - at that point he would be  
21 lawfully present in order to make that observation. He  
22 does see that the - - - that the operator is female versus,  
23 let's say, a registered owner who's a male. But he's  
24 lawfully there, but he doesn't even get - - - in your  
25 scenario, he doesn't even get a chance to wave her on



1 because now he has seen evidence of contraband in plain  
2 view. He's lawfully present under - - - under the other  
3 scenario, and he would wave her on. But now he sees  
4 contraband, and he would be lawfully present. He's still  
5 lawfully present at that driver's side window.

6 JUDGE FAHEY: Can I ask you? A lot of times in  
7 these cases, even though they're so fact-intensive there's  
8 a snowflake-like quality to them, there are usually a  
9 series of factors that a court can look to to evaluate  
10 them. What factors would you have us to look at, in this  
11 similarity hit problem, to establish that there was  
12 reasonable suspicion?

13 MS. GRAY: I think the factors that this court  
14 should look at are the - - -

15 JUDGE FAHEY: Let's say in every similarity hit  
16 type. These kind of problems of identification, through  
17 highly technical computer programs, are going to become  
18 more prevalent rather than less prevalent. That's why I'm  
19 asking you, because this case really could carry over and  
20 have more effect beyond simply this particular stop.

21 MS. GRAY: I think general - - - generally, the  
22 factors of what - - - what makes up the similarity hit,  
23 which was certainly explained by the officer in this case,  
24 in terms of the triggering mechanisms, the different  
25 criteria that would bring the information forth through the

1 MDT, and - - - and the - - - the factors of the similarity  
2 hit in terms of whatever the particular similarity hit is  
3 based on.

4 JUDGE FAHEY: You see the problem, if you - - -  
5 let's say you move into another type of technology, like  
6 facial recognition technology, and the problem of  
7 similarity hits, do you see how - - - how a lack of clearly  
8 defined factors that are set out in - - - in clear proof  
9 standards could really wreak havoc on all of our rights?

10 MS. GRAY: I - - - I believe the standard still  
11 remains. What is that quantum of knowledge that the police  
12 officer had in order to establish reasonable suspicion?  
13 And reasonable suspicion has never required the police  
14 officer to establish, with absolute certainty, that  
15 criminality - - -

16 JUDGE FAHEY: Oh, I think you're totally right,  
17 and that'd be unfair, and that - - - that would be a bad  
18 idea. We wouldn't be able to protect society in any way.

19 MS. GRAY: So - - -

20 JUDGE FAHEY: I agree with you, yeah.

21 MS. GRAY: So police officers are, at times,  
22 presented with equivocal fact scenarios, so they do have a  
23 duty to investigate that. And the similarity hit is no  
24 different than facial recognition technology that may be  
25 used in law enforcement in the future.



1           And in this case, the police officer had that  
2 quantum of knowledge. The People presented enough evidence  
3 at the - - - at the hearing to establish that.

4           JUDGE FAHEY: One of the things I struggled with  
5 was is I had nothing to compare it to. You said it was  
6 similar, but it didn't seem like the record really  
7 established the similarity; the name, the warrant, the look  
8 of the person, none of that was in the record. It was  
9 difficult.

10           MS. GRAY: Well, again, I think we - - - we know  
11 that it was a localized warrant coming out of the city of  
12 Rochester. The police officer testified, generally, as to  
13 what those triggering mechanisms were. We had the  
14 registered owner as a male. And the - - - the car  
15 associated with the person who could have the warrant was  
16 being operated in the jurisdiction out of which the - - -  
17 the warrant was issued. So all of those things, the trial  
18 court correctly concluded, the Appellate Division affirmed,  
19 that that gave rise to reasonable suspicion. A similarity  
20 hit, based on a judicially-authored warrant, can give rise  
21 to reasonable suspicion and sustain a traffic stop in New  
22 York.

23           CHIEF JUDGE DIFIORE: Thank you, counsel.

24           Counsel?

25           MS. SOMES: Going to Judge Fahey's question, I



1 think that your illustration of facial recognition is a  
2 good one here because, in order to be able to determine  
3 whether or not any - - - any hit was reasonable, you would  
4 need the two screens, the two screens of the face so that  
5 you can make a comparison. And here, if they had brought  
6 in the screens that the officer actually looked at, there  
7 would be a basis for comparison, but they didn't, and so  
8 there is not.

9 The decision, you know, below incentivizes the  
10 police not to look at readily-available information which  
11 will tell them whether or not there's a warrant for the  
12 registered owner of the car.

13 And going to Judge Feinman's concern about why he  
14 uses a middle initial, if - - - if a person is swept up in  
15 these similarity hits, and they're not the person that has  
16 the warrant, then that person is going to be subject to  
17 being stopped over and over and over again, and he will  
18 have - - - he or she will have no means to clear it up  
19 because only the person with the warrant could clear it up  
20 and get it out of the database.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of The People of the State of New York v. Everett D. Balkman, No. 79, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

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