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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 7

DAMON WHEELER,

Appellant.

20 Eagle Street
Albany, New York
January 8, 2020

Before:

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

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on the
2 calendar is appeal number 7, the People of the State of New
3 York v. Damon Wheeler.

4 MR. HERZFELD: Good morning, Your Honors.
5 Richard Herzfeld for appellant.

6 CHIEF JUDGE DIFIORE: Good morning. One second,
7 counsel.

8 Mr. Herzfeld, do you care to reserve rebuttal
9 time, sir?

10 MR. HERZFELD: Yes, please, three minutes.

11 CHIEF JUDGE DIFIORE: Three?

12 MR. HERZFELD: Yes. Thank you.

13 So the primary issue before the court is the
14 sufficiency of the accusatory instrument where it describes
15 the official government function as a, quote, unquote,
16 "proper vehicle stop".

17 The first thing I'd like to point out is that,
18 although the prosecution interchangeably refers to this as
19 a traffic stop, that's not what the accusatory instrument
20 says, and in fact that's not what this was. The accusatory
21 instrument simply described it as a - - -

22 JUDGE GARCIA: Counsel, let me ask you this. If
23 we were to find, just assume for a moment, that the
24 official action in this statute does not need - - - you
25 don't have to prove - - - it's not an element that it be



1 authorized, is the misdemeanor complaint facially
2 sufficient?

3 MR. HERZFELD: I don't believe it is, but I think
4 the stat - - -

5 JUDGE GARCIA: But why not?

6 MR. HERZFELD: Because the law requires, the
7 cases of this court require that you provide sufficient
8 factual information to allow the defendant to present the
9 defense. Where you simply say "proper vehicle stop" - - -
10 and you can't use conclusatory - - - conclusory language to
11 meet that burden. You have to have actual facts.

12 JUDGE FEINMAN: So there's not notice with the
13 language that they use, by saying "proper vehicle stop"?

14 MR. HERZFELD: It doesn't provide notice, yes.

15 JUDGE FEINMAN: Right.

16 MR. HERZFELD: That's our point, Your Honor.

17 JUDGE FEINMAN: So do we have to actually decide
18 then whether "authorized" is an element? I know that's how
19 it's written in the CJI. And I know that there are many
20 Appellate Division cases that say that. But have we
21 actually ever said that?

22 MR. HERZFELD: I believe Alejandro addresses
23 that. Judge Garcia disagrees with me.

24 JUDGE GARCIA: Yeah, I think that's an unlawful
25 arrest case.



1 MR. HERZFELD: I'm sorry?

2 JUDGE GARCIA: Yes, it's a resisting arrest.

3 MR. HERZFELD: It's a resisting arrest, but it
4 still required that the arrest - - -

5 JUDGE GARCIA: What's in the statute?

6 JUDGE FEINMAN: Resisting arrest, the word
7 "authorized" appears in the statute, right?

8 MR. HERZFELD: Yes.

9 JUDGE FEINMAN: It doesn't appear in this
10 statute.

11 MR. HERZFELD: Well, but I mean, you can infer it
12 from the fact that it's an official government function,
13 and it's not an official government function unless the act
14 is authorized. If it's an unauthorized act, then - - -
15 then you lose the - - - then the statute isn't complied
16 with. So I think that you have to read "authorized" into
17 that.

18 JUDGE GARCIA: But isn't that official? I mean,
19 if - - - that's really an official act. So what you're
20 saying is "official" is the same as "authorized"?

21 MR. HERZFELD: No, I'm saying that to be
22 official, it has to be authorized. If it's unauthorized,
23 then it's beyond the scope of the individual's authority,
24 and - - - and therefore it's not an official act.

25 JUDGE GARCIA: So if someone is serving, like, a



1 bench ticket or a bench warrant, or whatever, and they
2 believe that that is a duly-authorized warrant, and it
3 turns out, for legal reasons, it isn't, you can interfere
4 with that function because it's not official?

5 MR. HERZFELD: No, not at all, and this court's
6 already addressed that, I think, in Coffaro.

7 JUDGE GARCIA: So what's the difference?

8 MR. HERZFELD: The difference is if you have a
9 facially - - - and I think that's the language in Coffaro,
10 a facially-sufficient warrant, so you have an objective
11 standard for the officer, then you're acting in your
12 official capacity because - - -

13 JUDGE GARCIA: So it's an objective standard of
14 the officer believing it's authorized.

15 MR. HERZFELD: No, I - - - I mean, if it's an - -
16 -

17 JUDGE GARCIA: Because you could see why the
18 legislature might make this distinction, right? In an
19 arrest confrontational situation they've required that to
20 be authorized. But in a vehicle stop, let's say, a traffic
21 stop, which I know your point on that, but a traffic stop,
22 they don't want the driver saying, you know, my tail light
23 really isn't out, I can back half a mile up the road
24 because I wouldn't be obstructing you.

25 MR. HERZFELD: No, but if the officer said I



1 stopped that vehicle because I didn't like the color of the
2 shirt he was wearing.

3 JUDGE GARCIA: No, but let's say I believed the
4 tail light was out, and then ultimately they find - - - or
5 one of these cases where there's an obstruction in the
6 mirror or whatever, and ultimately it turns out it isn't,
7 it wasn't a law - - - it wasn't a reason to stop it, can
8 the driver then say, you know, I don't think my tail light
9 is out, I'm going to back up - - -

10 MR. HERZFELD: No. That - - -

11 JUDGE GARCIA: - - - because I'm not going to be
12 guilty of obstruction, you know, a government function;
13 it's not official.

14 MR. HERZFELD: I think we're taking this a step
15 beyond into trial proof at that point. I think - - -

16 JUDGE RIVERA: But I thought your point was that
17 the instrument didn't say - - -

18 MR. HERZFELD: Exactly. It's a notice - - -

19 JUDGE RIVERA: - - - that your light is out.

20 MR. HERZFELD: Right, exactly. It's a notice
21 issue, as Judge Feinman suggested.

22 JUDGE RIVERA: It would be a different case if
23 they had - - -

24 MR. HERZFELD: Right.

25 JUDGE RIVERA: - - - explained why they stopped.



1 JUDGE GARCIA: But I don't understand that
2 because isn't the rule that you have to make nonhearsay
3 allegations in the complaint of all the elements of the
4 crime, so it matters to the complaint that you've alleged
5 that or not, right? Isn't that Dreyden and the other
6 cases?

7 MR. HERZFELD: Right.

8 JUDGE GARCIA: So yes, it's a trial proof issue,
9 but aren't you saying then it isn't a trial proof issue.
10 You need to prove authorized. If we - - - if we say it's
11 required in the misdemeanor complaint, we're saying it's
12 required to be proved to trial under an element theory,
13 which I think is your theory - - - main theory. Right?
14 It's an element and it wasn't alleged - - -

15 MR. HERZFELD: Well, my main theory - - -

16 JUDGE GARCIA: - - - in nonhearsay form.

17 MR. HERZFELD: - - - as Judge Feinman noted, is a
18 notice issue. The - - - and empirically, if you look at
19 what happened here, nobody knew what was going on. The - -
20 - the warrant was sprung on the defense at the last minute.
21 Nobody knew which warrant was executed. And if you look at
22 the requirement that you have sufficient facts to allow a
23 defendant to defend, I think empirically you can see that
24 that standard is - - -

25 JUDGE RIVERA: So would it be - - - under



1 analysis, would it be sufficient if it said "affecting a
2 proper vehicle stop pursuant to a warrant"; is that enough?

3 MR. HERZFELD: I believe that would be enough,
4 Your Honor, and then it's up to the defense to take a look
5 at the warrant and decide whether or not the warrant was
6 facially valid.

7 JUDGE STEIN: What if it was a traffic stop, what
8 would - - - how much detail would you have to give for
9 that?

10 MR. HERZFELD: Just the basic of the reason for
11 the stop. I mean, if you - - -

12 JUDGE STEIN: Do you have to say what VTL
13 provision was violated, or just - - -

14 MR. HERZFELD: No, I don't believe - - -

15 JUDGE STEIN: - - - can you just say for
16 violation of VTL; is that enough?

17 MR. HERZFELD: I think you need to provide the
18 specifics of why the vehicle was stopped. If you look at
19 any of the cases that the prosecution cites about, you
20 know, hyper-technical pleading, they talk only about not
21 being required to use the word "authorized" or "legal".
22 But they provide a factual basis for the underlying action.

23 The Meyers case, relied on by the Appellate term,
24 talks about an assault by the defendant on the officer with
25 a pipe. So if it's a vehicle stop, I stop the vehicle



1 because of X, Y, and Z.

2 JUDGE STEIN: But let's what I'm asking: what is
3 X, Y, and Z? Because the tail light was out, you know,
4 violation of VTL section whatever, or can it just say
5 because I observed a - - - a violation of the VTL?

6 MR. HERZFELD: No, I think you need to specify
7 the nature of the violation. It's not so much the - - -

8 JUDGE FEINMAN: So let's say he's making a left
9 turn from the right lane, all right? Can he just say, you
10 know, I pulled him over after I saw him making a left turn
11 from a right lane? Or, I think what Judge Stein is getting
12 at, do you have to identify the specific VTL section?

13 MR. HERZFELD: No, I'm saying I don't believe you
14 have to identify the VTL section. I think it's necessary
15 to advise the defendant of the factual basis for the
16 underlying act that precipitated, whether it's resisting
17 arrest or obstructing - - -

18 JUDGE RIVERA: So then either one would be
19 enough? You can either describe the actual conduct or the
20 section that is violated by the conduct, because you can go
21 look it up, of course.

22 MR. HERZFELD: I don't believe citing the statute
23 would be sufficient at all because - - -

24 JUDGE RIVERA: Well, not just the VTL, if you
25 actually gave the section - - -



1 MR. HERZFELD: No, I - - -

2 JUDGE RIVERA: - - - which allows someone to go
3 look at the section and know what the conduct is.

4 MR. HERZFELD: I guess it depends on the nature
5 of the - - - I mean, if the section is specific enough so
6 that the defendant is going to know he - - - he was pulled
7 over for making a left-hand turn from the right-hand lane,
8 but if it's simply incautious driving, then you don't know
9 what you did.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.
11 Counsel?

12 MR. HERZFELD: Thank you.

13 MR. KASS: May it please the court. I'm Andrew
14 Kass. I represent the People in this matter.

15 JUDGE FEINMAN: So can I start with whether
16 you're conceding that it's an element of 195.05 that the
17 underlying government function has to be authorized?

18 MR. KASS: We're not conceding that for pleading
19 purposes because that becomes an - - - an aspect of a
20 defense, a potential defense at trial.

21 JUDGE STEIN: But if it's the People's burden to
22 prove, which I understood you were saying that you agreed
23 that it was the People's burden to prove that it was
24 authorized at trial, right? So how can it be an element
25 for - - - for the crime at trial and not be an element for



1 pleading? I don't understand that.

2 MR. KASS: Let me give an example here. And I
3 think, first of all, defendant's case illustrates that
4 because at - - - at trial itself, then there was the - - -
5 the factual issue regarding the date of the search warrant.
6 So that was presented as a question of fact for the trier
7 of fact at trial.

8 Now, getting back to your - - -

9 JUDGE STEIN: But that doesn't change whether
10 it's an element of the crime or not.

11 MR. KASS: Well, but it becomes almost like a
12 defense where then the People had the burden then to show,
13 at that point, that in fact in this case - - -

14 JUDGE STEIN: But the defense is that an element
15 of the crime has not been met.

16 JUDGE GARCIA: Unless it's a nullification
17 defense, right?

18 MR. KASS: Well, if I - - - if I may, for
19 example, as the court has suggested, that you don't have a
20 legal right, as a defendant, to interfere with the
21 execution - - - to physically interfere with the execution
22 of the search warrant. However, the search - - -

23 JUDGE STEIN: Right, but you have the right to
24 notice that that's the reason why you were stopped, don't
25 you?



1 MR. KASS: Well, but in this case - - - but if I
2 can just finish my explanation - - -

3 JUDGE STEIN: All right.

4 MR. KASS: - - - there. Right? A defendant who
5 - - - who may later contest the facial validity of that
6 search warrant, and it's possible that the search warrant
7 itself could be found to be defective. But it's the same
8 way with resisting arrest, where a defendant could be
9 acquitted, right, of the underlying allegation, but yet
10 convicted of resisting arrest, because you're dealing with
11 a different standard, right, of proof, probable cause
12 versus proof beyond a reasonable doubt.

13 JUDGE STEIN: I understand that, but there's
14 elements to the crime or resisting arrest.

15 MR. KASS: Sure.

16 JUDGE STEIN: Right? And you agree that the - -
17 - I think; maybe you don't - - - that the accusatory
18 instrument has to - - - that information has to establish
19 those elements to be valid.

20 MR. KASS: Yes.

21 JUDGE STEIN: Right?

22 MR. KASS: And but the - - -

23 JUDGE STEIN: Okay. So why is that not the same
24 principle for obstructing governmental administration or
25 any other crime?



1 MR. KASS: Well, because the legislature hasn't -
2 - - one, did not specifically include the term "authorized
3 official function" in contrast to the specific inclusion of
4 "authorized arrest". But it's also, in this type of case,
5 you could reasonably infer, because not only were they
6 alleging that they were making a proper vehicle stop, but
7 the - - -

8 JUDGE FEINMAN: Well, what does that mean, a
9 "proper vehicle stop"?

10 MR. KASS: Well - - -

11 JUDGE FEINMAN: How does that tell you anything?

12 MR. KASS: Well, because we're not limiting
13 ourselves to just those - - - those specific terms, but it
14 was in the context where the accusatory - - -

15 JUDGE FEINMAN: Well, but that's the official
16 function, right, that you're saying was obstructed here,
17 right?

18 MR. KASS: Yes, but - - - but it was - - -

19 JUDGE FEINMAN: A proper vehicle stop.

20 MR. KASS: But the officers also had alleged that
21 it was also under circumstances where they also had their
22 lights and sirens so that - - - activated, so that it's
23 more than just saying I was making a - - - a traffic stop
24 or a vehicle stop. But it was under - - -

25 JUDGE RIVERA: That explains how they facilitated



1 the stop. I mean, I think his point is you can put on your
2 sirens and all of that, but that's not explaining what's
3 the - - - what's the lawful basis for doing any of that to
4 get toward - - - to actually stop the individual. And - -
5 - and they just want to know, in the instrument, and that's
6 what our law says, what's the basis for the stop. But
7 that's your argument, right?

8 MR. KASS: Yeah, I understand what the court is
9 asking, but that - - - that's the distinction, what we've
10 had, because - - -

11 JUDGE RIVERA: So is your position if there was
12 an unmarked car, no sirens, then this would be an
13 insufficient instrument?

14 MR. KASS: If they had only alleged I was making
15 a stop, right, I would concede that in that context.

16 JUDGE RIVERA: Well, now you've changed it. My
17 question was if it only said - - - if it didn't say
18 anything else. Let me see - - - I'm trying to remember now
19 what they're saying here. If they didn't make reference to
20 the lights and sirens but they still said proper vehicle
21 stop, is it sufficient?

22 MR. KASS: It - - - it might depend, and the
23 reason why - - -

24 JUDGE RIVERA: Well, no, on this instrument - - -

25 MR. KASS: In this case - - -



1 JUDGE RIVERA: - - - with respect to this
2 instrument.

3 MR. KASS: In this case, probably not, but - - -
4 but I just want to mention that - - - and I - - - I - - -

5 JUDGE RIVERA: So emergency lights and sirens is
6 - - - is giving notice of what?

7 MR. KASS: Well - - -

8 JUDGE RIVERA: That they're officers?

9 MR. KASS: It's giving additional inferences from
10 which the courts - - - the reviewing courts can infer that
11 the police were engaged in an official function, and that
12 they're affecting a vehicle stop and they had their lights
13 and sirens on. It's in that context that you can infer
14 that they're - - -

15 JUDGE STEIN: Well, but haven't we all heard
16 stories about, you know, police doing that because they see
17 somebody, they don't like the way they look, they don't
18 think they belong in the neighborhood, or maybe it's
19 somebody they know. Maybe it's not proper for them to do
20 that, but they do that.

21 But here I think there's - - - there's a clear
22 example of what the problem is in that this defendant did
23 not know whether he had - - - he was being stopped for
24 something that he viol - - - a violation of the Vehicle and
25 Traffic Law or something else. And in this case, it was



1 something completely else; it was a search warrant based on
2 different transactions. So how does the - - - the proper
3 vehicle stop, in that case, give him notice of the basis
4 for the stop?

5 MR. KASS: Well, the interesting aspect about
6 this case, at least factually, from what we know from the
7 trial evidence, is that the defendant actually put the car
8 in reverse and took off before the police even had the
9 opportunity to announce the search warrant. So you're
10 saying he's entitled to notice for something which, at
11 least on the facts of this particular case, really didn't
12 affect - - -

13 JUDGE FEINMAN: But we don't look at the trial
14 evidence when we're - - -

15 MR. KASS: I - - -

16 JUDGE FEINMAN: I mean, we're talking about the
17 four corners of this information.

18 MR. KASS: I agree with that.

19 JUDGE FEINMAN: All right? So - - - so let's try
20 to stick to that.

21 MR. KASS: I agree, but it's an interesting
22 aspect about this case.

23 JUDGE GARCIA: Counsel, it seems to me, and
24 putting aside, I think, what's been asked about recently
25 about notice, and it's kind of another area to examine the



1 sufficiency, and your adversary makes that point. I think
2 you're in a difficult position because - - - and the
3 Appellate Division seemed to have been imposing this
4 authorized element into this crime, which we have never
5 said. So I think, concede or not concede, it's a tough
6 position for you to be in because I think that may be the
7 law where you - - - you know, in your department.

8 But it comes down to, it seems to me, on that
9 point, not the notice point, what are we going to say
10 "official" means, if we get to that issue. And is
11 "official" the same "authorize", because there's no defense
12 unless it's an element. So what would you say "official"
13 means in this statute?

14 MR. KASS: Well, I think, by analogy, we might -
15 - - we might agree that, for example, even if a police
16 officer makes an unlawful stop - - - and there - - - there
17 was a question earlier regarding a potential discriminatory
18 stop or something. I mean, when we look in the civil
19 realm, we do look at 1983 actions, whether somebody's
20 acting under the color of law, whether the action is lawful
21 or not. And I think that's what we're kind of - - -

22 JUDGE GARCIA: So in the course of their
23 authorized duties, perhaps "authorized" is a poor choice of
24 words maybe there, but in the course of their duties as an
25 X government official.



1 MR. KASS: Right, and I think that that's what
2 we're looking at. And just by - - - and I - - -

3 JUDGE FEINMAN: Are you familiar with the 1931
4 case from this court, O'Connor, which was a per curiam
5 decision where they basically glossed on "authorized" and -
6 - - and if that case is still valid, because obviously it
7 deals with the penal law from the late 1800s, or early
8 1900s, but assuming that that's still valid, why can't we
9 gloss on "authorized" as an element into this definition of
10 "official"?

11 MR. KASS: I see that my time is up. May I
12 briefly answer - - -

13 CHIEF JUDGE DIFIORE: Yes, please.

14 MR. KASS: - - - Mr. Feinman's question? Thank
15 you.

16 If - - - if I may, I think what I would ask the
17 court to look at, and I admit that I don't believe I - - -
18 I include this cite in my brief. There's a decision by
19 this court in 2014, People v. Dumay, D-U-M-A-Y; it's 23
20 N.Y.3d 518. And - - - and in that case, the court said
21 that the - - - the - - - it was an obstructing governmental
22 administration case, and the court said that the official
23 function in that case, or the official function that was
24 identified was a neighborhood patrol, that the allegations
25 were - - - it dealt with physical interference, but



1 somebody banged on the hood of a patrol car and prevented
2 the patrol car then from entering the street and the
3 officer continuing with his duties.

4 But it made only reference to neighborhood
5 patrol. And in that context, a neighborhood patrol, a - -
6 - you know, a proper vehicle stop, right? The court had -
7 - - nowhere in that case did they say that there was an
8 issue when it came to defining the official function. We -
9 - - we understood, neighborhood patrol is something that a
10 police officer would do. And I think in this case a
11 vehicle stop, when you have your lights and sirens
12 activated, we understand that to mean an official function.

13 CHIEF JUDGE DIFIORE: Thank you, counsel.

14 MR. KASS: Thank you, Your Honors.

15 CHIEF JUDGE DIFIORE: Counsel?

16 MR. HERZFELD: Thank you. Very briefly, I just
17 would like to address lights and sirens. Lights and sirens
18 tell you how this stop may have come about; it doesn't tell
19 you why this stop was made, so it really adds nothing to
20 the notice provisions.

21 If the court has no other questions, I'll rest on
22 my brief.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 (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 Matter of People of the State of New York v. Damon Wheeler, No. 7, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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