SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 23, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Saxe, Nardelli, Catterson, JJ.

847 Time Warner Entertainment Company, L.P., et al., Plaintiffs-Respondents, Index 602426/04

-against-

Travelers Property Casualty Company, et al., Defendants-Appellants.

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Karla Moskowitz, J.), entered on or about September 20, 2006,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated August 5, 2010,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: SEPTEMBER 23,2010

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Mazzarelli, J.P., Friedman, Catterson, Abdus-Salaam, JJ.

1139 The People of the State of New York, Appellant, SCI 16713C/05

-against-

Rolando Herrera, Defendant-Respondent.

Robert T. Johnson, District Attorney, Bronx (Stanley R. Kaplan of counsel), for appellant.

Robin S. Steinberg, The Bronx Defenders, Bronx (Matthew Caldwell of counsel), for respondent.

Order, Supreme Court, Bronx County (Caesar Cirigliano, J.), entered on or about May 28, 2008, which, in a prosecution for criminal possession of a weapon in the fourth degree and unlawful possession of a knife, granted defendant's motion to suppress physical evidence and a statement, reversed, on the law and the facts, the motion denied, and the criminal complaint reinstated.

On the night of March 11, 2007, the arresting detective and his partner were on motor patrol in an area known for gang activity. At approximately 11:30 p.m., defendant walked in front of the detective's unmarked car at a deliberately slow pace, giving the appearance that he was trying to interfere with the flow of traffic. As the police car passed defendant, the detective observed in the light of the street lamps a shiny, silver-colored metallic object clipped to defendant's right rear

pants pocket. In addition to the object's curved clip on the outside of the pocket, the top of the object visibly protruded above the top of the pocket. Based on his training and experience, involving 50 to 60 arrests for weapon possession, the detective believed the object to be a gravity knife or a small-caliber handgun.

After stopping his car, the detective and his partner approached defendant and asked him to stop. The officers did not draw their guns. When he was two to three feet behind defendant, the detective pulled the shiny object out of defendant's pocket. He did not frisk defendant or question him before taking the object, which proved to be an illegal gravity knife (*see* Penal Law 265.01[1]).

The detective and his partner placed defendant under arrest and drove him to the precinct station. While in transit, defendant spontaneously stated that he had been keeping the knife for his own safety, based on his belief that someone he knew was trying to kill him.

Defendant moved to suppress the knife and the statement he made in the police car. At the hearing, the arresting detective, who was the sole witness, testified to the facts set forth above. The detective testified that, before seizing the object clipped to defendant's pocket, he "recognized it to be something that [he] had experienced." In fact, he was "90 percent sure that it

was either a knife or some other weapon." "Basically," he said, "the way the clip is designed and curved" was "typical of clips that are . . . part of knives." The detective rejected defense counsel's suggestion on cross examination that there was a significant likelihood that the object might have been something innocuous, such as a money clip, a cell phone or a tape measure. The detective testified that money clips and cell phone clips do not curve upward, as did the clip on the object in defendant's pocket. As to the suggestion that the object might have been a tape measure, the detective noted that, had the object been a tape measure, the top of it (which stuck out of the pocket) would have been "square." When asked why he took the object from defendant's pocket, the detective answered: "Because I feared for my safety. And I didn't know whether it was a knife or [a] handgun."

The motion court granted suppression. It found the detective's testimony credible except for the assertion that he feared for his safety, which, in the court's view, was undercut by the detective's admission that he and his partner did not draw their sidearms as they approached defendant. The court also noted that, although defendant's obstruction of traffic was "obnoxious," his conduct was not otherwise suspicious, in that he did not act furtively, did not reach for his hip or back pocket, and never tried to flee. The court further rejected the

prosecution's contention that the detective's actions were justified by reasonable suspicion, noting that the detective could not absolutely exclude the possibility that the clipped object was lawful until he removed it from defendant's pocket. Defendant's statement was suppressed as the fruit of his arrest based on the disapproved seizure of the knife. This appeal by the People ensued.

We reverse and deny the motion. The detective's firm belief, based on his training and extensive experience, that the shiny object he saw clipped to (and protruding from) defendant's pocket was a gravity knife or small-caliber handgun, even if not amounting to an absolute certainty, constituted reasonable suspicion of criminal activity justifying a level-three forcible stop under *People v De Bour* (40 NY2d 210, 223 [1976]; *see People v Fernandez*, 60 AD3d 549, 549 [2009] [officer's belief that object in defendant's pocket was a gravity knife, "even if [its] "illegal status [could not] be determined without testing it," constituted "reasonable suspicion . . . that defendant possessed an illegal weapon"]; *People v Carter*, 49 AD3d 377 [2008], *lv denied* 10 NY3d 860 [2008] [suppression was properly denied based on finding that officer "saw what appeared, based on his experience, to be an illegal gravity knife clipped to defendant's

clothing, and that he did not merely see a clip"]).[1] Given his reasonable suspicion that defendant was carrying an illegal weapon, the detective acted properly in securing the suspicious object by immediately removing it from defendant's pocket (*Fernandez*, 60 AD3d at 550, citing *People v Batista*, 88 NY2d 650, 654 [1996]). "Patting down defendant's pocket would have served no useful purpose, since the knife was visible and a pat down would have revealed what the officer already knew" (*Fernandez*, 60 AD3d at 550). Specifically, had the detective patted down defendant's pocket, he would have confirmed only that the object clipped inside was most likely a gravity knife (*see* Penal Law § 265.00[5] [the blade of a gravity knife remains inside the handle or sheath until "released . . . by the force of gravity or the application of centrifugal force"]). Further, the detective's seizure of the knife was, in fact, less physically intrusive to defendant than a frisk would have been, and did not involve restraining him.

While the motion court did not credit the detective's testimony that he "feared for [his] safety," the detective's fear for his safety is not dispositive of whether the knife was properly seized. Even had the detective testified that he had no fear for his safety, "[t]he facts giving rise to the

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[1]In dismissing our decisions in *Fernandez* and *Carter* as "lack[ing in] precedential value," the dissent tacitly admits that the result it would reach is contrary to those cases.

constitutionally permissible intrusion by the officer [would] not [be] negated by [that testimony]" (*People v Batista*, 88 NY2d at 654). Given the detective's firm and well grounded belief that the object in defendant's pocket was an illegal weapon, he had "reasonable suspicion that defendant was armed or dangerous" (*id.*), and that was sufficient ground for denial of the suppression motion.

We note that defendant's reliance on *People v Best* (57 AD3d 279 [2008], *lv denied* 12 NY3d 756 [2009]) is misplaced. In *Best*, this Court affirmed the *denial* of suppression because "[t]he officer's observation of a clip and part of a knife protruding from defendant's pocket, which he believed to be a gravity knife based on prior experience, provided, *at least*, a founded suspicion of criminal activity, permitting the officer to make a nonforcible stop and a common-law inquiry" (*id.* at 280 [emphasis added]). Because the officer in *Best* had not gone beyond those steps, it was unnecessary for us to determine whether the same facts gave rise to reasonable suspicion, and we made no such determination, specifically noting that, on the record in that case, the officer had "at least" a founded suspicion of criminal activity. Also inapposite is *People v Mendez* (68 AD3d 662 [2009], *lv denied* 14 NY3d 842 [2010]), in which we granted suppression because the arresting officer, by his own account, "did not see any characteristics of an illegal type of knife"

(*id.* at 662), and admitted that the only basis for suspecting that the object in the defendant's pocket was a gravity knife was that "any folding knife [which the object appeared to be] could, upon inspection, turn out to be a gravity knife" (*id.*). Here, by contrast, the arresting detective specifically testified that, based on his training and experience, he believed the object in question to be an illegal weapon. While the defense in *Mendez* evidently succeeded in eliciting admissions warranting suppression from the police witness in that case, any such admissions were based on that particular witness's personal knowledge, training and experience, which may well have been less extensive than that of the police witness here. The People are not bound in subsequent cases by the testimony given by police witnesses in prior cases. In other words, each case is decided on its own record.

In reviewing the record of this particular case, we find no support for the dissent's theory that the only way to determine whether a partially obscured folding knife is most likely to be an illegal gravity knife is to hold and test the knife. In this case, the arresting detective testified that, based on his extensive experience and training, he could be substantially certain that the object he observed in defendant's pocket was an illegal weapon. Nothing in the record, in the statute, or in any prior holding of this Court, contradicts the import of that

testimony. In this regard, to the extent the detective acknowledged that it is possible for a legal knife to be furnished with a clip, or that he could not be absolutely sure that the object was an illegal knife until he tested it, this does not undermine his testimony that he was nonetheless substantially certain that the object in defendant's pocket was an illegal weapon. The standard for the detective's action was merely reasonable suspicion, not absolute certainty or even probable cause. Given that defendant bore the burden of proof on the suppression motion, we cannot assume that, had defense counsel pursued this line of questioning further, she would have succeeded in demonstrating that the detective in fact could not articulate his basis for reasonably suspecting that the object (if a knife rather than a handgun) was an illegal knife (such as a gravity knife or switchblade) rather than a legal knife (such as a pocket knife). Accordingly, on the record in this case, the detective's seizure of the knife was supported by reasonable suspicion of illegality.

Finally, we reject the dissent's view that the seizure of the knife was a level-four police intrusion under *De Bour* that required probable cause, not mere reasonable suspicion, for justification. As previously noted, the police action in question -- grabbing a suspicious object protruding out of defendant's back pocket -- did not involve any physical restraint

of defendant's person, and was less physically intrusive to him (and a considerably lesser breach of his privacy) than a frisk would have been. Hence, the seizure of the knife cannot be equated to an outright arrest. *People v Cobb* (208 AD2d 453 [1994]) is not to the contrary; the police action in that case was a full-blown search of the defendant's pocket. In this case, the detective neither felt the outside of defendant's pocket nor placed a hand inside it; he simply removed the suspicious object that was sticking out.

All concur except Catterson, J. who dissents in a memorandum as follows:

CATTERSON, J. (dissenting)

Because the Penal Law definition of a gravity knife precludes any possibility of identifying such a knife by simply looking at it, much less by viewing just the metal clip to which it is attached, I must respectfully dissent. Penal Law § 265.00(5) defines a gravity knife as any knife with "a blade which is released from the handle . . . by the force of gravity [and] which, when released, is locked in place." Thus, it is beyond cavil that the only way to distinguish an illegal gravity knife from a legal folding knife is by testing such a knife as to its dual-action operation. Neither training nor experience can provide a police officer with the ability to distinguish a gravity knife from a regular folding knife just by looking at it while it is partly concealed in someone's pocket. Indeed, in this case, the Detective and arresting officer, Antonio Benero, Jr., acknowledged in testimony that a curved metal clip like the one he saw on the outside of defendant's back pocket is also attached to legal pocket knives. Consequently, without more, the detective did not have probable cause for the level-four intrusion of a full-blown search and seizure, nor even reasonable suspicion for a forcible stop. <u>See</u> <u>People v. De Bour</u>, 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976); <u>see</u> <u>also</u> <u>People v. Cantor</u>, 36 N.Y.2d 106, 365 N.Y.S.2d 509, 324 N.E.2d 872 (1975).

The defendant was charged with criminal possession of a

weapon in the fourth degree (Penal Law § 265.02[1]) and unlawful possession of a knife (Administrative Code of City of New York 10-133[b]). He subsequently sought to suppress the evidence seized from him, as well as any statements made to the police at the time of his arrest. On March 27 and 28, 2008, a combined *Mapp/Dunaway* hearing was held, at the conclusion of which the hearing court suppressed the knife seized, as well as the statements made by the defendant.

At the hearing, Detective Benero testified to the events leading up to the defendant's arrest. He stated that on March 11, 2007, he and his partner were assigned to the Bronx Gang Unit and were on patrol in an unmarked police vehicle. He testified that, at approximately 11:30 p.m., they "slowed down for a pedestrian that intentionally slowed down as he walked in front of [the] vehicle ... just basically, you know, trying to control the traffic."

His testimony on direct proceeded as follows:

> "Q: [W]hen you saw the defendant cross in front of your vehicle what did you see[?]
>
> "A: I drove passed [sic] him. I was looking basically at his right side of his body. And I observed what appeared to be like a knife clipped to the rear jeans' pocket . . .
>
> "Q: How did you know it was a knife . . . ?
>
> "A: Based on my experience handling knives and after many arrests I just recognized it being either a knife, or it could have also been a small caliber weapon, also like

> handguns, too, they have those clips also. So – I pretty much was leaning towards the knife.
>
> "Q: And what did you do at this point . . . ?
>
> "A: I stopped the vehicle. I walked up behind him and asked him to stop and then I just grabbed, went for the knife, and pulled it out of his pocket."

Subsequent testimony established that the defendant did not make any furtive movements or threatening gestures toward either Detective Benero or his partner, nor did he reach for the knife or conceal it. The defendant did not exhibit any suspicious or disturbing behavior, other than walking slowly in front of the unmarked patrol car. His hands were not in his pockets. He was not running. Nor was this a case where a defendant was reaching for an object believed to be a weapon when the detective "just grabbed" the knife out of his pocket. He had not brandished the knife, or taken it out of his pocket at any time, or "flicked" it to expose a blade.

The detective did not question or frisk the defendant before "grabbing" for the object in the defendant's pocket. It was only once the knife was in his hands that he discovered that it could be opened by "flick[ing] it" with "a side move with [his] hand," confirming it was a gravity knife. At that point, the detective placed the defendant under arrest. The detective testified that he had taken the knife as a preventive act because he feared for his safety, as he could not ascertain whether the object was a

knife or a handgun.

In moving to suppress, the defendant argued that the detective had, at best, a basis to inquire, i.e., a level-two stop, in accordance with De Bour (40 N.Y.2d at 223, 386 N.Y.S.2d at 385). The defendant contends that the detective did not have reasonable suspicion to warrant a level-three seizure, or probable cause for arrest and a full-blown search, because the metal clip he observed could have been attached to any number of innocuous objects.

The court agreed that, at most, the police had a level-two common-law right to inquire pursuant to DeBour. The court found that the detective grabbed the knife from the defendant's pocket before he could determine with certainty that the object was, in fact, a dangerous weapon, and thus that he did not have the requisite reasonable suspicion of criminality warranting third- or fourth-level stop and seizure. The court suggested that, even accepting the testimony that the detective feared for his safety, he could have patted down or frisked the defendant first, instead of reaching for his pocket and removing the knife. The court therefore granted the defendant's motion to suppress both the knife and the statement.

On appeal, the People argue that the evidence presented at the hearing shows the detective had reasonable suspicion to stop the defendant. The People argue that it was sufficient that the

detective saw the distinctive shape of the gravity knife in the defendant's pocket, and that, based on his eighteen years of experience as a police officer, he took reasonable measures in preserving his safety.

In my opinion, the court properly granted the motion to suppress both the physical evidence of the gravity knife and the statement made to the police. It is well established that, for a lawful seizure, an officer must have a reasonable suspicion that an individual is committing a crime. People v. De Bour, 40 N.Y.2d at 223, 386 N.Y.S.2d at 385. In De Bour, the Court of Appeals established the standard for evaluating police-initiated encounters with citizens by dividing these encounters into four levels of intrusion. The first, and least intrusive, level is described as a request for information "when there is some objective credible reason for that interference not necessarily indicative of criminality." Id. The second level, the "common-law right to inquire, is activated by a founded suspicion that criminal activity is afoot," and while permitting "a somewhat greater intrusion" to gain information, falls "short of a forcible seizure." Id. Only where a police officer has "reasonable" suspicion that a particular person has committed or is about to commit a crime is the officer authorized to make a level-three forcible stop and detention. Id. This level brings with the right "to temporarily detain for questioning . . . the

authority to frisk if the officer reasonably suspects that he is in danger of physical injury by virtue of the detainee being armed." Id. The fourth level of intrusion is an arrest when there is probable cause to believe a person has committed a crime. Id.

As a threshold matter, and contrary to the majority's view that this was a level-three encounter requiring reasonable suspicion, I would find that the police conduct in this case rose to a level-four encounter requiring probable cause. See People v. Cobb, 208 A.D.2d 453, 617 N.Y.S.2d 721 (1994), citing, People v. Diaz, 81 N.Y.2d 106, 109, 595 N.Y.S.2d 940, 612 N.E.2d 298 (1993), and People v. Soto, 194 A.D.2d 371, 599 N.Y.S.2d 538 (1993). In Cobb, this Court determined, upon reviewing circumstances virtually identical to those in the instant case, that police officers who suspected a defendant was selling credit cards and conducted "a search of defendant's pocket without any inquiry" had essentially effected what "amounted to an arrest requiring probable cause." Cobb, at 453, 617 N.Y.S.2d at 722. Even were I to agree with the majority that the encounter was a level-three forcible stop, in my view, the detective had no basis, that is, he had no reasonable suspicion, for making such a stop. He testified that, based on his training and experience (including 50 to 100 arrests made for possession of weapons such as gravity knives), he knew that gravity knives "often" had the

same type of metal clip as was showing at the top of the defendant's pocket; and that "the way the clip is designed and curved those are most, they are typical of clips that are, you know, basically part of knives." However, he was obliged to acknowledge that, "[u]ntil I pulled it out of the pocket[,] whether it was a gun or knife, I wasn't sure."

The detective's equivocation apparently does not concern the majority, possibly because, as the majority holds, based on the sight of the metal clip "he believed the object in question to be an illegal weapon." However, his belief that it was either a small-caliber handgun or a knife cannot translate into a reasonable suspicion, nor even a founded suspicion, that the object was an illegal weapon. To find such a belief constitutes reasonable suspicion would be to ignore the simple fact that the Penal Law does not criminalize the possession of all knives. See Penal Law 265.01(1); see also People v. Jose F., 60 A.D.2d 918, 401 N.Y.S.2d 573 (1978) (defendant "was simply carrying [a] knife, and a knife is not a weapon per se"); Matter of Ricci S., 34 N.Y.2d 775, 358 N.Y.S.2d 141, 314 N.E.2d 879 (1974) ("An unmodified hunting knife with a five- to six-inch blade cannot be said to be a dangerous knife within the meaning of [section 265.05]"); People v. Irizarry, 17 Misc.2d 1118(A), 2007 NY Slip Op 52051(U) (2007) ("There are many legitimate reasons for a person to carry a small pocket knife and numerous citizens

legally do so in the course of their occupations”).

Indeed, the detective himself acknowledged that metal clips are often attached to legal knives, as the following demonstrates:

> Q: Detective, it is true that there are many objects that have metal clips; is that correct?
>
> A: That is correct . . .
>
> Q: There are tape measure clips that are also metal; yes?
>
> A: That is correct.
>
> Q: And there are actually also many legal pocket knives that have metal clips?
>
> A: Legal pocket knives?
>
> Q: Yes.
>
> A: That’s correct.

Setting aside his apparent surprise that possession of some knives is not criminal per se, the detective essentially acknowledged that the metal clip could equally well have been attached to a legal knife. Indeed, he then testified that he did not discover it was a gravity knife after grabbing it out of the defendant’s pocket, but only after he actually opened it and tested it to ascertain that it was an illegal gravity knife. “I basically took it out and flicked it and it opened up. I have a side move with my hand and I flicked it and it opened up.”

More significantly, the detective could not point to any

specific, articulable facts that would support a reasonable suspicion prior to seizure that the knife was an illegal gravity knife: There is no evidence in this record (or in any case involving gravity knives) that a gravity knife can be identified by being a particular brand of knife or one of a number of brands of gravity knives sold in stores. Indeed, in no case before this Court has a police witness testified to identifying a gravity knife based on any visible, identifying characteristics peculiar to gravity knives. For example, in People v. Mendez (69 A.D.3d 662, 894 N.Y.S.2d 9 (1st Dept. 2009)), we granted suppression and quashed the indictment because the observation by a police officer of a knife in the defendant's possession did not support a finding of reasonable suspicion of criminality. The officer testified that he based his suspicion that the knife was a gravity knife on the fact that "any folding knife could, upon inspection, turn out to be a gravity knife." Id. at 662, 894 N.Y.S.2d at 148.

The majority, I believe, misses the point when it attempts to distinguish this result by focusing on the police officer's testimony that he "did not see any characteristics of an illegal type of knife" (id.) as if it was the police officer's failure of observation or his lack of experience that accounted for missing the defining characteristics of a gravity knife on sight. The relevant point that emerged from the truthful testimony is that a

gravity knife can only be recognized "upon inspection" and not through any distinguishable identifying characteristics, even were the arresting officer endowed with the proverbial x-ray vision.

Abundant case law from criminal courts (which regularly deal with suppression motions like the one at issue on this appeal) supports the view that because a police officer cannot ascertain whether a knife is an illegal one just by looking at it or even holding it, there is no "quantum of knowledge" that could give rise to reasonable suspicion, or even a founded suspicion, that what appears to be a knife in a defendant's possession is in fact an illegal gravity knife. In other words, suppression courts have taken the view that there is no evidence that can be presented as to visible differentiating characteristics that would support a reasonable belief or suspicion as to the illegality of the knife, and thus seizure cannot be warranted in those cases. See People v. Francis, 17 Misc.3d 870 (Sup. Ct., Bronx County (2007)) (where officer observed only a portion of a knife clip, inquiry may have been warranted but not seizure); People v. Sosa, 20 Misc.3d 1140(A), 2008 N.Y. Slip Op. 51805[u] (Dist. Ct., Nassau County, (2008)) (observation of clip and outline of folding knife did not justify search and seizure); People v. Irizarry, 17 Misc.3d 1118(A), 2007 N.Y. Slip Op. 52051[u], *3 (Sup. Ct., New York County (2007)), supra ("no

testimony elicited [as to] anything in the knife's physical appearance . . . to differentiate it from a legal pocket knife . . . Therefore, prior to . . . conducting the physical test on the knife, there was no evidence to support a reasonable belief the knife was a gravity knife"); People v. Higginson, 24 Misc.3d 1217(A), 2009 N.Y. Slip Op. 51478(U), *3 (Crim. Ct., City of N.Y.) ("deponent determined that said knife was a gravity knife because deponent opened the knife with centrifugal force by flicking his wrist while holding the knife and the blade locked in the open position").

In United States v. Irizarry (509 F.Supp.2d 198 (E.D.N.Y. 2007)), the court concluded that the officer who arrested the defendant for carrying a Home Depot utility knife that he used for his work did not have reasonable suspicion of criminal activity. The court observed that "[t]he widespread and lawful presence of an item in society undercuts the reasonableness of an officer's belief that it represents contraband." Irizarry, at 209, citing United States v. Romy (1997 WL 1048901, *8 (E.D.N.Y. 1997) (while recognizing cell phones as tools of drug trade, court rejected argument that possession of cell phones established either probable cause or reasonable suspicion that

defendant had engaged in criminal activity); see also People v. Cantor (36 N.Y.2d 106, 113, 365 N.Y.S.2d 509, 324 N.E.2d 872 (1975), supra) (officers made unlawful forcible stop after viewing defendant from across street smoking a cigarette, which they believed contained marijuana); see also People v. Grunwald (29 A.D.3d 33, 810 N.Y.S.2d 437 (2006)). In Grunwald, this Court affirmed a finding that police officers seeing defendant with a hand-rolled, filter-less cigarette, holding it like a "joint," only had a first-level right to request information in their initial encounter and lacked the reasonable suspicion of criminal activity that would justify a forcible stop.

The People's, and the majority's, reliance on People v. Carter (49 A.D.3d 377, 852 N.Y.S.2d 770 (1st Dept. 2008), lv. denied, 10 N.Y.3d 860, 860 N.Y.S.2d 487, 890 N.E.2d 250 (2008)), People v. Snovitch (56 A.D.3d 328, 868 N.Y.S.2d 21 (1st Dept. 2008), lv. denied, 11 N.Y.3d 930, 874 N.Y.S.2d 16 (2009)) and People v. Fernandez (60 A.D.3d 549, 875 N.Y.S.2d 472 (1st Dept. 2009)) is misplaced. These are two-paragraph decisions in three cases where gravity knives were recovered from defendants. The decisions are bereft of any factual or legal analysis, and thus, in my opinion, lack precedential value. Certainly, I would hesitate to cite any of the three cases as standing for the proposition that reasonable suspicion in gravity knife cases may be based solely on the arresting officer's "experience," or even

"extensive experience." In <u>Fernandez</u>, the police officer did acknowledge that a gravity knife cannot be determined as such without testing. <u>Fernandez</u> at 549 (testimony that the top of a shiny metal knife attached with a clip to the defendant's pants pocket was "likely to be a gravity knife, even if the knife's illegal status cannot be determined without testing it"). There is no explanation of how the officer's experience led him to believe that the particular knife in question was "likely" to be a gravity knife. In <u>Snovitch</u>, this Court did not analyze the lawfulness of the initial stop but appeared to equate it with a request for information in a first-level encounter pursuant to <u>DeBour</u> (40 N.Y.2d at 223), finding that "the officer merely approached defendant, identified himself as a police officer, and told defendant that he was stopping her because of the knife in her pocket." <u>Snovitch</u> at 329. The Court then determined that the officer was justified in removing the knife "after defendant's hand moved toward the knife" and the officer became concerned for his safety. <u>Id.</u> In <u>Carter</u>, there is no information at all beyond the sentence that "the officer saw what appeared, based on his experience, to be an illegal gravity knife clipped to defendant's clothing, and that he did not merely see a clip." 49 A.D.3d at 377, 852 N.Y.S.2d at 770.

It should be evident from the foregoing that a police officer's testimony as to identifying an illegal gravity knife

from a distance based on his "training and experience" can be nothing more than the "rote recital of the words deemed necessary to retroactively validate a patently improper search." The foregoing phrase is borrowed from People v. Howard (147 A.D.2d 177, 182, 542 N.Y.S.2d 536, 540 (1st Dept. 1989)), in which this Court applied it to unsupported conclusory statements made by police officers at a hearing that they were afraid for their lives. They appear particularly appropriate applied to the many cases where police officers have offered conclusory statements that their training and experience is a basis for recognizing otherwise unidentifiable gravity knives.

In my opinion, the testimony of the detective in this case supports a finding that he acted only on an assumption when he seized the defendant and grabbed the item from his pocket: Not only did he act on the assumption that the object was a knife, but he operated under the further assumption that such knife was an illegal gravity knife. An assumption is an impermissible basis for any encounter above a level-one request for information. See People v. DeBour, 40 N.Y. 2d at 223, 386 N.Y.S.2d ; People v. Taveras, 155 A.D.2d 131, 135, 533 N.Y.S.2d 305 (1st Dept. 1990) ("a vague or inparticularized hunch" does not amount to a reasonable suspicion). Since, in my opinion, the

illegal gravity knife and statements were obtained as a result of an unlawful seizure, I would affirm Supreme Court in suppression of both the knife and the defendant's statements.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 23, 2010

CLERK

Saxe, J.P., Friedman, Moskowitz, Freedman, Román, JJ.

3237 The People of the State of New York, Ind. 2066/07
Respondent,

-against-

Ernesto Abreu,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Bruce D. Austern of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

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Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered June 6, 2008, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree (two counts), criminal possession of a controlled substance in the fifth degree and criminally using drug paraphernalia in the second degree (two counts), and sentencing him to an aggregate term of 4 years, unanimously affirmed.

The trial court properly declined to charge seventh-degree possession as a lesser included offense, since there was no reasonable view of the evidence, viewed most favorably to defendant, that his possession was without intent to sell (*see People v Negron*, 91 NY2d 788, 792 [1998]). In a paraphernalia-ridden apartment that was a proverbial drug factory, the police found 43 bags of heroin and 10 bags of cocaine on open shelves in

defendant’s bedroom, as well as a large amount of cash on his person. On appeal, defendant posits a theory that he knew the drugs were present, knew they were being sold by other people, but had no intent to sell. However, if defendant only knew of the presence of the drugs, but did not share in the exercise of dominion and control over them, he would have been entitled to a complete acquittal, not a finding that he possessed them without intent to sell. If, on the other hand, defendant did share in dominion and control over the drugs, there was no reasonable view of the evidence that he did so without being part of the drug-selling operation being conducted in the apartment.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 23, 2010

CLERK

Saxe, J.P., Friedman, Moskowitz, Freedman, Román, JJ.

3238 The People of the State of New York, Ind. 1537/08
Respondent,

-against-

Keith Brown,
Defendant-Appellant.

____

Steven Banks, The Legal Aid Society, New York (Laura Boyd of counsel), for appellant.

____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about April 22, 2009, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 23, 2010

CLERK

Saxe, J.P., Friedman, Moskowitz, Freedman, Román, JJ.

3239 The People of the State of New York, Docket 48694/06
Respondent,

-against-

John R. Daley, Jr.,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Kristina Schwarz of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

Appeal from judgment, Criminal Court, Bronx County (Arthur Birnbaum, J.), rendered September 14, 2006, convicting defendant, upon his plea of guilty, of theft of services, and sentencing him to a conditional discharge, unanimously transferred to the Appellate Term, First Judicial Department.

Since defendant pleaded guilty at his arraignment in the Criminal Court of the City of New York, Bronx County, this case was never transferred to the Bronx Criminal Division of Supreme Court. “[A] transfer occurs only if a case is not disposed of at arraignment” (*People v Correa*, 15 NY3d 213, 226 [2010]).

Accordingly, Appellate Term has the exclusive jurisdiction to hear this appeal (CPL 450.60[4]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 23, 2010

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Saxe, J.P., Moskowitz, Freedman, Román, JJ.

3241 Esther Jacobs, Index 7500/07
Plaintiff-Appellant, 86236/07

-against-

Hector D. Rolon,
Defendant-Respondent.

[And a Third-Party Action]

____

Marcel Weisman, LLC, New York (Ezra Holczer of counsel), for appellant.

Kay & Gray, Westbury (Rodney A. Mohammed of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Cynthia S. Kern, J.), entered June 17, 2009, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated.

Defendant met his initial burden of proof on the motion. He established that plaintiff's injuries were not, as a matter of law, serious (Insurance Law § 5102[d]) through the report of an orthopedic surgeon, who determined that, two-and-a-half years after the subject motor vehicle accident, plaintiff demonstrated only an insignificant reduction in range of motion in her lumbar spine and exhibited full range of motion in all other areas. Defendant also demonstrated that plaintiff's injuries were not

causally related to the accident through the report of a radiologist, who opined that any reduction in range of motion in her lumbar spine was attributable to degenerative disc disease (*see Tuberman v Hall*, 61 AD3d 441, 441 [009]; *Santos v Taveras*, 55 AD3d 405, 405 [2008]; *Shinn v Catanzaro*, 1 AD3d 195, 197 [2003]).

Plaintiff, however, raised issues of fact as to whether her injuries met the statutory definition of "serious" and were causally related to the accident sufficiently to defeat summary judgment. Plaintiff's treating physician determined, based on objective, quantitative tests, that plaintiff had significant limitations in range of motion in both her lumbar and cervical spine, both immediately following the accident and three years later (*see Toure v Avis Rent A Car Sys.,* 98 NY2d 345, 350 [2002]), and that her impairments were not degenerative in nature but were causally related to the accident. These findings clearly conflict with those of defendants' experts (*see e.g. Vera v Islam*, 70 AD3d 525, 525 [2010]; *Colon v Bernabe*, 65 AD3d 969, 970 [2009]). Plaintiff's treating physician's conclusion as to causation was no more speculative than that of defendant's radiologist, given that plaintiff had no prior history or ever exhibited any symptoms of degenerative disc disease or any other condition, and the report of the radiologist who took the MRI films contemporaneously with the accident made no mention of

degeneration (*see Harris v Boudart*, 70 AD3d 643, 644-45 [2010]; *Linton v Nawaz*, 62 AD3d 434, 439-441 [2009], *affd* 14 NY3d 821 [2010]). Thus, contrary to defendant's contention, plaintiff's physician adequately rebutted defendant's radiologist's claim of degenerative disc disease as the cause of plaintiff's injuries.

Finally, plaintiff adequately explained her two-year gap in treatment through her affidavit in which she averred that she continued physical therapy with her treating physician until her no-fault benefits ceased, that she was told that her health insurance would not cover continued treatment, and that she could not afford to pay for treatment out-of-pocket (*see Perez v Vasquez*, 71 AD3d 531, 532 [2010]; *Wadford v Gruz*, 35 AD3d 258, 259 [2006]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 23, 2010

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Saxe, J.P., Friedman, Moskowitz, Freedman, Román, JJ.

3242 The People of the State of New York, Ind. 184/09
Respondent,

-against-

Stephen Phinazee,
Defendant-Appellant.

____

Center for Appellate Litigation, New York (Robert S. Dean of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey of counsel), for respondent.

____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee A. White, J.), rendered on or about June 9, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: SEPTEMBER 23, 2010

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Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

Saxe, J.P., Friedman, Moskowitz, Freedman, Román, JJ.

3243 The People of the State of New York, Respondent, Ind. 3006/03

-against-

Jamel Duggins, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Annie Costanzo of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Charlotte E. Fishman of counsel), for respondent.

Order, Supreme Court, New York County (Michael J. Obus, J.), entered April 8, 2009, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in declining to grant a downward departure from defendant's presumptive risk level (*see People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]), given the seriousness of the underlying conduct involving a child.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 23, 2010

CLERK

Saxe, J.P., Friedman, Moskowitz, Freedman, Román, JJ.

3245 The People of the State of New York, Ind. 2712/04
Respondent,

-against-

Robert Galarza,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for respondent.

Order, Supreme Court, Bronx County (Joseph J. Dawson, J.), entered on or about September 12, 2007, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in declining to grant a downward departure from defendant's presumptive risk level (*see People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]). Defendant's lack of a prior criminal record was adequately taken into account by the risk assessment instrument (*see People v Hansford*, 67 AD3d 496 [2009]). Defendant's remaining arguments are based upon

scientific studies not presented to the hearing court, or are otherwise unpersuasive.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 23, 2010

CLERK

Saxe, J.P., Friedman, Moskowitz, Freedman, Román, JJ.

3246 The People of the State of New York, Ind. 2647/99
Respondent,

-against-

Rafael Padilla,
Defendant-Appellant.

____

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

____

Judgment of resentence, Supreme Court, New York County (Richard D. Carruthers, J.), rendered April 17, 2009, resentencing defendant to concurrent terms of 12 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was not barred by double jeopardy, since defendant was still serving his prison term at that time, and therefore had no reasonable expectation of finality in his illegal sentence (*see People v Murrell*, 73 AD3d 598 [2010]).

We have considered and rejected defendant's due process

argument. Defendant’s remaining claims are similar to arguments that were rejected in *People v Williams* (14 NY3d 198 [2010]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 23, 2010

CLERK

Saxe, J.P., Friedman, Moskowitz, Freedman, Román, JJ.

3247 Joseph Jangana, et al., Index 107716/08
Plaintiffs-Respondents,

-against-

Arline Cogan,
Defendant-Appellant.

____

Edward I. Yatkowsky, White Plains, for appellant.

Smith & Shapiro, New York (Harry Shapiro of counsel), for respondents.

____

Order and judgment (one paper), Supreme Court, New York County (Debra A. James, J.), entered July 30, 2009, which, inter alia, granted plaintiffs' motion for summary judgment declaring that defendant breached the subject contract and that plaintiffs are entitled to the return of their contract deposit and dismissing defendant's affirmative defenses and counterclaims, and ordered defendant's counsel to release to plaintiffs' counsel the entire deposit under the contract in the sum of $220,000, together with all interest accrued thereon to date, unanimously affirmed, with costs.

The terms of the contract provide that in the event the cooperative board (Board) refused to provide its unconditional

consent to the sale of defendant’s apartment to plaintiffs, plaintiffs were entitled to the return of their escrowed down payment, unless the Board’s refusal was due to plaintiffs’ bad faith.

Here, following plaintiffs’ prima facie showing of entitlement to judgment as a matter of law, defendant failed to raise a triable issue of fact as to whether plaintiffs had, in bad faith, submitted data to the Board containing misrepresentations or falsehoods, and whether, as a result of such bad faith submissions, the Board refused to consent to the sale of the apartment (*see Alter v Levine*, 57 AD3d 923 [2008]; *cf. Mounessa v Promenade Holding Corp.*, 74 AD3d 1296 [2010]).

Defendant further failed to raise a question of fact as to plaintiffs’ alleged bad faith in refusing to consent to the Board’s request to reduce their financing, where the record does not show either that plaintiffs received such a request from the Board or that the Board refused to consent to the sale of the apartment on that basis (*see Alter*, 57 AD3d at 924). In any event, plaintiffs were not obligated to reduce their financing under the contract (*see Albert & Kimmel v Herman*, 276 AD2d 413 [2000]).

We have considered defendant's remaining arguments, including that further discovery is warranted, and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 23, 2010

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CLERK

Saxe, J.P., Friedman, Moskowitz, Freedman, Román, JJ.

3248 The People of the State of New York, Ind. 5785/02
Respondent,

-against-

Nathaniel Syville,
Defendant-Appellant.

____

Robert S. Dean, Center for Appellate Litigation, New York
(Abigail Everett of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea
of counsel), for respondent.

____

Judgment of resentence, Supreme Court, New York County (William A. Wetzel, J.), rendered January 6, 2009, resentencing defendant to a term of 12 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was not barred by double jeopardy, since defendant was still serving his prison term at that time, and therefore had no reasonable expectation of finality in his illegal sentence (*see People v Murrell*, 73 AD3d 598 [2010]).

We have considered and rejected defendant's due process argument. Defendant's statutory claims are similar to arguments that were rejected in *People v Williams* (14 NY3d 198 [2010]).

There is no basis for a reduction of the PRS term, or for a remand for reconsideration of that term.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 23, 2010

CLERK

Saxe, J.P., Friedman, Moskowitz, Freedman, Román, JJ.

3249 The People of the State of New York, Ind. 5400/08
Respondent,

-against-

Manuel Mack,
Defendant-Appellant.

____

Center for Appellate Litigation, New York (Robert S. Dean of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered June 30, 2009, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him to a term of 5 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant youthful offender treatment (*see People v Drayton*, 39 NY2d 580 [1976]), given the seriousness of the crime, defendant's prior record and his failure to comply with several conditions of his plea agreement.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 23, 2010

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CLERK

Saxe, J.P., Friedman, Moskowitz, Freedman, Román, JJ.

3250N KB Gallery, LLC, Index 603766/09
Plaintiff-Appellant,

-against-

875 W. 181 Owners Corp.,
Defendant-Respondent.

____

The Dweck Law Firm, LLP, New York (H. P. Sean Dweck of counsel), for appellant.

Cantor, Epstein & Mazzola, LLP, New York (Gary Ehrlich of counsel), for respondent.

____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered June 10, 2010, which denied plaintiff's application for *Yellowstone* relief, and vacated an order temporarily restraining defendant from terminating plaintiff's commercial lease, unanimously affirmed, with costs.

The motion court properly found that plaintiff did not timely seek *Yellowstone* relief (*see First Natl. Stores v Yellowstone Shopping Ctr.,* 21 NY2d 630 [1968]), since plaintiff did not make its application until after the applicable cure period had expired and the notice of termination had been served (*see 319 Smile Corp. v Forman Fifth, LLC*, 37 AD3d 245, 245 [2007]; *JH Parking Corp. v East 112th Realty Corp.*, 298 AD2d 258 [2002]). We reject plaintiff's contention that a *Yellowstone* application brought after the expiration of the applicable cure

period will be deemed timely as long as it is made before the lease in question is actually terminated (*see Korova Milk Bar of White Plains, Inc. v PRE Props., LLC*, 70 AD3d 646, 647-48 [2010]).

We have considered plaintiff's other arguments and find them to be unpreserved and unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 23, 2010

CLERK