To Be Argued By: Paul B. Watkins, Esq.
Time Requested: 25 Minutes

COURT OF APPEALS OF THE STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK *Respondent* v. TYQUAN JOHNSON *Defendant/Appellant*	Court Of Appeals Docket No. **APL-2022-00116** Appellate Division Docket No. **KA 18-01957** Monroe County Indictment No.**2015-0800**

REPLY BRIEF FOR DEFENDANT/APPELLANT TYQUAN JOHNSON

Date Completed: December 22, 2022

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INTRODUCTION

Defendant/Appellant Tyquan Johnson ("Defendant") filed his Appellant's Brief in this matter and Respondent People of the State of New York ("People") filed a Brief For Respondent ("Respondent's Brief"). Defendant now submits this Reply Brief.

The issue for this is appeal is whether Rochester Police Department Officer Bradley Pike had justification to stop and frisk Defendant under the *People v. De Bour*, 40 N.Y.2d 216 (1976) four level analysis. As shown in Appellant's Brief, Officer Pike's observation of Defendant in the parked Ford Explorer clearly did not provide the justification necessary for the Level One approach, and his observation of Defendant pulling up his pants did not provide the required justification for a Level Two "common law" inquiry. Finally, there was no justification for a Level Three stop, and the subsequent frisk.

The People's Respondent's Brief fails to present reasons for this Court to do anything other than find the evidence Officer Pike seized should have been suppressed, and the indictment dismissed.

POINT ONE
STANDARD OF REVIEW: THE RECORD DOES NOT SUPPORT THE TRIAL COURT'S DETERMINATION

The People first cite cases concerning this Court's standard of review. *Respondent's Brief*, pp.10-11. However, the case on point for Defendant's case is *People v. McIntosh*, 96 N.Y.2d 521 (2001) where this Court considered a *De Bour* issue and found:

> Defendant asserts that police conduct in this case violated the rules regulating police-initiated encounters with civilians as set forth in *People v De Bour* (40 NY2d 210) and *People v Hollman* (79 NY2d 181). At the outset, we note that whether police conduct in any particular case conforms to *De Bour* is a mixed question of law and fact (see, e.g., *People v Battaglia*, 86 NY2d 755, 756; *People v Alvaranga*, 84 NY2d 985, 986). Therefore, our review is limited to whether there is evidence in the record supporting the lower courts' determinations. Here we conclude there is not. *Id*., 524-525.

Likewise, as shown in Appellant's Brief, and below, the Trial Court's determination is not supported by the evidence in the Record. The Trial Court should have granted Defendant's suppression motion and dismissed the indictment

POINT TWO
THE PEOPLE DO NOT ADDRESS THE ISSUE OF WHAT JUSTIFICATION IS REQUIRED FOR A LEVEL ONE INQUIRY OF OCCUPANTS OF A PARKED CAR AND MISSTATE OFFICER PIKE'S TESTIMONY

This case involves the justification required for the police to approach occupants of a parked car for a Level One request for information. As noted in Appellant's Brief, pp.14-15, in *People v. Ocasio*, 85 N.Y.2d 982, 985 (1995) this Court held that the Level One standards apply to a parked car, but did no explicitly state what justification is required.

However, as Defendant noted *(Appellant's Brief*, pp.15-18), there are numerous Appellate Division cases which do set out what is required, i.e. *People v. Laviscount*, 116 A.D.3d 976 (2nd Dept. 2014), *lv. denied* 24 N.Y.2d 962, *People v. Rutledge*, 21 A.D.3d 1125, 1126 (2nd Dept.2005), *lv denied* 6 NY3d 758 (2005), *People v. Stover*, 181 A.D.3d 1061 (3rd Dept.2020) and *People v. King*, 199 A.D.3rd 1454 (4th Dept. 2021). Defendant compared the facts in those case to the facts in Defendant's case, and pointed out how the cases clearly show there was no justification for Officer Pike to approach Defendant for a Level One inquiry.

The People do not attempt to distinguish these cases, or provide any authority concerning a Level One inquiry for occupants of a parked car. Instead, they first cite *People v. Hollman*, 79 N.Y.2d 181 (1992), which involved an

inquiry in a commercial bus (*Id*. at 187), and then *People v. Harrison*, 57 N.Y.2d 470 (1982), which concerned a police observation of a dirty rental car which had stopped *(Id.* at 475). Finally the People reference *People v. De Bour*, 49 N.Y.2d 210 (1976), where the defendant had crossed the street to avoid the police. (*Id*. at 220). *Respondent's Brief*, p.17. These cases simply are not on point for the Level One issue in this case.

It should also be noted that the People misstate the facts in this case for their argument. The People first state that "[h]ere, the encounter began as a Level 1 inquiry as the Defendant had been seating (sic) 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." (emphasis added). *Respondent's Brief*, pp.15-16.

Outside of the characterization that Defendant "jumped around the inside of the vehicle" when Officer Pike's testimony was only that he moved from the driver to the passenger seat, there is nothing in the Record to support the People's statement that Defendant reached into the back seat to stash something. Officer Pike's testimony was:

> Q. Just for clarification, you initially saw the individual moving from the driver seat to the passenger seat?

A. Yes, ma'am.

Q. And then you saw some additional motion back towards the driver seat with a portion of his body?

A. Yes, ma'am.

Q. What portion of his body did you see moving then back towards the drier seat area?

A. His upper torso, mainly his shoulders and head.

Q. And after you saw that motion did you see him move any other respect at that time?

A. He was getting out of the vehicle. (Appendix on Appeal 63:20 to 64:6).

Officer Pike only saw Defendant move his upper torso toward the driver's seat, he never testified that he saw Defendant reach into the back seat to "stash" something.

While the People initially summarized Officer Pike's testimony without the misstatement in their statement of facts (*Respondent's Brief*, p.5), they apparently were relying on the misstatement for the argument part of their Brief, as they stated "Officer Pike had an artibulable basis for wishing to engage the Defendant, after observing him and his *unusual activities* inside the motor vehicle....." (emphasis added), and then cited the cases noted above. *Respondent's Brief*, p.17.

To the extent the People's argument is based on this misstatement, it should not be considered as it relies on matters not in the Record.

In summary, the issue here is the justification that is needed for a police officer to make a Level One inquiry of an occupant in a parked car. Defendant cited the facts and holding in numerous cases that, when applied to the facts of this case, show there was no justification. The People do not attempt to distinguish these cases, and instead, misstate Officer Pike's testimony, and then cite cases that do not consider a Level One inquiry for a parked car.

As set out in Appellant's Brief, pp. 26-27, after Officer Pike stopped and exited his patrol car, and observed Defendant adjust his pants, the case immediately escalated to a Level Two, and then a Level Three case, and Officer Pike did not make the Level One inquiry. However, as Officer Pike did not have justification for a Level One inquiry, he should not have stopped the patrol car to approach Defendant, and everything which occurred after that would not have happened. Because there was no justification for Officer Pike to stop for a Level One inquiry, the entire indictment should have been dismissed.

POINT THREE
THERE WAS NO JUSTIFICATION FOR THE LEVEL TWO INQUIRY

As argued in Appellant's Brief, pp.24-26, this case became a Level Two common law inquiry, which required a founded suspicion that criminal activity was taking place, once Officer Pike observed Defendant adjusting his pants, followed Defendant and asked him if he had a gun. The People do not dispute this was a Level Two inquiry, but argue that under *People v. Benjamin*, 51 N.Y.2d 267 (1980), Defendant's adjustment of his pants, along with Officer Pike's observation of Defendant in the Ford Explorer, supplied the required justification. *Respondent's Brief*, p.17.

As below, *People v. Benjamin* is not on point for the facts of this case. However, more importantly, the People nowhere address the undisputed fact that Defendant did not have a gun in his possession, which meant he was not adjusting his pants to hide or carry one. The absence of a gun also meant there was no bulge or other signs of a gun that could have justified Officer Pike's actions.

As the People are also arguing that Officer Pike's observation of Defendant in the Ford Explorer justified the Level Two inquiry, they are again apparently relying on the misstatement that Officer Pike observed Defendant reach into the back seat to "stash" or retrieve something to support that argument.

As to *People v. Benjamin*, the officer involved had received a radio call advising him that there were men with guns at a specified street location. When the officer arrived at the scene, he saw approximately 30 people. As the officer got within ten feet of the crowd, he saw Defendant, who was standing on the sidewalk, step backwards while simultaneously reaching beneath his jacket with both hands to the rear of his waistband. The officer then did a pat down search which produced a loaded weapon. *Id*. at 269.

This Court found

> It is equally apparent that law-abiding persons do not normally step back while reaching to the rear of the waistband, with both hands, to where such a weapon might be carried. Although such action may be consistent with innocuous or innocent behavior, it would be unrealistic to require Officer Loran, *who had been told that gunmen might be present*, to assume the risk that the defendant's conduct was in fact innocuous or innocent. (emphasis added). *Id.* at 271,

and then concluded "[c]onsidering the *totality of the circumstances, including the radio call* and the information acquired by observation at the scene, there was an ample measure of reasonable suspicion necessary to justify the limited intrusion which produced the loaded revolver." (emphasis added) *Id*. at 271.

Here, Officer Pike had not received a radio call, or any information that Defendant may have been in possession of a gun. The facts of *People v. Benjamin* are readily distinguishable from the facts in this case.

As noted in Appellant's Brief, pp.28-29, in *People v. Sierra*, 83 N.Y.2d 928, 930 (1994), this Court held that a defendant grabbing at his waistband, even when fleeing from a stopped cab, did not provide the police with information regarding criminal activity. As also noted, in *People v. Riddick*, 70 A.D.3d 1421, 1422-1423 (4th Dept.2010), the Fourth Department cited *People v. Sierra*, applied it to facts which are exactly on point for Defendant's case, and found the police intrusion was not justified.

Even if Defendant was in possession of a gun, his adjustment of his pants after he got out of the Ford Explorer did not provide Officer Pike with the required founded suspicion that criminal activity was taking place, which was required to justify the Level Two common law inquiry. The undisputed fact that Defendant did not have a gun only serves to reinforce this argument.

POINT FOUR
OFFICER PIKE DID NOT HAVE JUSTIFICATION FOR THE LEVEL THREE STOP AND FRISK, AND DEFENDANT DID NOT VOLUNTARILY ABANDON THE DRUGS

As Defendant argued at pp. 25-27 of the Appellant's Brief, this case became a Level Three stop once Officer Pike caught up with Defendant, and stepped in front of him to perform the frisk. The People do not dispute that this was a Level Three stop, but argue the frisk was justified. *Respondent's Brief*, p.18. However,

as below the facts of this case simply do not justify Officer Pike's actions.

The People then contend that Defendant's taking items out of his pocket support the hearing court's finding that Office Pike's seizure of the drugs was not the result of "submission to police authority". However, the Trial Court never found this, and that argument is unpreserved. In any case, the facts do not support this contention.

A. Officer Pike Did Not Have The Required Justification For the Level Three Stop

Initially, it should be noted that the People's argument is only that Officer Pike's observation that Defendant appeared to be nervous, Defendant's denial that he was and Officer Pike's previous observations justified a *pat frisk*, citing *People v. Wideman*, 38 N.Y.3d 1062 (2022) and *People v. Batista*, 88 N.Y.2d 650 (1996). *Respondent's Brief,* p.18.

However, there are two separate issues involved with Officer Pike's actions. The first is whether he had justification to make the Level Three stop, and the second is once he did the stop, whether he had justification to do the frisk. *People v. Wideman* and *People v. Batista* concern only the frisk part of the encounter, and as below, are not on point for the facts of this case. While the People did cite *People v. De Bour*, 40 N.Y.2d at 223 when noting that Officer Pike had to have a

reasonable suspicion that Defendant had committed, or was about to commit a crime for a Level Three stop (*Respondent's Brief,* p.13), they nowhere attempt to distinguish the authority in Appellant's Brief, pp.33-36 that the facts in this case do not provide the necessary justification for Level Three stop.

As noted at Appellant's Brief, p.33, the Trial Court found that Officer Pike's observation that Defendant appeared nervous, combined with his knowledge that armed individuals commonly put guns in their waistband and Defendant's seemingly inconsistent statements, justified the Level Three stop. (Also see Appendix 51).

As to Defendant's adjustment of his pants justifying the Level Three stop, Defendant cited *People v. Riddick, supra*, 70 A.D. 3d at 1422-1423, *lv. denied* 14 N.Y.3d 844, *People v. Williams*, 191 A.D.3d 1495, 1498 (4th Dept.2021) and *In Re Jaquan M.*, 97 A.D.3d 403, 406-407 (1st Dept.2012), *appeal dismissed* 19 N.Y.3d 1041, all of which when applied to the facts in this case, show that it did not. *Appellant's Brief*, pp.34-35.

As to his alleged nervousness, Defendant cited cases, including *People v. Hollman,* 79 N.Y.2d 181, 192 (1992), which hold that a defendant's nervousness is not sufficient. Also see *People v. Freeman*, 144 A.D.3d 1650, 1651 (4th Dept.2016), "... and we conclude that defendant's nervousness upon being

confronted by the police did not give rise to a founded suspicion that criminal activity was afoot (see *Garcia*, 20 NY3d at 324; *Hightower*, 136 AD3d at 1397; see generally *Dealmeida*, 124 AD3d at 1407)."

As to Defendant's alleged inconsistent statements, the only statements Defendant made to Officer Pike were that he did not have a weapon (Appendix 66 and 70), and that he was not nervous. (Appendix 66). There were no discrepancies in these statements. Initially, it is undisputed that Defendant did not have a weapon, which was what he told Officer Pike. As to denying he was nervous, Office Pike's observation that Defendant was nervous was completely subjective, and Defendant's statement that he was not, was just as likely to be correct.

In any case, even if Defendant's statements were inconsistent, as this Court held "[t]he two different reasons given by defendant for his presence in the parking area, although at variance, along with defendant's nervousness and other inconsistencies in his statements, provided no indication of criminality on his part which would have justified further detention." *People v. Milaski*, 62 N.Y.2d 147, 156 (1984).

The Fourth Department considered the inconsistent statement/nervousness issue in *People v. Dealmeida*, 124 A.D.3d 1405 (4th Dept.2015). There, the officer had "....observed that defendant was nervous, and defendant gave responses to

questions concerning where he was coming from and where he was going that did not make sense considering the direction in which he was traveling." *Id*. at 1407. However, the Court concluded that "Defendant's nervousness and discrepancies in describing where he was coming from and going are not enough to give rise to a reasonable suspicion that criminal activity is afoot." *Id.* at 1407.

A "reasonable suspicion that criminal activity is afoot" is the justification needed for a Level Two inquiry. If a defendant's nervousness and discrepancies do not meet the Level Two standard, then they certainly do not meet the more stringent Level Three standard that a crime is actually taking place.

Defendant's alleged nervousness, and his alleged inconsistent statements, did not provide a reasonable suspicion that Defendant had committed, or would be committing a crime, and Officer Pike's Level Three stop was not justified. The People's Respondent's Brief does not offer a sufficient argument for this Court to find otherwise.

B. Officer Pike Did Not Have The Required Justification To Pat/Frisk Defendant

As argued in Appellant's Brief, pp.36-37, Officer Pike had to have a reasonable basis to suspect that Defendant was armed and a danger to him in order to perform the frisk. Given the fact that Officer Pike did not see an outline of a

gun, or any bulges which could be a gun, as Defendant did not have a gun, it is clear from the cases cited that Officer Pike did not have a reasonable basis to suspect that Defendant was armed and dangerous.

In response, the People first cite *People v. Wideman*, 38 N.Y.3d 1067, 1068 (2022). However, this Court stated only that "[o]n the unique facts of this case, there is record support for the Appellate Division's finding of reasonable suspicion to conduct the pat frisk for officer safety (see generally *People v Batista*, 88 NY2d 650, 654-655 [1996]).*" *Id*. at 1068. "*We have no occasion to consider whether a search for weapons is reasonable when it is solely justified by a missing or endangered person report." *Id.* at 1068 n.

While this Court did not specify the unique facts of the case, they are set out in the Appellate Division decision, *People v. Wideman*, 192 A.D.3d 1384 1386 (3rd Dept.2021), "[t]he pat frisk of defendant was justified as he was the subject of a missing and endangered person report and a parallel narcotics investigation such that the trooper had a reasonable basis to perform a protective pat frisk (see *People v Batista*, 88 NY2d at 653-654; *People v Martin*, 156 AD3d at 958; *People v Issac*, 107 AD3d at 1058; *compare People v Driscoll*, 101 AD3d 1466, 1467 [2012])."

Here, Defendant was not the subject of a missing person's report, and Officer Pike was not performing a parallel investigation of any kind. *People v. Wideman* is not on point for this case.

The second case the People cite, *People v. Batista*, 88 N.Y.2d 650 (1996), is also not on point. There, after a traffic stop of a cab, the police officer involved observed the defendant sitting in the backseat wearing what the office believed was a bulletproof vest. When the officer touched the vest, the defendant threw his hands to his sides and the officer saw what he believed was the bulge of a gun. The officer grabbed defendant's pocket, felt a gun, and then found a loaded weapon. *Id*. at 652-653.

This Court found the frisk was justified as "[h]ere, the frisk was undertaken only after defendant's unusual movement immediately following the valid traffic stop, the defendant's evasive denials about his bulletproof vest and the officer's observation of what his personal experience taught him was a bulletproof vest on a person." *Id*. at 655. None of those factors were present in Defendant's case. *Batista* is not on point.

Office Pike did not have a reasonable suspicion that Defendant was armed and a danger to him. There was no justification for the pat frisk.

C. Officer Pike Obtained The Drugs From Defendant Pursuant To The Unjustified Search

As noted in the Statement of the Case in Appellant's Brief, pp.8-9, during the pat/frisk, Officer Pike felt an object in one of Defendant's pockets that he thought felt like a bag of drugs. When he asked Defendant what he had in his pocket, Defendant said "nothing". However, Defendant began to empty his pocket, and threw down on the ground what Officer Pike thought were two bags of marijuana and some dollar bills. Officer Pike also thought he could see bags of heroin in Defendant's hand, and arrested him.

The People contend that based on this "....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 N.Y.2d 945, 946 (1994)." *Respondent's Brief*, p.18. However, the hearing court made no such determination, and in any case, Officer Pike's seizure of the drugs was the result of an unjustified search.

Initially, what the Trial Court actually stated was:

> Finally, although the officer felt what he believed to be a bag of drugs in Defendant's pants during the frisk, Office Pike neither opened, nor emptied the defendant's pocket and he never directed Defendant to do so (compare *People v. Smith*, 134 A.D.3d 1453 [4th Dept.2015]). Although Defendant said he had "Nothing", he proceeded to empty the contents of his pocket onto the ground on his own volition, at which point Officer Pike observed

> suspected marijuana and heroin, therefore providing probable cause for Defendant's arrest.
>
> Accordingly, Defendant's motion to suppress all evidence obtained as a result of an unlawful seizure is denied. (Appendix 52-53).

The Trial Court never found Defendant's relinquishment of the drugs did not occur as a result of Defendant's submission to police authority. Defendant's suppression motion was denied as the Trial Court found there was probable cause for the arrest. Any argument the People make that the seizure of the drugs was not the result of police activity is unpreserved.

In any case, *People v. Reyes*, 83 N.Y.2d 945 (1994) is not on point. There, the police had approached the defendant for a Level One permissible request for information, as the defendant was observed in a drug prone area walking away from a group of men, and clutching something under his armpit. The officers asked the defendant to stop, and when he did and turned toward the police, a kilogram brick of cocaine fell onto the ground. *Id*. at 946.

This Court held only that:

> In addition, the Appellate Division's determination that defendant's relinquishment of the first kilogram brick of cocaine was not based upon submission to police authority is a mixed question of law and fact that is supported by the record, and, thus, is not subject to our further review (see, *People v Holmes*, 81 NY2d 1056, 1058-1059; *People v Hollman*, 79 NY2d, at 193-194, *supra*). *Id*. at 946.

Initially, the *Reyes* defendant's dropping of the drugs occurred during a Level One inquiry, not a Level Three stop as in Defendant's case. Secondly, this Court did not find that the relinquishment was not based on submission to police authority, only that the issue was not subject to further review.

The case which is on point is *People v. Hightower*, 136 A.D.3d 1396 (4th Dept.2016). There, the police officer had made a Level Two inquiry of the defendant, and the defendant walked away. The case then proceeded to a Level Three seizure when the officer commanded the defendant to stop, defendant continued to walk away, and the office pursued him with a tazer. *Id*. at 1397.

The Court concluded "[f]inally, we conclude that defendant's disposal of the bags containing cocaine during the officer's pursuit was precipitated by the illegality of that pursuit (see *People v Clermont*, 133 AD3d 612, 614 [2015]). Thus, the court erred in refusing to suppress the bags of cocaine." *Id.* at 1397.

Likewise, Defendant had been stopped by Officer Pike for a Level Three inquiry. Officer Pike's seizure of the drugs was a direct result of that unjustified Level Three stop, and the drugs should have been suppressed.

D. Conclusion

Defendant's alleged nervousness and supposedly inconsistent statements did not provide Officer Pike with a reasonable suspicion that Defendant had

committed, or was about to commit a crime to justify a Level Three stop. Defendant did not have a gun in his possession, and there was no sign or bulge of a gun that would justify Officer Pike frisking Defendant once Defendant was stopped. Officer Pike seized the drugs from Defendant pursuant to the unjustified stop and frisk.

CONCLUSION

For the above stated reasons, and the reasons stated in Brief For Defendant/Appellant Tyquan Johnson, Defendant/Appellant Tyquan Johnson respectfully requests that the Order of the Appellate Division, Fourth Department, entered June 10, 2022 be overruled, the Judgment of Conviction and Sentence of the Supreme Court, Monroe County, rendered on April 4, 2017 be vacated, and the indictment dismissed, and for such other and further relief as this Court deems appropriate.

Dated:

_____

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PEOPLE OF THE STATE OF NEW YORK *Respondent* v. TYQUAN JOHNSON *Defendant/Appellant*	**RULE 500.13 (C) PRINTING SPECIFICATION STATEMENT** Court Of Appeals Docket No. **APL-2022-00116** Monroe County Indictment No.**2015-0800** Appellate Division Docket No. **KA 18-01957**

The attached Reply Brief For Defendant/Appellant Tyquan Johnson was prepared on a computer using Word Perfect 2020 program with Times New Roman font, 14 point size, double spaced.

The word count, exclusive of the Table of Contents and Table of Authorities and the Statement of Questions Presented, pursuant to the Word Perfect 2020 word count system, is 4114.

Dated:_____ _____

PAUL B. WATKINS

PEOPLE OF THE STATE OF NEW YORK *Respondent* v. TYQUAN JOHNSON *Defendant/Appellant*	**AFFIRMATION OF SERVICE** Court Of Appeals Docket No. **APL-2022-00116** Monroe County Indictment No.**2015-0800** Appellate Division Docket No. **KA 18-01957**

I, PAUL B. WATKINS, DO AFFIRM UNDER PENALTY OF PERJURY AS FOLLOWS:

1. I am an attorney, licensed to practice in the State Of New York. I am over the age of eighteen years and not a party to the within entitled action. My business address is 115 North Main Street, Fairport, NY 14450. I make this Affirmation pursuant to CPLR Rule § 2106.

2. On December 22, 2022, I served three copies of the following:

REPLY BRIEF FOR DEFENDANT/APPELLANT TYQUAN JOHNSON

on the interested parties to said action,, by placing a true copy thereof enclosed in a sealed envelope addressed as follows. I placed the envelope for collection and processing for mailing following this business' ordinary practice with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States

Postal Service.

Attorney for the People Of The State Of New York
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I declare under penalty of perjury that the foregoing is true and correct.

Dated:_____ _____

PAUL B. WATKINS