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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 91

JOHN ANDUJAR,

Appellant.

20 Eagle Street
Albany, New York
September 5, 2017

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 G. FEINMAN

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The first matter on this
2 afternoon's calendar is appeal number 91, People of the
3 State of New York v. John Andujar.

4 Counsel

5 MS. KALIKOW: Good afternoon. May it please the
6 court, my name is Karen Kalikow. I represent the
7 appellant, John Andujar. I'd like to reserve two minutes
8 for rebuttal, please, Your Honor.

9 CHIEF JUDGE DIFIORE: You may.

10 MS. KALIKOW: The legislators did - - - the
11 legislature did not intend to criminalize mere possession
12 or access to a portable device capable of receiving police
13 frequencies in an automobile. As a consequence, the
14 accusatory instrument in this case was insufficient because
15 it didn't establish reasonable cause to believe that - - -

16 CHIEF JUDGE DIFIORE: What's the gravamen of this
17 statute?

18 MS. KALIKOW: That you - - - a person cannot
19 equip a motor vehicle with a radio device capable of
20 receiving police frequencies.

21 JUDGE GARCIA: Because the harm is the car having
22 a radio device attached to it?

23 MS. KALIKOW: I think that is the harm. The
24 target of this - - - of the legislature was the car.

25 JUDGE GARCIA: So if it's in the trunk, it's

1 attached. What's the harm?

2 MS. KALIKOW: If the legislature had wanted to do
3 more than talk about - - -

4 JUDGE GARCIA: I understand that argument, but
5 what's the harm of having one of these devices attached in
6 the trunk? Would that fall within the statute as you read
7 it?

8 MS. KALIKOW: If it's attached in the trunk?

9 JUDGE GARCIA: Um-hmm.

10 MS. KALIKOW: I would - - - I - - - I believe
11 that the legislature, when they enacted the statute, if
12 we're going back to - - -

13 JUDGE GARCIA: But what would the harm be of one
14 of these things in the trunk?

15 MS. KALIKOW: I mean respondent would say there
16 would be access to it. I would say there wouldn't be a
17 harm.

18 JUDGE GARCIA: Unless you're in the trunk, there
19 wouldn't be access to it, right?

20 MS. KALIKOW: Right.

21 JUDGE GARCIA: But so what would the harm be of
22 having one of these in the trunk? But it would fall within
23 the definition of - - -

24 MS. KALIKOW: Well, that's the problem, Your
25 Honor - - -

1 JUDGE FAHEY: - - - in the statute.

2 MS. KALIKOW: - - - is the technology has so
3 outstripped the legislative intent in this case. The
4 statute - - -

5 JUDGE GARCIA: Well, I think the intent was it
6 seems, a very good argument, would be that you can't have
7 access to one of these devices while you are driving your
8 car.

9 MS. KALIKOW: If - - - if the legislative intent
10 was to prohibit access, the court - - - the legislature
11 could have said that rather than - - -

12 JUDGE GARCIA: Well, they said it with equip.

13 MS. KALIKOW: They said - - - well, equip because
14 back - - - back in 1933, the only way to use a device, a
15 radio device like this, was to attach it to the car and
16 affix it to the car.

17 CHIEF JUDGE DIFIORE: So before we get to that,
18 if - - - if the intent was to prevent people who weren't
19 authorized from intercepting police communications over a
20 radio, what difference does it matter if the device is
21 physically attached to the car or not as long as it is
22 capable of intercepting the communications over the police
23 frequency?

24 MS. KALIKOW: Because I don't think that's the
25 way the statute was written. When the legislature wrote

1 the statute, they targeted the car. They targeted the car
2 in terms of attaching or fixing or adapting or installing a
3 radio to the car.

4 JUDGE WILSON: But they didn't actually say any
5 of those words in the statute, right? They chose a
6 different word that has something of a different meaning.

7 MS. KALIKOW: They chose the word equip.

8 JUDGE WILSON: Not affix, attach - - - I've
9 forgotten the other - - - what - - - out - - - you know,
10 the other words you said. They didn't use any of those.

11 MS. KALIKOW: But I think that when you look at
12 the definitions that respondent has - - - has given to this
13 court, you can't look at them detached from when the
14 statute was written in 1933. When the statute was written,
15 equip could not be - - - mean use. It could not mean
16 possess with intent to use. It had to mean affix to the
17 car, attach to the car - - -

18 CHIEF JUDGE DIFIORE: Aren't there other portions
19 of the vehicle in traffic law that actually require that
20 something be affixed or mounted on a car?

21 MS. KALIKOW: There are some that require that.
22 In those situations where they say equipped and then
23 explain how to attach it, those objects have to be attached
24 in a certain place. I think that distinguishes those from
25 our statute. And - - -

1 JUDGE RIVERA: Yes. But then you could just, for
2 those sections, have said equipped and then indicate the
3 certain place. But in those sections, it says equipped and
4 mount, for one example.

5 MS. KALIKOW: Right.

6 JUDGE RIVERA: So if equip meant attach, you
7 would not need - - - it would be super - - - superfluous.
8 You wouldn't need the word mount.

9 MS. KALIKOW: Well, interestingly, in the - - -
10 in the VTL, when they talk about snowplows is only equip.
11 I think because the understanding - - -

12 JUDGE FAHEY: Well, the - - - the V&T, though - -
13 - the V&T has numbers of examples that uses the word
14 equipped. And - - - and it seems to - - - they seem to
15 undermine your argument, and they - - - and the legislature
16 really declined to equate equipped with attached. I don't
17 know them all, but there's equipped with a hand fire
18 extinguisher in 375(9), equipped with a mirror to the right
19 side of a vehicle, not attach.

20 MS. KALIKOW: Right.

21 JUDGE FAHEY: But - - - but equipped. There's a
22 sideview mirror. One is 375(10)(a) and 375(48)(b), which
23 is equipped with both a front and rear bumper, each
24 securely fastened. That's the only time it says securely
25 fasten. In other words, equipped is not equivalent to

1 attached in those V&T circumstances.

2 MS. KALIKOW: If we look at the legislative
3 intent when defining equip, though, Your Honor, there have
4 been such advances and such changes that I don't think that
5 the legislature when they wrote equipped ever intended this
6 statute to cover any portable device, cell phones that have
7 apps - - -

8 JUDGE FEINMAN: Well, certainly the legislature
9 didn't foresee cell phones when it wrote this statute
10 decades ago.

11 MS. KALIKOW: Right. But the - - - the statute
12 isn't static. I think that - - -

13 JUDGE RIVERA: No. No. But - - - but weren't
14 the definitions, even at the time that you're referring to,
15 not the kinds of definitions that limit equip to
16 attachment? Could be to be outfitted. So it is possible,
17 of course, that something could be equipped by the process
18 of attaching, right? But it need not be equipped by
19 attachment. And - - - and the - - - the definitions from
20 that period don't mean that you - - - don't - - - don't
21 explain equipped as requiring a physical connection.

22 MS. KALIKOW: It - - - it doesn't necessarily
23 have to be a physical connection. It could be an
24 adaptation. There needs to be the connection to the
25 vehicle.

1 JUDGE FEINMAN: So - - - so let me ask you this.
2 Let's say you were using a modern cell phone, and you set
3 up your in-house or your in-car, I should say, equipment so
4 that it, basically through one of these apps, gave you the
5 same thing as the scanner. Is that equipping the vehicle?

6 MS. KALIKOW: I would say that it's not equipping
7 the vehicle because you could have your phone - - - the - -
8 - you could have any number of apps, and in fact, there are
9 thousands of police scanner apps - - -

10 JUDGE FEINMAN: But I'm not talking about the
11 app. You - - - you set up the app so that it runs through
12 your dashboard - - -

13 MS. KALIKOW: So - - - so like Bluetooth.

14 JUDGE FEINMAN: - - - you know, on one of these
15 navigation devices.

16 MS. KALIKOW: Right.

17 JUDGE FEINMAN: Or - - - or - - -

18 MS. KALIKOW: I would say that no. That the
19 statute - - -

20 JUDGE FEINMAN: You know, and so it talks to you
21 with, you know, hands free.

22 MS. KALIKOW: I would say that this statute was
23 not meant to cover that. I think that - - -

24 JUDGE FEINMAN: Well, but if it - - - if it
25 equipped the vehicle, right, you're doing something to the

1 vehicle, if you've set up the vehicle so that it runs your
2 app on your phone, why isn't that covered?

3 MS. KALIKOW: Because I think that with
4 Bluetooth, you're - - - you're doing something to the
5 vehicle to attach your phone to it. Here, we're looking at
6 a statute - - -

7 JUDGE FEINMAN: It doesn't have to be physically
8 attached.

9 MS. KALIKOW: Excuse me?

10 JUDGE FEINMAN: It doesn't have to be physically
11 attached.

12 MS. KALIKOW: I'm - - - no. Not physically
13 attached.

14 JUDGE FEINMAN: Okay.

15 MS. KALIKOW: But you're adapting in order for
16 the Bluetooth to run through your car. Here, we're looking
17 at a statute where the target was the car, not the person.
18 So that the person - - -

19 CHIEF JUDGE DIFIORE: Isn't the target the
20 conduct to prevent people from running around chasing car
21 accidents and things of that nature?

22 MS. KALIKOW: I think initially the conduct was
23 having a car equipped with capability for - - - to access
24 police scanners because the fear was they didn't want
25 getaway drivers accessing the frequencies - - -

1 JUDGE RIVERA: So - - - so the target is the
2 defendant. I mean that - - - that's the person who's
3 violating the statute.

4 MS. KALIKOW: But the - - -

5 JUDGE RIVERA: I mean the - - - the target's
6 always the - - - that's the person who's going to get
7 arrested.

8 MS. KALIKOW: If this - - - if this behavior is
9 prohibited, if this court wanted to prohibit that, the
10 legislature has to be the one to rewrite the statute. The
11 Appellate Term by ruling - - -

12 JUDGE RIVERA: Well, I'm not clear why you equate
13 adaption, what you said, adaptation with the physical
14 attachment, and I - - - I don't see why that's - - -

15 MS. KALIKOW: I don't think that - - -

16 JUDGE RIVERA: - - - a natural and common
17 understanding of equip.

18 MS. KALIKOW: I think the fitting out of the car
19 in order to function with the - - - with the police - - -
20 with the radio that you needed in 1933, you needed some
21 kind of adaptation fitting out attachment. It couldn't
22 just be a portable device. There needed to be the
23 connection to the car. The statute was amended in 1948.
24 It was amended again in 1966. In 1966, automobile was
25 changed to motor vehicle and at that point, portable radios

1 were foreseeable, and the legislature didn't change the
2 wording.

3 CHIEF JUDGE DIFIORE: Thank you, counsel.

4 Counsel.

5 MS. RENO: May it please the court, Catherine
6 Reno for the Bronx District Attorney's Office. Defendant -
7 - -

8 JUDGE STEIN: So, Ms. Reno, can we - - - can we
9 talk about the cell phone a little bit and the app? What
10 if - - - what if the cell phone is sitting on the seat and
11 it's turned off or even if it's turned on but the app isn't
12 running, nothing's being run through Bluetooth? Is - - -
13 is the vehicle at that point equipped with a scanner?

14 MS. RENO: Well, just to be clear, those aren't
15 the circumstances here. Here defendant had - - -

16 JUDGE STEIN: Well, I understand that.

17 MS. RENO: - - - a police scanner.

18 JUDGE STEIN: But I'm trying to under - - - I'm
19 trying to understand what your definition of equipped is,
20 and so does that - - -

21 MS. RENO: Sure.

22 JUDGE STEIN: - - - does it encompass that
23 scenario?

24 MS. RENO: If the cell phone was turned off but
25 sitting in the passenger seat?

1 JUDGE STEIN: Yes.

2 MS. RENO: If - - - if - - - the key to equip is
3 that it's - - - can efficiently carry out an action. So in
4 that case, again, those aren't the circumstances here
5 because this is an actual police scanner.

6 JUDGE STEIN: Where does the statute say anything
7 about efficiently carrying on a transaction?

8 MS. RENO: Well, that's from the dictionary
9 definitions. Part of - - - part of equip isn't just that
10 something is there. It's that it's avail - - - available
11 for efficient use. So if it's in - - - in the trunk, for
12 instance, that's not available for efficient use. If I'm
13 the driver, I can't - - - I would have to pull over, get
14 out of the car, open the trunk, and then that's not - - -
15 that's not efficient use. So - - -

16 JUDGE RIVERA: You mean in - - - efficient in the
17 sense immediate use?

18 MS. RENO: Yes. Within seconds is how the
19 Appellate Term characterized it.

20 JUDGE STEIN: How about if the - - - if the cell
21 phone is turned on but it's not being run through Bluetooth
22 or anything?

23 MS. RENO: Yes. It would be - - -

24 JUDGE STEIN: And the app - - - and the app is
25 not activated, but you could - - - you could activate it by

1 pushing a button, right?

2 MS. RENO: Exactly. That would be like - - -

3 JUDGE STEIN: So that's equipped?

4 MS. RENO: Yes.

5 JUDGE STEIN: Okay.

6 MS. RENO: Just - - -

7 JUDGE STEIN: So how - - - how does the average
8 person reading the statute know that distinction?

9 MS. RENO: Because that is the - - - the general
10 and ordinary understanding of - - - of the term equip as
11 opposed to - - -

12 JUDGE FEINMAN: Is it? Or is it more that you've
13 done something to the car? Equipped the motor vehicle,
14 verb, direct object, you've done something to the car?
15 Isn't that the ordinary definition?

16 MS. RENO: Well, that would be sort of a subset
17 of the ordinary definition. That is a more narrow reading
18 of the broader definition. I - - -

19 JUDGE FEINMAN: Well, doesn't the Rule of Lenity
20 tell us we read it narrowly?

21 MS. RENO: Well, the Rule of Lenity only comes
22 into play after all of the other canons of construction
23 have been used and there still is a reasonable doubt
24 lingering. And in this case, looking at myriad dictionary
25 definitions dating all the way back to 1919 and then in the

1 '50s, none of - - - none of them gave such a narrow
2 definition where a physical attachment was required.
3 Certainly, that would come under the umbrella of the
4 broader definition, but terms of general import in a
5 statute are ordinarily - - - they must receive their - - -
6 their full significance. So in this case, defendant is too
7 narrowly reading the word equip.

8 JUDGE WILSON: I have a question.

9 JUDGE FAHEY: What about the - - - no. You go
10 ahead.

11 JUDGE WILSON: No. You go ahead.

12 JUDGE FAHEY: No, you - - - no, you go.

13 JUDGE WILSON: A question for you about cell
14 phones and why you care about the enforcement of the
15 statute at all given the technological change because as I
16 read the statute, it requires that the device, whatever it
17 is, is a "radio set capable of receiving signals on the
18 frequencies allocated for police use." And although I can
19 get a variety of apps on my phone that will get me that
20 information, my phone is not actually a device that can
21 receive signals on the frequencies allocated.

22 MS. RENO: That's correct.

23 JUDGE WILSON: So why do you care because
24 everybody's just going to move to cell phones and the - - -
25 and the legislature has to rewrite the statute anyway?

1 MS. RENO: Well - - -

2 JUDGE WILSON: Why isn't opposing counsel right
3 that we should just let the legislature fix this?

4 MS. RENO: Well, the - - - the court and the
5 legislature hasn't actually defined what radio receiving
6 set is yet. So in this case, obviously, we care - - -

7 JUDGE WILSON: Well, frequencies allocated for
8 police use are clearly not my cell phone.

9 MS. RENO: Right. But your cell phone is
10 receiving a stream of that via your cell phone data package
11 or the internet, and it's the same basic functionality.
12 But in this case specifically, defendant had a police
13 scanner. He had an actual police scanner device. So - - -

14 JUDGE STEIN: If it was in the back seat, right,
15 in - - - you know, behind him, say, or on the floor of the
16 backseat but not in his pocket, is that attach - - - is
17 that equipped?

18 MS. RENO: Again, the - - - the focus would be
19 whether it's ready for efficient use so - - -

20 JUDGE STEIN: Okay. So but the question is is,
21 you know, there - - - there are so many - - - at what point
22 does it get to that point, and does it depend on how long
23 your arms are? Does it depend on what size your car is?
24 And - - - and again, I'm sort of getting back to how an
25 average person, the ordinary understanding and meaning of

1 the statute - - -

2 MS. RENO: Certainly, something - - -

3 JUDGE STEIN: - - - would - - - would understand
4 it.

5 MS. RENO: - - - within arm's reach would - - -
6 would come within equip, but perhaps not if - - -

7 JUDGE STEIN: So it depends upon that person and
8 - - - and, again, the length of his or her arms and the
9 size of the car and all that?

10 MS. RENO: Well, an important distinction, Your
11 Honor, here is this isn't at the stage of an accusatory
12 instrument. So at this point that should be enough. It's,
13 you know, a general factual basis. This is - - - that
14 could be a trial issue that would be resolved by the jury
15 or - - - or the judge if it's a bench trial. But for - - -
16 for accusatory instrument purposes, this was sufficient.
17 Defendant was able to prepare a defense and double jeopardy
18 concerns were - - - were not - - -

19 JUDGE FAHEY: You know, I - - - I had asked
20 opposing counsel about some V&T example. There's a V&T
21 example as to the radar detectors where they - - - where
22 they referred - - - the legislature refers to the use of
23 radar detectors and laser detectors in motor vehicles. It
24 seems that there's a difference between the word use, which
25 pretty much covers everything, right? It's in your car so

1 - - - so that's a - - - it's a safe word, I think, for the
2 legislature to use. And equip. And how would you
3 characterize the difference?

4 MS. RENO: I - - - I would say that use is a more
5 narrow term than equip.

6 JUDGE FAHEY: Oh, really?

7 MS. KALIKOW: Because it requires active
8 operation whereas equip could just be - - - again, the
9 device could be off. Here defendant had the - - - the
10 device in his pocket, but it was not switched on. So
11 technically, he - - - he could have a defense at trial that
12 he was not using the - - - the device whereas he would
13 still have equipped the vehicle with the device.

14 JUDGE FAHEY: Thanks.

15 MS. RENO: Just one last thing, Your Honors. The
16 essence and functionality of a radio receiving set does not
17 hinge on a physical connection or tether to a vehicle. If
18 Your Honors have no further questions, I ask that you
19 affirm the Appellate Term. Thank you.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 Ms. Kalikow.

22 MS. KALIKOW: Just quickly, Your Honor. I think
23 if we accept respondent's definition of equip, then someone
24 using Waze, which is a GPS device that you can access
25 through your phone to tell you what is the best route to

1 take, would - - - would be guilty of - - - would - - -
2 would violate 397 because Waze now uses police activity to
3 tell you how to avoid it.

4 JUDGE FAHEY: But they're not listening to police
5 activity.

6 MS. KALIKOW: Excuse me?

7 JUDGE FAHEY: You're not listening to police
8 activity while you do it. That's the difference. You
9 know, there was this case from - - - oh, God, before I was
10 a lawyer, '78 or something, Judge Bestry from the town of
11 Amherst. I think the case is called McKee. It's an old
12 case. I think Judge Bestry has now passed away. But
13 anyway, he - - - he had written an article that on this
14 that finally got published and he said well, it's obvious
15 why the law was passed here, that police, they don't want -
16 - - police don't want criminals listening to them. And - -
17 - and that kind of obviousness may be obfuscated by our
18 discussion here. I think that's the core of the problem
19 with the analysis.

20 MS. KALIKOW: Well, that's why I bring up Waze
21 because if the point is to avoid police activity, just by
22 turning on your GPS, you'll know where the police activity
23 is, which is why it's my position that the legislature
24 needs - - -

25 JUDGE RIVERA: But isn't - - - isn't the

1 distinction that your point was about traffic jams, right?

2 MS. KALIKOW: Right.

3 JUDGE RIVERA: That - - - isn't that the kind of
4 public information that no one is saying - - -

5 MS. KALIKOW: But the two - - -

6 JUDGE RIVERA: - - - the police are trying to
7 keep from someone hearing, which I thought was Judge
8 Fahey's point?

9 MS. KALIKOW: Right. I - - - right. I
10 understand that, but what I'm saying is with the advances
11 in technology, the two - - - they - - - they merge, and the
12 problem is that people don't know what's prohibited. And I
13 would argue that in terms of the accusatory instrument in
14 this case, there wasn't notice of what equipped was.

15 JUDGE FEINMAN: Would - - - would you agree with
16 your adversary that use is more narrow than equip?

17 MS. KALIKOW: No. I would not. I believe that
18 the - - - the prohibition that respondent is talking about
19 is possess or possess with intent to use. If that's what
20 the legislature wants to prohibit, that's what the
21 legislature needs to - - - to write, and it wasn't up to
22 the Appellate Term to make that decision. Thank you.

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, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. John Andujar, No. 91 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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