APL-2022-00116

To be argued by Martin P. McCarthy, II
Time requested: 10 minutes

State of New York
Court of Appeals

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-vs-

TYQUAN JOHNSON,

Defendant-Appellant.

BRIEF FOR RESPONDENT
Ind. No.: 2015-0800

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
QUESTION PRESENTED	1
PRELIMINARY STATEMENT	2
STATEMENT OF FACTS	4
ARGUMENT	10
POINT I	10

The Appellate Division's decision, affirming the lower court's determination that the police officer's initial approach and subsequent stop of the Defendant was proper under *De Bour,* was amply supported by the record, and, as a mixed question of law and fact, is beyond further review

CONCLUSION AND WORD COUNT CERTIFICATION	19

TABLE OF AUTHORITIES

FEDERAL CASES

Minnesota v Dickerson, 508 US 366 (1993) 14

Terry v Ohio, 392 US 1 (1968) 14

STATE CASES

People v Barksdale, 26 NY3d 139 (2015) 10

People v Batista, 88 NY2d 650 (1996) 14, 15, 18

People v Benjamin, 51 NY2d 267 (1980) 15, 17

People v Blandford, 37 NY3d 1062 (2021), *cert denied sub nom. Blandford v New York*, __US__, 212 L Ed 2d 333 (2022) 11, 15

People v Bora, 83 NY2d 531 (1994) 17

People v Britt, 34 NY3d 607 (2019) 10

People v Carey, 163 AD3d 1289 (3d Dept 2018) 15

People v Chestnut, 51 NY2d 14 (1980) 12

People v De Bour, 40 NY2d 210 ..... *Passim*

People v Garcia, 20 NY3d 317 (2012) 16

People v Ginty, 204 AD3d 1487 (4th Dept 2022) 15

People v Grimes, 196 AD3d 1088 (4th Dept 2021), *lv denied* 37 NY3d 1059 (2021) 15

People v Harrison, 57 NY2d 470 (1982) 11, 17

People v Hollman, 79 NY2d 181 (1992) 13, 16, 17

People v Howard, 22 NY3d 388 (2013) 10

People v Howard, 50 NY2d 583 (1980) 16

People v Johnson, 203 AD3d 1649 (4th Dept 2022), *lv denied* 38 NY3d 1071 (2022) 2

People v Johnson, 203 AD3d 1651 (4th Dept 2022), *lv denied* 38 NY3d 1071 (2022) 2

People v Johnson, 38 NY3d 1151 (2022) 3

People v Moore, 6 NY3d 496 (2006) 12

People v Perez, 31 NY3d 964 (2018) 10

People v Reyes, 83 NY2d 945 (1994) 18

People v Rivera, 14 NY2d 441 (1964) 15

People v Sobotker, 43 NY2d 559 (1978) 14

People v Wheeler, 2 NY3d 370 (2004) 11, 12

People v Wideman, 192 AD3d 1384 (3d Dept 2021), *affd* 38 NY3d 1067 (2022) 15, 18

People v Williams, 17 NY3d 834 (2011) 11

STATUTES

PL § 220.16 2

PL § 221.05 2

MISCELLANEOUS

NY Const Art. I, § 12 12

US Const Amend IV 12

QUESTION PRESENTED

Question I:	Whether during a street encounter with the Defendant, the police conduct in attempting to engage the Defendant was justified at its inception and at every subsequent stage?
Answer of the Supreme Court:	After a hearing, the Supreme Court denied the Defendant's suppression motion, holding that the police conduct was proper under *De Bour*.
Answer of the Appellate Division:	In affirming the Defendant's conviction, the Appellate Division, Fourth Department held that the evidence at the suppression hearing established that the action taken by the police officer was justified in its inception and at every subsequent stage of the encounter.

PRELIMINARY STATEMENT

Defendant-Appellant (hereinafter, "Defendant") Tyquan Johnson was convicted on February 28, 2017 after a bench trial verdict of two counts of Criminal Possession of a Controlled Substance in the Third Degree (PL § 220.16 [1]), and one count of Unlawful Possession of Marijuana (PL § 221.05) (Appellant's Appendix [hereinafter "A"] 146-147).

At the time of sentencing, the Defendant stood previously convicted of four non-transactional residential burglaries under indictments 2015-0638 and 2015-0781 in Monroe County Court, and had been sentenced to an aggregate determinate sentence of 7 years incarceration with 5 years of post-release supervision on indictment 2015-0638, a consecutive determinate sentence of 3.5 years incarceration with 5 years of post-release supervision on indictment 2015-0781. Those convictions were affirmed on appeal and this Court denied leave to appeal on both convictions (*see People v Johnson*, 203 AD3d 1649 [4th Dept 2022], *lv denied*, 38 NY3d 1071 [2022]; *People v Johnson*, 203 AD3d 1651 [4th Dept 2022], *lv denied*, 38 NY3d 1071 [2022]).

For the instant matter, Supreme Court, Monroe County (Winslow, J.) sentenced defendant to concurrent determinate sentences of 5 years incarceration with two years of post-release supervision on each of his convictions for Criminal

Possession of a Controlled Substance in the Third Degree and directed that this sentence was to run consecutively to the sentences imposed on the burglary indictments, with an aggregate determinate sentence of 15.5 years determinate with 5 years of post-release supervision (A 9-10, 155-156). There has been no stay of sentence, and the Defendant is currently incarcerated (http://nysdoccslookup.doccs.ny.gov/[DIN 17B1104]). A Judge of this Court granted leave to appeal (*People v Johnson*, 38 NY3d 1151 [2022] [Rowan D. Wilson, J.]).

STATEMENT OF FACTS

The Defendant moves to suppress tangible evidence seized as a result of a street encounter.

The Monroe County Grand Jury voted an indictment charging the Defendant with two counts of Criminal Possession of a Controlled Substance in the Third Degree and one count of Unlawful Possession of Marijuana (A 7-8). The Defendant moved to suppress tangible evidence seized as a result of a street encounter (A 11-13, 30), the People opposed the motion (A 40-41), and Supreme Court granted a hearing on the issue and took testimony (A 44-45).

The evidence at the hearing.

Rochester Police Department Officer Bradley Pike ("Officer Pike"), a police officer with approximately nine years experience (A 59), testified that on April 15, 2015 at approximately 5:10 pm he was on a proactive "violence suppression" detail around Harvest Street due to increased violence in the area (A 61, 70-71). As the Officer Pike's patrol car was traveling on Harvest Street, he observed a black Ford Explorer parked on the side of the street (A 62).

When his cruiser came within 50 feet of the Explorer, Officer Pike observed the sole occupant in the driver's seat unexpectedly jump from the driver's seat to

the passenger's seat (A 62-63, 71-72). Officer Pike found this action unusual, as it was "not common for someone to jump from the driver's seat to the passenger's seat" (A 63). He positioned his car so the overhead lights illuminated the Explorer so he could get a better view of what was happening within the car (A 63). As the cruiser neared, Office Pike observed the Defendant, the sole occupant of the vehicle, now fully in the passenger seat, reach back across the car towards the driver's seat, returned to the passenger's seat, and immediately began to exit the car (A 63-64). Based upon his training and experience, Officer Pike interpreted the movement as a potential attempt to stash a weapon on the driver's side of the car, or retrieve a weapon from the driver' seat (A 64). Officer Pike began exiting his cruiser at the same time defendant exited the Explorer (A 64).

As he was exiting his cruiser, Officer Pike observed that the Defendant's "pants were undone and he was trying to button or buckle his belt" (A 64-65). This unusual conduct further raised alarms with Officer Pike, as he was aware from his training and experience that the belt line was "a common place that some suspects hide weapons, and the belt is used to secure them to your body"(A 65).

Officer Pike "asked him to hold up a minute and [Defendant] didn't react, he just kept walking away from [him]" (A 65-66, 74). Officer Pike then walked beside the Defendant and observed that the Defendant was breathing rapidly as if

he was stressed and nervous (A 66, 76). The officer asked the Defendant what his name was, and why he appeared nervous and the Defendant replied that he was not nervous (A 66). Officer Pike asked if the Defendant had any weapons, and Defendant replied, "nothing" (A 66, 70, 75).

Officer Pike conducted a pat frisk of the Defendant "to make sure he wasn't concealing any sort of weapon that could potentially hurt [him]" (A 66-67, 77). During the frisk, the officer felt an object in defendant's pant pocket that was consistent with a bag of drugs (A 67). The Officer did not reach into the pocket and, instead, he asked the Defendant what the object in his pocket was, to which the Defendant replied, "nothing" (A 67, 77). Without prompting or instruction from the officer, the Defendant voluntarily began to remove items from the pocket and while doing so Defendant discarded a quantity of marijuana to the ground along with several dollar bills (A 67-68).

As the Defendant was discarding the items from his pocket, the officer was able to observe a clear bag of what he suspected to be heroin protruding from the Defendant's clenched fist (A 68-69). The officer secured this bag and confirmed it contained fifteen bags of heroin and one bag of crack cocaine (A 69).

Supreme Court denies the motion and the Appellate Division affirms that denial.

After taking testimony, the hearing court evaluated the encounter under the *DeBour* framework articulated by this Court (*People v De Bour*, 40 NY2d 210 [1976]). Crediting Officer Pike's testimony, the hearing court held that the People sustained its burden of establishing the legality of the police conduct (A 50). The hearing court held that Officer Pike's observation of the Defendant moving back and forth between the driver and passenger seats of the parked car, alighting from the vehicle, and upon seeing Officer Pike, began walking away supported Officer Pike's Level 1 inquiry, as he had "an objective credible reasons not necessarily indicative of criminality to approach Defendant and request information" (A 50).

In approaching the Defendant, Officer Pike made further observations, including "his unbuckled belt and efforts to secure his pants as he walked away from the officer in a high crime neighborhood, justifiably heightened the officer's suspicion and supported" a more intrusive Level 2 common-law inquiry (A 50-51). While Officer Pike was engaging in these efforts, the hearing court held that the officer did not forcibly stop the Defendant, and though Officer Pike told the Defendant to "hold-up a minute," Officer Pike was just attempting to engage the Defendant in conversation and the Defendant "remained free to walk away and go

about his business" (A 51).

As Officer Pike approached, he observed the Defendant's chest "moving up and down rapidly, as if he was engaged in some sort of strenuous activity that would cause one's heart to race," and as Officer Pike now recognized the Defendant from previous encounters, it was apparent to him that the Defendant appeared nervous (A 51). The hearing court found that "these additional observations, coupled with the officer's knowledge that armed individuals commonly use belts to secure weapons in the waistbands of their pants," taken together with the Defendant's "seemingly inconsistent responses to the officer's inquiry, reasonably elevated the officer's level of suspicion," as well as increased the potential for threat to Officer Pike (A 51-52).

In conducting the search, Officer Pike felt what he believed to be a bag of drugs in the Defendant's pants, but Officer Pike never opened nor emptied the Defendant's pocket and, "he never directed the Defendant to do so" (A 52). The Defendant himself emptied his pocket "onto the ground on his own volition" and it was at this point, Officer Pike observed what appeared to be marijuana and heroin (A 52).

In affirming the hearing court's denial of the Defendant's suppression motion, the Appellate Division, Fourth Department held that "the evidence at the

suppression hearing established that the action taken by the police officer was justified in its inception and at every subsequent stage of the encounter" (A 4). The Defendant now pursues this argument on appeal.

ARGUMENT

Point I: The Appellate Division's decision, affirming the lower court's determination that the police officer's initial approach and subsequent stop of the Defendant was proper under *De Bour*, was amply supported by the record, and, as a mixed question of law and fact, is beyond further review

On appeal, the Defendant argues that Officer Pike did not have an objective credible reason to approach the Defendant and make a Level 1 inquiry, or, in the alternative, that Officer Pike did not have a founded suspicion that criminal activity was afoot to justify a Level 2 inquiry, or, in the alternative, that Officer Pike engaged in a Level 3 seizure in conducting a pat frisk.

A. The Standard of Review

When the issue of appeal is whether the police conduct conformed to *De Bour*, such an issue presents a mixed question of law and fact, which is not reviewable in this Court when there is record support for the determination made by the lower courts (*People v Perez*, 31 NY3d 964, 966 [2018] *citing People v Barksdale*, 26 NY3d 139, 143 [2015]; *see also People v Britt*, 34 NY3d 607, 617 [2019]). As this Court explained, the Court applies this rule because "questions of the reasonableness of conduct can rarely be resolved as a matter of law even when the facts are not in dispute" (*People v Howard*, 22 NY3d 388, 403 [2013] *quoting*

People v Harrison, 57 NY2d 470, 478 [1982]). This rule applies "where the facts are disputed, where credibility is at issue or *where reasonable minds may differ as to the inferences to be drawn*" (*People v Blandford*, 37 NY3d 1062, 1063 [2021], *cert denied sub nom. Blandford v New York*, ___ US ___, 212 L Ed 2d 333 [2022] (emphasis in original)). Thus, unless there is no possible view of the evidence that would support the determination of the hearing courts, this Court is "bound by the suppression court's findings" (*People v Wheeler*, 2 NY3d 370, 373 [2004]), even when "different conclusions may not have been unreasonable" (*People v Williams*, 17 NY3d 834, 836 [2011]).

Here, the Appellate Division affirmed the hearing court's decision to deny suppression and held that the police encounter was lawful from its inception and at every stage thereafter. In so doing, the Appellate Division affirmed the hearing court's determinations that: (1) Officer Pike engaged in a permissible Level 1 inquiry; (2) that the Defendant's lack of response and Officer Pike's observations of the Defendant justified a Level 2 inquiry; (3) that based upon Officer Pike's training and experience as well as his familiarity with the Defendant, the Defendant's appearance of being nervous, the Defendant's actions while first inside the vehicle and his repeated attention to his pants, and that he was in a high violent crime area, Officer Pike was permitted to engage in a pat frisk for officer

safety; and (4) the pat-frisk was not followed by a full search, and the contraband possessed by the Defendant was discarded by him.

B. The freedom against *unreasonable* searches and seizures, and the law of street encounters

Both the United States and the New York State Constitutions protect citizens against unreasonable searches and seizures (US Const Amend IV; NY Const Art. I, § 12). Thus, when assessing the legality of a street encounter, the ultimate touchstone is the "reasonableness" of police conduct (*People v Wheeler*, 2 NY3d at 374). Indeed, "police-citizen encounters are dynamic situations," and "unrealistic restrictions on the authority to approach individuals would hamper the police in the performance of their other vital tasks" (*People v De Bour*, 40 NY2d at 218, 225). Therefore, the officer's actions should be "considered as a whole, remembering that reasonableness is the key principle" (*People v Chestnut*, 51 NY2d 14, 23 [1980]).

To guide courts in assessing the reasonableness of police conduct, this Court has defined four stages of police-citizen interaction (*People v Moore*, 6 NY3d 496, 498 [2006]). Referred to as the *De Bour* framework, there are 4 escalating levels of police-citizen encounters (*People v De Bour*, 40 NY2d at 223).

At the first level of *De Bour*, a police officer may approach a citizen to request information if there is "some objective credible reason for that interference not necessarily indicative of criminality" (*People v De Bour*, 40 NY2d at 223). The Court has defined this level of intrusion as limited to "basic, nonthreatening questions regarding, for instance, identity, address or destination" (*People v Hollman*, 79 NY2d 181, 185 [1992]).

At the second level of *De Bour*, an officer has a common-law right to inquire when there is a founded suspicion that criminality is afoot (*People v De Bour*, 40 NY2d at 223). Under this level, police are permitted to interfere with a citizen's liberty "to the extent necessary to gain explanatory information, but short of a forcible seizure" (*People v De Bour*, 40 NY2d at 223; *see also People v Hollman*, 79 NY2d at 18). To that end, the police can issue some verbal commands and ask questions that may be extended and accusatory in tone so that the individual stopped may believe that he or she is suspected of some wrongdoing (*People v De Bour*, 40 NY2d at 223).

Under the third level of *De Bour*, an officer can forcibly stop or detain a person when the officer has a reasonable suspicion that the person has committed, or is about to commit, a crime (*People v De Bour*, 40 NY2d at 223). Reasonable suspicion is "that quantum of knowledge sufficient to induce an

ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand" (*People v De Bour*, 40 NY2d at 223; *see also People v Sobotker*, 43 NY2d 559 [1978]). Finally, at the fourth level, an officer may arrest a person once the officer acquires probable cause (*People v De Bour*, 40 NY2d at 223).

When it comes to the reasonableness of a pat frisk, the Supreme Court held that a frisk is permissible when "an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to other" (*Terry v Ohio*, 392 US 1, 24 [1968]). The Supreme Court explained that the purpose "of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence...." (*Minnesota v Dickerson*, 508 US 366, 373 [1993]).

In New York, if during a lawful inquiry an officer entertains an independent and reasonable suspicion that the suspect is armed and may pose a danger to the officer or the public, the officer may conduct a frisk of the suspect (*People v Batista*, 88 NY2d 650, 654 [1996]). While generally a frisk accompanies a Level 3 stop which would require reasonable suspicion of criminality as a predicate, courts have routinely upheld a *Terry* frisk conducted

during level two common-law inquiries where the police either observe a "bulge" on the suspect or otherwise develop reason to believe he may be armed (*see e.g. People v Wideman*, 192 AD3d 1384, 1385 [3d Dept 2021], *affd*, 38 NY3d 1067 [2022]; *People v Ginty*, 204 AD3d 1487, 1489 [4th Dept 2022]; *People v Grimes*, 196 AD3d 1088, 1089 [4th Dept 2021], *lv denied*, 37 NY3d 1059 [2021]; *People v Carey*, 163 AD3d 1289, 1291 [3d Dept 2018]). The Court has explained the justification for a frisk on the grounds that a police officer does not have "to await the glint of steel before he can act to preserve his safety" (*People v Benjamin*, 51 NY2d 267, 271 [1980]) and has explained the underlying rationale for why a police officer may engage in a protective frisk during a street encounter should he suspect the person being armed:

> If we recognize the authority of the police to stop a person and inquire concerning unusual street events we are required to recognize the hazards involved in this kind of public duty. The answer to the question propounded by the policeman may be a bullet; in any case the exposure to danger could be very great. We think the frisk is a reasonable and constitutionally permissible precaution to minimize that danger (*People v Batista*, 88 NY2d at 654 *quoting People v Rivera*, 14 NY2d 441, 446 [1964]).

C. The Appellate Division's holding that the police encounter was lawful is supported by the record

Here, the encounter began as a Level 1 inquiry as the Defendant had been

seating in a parked vehicle, jumped around the inside of the vehicle, reached into the back seat to either retrieve or stash something, and eventually exited the vehicle.

During a Level 1 encounter an officer can make, a request for information, which is a "general, nonthreatening encounter in which an individual is approached for an articulable reason and asked briefly about his or her identity, destination, or reason for being in the area" (*People v Hollman*, 79 NY2d at 191; *see also People v Garcia*, 20 NY3d 317, 322 [2012]). A police officer may also engage in observations, provided they do so unobstrusively and do not limit the subject's freedom of movement (*People v Howard*, 50 NY2d 583, 592 [1980]). As long as the officer has an "objective credible reason" for making a Level 1 inquiry, he "may approach a private citizen on the street for the purpose of requesting information," even "in the absence of any concrete indication of criminality" (*People v Hollman*, 79 NY2d at 184, 189; *People v De Bour*, 40 NY2d at 213). Put another way, the "basis for this inquiry need not rest on any indication of criminal activity on the part of the person of whom the inquiry is made but there must be some articulable reason sufficient to justify the police action which was undertaken" (*People v De Bour*, 40 NY2d at 213). So long as they "do not act on a whim or caprice," police officers have "fairly broad

authority" to request information "in their law enforcement capacity" (*People v Hollman*, 79 NY2d at 190, *citing People v De Bour*, 40 NY2d at 219).

Officer Pike had an articulable basis for wishing to engage the Defendant, after observing him and his unusual activities inside of the motor vehicle and this Court has repeatedly held that a police officer may approach when he sees something unusual (*see e.g.* , *People v Hollman*, 79 NY2d at 187, 194 (defendant's placement of bag at distance from himself); *People v Harrison*, 57 NY2d at 475 (dirty condition of rental car); *People v De Bour*, 40 NY2d at 220 (defendant's crossing of street upon sighting of officers]).

Once Officer Pike observed the Defendant step from the vehicle in a state of undress, with his pants unbuttoned, his belt unbuckled, and the Defendant fidgeting with his waistband, which, as this Court has observed that it "may almost be considered common knowledge, that a handgun is often carried in the waistband" (*People v Benjamin*, 51 NY2d at 271). These new observations coupled with the observations Officer Pike made of the Defendant inside of the vehicle escalated Officer Pike's suspicions to reasonably believe that criminality was afoot. When Officer Pike told the Defendant to "hold up," the hearing court properly held that this did not effectuate a seizure or escalate the encounter to a Level 3 encounter (*People v Bora*, 83 NY2d 531, 534 [1994] (telling a defendant

to "stop" did not escalate a Level 2 encounter to a Level 3 encounter).

As Officer Pike caught up to the Defendant, he recognized him from other encounters and using those encounters as a baseline, observed that the Defendant was nervous, with his chest rising and falling as if he had been engaged in some strenuous activity. When Officer Pike asked the Defendant why he appeared nervous, the Defendant responded he was not nervous. This encounter, coupled with the observations Officer Pike previously made, caused Officer Pike to fear for his safety and he conducted a pat frisk (*People v Wideman*, 38 NY3d at 1068, *People v Batista*, 88 NY2d at 654). After conducting the pat frisk, Officer Pike did not then attempt a full search of the Defendant and, it is critical to note, the contraband initially seized occurred as a result of the Defendant emptying his pockets on his own volition. When he did so, Officer Pike observed bags of marijuana that the Defendant threw to the ground. Thus, the hearing court properly found that the Defendant's relinquishment of the marijuana did not occur as a result of the Defendant's "submission to police authority" and that conclusion is supported by the record (*People v Reyes*, 83 NY2d 945, 946 [1994]). Having now observed the commission of a crime and the observation of what appeared to be heroin in the Defendant's closed hand, Officer Pike was justified in arresting the Defendant and seizing the crack and heroin.

CONCLUSION

The Order of the Appellate Division, Fourth Department should be affirmed.

Dated: December 9, 2022

Respectfully submitted,

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Pursuant to 22 NYCRR 5001 (j) and 500.13 (c) (1), I, Martin P. McCarthy, II, by way of my signature above, certify that the word-processing system's word count used to prepare this brief indicated that 3,694 words were used in the body of this brief. The brief is printed in Times New Roman typeface. The type size is 14 points in the text.

STATE OF NEW YORK COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,

-vs-

TYQUAN JOHNSON,

Defendant.

AFFIDAVIT
OF SERVICE
BY MAIL

STATE OF NEW YORK)
COUNTY OF MONROE) SS:
CITY OF ROCHESTER)

EMMA F. STRATTON LAWS, being duly sworn, deposes and says that deponent is not a party to this action, is over the age of eighteen (18) years and resides at Rochester, New York.

That on the 12th day of December, 2022 deponent served three (3) copies of the brief for Respondent upon Paul B. Watkins, Esq., attorney for defendant in this action, at 115 N. Main Street, Fairport, New York 14450, by depositing a true copy of the same, enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Emma F. Stratton Laws
EMMA F. STRATTON LAWS

Sworn to before me this
12th day of December, 2022

Denise M. Capron
NOTARY PUBLIC

My Commission Expires 11/16/24

DENISE M. CAPPON
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01CA8411312
STATE OF NEW YORK