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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

NO. 35

TYQUAN JOHNSON,

Respondent.

20 Eagle Street
Albany, New York
April 18, 2023

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Alexander Reaves
Official Court Transcriber

1 ACTING CHIEF JUDGE CANNATARO: People v. Johnson.

2 MR. WATKINS: Good afternoon, Your Honor. I was
3 going to reserve two minutes for rebuttal?

4 ACTING CHIEF JUDGE CANNATARO: You may. Two
5 minutes.

6 MR. WATKINS: Paul Watkins representing the
7 Defendant Appellant, Tyquan Johnson. As the Court knows,
8 this involves the first three to four levels. On the first
9 level, the police officer needed an objective credible
10 reason to stop and approach and my client in his parked
11 car.

12 JUDGE TROUTMAN: Let's talk about what happened
13 here. What did the Appellate Division decide as to which
14 level was involved?

15 MR. WATKINS: Well, that's a problem, Your Honor.
16 As I pointed out in my brief, they just went ahead and gave
17 a blanket decision. They didn't specify what level was
18 involved. The trial court said level 1, 2, and 3 were all
19 involved, and the Appellate Division in their decision just
20 stated - - - refined that trial court was correct without
21 specifying what level, and I pointed out some of the cases
22 they cited don't even apply to this situation.

23 So I don't know the answer to that, Your Honor.
24 My brief and my request to this Court was all three levels.
25 Now, going back to the level 1, I looked - - - this Court

1 has said that you need a - - -

2 JUDGE RIVERA: Well, I'm sorry. I mean, the
3 Appellate Division does say - - -

4 MR. WATKINS: I'm sorry, Your Honor?

5 JUDGE RIVERA: The Appellate Division does say
6 that the evidence at the hearing established the action
7 taken by the officer was justified in its inception, which
8 must refer to step 1, level 1, and at every subsequent
9 stage of the encounter leading to the arrest, which must
10 mean 1, 2, 3, and then arrest.

11 MR. WATKINS: Yes. My point, Your Honor, was
12 that the case is - - - you know, if they didn't specify
13 what case they said goes to what level. So I mean,
14 ultimately, levels were at stake here. It's just that - -
15 -

16 JUDGE RIVERA: But then it says, generally De
17 Bour.

18 MR. WATKINS: Excuse me?

19 JUDGE RIVERA: But then it says, generally
20 DeBour. People need De Bour, so.

21 MR. WATKINS: Right. Right, so - - -

22 JUDGE RIVERA: And De Bour sets out this
23 framework.

24 MR. WATKINS: Yes. So I'm not sure. All three
25 levels are at stake, Your Honor, here in the appeal.

1 JUDGE RIVERA: No, I don't disagree with you on
2 that, but let me ask you this just to clarify the record
3 somewhat. Is it your position that the testimony by the
4 officer at the hearing is that he stops and is curious
5 because he observes this car parked in this particular
6 neighborhood and the person jumps, moves from the driver to
7 the passenger seat, and then makes a hand movement back to
8 the driver's seat; is that what triggers that first level 1
9 approach?

10 MR. WATKINS: Except for the - - -

11 JUDGE RIVERA: Is that the way you read the
12 record or is there more that the officer has observed?

13 MR. WATKINS: No, Your Honor, except whether the
14 area is parked in - - - I mean, the officers did say they
15 were because of an uptick of crime, but then that's not the
16 reason he gave when he testified as to why he decided to
17 approach my client for the level 1.

18 It was, as you pointed out, my client simply, in
19 a parked car, moving from the driver's seat to the
20 passenger's seat, and then moving back, his upper body, not
21 his hands. Police officer did not see his hands, and
22 contrary to what the People said in their brief, my client
23 did not reach into the back.

24 Officer just saw him move from the driver's seat,
25 passenger's seat, leaned back, and decided to pull over.

1 One other thing that I thought was very important is the
2 fact there's nothing in the record to show my client made
3 any moves because he was aware of the police officer.

4 No other level 1 cases with parked cars, the
5 police officers pull up beside. No parked car - - - they
6 approach the parked car. Here, the officer said, he was
7 fifty feet behind in his car, pulling up behind my client
8 in a parked car when he saw the movement.

9 So the supposition or you know, the - - - you
10 know, moving from the fact that my client somehow did it
11 because it was furtive or he saw the police officer,
12 there's nothing in the record to show that.

13 JUDGE SINGAS: So doesn't that make it a level 2,
14 then?

15 MR. WATKINS: Well, Your Honor, no. The level 2
16 - - -

17 JUDGE SINGAS: If he's - - - if they're not - -
18 - if he's not responding to the car pulling up behind him
19 and the first interaction he has with the police officers
20 once they're outside the car, so does - - - haven't we
21 just skipped right to level 2 in this case?

22 MR. WATKINS: That's correct. My business
23 knowing, Your Honor, is that the police officer should have
24 just kept on going. There's no reason for him to stop his
25 car because all he did to stop the car was see my client

1 move from the seat. He should have said, oh, nothing wrong
2 with that. People move all - - - their seats all the
3 time. I'm going to move onto - - -

4 JUDGE RIVERA: They didn't stop his car.

5 MR. WATKINS: - - - someone who is really doing
6 something bad.

7 JUDGE RIVERA: I'm sorry. He didn't stop the
8 car, right? The car was stopped, was parked.

9 MR. WATKINS: Yeah, I'm sorry. I meant - - -

10 JUDGE RIVERA: You mean follow him; is that what
11 you're talking about? Is this - - -

12 MR. WATKINS: No, no - - -

13 ACTING CHIEF JUDGE CANNATARO: You mean the
14 officer shouldn't have stopped his car?

15 MR. WATKINS: That's correct. I missed - - -

16 JUDGE RIVERA: Oh, I'm sorry.

17 MR. WATKINS: Right.

18 JUDGE RIVERA: I misunderstood you. Thank you.

19 MR. WATKINS: Right. My client's - - - yeah - -
20 - I can - - -

21 ACTING CHIEF JUDGE CANNATARO: But he did more
22 than stop his car.

23 MR. WATKINS: - - - this car, that car, exactly
24 right.

25 ACTING CHIEF JUDGE CANNATARO: The officer

1 stopped his car and he turned on his lights.

2 MR. WATKINS: Yes.

3 ACTING CHIEF JUDGE CANNATARO: Didn't he do that?
4 Now, that to me - - - I don't know. There's something
5 interesting to me about that that suggests some sort of
6 criminal investigation is underway. That itself seems to
7 me to have a level 2 sort of feel to it. What's your take
8 on the lights?

9 MR. WATKINS: My take, Your Honor, is what the
10 officer's purported reason - - - said, I wanted to check
11 what was going on. Why he didn't turn on his front head
12 lights, I don't know. Why he didn't turn on his overhead
13 lights, I don't know, but no, there was - - -

14 JUDGE GARCIA: But I think the question is, is
15 that act, pulling up behind, turning lights on - - - so I
16 guess some of the interior of the car's illuminated. Is
17 that in itself a level 2 interaction?

18 MR. WATKINS: Well, Your Honor, I would say the
19 level 2 interaction, according to what the cases say - - -
20 you have a - - - you know, you can go up and ask someone a
21 question that makes them think that he's under - - -

22 JUDGE GARCIA: It's a criminal interaction - - -

23 MR. WATKINS: Right.

24 JUDGE GARCIA: - - - between the police and the
25 citizen.

1 MR. WATKINS: Right. I can - - - and in my
2 brief, I try to go in differential way, the level 1, level
3 2 - - -

4 JUDGE TROUTMAN: But here, there's no actual
5 interaction until both are out of the cars?

6 MR. WATKINS: That's correct. My position in
7 this is that we skipped over level 1 entirely. If he had
8 gone ahead, stopped the car, my client's in the passenger
9 seat, walked up and said, what's going on, maybe. He
10 didn't do that.

11 ACTING CHIEF JUDGE CANNATARO: What did he ask?

12 MR. WATKINS: He immediately went ahead, and when
13 he stopped the car and got out, and this is important, he
14 got out just as my client got out. My client gets out.
15 The police officer says, well, he's adjusting his pants. I
16 thought that might be where he puts a weapon, so I started
17 to follow him.

18 ACTING CHIEF JUDGE CANNATARO: And the question
19 was, do you have a gun? Wasn't - - - wasn't that the
20 question?

21 MR. WATKINS: Yes, Your Honor, and as I pointed
22 out in my brief, and as this is very unique. In all the
23 level 2 cases I've had, this is the only one I've seen
24 where the client did not have a gun.

25 JUDGE GARCIA: Yeah, but if he had a gun, would

1 the interaction have been okay?

2 MR. WATKINS: I'm sorry, Your Honor?

3 JUDGE GARCIA: So let's say he had a gun. Not
4 this case, hypothetical, same facts. He has a gun. Would
5 your view be, then, that was okay?

6 MR. WATKINS: No, it wouldn't.

7 JUDGE GARCIA: So what's the difference if he has
8 a gun?

9 MR. WATKINS: The difference is, then, he can - -
10 - the officer cannot go ahead and start saying, well,
11 there was a bulge, or there was some other clip. There's a
12 clip of a weapon. A weapon did not exist. The only thing
13 that he has to go on is my client pulling up his pants when
14 he gets out of the car.

15 JUDGE SINGAS: So isn't it easier to just say
16 that at level 3, there's no articulable reason why the
17 officer should have put hands on the defendant and then it
18 doesn't matter what happened in level 1 and 2, because
19 there's no justification for that frisk at 3?

20 MR. WATKINS: Oh, yeah, the - - - well, Your
21 Honor, that's fine. I'm just covering all my bases. If
22 for some reason you say level 1, yes. Level 2, yes. Level
23 3, no; that's fine with me. Either way - - - any level
24 where you find he shouldn't have done it, then the docket
25 should be dismissed. If you want to skip all the way to

1 level 3, that's good.

2 I'm just pointing out that each level, and just
3 to make sure that everything's covered, I may argue - - -

4 JUDGE TROUTMAN: There is no - - -

5 MR. WATKINS: - - - I may - - - I actually
6 think the level 1 argument - - -

7 JUDGE TROUTMAN: Counsel, your argument is
8 basically there was no justification at any point for any
9 of the conduct of the - - - on the part of the police
10 officer as it relates to your client.

11 MR. WATKINS: That's correct. Yep, and Your
12 Honor, the other thing is - - -

13 JUDGE RIVERA: So let me follow up on Judge
14 Troutman's point, there. So your first point was, he sees
15 the movement - - - the officer, excuse me, sees the
16 movement in the vehicle - - - sees it's parked, sees the
17 movement in the vehicle. He should not have - - - the
18 officer should not have stopped his own car. He should
19 have kept going; is that your point?

20 MR. WATKINS: That's correct.

21 JUDGE RIVERA: Okay. That's your view. All
22 right. And let's say we didn't agree with that. Once the
23 gentleman got out of the car and he adjusted his belt, that
24 the officer should not have followed him; is that also your
25 view at that point?

1 MR. WATKINS: No.

2 JUDGE RIVERA: Okay.

3 MR. WATKINS: My view is - - -

4 JUDGE RIVERA: He could follow him?

5 MR. WATKINS: He could - - - what he could do
6 for level 2, and this is what he did. He said - - -

7 JUDGE RIVERA: If the officer is correct at level
8 1 - - -

9 MR. WATKINS: Right.

10 JUDGE RIVERA: - - - he can follow him because
11 of the belt adjustment and what he's observed in the car?

12 MR. WATKINS: What he can do for the level 2 is
13 say, hold up, which he did, and then follow him, because on
14 the level 2 - - - but then he asked a very pointed
15 question, do you have a gun, and my client says no, which
16 is right.

17 And then that's where the level 2 ends. He's
18 followed my client - - -

19 JUDGE RIVERA: But he could have followed him.
20 He could have tried to stop him physically by getting in
21 front of him; and he could have asked this question about
22 the weapon, since that was his concern when he first
23 observed the movement in the car. And once the defendant
24 says no, what does the officer do? He just walks away?

25 MR. WATKINS: That's correct.

1 JUDGE RIVERA: And the defendant keeps walking?
2 Can he follow him?

3 MR. WATKINS: Yep. Where he - - - yes, Your
4 Honor. That's correct.

5 JUDGE RIVERA: Can he follow him? Can he follow
6 him?

7 MR. WATKINS: Yes. He can - - -

8 JUDGE RIVERA: Let's say he doesn't believe him
9 and he wants to follow him. Let's say yes?

10 MR. WATKINS: I'm sorry, Your Honor?

11 JUDGE RIVERA: Let's say the defendant has said
12 no. The officer says, okay, I have to stop asking you
13 questions and I can't prevent you from walking away. You
14 have a right to walk away from me.

15 MR. WATKINS: Right.

16 JUDGE RIVERA: Can he follow him?

17 MR. WATKINS: Well, he did. Yes, what he did was
18 - - -

19 JUDGE RIVERA: Well, follow him without touching
20 him, without saying anything else. Can he just surveil?

21 MR. WATKINS: My position is level 2 inquiry,
22 once he went ahead and asked the pointed question - - -

23 JUDGE RIVERA: Yes.

24 MR. WATKINS: - - - do you have a gun? My
25 client says no. Level 2 is done because he asked a pointed

1 question, got a no. Instead, he went ahead and took it up
2 to level 3 by keeping on following him and getting next to
3 him, and then asking him, you look nervous. And my client
4 says, no, I'm not nervous. All right, well, I'm going to
5 frisk you.

6 So then he steps in front and starts frisking my
7 client based on the fact only that my client says, well,
8 I'm not nervous.

9 ACTING CHIEF JUDGE CANNATARO: So what made it
10 level 3? Was it the following and saying, you look
11 nervous, or was it the actual pat down that made it level
12 3?

13 MR. WATKINS: Well, Your Honor, the - - - when I
14 did in my brief - - - I made the difference between level
15 3 approach and the frisk. Level 3, now, you go ahead and
16 you have a suspicion that criminality is afoot, you know,
17 that there's criminal activity going.

18 Then you can do the level 3 and you stop and you
19 ask very pointed questions, and then which the officer did,
20 and then just based on the fact you walked up to my client,
21 my client stops, you look nervous. My client says, no, I'm
22 not nervous, and he says, all right.

23 Then he steps in front, stops him, and does the
24 frisk. My point is I differentiated in my brief beside - -
25 - between what a level 3 is and the actual frisk. I mean,

1 as a practical purposes, level 3 and frisks is hard to
2 differentiate.

3 I've never seen a case where someone's in a level
4 3 inquiry and then they just walk away. Of course they're
5 going to, you know, frisk them if they think there's
6 something wrong, but there is a difference between the
7 level 3.

8 The level 3, you can ask - - - you can go ahead
9 and stop and detain if you have reasonable suspicion the
10 felony happened. Then, if you wanted to do a frisk, you
11 need to have something to go ahead and do a frisk.

12 Now, one thing that I thought was interesting in
13 this is that - - -

14 JUDGE GARCIA: Counsel, before we get to that,
15 what - - - do you see that there is a level 1 encounter at
16 all, here, or this goes right to 2?

17 MR. WATKINS: I'm sorry, Your Honor?

18 JUDGE GARCIA: Do you see a level 1 interaction
19 at all, here, or does this go to - - - right to a 2?

20 MR. WATKINS: Well, Your Honor, I see it go right
21 to 2. Level 1, you walk up and say, what's your name,
22 how's things going. He never did that.

23 JUDGE GARCIA: Some inquiry. Right.

24 MR. WATKINS: Right. He - - - this would have
25 been a level 1 situation - - - like I said, my client had

1 changed from the driver's seat to passenger's seat.

2 Officer walks up to the window and says, what's going on?

3 JUDGE GARCIA: Right.

4 MR. WATKINS: That's a level 1. Never happened
5 because the officer says he got out of the car.

6 ACTING CHIEF JUDGE CANNATARO: Understood. And
7 so the - - - your argument isn't that by pulling up behind
8 the car and shining the light into the car to whatever
9 extent, that's a level 1 encounter?

10 MR. WATKINS: Well, no, Your Honor. Just because
11 the way the cases are, the officer gets to ask, you know,
12 some questions about pedigree, for a better, you know,
13 term. What's your name, how you're doing, what are you
14 doing here.

15 I think just actually - - - if, for some reason,
16 the lights got turned on and my client tried to drive away,
17 it'd be a different story, but no, I don't see the - - -
18 you know, the lights. The lights are just what the police
19 officer said, I wanted to see inside.

20 JUDGE RIVERA: Well, why is it a different story?
21 I thought people could just walk away.

22 MR. WATKINS: I'm sorry, Your Honor?

23 JUDGE RIVERA: Why would it be a different story?
24 I thought you have the right not to engage with a police
25 officer. You can just walk away or pull away in your

1 example.

2 MR. WATKINS: The lights - - -

3 JUDGE RIVERA: It'd be hard to do, he's got to
4 get back in the driver's seat.

5 MR. WATKINS: I'm sorry, Your Honor. If he had
6 not turned the lights on?

7 JUDGE RIVERA: No, I thought you said it would be
8 different if the lights were turned on and then the
9 defendant had pulled away?

10 MR. WATKINS: Yeah, something like that. I mean,
11 the lights would have had instigated him, and then we'd
12 have - - - we'd be at a De Bour level, we'd be into what
13 that a cop - - - what a police officer need to actually
14 follow somebody.

15 I mean, I view the overhead lights as just the
16 police officer, as he said, just wanted to look in the car.
17 My client, no, wasn't trying to drive away, and the lights
18 didn't stop him from driving away, according to the police
19 officer. It was just for the officer to be able to see
20 inside.

21 ACTING CHIEF JUDGE CANNATARO: It was 5 o'clock
22 on April 13, 14, 15, right?

23 MR. WATKINS: It's almost exactly eight years
24 ago.

25 ACTING CHIEF JUDGE CANNATARO: Yeah. Wouldn't it



1 be light out at 5 o'clock?

2 MR. WATKINS: Yes.

3 ACTING CHIEF JUDGE CANNATARO: Okay.

4 MR. WATKINS: Right. And so my client had looked
5 at it. I mean, if it's dusk, he's fifty feet away. It
6 makes even less sense, but no, it wasn't. It's just, like,
7 you know, an hour from now.

8 ACTING CHIEF JUDGE CANNATARO: It's almost 5
9 o'clock now. Speaking of which, Counsel, your time is up.

10 MR. WATKINS: Thank you, Your Honor.

11 ACTING CHIEF JUDGE CANNATARO: Thank you.

12 MR. MCCARTHY: Good afternoon, Your Honors.

13 Marty McCarthy for the Respondent. To take just Ms.
14 Troutman's question at the beginning, the Appellate
15 Division had to have decided what was decided at the trial
16 court.

17 The fourth department religiously follows this
18 Court's rulings and Concepcion and LaFontaine, so the trial
19 court found that this began as a level 1 encounter. It
20 went to a level 2 encounter. Ultimately ended at a level 3
21 encounter and subsequent.

22 ACTING CHIEF JUDGE CANNATARO: So we're bound by
23 that?

24 MR. MCCARTHY: Well, the Appellate Division felt
25 bound by that, and that's what they decided. That's why

1 they worded it that way. It wasn't our fault. I will
2 certainly concede that point, but that is what they were
3 saying when they said that.

4 Two, to deal with the issue with the lights, I
5 just want to make sure that we're talking about - - -
6 we're talking about the same set of lights. There's two
7 set of lights on top of a police car. The first set are
8 the ones that rotate, the ones that you see when somebody's
9 pulled over on the side of a road for a traffic stop, and
10 then there's a second set of lights which are just white.

11 He indicated he activated the overhead lights,
12 not the emergency lights, so the lights - - -

13 ACTING CHIEF JUDGE CANNATARO: These are the ones
14 that strobe?

15 MR. MCCARTHY: Those are the emergency lights.

16 ACTING CHIEF JUDGE CANNATARO: Okay.

17 MR. MCCARTHY: And he indicated he activated the
18 overhead lights, so this wasn't a scenario where what he
19 was doing was pulling up and effectuating a traffic stop at
20 the stop vehicle, and this wasn't a stop of a moving
21 vehicle. He was just - - -

22 JUDGE RIVERA: He was doing it to be able to look
23 in?

24 MR. MCCARTHY: He was doing it to be able to look
25 in, and you know, I - - - there was not a whole lot of

1 indication of what the lighting conditions were. You know,
2 it was April.

3 JUDGE TROUTMAN: Okay. So what about someone in
4 a car moving from one seat to another, getting out, pulling
5 up their pants, caused the officer or justified the officer
6 taking the actions that he did, here?

7 MR. MCCARTHY: So I'm going to break that up,
8 okay? I'm going to start with the - - - because the - - -
9 the way the court analyzed it was the actions of moving
10 back and forth in the car were unusual.

11 JUDGE RIVERA: Well, he didn't move back and
12 forth.

13 JUDGE TROUTMAN: No.

14 JUDGE RIVERA: He moved from the driver's seat to
15 the passenger's seat and then reached back over. That's
16 not jumping and moving back and forth.

17 MR. MCCARTHY: It's at least one jump with one
18 sort of - - -

19 JUDGE RIVERA: Reach over.

20 MR. MCCARTHY: - - - reaching in this direction.

21 JUDGE RIVERA: I move - - - I move to the
22 passenger seat, oh, I forgot my cell phone, let me - - -
23 oh, I dropped my cell phone. As I did that, let me go pick
24 it up.

25 MR. MCCARTHY: That's unusual.

1 JUDGE RIVERA: Well, how is that unusual?

2 MR. MCCARTHY: Well, I'll - - - I'll give you
3 this.

4 JUDGE RIVERA: A moving car. That's a huge car.

5 MR. MCCARTHY: I'll give you an example of People
6 v. Perez where - - -

7 JUDGE RIVERA: Oh, my favorite, yes.

8 MR. MCCARTHY: I know you're familiar with that
9 case, Your Honor. The officer in that case was standing in
10 the hallway area and the defendant in that case came out of
11 the elevator, saw them, and immediately went back in the
12 elevator. That was unusual, right? It just has to be an
13 objective, credible reason.

14 JUDGE RIVERA: Okay. He - - -

15 JUDGE SINGAS: But can we get to level 3, though,
16 honestly, because this is what's troubling me, right? He's
17 adjusting his pants, or his pants are unbuckled. Usually,
18 the argument is you're putting a gun into your waistband to
19 secure that weapon.

20 Clearly you're not securing it in pants that are
21 unbuckled. So like, what other basis of fact do you have
22 that would justify this police officer doing the frisk for
23 a level 3? I mean, I think we can argue about 1 and 2 and
24 whether it's affirmed findings of fact and so on.

25 Was it a level 1, did we jump right to level 2,

1 but let's cut to the chase. How do you justify the level
2 3?

3 MR. MCCARTHY: Well, let me stop you there for
4 one second, because we're done with level 1, right? I
5 don't think there's any more questions about level 1, so
6 then what - - - that was the reason why he stopped.

7 JUDGE SINGAS: Perhaps.

8 ACTING CHIEF JUDGE CANNATARO: No promises.

9 JUDGE RIVERA: Perhaps.

10 JUDGE GARCIA: No, I - - -

11 JUDGE TROUTMAN: Yes, level 3. 3.

12 MR. MCCARTHY: You can certainly ask me
13 questions, right?

14 JUDGE TROUTMAN: She asked you level 3.

15 MR. MCCARTHY: Yeah, and I'm going to get there
16 in one second, because I'm - - - because I'm not sure if
17 we're talking about - - - when we say level 3, I want to
18 make sure we're talking about the same thing, right?

19 So that justified him to stop the car. Let's
20 just agree on that.

21 JUDGE SINGAS: The car stopped. The car stopped,
22 right?

23 MR. MCCARTHY: Yep, so he's - - -

24 JUDGE SINGAS: There was no - - - there was no
25 action of the police officer stopping the car?

1 JUDGE GARCIA: Assume everything's justified
2 until he - - -

3 JUDGE SINGAS: Okay.

4 MR. MCCARTHY: So he gets out, right, and - - -
5 and - - - and what the court found is not that the pat
6 frisk was pursuant to the level 3 De Bour. What the court
7 found was this was a Terry frisk pursuant to level 2 based
8 on the officer's familiarity with the defendant.

9 He had met this defendant several times before,
10 and when he encountered him on this particular occasion, he
11 was very nervous, right? His heart was racing.

12 JUDGE TROUTMAN: Anybody would be nervous when
13 the police come up. I'm nervous when the police come up.

14 MR. MCCARTHY: Well, I mean - - -

15 JUDGE TROUTMAN: That's a normal human reaction.

16 MR. MCCARTHY: I would be, too, but based on the
17 record, it appeared that what the court found was that in
18 this particular case, he was nervous where the other times,
19 he was not, right, and that was why he talked about the
20 fact, I dealt with him before, and he was nervous this
21 time, right?

22 His heart was racing, so as he approaches him as
23 part of the - - -

24 JUDGE RIVERA: Maybe his heart is racing from
25 moving from the driver's seat to the passenger's seat in

1 the Ford Explorer, reaching over, walking out, moving right
2 along.

3 MR. MCCARTHY: Yeah, yeah. That's - - - that's
4 - - - that's a possibility.

5 JUDGE RIVERA: I mean, he said he's not nervous.

6 MR. MCCARTHY: That's - - - that - - - and - -
7 - and that was the thing. He's not nervous, but - - -

8 JUDGE TROUTMAN: But the point is, isn't that
9 behavior just as equally innocent behavior?

10 MR. MCCARTHY: Well, when it comes to - - - when
11 you look at the - - - the authority for conducting a Terry
12 frisk, right, the police officer doesn't have to wait for
13 the - - - a defendant to pull a gun out, right? He could
14 - - -

15 JUDGE TROUTMAN: So here, you're saying his heart
16 was beating fast, he seemed nervous, so the officer had the
17 right to search him?

18 MR. MCCARTHY: He didn't - - - he conducted a
19 pat search.

20 JUDGE TROUTMAN: A pat frisk.

21 MR. MCCARTHY: He conducted a pat - - -

22 JUDGE TROUTMAN: Well, it's an intrusive thing to
23 do to a citizen walking on this street. Is it your
24 suggestion any time a police officer sees someone and they
25 says - - - they say, that person is nervous, they have the

1 right to pat that person down?

2 MR. MCCARTHY: It was based on the police
3 officer's previous encounter with the - - -

4 JUDGE TROUTMAN: Okay. There was no crime that
5 had been occurred. He wasn't responding to a call.

6 MR. MCCARTHY: No.

7 JUDGE TROUTMAN: So, and he didn't say he
8 witnessed criminal activity prior to making the actual
9 encounter with the defendant, correct?

10 MR. MCCARTHY: No.

11 JUDGE TROUTMAN: It's just, he's nervous so I'm
12 going to pat him down?

13 MR. MCCARTHY: It was him being nervous. It was
14 the conduct of - - - so the question I think it was - - -
15 I don't know if it was Judge Garcia, how do you secure a
16 gun? Well, you secure a gun - - - the testimony was you
17 secure a gun - - - or Judge Singas, I'm sorry, by putting
18 it in your pants and tightening the belt, which is what he
19 was doing.

20 JUDGE TROUTMAN: His pants were loose. How - - -
21 how - - - she - - - she - - -

22 MR. MCCARTHY: He - - - he - - - when he got
23 out of the - - -

24 JUDGE TROUTMAN: Judge Singas pointed out it is
25 always stated, yes, they secured it in the belt with the

1 belt secured. In this instance, accepting the findings of
2 fact, his pants were falling down. How could it be holding
3 a gun?

4 MR. MCCARTHY: When he got out of the car. When
5 he got out of the car, his pants were down. As he
6 approached them, he tightened his pants, so.

7 ACTING CHIEF JUDGE CANNATARO: But Counsel, I
8 think the nature of the question is that logically
9 speaking, in order to secret the gun, the pants have to be
10 tight first. You can't put the gun in and then secure the
11 belt and close the pants.

12 That just makes no sense. That's illogical.

13 MR. MCCARTHY: Well, the gun couldn't have - - -
14 it - - - it - - - given physics, he probably wouldn't
15 have had the gun in his pants when he was sitting down.

16 ACTING CHIEF JUDGE CANNATARO: Yeah, and given
17 physics, he wouldn't have had the gun in his pants before
18 he had buttoned his pants and closed his belt.

19 MR. MCCARTHY: But the other thing that - - -
20 the other thing that - - - the other fact is - - - is - -
21 - is here's the defendant and here's the officer. The
22 officer's behind him, not in front of him, so he's not
23 coming this way. If he had come this way, he could clearly
24 see his hands, clearly see anything in his hands. He can't
25 see anything in his hands.



1 The conduct in the car of reaching from - - -
2 from going from the - - - the driver's seat to the
3 passenger's seat and then reaching back to the driver's
4 seat, which he described as either secreting something or
5 retrieving something, and in this case - - -

6 JUDGE TROUTMAN: So any time you exit a car,
7 instead of out - - - out of your own door, you go to the
8 other side, you're secreting something? That's suspicious?
9 The door could have been broken on his side.

10 MR. MCCARTHY: It was potentially suspicious, and
11 again, once he got up to him, right - - - to me, the fact
12 that sort of tips the analysis. Had he gotten up to him
13 and he had said, hey, how are you doing, and he was not
14 nervous, then you wouldn't have - - - you wouldn't have a
15 basis to escalate.

16 JUDGE RIVERA: Yeah, but you see, now, this is
17 why you're wrong about that level 1, because why is he
18 approaching him? There's nothing to suggest that he should
19 be approaching this gentleman. That's the argument,
20 anyway.

21 MR. MCCARTHY: Well, that's his argument, yes.

22 JUDGE RIVERA: The man is moving in the car. He
23 exits the car. You can correct me if I'm wrong. As I
24 understand the record, the officer doesn't testify the
25 defendant exited the car because he noticed the officer was

1 coming towards him, even though someone can walk away from
2 an officer.

3 MR. MCCARTHY: And that's - - - and you've said
4 that before and you're correct.

5 JUDGE RIVERA: But why are you going up and
6 stopping the man?

7 MR. MCCARTHY: But the whole idea behind level 1
8 just requires an objective credible reason.

9 JUDGE RIVERA: And that's my question. How is
10 this objective? People move around in a car.

11 MR. MCCARTHY: So in Barksdale, the defendant in
12 - - -

13 JUDGE RIVERA: Oh, my other favorite case.

14 MR. MCCARTHY: Again, I'm bringing out all your
15 hits, here.

16 JUDGE RIVERA: I know. All the hits, yes.

17 MR. MCCARTHY: In Barksdale, the defendant was
18 just standing in a lobby. That's all he was doing. He
19 wasn't doing anything other than standing in a lobby, and
20 that was justified as a level 1. Here, he's doing - - -
21 there's a little bit more what you would call surreptitious
22 activity here - - -

23 JUDGE RIVERA: Standing in a lobby who knows if
24 he should even be there, but there's no suggestion he's not
25 properly in his car. It's not, like, the officer thinks

1 that he has stolen this car or this vehicle.

2 MR. MCCARTHY: Well, there's nothing in the
3 record one way or the other as to whether - - -

4 JUDGE GARCIA: And Counsel, on this point you
5 made on he knew the defendant, my reading of the Supreme
6 Court decision is that - - - the - - - this person court
7 is that that just goes to nervousness. It's not like he
8 knew him to be in a gang or he carried a gun in the past.

9 It was, I knew him and he seemed nervous, now.
10 Does that get you a little - - - a pat down?

11 MR. MCCARTHY: Well, the nervousness in the sense
12 of at that point, he was nervous and the officer feared for
13 his safety as a result of that, so it was a baseline - - -

14 ACTING CHIEF JUDGE CANNATARO: It has to be a
15 reasonable fear, right?

16 MR. MCCARTHY: Well - - -

17 ACTING CHIEF JUDGE CANNATARO: And all he's got,
18 even with the past knowledge is he's nervous. Now, I think
19 we've been through enough the pants adjustment, but those
20 two things, right?

21 MR. MCCARTHY: Again - - -

22 JUDGE TROUTMAN: Did he ever see a bulge?

23 MR. MCCARTHY: Well, he was always - - - in that
24 sense, when he was approaching, he was behind him.

25 JUDGE TROUTMAN: Right.

1 MR. MCCARTHY: When he was in the front, I don't
2 know if the - - - I don't believe the record reflects
3 whether there was a bulge there.

4 JUDGE RIVERA: What happened to the other
5 officer? He stayed in the car?

6 MR. MCCARTHY: I don't think the other officer
7 testified, and I don't - - - there's no real - - -

8 JUDGE RIVERA: So he didn't?

9 MR. MCCARTHY: Yeah, and there's no real
10 indication as to what he did or didn't do. Are there any
11 other questions?

12 ACTING CHIEF JUDGE CANNATARO: Time's up.

13 MR. MCCARTHY: Thank you.

14 MR. WATKINS: Just a couple of points. When
15 Counsel pointed out the Barksdale case where a defendant
16 saw a police officer and then moved, the issue here is that
17 there's nothing in the record that shows my client made any
18 moves in the car because he was aware of the police
19 officer.

20 Police officer didn't approach him from the side,
21 didn't come straight on, and so the Barksdale case is not
22 on point. There's so many other explanations that could be
23 had for moving in the car. I can think of that maybe the
24 door didn't open correctly.

25 You know, maybe he looked and saw someone coming

1 down on a bicycle on the wrong side of the road and decided
2 that he was going to try to move out of the car in the
3 passenger's seat.

4 There's so many innocuous reasons, but the main
5 thing is there's nothing to show that he knew the police
6 officer was behind him, and so to say that he made the move
7 as a furtive or a response to police, there's nothing in
8 the record to show that.

9 Now, the thing about the officer and the
10 nervousness, yes, the officer did testify that he had
11 recognized my client. Under what circumstances, we don't
12 know. Was my client an informant? We don't know. Was he
13 helping the police when he saw them? We don't know.

14 So to say that somehow, because he saw my client
15 before, he knew he was nervous, that's not supported by the
16 record, and as Justice Troutman, you pointed out, are we
17 going to start letting police officers start stop, frisk
18 people just because they're nervous when they meet the
19 police? I don't think we want to do that.

20 JUDGE RIVERA: Well, but I thought the argument
21 was that it's from the moment the officer sees this car.
22 It's everything that has led up to that moment that - - -

23 MR. WATKINS: Well, Your Honor - - -

24 JUDGE RIVERA: - - - that supports, right? It's
25 not just - - - this may take it over the top, but you have

1 to look at the totality of the circumstances.

2 MR. WATKINS: Well, Your Honor, this is not a
3 situation where the whole is greater than some of the
4 parts, because each of the parts had to be examined in
5 their own separate area, as, you know, we don't get to
6 level 3 if you find that there was not a - - - you know,
7 not for level 1.

8 And so when you go to the level 3, you have to
9 have exactly what is needed for that under the law, and for
10 that, you need to have him enveloped in a felony. Now, I
11 had one other issue about the - - - now, what you said,
12 Justice, about the other officer, I was going to point out
13 that if Officer Pike was really, really concerned about his
14 safety that he had to frisk my client, where was the other
15 officer?

16 There's nothing in the record that shows Ofc.
17 Pipe said, yeah, I called Officer - - - I think Shultz to
18 come over because I was worried I wouldn't have backup.
19 Nothing there. If he's really, really concerned about his
20 safety because my client allegedly had a gun or a weapon,
21 why didn't he testify, I was so concerned, I had the other
22 officers come over.

23 We don't know where the other officer was. They
24 never called him to corroborate any of this testimony, and
25 so your point, Your Honor, is very correct. Where was the

1 other officer during all this time Officer Pike thought
2 that he was in danger for his life and had to frisk my
3 client only because he looked nervous?

4 JUDGE RIVERA: How much time has passed? These
5 are quickly, right? It's a fast-paced situation, as many
6 of these interactions are?

7 MR. WATKINS: Well, Your Honor, that's not in the
8 record. I mean, there's nothing - - - no one asked the
9 police officer, what time did you stop. I mean, the other
10 thing is it's unclear to me why someone didn't put the
11 police report into evidence because they tried to go ahead
12 and impeach the officer with it.

13 With the police report in evidence, it might be -
14 - - answered the question. I don't know why that didn't
15 happen, but it didn't. I do not know the answer to the
16 question, but just from a very practical point of view, if
17 they have another police officer in the car and there's an
18 account with somebody that, you know, could be suspicious
19 or have a weapon, that officer's not just going to sit in
20 the car. He's going to be somewhere, doing something.

21 No testimony from that officer. No testimony
22 from Officer Pike about it.

23 ACTING CHIEF JUDGE CANNATARO: Thank you,
24 Counsel.

25 MR. WATKINS: To me, that does it.

1 ACTING CHIEF JUDGE CANNATARO: We'll leave it at
2 that.

3 MR. WATKINS: Thank you, Your Honor.

4 THE BAILIFF: All, please rise.

5 (Court is adjourned)

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

I, Alexander Reaves, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Tyquan Johnson, No. 35 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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