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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 166

JOCELYN CLERMONT,

Appellant.

20 Eagle Street
Albany, New York 12207
September 11, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 166, People v.
2 Clermont.

3 All right, counsel, go ahead.

4 MS. GLASHAUSSER: Can I reserve two minutes
5 for rebuttal?

6 CHIEF JUDGE LIPPMAN: Two minutes, sure, go
7 ahead.

8 MS. GLASHAUSSER: Your Honors, the
9 suppression hearing was the whole case for Mr.
10 Clermont.

11 CHIEF JUDGE LIPPMAN: What - - - what about
12 the judge's ruling here? Did the judge get it right
13 as to what happened?

14 MS. GLASHAUSSER: No, the judge gave a - -
15 -

16 CHIEF JUDGE LIPPMAN: What exactly were the
17 circumstances - - - where did the judge get it wrong?

18 MS. GLASHAUSSER: Sure. The judge got the
19 undisputed facts wrong. The defendant - - -

20 CHIEF JUDGE LIPPMAN: How so? Describe
21 what he did.

22 MS. GLASHAUSSER: Right. The defendant was
23 walking down the street. Police officers got out of
24 their car. The defendant ran. The police officer
25 chased. While Mr. Clermont was running, being chased

1 by the police officers, he threw a gun. What the
2 suppression court wrote was that Mr. Clermont had
3 abandoned the gun, then he was running, and then the
4 police officers chased him.

5 CHIEF JUDGE LIPPMAN: And that's contrary
6 to the record in the case?

7 MS. GLASHAUSSER: Exactly.

8 JUDGE SMITH: Actually, he - - - he - - -
9 as I remember, the court's decision says, that he - -
10 - he finds the facts correctly in his findings, then
11 recites them wrong in his conclusion.

12 MS. GLASHAUSSER: Exactly. So the court -
13 - - these are the undisputed facts at the hearing.
14 The hearing was brief, and there were no - - -
15 there's absolutely no dispute about the facts. But
16 the court just got it wrong in writing his legal
17 analysis.

18 JUDGE PIGOTT: So you think - - - you think
19 that had he had it right, he would have suppressed
20 it?

21 MS. GLASHAUSSER: Yes. Any reasonable
22 judge would have had to suppress on these facts.

23 JUDGE SMITH: Are we - - - is the question
24 of - - - of - - - I mean, of whether it should have
25 been suppressed before us, or is it - - - or are we -

1 - - or is it just an ineffective assistance appeal?

2 MS. GLASHAUSSER: Both, Your Honor. So the
3 defense lawyer was ineffective for failing to raise
4 this obvious, clear-cut and winning suppression
5 argument.

6 JUDGE READ: So you think this is a Turner
7 case? You're arguing this is a Turner case.

8 MS. GLASHAUSSER: Defense counsel didn't
9 just make one error; he made one egregious error in
10 failing to raise this issue, but it started at the
11 beginning. He put in motion papers with the wrong
12 name, the wrong facts.

13 JUDGE SMITH: You're - - - you're saying
14 this is - - - it's also a farce and mockery case?

15 MS. GLASHAUSSER: This is - - - I'm saying
16 that this is not just a one-error case. There's one
17 egregious error.

18 JUDGE SMITH: And with the words - - - I
19 mean, farce and mockery is out of date now, but that
20 was the original - - - you know, back when I was in
21 law school that was the standard for ineffective
22 assistance. It had to be a farce and mockery.

23 CHIEF JUDGE LIPPMAN: Right.

24 JUDGE SMITH: If that were the test, could
25 you meet it here?

1 MS. GLASHAUSSER: Yes. Under any standard
2 for ineffectiveness, counsel was ineffective here.

3 JUDGE GRAFFEO: Well, it - - - it looked
4 like this was kind of a previous suppression motion,
5 and whoever was working at the computer, didn't
6 delete and change certain information in it.

7 MS. GLASHAUSSER: Right, he - - -

8 JUDGE GRAFFEO: So does that - - - does
9 that rise to the Turner standard?

10 MS. GLASHAUSSER: Well, counsel submitted
11 basically the wrong motion. He put in papers for
12 somebody else. He changed some things, but he didn't
13 change the relevant - - -

14 JUDGE PIGOTT: And as a result, what - - -
15 what happened as a result of that filing?

16 MS. GLASHAUSSER: As a result of that
17 filing, he got a hearing.

18 JUDGE PIGOTT: Is that what he was asking
19 for?

20 MS. GLASHAUSSER: That is what he was
21 asking for.

22 JUDGE PIGOTT: So was there any effect on
23 the mistake in filing?

24 MS. GLASHAUSSER: Yes, because he never
25 corrected his error in that motion, when he - - -

1 JUDGE PIGOTT: It's just some evidence that
2 he wasn't paying attention, right? I mean, because
3 the facts came out that there wasn't any car, that it
4 wasn't dropped out of the car. So the real facts
5 came out.

6 MS. GLASHAUSSER: The real facts did come
7 out, but counsel never corrected his legal errors.
8 He never made the correct legal - - -

9 JUDGE SMITH: On this - - -

10 JUDGE PIGOTT: What was he supposed to do?
11 Go ahead and say, judge, can I have my papers back,
12 because I want amend them before we go to this
13 hearing, which I've asked for and you've now granted?

14 MS. GLASHAUSSER: No, he didn't have to do
15 that. He just had to make the proper argument at the
16 hearing, and that's where the crux of this error is.

17 JUDGE SMITH: Is there any sign that
18 defendant ever realized that he'd - - - he'd made the
19 wrong motion? Defense - - - defense counsel ever
20 realize that?

21 MS. GLASHAUSSER: No, there's no indication
22 that he - - -

23 JUDGE SMITH: And he did - - - he said - -
24 - then he puts in an affidavit to be relieved, saying
25 I can't competently represent all my clients.

1 MS. GLASHAUSSER: Exactly.

2 JUDGE SMITH: Did he do a competent job at
3 the hearing?

4 MS. GLASHAUSSER: No.

5 JUDGE SMITH: Why not?

6 MS. GLASHAUSSER: When we get to the
7 hearing, counsel - - - he asks a few questions, but
8 he never makes this obvious, clear-cut and winning
9 suppression issue. He never - - -

10 JUDGE ABDUS-SALAAM: Does he make any
11 argument after he conducts the hearing?

12 MS. GLASHAUSSER: No, he makes no argument.

13 JUDGE ABDUS-SALAAM: He made opening and
14 closings.

15 MS. GLASHAUSSER: Right.

16 JUDGE ABDUS-SALAAM: And didn't say
17 anything after the hearing was - - - after the
18 evidence went in?

19 MS. GLASHAUSSER: Exactly.

20 JUDGE SMITH: No - - - and no memorandum.

21 MS. GLASHAUSSER: No.

22 JUDGE SMITH: Never cites a case to the
23 court.

24 MS. GLASHAUSSER: No.

25 JUDGE SMITH: Never says in substance,

1 yeah, I'm to - - - there's too many - - - this is too
2 easy for you. I'll save these for your adversary.

3 MS. GLASHAUSSER: So - - - right, so
4 counsel does nothing at the hearing to correct his
5 previous error, and we have this winning suppression
6 argument that he could have made. The only facts on
7 the record that Mr. Clermont did before the police
8 officers chased him said he adjusted his waistband.

9 JUDGE PIGOTT: Well, the cops said that he
10 adjusted it in a furtive manner, in which they
11 thought he probably had a gun. It turned out they
12 were right.

13 MS. GLASHAUSSER: Well, the police officer
14 actually did not say that, Your Honor.

15 JUDGE SMITH: He said at trial, I think.
16 We're talking about the sup - - - you're talking
17 about the suppression hearing?

18 MS. GLASHAUSSER: I don't believe the
19 police office ever said that. He certainly didn't
20 say it at the suppression hearing. The police
21 officer - - - the police officer only said - - -

22 JUDGE SMITH: And the suppression hearing's
23 the only thing relevant, right?

24 MS. GLASHAUSSER: Yes, Your Honor. He only
25 said, I saw him adjusting his waistband. He

1 specifically did not say I saw him adjusting his
2 waistband and I saw a bulge that looked like a
3 weapon. I saw - - -

4 CHIEF JUDGE LIPPMAN: Was that enough, the
5 adjusting of the waistband?

6 MS. GLASHAUSSER: No.

7 JUDGE GRAFFEO: Yeah, it's not Pines.

8 MS. GLASHAUSSER: Not Pines.

9 JUDGE PIGOTT: It said - - - it said "The
10 defendant was making constant adjustments to his
11 right waistband area. Lunt got out of the unmarked
12 police car and identified himself as a detective.
13 The defendant ran, discarded the weapon, and jumped
14 the fence."

15 MS. GLASHAUSSER: Right.

16 JUDGE GRAFFEO: Why is that not Pines?

17 MS. GLASHAUSSER: In Pines, the officer
18 testified that he observed the defendant making a
19 cupping motion under his jacket that was like a
20 motion you would use to adjust a gun. What we're
21 missing here is that it was like a motion used to
22 adjust a gun. We're missing any indication of
23 criminality. The officer didn't - - -

24 JUDGE SMITH: Suppose - - -

25 JUDGE ABDUS-SALAAM: Yeah, if the pants

1 were too big or too small is the way they're wearing
2 them now, right? The pants are too small, so they're
3 always coming off, you know, and so they have to pull
4 them up if they want to be halfway decent, right?

5 MS. GLASHAUSSER: Right, there are any sort
6 of innocuous reasons that he could have - - -

7 JUDGE SMITH: Suppose - - - suppose - - -
8 suppose - - -

9 JUDGE RIVERA: But weren't they really
10 informed in the fact that this was a - - - an area
11 where they knew about gang activity? Isn't that what
12 really drove him to stop him?

13 MS. GLASHAUSSER: This - - -

14 JUDGE RIVERA: Or to approach him?

15 MS. GLASHAUSSER: The officer said it was a
16 gang neighborhood, but that's certainly not enough to
17 show reasonable suspicion.

18 JUDGE PIGOTT: Well, it's a mixed question.
19 I don't know if we can get to it, can we?

20 MS. GLASHAUSSER: No, this is below the
21 minimum standard of reasonable suspicion as a matter
22 of law.

23 JUDGE SMITH: So suppose - - - suppose - -
24 - suppose we - - - suppose we find the suppression
25 issue closer than you say it is. I mean, you - - - I

1 - - - you say it's an absolute winner; it's like
2 Turner; there's no way you could have lost this.
3 Suppose we disagree with you and we say it's a
4 debatable issue. Do you still have an ineffective
5 assistance claim?

6 MS. GLASHAUSSER: Yes. I - - - I - - - it
7 would not in any way concede that this wasn't a
8 winning suppression issue.

9 JUDGE SMITH: I understand.

10 MS. GLASHAUSSER: But counsel was clearly
11 ineffective. Counsel admittedly was overworked,
12 unprepared. And we know from his motion that he was
13 careless. He submitted the wrong motion papers.

14 JUDGE PIGOTT: I think you've described
15 seventy-five percent of the attorneys in the crime -
16 - - and I'm not picking on them. I'm thinking of
17 myself when I used to do this. You're always
18 overworked and underprepared in trying to get the
19 thing done. The judge in this case, it struck me - -
20 -

21 JUDGE SMITH: Some of us get the right
22 name, though.

23 JUDGE PIGOTT: - - - was say - - - the
24 judge in this case was saying, can you just do this
25 hearing, so we can get this thing trial-ready? It

1 sounded like he'd already made up his mind on the
2 suppression.

3 MS. GLASHAUSSER: Sure, and - - - you know,
4 suppression, just getting ready for the trial when
5 suppression is the key moment in your case, you can't
6 just get the thing ready for trial, and just sort of
7 brush it off, like I'll be on for arraignment only.
8 This was the whole case.

9 JUDGE RIVERA: Did - - - did the judge
10 commit error when counsel says, I'm just not
11 prepared?

12 MS. GLASHAUSSER: Did the judge commit
13 error in asking to proceed?

14 JUDGE RIVERA: And then asking him,
15 proceed?

16 MS. GLASHAUSSER: No, it's - - - it's
17 really on counsel. Counsel had explained it, so we
18 don't have to guess in this case why counsel was not
19 ready to make the proper argument. We know. But
20 counsel said he would go forward. He shouldn't have.

21 Counsel was unprepared on the law; he was
22 unprepared of the facts. He shouldn't have gone
23 forward with the hearing. And this hearing was the
24 whole case for Mr. Clermont. Once the hearing was
25 lost, Mr. Clermont's case was lost.

1 And then there's this third moment when the
2 court - - -

3 JUDGE PIGOTT: Don't you get - - - don't -
4 - - I mean, how many people win suppression hearings?
5 And you make it sound like this was a slam-dunk. And
6 of course, your opponent's going to argue it was
7 anything but. And as Judge Rivera mentioned, there
8 was an awful lot of findings that this was a, you
9 know, a high-crime area. It was a gangland area.
10 The officers were there specifically for this type of
11 activity.

12 There was an awful lot to indicate that the
13 police were doing exactly what they should have done,
14 and based on their expertise, did what they did, and
15 that the - - - they found a gun, and it was his.

16 MS. GLASHAUSSER: So it's a gang
17 neighborhood. There was no information that there
18 was any gang activity going on. The officers were
19 not responding to a report of a crime. They weren't
20 responding to a report of gang activity. They didn't
21 think that Mr. Clermont was in a gang. He wasn't
22 wearing gang colors. There was no rumor that - - -

23 JUDGE SMITH: There's a case called Cadle,
24 I think; it was decided after the hearing below. But
25 it's pretty much identical with this, right?

1 MS. GLASHAUSSER: Yes, there are two cases
2 out of the - - -

3 JUDGE SMITH: And the defendant won it in
4 the Appellate Division. I mean, did - - - did - - -
5 I mean, obviously - - - obviously, you can't blame
6 your trial counsel for not knowing of it, because it
7 hadn't happened. But does that - - - does that
8 suggest that there was at least some possible merit
9 to his argument - - - to the argument he didn't make?

10 MS. GLASHAUSSER: Yes, there are two cases
11 out of the Appellate Division that are very similar,
12 Carmichael as well, that were decided around the same
13 time of Mr. Clermont's case in the Appellate
14 Division. And crucially, even before those cases,
15 there were no cases finding reasonable suspicion to
16 chase a particular person based - - -

17 CHIEF JUDGE LIPPMAN: Okay, counsel.

18 MS. GLASHAUSSER: - - - only on reasonable
19 suspicion and a waistband adjustment.

20 CHIEF JUDGE LIPPMAN: Okay, thanks,
21 counsel.

22 MS. GLASHAUSSER: Thank you.

23 CHIEF JUDGE LIPPMAN: Counsel?

24 MS. SULLIVAN: May it please the court,
25 Suzanne Sullivan for the People. In this case, this

1 court should affirm the Appellate Division's decision
2 finding that the defense attorney provided effective
3 assistance.

4 JUDGE ABDUS-SALAAM: There was no argument
5 made after the suppression hearing. How can we
6 affirm that - - - that there - - - that that was
7 effective assistance of counsel, not doing anything?
8 After you put evidence on, you don't say anything?

9 MS. SULLIVAN: Your Honor, in this case,
10 neither the prosecutor nor the defense attorney did
11 make a closing or an opening.

12 JUDGE ABDUS-SALAAM: But the prosecution
13 doesn't have any obligation to represent this
14 defendant. The defendant's attorney does.

15 MS. SULLIVAN: That is true, Your Honor,
16 however this was a very simple, one witness case, in
17 - - -

18 JUDGE SMITH: It was simple, but was it - -
19 - but it was - - - it was - - - you have to - - - she
20 has a respectable argument on suppression. Doesn't
21 she? I mean, it's not - - - you will not - - - you
22 will not admit it's a slam-dunk, but you're not going
23 to say she has no argument on the issue.

24 MS. SULLIVAN: No, Your Honor, I'm not
25 going to say that, however, ma - - -

1 JUDGE SMITH: So why didn't the law - - -
2 the trial counsel make the argument?

3 MS. SULLIVAN: Your Honor, when you look at
4 the defense attorney's performance there, many of the
5 factors in which my adversary relies upon to show
6 that the officers did not have reasonable suspicion,
7 were brought out by the defense attorney during its
8 cross - - - during his cross-examination, so - - -

9 JUDGE SMITH: What's the most devastating
10 question he asked on cross?

11 MS. SULLIVAN: I believe, whether or not
12 the officers were responding to any specific activity
13 in the neighborhood or if they had any indicia that
14 this particular individual was committing a crime at
15 that time.

16 JUDGE SMITH: There were - - - there are
17 cases in our court, Russell, Sierra, that seem to
18 help her, that existed then. Shouldn't a - - -
19 shouldn't a competent lawyer at least have made the
20 trial court aware of them?

21 MS. SULLIVAN: Your Honor, I think when the
22 court - - - when the suppression hearing was being
23 held, everyone knew that the item that was supposed
24 to be suppressed was a handgun. And that the purpose
25 of the Mapp hearing was to determine the legality of

1 the police conduct. And with this simple one-witness
2 case, in which there really was not a complicated set
3 of facts - - -

4 JUDGE SMITH: Shouldn't - - - shouldn't - -
5 - doesn't the defense lawyer at some point in some
6 way have to send the message to the judge, Judge, all
7 you've got here is flight plus a grabbing of the
8 waistband plus a high-crime area; it's not enough?

9 MS. SULLIVAN: No, Your Honor, I think when
10 you look at what the burden was - - - it was the
11 People's burden to show that the conduct was legal.
12 And I submit to you that if the defense attorney went
13 into a long and protracted cross-examination to try
14 to find some way of finding that - - -

15 JUDGE SMITH: I just made an oral argument.
16 It didn't sound all that long and protracted. What
17 stopped him from doing that?

18 MS. SULLIVAN: Your Honor, I feel - - - I
19 believe that it may have been a way of - - - a
20 strategy in the sense that, if the defense attorney
21 did not elaborate on, perhaps, the officer's
22 experience or his experience with the drug-prone area
23 - - - he had been a police officer for ten years, and
24 - - -

25 JUDGE SMITH: I'm agreeing - - - I - - - I

1 can see your point that maybe it's a good - - - yeah,
2 sometimes in these cases, it's a good idea not to ask
3 the police officer very many questions because your
4 whole point is - - - the whole strength of your case
5 is how little - - - how little he has said. And you
6 don't want him to say anything more. But shouldn't
7 you, at some point, point out the weaknesses in the
8 prosecution case?

9 MS. SULLIVAN: Your Honor, I think that the
10 defense attorney's inves - - - cross-examination in
11 this case, in which he highlighted the fact that
12 there were no specific reports of criminal activity,
13 as well as nothing specific - - - information that
14 the officer had directed to this specific defendant,
15 I think that those pointed questions was enough to
16 show - - - to at least argue that there was not
17 reasonable suspicion in this case.

18 JUDGE SMITH: Isn't there - - - doesn't
19 this record give you a sense that this suppression
20 hearing - - - everyone is mailing it in? The defense
21 lawyer puts in a motion for the wrong case, then he
22 writes - - - then he does a motion to relieve, saying
23 I'm too busy to do my job, then he - - - then he
24 shows up, and the judge says, well, just stick around
25 for the suppression hearing; I'll get somebody else

1 for trial.

2 The possibility that he might prevail on
3 suppression isn't even mentioned. And the judge - -
4 - and the lawyer says, oh, okay, sure. And he asks -
5 - - I counted - - - fifteen questions. Is this - - -
6 is this the kind of rep - - - is this really the
7 effective assistance of counsel?

8 MS. SULLIVAN: No, it's not in - - - well,
9 it's not ineffective, and I submit to you that - - -

10 CHIEF JUDGE LIPPMAN: Counsel, if this
11 isn't ineffective, what is?

12 MS. SULLIVAN: Well, if the - - - in this
13 case, the not moving for a suppression hearing,
14 necessarily, doesn't make ineffective assistance of
15 counsel. So I think his perform - - - asking for the
16 hearing in the first place - - -

17 JUDGE SMITH: So you're saying a lawyer
18 could have been effective in this case by - - - if
19 he'd - - - if he'd waived the right - - - if he'd
20 abandoned suppression - - - if he never made a
21 suppression motion?

22 MS. SULLIVAN: No, Your Honor, what I am
23 saying is when you look at the defense attorney's
24 representation as a whole, he did provide effective
25 representation, notwithstanding the fact that he did

1 get the facts wrong on the omnibus motion, and in his
2 - - - in his motion for the Mapp hearing.

3 JUDGE SMITH: I mean, he - - - he more than
4 got the facts wrong. He - - - he - - - he put in a
5 motion for the wrong case, didn't he?

6 MS. SULLIVAN: Yes, Your Honor; however, if
7 you look at the - - - if you look at each individual
8 error, if you want to even call it an error, there
9 was no harm, no foul in that case, because he did
10 result - - -

11 CHIEF JUDGE LIPPMAN: Counsel, isn't it
12 along the lines that Judge Smith indicated before?
13 It's almost comical the number of errors and the
14 kinds of errors he's making?

15 MS. SULLIVAN: No, Your Honor, and if I
16 may, when you look - - -

17 CHIEF JUDGE LIPPMAN: No? No - - - why is
18 it not almost comical?

19 MS. SULLIVAN: I think when you're looking
20 at - - - I think what this court is - - - what Your
21 Honor is doing at this point is taking the facts and
22 putting - - - not looking at it in a - - - in a
23 different light, and I think if you look at it from -
24 - - from my perspective, when - - - the defense
25 attorney here did make an error, I admit, about the -

1 - - in the facts being wrong when you look at the
2 hearing. However, when - - -

3 CHIEF JUDGE LIPPMAN: Isn't he either - - -
4 either incompetent - - - totally incompetent - - - or
5 mailing it in? Isn't he?

6 MS. SULLIVAN: No, Your Honor, because when
7 you look at this case, this - - - this defense
8 attorney had - - - he applied for the omnibus motion.
9 At - - - while the omnibus motion was pending, he
10 realized that his - - - his associate had quit.
11 Within two weeks of his associate quitting, he
12 alerted the court that, at that time, he was not
13 going to be able to effectively represent the
14 defendant throughout the duration - - -

15 JUDGE SMITH: The most effective thing he
16 did was move to be relieved.

17 JUDGE RIVERA: Yeah, but wasn't he right?

18 MS. SULLIVAN: No, Your Honor, because at
19 the hearing, he was able to gauge his own
20 performance, and he told the court, I cannot complete
21 this entire trial. And when you read - - - a careful
22 reading of his omnibus - - - of his motion to be
23 relieved, he didn't say because he didn't understand
24 the law or the facts, or because he didn't have a
25 grasp of what was going on in this case.

1 It was merely a scheduling conflict with
2 his immigration practice. And he said, because he
3 had to go to court nearly five days a week on federal
4 immigration matters, he was un - - - he was going to
5 be unable to be fully devoted to the trial. He never
6 said he was unable to do the hearing.

7 JUDGE SMITH: How - - - how thorough - - -
8 how thoroughly do you think he was prepared for the
9 suppression hearing?

10 MS. SULLIVAN: I think he was prepared for
11 the hearing. It was a simple one-witness case.
12 Everyone knew that the item to be suppressed was a
13 handgun. Everybody knew that the standard was
14 reasonable suspicion. And notwithstanding any other
15 - - - any other errors, I submit this was a single
16 error, not arguing the reasonable suspicion at the
17 hearing. But in either event, it would not have
18 changed the outcome of the hearing.

19 JUDGE PIGOTT: Do you think the judge got
20 it right in finding reasonable suspicion and not
21 suppressing the gun?

22 MS. SULLIVAN: Yes, Your Honor, and when
23 you look at the judge's oral decision, immediately
24 after the hearing, he - - - he denies the defendant's
25 suppression motion. And when you look at the facts

1 of this case, this is not a clear-cut or dispositive
2 issue.

3 JUDGE RIVERA: Why not? Why - - - what - -
4 -

5 MS. SULLIVAN: Well, initially, it's a
6 mixed question of law and fact. So you really do
7 have to look specifically at what happened in this
8 case. And when you look at this case - - -

9 JUDGE ABDUS-SALAAM: Well, what more do you
10 have to look at - - -

11 JUDGE SMITH: If it's clear-cut, it's
12 dispositive, isn't it?

13 MS. SULLIVAN: I - - - I didn't hear you.

14 JUDGE SMITH: I'm saying, I see your point
15 about clear-cut. If it's clear-cut, it's
16 dispositive. I mean, there's - - - there's no way
17 this guy gets convicted if the gun's suppressed.

18 MS. SULLIVAN: Correct. This isn't
19 dispositive, but it's not clear-cut, and - - - it's
20 not clear-cut in the sense that when you look at the
21 police conduct under either scenario, whether it's
22 the actual scenario what was borne out by the hearing
23 transcript, or even under the - - - of what happened
24 in error, the police conduct was proper in every
25 juncture.

1 In this case, the defendant's activity:
2 walking at night, in a gang-prone area known for gang
3 activity. This - - - this officer was a ten-year
4 veteran of the police department. A specific - - -
5 specifically assigned to the gang squad.

6 JUDGE RIVERA: But it's a residential
7 neighborhood. People live there, too.

8 MS. SULLIVAN: That is true.

9 JUDGE RIVERA: Not everyone in that
10 environment - - -

11 MS. SULLIVAN: That is correct.

12 JUDGE RIVERA: Okay.

13 MS. SULLIVAN: But that being in a gang
14 area - - -

15 JUDGE ABDUS-SALAAM: But what other - - -
16 what other than that and someone adjusting their
17 waistband did he have? He didn't say he saw a bulge,
18 as was mentioned before, or that he even saw the
19 defendant cup his hand in a way that suggested that
20 he had anything in those - - - in that waistband.

21 MS. SULLIVAN: No, Your Honor, what he did
22 say is he saw repeated adjustments to a waistband.
23 And based on the hearing transcript, you would be
24 able to surmise that this was a - - - indicative of -
25 - - of a gun.

1 JUDGE RIVERA: How - - - how - - - how
2 would you surmise that? From adjusting your
3 waistband several times?

4 MS. SULLIVAN: Well, you would adjust - - -
5 from repeated adjustments of a waistband, coupled
6 with the being in a gang-prone area, coupled with - -
7 -

8 JUDGE RIVERA: We've rejected that the - -
9 - you know, finding someone is involved in criminal
10 activity simply because they live in a neighborhood
11 where there may be some criminal activity.

12 MS. SULLIVAN: Correct, Your Honor,
13 however, at least at that point, it gave the officer
14 a credible objective reason to approach the
15 defendant, which he did - - -

16 CHIEF JUDGE LIPPMAN: Okay, counsel.

17 MS. SULLIVAN: Okay, thank you, Your Honor.

18 CHIEF JUDGE LIPPMAN: Thanks, counsel.
19 Appreciate it.

20 Counsel, rebuttal?

21 MS. GLASHAUSSER: Your Honors, just briefly
22 to address the clear-cut nature of the reasonable
23 suspicion argument. As my adversary just mentioned,
24 the officers had, maybe, an objective, credible
25 reason to talk to Mr. Clermont. But what they didn't

1 have was any indication that Mr. Clermont, in
2 particular, was involved in criminal activity.

3 JUDGE SMITH: But then he - - - but then he
4 - - - wait a minute. I think - - - I don't think
5 she'd argue with you that if he hadn't run away,
6 there would never had been reasonable suspicion, but
7 he did run.

8 MS. GLASHAUSSER: Right, but - - -

9 JUDGE SMITH: Why - - - why - - - why isn't
10 - - - yeah. I mean, you're allowed to - - - most
11 people don't turn around and run like mad when they
12 see a police officer coming. Isn't he allowed to
13 take that - - - isn't he allowed to get a little
14 suspicious, maybe this guy did something bad?

15 MS. GLASHAUSSER: In New York State, you
16 have a right not to talk to police officers. You
17 have a right to be left alone.

18 JUDGE SMITH: Yeah, but to be - - - but
19 flight - - - but flight doesn't have to be totally
20 disregarded?

21 MS. GLASHAUSSER: No, it doesn't have to be
22 totally disregarded.

23 JUDGE PIGOTT: Well, if you let him - - -
24 if you let him fly, that's okay. But then when he -
25 - - when he throws a gun away, can you do something?

1 MS. GLASHAUSSER: Your Honor, you can't
2 chase Mr. Clermont without a particularized reason
3 that he is committing - - -

4 JUDGE PIGOTT: So he should have - - - as
5 long as he was running, they should have just
6 stopped, and then the issue then becomes whether he
7 dropped a gun because they were chasing them, or
8 because he just dropped the gun.

9 MS. GLASHAUSSER: Well, the People don't
10 even argue that he didn't discard the gun because the
11 police were chasing him. That there - - - the People
12 don't even raise that argument.

13 JUDGE PIGOTT: Well, the majority found
14 that. They said, "While the defendant was being
15 chased by detectives, he removed a firearm from his
16 right side in his waistband, and threw it on the
17 ground."

18 MS. GLASHAUSSER: Right, as he was being
19 chased by the police officers. But the point here is
20 that they need some indication of criminal activity
21 before flight is enough to have reasonable suspicion.
22 And this is settled case law, to find that this - - -

23 JUDGE SMITH: You're - - - you're not
24 saying that they - - - that they were wrong to grab
25 him after he threw the gun away. You're saying they

1 could not - - - they could not chase him before they
2 threw the gun away.

3 MS. GLASHAUSSER: Exactly, Your Honor. And
4 to find otherwise would be to lower the minimum level
5 of reasonable suspicion, which this court has not
6 done.

7 CHIEF JUDGE LIPPMAN: Okay, counsel.

8 MS. GLASHAUSSER: Thank you.

9 CHIEF JUDGE LIPPMAN: Thanks. Thank you
10 both. Appreciate it.

11 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Jocelyn Clermont, No. 166 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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