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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 202

JEANNE M. VANDOVER,

Respondent.

20 Eagle Street
Albany, New York 12207
October 17, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 202, People v.
2 Vandover.

3 Counselor?

4 MR. MIDDLEMISS: Good afternoon, Your
5 Honors, may it please the court. My name is Robert
6 Middlemiss and I am before you this afternoon on
7 behalf of the People. I'd request two minutes of
8 rebuttal time, please.

9 JUDGE CIPARICK: What's the appropriate
10 standard here - - -

11 MR. MIDDLEMISS: The appropriate stand - -
12 -

13 JUDGE CIPARICK: - - - to determine
14 probable cause of the DWI arrest.

15 MR. MIDDLEMISS: The appropriate standard
16 is probable cause. The Appellate Term effectively
17 required factual proof of the element of impairment.

18 JUDGE GRAFFEO: It's probable cause of
19 what, driving while ability impaired, or driving
20 while intoxicated? What's - - -

21 MR. MIDDLEMISS: Driving while ability
22 impaired. The long line of case law consistently
23 says that the appropriate standard for probable cause
24 in these cases is any violation of Vehicle and
25 Traffic Law, Section 1192.

1 CHIEF JUDGE LIPPMAN: The evidence is
2 compatible with guilt or innocence, there's no
3 probable cause, right?

4 MR. MIDDLEMISS: Correct, Your Honor.

5 CHIEF JUDGE LIPPMAN: So why isn't that the
6 case here?

7 MR. MIDDLEMISS: No, Your Honor.

8 CHIEF JUDGE LIPPMAN: Why?

9 MR. MIDDLEMISS: The question is not
10 whether it's compatible with either; it's whether
11 it's equally compatible with either.

12 CHIEF JUDGE LIPPMAN: Why isn't it equally
13 compatible?

14 MR. MIDDLEMISS: Because the standard of
15 proof is impairment to any extent, and the indicia
16 identified here by the witnesses were consistent with
17 impairment to any extent. Notably, the initial
18 officer noted bloodshot eyes.

19 JUDGE SMITH: Suppose it had only been the
20 smell of alcohol on the breath. Is that enough?

21 MR. MIDDLEMISS: Whether or not that would
22 be enough, Your Honor, would depend on the totality
23 of the facts and circumstances.

24 JUDGE SMITH: Well, suppose that's the only
25 one you've got. You can't arrest somebody just

1 because she's getting into her car and you smell
2 liquor, right?

3 MR. MIDDLEMISS: If that were the only
4 thing that could be interpreted to indicate it, then
5 presumably that would be insufficient, yes, Your
6 Honor. If there were other indicia - - -

7 JUDGE SMITH: So here you have the fact
8 that her speech was slow and her eyes were bloodshot.

9 MR. MIDDLEMISS: Yes, Your Honor. Her
10 speech was slow. She appeared generally lethargic,
11 physically sedated, something to that effect.

12 JUDGE SMITH: And - - -

13 CHIEF JUDGE LIPPMAN: And - - - go ahead.

14 JUDGE SMITH: And also, I suppose, you have
15 the fact that these two officers witnessed some of
16 the sobriety test, the field sobriety test, and it
17 looked like she wasn't doing all that well; is that a
18 fair sum - - - I mean, the results - - -

19 MR. MIDDLEMISS: Correct.

20 CHIEF JUDGE LIPPMAN: - - - of the sobriety
21 test never get in, but - - -

22 MR. MIDDLEMISS: Correct, Your Honor.

23 JUDGE SMITH: - - - she wasn't at the head
24 of the class on that test.

25 MR. MIDDLEMISS: Yes, Your Honor, exactly;

1 a class is a good analogy. In this case, the officer
2 witnessed portions of the tests, the one-leg-stand
3 test and the walk-and-turn test. First he observed
4 her not stand on one leg, put her foot down, and then
5 he watched her not turn around at all during the
6 walk-and-turn test. If you take a math test and you
7 don't do the math - - -

8 JUDGE SMITH: So granted that you might
9 have enough for probable cause, is it really clear,
10 as a matter of law? I mean, here we have affirmed
11 findings of fact that this doesn't make it to
12 probable cause. Why aren't we bound by that?

13 MR. MIDDLEMISS: Because, Your Honor, the
14 facts are entirely uncontested. But in making - - -

15 JUDGE SMITH: But that's why we call it a
16 mixed question, that even where the facts - - -

17 MR. MIDDLEMISS: Right.

18 JUDGE SMITH: - - - are uncontested, the
19 inference to be drawn from them is normally for the
20 fact finder and a court of law can't review it.

21 MR. MIDDLEMISS: That's very true, Your
22 Honor, but the issue, of course, is the inference to
23 be drawn, and the standard applied by the Appellate
24 Term wouldn't allow a court to draw any inferences.
25 They require the showing of actual impairment, not

1 that it was more probable than not that the defendant
2 was actually impaired.

3 CHIEF JUDGE LIPPMAN: What's your standard?

4 MR. MIDDLEMISS: Just that, that it would
5 be more probable than not that the defendant would be
6 actually impaired to any extent so that it wouldn't
7 be necessary to show that they were, in fact,
8 intoxicated, or that it wouldn't be necessary to show
9 that they were actually impaired, merely facts and
10 circumstances which - - -

11 CHIEF JUDGE LIPPMAN: You don't think you
12 could draw different inferences from the facts here?

13 MR. MIDDLEMISS: No, I don't, Your Honor.
14 Her general appearance was - - -

15 CHIEF JUDGE LIPPMAN: I mean, the court
16 didn't draw the inference that you're proposing,
17 right?

18 MR. MIDDLEMISS: The court apparently
19 didn't draw any inference, Your Honor, the Appellate
20 Term. Specifically, they just said that the evidence
21 was insufficient to prove actual impairment. They
22 required proof of actual impairment so that they
23 weren't willing to draw any inference at all. They
24 simply said it was insufficient to prove actual
25 impairment. That's not the standard. The standard

1 is more probable than not, and in this case a general
2 - - - a clearly sedate state, and particularly her
3 slow state - - -

4 JUDGE SMITH: But while - - -

5 CHIEF JUDGE LIPPMAN: Go ahead, Judge.

6 JUDGE SMITH: - - - insufficient to prove,
7 doesn't that, in context, mean to prove by a
8 preponderance of the evidence which really is the
9 probable cause standard?

10 MR. MIDDLEMISS: No, Your Honor, because
11 the court specifically articulated the - - - they
12 pointed to Cruz which identifies a trial standard of
13 proof and referred to actual impairment, not that it
14 was more probable than not that - - -

15 JUDGE SMITH: Although Cruz is - - -

16 MR. MIDDLEMISS: - - - she was actually
17 impaired.

18 JUDGE SMITH: - - - Cruz is relevant as to
19 what you have to prove. The quantum of proof is
20 different on probable cause or a trial.

21 MR. MIDDLEMISS: Correct.

22 JUDGE SMITH: But it's the same fact that
23 has to be established, so it's reasonable to cite
24 Cruz as saying this is what they had to have probable
25 cause just to believe.

1 MR. MIDDLEMISS: And that's very true, Your
2 Honor, and that's exactly why you cite Cruz, to say
3 that this is what you have to have probable cause to
4 believe. If they had included the words "probable
5 cause" in that sentence, then we wouldn't be here.
6 But they didn't. They said that there was an
7 obligation to show actual impairment. That's not the
8 same thing as - - -

9 JUDGE SMITH: They didn't include the words
10 "beyond a reasonable doubt" either.

11 MR. MIDDLEMISS: I'm sorry?

12 JUDGE SMITH: They didn't put the words
13 "beyond a reasonable doubt" either.

14 MR. MIDDLEMISS: That's certainly true.

15 JUDGE SMITH: Why shouldn't we give the
16 more charitable interpretation to what they said,
17 which is they were thinking of the probable cause
18 standard?

19 MR. MIDDLEMISS: Because the language was
20 inconsistent with that, Your Honor. The word
21 "actual" is the word "actual". Actual - - - "I am
22 actually here", I'm not more probable that - - - it's
23 not just more probable than not that I'm here.

24 JUDGE SMITH: You're here beyond a
25 reasonable doubt.

1 MR. MIDDLEMISS: Yes, Your Honor. So the
2 word "actual" would be consistent with that beyond a
3 reasonable doubt. You can say that it actually is;
4 therefore, there's no reason to doubt it.

5 CHIEF JUDGE LIPPMAN: Okay, counselor, what
6 else?

7 MR. MIDDLEMISS: The application of such a
8 standard would cause numerous problems since - - - as
9 we indicated. There are numerous circumstances in
10 which individuals are stopped for violations of
11 vehicle and traffic law or other reasons not related
12 to their specific driving. In addition, there are
13 things like checkpoints for DWI. Under this
14 standard, it would be impossible to arrest
15 individuals in those situations, if they weren't
16 driving erratically, without letting them go on and
17 drive again.

18 JUDGE SMITH: You could give them a field
19 sobriety test.

20 MR. MIDDLEMISS: Under select circumstances
21 I would say yes, Your Honor, but as I indicated - - -

22 JUDGE SMITH: Isn't this - - -

23 MR. MIDDLEMISS: As I - - -

24 JUDGE SMITH: Isn't this case really just
25 sort of an artifact because for reasons that no one

1 knows the guy who gave the field sobriety test wasn't
2 called at the hearing. If he had been called, we
3 could have saved all this trouble for everybody.

4 MR. MIDDLEMISS: Well, Your Honor, that may
5 very well have been true - - -

6 JUDGE SMITH: Everybody except Ms.
7 Vandover.

8 MR. MIDDLEMISS: That may very well have
9 been true at the local court level, but that's not
10 what the ultimate determination was based on. The
11 ultimate determination was based on the standard, and
12 more importantly, field sobriety tests are merely
13 confirmatory. They're not the specific indicator.
14 It's certainly possible to arrest people without
15 conducting field sobriety tests. It happens all the
16 time in New York City, metropolitan areas. It
17 happens if the stop is made in bad weather, an
18 upstate blizzard or a particularly gravelly area.
19 There are plenty of instances in which probable cause
20 doesn't require field sobriety tests, including
21 instances in which people aren't observed operating
22 the vehicle. There are numerous cases involving
23 officers who've arrested people found asleep in their
24 vehicles at the side of the road who display indicia
25 of intoxication and who you have concluded,

1 reasonably, usually based on statements, that they
2 drove there.

3 JUDGE PIGOTT: Even downstate blizzards.

4 MR. MIDDLEMISS: Yes, thank you, Judge.

5 JUDGE PIGOTT: Just want the record - - -

6 MR. MIDDLEMISS: Thank you, Your Honor.

7 CHIEF JUDGE LIPPMAN: Okay, counsel,
8 anything else?

9 MR. MIDDLEMISS: No, I don't believe so,
10 Your Honor.

11 CHIEF JUDGE LIPPMAN: Okay. Thank you,
12 counsel.

13 Counselor?

14 JUDGE CIPARICK: All right. Mr. Lerner,
15 what do you say the standard should be?

16 MR. LERNER: I agree that the standard
17 should be probable cause, and that's exactly what the
18 Appellate Term applied here. In fact, I respectfully
19 turn Your Honor's attention to page 5 of the
20 appendix. There is the statement and there's the
21 quotation by Cruz in the second paragraph followed up
22 by the odor of alcoholic beverage - - - I'm sorry,
23 "The odor of an alcoholic beverage, an admission of
24 consumption of alcoholic beverages six hours earlier,
25 glassy bloodshot eyes and a fatigued demeanor are

1 insufficient to establish probable cause for
2 impairment."

3 JUDGE GRAFFEO: So what was insufficient in
4 this case? What was missing? What would the People
5 have needed?

6 MR. LERNER: The People needed to supply
7 some point - - -

8 JUDGE GRAFFEO: You don't have to be
9 driving, do you? I mean, were they supposed to wait
10 until she got in the car with the children and went
11 down the road before they stopped her?

12 MR. LERNER: Well, that goes to the stop,
13 Judge Graffeo, and our position is that the stop was
14 unreasonable. At the point that Officer James was in
15 the court with and observed Ms. Vandover, the only
16 thing that he did observe was odor on her breath,
17 slow speech, not this idea of sedation. It was slow
18 speech, odor on the breath, and there was also glassy
19 eyes.

20 JUDGE PIGOTT: How many times have you
21 heard an officer testify with respect to probable
22 cause that when he pulled the car over that the
23 person's speech was slurred, he had the odor of
24 alcohol on his breath, his eyes were glassy, and when
25 I asked him to get out of the car he had difficulty

1 doing so?

2 MR. LERNER: I'm not a DWI attorney. I did
3 work with a lot of DWI attorneys - - -

4 JUDGE PIGOTT: It makes a lot of sense,
5 though, doesn't it?

6 MR. LERNER: Well - - -

7 JUDGE PIGOTT: Isn't that what usually
8 happens?

9 MR. LERNER: That's what usually happens.
10 That's not the facts - - -

11 JUDGE PIGOTT: It's probable cause.

12 MR. LERNER: That's not the facts that were
13 stated here. There wasn't slurred speech - - -

14 JUDGE PIGOTT: "Witness agrees the
15 defendant's speech" - - -

16 MR. LERNER: - - - or slow speech.

17 JUDGE PIGOTT: Yeah, well, that's right,
18 but it says "the odor of an alcoholic beverage,
19 admission of the consumption of alcoholic beverages
20 six hours earlier, glassy bloodshot eyes and fatigued
21 demeanor". That sounds like the usual probable cause
22 to me. What's missing from that?

23 MR. LERNER: What's missing is - - - and I
24 point to a litany of cases that are cited in the
25 People's brief.

1 JUDGE PIGOTT: Pick one.

2 MR. LERNER: Let's talk about People v.
3 Fenger, 68 AD3d 1441. Woman fell back - - - or the
4 person, defendant fell back in the car, was found
5 unconscious, was slurring speech and was hard to
6 understand when spoken to. That's not the proof that
7 the People brought in at the probable cause hearing.

8 JUDGE SMITH: You're really relying a lot
9 on the distinction between slow speech and slurred
10 speech, aren't you?

11 MR. LERNER: I'm not relying on it; the
12 evidence demonstrates it. In fact, the Officer James
13 stated - - -

14 JUDGE PIGOTT: No, but I mean, if he said
15 "slurred speech" you'd be out of court.

16 MR. LERNER: Most likely I would be, but
17 that's not - - -

18 JUDGE PIGOTT: So slurred and slow is the
19 defining issue here?

20 MR. LERNER: In this case?

21 JUDGE PIGOTT: Yes.

22 MR. LERNER: I think the defining issue was
23 the fact that the People failed to call the arresting
24 officer.

25 JUDGE PIGOTT: Well, that didn't answer my

1 question, but I get your point. And you do also
2 agree that the statement that "the hearing proof
3 failed to establish that the defendant exhibited
4 actual impairment to any extent of the physical and
5 mental abilities which a person is expected to
6 possess in order to operate a vehicle as a reasonable
7 and prudent driver" is the improper standard. You're
8 saying they stated that but that's not - - -

9 MR. LERNER: It's a probable cause
10 standard, and the fact is, is that if you're going to
11 demonstrate actual impairment, if there's some sign
12 of impairment, you're essentially demonstrating
13 actual impairment anyway.

14 JUDGE PIGOTT: No, you're not. I mean - -
15 -

16 MR. LERNER: Well - - -

17 JUDGE PIGOTT: - - - if - - - I mean, if
18 somebody's weaving down the road and they're
19 following him, they can quite often pull them over
20 and then they say eyes were glassy, speech was
21 slurred and so we gave him a test. And everybody
22 says that's probable cause.

23 MR. LERNER: Well, what I was referring to
24 is slurred speech, failure - - - or failed the field
25 sobriety test. That's what I meant by actual

1 impairment.

2 JUDGE CIPARICK: Look at - - -

3 JUDGE READ: So they had to call the
4 arresting officer? Why?

5 MR. LERNER: In this - - - in this case - -
6 -

7 JUDGE READ: Yeah.

8 MR. LERNER: - - - based on the proof, they
9 did need to because - - - I will talk about the
10 arrest. We - - -

11 JUDGE GRAFFEO: Officer James, who
12 testified, was the one that spoke to her in the
13 hallway about all what he perceived were her physical
14 condition.

15 MR. LERNER: Correct.

16 JUDGE GRAFFEO: Correct?

17 MR. LERNER: Correct. He - - -

18 JUDGE GRAFFEO: And then there was a
19 sergeant that testified.

20 MR. LERNER: He did testify and he stated
21 that actually the odor was moderate, which syncs up
22 to actually right before - - - after the stop, right
23 before the arrest.

24 JUDGE READ: So why did they have to call
25 the arresting officer, too?

1 MR. LERNER: Because the signs that were
2 pointed - - - as to what the proof was pointing out
3 was the fact that it was not more probable than not
4 that this person, the signs pointed to the fact of
5 impairment. What it pointed to was the fact that she
6 had consumed alcohol at some point during that day.

7 JUDGE GRAFFEO: What about the fact that
8 she told them she had consumed alcohol within so many
9 hours?

10 MR. LERNER: It was six hours before. I
11 think that that is evidence. There are three signs
12 that all say - - -

13 JUDGE GRAFFEO: It's not unusual sometimes
14 for people to misgauge the amount or the timing of
15 their consumption of alcoholic beverages in these
16 cases, is it?

17 MR. LERNER: I just want to understand,
18 it's not unusual for somebody that - - -

19 JUDGE PIGOTT: Everybody says he only had
20 two.

21 MR. LERNER: Right.

22 JUDGE SMITH: On the other hand, you don't
23 get probable cause just by disbelieving them, I
24 suppose.

25 MR. LERNER: That's the point, and the

1 point - - -

2 JUDGE GRAFFEO: No, but it was another
3 indicia, wasn't it, that they - - -

4 MR. LERNER: That - - - well - - -

5 JUDGE GRAFFEO: - - - that they testified
6 to?

7 MR. LERNER: What I think that indicia - -
8 - there are three points: the odor, the admission -
9 - - and this is just toward the arrest, not the stop,
10 because that evidence wouldn't have come in because I
11 - - - my position is, is that the stop was - - -
12 there wasn't authority to have the stop. But if we
13 get past that and we look toward the arrest, it's
14 basically seeing three of the same things: the
15 portable breath test, the admission of consuming
16 alcohol, and the odor of breath merely demonstrate
17 the same thing, that she consumed alcohol, not that -
18 - -

19 JUDGE PIGOTT: Well, the glassy eyes.

20 MR. LERNER: The glassy eyes, that could be
21 anything.

22 JUDGE PIGOTT: Now - - -

23 MR. LERNER: She - - -

24 JUDGE PIGOTT: - - - what - - - it's common
25 with drinkers; that's why they always talk about it.

1 And if she'd had whatever she'd had to drink six
2 hours before and her eyes were still glassy, couldn't
3 the officer make some judgments there and try to
4 figure out whether he's going to let her drive home
5 with her daughter in the car?

6 MR. LERNER: Well, at that point he had
7 stopped and - - -

8 JUDGE PIGOTT: Right.

9 MR. LERNER: - - - there was a field
10 sobriety test. And I think that is the crucial
11 factor in this case, and the rule that I think that
12 the People are advancing is problematic for cases in
13 the future. There was a field sobriety test that was
14 administered that the other two officers really
15 couldn't speak to.

16 JUDGE PIGOTT: I think the distinction - -
17 - and Mr. Middlemiss will probably do this when he
18 speaks again but - - - is there's a difference
19 between the probable cause and then the trial. And
20 when you have the probable cause, you establish
21 probable cause and you can use hearsay then, right?

22 MR. LERNER: You definitely can.

23 JUDGE PIGOTT: Right. So if they establish
24 probable cause, then they come to the trial; if they
25 don't show up with the testing officer then you've

1 probably got a strong case for a dismissal. Isn't
2 that the distinction that - - -

3 MR. LERNER: It is the distinction but the
4 Appellate Term didn't apply beyond a reasonable doubt
5 here.

6 JUDGE SMITH: Did they put in the hearsay
7 results of the field sobriety test?

8 MR. LERNER: It was discussed by - - - I
9 think Officer James discussed the fact that she - - -
10 he only saw parts of the test and she didn't look
11 like she had passed or - - -

12 JUDGE SMITH: Yeah, but the actual - - - I
13 mean, I've - - - somewhere in this folder, which
14 maybe I shouldn't have seen but I did, there is a
15 field sobriety test that shows what happened. But
16 that never got into evidence, right?

17 MR. LERNER: No, Your Honor, I don't
18 believe so.

19 JUDGE SMITH: And now I suppose - - - I
20 mean, I guess it's right that since hearsay is
21 admissible at these hearings, somebody could have
22 said, hey, did the officer tell you how she did and
23 is this how she did. But that didn't happen?

24 MR. LERNER: That didn't happen. All that
25 was testified to was the fact that Officer James said

1 that he witnessed - - - I think it was Officer James
2 and not Sergeant Metzger, said that he witnessed
3 parts of the test and that she - - -

4 JUDGE GRAFFEO: He said that - - - as I
5 recall, he said he witnessed her perform two of the
6 requests as part of the field sobriety test.

7 MR. LERNER: I think he said - - -

8 JUDGE GRAFFEO: So he was present for part
9 of what she did, and he did testify to that.

10 MR. LERNER: He did testify to it and he
11 said - - -

12 JUDGE PIGOTT: And there's this statement -
13 - -

14 JUDGE GRAFFEO: And that's not enough?

15 MR. LERNER: No, I don't believe so,
16 because he didn't see the full test; I think he saw
17 parts of the leg-stand test and I think it was - - -
18 he also said the turn test.

19 JUDGE PIGOTT: It also says that one of the
20 officers testified that the positive reading of the
21 field breath test was as consistent with an alcoholic
22 content below the statutory level of impairment as
23 would a blood alcohol content above that limit.

24 MR. LERNER: Correct.

25 JUDGE PIGOTT: So at least some evidence of

1 the test came in.

2 MR. LERNER: It just - - - it came in, the
3 fact that she consumed alcohol, which is the same
4 thing as the admission that she had consumed alcohol
5 six hours, maybe five hours, maybe four hours before.

6 JUDGE PIGOTT: Are we getting circular? I
7 mean, they want to say all we've got to do is show
8 probable cause; what the court wanted to do was say
9 that we had to show actual impairment. And all of
10 these statements are saying they didn't show actual
11 impairment, and they're saying you're right, we
12 didn't, we showed probable cause and when we get to
13 the trial we'll show the actual impairment.

14 MR. LERNER: There has to be a
15 demonstration of probable cause that it's more likely
16 than not that there was some impairment to her mental
17 or physical capabilities in order to operate a motor
18 vehicle like a reasonable and prudent driver. In
19 this case, all the evidence that was put forth by the
20 People just demonstrated that she consumed alcohol.
21 And under Cruz - - -

22 JUDGE GRAFFEO: Well, James testified that
23 he saw her fail to perform two of the field sobriety
24 tests. I'm having difficulty understanding why that
25 doesn't support the probable cause.

1 MR. LERNER: I believe that it was - - -
2 unless I misread the appendix, I believe it's parts
3 of the field sobriety test, the battery of tests.
4 It's a battery of tests.

5 JUDGE GRAFFEO: Two - - - he said he saw
6 her fail to perform two portions of the field
7 sobriety test.

8 MR. LERNER: And - - -

9 JUDGE GRAFFEO: That's not enough?

10 MR. LERNER: No - - - no, Your Honor. He
11 needs to see - - -

12 JUDGE GRAFFEO: He has to - - -

13 MR. LERNER: - - - the battery.

14 JUDGE GRAFFEO: - - - witness the whole
15 field sobriety test? Along with all of the other
16 factors here, it's not enough?

17 MR. LERNER: Enough of the field sobriety
18 test to demonstrate that there was some sign of
19 impairment. The fact that he witnessed her put her
20 leg down at some point and that she failed to turn
21 around at some point - - -

22 JUDGE SMITH: Suppose the courts below had
23 found probable cause; would we be able to reverse
24 them? Do you think that there's an absence of
25 probable cause as a matter of law?

1 MR. LERNER: No, Your Honor, and that gets
2 me to my initial point of what I should have started
3 the argument off with is the fact that the court's
4 scope of review - - - because of the fact that the
5 determinations are supported by the record, it's
6 beyond the court's scope of review to get into - - -
7 it's a - - - I'm sorry, it's a mixed question of law
8 and fact. And therefore, because the determinations
9 were supported by the record below, this discussion
10 about was this fact a sign or was this other fact a
11 sign is beyond this court's scope of review.

12 JUDGE CIPARICK: Are you suggesting we
13 should dismiss this appeal, People's appeal?

14 MR. LERNER: Based on the fact that the
15 People did certify that they will be unable to
16 demonstrate their case, I do agree with the People
17 that the fact that the Appellate Term dismissed
18 instead of just stated that there was no probable
19 cause, that that was a mistake, but the fact that the
20 People have certified to the fact that they won't be
21 able to prove their case without the suppression of
22 evidence, I would respectfully request that the court
23 just affirm the Appellate Term's decision.

24 CHIEF JUDGE LIPPMAN: Okay, counsel,
25 thanks.

1 MR. LERNER: Thank you.

2 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

3 MR. MIDDLEMISS: Yes, Your Honor. Just
4 briefly, two things. One, this is a reviewable case,
5 specifically because it's illustrated directly by the
6 Appellate Term's opinion. They state the standard
7 and then they apply that standard to the facts. And
8 it's the question of the statement of that standard
9 that we have a problem with. It's the incorrect
10 standard for probable cause.

11 The amicus wants to point to all of the - -
12 - separately, the amicus wants to point to all of the
13 indicia in isolation: oh, this sign didn't show
14 anything, this sign didn't show anything, didn't see
15 the whole battery of FSTs so it can't make an FST
16 conclusion. But all of those things have to be
17 viewed in context. They all have to be viewed
18 together in their totality. Are they enough to allow
19 a reasonable and prudent person to infer that - - -

20 JUDGE SMITH: Why isn't the argument you're
21 now making an argument that has to be made to the
22 fact finder?

23 MR. MIDDLEMISS: The argument isn't an
24 argument that has to be made to the fact finder
25 specifically because it's based on the facts that are

1 here. The facts are, in fact, found. There's no
2 question as to what the facts are. The only question
3 is the standard that's being applied, which is why
4 we're here and not somewhere else.

5 JUDGE SMITH: Okay.

6 MR. MIDDLEMISS: Thank you, Your Honors.

7 CHIEF JUDGE LIPPMAN: Thanks, counsel.

8 (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 PEOPLE v. JEANNE M. VANDOVER, No. 202 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

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