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## Search and Seizure

Doris Waldmann

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**SUPREME COURT  
QUEENS COUNTY**

People v. Henry<sup>1</sup>  
(decided August, 12, 1999)

Defendant Henry was indicted for driving a vehicle at night without lit headlights,<sup>2</sup> reckless driving,<sup>3</sup> possession of a stolen blue Honda,<sup>4</sup> unauthorized use of the vehicle,<sup>5</sup> and possession of burglar tools.<sup>6</sup> The defendant moved to suppress a pair of wire

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<sup>1</sup> 181 Misc. 2d 689, 695 N.Y.S.2d 892 (N.Y. Sup. Ct. 1999).

<sup>2</sup> VEH. & TRAF. LAW § 375.2A[1].

<sup>3</sup> VEH. & TRAF. LAW § 1212 (providing in pertinent part: “Reckless driving shall mean driving or using any motor vehicle . . . which . . . unreasonably endangers users of the public highway. Every person violating this provision shall be guilty of a misdemeanor.”).

<sup>4</sup> PENAL LAW §§ 165.50 and 165.45[5]. § 165.50 provides in pertinent part:

[a] person is guilty of criminal possession of stolen property in the third degree when he knowingly possesses stolen property, with intent to benefit himself . . . or impede recovery by an owner thereof, and when the value of the property exceeds three thousand dollars. Criminal possession of stolen property in the third degree is a class D felony.” (§165.45[5] provides in pertinent part “[a] person is guilty of criminal possession of stolen property in the fourth degree when he knowingly possesses stolen property, with intent to benefit himself . . . or to impede the recovery by an owner thereof, and when: (1) The value of the property exceeds one thousand dollars . . .”

*Id.*

<sup>5</sup> PENAL LAW (§165.05 [1] (provides in pertinent part:

[a] person is guilty of unauthorized use of a vehicle in the third degree when (1) Knowing that he does not have the consent of the owner, he takes, operates . . . or otherwise uses the vehicle. A person who engages in any such conduct without the consent of the owner is presumed to know that he does not have such consent.”

*Id.*

<sup>6</sup> PENAL LAW §140.35 provides in pertinent part: “[a] person is guilty of possession of burglar’s tools when he possesses any tool, . . . designed . . . for

pliers, discovered during a search of his person, as well as a statement made to the arresting officer, on the grounds that the officer was not authorized to search the defendant.<sup>7</sup> At a Supreme Court, Queens County hearing to decide defendant's motion to suppress, the court's analysis focused on an examination of both federal<sup>8</sup> and New York State<sup>9</sup> constitutions as well as case law. The court concluded that both the defendant's statement and the covered wire pliers were admissible.<sup>10</sup> The court disposed of the issue of defendant's statement to the arresting officer by noting that "since defendant was given his Miranda warnings, his voluntary statement can be admitted into evidence at trial . . . ."<sup>11</sup>

On January 12, 1999, Police Officer James Pelosi and Sergeant George Norris, who were part of the Street Narcotics Enforcement Unit, were driving in an unmarked car.<sup>12</sup> Upon stopping at an intersection, the officers spotted defendant's car and noted that its headlights were not turned on.<sup>13</sup> After following the defendant's

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committing . . . offenses involving larceny by a physical taking . . . evincing an intent to use . . . the same in the commission of an offense of such character." Defendant was arrested for possession of wire cutters, screwdriver, mace, macguar and socket, penlight and gloves.

<sup>7</sup> *People v. Henry*, 181 Misc. 2d 689, 691, 695 N.Y.S.2d 892, 893.

<sup>8</sup> U.S. CONST. amend. IV provides:

The right of the 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.*

<sup>9</sup> N.Y. CONST. art. I, §12 (1999) provides in pertinent part:

The right of the people to be secure in their persons, houses, papers and effect, 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.*

<sup>10</sup> *Henry*, 181 Misc. at 695, 695 N.Y.S.2d at 898.

<sup>11</sup> *Id.* at 691, 695 N.Y.S.2d at 895.

<sup>12</sup> *Id.* at 690, 695 N.Y.S.2d at 893-94.

<sup>13</sup> *Id.* at 690, 695 N.Y.S.2d at 894.

car for an eighth of a mile, the officers turned on their siren and emergency lights.<sup>14</sup> The defendant sped up and attempted to lose the officers by driving erratically while taking sharp turns and accelerating quickly but the defendant's car struck a curb causing a flat tire.<sup>15</sup> The officers pulled alongside the defendant's car at which time the defendant exited through the passenger door and fled.<sup>16</sup> Officer Pelosi pursued the defendant, shouting at the defendant to stop while Sergeant Norris telephoned the aviation unit.<sup>17</sup>

When the defendant was apprehended, he was not asked for his license or registration and was not read his Miranda rights, until after defendant asked why he was being apprehended.<sup>18</sup> After reading the defendant his Miranda rights, Officer Pelosi handcuffed and searched the defendant.<sup>19</sup> Officer Pelosi stated that "after placing Mr. Henry under arrest and searching him for my safety, I recovered a pair of wire pliers from his right front jacket pocket."<sup>20</sup>

After being asked again by the defendant why he was arrested, Officer Pelosi responded that he was being arrested for driving a stolen vehicle.<sup>21</sup> However, Officer Pelosi did not determine the stolen status of the car until he took the defendant back to the vehicle and discovered that the passenger door handle was jarred and the glove compartment was broken and held together by a string.<sup>22</sup>

The Court noted that "[I]t is well settled that a police officer may lawfully stop a car where that officer has reasonable cause to believe that the driver violated the vehicle and traffic law."<sup>23</sup> However, in this case, the question before the court was whether

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Henry*, 181 Misc. at 690, 695 N.Y.S.2d at 894.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (quoting Transcript, page 14).

<sup>21</sup> *Henry*, 181 Misc.2d at 690-91, 695 N.Y.S.2d at 894.

<sup>22</sup> *Id.* at 691, 695 N.Y.S. 2d at 894.

<sup>23</sup> *Id.*

an officer is authorized to search such a traffic offender or his car, and if so, under what circumstances. The court began its analysis by examining both New York state and federal case law on this issue.

In 1967, the New York State Court of Appeals decided the case of *People v. Marsh*<sup>24</sup> in which it held that legislative design as well as the Federal and State constitutional guarantees against unreasonable searches and seizures will not sustain a contemporaneous search of a person without more than a mere custodial arrest for a *traffic offense*.<sup>25</sup> However a search would be upheld if it can be justified as one for weapons.<sup>26</sup> Thus “except in rare instances, there can be no fruits of such traffic offenses” unless the search can be justified as one for weapons.<sup>27</sup> The court noted that a motorist who is stopped for a traffic infraction does not indicate a propensity for violence and the officer does not have a cause for thinking that he is in danger of being assaulted.<sup>28</sup> The *Marsh* Court seemed to draw a distinction between criminal and traffic offense arrests.<sup>29</sup>

In 1973, the Court of Appeals addressed the issue of whether an officer is authorized to search a person incidentally to a custodial detention for a misdemeanor traffic violation in its decision of *People v. Adams*.<sup>30</sup> The court concluded that notwithstanding that

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<sup>24</sup> *People v. Marsh*, 20 N.Y.2d 98, 281 N.Y.S.2d 789, 228 N.E.2d 783 (N.Y. 1967). Defendant was arrested pursuant to an arrest warrant issued in 1965 for speeding. *Id.* Police officer searched defendant and discovered a book of matches in defendant’s pocket with a sheet of paper implicating him in the playing of policy. *Id.* Defendant was then arrested and convicted for possession of a policy slip. *Id.*

<sup>25</sup> *Marsh*, 20 N.Y.2d at 101, 281 N.Y.S.2d at 792, 228 N.E.2d at 785 (emphasis added).

<sup>26</sup> *Id.*

<sup>27</sup> *Marsh*, 20 N.Y.2d at 101, 281 N.Y.S.2d at 792, 228 N.E.2d at 785.

<sup>28</sup> *Marsh*, 20 N.Y.2d at 101, 281 N.Y.S.2d at 792, 228 N.E.2d at 786.

<sup>29</sup> *Henry*, 181 Misc.2d at 69, 695 N.Y.S. 2d at 895.

<sup>30</sup> *People v. Adams*, 32 N.Y.2d 451, 453-54, 299 N.E.2d 653, 654, 346 N.Y.S.2d 229, 230 (N.Y. 1973). Defendant was arrested on the charge of altering a car’s identification number in violation of the Vehicle and Traffic Law. *Id.* The arresting officer then conducted a warrantless search of defendant’s person and car and discovered marijuana in defendant’s pocket and car. *Id.*

the arrest was for a misdemeanor, as opposed to an infraction, as was the case in *Marsh*, the search incident to an arrest exception would not sustain the search for this type of traffic misdemeanor.<sup>31</sup> In its analysis, the court examined the case of *Coolidge v. New Hampshire*<sup>32</sup> which noted that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are Per se unreasonable under the Fourth Amendment [of the U.S. Constitution] subject only to a few specifically established and well-delineated exceptions."<sup>33</sup> The exceptions will only be applied when there is a showing by those seeking exemption that the search was imperative.<sup>34</sup>

The United States Supreme Court also addressed the issue of an officer's authority to search incident to a lawful arrest in its 1973 decision of *United States v. Robinson*.<sup>35</sup> The Court held that the Fourth Amendment to the federal constitution allowed for searches incident to a traffic violation arrest.<sup>36</sup> The Supreme Court noted that pursuant to the Fourth Amendment, a police officer's judgment as to how and where to search a suspect, does not have to be broken down into an analysis of each step of his search.<sup>37</sup> The Court held,

A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant

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<sup>31</sup> *Adams*, 32 N.Y.2d at 455, N.E.2d at 655, 346 N.Y.S.2d at 232.

<sup>32</sup> 403 U.S. 443 (1971).

<sup>33</sup> *Coolidge*, 403 U.S. at 454-55.

<sup>34</sup> *Id.*

<sup>35</sup> 414 U.S. 218 (1973). Defendant was arrested for operating a motor vehicle after revocation of his driver's license and was searched without a warrant. *Id.* The arresting officer discovered a crumpled cigarette package and heroin capsules in the defendant's left breast pocket. *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 235.

requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.<sup>38</sup>

The *Adams* issue was revisited by the New York Court of Appeals in 1974 in the case of *People v. Troiano*.<sup>39</sup> The Court took this opportunity to address the United States Supreme Court's decision in *Robinson* by noting that although it relied in part on the Fourth Amendment of the Federal Constitution in its decisions of *Marsh* and *Adams*, its decision on this issue "is primarily an expression of State policy found in the State constitution . . ."<sup>40</sup> *People v. Troiano* sets forth the current state of New York constitutional law.<sup>41</sup> The court held that the general rule is that where an arrest is lawful, an incidental search is inevitable.<sup>42</sup> However there might be "an area of traffic violation arrests where a full blown search is not justified where an arrest was not necessary because an alternative summons was available or because the arrest was a suspect pretext."<sup>43</sup>

In short, the Federal Constitution as interpreted by the United States Supreme Court affords police officers a broader right to search a suspect incidentally to a valid arrest than the New York State Constitution as interpreted by the New York State Court of Appeals.<sup>44</sup> Pursuant to federal law, a search incident to a valid arrest requires no additional justification.<sup>45</sup> Under New York law, there must be (1) a danger of the defendant being armed, (2) no alternatives to custodial arrest such as a summons, and (3) the

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<sup>38</sup> *Id.*

<sup>39</sup> 35 N.Y.2d 476, 363 N.Y.S.2d 943, 323 N.E.2d 183 (N.Y. 1974). A warrant was issued for the defendant's arrest for a misdemeanor charge of driving with a suspended license. *Id.* Six days later an officer stopped defendant, displayed the arrest warrant, arrested, frisked and searched the defendant and discovered a loaded revolver. *Id.*

<sup>40</sup> *People v. Henry*, 181 Misc.2d at 692, 695 N.Y.S.2d at 895 (quoting *People v. Weintraub*, 35 N.Y.2d 351 concurring opn. p. 355, 361 N.Y.S.2d 897, 320 N.E.2d 636 (1974)).

<sup>41</sup> *Henry*, 181 Misc.2d at 694, 695 N.Y.S.2d at 896.

<sup>42</sup> *Troiano*, 35 N.Y.2d at 478, 363 N.Y.S.2d at 945, 323 N.E.2d at 185.

<sup>43</sup> *Id.*

<sup>44</sup> *People v. Weintraub*, 35 N.Y.2d at 353, 361 N.Y.S.2d at 899, 320 N.E.2d at 637.

<sup>45</sup> *Robinson*, 414 U.S. 218.

arrest can not be a suspect pretext in order to justify the search of a suspect.<sup>46</sup>

*Doris Waldmann*

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<sup>46</sup> *Henry*, 181 Misc.2d at 694, 695 N.Y.S.2d at 896.