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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

LANCE RODRIGUEZ,

Appellant.

NO. 97

20 Eagle Street
Albany, New York
November 16, 2022

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

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1 ACTING CHIEF JUDGE CANNATARO: Our next appeal is
2 number 97, People v. Lance Rodriguez.

3 Good afternoon.

4 MS. KON: Good afternoon. May it please the
5 court, Hannah Kon of Appellate Advocates, on behalf of
6 Lance Rodriguez. May I reserve two minutes for rebuttal?

7 ACTING CHIEF JUDGE CANNATARO: You may.

8 MS. KON: When police pull over a moving
9 bicyclist on a public road, that's a seizure because bicyc
10 - - -

11 JUDGE SINGAS: Says who?

12 MS. KON: Bicyclists reasonably believe, just
13 like motorists do, when they're on the road, that a police
14 officer's direction to stop is a command that must - - -

15 JUDGE GARCIA: Scooter?

16 MS. KON: - - - be complied with. Absolutely.
17 And it - - -

18 JUDGE GARCIA: So it would be a bike and scooter
19 rule?

20 MS. KON: It would be any machine that makes you
21 go faster - - -

22 JUDGE SINGAS: Hoverboard?

23 MS. KON: - - - on the road.

24 ACTING CHIEF JUDGE CANNATARO: Skateboards are
25 not machines. Is - - - is that count?



1 MS. KON: I think it applies to any type of
2 vehicle that, you know, the VTL tells us has to obey the
3 same rules of the road as cars, so bikes, inline skate,
4 scooters, motorcycles. All of those are vehicles that
5 raise inherent danger on the roads and that the legislature
6 has recognized are - - - you know, need to follow rules of
7 the road.

8 Bicyclists are - - - are told that they have to
9 follow the rules of the road when they're on roadways. So
10 the legislature has carved out special rules for the road
11 because roads are dangerous. And there's a societal
12 expectation that when you're operating something on the
13 road that is dangerous, you comply when the police tell you
14 to stop, because any other rule would create unsound public
15 policy.

16 JUDGE GARCIA: So any time a bicyclist is
17 violating a traffic rule, you could pull them over, though.

18 MS. KON: On the road? Absolutely. Yes. If
19 they have probable cause for a VTL violation, you could
20 pull them over just like you could a car.

21 ACTING CHIEF JUDGE CANNATARO: So if this case
22 had involved the police stopping this particular bicyclist
23 because of something that he was doing that violated a VTL
24 provision, it would be a completely different analysis in
25 terms of the stop and the seizure, you know, arguably, and



1 whether there was, you know, a valid legal reason to do
2 that.

3 MS. KON: Yeah. Well, it would still - - - it
4 would still be a seizure, but it would have been a - - - a
5 legal - - -

6 ACTING CHIEF JUDGE CANNATARO: But it would have
7 been based - - -

8 MS. KON: - - - illegal seizure.

9 ACTING CHIEF JUDGE CANNATARO: - - - a violation
10 of the VTL.

11 MS. KON: Correct. But there was no violation of
12 the VTL here.

13 ACTING CHIEF JUDGE CANNATARO: Alleged.

14 MS. KON: Alleged.

15 ACTING CHIEF JUDGE CANNATARO: Yeah.

16 MS. KON: Right. And - - - and, you know, Of - -
17 - Officer Shell only followed my client for thirty to sixty
18 seconds, so arguably, if - - - you know, if he had been a
19 little more patient and followed unobtrusively, he probably
20 would have gotten to a seizure. Mr. Rodriguez might have
21 violated any myriad of VTL violations, or he would have
22 better observed him to get reasonable suspicion for a
23 crime. But Officer Shell stopped him prematurely.

24 This - - - this is - - -

25 JUDGE SINGAS: So if he had turned the corner,



1 and taken out his gun, and shot somebody, then the police
2 could stop him. But short of that, they couldn't. Seeing
3 the bulge, seeing him drive erratically was not enough for
4 the police to pull him over and say, hey, what's going on?

5 MS. KON: Well, actually, I think there's a lot
6 that goes between a bulge and - - - and actually shooting
7 someone. I think there's - - -

8 JUDGE SINGAS: Um-hum.

9 MS. KON: - - - a lot of things that could have
10 been observed in between. Again, followed him
11 unobtrusively, probably would have gotten the VTL
12 violation, or could have, you know, seen more, right?

13 And if he doesn't get there, if there isn't
14 reasonable suspicion of a crime, and there isn't probable
15 cause of a VTL violation, then it's hard to conceive of
16 why, you know, the Fourth Amendment protection should be
17 disregarded, and - - - and an immediate seizure needs to
18 happen.

19 And I - - - I think that critically - - - you
20 know, the critical test here is would a reasonable person
21 feel free to leave. Did they stop because police action
22 told them that they had no choice but to stop.

23 ACTING CHIEF JUDGE CANNATARO: Didn't they ask
24 him to stop once, and he didn't? And the - - - the - - -
25 there were two requests to stop, weren't there, in this



1 case?

2 MS. KON: Yes. One followed right after the
3 other, and I - - -

4 ACTING CHIEF JUDGE CANNATARO: Does - - - does
5 the first refusal or disregard of the - - - of the request
6 or command to stop te - - - teach us something about what
7 the state of mind of the defendant was in terms of his
8 ability to not comply?

9 MS. KON: No. I don't think so. This was very
10 quick. And also, it's not what my client believed, it's
11 what a reasonable person would believe. But anyway, I
12 think that the fact that there was a repeated command shows
13 that, you know, Officer Shell was treating this like he
14 would a - - - a car stop. He commanded him, "Police. Hold
15 up." And when my client - - -

16 JUDGE TROUTMAN: Does it matter that there were
17 no lights or sirens?

18 MS. KON: No. Absolutely not. Just like for
19 cars, you know, if someone can pull over a car without
20 lights or sirens, that's still a seizure. And I think what
21 Officer Shell did - - -

22 JUDGE TROUTMAN: Is it any less intrusive without
23 lights or sirens?

24 MS. KON: No. And - - - and again, you know, the
25 idea of intrusiveness, and shows of authority - - -



1 JUDGE RIVERA: But didn't they - - -

2 MS. KON: - - - and the anxiety - - -

3 JUDGE RIVERA: - - - identify themselves as
4 officers?

5 MS. KON: Absolutely. He said twice, police.
6 Hold up. And then, police. Hold up. And you know, after
7 the first police hold up, when my client continued, he
8 didn't say to himself, well, he's free to go. That's his
9 prerogative. This is only a level two. No, of course not.
10 He treated this like a tra - - - like a car stop. He
11 pulled him over. Co - - - police, stop, you know.

12 JUDGE GARCIA: So would you look at the facts and
13 circumstances of this case to determine the level, or would
14 you say, any time a person's riding a bicycle, and you're
15 asked to stop, that's a level three?

16 MS. KON: I would say any time a person is riding
17 a - - - moving a bicycle on a public road, on a roadway,
18 and that police tell them to stop, that is a seizure,
19 because you have both an obligation to stop - - -

20 JUDGE GARCIA: But forget - - - tell - - - like,
21 so tell them, command them, or ask them, please, to stop?
22 Does it matter how they ask, or automatically, once you
23 request to stop, it's a level three?

24 MS. KON: I - - - I think that if you request a
25 stop, just like with a car, or a motorcycle, or anything



1 else that's driving on the road and subject to VTL
2 obligations, there's a societal expectation when police
3 say, please stop, that you will stop.

4 JUDGE TROUTMAN: So your operative factor is
5 driving upon the roadway?

6 MS. KON: Yes. I think that if he - - -

7 JUDGE TROUTMAN: So if he'd been riding his
8 bicycle on the sidewalk, is it a different standard?

9 MS. KON: Yeah. I'm - - - yeah. I'm not
10 adv - - - advocating for a rule that applies to pedestrian
11 areas. I'm advocating for a rule where when bicyclists are
12 acting like cars, when they're on the roads, and they have
13 to follow the same rules as cars, then they are seized just
14 like cars.

15 JUDGE WILSON: Suppose he had been - - - facts
16 are the same, except Mr. Rodriguez is walking down the
17 street, and the officer tells him to stop. Does the have a
18 right to just walk away?

19 MS. KON: Yes. If he's on a sidewalk. And under
20 the People's analysis of this, if this was a request, then
21 yeah. He could keep walking.

22 JUDGE RIVERA: But I thought the question was,
23 what if he's walking in the middle of the road? I may have
24 missed your question.

25 JUDGE WILSON: No.



1 MS. KON: Oh.

2 JUDGE WILSON: It was actually walking on the
3 sidewalk.

4 MS. KON: Si - - - sidewalk, right.

5 JUDGE RIVERA: Oh, okay.

6 JUDGE WILSON: Walking on the sidewalk.

7 MS. KON: Yeah. I - - - I think the rules for
8 pedestrians are different, and - - - and again, it might
9 very well be a seizure. You look at all the circumstances.
10 You look at the tone, and the authority involved. And I
11 think certainly here, you know, Officer Shell's tone was
12 very authoritative. This wasn't a request. There wasn't a
13 question mark at the end of, you know, "Police. Hold up."
14 This was a command. Offi - - - Officer Shell acknowledged
15 it was a command.

16 JUDGE SINGAS: Yeah. But now I think you've gone
17 back - - -

18 JUDGE RIVERA: Well, I'll ask that question.
19 What if he's walking in the road?

20 MS. KON: What if the - - -

21 JUDGE RIVERA: Not on the curb, not on the
22 street.

23 MS. KON: So I - - -

24 JUDGE RIVERA: Which is a pedestrian pathway. So
25 what if he's not doing that?



1 MS. KON: So if - - - pedestrians - - -

2 JUDGE RIVERA: Um-hum.

3 MS. KON: - - - are generally not allowed to walk
4 on the roads unless - - -

5 JUDGE RIVERA: All right.

6 MS. KON: - - - there's no sidewalk. And even
7 so, they're not allowed in the middle of the road. They
8 have to be on the left, so I'd think you'd have probable
9 cause for a VTL violation there.

10 JUDGE RIVERA: Correct.

11 MS. KON: But I do think that - - -

12 JUDGE RIVERA: And so that means if he
13 could - - - if the officer tells him to stop, and he kept
14 walking, what happens?

15 MS. KON: He would have to stop. He's a - - -
16 that's a seizure.

17 JUDGE RIVERA: Well, what happens? Could the
18 officer then arrest him?

19 MS. KON: Oh, and he kept walking?

20 JUDGE RIVERA: If he keeps walking?

21 MS. KON: Yeah. I mean, I think the officer
22 could effect a seizure. Absolutely. There's - - - there's
23 probable cause of a VTL violation. But I think that the
24 key here is that we can't have bicyclists - - -

25 JUDGE RIVERA: So the bicyclist on the roadway is



1 told to stop, and let's say the officer observed a VTL
2 violation. If the bicyclist doesn't stop, the officer can
3 then try and forcibly stop him?

4 MS. KON: Yeah. Ab - - - absolutely. And I
5 think any reasonable bicyclist would think that they would
6 need to comply with that. We can't have a different rule.

7 JUDGE RIVERA: So does that mean if there was a
8 decision below, that there was a VTL violation?

9 MS. KON: There was no V - - -

10 JUDGE RIVERA: That this would be a whole
11 different case?

12 MS. KON: I think if there was a - - - a fact
13 that there was a VTL violation, then yeah. I think there
14 would be - - -

15 JUDGE RIVERA: But - - -

16 MS. KON: - - - different grounds.

17 JUDGE RIVERA: But didn't - - - maybe I've
18 misunderstood this record. Didn't the - - - the court
19 credit the officers that they had observed defendant
20 bicycling recklessly?

21 MS. KON: Right. So they - - - they obs - - -
22 there was no determination whether or not the recklessness
23 actually was a VTL violation.

24 JUDGE RIVERA: Okay.

25 MS. KON: And again, Officer Shell could have



1 just followed him a little longer and determined whether he
2 was actually violating the VTL or not. I - - - I see my
3 time is up.

4 ACTING CHIEF JUDGE CANNATARO: Thank you.

5 MS. KON: Thank you.

6 MS. ZELIG: Good afternoon, Your Honors. May it
7 please the court, Mariana Zelig, Queens County District
8 Attorney's Office, Office of Melinda Katz.

9 Your Honors, initially, this is a mixed claim
10 before the court. Therefore, it's only subject to this
11 court's review if the record supports the Appellate
12 Division's conclusion that this was a level two stop under
13 DeBour.

14 JUDGE WILSON: Well, don't we have to know what
15 the legal standard is?

16 MS. ZELIG: Yes, Your Honor. The legal standard
17 in this case, whether it was the correct application of the
18 level of DeBour, in which the lower court, the suppression
19 court, and the Appellate Division found, which was a level
20 two.

21 In this particular case, the court said that it
22 did not rise to a level of a seizure, the Appellate
23 Division, did not rise to a level of a seizure. And
24 therefore, they felt there was a founded suspicion based
25 upon this defendant riding his bike in a reckless manner



1 with one hand on his waistband, holding a bulky item.

2 JUDGE GARCIA: Counsel, it almost seems - - - the
3 way I read the suppression court decision, and I'm not sure
4 you're arguing this. It's unclear to me in the record.
5 But there's almost an alternate finding by the suppression
6 judge that there was justification for a level three
7 seizure, when the judge says, "Moreover, since the officer
8 had a reasonable suspicion that the defendant was engaged
9 in criminal activity, the stop and brief detention was
10 authorized."

11 That's a level three justification to me for a
12 stop.

13 MS. ZELIG: Are you talking about the suppression
14 court's decision - - -

15 JUDGE GARCIA: Yes.

16 MS. ZELIG: - - - correct? Yes, Your Honor.
17 He - - - the court did write that, but it was not quite
18 clear because the tenure of the decision - - - you're
19 correct. But the decision, the way it was written, it
20 appears that the court felt that the reasonable suspicion
21 was actually once the defendant said that he had a gun.
22 That would be, I think, the correct way to interpret it
23 because the - - - the substance of the decision was he
24 initially had the - - - the officer had the initial right
25 to inquire when he saw the erratic bike riding. And then,



1 subsequent to that, once he - - -

2 JUDGE GARCIA: Clearly, they - - -

3 MS. ZELIG: - - - saw the bulge.

4 JUDGE GARCIA: - - - say that. But your view - - -

5 - it - - - and I agree with you. But your view - - -

6 MS. ZELIG: Oh, thank you.

7 JUDGE GARCIA: - - - then is that that's - - - it

8 - - - it's just inartfully phrased, but - - -

9 MS. ZELIG: I agree. Yes.

10 JUDGE GARCIA: - - - it's a level - - - okay.

11 MS. ZELIG: That would be my - - - my - - -

12 ACTING CHIEF JUDGE CANNATARO: So the only
13 question here is founded suspicion, level two, protrusion.

14 MS. ZELIG: Correct. Correct.

15 ACTING CHIEF JUDGE CANNATARO: And - - - and - - -

16 - and whether this - - -

17 MS. ZELIG: Which is - - -

18 ACTING CHIEF JUDGE CANNATARO: - - - goes beyond
19 that.

20 MS. ZELIG: Correct. Because reasonable
21 inferences could differ. Reasonable minds could differ on
22 the inferences that could be drawn.

23 JUDGE GARCIA: You're arguing Bora Ocasio
24 deference.

25 MS. ZELIG: Correct. Correct. But aside from



1 that, Your Honors, based upon the facts of this case, it
2 did not rise above a level two. And in this particular
3 case, if the court would have said - - -

4 JUDGE TROUTMAN: Why didn't it rise above a level
5 two, when he keeps riding, and he's told again, stop.
6 Police. That doesn't sound like an invitation at that
7 point.

8 MS. ZELIG: No. I wouldn't quite go to say it's
9 an invitation, Your Honor, but what it is in this
10 particular case is, under this court's jurisdiction in
11 People v. Bora, for example, and even in the U.S. Supreme
12 Court decisions, a stop - - - a command to stop, even a
13 request, or even if it's classified as a stop as a command
14 is not sufficient to constitute to a level of a seizure.
15 And it would not indicate to a reasonable person that he
16 was restrained - - - that his freedom of movement was
17 restrained.

18 Indeed, even a level one stop starts with a - - -
19 a request to stop. A level one encounter - - - I'm sorry -
20 - - starts with a request to stop.

21 JUDGE RIVERA: So what - - - what would elevate
22 it?

23 MS. ZELIG: If there was more indicia of force or
24 in other words, if the police car maybe had cut him off,
25 and then - - - with their guns drawn. And then their



1 sirens went on, and their lights and sirens. And then they
2 - - - the - - - the three officers that were present
3 initially in the vehicle may have surrounded the defendant.
4 That would clearly rise to the level of a seizure.

5 ACTING CHIEF JUDGE CANNATARO: That's - - -
6 that's - - -

7 JUDGE RIVERA: And - - - and what happens when
8 the police say, stop, and someone doesn't? Let - - - let's
9 say defendant did not.

10 MS. ZELIG: Sure.

11 JUDGE RIVERA: They kept - - - kept going on the
12 bike.

13 MS. ZELIG: Sure.

14 JUDGE RIVERA: Turned and kept going. Now what?

15 MS. ZELIG: Without more, that would have been
16 it.

17 JUDGE RIVERA: They keep following, saying, stop,
18 stop, stop.

19 MS. ZELIG: He could continue - - - he could
20 continue following, but that would be all the officer could
21 do in this particular case.

22 JUDGE RIVERA: And if at that point, they cut in
23 front of him, then you say - - -

24 MS. ZELIG: Then I would say it would rise to a
25 level of a seizure.



1 JUDGE WILSON: And suppose he had been in a car,
2 and the police come up with a megaphone and say, stop.
3 Otherwise, everything's the same. Is that a level two or
4 level three?

5 MS. ZELIG: Well, if - - - according to this
6 court's jurisprudence, that would be a level three if the
7 car was in motion on the road. And that - - -

8 JUDGE WILSON: So then isn't that really the
9 question here, is should we have a different standard for a
10 bicycle if, otherwise, the facts are the same?

11 MS. ZELIG: Correct. So our position, Your
12 Honor, is that the standard should not be the same for two
13 reasons. The first reason is the intrusiveness of stopping
14 a police car in transit, and the second reason is the
15 visibility of a person on a bicycle. So the - - -

16 JUDGE TROUTMAN: You can have visibility of
17 certain motor vehicles. They're Jeeps. They have no roof,
18 they have no doors. It's completely open. Is it still not
19 a motor vehicle?

20 MS. ZELIG: I think it would depend on the
21 particular circumstances. You're correct. If it's a
22 convertible, it - - - there might be - - - that might rise
23 to the level of indicia of criminality. Then possibly, the
24 police might see - - -

25 JUDGE WILSON: But that's really - - - that's



1 probable cause.

2 MS. ZELIG: Yeah.

3 JUDGE WILSON: That's not - - -

4 MS. ZELIG: That would rise to - - - right.

5 JUDGE WILSON: That's not - - - right.

6 MS. ZELIG: Correct. That would rise to the
7 level of probable cause, but in and of itself, a bike
8 should not be compared to a car because it would also make
9 it difficult for the police to carry out their general
10 policing duties.

11 If a car is riding on the sidewalk, then the
12 police and - - - the police would have the right to stop
13 that bicycle, one for a VTL violation. And two, because
14 they would also possibly have some other indicia that they
15 would want to inquire under the four levels of DeBour.

16 JUDGE TROUTMAN: So are you saying if the bike is
17 treated differently, despite it being in motion, despite,
18 quite frankly, now there are electric bikes - - -

19 MS. ZELIG: Um-hum.

20 JUDGE TROUTMAN: - - - bikes can travel at
21 certain speeds. Somehow, the police are prevented from pre
22 - - - doing their law enforcement duties if you require
23 more of them?

24 MS. ZELIG: Well, if I understand your question,
25 Your Honor, it's not they would - - - they would be



1 prevented, yes, because an officer - - - well, let's say in
2 this particular case, sees the bulge or the bulky item in
3 the defendant's waistband, for example. You wouldn't see
4 that if the - - - in a motorist, right? Because if the car
5 is driving at a certain speed on a highway - - -

6 JUDGE WILSON: Or you might see it on a
7 motorcycle, and so we ha - - -

8 MS. ZELIG: You might see it on motorcycle.

9 JUDGE WILSON: And so where do we put
10 motorcycles, with your bike rule or with the car rule?

11 MS. ZELIG: That might be another case, Your
12 Honor.

13 JUDGE WILSON: Yeah. It might be, but
14 that - - - this - - - that's the problem with this case, is
15 that we have all kinds of things on the road - - -

16 MS. ZELIG: Correct.

17 JUDGE WILSON: - - - and the line's going to have
18 to be drawn somewhere.

19 MS. ZELIG: Correct. And that's why the People -
20 - -

21 JUDGE WILSON: And so if the - - -

22 MS. ZELIG: - - - position - - -

23 JUDGE WILSON: - - - line is visibility, that
24 doesn't help - - - that's - - - that has a necessary
25 implication for motorcycles.



1 MS. ZELIG: Um-hum. Correct, but the issue is
2 visibility and the intrusiveness. And the - - - and
3 that's - - -

4 JUDGE WILSON: Well, I - - - yes, so the - - -
5 the visibility, I have a little trouble, along Judge
6 Troutman's lines, understanding what - - - I mean, that
7 would make it certainly easier for the police to detect
8 something that would give them probable cause, but that
9 doesn't really go to the intrusiveness of the stop, right?
10 That's just what you can see. The intrusiveness - - -

11 MS. ZELIG: Right.

12 JUDGE WILSON: - - - seems to me to have more to
13 do with the motion.

14 MS. ZELIG: Well, the issue, Your Honor, is that
15 everything technically is in motion. A pedestrian is in
16 motion.

17 JUDGE WILSON: Sure.

18 MS. ZELIG: A scooter, as the court had said.

19 JUDGE WILSON: Sure.

20 MS. ZELIG: A hoverboard. A unicycle.

21 JUDGE GARCIA: Isn't the test - - - look, there's
22 this car rule, but the real test - - -

23 MS. ZELIG: Correct.

24 JUDGE GARCIA: - - - is would a reasonable person
25 feel that this is a limitation on their ability to move,



1 right, they've been seized?

2 MS. ZELIG: Correct.

3 JUDGE GARCIA: In a car, there really seems to be
4 only one way you can get a moving car off a highway. You
5 put your lights and flashers on. The trooper comes out of
6 his car. He's got his hand on his holster, and he walks
7 over to your window, right?

8 MS. ZELIG: Right.

9 JUDGE GARCIA: I think the case law that we have
10 seems to me to say, no reasonable person is not - - - isn't
11 going to think, yeah, I could just keep going. You know,
12 the lights and flashers are on. Guy's following me, and
13 I - - - you know, it puts the siren on, and - - - but no
14 thanks. You know, I'll keep going.

15 The question is, this is different, right? It's
16 a bicycle. There's no lights and sirens. There's - - - so
17 are we going to adopt, essentially, assume lights and
18 sirens here in every case, where if someone asks a moving
19 bicycle to pull over, or are we going to look at all the
20 facts and circumstances? That's what this case seems like
21 - - -

22 MS. ZELIG: Correct.

23 JUDGE GARCIA: - - - to me, right?

24 MS. ZELIG: That is.

25 JUDGE GARCIA: So what is your reason why we



1 should not apply the lights and sirens rule to a moving
2 other vehicle?

3 MS. ZELIG: Well, it's really the totality of the
4 circumstances, as Your Honor said. And that - - - that's
5 really the heart of the Fourth Amendment jurisprudence. We
6 shouldn't be making bright line rules, and this court has
7 eschewed from making bright line rules because it's not
8 enforceable for police on the street to be able then to
9 carry out their duties. By it's very nature, a car stands
10 apart. And Your Honor, as you had said with the
11 motorcycle, that might be - - - I think that's - - -

12 JUDGE TROUTMAN: But a bike - - -

13 MS. ZELIG: - - - specific - - -

14 JUDGE TROUTMAN: stands - - -

15 MS. ZELIG: - - - but - - -

16 JUDGE TROUTMAN: A bike is required to follow the
17 V and T.

18 MS. ZELIG: Yes.

19 JUDGE TROUTMAN: There are bike lanes now. They
20 are integrated into our society such that there are many
21 people that don't drive motor vehicles. They instead
22 choose to operate bicycles, and at, quite frankly,
23 excessive speeds beyond what a car is travelling at
24 oftentimes. But you're saying they're still not - - - they
25 should not be treated any differently than walking on the



1 street, when they're actually within the flow of traffic.

2 MS. ZELIG: Yes, Your Honor. Well, one, I don't
3 believe bicycles that are pedaled by human power can go
4 faster than a motor vehicle. But - - -

5 JUDGE TROUTMAN: Have you not seen traffic - - -

6 ACTING CHIEF JUDGE CANNATARO: In traffic, they
7 can.

8 JUDGE TROUTMAN: - - - traffic.

9 MS. ZELIG: And by the way, they don't listen.

10 JUDGE RIVERA: No.

11 MS. ZELIG: No, they don't stop.

12 JUDGE RIVERA: But they go - - - they go a lot
13 faster - - - they go a lot faster, having ridden my share
14 of them - - -

15 MS. ZELIG: Okay.

16 JUDGE RIVERA: - - - than a human being, and they
17 can actually go faster than someone who's running. So they
18 actually have a great deal of speed.

19 MS. ZELIG: True.

20 JUDGE RIVERA: And if they hit you, they can
21 cause tremendous injury.

22 MS. ZELIG: That's true, but the reality is, Your
23 Honor, it shouldn't rely only on the movement. It should
24 be on the totality of the circumstances, because where do
25 you draw a line. Now a police officer - - - if you impose



1 the rule that a bicycle is now a car, where do you draw the
2 line with the police officer? So now a bicycle is a car,
3 but then we - - - do we come back here for a scooter? Do
4 we come back here - - -

5 JUDGE SINGAS: Well, you're not arguing - - -

6 MS. ZELIG: - - - for a skateboard?

7 JUDGE SINGAS: - - - are you Counsel, that you
8 can never seize a bicyclist, that that - - -

9 MS. ZELIG: Correct.

10 JUDGE SINGAS: - - - circumstances wouldn't
11 amount to a seizure, right?

12 MS. ZELIG: Correct. We're saying, look at the
13 totality of the circumstances.

14 JUDGE WILSON: Thought the police - - -

15 MS. ZELIG: There should not be a person - - -
16 I'm sorry, Your Honor.

17 JUDGE WILSON: I thought the police prefer bright
18 line rules?

19 MS. ZELIG: I'm sorry.

20 JUDGE WILSON: I thought the police prefer
21 bright - - - bright line rules that make it easier to know,
22 in this category, we always can do this, and we always
23 can't do that. Rather than, gee, I've got to make an on-
24 the-spot decision. Isn't that harder?

25 MS. ZELIG: Well, not really, Your Honor, because



1 even within DeBour, for example, it's confusing the
2 difference between level one or level two, and the same
3 similarly situated facts could potentially have different
4 results, depending upon the court that reviews it.

5 But in terms of bright-line rules, yes, what
6 we're saying in Fourth Amendment rules, it would be
7 difficult for the police - - -

8 JUDGE TROUTMAN: But what about some of the - - -
9 the amici briefs indicating the impact of being pulled over
10 in certain communities. Does that matter?

11 MS. ZELIG: Well, I - - - Your Honor, I don't
12 think that the race rhetoric is relevant.

13 JUDGE TROUTMAN: Rhetoric?

14 MS. ZELIG: Well, in terms of the dec - - - the
15 issue about race in terms of black or brown communities or
16 indigent communities. It should rely on the Fourth
17 Amendment protections of the reasonableness of the police
18 conduct in every particular situation and how the police
19 respond.

20 JUDGE RIVERA: Yeah. But - - - but then your
21 rule, as I understand it, even though you eschew a bright-
22 line rule, is that the cops got to block them. The cops
23 block them, you're done. That's a seizure.

24 MS. ZELIG: Well, it - - - it depends - - -

25 JUDGE RIVERA: That seems very aggressive, and I



1 don't think we've ever - - -

2 MS. ZELIG: No, no. I - - - I - - -

3 JUDGE RIVERA: - - - said, you need that full
4 kind of intrusion.

5 MS. ZELIG: I was about to say, it has to depend
6 on the totality of the circumstances.

7 JUDGE RIVERA: Okay. So give me what's less. I
8 mean, you have a car following. And then the car is right
9 next to them. You have the officer and the court both
10 identifying the words spoken as commands, not invitations,
11 not solicitations, not "Would you please do this, sir."
12 Commands. So - - - so - - -

13 MS. ZELIG: My time is up.

14 JUDGE RIVERA: It - - - other - - -

15 MS. ZELIG: May I continue?

16 JUDGE RIVERA: - - - than what - - - my point is
17 other than - - -

18 ACTING CHIEF JUDGE CANNATARO: You can - - - you
19 can answer the question.

20 MS. ZELIG: Sure.

21 JUDGE RIVERA: It's - - - since you say that's
22 not enough under the circumstances, but if indeed they had
23 cut them off, that would be enough. Where's the middle?

24 MS. ZELIG: Well, Your Honor, it's very difficult
25 to answer that because every situation is so fact specific.



1 But in this particular case, if I may, the words command,
2 yell, pursuit, those were all words that were brought out
3 by a very competent defense attorney on cross-examination.
4 And if you look at the - - - the hearing minutes in
5 total - - -

6 JUDGE RIVERA: What step short of blocking them,
7 if this is not enough, would elevate it to level three?

8 MS. ZELIG: In this particular case.

9 JUDGE RIVERA: Yes. Let's give a little
10 guidance.

11 MS. ZELIG: I - - - I would think I - - -

12 JUDGE RIVERA: What would it be?

13 MS. ZELIG: Sure. I would think if the police
14 tried to stop him with lights and sirens, or the police
15 came with their guns drawn and said, freeze. Hold it.
16 Don't move. Something like that would rise to a level of a
17 seizure. But in this particular fact, there was just - - -
18 and even if you want to phrase it as a command, it was just
19 more of a - - -

20 JUDGE RIVERA: If you don't stop, I'll arrest
21 you. Does that one work?

22 MS. ZELIG: That would work. If you don't - - -

23 JUDGE RIVERA: Because?

24 MS. ZELIG: - - - stop, I'll arrest you. Be - -

25 -



1 JUDGE RIVERA: Because?

2 MS. ZELIG: Because the standard for a seizure is
3 whether a reasonable person would feel there's a
4 significant interruption of their liberty of movement. And
5 clearly, "If you don't stop, and I'll arrest you", a
6 reasonable person would feel, then, they can't move. Their
7 liberty's restrained. But even the United States Supreme
8 Court - - -

9 JUDGE RIVERA: So why wouldn't a reasonable
10 person think, under these circumstances, late at night on a
11 road. Cops have been following. Cops are now parallel to
12 me. Commands and yells more than once, twice. We'll stay
13 with the twice, that if I don't stop, I'll get arrested.
14 Why is that not a reasonable - - -

15 MS. ZELIG: Be - - - because it's a - - -

16 JUDGE RIVERA: - - - conclusion by a reasonable
17 person on that bike under those circumstances?

18 MS. ZELIG: Well, it's actually a reasonable
19 person innocent of a wrongdoing, Your Honor, that's the
20 standard. And in this particular case, if a police
21 officer - - - any show of authority could be unsettling for
22 an individual, but the issue is, do you feel free to go?

23 And in this particular case, the police did not
24 do anything that would indicate to this defendant,
25 objectively, that he was not free to go. What if the



1 police said, oh, excuse me. You dropped your wallet. I
2 mean, it could be something as innocuous as that. It's no
3 different than a pedestrian walking on the street and said,
4 please stop.

5 That was the case in People v. Bora.

6 JUDGE RIVERA: Let me ask you this. If there was
7 a history in that particular community of officers being
8 particularly aggressive with men on bikes, would you say
9 that might create a different situation? I'm not talking
10 about race rhetoric, as you termed it, just data, just
11 plain old data.

12 MS. ZELIG: Well, Your Honor, I don't think I
13 would - - - could answer that question to say if it was
14 just based on data because it wouldn't be specific to the
15 facts of the particular case. I mean, there's - - -

16 JUDGE RIVERA: It's known in that - - -

17 MS. ZELIG: - - - good cops and bad cops - - -

18 JUDGE RIVERA: It's known in that community that
19 officers are aggressive for people who are on bikes - - -
20 men who are on bikes. Excuse me. Would it make a
21 difference?

22 MS. ZELIG: Would it make a difference if that
23 was a seizure then? Was - - - I don't understand the
24 question exactly. Can you rephrase that?

25 JUDGE RIVERA: Does that make a difference to the



1 analysis as to whether or not a reasonable person under
2 these circumstances would believe they're not free to move?

3 MS. ZELIG: I do not think it would make a
4 difference, Your Honor, because it's an objective standard,
5 and it's a reasonable person. And the standard, at least
6 with this court's jurisprudence, is not specific to a
7 community necessarily. It's specific to the reasonable
8 person viewed objectively.

9 ACTING CHIEF JUDGE CANNATARO: Thank you,
10 Counsel.

11 MS. ZELIG: Thank you, Your Honors.

12 ACTING CHIEF JUDGE CANNATARO: Counsel, language
13 like the totality of the circumstances in weighing the
14 governmental interests versus the - - - the intrusion into
15 the - - - the subject's ability to move freely in the world
16 is very comfortable for a lawyer, maybe not so comfortable
17 for a cop. But you know, that's the sort of language we
18 work and trade in every day.

19 So why is that not a more appealing option for
20 deciding whether these - - - whether these kinds of
21 encounters violate the person's rights, as opposed to some
22 arbitrary rule about whether something is a motor vehicle,
23 or not a motor vehicle, or has momentum, or doesn't have
24 momentum? You know, that doesn't seem to live in the real
25 world to me, where everything really depends on where you



1 are, what time it is, what the character of the
2 neighborhood is, all different kinds of things.

3 So just tell me, why is your rule better than her
4 rule?

5 MS. KON: Okay, for two reasons. The first
6 reason is, as this court said not that long ago in *People*
7 *v. Garcia*, we need bright line rules because law
8 enforcement have to have even application of these rules on
9 the - - - on the road. The rule we're proposing is a very
10 workable rule. If something is on the road, and the person
11 operating that thing has to follow the same rules of the
12 road as cars, then they are seized when they are told to
13 stop because they have to stop.

14 The second reason why this rule is necessary is
15 because of what happened in this case. The Appellate
16 Division applied a bright line rule. It was the wrong one.
17 They said, bicyclists are uniformly treated as pedestrians.
18 That's not true, nor should it be. That would create a
19 real safety problem on the roads. We are putting - - -

20 JUDGE SINGAS: Well, hold on. If we're going to
21 talk about safety and a police officer's duty to patrol, to
22 investigate crimes, to keep order in society, if we're
23 talking about safety, and you're asking us to say that it's
24 completely unreasonable, I think, for a police officer who
25 observes someone operating their bicycle in an unsafe



1 manner - - - these are the facts below, right. These are
 2 the facts that we have - - - causing other cars to stop so
 3 they wouldn't injure him or injure themselves, holding onto
 4 a bulky item in his waistband, which we've ruled before is
 5 a telltale sign of a weapon. You're saying for safety
 6 reasons, that police officer can't say to that guy, hey,
 7 can you - - - can you hold up a minute?

8 MS. KON: He can, and that's a seizure. And he
 9 needs reasonable suspicion to do it. We are putting
 10 bicyclists in an impossible situation if we do what the
 11 People are advocating. A bicyclist - - - is a bicyclist
 12 supposed to decide if an officer's request is just a
 13 request, if he can keep going. Is he then going to be
 14 charged with violating, you know, the lawful order
 15 provision?

16 This is not a workable rule for our - - - for
 17 people on the road.

18 JUDGE SINGAS: But you're saying, in this case,
 19 this didn't rise to the level of the seizure. So the facts
 20 as I've laid out, according to you, is not a seizure.

21 MS. KON: No. This - - - this was a seizure. He
 22 commanded him to stop. He pursued him, and my client,
 23 importantly, submitted to that authority. He had a show of
 24 authority, a pursuit, a repeated command, and authority to
 25 - - -



1 JUDGE SINGAS: But they didn't have reasonable
2 suspicion.

3 MS. KON: They did not, and the People have never
4 argued that they had - - -

5 JUDGE SINGAS: So - - - so what are we supposed
6 to do in - - - in - - - in a public setting, in a community
7 if guns are prevalent, and if guns become more prevalent?
8 A police officer seeing a bulge can't stop someone and say,
9 hey, do you have a license for what's in your waistband?
10 Like, be - - - you're saying that's not enough reasonable
11 suspicion to sustain this seizure?

12 MS. KON: No. A - - - a bulge is not, nor have
13 the People argued that it is. We're not - - - we're not
14 asking this court to determine whether or not Officer Shell
15 had reasonable suspicion. The People have never argued
16 that. And the answer to your question is follow him a
17 little longer. You followed him for thirty to sixty
18 seconds. That - - - that was not enough time. Do good
19 police work, and you will be rewarded with reasonable
20 suspicion or probable cause of a VTL violation.

21 JUDGE GARCIA: As I understand your argument,
22 Counsel, it's, you know, the bicycle rule or any
23 alternative, if we do not adopt that rule, that this was a
24 level three on all the facts and circumstances, right?

25 MS. KON: Yes, absolutely. And lights and sirens



1 aren't dispositive. In Whren, you know, it was still a
2 seizure even though he pulled a car over without lights and
3 sirens. It's not about lights and sirens. It's about
4 whether the person feels they have to stop, and bicyclists
5 on the road feel like they have to stop. And we should
6 want them to feel that way, and police should be able to
7 have a workable rule.

8 But whatever this court decides, whether it's
9 because bicycles are - - - are always - - - stops are
10 always seizures, or whether it's because there was a clear
11 command and a submission to that command in this case, this
12 was an unlawful seizure. The People have never argued that
13 there was reasonable suspicion, and so the evidence should
14 be suppressed and the indictment dismissed.

15 ACTING CHIEF JUDGE CANNATARO: Thank you,
16 Counsel.

17 MS. KON: Thank you.

18 (Court is adjourned)

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

I, Melissa Key, certify that the foregoing transcript of proceedings in the Court of Appeals of Lance Rodriguez v. People, No. 97 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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