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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 22

OSCAR SANDERS,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
January 05, 2016

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Sara Winkeljohn  
Official Court Transcriber

1 JUDGE PIGOTT: We'll proceed with case  
2 number 22, People v. Oscar Sanders.

3 Ms. Sibley, welcome.

4 MS. SIBLEY: Good afternoon. My name is  
5 Shanda Sibley, and I'm here from Appellate Advocates  
6 on behalf of appellant Oscar Sanders. I'd like to  
7 reserve two minutes for rebuttal.

8 JUDGE PIGOTT: Fine.

9 MS. SIBLEY: As a hospital patient being -  
10 - - being treated in an emergency room, appellant  
11 retained a reasonable - - - reasonable expectation of  
12 privacy in the clothing that was being stored by the  
13 hospital for safekeeping on his behalf. Because  
14 appellant had a privacy interest in his clothing, the  
15 full protections of the Fourth Amendment apply to  
16 that clothing, which meant that in order for the  
17 police to search the clothing, they needed to have  
18 consent, a warrant - - -

19 JUDGE RIVERA: Is it a diminished privacy  
20 interest - - -

21 MS. SIBLEY: There's no diminished privacy  
22 interest.

23 JUDGE RIVERA: - - - given that it's in a  
24 plastic bag - - -

25 MS. SIBLEY: Excuse - - -

1 JUDGE RIVERA: - - - outside in the open?

2 MS. SIBLEY: It's - - - it's - - - the  
3 plastic bag wasn't outside in the open, so what the  
4 record shows is that appellant had been gowned  
5 because he had these injuries and was being actively  
6 treated in the emergency room. The clothing had been  
7 put into a hospital bag and placed on a shelf  
8 underneath a gurney, and so there's no indication  
9 from the record that the clothing was out in the open  
10 or was somehow available to the public.

11 JUDGE ABDUS-SALAAM: Was it near him or was  
12 it some - - - some distance away from him, the bag?

13 MS. SIBLEY: At the - - - at the time that  
14 the - - - that the officer came and spoke with  
15 appellant, the bag was actually fifteen feet away in  
16 a different room, but the record shows that appellant  
17 had been in that room and so he had been in the  
18 trauma room and then was in the hallway at the  
19 particular moment when the officer actually came to  
20 talk to him.

21 JUDGE FAHEY: Well, it isn't the enclosure,  
22 though. Isn't it the visibility that - - - that's  
23 the question here and the clothing was clearly  
24 visible, right?

25 MS. SIBLEY: No, the clothing was not

1 clearly visible.

2 JUDGE FAHEY: Okay.

3 MS. SIBLEY: And so actually there are  
4 several - - -

5 JUDGE FAHEY: So it wasn't in a plastic  
6 hospital bag closed up in a separate room from the  
7 defendant?

8 MS. SIBLEY: It was in a plastic hospital  
9 bag.

10 JUDGE FAHEY: Closed up.

11 MS. SIBLEY: A sealed - - -

12 JUDGE FAHEY: Right.

13 MS. SIBLEY: - - - hospital bag in the  
14 trauma room, yes, that defendant was outside of.

15 JUDGE FAHEY: And it - - - the plas - - -  
16 the plastic bag wasn't clear?

17 MS. SIBLEY: The officer testified that the  
18 plastic bag was - - - was - - - was clear, yes.

19 JUDGE FAHEY: So it's visible, then.

20 MS. SIBLEY: The bag itself was visible,  
21 but there's no indication that the clothing within  
22 the bag was visible - - -

23 JUDGE FAHEY: I see.

24 MS. SIBLEY: - - - to the officer.

25 JUDGE FAHEY: Okay.

1 JUDGE RIVERA: When - - - when the bag is  
2 see-through?

3 MS. SIBLEY: Well, the bag is clear, but  
4 the officer did not testify that he could see  
5 anything through the bag. And so - - -

6 JUDGE RIVERA: Well, let me ask a different  
7 kind of question.

8 MS. SIBLEY: Um-hum.

9 JUDGE RIVERA: The - - - the officer knew  
10 before seeing the bag that there were clothes,  
11 correct?

12 MS. SIBLEY: Correct. The officer was told  
13 that - - -

14 JUDGE RIVERA: There were clothes in the -  
15 - -

16 MS. SIBLEY: - - - there was clothing in  
17 the bag.

18 JUDGE RIVERA: And at that time formed some  
19 opinion that these clothes might have some  
20 evidentiary value; was that correct?

21 MS. SIBLEY: The officer did not form any -  
22 - - any opinion - - -

23 JUDGE RIVERA: Okay.

24 MS. SIBLEY: - - - that the clothing may  
25 have some evidentiary value.

1                   JUDGE RIVERA: So at - - - at what time did  
2 the officer think there might be some reason for me  
3 to look at these clothes?

4                   MS. SIBLEY: After he took the clothing out  
5 of the bag, engaged in a warrantless search, and  
6 compared - - -

7                   JUDGE RIVERA: But what inspired the  
8 interest - - -

9                   MS. SIBLEY: - - - the boxer - - -

10                  JUDGE RIVERA: But what inspired the  
11 interest in the clothes?

12                  MS. SIBLEY: Excuse me?

13                  JUDGE RIVERA: What inspired the interest  
14 in the clothes? Why go through that if you don't  
15 think there's a purpose to it?

16                  MS. SIBLEY: Merely that another detective  
17 told him that my client's possessions were in this  
18 bag, so he went basically on a fishing expedition and  
19 looked in the bag to see - - -

20                  JUDGE STEIN: Well, he - - - he knew that -  
21 - -

22                  MS. SIBLEY: - - - if he could find  
23 anything there.

24                  JUDGE STEIN: - - - your client had said  
25 that he had been shot.

1 MS. SIBLEY: That he had been shot in  
2 Liberty Park.

3 JUDGE STEIN: And he was called there to  
4 investigate this shooting, correct?

5 MS. SIBLEY: Correct.

6 JUDGE STEIN: And so wouldn't it make sense  
7 that he - - - I mean, why would he go in the bag if  
8 he wasn't looking for some evidence with regard to  
9 the shooting?

10 MS. SIBLEY: Well, abso - - - absolutely  
11 not, because he did not interview my client  
12 extensively. He did not see any wounds, so he didn't  
13 know where my client was shot. He didn't - - -

14 JUDGE STEIN: Well, he said he was shot in  
15 the leg; didn't - - - didn't he?

16 MS. SIBLEY: No.

17 JUDGE STEIN: No, he just said he was shot?

18 MS. SIBLEY: No, just that he was shot, and  
19 so the officer did not know where my client had been  
20 shot. He didn't know what items of clothing were in  
21 the bag, so he didn't even know if boxer shorts would  
22 be in the bag. I mean my client could have very well  
23 been wearing his underwear under the hospital gown.  
24 And so there was no reason for the officer to believe  
25 - - -

1 JUDGE STEIN: So - - -

2 MS. SIBLEY: - - - that anything in the bag  
3 would be incriminating.

4 JUDGE STEIN: So you - - - so you're - - -  
5 you're suggesting then that the officer went in the  
6 bag because he was looking for - - - to - - - to get  
7 your client on something?

8 MS. SIBLEY: I'm not - - - I'm not imputing  
9 any motives to - - - to the - - - to the officer.  
10 I'm not saying he was trying to set my client up - -  
11 -

12 JUDGE RIVERA: Would it matter?

13 MS. SIBLEY: - - - or do anything.

14 JUDGE RIVERA: Would it matter?

15 MS. SIBLEY: I don't think it matters at  
16 all. What - - - what matters is - - - well,  
17 actually, a couple things matter. One is that even  
18 though we're talking about the plain view doctrine,  
19 as an initial matter, the plain view doctrine is not  
20 preserved in this - - - in this case, because that's  
21 not the theory under which the People supported the  
22 search at the suppression hearing.

23 JUDGE FAHEY: Well, but - - - but that's -  
24 - - that's not a theory that the court ruled on, but  
25 I thought that was in their motion papers.

1 MS. SIBLEY: There was one clause in their  
2 motion paper - - -

3 JUDGE FAHEY: Now, I wouldn't waste time on  
4 that. I don't think that's a very strong argument.  
5 I - - - I - - - I really think you should hold off  
6 that argument. That's - - - the preservation  
7 argument, maybe, maybe not, but you know, I - - - I  
8 would - - -

9 MS. SIBLEY: Okay.

10 JUDGE FAHEY: - - - I would stick with your  
11 stronger arguments.

12 MS. SIBLEY: Well - - -

13 JUDGE FAHEY: You know, what I'm - - -

14 MS. SIBLEY: Um-hum.

15 JUDGE FAHEY: What I'm wondering about is  
16 how does this case compare to People v. Cook? I - -  
17 - I think you should address that.

18 MS. SIBLEY: Yes. Okay.

19 JUDGE FAHEY: Yeah.

20 MS. SIBLEY: People - - - People v. Cook  
21 actually - - - actually gives us the same facts but  
22 actually more - - - more damning facts for the  
23 defendant that was in Cook. So in Cook we have a  
24 hospitalized patient, he's wounded, and the - - - and  
25 there actually is a suspicion that he has committed a

1 crime in that - - - in that case, as - - - as opposed  
2 to in my case where at the point at which the officer  
3 conducted the search, my client was considered to be  
4 a victim.

5 JUDGE FAHEY: The big difference that I see  
6 is that the clothing in Cook was lying next to the  
7 hospital stretcher, and the defendant, I believe  
8 there, was lying incoherent on a - - - on a stretcher  
9 and - - - and then the - - - the materials were gone  
10 through then and he was arrested on the basis of what  
11 they found. It was a pile of clothing - - -

12 MS. SIBLEY: Right.

13 JUDGE FAHEY: - - - they found. Here - - -  
14 it wasn't in a separate room and it wasn't in a clear  
15 plastic bag as it was here.

16 MS. SIBLEY: Well, the clothing in Cook was  
17 - - - was actually - - - if - - - if we're going to  
18 rely upon the plain view doctrine, the clothing in  
19 Cook was actually spread out on the floor and was  
20 available for the officer to see. Here, that's not  
21 the case. Here my client's clothing was in a bag  
22 that was sealed and the officer testified that he had  
23 to inspect the clothing, that he had to lay out the  
24 boxer shorts - - -

25 JUDGE ABDUS-SALAAM: So what - - - what if

1 the - - -

2 MS. SIBLEY: - - - next to the jeans.

3 JUDGE ABDUS-SALAAM: What if the bag, the  
4 clear bag, showed - - - if it's possible, I don't  
5 know that it's possible - - - showed the underwear  
6 with bullet holes but the - - - the officer could see  
7 through the bag that the jeans had no bullet holes?

8 MS. SIBLEY: I think that if there was  
9 testimony that - - - that the officer could develop  
10 probable cause to believe that it was evidence  
11 without touching the bag, just from looking at it  
12 across the room, so if he could see those things, I  
13 think that that would be a different situation. But  
14 that's not what the record is in this - - - in this  
15 case. There's no testimony, and it would have been  
16 the People's burden to elicit that testimony - - -

17 JUDGE PIGOTT: What were the specific - - -

18 MS. SIBLEY: - - - at the hearing.

19 JUDGE PIGOTT: I'm - - - I'm sorry. What  
20 was - - - what was the specific ruling of the trial  
21 court? What - - - what did it base its decision on?

22 MS. SIBLEY: So the trial court said that  
23 there - - - that it was unsure whether or not my  
24 client had a reasonable expectation of privacy in the  
25 - - - in the clothing, but that he didn't see a

1 Fourth Amendment violation because the bag was quote  
2 "potentially was evidence of a crime."

3 JUDGE PIGOTT: Is that - - - is that an  
4 appropriate grounds to forego the Fourth Amendment?

5 MS. SIBLEY: That is absolutely an  
6 inappropriate ground to forego the Fourth Amendment.  
7 There is - - - there's no Fourth Amendment exception  
8 for potentially the evidence of a - - - of a crime.  
9 And here - - -

10 JUDGE RIVERA: Can a victim deny access to  
11 law enforcement of evidence of a crime?

12 MS. SIBLEY: Can a victim deny?

13 JUDGE RIVERA: Yes.

14 MS. SIBLEY: Absolutely. And so one of the  
15 - - - one of the situations that this would actually  
16 affect quite often is a rape victim, right, because  
17 if someone comes into the hospital and they're a  
18 victim of rape or say domestic violence, and they're  
19 wearing clothing, that clothing would also be  
20 potentially evidence of a crime, generally speaking.  
21 But we've held and we - - - and we understand as a  
22 community that that victim has a privacy interest in  
23 those things and so those things cannot be searched  
24 without their consent or without a warrant or without  
25 some other recognized exception to the warrant

1 requirement. And that's the same situation that we  
2 have here.

3 JUDGE PIGOTT: Thank you. Thank you, Ms.  
4 Sibley.

5 MS. SIBLEY: Thank you.

6 JUDGE PIGOTT: Mr. Branigan.

7 MR. BRANIGAN: William Branigan for the  
8 People. Good afternoon, Your Honors; may it please  
9 the court. Your Honor, the People - - - the police  
10 properly seized the clothing found in a clear bag on  
11 the hospital floor as evidence of a crime that they  
12 were investigating, in particular that the defendant  
13 had been shot.

14 JUDGE PIGOTT: Shouldn't - - - shouldn't  
15 they - - - one of the arguments that Ms. Sibley makes  
16 is that you could always ask permission. And - - -  
17 and the reason I thought about that was, let's assume  
18 for a minute that all the facts are as indicated  
19 here, but this particular defendant had marijuana in  
20 his - - - in his pocket when he was shot, he - - -  
21 assuming he was a victim and he didn't want the  
22 police to know that because he was going to be  
23 charged with possession of marijuana. So he doesn't  
24 want them to look at his clothes; not having - - -  
25 having nothing to do with the particular incident

1 involved. Has he forfeited his right to protect his  
2 privacy interest in his clothes by being the victim  
3 of a shooting?

4 MR. BRANIGAN: No, Your Honor. It's - - -  
5 it's - - - the - - - there's two things here. One is  
6 the - - - the probable cause that there was a crime  
7 that was committed, which was the shooting of the  
8 defendant, and secondly that the - - - the evidence  
9 of the shooting was in a clear bag on the floor. So  
10 in - - - in this case, we're relying solely on plain  
11 view, not that there was consent. The defendant  
12 could have - - -

13 JUDGE PIGOTT: Doesn't plain view imply  
14 that you have - - - it has - - - the - - - the fruits  
15 of a crime or the crime res has to be in plain view,  
16 not simply, you know, you say well, this apartment is  
17 in plain view, I can search it, or his clothing is in  
18 plain view, I can search it? In other words, it has  
19 to be the - - - you know, what you're looking for has  
20 to be in plain view, right?

21 MR. BRANIGAN: The standard is whether it's  
22 - - - it's useful as evidence of the crime. And - -  
23 -

24 JUDGE FAHEY: I thought it was whether or  
25 not the instrumentalities of the crime, I thought.

1 That was - - - that was it, and so is clothing an  
2 instrumentality of the crime?

3 MS. SIBLEY: Well, it's - - - it's  
4 instrumentality of the crime or useful as - - - as  
5 evidence of - - - of the crime, Your Honor. So the -  
6 - -

7 JUDGE ABDUS-SALAAM: Well, take the - - -  
8 take the example that your adversary just raised  
9 about a rape victim who's still in her clothing when  
10 the SVU police officers show up, and she has  
11 something that she doesn't want them to see; I don't  
12 know what, maybe she's got a weapon in there, I'm not  
13 sure, and she says, no, I don't want you to take my  
14 clothing? We know that there's - - - there's been a  
15 report of a rape, right, and there's suspicion that a  
16 crime has been committed and that this person is a  
17 victim, so do they take the clothing or not under  
18 your theory?

19 MR. BRANIGAN: I'm pretty sure you can't  
20 seize clothes off - - - off the back of a person,  
21 Your Honor. The - - - the difference would be if the  
22 - - - if - - - let's say - - - and again, this would  
23 not be how a rape kit was typically done. Let's say  
24 that there was a rape kit done. Let's say she was in  
25 another room in a hospital gown and for whatever

1 reason they left her - - - her clothes on the floor  
2 from the rape, that might be a different situation if  
3 the - - - if the officers came in investigating that.  
4 That would be - - - that would be very - - - that  
5 would be a very odd situation. The - - - so the  
6 difference here is that the - - - that the clothes  
7 are - - - are on - - - on the floor in plain view.

8 JUDGE STEIN: Well, I think - - -

9 MR. BRANIGAN: And the - - - the - - -

10 JUDGE RIVERA: Yeah, but they're in a  
11 sealed bag. Doesn't that suggest that hands off,  
12 this is - - - this is the private personal property  
13 of someone?

14 MR. BRANIGAN: The - - - no, Your Honor,  
15 because it's a clear - - - it's a clear bag. So the  
16 - - -

17 JUDGE RIVERA: But he doesn't have no - - -  
18 any choice over that, right? That's what - - - what  
19 hospitals provide. I mean, this person does not have  
20 the option to try and secrete this bag.

21 MR. BRANIGAN: Well, Your Honor - - -

22 JUDGE RIVERA: Or to use a different bag.

23 MR. BRANIGAN: Your Honor, we don't know  
24 that from the record. There is - - - there is  
25 evidence in the record that this is a - - - this is a

1 clear bag - - -

2 JUDGE RIVERA: Um-hum.

3 MR. BRANIGAN: - - - that the - - - that  
4 the - - - the officer who was in the room lawfully  
5 was able to see what was inside of that bag. What  
6 the off - - - if - - -

7 JUDGE ABDUS-SALAAM: All he could see,  
8 though, counsel - - - what - - - what if all he could  
9 see is what I think the record suggests, is that  
10 there are clothes in the bag? He has to go inside of  
11 the bag to find out that the underwear have bullet  
12 holes but not the jeans.

13 MR. BRANIGAN: Your Honor, ultimately - - -  
14 ultimately the - - - the clothes had to be analyzed  
15 for - - - for the ballistics evidence, but he knows  
16 the clothing - - - as a trained officer, he knows  
17 that the clothing is always going to be evidence of -  
18 - - of the shooting. He knows - - -

19 JUDGE RIVERA: But isn't that, then, the  
20 problem? He only knows that - - - following off on  
21 what Judge Abdus-Salaam is saying - - - he only knows  
22 that because he knows there's a shooting, shot in the  
23 leg, right, supposedly. I understand your - - - the  
24 adversary disagrees, but let's just stay with this  
25 for one moment.

1                   He knows there's a shooting, he knows that  
2 he's shot in the leg, ah, so those clothes must have  
3 holes, they must have something of value, but he  
4 really doesn't know anything about that, or the  
5 officer wouldn't know anything about that until you  
6 go through a forensic analysis of this evidence. So  
7 he learns nothing - - - what I'm saying is he learns  
8 nothing from the observation, right?

9                   He only thinks there's something valuable  
10 because he knows about the shooting, he knows of the  
11 shooting in the leg, the clothes must have been  
12 affected in this shooting, but he doesn't know  
13 anything from seeing the bag, correct? He's got to  
14 go looking for something.

15                  MR. BRANIGAN: Yes, Your Honor, he has to  
16 examine the clothing to - - - to know exactly what  
17 kind of ballistics evidence they'll yield, but it's  
18 the clothes themselves that are evidence in this  
19 crime, so the standard is - - -

20                  JUDGE FAHEY: Take a - - - take a step  
21 back. We know the standards, all right, but - - -  
22 but take a step back. Normally plain view is a  
23 policeman pulls you over, you've got an open beer in  
24 the car, he sees the open beer there, it's in plain  
25 view, he can see it, he said were you drinking that,

1           yeah, boom. It's in plain view. Here, the  
2           incriminating nature of the object usually has to be  
3           apparent, like drugs or alcohol or a gun, something  
4           that's readily apparent and you see it when you come  
5           in. So the question - - - that's why we're asking  
6           these questions, obviously, because I'm trying to see  
7           how the incriminating nature of the object here - - -  
8           the instrumentality of the crime, the clothes - - -  
9           is apparent when it's closed up and inside a bag.

10                       MR. BRANIGAN: Your Honor, because in every  
11           shooting case, the clothing is evidence of the crime.  
12           The - - - it's going to have - - - they're always  
13           going to have some kind of forensics, some kind of  
14           bullet holes - - -

15                       JUDGE STEIN: You're making a - - -

16                       MR. BRANIGAN: - - - you'll have blood.

17                       JUDGE PIGOTT: What's your - - - what's  
18           your rule then, that in any shooting case, all  
19           clothing is subject to police confiscation and  
20           inspection?

21                       MR. BRANIGAN: Your Honor, when the  
22           clothing is - - - is out in the open, when there's  
23           other - - -

24                       JUDGE PIGOTT: Wearing it. I - - - I - - -

25                       MR. BRANIGAN: No, Your Honor - - -

1 JUDGE PIGOTT: I just have trouble - - -

2 MR. BRANIGAN: You've relinquished your - -  
3 - it's - - - the reasonably objective officer does  
4 not see any privacy interests in a bag of clothes on  
5 the floor that he can see. If your clothes are on  
6 your back, that doesn't mean he can see your - - -

7 JUDGE PIGOTT: Well, maybe he's wrong, is  
8 my point. I - - - I was thinking, too, let's suppose  
9 you're a hit-and-run victim - - - victim, and you're  
10 - - - and you're in the hospital. The police come to  
11 investigate. You're saying that because you're a  
12 victim of a crime, you are forfeiting your right to  
13 your privacy with respect to that clothing, and if  
14 you have a gun, if you have drugs, if you have  
15 anything like that, that's too bad because they have  
16 an absolute right to your clothing and all - - - and  
17 all of the fruits of that - - - of that  
18 investigation. That doesn't make sense to me. It  
19 sounds like it's violating the Fourth Amendment.

20 MR. BRANIGAN: No, Your Honor. Again, the  
21 - - - you've laid out a few different scenarios  
22 there, a hit-and-run and these - - - these different  
23 scenarios. Now, first of all, just as policy in  
24 hospitals - - - and the court, if - - - if it wants  
25 to, can look at - - - there was actually two cases in

1 the Appellate Division from our office at the - - -  
2 at the same time, one was Salvodon; I can't remember  
3 the name of the second case.

4 JUDGE PIGOTT: Are they in your brief?

5 MR. BRANIGAN: In those the - - - those are  
6 - - - those are not in the briefs, Your Honor.

7 JUDGE PIGOTT: Why don't you send them up,  
8 then, after argument?

9 MR. BRANIGAN: Okay. The - - - those - - -  
10 in those two other cases, in one case the Appellate  
11 Division found that the - - - the search was unlawful  
12 because the property was held in safekeeping by the  
13 hospital. In the second case, it was being held by  
14 the nurses in an opaque bag that the officers asked  
15 for, so those are two different situations. Here,  
16 the officers arrive at the hospital to - - - to  
17 investigate the shooting of this defendant. They see  
18 clothes that the officer knows by his training to be  
19 evidence of that crime. The officer - - -

20 JUDGE ABDUS-SALAAM: Was there blood on the  
21 clothing? What - - - other than that they were in a  
22 plastic - - - clear plastic bag and someone said they  
23 belonged to defendant - - - you're saying that the  
24 officer was drawn to that. What if - - - what if the  
25 defendant had been shot in the hand, not in some

1           portion of his clothing, and no bullet holes would  
2           have appeared in any part of his clothing - - - that  
3           he had been shot through the hand and the bullet came  
4           through and through - - - would the clothing be  
5           important then?

6                   MR. BRANIGAN: Your Honor, again, it could  
7           be that there's situations where the clothing would  
8           turn out not to yield evidence, but the clothing is  
9           always useful as evidence in this type of case and  
10          that's - - - that's the standard.

11                   JUDGE PIGOTT: That's a broad - - - that's  
12          a broad rule, don't you think?

13                   MR. BRANIGAN: It's - - - it's not a broad  
14          rule, Your Honor. This is - - - this is - - -

15                   JUDGE PIGOTT: Why wouldn't you ask for  
16          permission? Why wouldn't you ask?

17                   MR. BRANIGAN: Your Honor, it's - - - this  
18          is a very atypical case. It is - - - it is not the  
19          normal thing for the officer to come in and find the  
20          clothing and miss - - - and as - - - as it was found  
21          here.

22                   JUDGE PIGOTT: But why wouldn't you ask? I  
23          mean, couldn't you have just said, you know, we'd  
24          like to look at your clothes?

25                   MR. BRANIGAN: He - - - he could have said

1           that.

2                       JUDGE PIGOTT:  And if the officer - - - and  
3           if the guy said no, I don't want you to look at my  
4           clothes, could have then have gone and gotten a  
5           warrant?

6                       MR. BRANIGAN:  Your Honor, he - - - yes,  
7           those - - - I mean the answer to both questions is  
8           yes, but the - - - but here we have plain view, so it  
9           was not - - -

10                      JUDGE PIGOTT:  Let me - - - let me go back  
11           to you on plain view.  Judge Fahey said this; plain  
12           view is of the - - - of the contraband, of the  
13           weapon, of the res that formed the basis of the  
14           crime.  It's not, well, I was in the apartment and it  
15           was clear that in plain view was tinfoil, and I know  
16           that tinfoil can be used in packaging drugs,  
17           therefore, you know, we had a right to search.  I  
18           mean - - -

19                      MR. BRANIGAN:  Yes, Your Honor, that would  
20           be plain view.  If - - - if that was evidence you'd  
21           be talking about - - -

22                      JUDGE PIGOTT:  Or it's not.

23                      MR. BRANIGAN:  If the tinfoil - - - if the  
24           trained officer could say that - - -

25                      JUDGE PIGOTT:  It's Reynolds Wrap, it's in

1 a - - - it's in a roll. It's - - -

2 MR. BRANIGAN: Your Honor, in - - - in a  
3 drug case, under the circumstances, the - - - the  
4 tinfoil found in plain view could be useful as  
5 evidence of - - - of that crime. So these - - -

6 JUDGE ABDUS-SALAAM: Counsel, what is the  
7 case - - - you keep intoning useful as evidence.  
8 What is the case that supports that proposition?

9 MR. BRANIGAN: Your Honor, it's one of the  
10 - - - the Supreme Court cases. It's cited - - - it's  
11 cited in our - - - in our brief.

12 JUDGE FAHEY: I thought it was Horton that  
13 you were - - - that was where I found the language  
14 from, but I could be wrong.

15 JUDGE RIVERA: All right, so if the  
16 hospital used opaque bags and the officer knows the  
17 clothes are in there, your position is that's not  
18 plain view, the officer's going to have to ask, and  
19 if denied access, would then have to try and get a  
20 warrant; am I correct in understanding your argument?

21 MR. BRANIGAN: That's correct, Your Honor.

22 JUDGE RIVERA: Okay, so he has no - - - the  
23 victim, the defendant here, has no choice in whether  
24 or not a plastic bag or an opaque bag is used.  
25 Right, a victim has no choice about how to ensure

1           that the privacy of these clothes are maintained and  
2           - - - but the bag is sealed. Why isn't that enough  
3           to make clear that the plain view doesn't apply in  
4           this kind of a case?

5                       MR. BRANIGAN: Your Honor, because we have  
6           to look at the reasonably objective circumstances.  
7           We have to understand that the officer's coming in;  
8           he's dealing with the situation in - - - in a very  
9           rapid way. He's just been called in.

10                      JUDGE RIVERA: I understand, but we're also  
11           dealing with these - - - with these - - -

12                      MR. BRANIGAN: So - - -

13                      JUDGE RIVERA: Excuse me. We're also  
14           dealing with the interests of the defendant, the  
15           privacy interest and then there's also a property  
16           interest in - - - in these clothes, and in part the  
17           plain view doctrine also exists because if you're the  
18           defendant and you've got things out in the open, you  
19           have diminished expectations of privacy. But in this  
20           case, he can't make any choice about that bag; that's  
21           the hospital's bag and obviously the hospital has  
22           taken off his clothes to give him services. He's got  
23           some diminished expectation of privacy because he's  
24           got to agree to the service, the medical services,  
25           but does that mean then when they seal the bag that

1           somehow it's free for officers to just go in and rip  
2           it open and take everything out?

3                   MR. BRANIGAN:   Your Honor, if they can see  
4           what's inside.   Here he can see what was inside.  
5           It's the same - - -

6                   JUDGE RIVERA:   But they learn no more by  
7           seeing than they do by knowing that he's been shot,  
8           because the only interest in the clothes is because  
9           you know he's been shot.   There's no observation - -  
10          - there's no information gained by the observation of  
11          the plain view is what I'm saying, and certainly  
12          that's counterbalanced by the sealing of the bag that  
13          shows that these - - - that it's supposed to be a  
14          private bag.   Everyone can't go in there, right?  If  
15          someone walked by and went in that bag and took  
16          something, he's got a claim against him, does he not?

17                   MR. BRANIGAN:   Yes, Your Honor.

18                   JUDGE RIVERA:   Okay, so it's not like he's  
19          got sort of everything out in the open in that way.

20                   MR. BRANIGAN:   But again, even if - - -  
21          even if it wasn't in the bag, the - - - the same - -  
22          - the same would apply.   Nobody could - - - could  
23          simply come in there and - - - and take the clothes  
24          out of the hospital.   It would be the same as if his  
25          clothes had simply been left on the floor.   If the -

1 - - if the officer had come in five minutes before,  
2 it's possible - - -

3 JUDGE RIVERA: If it's in - - - if it's in  
4 the clear bag but in a closet in a hospital room,  
5 could the cop have opened the closet door and gone  
6 in?

7 MR. BRANIGAN: No, because he - - -

8 JUDGE RIVERA: It's in a clear bag.

9 MR. BRANIGAN: No, Your Honor, because it  
10 wouldn't satisfy the - - - the first two prongs of -  
11 - - of plain view.

12 JUDGE RIVERA: Because he had to open the  
13 door.

14 MR. BRANIGAN: Yes.

15 JUDGE RIVERA: Yeah.

16 JUDGE ABDUS-SALAAM: Well, in Cook,  
17 counsel, the clothes were on the floor and we said  
18 that was not good enough.

19 MR. BRANIGAN: In Cook, the - - - the  
20 People were making completely different arguments.  
21 In that case, the People were arguing that there was  
22 probable cause to arrest the defendant, and based  
23 upon that arrest, the clothing was properly seized.  
24 There was never an idea that - - - for instance, that  
25 there was a crime that had occurred. There was - - -

1           there was no knowledge of that, so there was no  
2           support in the record for the People's argument in  
3           that case. Plain view was - - - was never argued in  
4           that case.

5                        JUDGE PIGOTT: Thank you, Mr. Branigan.

6                        Ms. Sibley, you have two minutes.

7                        MR. BRANIGAN: Thank you, Your Honors.

8                        MS. SIBLEY: I just want to follow on from  
9           the last line of questioning, which is that a  
10          patient's Fourth Amendment protections shouldn't  
11          depend on the vagaries of any given hospital policy,  
12          and so - - - and so the Fourth Amendment shouldn't  
13          depend if you go to Jamaica Hospital by ambulance,  
14          you have full Fourth Amendment protections because  
15          they put a bag in a closet or they have an opaque  
16          bag, but if you're brought to Long Island Jewish, all  
17          of a sudden you don't have Fourth Amendment  
18          protections. That's not how the Fourth Amendment  
19          operates.

20                       JUDGE FAHEY: But - - - but it may actually  
21          - - - that may actually be the case, because here  
22          we're not talking - - - in one instance we're talking  
23          about a search or something's in a room and whether  
24          or not you had the right to search it. If it's  
25          closed - - - in a closed space in a room, you have -

1           - - may have an expectation of privacy, where you  
2           don't in an open trauma room where clothing is laying  
3           on the floor or lay - - - or inside of a bag that's  
4           visible. That's a seizure, that's not a search so  
5           it's a different situation, you don't have the same  
6           expectation.

7                       MS. SIBLEY: Well, according to Ariz - - -

8                       JUDGE FAHEY: I - - - I hate to - - - to  
9           drag you down this road, but we haven't even talked  
10          about the Sandoval issue at all - - -

11                      MS. SIBLEY: Yes. Yes.

12                      JUDGE FAHEY: - - - to either of you, so -  
13          - - all right.

14                      MS. SIBLEY: Can I - - - can I just answer  
15          - - - answer that?

16                      JUDGE FAHEY: Sure, go ahead.

17                      MS. SIBLEY: Because according to Arizona  
18          v. Hicks, they're both searches. According to  
19          Arizona v. Hicks, once the officer has to move the  
20          clothing, once he's not merely observing it, then  
21          that's a search as well under the Fourth Amendment.  
22          And so if we find that the patient retains his  
23          privacy interest in his clothing - - - and this is  
24          not a question of does the cop believe that he has  
25          the privacy interest. Under the Fourth Amendment,

1 the privacy interest is whether or not the person  
2 evidences a subjective desire for privacy, and  
3 whether or not society believes that that's  
4 reasonable, and so is there a reasonable expectation  
5 of privacy; not whether or not the officer believes  
6 that the item is private.

7 JUDGE ABDUS-SALAAM: Counsel, I'm also  
8 interested in your Sandoval - - -

9 MS. SIBLEY: Yes.

10 JUDGE ABDUS-SALAAM: - - - issue, but I  
11 also would like you to address what your adversary  
12 said about the difference between this and Cook.

13 MS. SIBLEY: There - - - there is no  
14 meaningful difference between this case and Cook. My  
15 adversary has said that Cook is a search incident to  
16 arrest case; there's nothing in the decision that  
17 tells us that. What this court held in Cook was that  
18 even though the clothing was on the floor, even  
19 though the police were aware that a crime had been  
20 committed, and even though that person had been shot,  
21 that because there was no warrant, no consent, and no  
22 exception to the warrant requirement, that it was a  
23 violation of his Fourth Amendment rights. And that  
24 is the holding in Cook.

25 JUDGE PIGOTT: Would you take a couple

1 minutes - - - I know your red light's on but - - -

2 MS. SIBLEY: Sure.

3 JUDGE PIGOTT: - - - there've been a couple  
4 of questions about Sandoval.

5 MS. SIBLEY: Absolutely.

6 JUDGE PIGOTT: And the Appellate Division  
7 seemed to think that - - - I'll say no harm, no foul.

8 MS. SIBLEY: That is what they seem to  
9 think.

10 JUDGE PIGOTT: What - - - what's your  
11 position?

12 MS. SIBLEY: Well, the - - - well, the  
13 standard if - - - if this court finds that my client  
14 was not at a Sandoval hearing, is that it's - - -  
15 it's only harmless if the Sandoval ruling was wholly  
16 favorable to him and that is the standard, wholly  
17 favorable, so favorable in every way. Here - - -

18 JUDGE STEIN: What about if it was  
19 superfluous?

20 MS. SIBLEY: Well - - - well, those two  
21 concepts are - - - are linked, right, because - - -  
22 because Favor and - - - and Monclavo say that my  
23 client's presence would only be considered  
24 superfluous if the decision was wholly favorable to  
25 him, right, and so in that case, there's nothing

1           conceivable that he could have said that would have  
2           gotten him a better result because he got the best  
3           result - - -

4                    JUDGE STEIN:  Well, so we can't - - - we  
5           can't - - -

6                    MS. SIBLEY:  - - - imaginable.

7                    JUDGE STEIN:  What - - - I mean, what could  
8           - - - here the - - - well, the inquiry that was  
9           allowed was limited to the fact that he had these  
10          convictions, but none of the details about them, so  
11          what - - - what is it that - - - that the defendant  
12          as opposed to his counsel could have offered in that  
13          discussion that would have made a difference there?

14                   MS. SIBLEY:  Right.  Well, Monclavo and  
15          Favor say that we can't speculate as to - - - as to  
16          what exactly he could have offered or - - -

17                   JUDGE STEIN:  So you're equating  
18          superfluous with wholly favorable or unfavorable?

19                   MS. SIBLEY:  Well, that is what the case  
20          law, I - - - I believe, tells us is that his presence  
21          can only be considered superfluous if the ruling was  
22          wholly - - - wholly favorable.  Here, the court - - -  
23          the court's position was that because the ruling was  
24          highly favorable, that somehow that's enough.  But  
25          under this court's case law, that's not enough, it

1 has to be wholly favorable, and we can think of a lot  
2 of other rulings that would have been more favorable  
3 to him, especially because in this case, his defense  
4 was merely that he was a victim of a crime and so  
5 bringing up the fact that he had the criminal history  
6 makes it seem less likely that he's an innocent  
7 victim of a crime, perhaps, to a jury, and so would  
8 have made him less likely to testify.

9 JUDGE PIGOTT: We'll - - - we'll take a  
10 look at it. Thank you.

11 MS. SIBLEY: All right. Thank you.

12 JUDGE PIGOTT: Mr. Branigan, since we went  
13 into overtime, I think we owe you a minute or two if  
14 you want to address the Sandoval.

15 MR. BRANIGAN: Thank you, Your - - - Your  
16 Honors. Just briefly, the - - - what the Court of  
17 Appeals has held is that the - - - the defendant's -  
18 - - or back when it - - - when it made these rulings  
19 was that the defendant's presence was useful  
20 basically so they - - - he could address the - - -  
21 the particular facts - - - the particular underlying  
22 facts, he could address the DCJS reports, or if there  
23 was - - - if there was no conviction, that he could  
24 address the particulars of prior bad acts. Here, his  
25 - - - his - - - he would have been superfluous

1           because it was - - -

2                         JUDGE STEIN:   So you don't agree that  
3           superfluous is equated with wholly favorable or  
4           unfavorable?

5                         MR. BRANIGAN:   It's - - - I would - - -

6                         JUDGE STEIN:   Well, the most favorable  
7           outcome here would have been they couldn't inquire at  
8           all, right?

9                         MR. BRANIGAN:   That's correct, Your Honor.

10                        JUDGE STEIN:   Okay, so this wasn't wholly  
11           favorable.  It was a pretty good - - - it was a  
12           pretty good result, but it wasn't wholly favorable.

13                        MR. BRANIGAN:   Your Honor, it - - - it  
14           should be two different - - - two different concepts.  
15           The - - - the - - - first of all, was the - - - these  
16           decisions were based on the defendant's utility at  
17           the proceedings.  So if it's determined that the - -  
18           - the defendant would have no utility at the  
19           proceeding, nothing to contribute, then the - - -  
20           then the attorney could make the decision, or rather  
21           in this case, basically consent, make the agreement  
22           on - - - on his own.  So here - - -

23                        JUDGE PIGOTT:   Well, there - - - there  
24           you're - - - you'd be conceding that he's not there.  
25           One of the things that struck me was we're not

1 exactly sure - - - and I'm wondering if maybe were we  
2 to decide that Sandoval was important here, that we  
3 ought to send it back to a reconstruction hearing.  
4 Does that make any sense to you?

5 MR. BRANIGAN: Your Honor, we're not - - -  
6 first of all, we're not conceding that the defendant  
7 - - - that the defendant was not present. The - - -  
8 the record is - - -

9 JUDGE FAHEY: It's their burden to show  
10 that he wasn't present.

11 MR. BRANIGAN: Yes, Your Honor, by  
12 substantial evidence, it's their burden to show that  
13 he wasn't present.

14 JUDGE FAHEY: So - - - so the only proof  
15 that's offered is the phrase "one coming out" that's  
16 made by the deputy during the beginning of the  
17 afternoon session in court.

18 MR. BRANIGAN: That's correct, Your Honor.

19 JUDGE FAHEY: Okay. All right. So - - -  
20 all right.

21 JUDGE PIGOTT: Thank you, Mr. Branigan,  
22 appreciate your argument.

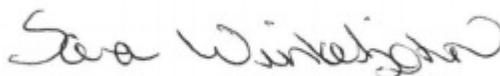
23 MR. BRANIGAN: All right, thank you, Your  
24 Honors.

25 (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. Oscar Sanders, No. 22 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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