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Search and Seizure

Susan Clark

SUPREME COURT
MONROE COUNTY

Grinberg v. Safir[1]
(decided May 18, 1999)

Pursuant to the newly implemented New York City vehicle forfeiture laws, petitioner Grinberg's vehicle was seized during his Driving While Intoxicated (hereinafter "D.W.I.") arrest.[2] Grinberg demanded the return of his car by letter and commenced a proceeding to invalidate the City's policy by claiming that the taking and retention of his car was unconstitutional because it was an unreasonable seizure,[3] constituted an excessive fine,[4] and

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[1] 181 Misc. 2d 444, 694 N.Y.S.2d 316 (N.Y. Sup. Ct. 1999).

[2] *Id.* at 447, 694 N.Y.S.2d at 319. His arrest was made pursuant to NY VEH. & TRAF. LAW § 1192 (Consol. 1999) which states in pertinent part:

> 2. Driving while intoxicated; per se. No person shall operate a motor vehicle while such person has .10 of one per centum or more by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this article.
> 3. Driving while intoxicated. No person shall operate a motor vehicle while in an intoxicated condition.
> *Id.*

[3] U.S. CONST. amend. 4. The Fourth Amendment provides:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.
> *Id.*

N.Y. CONST. art. 1, § 12. This section provides:

> The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

violated his Due Process rights[5] under both the Federal and New York State Constitutions.[6] The New York Supreme Court, New York County, held that the City D.W.I. forfeiture policy does not violate the Due Process, Search and Seizure, or Excessive Fine clauses[7] of the Federal or State Constitutions.

On February 20, 1999, Police Commissioner Safir announced that the Property Clerk Forfeiture Law (hereinafter "Forfeiture Law") would apply to vehicles operated by individuals arrested for D.W.I.[8] in New York City. On February 21, 1999, Mr. Grinberg was stopped and arrested for D.W.I. while driving within the city limits.[9] A breathalyzer test confirmed that his blood alcohol content was, in fact, over the legal threshold.[10] As a result, his

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Id.

[4] U.S. CONST. amend. 8. This amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

N.Y. CONST. art. 1, § 5. The article states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments be inflicted, nor shall witnesses unreasonably be detained." *Id.*

[5] U.S. CONST. amend. 14. The Fourteenth Amendment provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
> *Id*

N.Y. CONST. art. 1, § 6. This section states:

> In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him...No person shall be deprived of life, liberty or property without due process of law.
> *Id.*

[6] *Grinberg*, 181 Misc. 2d at 451, 453, 457, 694 N.Y.S.2d at 322, 323, 326.

[7] *Id.* at 453, 457, 459, 694 N.Y.S.2d at 323, 326, 327.

[8] *Id.* at 447, 694 N.Y.S.2d at 319.

[9] *Id.*

[10] *Id.* at 447, 694 N.Y.S.2d at 320 (stating that "the breathalyzer indicated 0.11 per cent blood alcohol content, over the 0.10 per cent intoxication threshold").

vehicle was taken under the newly implemented Forfeiture Law.[11] On February 26, 1999, Mr. Grinberg's attorney wrote a letter demanding that the car be returned to Mr. Grinberg.[12]

On March 9, 1999, the petitioner, Mr. Grinberg, commenced this proceeding by an order to show cause and petition against New York City in an attempt to have the law invalidated.[13] On March 19, 1999, the Property Clerk commenced a separate action against the petitioner for a judgment declaring the vehicle forfeited as the instrumentality of Mr. Grinberg's crime of D.W.I.[14]

At trial, Mr. Grinberg argued three different Federal and New York State Constitutional violations.[15] The first claim was that the taking and retention of his car was tantamount to unreasonable seizure.[16] The court evaluated both the Federal[17] and State[18] Search and Seizure Clauses in the same manner.[19] Mr. Grinberg asserted that even if the seizure of his car did not violate the Federal Constitution, it was unconstitutional on state grounds because a heightened level of scrutiny should be applied in state cases.[20] Mr. Grinberg relied on the holding in *People v. P.J. Video*,[21] where the Court of Appeals held that a heightened level of scrutiny was necessary to analyze the facts in a case involving the first

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[11] *Id.* (explaining that "[o]fficers took petitioner's 1988 Acura for forfeiture").

[12] *Grinberg*, 181 Misc. 2d at 447, 694 N.Y.S.2d at 319-20.

[13] *Id.* at 447-48, 694 N.Y.S.2d at 319-20.

[14] *Id.* at 448, 694 N.Y.S.2d at 320 (stating that the "property clerk must cause a civil forfeiture proceeding or other similar civil proceeding to be initiated before or within 25 days of a claimant's demand").

[15] *Grinberg*, 181 Misc.2d at 451, 453, 457, 694 N.Y.S.2d at 323, 326, 327 (bringing claims of unreasonable search and seizure, that the seizure was a violation of his Due Process rights, and that the seizure was an excessive fine).

[16] *Id.* at 451, 694 N.Y.S.2d at 323.

[17] U.S. CONST. amend. 4. *See supra* note 3 and accompanying text.

[18] N.Y. CONST. art. 1, § 12. *See supra* note 3 and accompanying text.

[19] *Grinberg*, 181 Misc. 2d at 451 n.6, 694 N.Y.S.2d 316 (explaining that the circumstances presented here must be analyzed the same way under federal and New York constitutional law).

[20] *See* People v. P.J. Video, 68 N.Y.2d 296, 508 N.Y.S.2d 907, 501 N.E.2d 556 (1986) (stating that the court should depart from the Federal rule of law and analyze the facts under a heightened level of scrutiny because the case involved obscenity and the First Amendment as well).

[21] *Id.*

amendment. In the instant case, the court did not rely on *People v. P.J. Video* because First Amendment claims were not implicated in this case.[22]

Further, the court here held that not only did the seizure of Mr. Grinberg's car not violate either the Federal or State Constitutions, but that the seizure was reasonable under three different theories.[23] These theories were the plain view theory,[24] the theory that it was incident to the arrest,[25] and the theory granting an automobile exception.[26] Thus, the court found that although all of those bases

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[22] *See* People v. P.J. Video, 68 N.Y.2d at 308-09, 508 N.Y.S.2d at 915-16, 501 N.E.2d at 564.

[23] *Grinberg*, 181 Misc. 2d at 451, 694 N.Y.S.2d at 322.

[24] People v. Diaz, 81 N.Y.2d 106, 110, 612 N.E.2d 298, 301, 595 N.Y.S.2d 940 (1993). The court explained:

> [I]f the sight of an object gives the police probable cause to believe that it is the instrumentality of a crime, the object may be seized without a warrant if three conditions are met: (1) the police are lawfully in the position from which the object is viewed; (2) the police have lawful access to the object; and (3) the object's incriminating nature is immediately apparent.
> *Id.*

See also People v. Horton, 496 U.S. 128, 136-37(1990).

[25] *See* People v. DeSantis, 46 N.Y.2d 82, 87, 385 N.E.2d 577, 412 N.Y.S.2d 838 (1978). The DeSantis court held that:

> one of these exceptions, of course, allows for a warrantless search of a person and the objects within his access incident to his lawful arrest. ... the practical impetus for allowing these searches lies in the fact that the arrests itself constitutes such a major intrusion into the privacy of the individual that the encroachment caused by a contemporaneous search of the arrestee and his possessions at hand is in reality de minimus.
> *Id.*

See also Chimel v. California, 395 U.S. 752 (1969).

[26] People v. Blaisich, 73 N.Y.2d 673, 678-79, 541 N.E.2d 40, 543 N.Y.S.2d 40 (1989). The Blaisich court explained that:

> where the police have validly arrested an occupant of an automobile, and they have reason to believe that the car may contain evidence related to the crime for which the occupant was arrested or that a weapon may be discovered or a means of escape thwarted they may contemporaneously search the passenger compartment, including any containers found therein.
> *Id.*

applied, even one of them would have been sufficient to conclude that the seizure of the vehicle was constitutional.[27]

The second constitutional claim raised by the petitioner was that the seizure of his car violated his Due Process rights.[28] Mr. Grinberg asserted that his Federal[29] and State[30] Due Process Rights were violated when he was not afforded a pre- or post-seizure hearing although the police were allowed to take and retain his vehicle[31] because, he argued, that in order for the police to take and keep his vehicle, he was entitled to a hearing. Under federal analysis,

> [T]he general rule, of course, is that absent an 'extraordinary situation' a party cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified. But [the court has] previously held that such an extraordinary situation exists when the government seizes items subject to forfeiture.[32]

The court recognized that although the Due Process Clauses are similar, the New York State clause has occasionally been given a wider scope.[33] Unlike the Federal Constitution, the New York State Constitution's Due Process Clause does not include any

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See also Pennsylvania v. Labron, 518 U.S. 938, 940 (1996).

[27] *Grinberg*, 181 Misc. 2d 444, 451, 694 N.Y.S.2d 316, 322 (1999) (stating that "[t]he seizure was reasonable under three theories: plain view, incident to arrest and the automobile exception").

[28] *Id.* at 453, 694 N.Y.S.2d at 323.

[29] U.S. CONST. amend. 14. *See supra* note 5 and accompanying text.

[30] N.Y.CONST. art. 1, §6. *See supra* note 5 and accompanying text.

[31] *Grinberg*, 181 Misc. 2d at 453, 694 N.Y.S.2d at 323.

[32] United States v. Eight Thousand Eight Hundred and Fifty Dollars in U.S. Currency, 461 U.S. 555, 563, n12 (1983).

[33] *Grinberg* at 457, 694 N.Y.S.2d at 326 (explaining that "while the federal and state Due Process clauses are similar, our state clause occasionally has been accorded wider scope"). *See also* Sharrock v. Dell Buick-Cadillac, 45 N.Y.2d 152, 159, 379 N.E.2d 1169, 1173, 408 N.Y.S.2d 39 (1978) (stating that "on innumerable occasions this court has given our State Constitution an independent construction, affording the rights and liberties of the citizens of this State even more protection than may be secured under the United States Constitution").

language that requires State action before an individual may find refuge in its protections.[34]

The court determined that the seizure of the vehicle in a D.W.I. arrest was necessary because it was a mobile instrumentality of the crime committed.[35] In this case, the court held that there was a sufficient tie between the crime and the property, which created the justification for the forfeiture of the car.[36] However, in this instance, "neither federal nor state due process requires a pre- or post-seizure evidentiary hearing for seizure and retention of D.W.I. vehicles for forfeiture during pendency of the criminal action."[37]

The final constitutional claims, brought under both Federal[38] and New York State[39] Constitutions by Mr. Grinberg,[40] was that the seizure of his car was an excessive fine.[41] The court stipulated initially that both the Federal and State Excessive Fine Clauses required the same analysis with the New York clause providing no greater protection than the federal clause.[42] In *Austin v. United States*, the Supreme Court ruled that if even part of a forfeiture is

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[34] Sharrock v. Dell Buick-Cadillac, 45 N.Y.2d at 160, 379 N.E.2d at 1173, 408 N.Y.S.2d at 42 (1978).

[35] *Grinberg* at 455, 694 N.Y.S.2d at 325 (stating that "while the City's DWI policy prevents accused drunk drivers from using property before a determination in the criminal action, the City's interest in deterring drunk driving and ensuring enforceability of a subsequent forfeiture order, clearly outweighs the private interest affected").

[36] *Id.* at 456, 694 N.Y.S.2d at 326. Stating in pertinent part:

> Retention prevents the vehicle from being used for repeated illegal activity. An automobile is an integral part of DWI; it poses the threat of being used as an "instrumentality of death" should the crime be repeated .. . Just as there is a strong public interest in withholding a non-contraband murder weapon from a homicide defendant, there is a strong public interest in withholding a car from a DWI defendant. *Id.*

[37] *Grinberg*, 181 Misc. 2d at 457, 694 N.Y.S.2d at 326.

[38] U.S. CONST. amend. 8. *See supra* note 4 and accompanying text.

[39] N.Y. CONST. art. 1, §5. *See supra* note 4 and accompanying text.

[40] *Grinberg*, 181 Misc. 2d at 457, 694 N.Y.S.2d at 326.

[41] *Id.*

[42] *Id.* (explaining that "New York's Excessive Fines clause requires the same analysis as the federal, and provides no greater protection .... There is no evidence that incorporating the Eighth amendment text into the State Constitution in 1846 evinced a different meaning or scope.").

serving to punish, the forfeiture needs to be analyzed as to whether it is an excessive fine.[43]

Here the court conceded that although the forfeiture could be considered a fine, it was definitely not excessive when analyzed under any of three tests for measuring excessiveness: the proportionality, instrumentality, and mixed "proportionality-instrumentality" tests.[44] In applying the proportionality test,[45] the court concluded that since the crime of D.W.I. has a first offense maximum sentence of one year in jail, a fine of one thousand dollars, and three years probation, or a combination of these plus the loss of driving privileges, and since subsequent offenses are considered felonies with up to four years of imprisonment, the seizure of an eleven year old car with a value of $2,000 is not disproportionate to the severity of the available sentence.[46]

In examining the instrumentality test, the court looks to whether "the owner's role and his use of the property were temporally and spatially coextensive with the offense charged."[47] As for the instrumentality test,[48] the forfeiture was not excessive because the car was determined to be the instrument of the crime of drunk driving and Mr. Grinberg is the owner of the car.[49] Since the fine was not considered excessive under eitherthe instrumentality test or the proportionality test, it was clearly not excessive under the

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[43] *See* Austin v. United States, 509 U.S. 602, 610-11(1993).

[44] *Grinberg,* 181 Misc. 2d at 457, 694 N.Y.S.2d at 326.

[45] *Id.* at 458, n.16, 694 N.Y.S.2d at 327, n.16 (stating that excessiveness is measured "by whether the property's value is grossly disproportional to the gravity of the offense"). *See also* U.S. v. Bajakajian, 524 U.S. 321, 329 (1998) (explaining that "[T]he touchstone of constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.").

[46] *Grinberg,* 181 Misc. 2d at 459, 694 N.Y.S.2d at 328.

[47] *Id.* at 457-58, 694 N.Y.S.2d at 327.

[48] Austin v. United States, 509 U.S. 602, 628 (1993) (explaining that "the question is not how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offense").

[49] *Grinberg,* 181 Misc. 2d at 457-58, 694 N.Y.S.2d at 327 (determining that "the petitioner's vehicle is the instrumentality of a charged crime, inseparable from it, and its prerequisite. Petitioner owns the car and drove it at the time of the alleged offense.").

mixed instrumentality-proportionality test.[50] The court consequently held that the D.W.I. forfeiture policy does not violate the Excessive Fines Clause.[51]

In conclusion, the Federal and New York State Constitutional provisions are treated similarly with respect to the Due Process, Search and Seizure, and Excessive Fines clauses. Under the federal or state analysis of all three clauses, the Court determined that the City vehicle forfeiture law did not violate any of these clauses. Under the New York City Vehicle Forfeiture Law, vehicles can be seized and held in DWI cases without violating a person's right to due process of the law, right to be free of illegal search and seizure, or the imposition of excessive fines. Although there may be a slight difference in the wording of some of the clauses, under these particular facts, the court analyzed both

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[50] *See* U.S. v. Milbrand, 58 F.3d 841, 847-48 (1995). The court noted:

> In our view, the factors to be considered by a court in determining whether a proposed in rem forfeiture violates the Excessive Fines Clause should include (1) the harshness of the forfeiture (e.g. the nature and value of the property and the effect of forfeiture on innocent third parties) in comparison to (a) the gravity of the offense, and (b) the sentence that could be imposed on the perpetrator of such an offense; (2) the relationship between the property and the offense, including whether use of the property in the offense was (a) important to the success of the legal activity, (b) deliberate and planned or merely incidental and fortuitous, and (c) temporally or spatially extensive; and (3) the role and degree of culpability of the owner of the property.
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> *Id.*

[51] *Grinberg*, 181 Misc. 2d at 459, 694 N.Y.S.2d at 328 (holding that "the City's DWI forfeiture policy does not violate the Excessive Fines Clause, as a matter of law, either facially or as applied to petitioner's vehicle").

federal and New York provisions in the same way, concluding that there really was no difference in the federal and New York applications of the clauses discussed.

Susan Clark