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**SUPREME COURT OF NEW YORK
KINGS COUNTY**

People v. Abdul-Akim¹
(decided May 6, 2010)

Ali Abdul-Akim and Marcus Ayala were charged with criminal possession of a weapon following the recovery of a firearm during a search of defendant Ayala's vehicle.² The defendants moved to suppress the firearm claiming that defendant Ayala's arrest for unlicensed driving and illegal use of a cell phone was not supported by probable cause and, as a result, the firearm seized following his arrest was illegally obtained.³ After holding a *Mapp/Dunaway* hearing, the court granted the defendants' motion to suppress the firearm.⁴ It determined "that the arrests of the defendants and the [subsequent] inventory search of defendant Ayala's [vehicle] were not legal" because the actions by the law enforcement officers were unreasonable and not supported by probable cause.⁵ Specifically, the court determined that the police conduct in this case violated Ayala's rights⁶ under the Fourth Amendment to the United States Constitution⁷ and article I, section 12 of the New York Constitution.⁸ More importantly, the court determined that even if probable cause had existed in this case,

¹ No. 5518/09, 2010 WL 1856007 (N.Y. Sup. Ct. May 6, 2010).

² *Id.* at *1. "Defendant Abdul-Akim w[as] also charged with Unlawful Wearing of a Body Vest." *Id.*

³ *Id.* Defendant Abdul-Akim also moved to suppress the body vest. *Id.*

⁴ *Abdul-Akim*, 2010 WL 1856007, at *12. The court also granted Abdul-Akim's motion and suppressed the body vest. *Id.*

⁵ *Id.*

⁶ *Id.* at *9.

⁷ The Fourth Amendment to the United States Constitution states, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

⁸ Article I, section 12 of the New York State Constitution states, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

Ayala's arrest for the cell phone infraction was unwarranted and a violation of his constitutional rights.⁹

On June 16, 2009, Officer Armenio, while on foot patrol, observed defendant Ayala "holding a cell phone with both hands" while operating a vehicle.¹⁰ After directing him to pull over, Officer Armenio asked Ayala for his driver's license, registration, and proof of insurance.¹¹ Ayala complied with this request and produced a Virginia "permit" together with registration and insurance documents.¹² After examining the "permit," Officer Armenio "determined at the scene that the document was not a driver's license and arrested defendant Ayala for unlicensed driving, as well as for operating a motor vehicle while unlawfully using a cell phone."¹³ As he was being arrested, Ayala requested that the officers verify the validity of the Virginia license; however, the officer told Ayala that nothing was found in the database.¹⁴ Following the arrest, Ayala's vehicle was seized and transferred "to the precinct for inventory and safekeeping."¹⁵ During the inventory search, "a loaded nine millimeter firearm and one loose nine millimeter round" were discovered.¹⁶

At the *Mapp/Dunaway* hearing, Ayala testified that he was issued a temporary license from the Virginia Department of Motor Vehicles the day prior to his arrest.¹⁷ He was informed by the Department of Motor Vehicles that he would receive his actual license in the mail within one week.¹⁸ The defense offered Ayala's Virginia temporary driving permit into evidence, which was issued in February 2010.¹⁹ This document was "identical" to the temporary

⁹ *Abdul-Akim*, 2010 WL 1856007, at *11.

¹⁰ *Id.* at *1. Defendant Abdul-Akim and an acquaintance, Jeffrey Brown, were also in Ayala's vehicle. *Id.* At some point during the stop, Brown produced a valid New York State driver's license at the request of Officer Armenio. *Id.* at *2.

¹¹ *Id.* at *1.

¹² *Abdul-Akim*, 2010 WL 1856007, at *1.

¹³ *Id.* While Officer Armenio was questioning Ayala, he witnessed defendant Abdul-Akim exit Ayala's vehicle. *Id.* at *2. Subsequently, two officers on foot patrol stopped, searched, and arrested Abdul-Akim for the unlawful wearing of a body vest. *Id.*

¹⁴ *Id.* at *3.

¹⁵ *Abdul-Akim*, 2010 WL 1856007, at *2.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* Ayala received this temporary driving permit in February 2010 after he lost his

driving permit he presented to Officer Armenio on June 16, 2009, “with the exception of the issue date.”²⁰ The top center of the document contained the words “ ‘Commonwealth of Virginia Temporary Driving Permit.’ ”²¹ Just below these words, Ayala’s license type indicated that he was, in fact, a licensed driver.²² Moreover, the defense offered a transcript of Ayala’s driving record into evidence which confirmed that Ayala was properly licensed as of June 15, 2009.²³

Based on the evidence presented at the hearing, the court made two findings of fact in determining the defendants’ motion to suppress the evidence seized from Ayala’s vehicle.²⁴ First, the court determined that Ayala’s arrest for unlicensed driving was factually unwarranted.²⁵ Relying on the evidence proffered by the defense, the court determined that Ayala furnished a valid driver’s license despite the fact that the word “permit” was displayed on it.²⁶ Notably, the Virginia statute governing the issuance of temporary permits provides that a temporary driving permit is valid “until the holder is issued a driver’s license.”²⁷ Furthermore, based upon the documentary evidence offered by the defense, there was “no indication that Virginia ever issued defendant Ayala a learner’s permit. There thus [wa]s every reason to believe that what Officer Armenio saw on June 16, 2009 was a driver’s license.”²⁸ Second, the court found that defendant Ayala’s arrest for the unlawful use of a cell phone was not

driver’s license. *Abdul-Akim*, 2010 WL 1856007, at *3. Again, as in June 2009, Ayala “was issued [a] temporary license and [was] told to use it as a driver’s license and to carry photo ID along with it” until he received his photo license in the mail. *Id.* Because Ayala “never received the [2009] Virginia document back from the police[,]” Ayala offered the February 2010 document into evidence as a substitute for the document he presented to Officer Armenio on June 16, 2009. *Id.*

²⁰ *Id.* The temporary license Ayala handed to Officer Armenio indicated June 15, 2009 as the issue date. *Id.*

²¹ *Abdul-Akim*, 2010 WL 1856007, at *3.

²² *Id.* “Apparently both a Virginia temporary license and a Virginia temporary learner’s permit are headed ‘Temporary Driving Permit.’ ” *Id.* at *8. “But the ‘type’ of authorization granted . . . is plainly specified.” *Id.*

²³ *Id.* at *4.

²⁴ *Abdul-Akim*, 2010 WL 1856007, at *4.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at *5 (“No other circumstance provides a reasonable basis for concluding that Officer Armenio was instead shown a ‘learner’s permit.’ ”).

supported by the evidence.²⁹ Although Officer Armenio testified that he witnessed Ayala with a cell phone in his hands as he was driving his car, the Vehicle and Traffic Law, at the time of defendant Ayala's arrest, "prohibit[ed] a driver's use of a cell phone while [the] car is in motion, but only if the cell phone is near the driver's ear."³⁰ Therefore, since Armenio's testimony indicated that Ayala was most likely texting, which was not a traffic violation at that time, Ayala's use of the cell phone did not violate the Vehicle and Traffic Law.³¹

Based upon these findings of fact, the court granted the defendants' motion to suppress the firearm obtained from the search of Ayala's vehicle.³² Foremost, the court concluded that defendant Ayala's arrest violated his constitutional rights.³³ A driver may be stopped and questioned by a law enforcement officer only "where the officer has probable cause to believe . . . the driver violated the Vehicle and Traffic Law."³⁴ Since Ayala was not violating the Vehicle and Traffic Law by using his cell phone, Officer Armenio should never have stopped Ayala or asked him to produce his license.³⁵ Despite this conclusion, the court continued to analyze the legality of the arrest based upon Officer Armenio's belief that Ayala was operating a vehicle without a proper license.³⁶ In deciding this issue, the inquiry was whether Officer Armenio's mistaken belief that Ayala presented an invalid license resulted from a mistake of fact or a mistake of law.³⁷

[S]hould an officer make an illegal arrest based on a mistake of law and as a result recover evidence, the

²⁹ *Abdul-Akim*, 2010 WL 1856007, at *5.

³⁰ *Id.* Section 1225-d of the Vehicle and Traffic Law was enacted in late 2009, after defendant Ayala's arrest, to prohibit the use of a cell phone while the car is in motion regardless of whether the phone is near the driver's ear. *Id.*

³¹ *Id.* at *5-6. In addition to Officer Armenio's testimony, the court relied on defendant Ayala's testimony that "he did not use his cell phone while driving" in making its determination. *Id.* at *6.

³² *Abdul-Akim*, 2010 WL 1856007, at *12.

³³ *Id.* at *9.

³⁴ *Id.* at *6 (citing *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *People v. Robinson*, 767 N.E.2d 638, 642 (N.Y. 2001)).

³⁵ *Id.* ("The court . . . concludes that defendant Ayala's cell phone use provided no justification for a stop, in that there was no evidence that defendant Ayala was using his cell phone illegally.")

³⁶ *Id.*

³⁷ *Abdul-Akim*, 2010 WL 1856007, at *6.

evidence must be suppressed[;] [b]ut generally, if the reason for an illegal arrest is a mistake about the facts supporting the officer's belief that probable cause exists, the arrest is not unlawful.³⁸

Recognizing that Officer Armenio's mistake could be classified as either a mistake of law or a mistake of fact, the court "assume[d], in the People's favor, that in examining defendant's license Officer Armenio made a mistake of fact."³⁹ Where a mistake is one of fact, an otherwise unlawful arrest will be upheld only where it is determined that the mistake was reasonable under the circumstances.⁴⁰ Based upon the evidence, Officer Armenio's mistaken belief that Ayala was an unlicensed driver did not meet this standard.⁴¹ As previously noted, the license explicitly indicated that Ayala was a licensed driver.⁴² Moreover, in view of the fact that Ayala furnished valid registration and insurance papers, Officer Armenio should have further researched the matter.⁴³ A simple inquiry into the status of Ayala's license would have revealed that he was fully licensed.⁴⁴ Therefore, "[t]he arrest [based upon the unlicensed operation of a vehicle] was simply illegal, and it follows that the seizure of defendant Ayala's car and the recovery of the firearm from the glove box were actions taken in violation of defendant Ayala's state and federal constitutional rights."⁴⁵

Although the court concluded that Ayala's arrest for unlawfully using a cell phone was factually unwarranted, it proceeded to analyze the legality of a search incident to an arrest for a mere traffic violation.⁴⁶ Pursuant to the Vehicle and Traffic Law,

³⁸ *Id.* (" 'The constitutional validity of a stop is not undermined simply because the officers who made the stop were mistaken about relevant facts[.]' " (quoting *United States v. Jenkins*, 452 F.3d 207, 212 (2d Cir. 2006))).

³⁹ *Id.* at *7.

⁴⁰ *Id.* ("[I]t has been held that intrusive action may be justified by a 'reasonable' mistake of fact.").

⁴¹ *Id.* at *8.

⁴² *Abdul-Akim*, 2010 WL 1856007, at *8 ("[T]he court cannot ratify as 'reasonable' police conduct based on obliviousness to the plain facial contents of a license.").

⁴³ *Id.*

⁴⁴ *Id.* at *8-9 ("[T]he resources available to the police to determine the status of a driver should have enabled the police to confirm the validity of defendant Ayala's driver's license at the scene, obviating any need to transport defendant and his vehicle to the station house.").

⁴⁵ *Id.* at 9.

⁴⁶ *Id.* ("[T]he record does not permit the court to conclude that defendant Ayala could be

an individual who unlawfully uses a cell phone while driving may be fined no more than one hundred dollars.⁴⁷ Although this act is defined as a mere “traffic infraction” for which a “jail term is not authorized,” the governing statutes permit a police officer to execute a warrantless arrest for this offense.⁴⁸ Of course, a police officer may, as an alternative to making a warrantless arrest, issue a summons.⁴⁹ Although an arrest based upon a traffic infraction is statutorily permitted, the arrest must nonetheless be reasonable under the circumstances in order to prevail against a constitutional claim.⁵⁰ Relying on this standard, the court determined that the “arrest of defendant Ayala for unlawful cell phone use, with the ensuing seizure of his automobile and the inventory of its contents, w[as] simply not . . . reasonable.”⁵¹ A number of facts contributed to this conclusion.⁵² Foremost, Officer Armenio should have issued a citation for the alleged cell phone violation given the fact that Ayala produced “numerous items of identification.”⁵³ Second, the officer had the option of allowing Brown, one of the licensed passengers in the vehicle, to drive Ayala’s car.⁵⁴ Finally, not only was the decision to make an arrest in this situation unreasonable, but it was also followed by the unnecessary seizure and inventory search of Ayala’s vehicle.⁵⁵

In sum, the police officers’ conduct was not reasonable under

arrested for unlawfully using a cell phone while driving. But if that conclusion is wrong, even a legal arrest for the cell phone offense would not have made the recovery of the firearm . . . proper”).

⁴⁷ *Abdul-Akim*, 2010 WL 1856007, at *9.

⁴⁸ *Id.* at *8. “The Vehicle and Traffic Law and the Criminal Procedure Law provide that a warrantless arrest may be made for [unlawfully using a cell phone while driving].” *Id.* at *9. More specifically, pursuant to the Vehicle and Traffic Law, “[f]or the purposes of arrest without a warrant, . . . a traffic infraction . . . [is] deemed an offense.” *Id.* at *9 n.9. The Criminal Procedure Law permits an officer to arrest an individual for any offense so long as the arrest is supported by probable cause. *Id.*

⁴⁹ *Abdul-Akim*, 2010 WL 1856007, at *9 (“[A]n officer may issue an appearance ticket in lieu of making a warrantless arrest.”).

⁵⁰ *Id.* (“[R]easonableness of police conduct is the key consideration in analyzing [police] conduct under the Fourth Amendment and . . . Article I § 12 of the [New York] [C]onstitution.”).

⁵¹ *Id.* (“Even though the arrest was authorized by statute, the disproportionate nature of the police response to a supposed cell phone violation is apparent.”).

⁵² *See id.* at *10.

⁵³ *Id.* (“Issuance of a citation was eminently practicable, for defendant Ayala had numerous items of identification-and, of course, a valid license.”).

⁵⁴ *Abdul-Akim*, 2010 WL 1856007, at *10.

⁵⁵ *Id.*

the circumstances, and therefore, the state and federal constitutional rights of the defendants were violated once Ayala's arrest occurred.⁵⁶ Since Ayala's arrest for the cell phone infraction and unlicensed driving offense was not warranted, the search of the vehicle was unconstitutional.⁵⁷ Moreover, "even if [there had been] probable cause to believe that defendant Ayala drove his car while unlawfully using a cell phone, that was not a valid predicate for the resultant arrest, search of the car, and recovery of the firearm."⁵⁸

The United States Supreme Court has addressed whether an arrest for a traffic infraction violates an individual's Fourth Amendment rights.⁵⁹ In *Atwater v. City of Lago Vista*,⁶⁰ Gail Atwater was arrested for, and ultimately charged with, "driving without her seatbelt fastened, failing to secure her children in seatbelts, driving without a license, and failing to provide proof of insurance" after a police officer observed her driving while not wearing a seatbelt.⁶¹ The applicable law authorized the police officer to either issue a citation or make an arrest for the seatbelt violation.⁶²

Atwater filed a § 1983 lawsuit against the City of Lago Vista alleging a violation of her Fourth Amendment right against unreasonable seizure.⁶³ In interpreting the Fourth Amendment, the reviewing court must consider " 'the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing.' "⁶⁴ Atwater first contended that the common law prohibited warrantless arrests for misdemeanor offenses unless such arrest was for breach of the peace.⁶⁵ The Court rejected this argument, finding that it was neither supported by precedent nor the historical record.⁶⁶ Moreover, the history surrounding the development of the Fourth Amendment did not support Atwater's

⁵⁶ *Id.* at *9.

⁵⁷ *Id.*

⁵⁸ *Id.* at *11.

⁵⁹ See *Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001).

⁶⁰ *Id.* at 318.

⁶¹ *Id.* at 324.

⁶² *Id.* at 323.

⁶³ *Id.* at 325.

⁶⁴ *Atwater*, 532 U.S. at 326 (quoting *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995)).

⁶⁵ *Id.* at 326-27.

⁶⁶ *Id.* at 332 ("We thus find disagreement, not unanimity, among both the common-law jurists and the text writers who sought to pull the cases together and summarize accepted practice.").

argument.⁶⁷ In fact, “[d]uring the period leading up to and surrounding the framing of the Bill of Rights, colonial and state legislatures . . . regularly authorized local peace officers to make warrantless misdemeanor arrests without conditioning statutory authority on breach of the peace.”⁶⁸ Thus, the Fourth Amendment did not prevent peace officers from making warrantless arrests for misdemeanors not based on breach of the peace.⁶⁹ Furthermore, there has been “two centuries of uninterrupted (and largely unchallenged) state and federal practice permitting warrantless arrests for misdemeanors not amounting to or involving breach of the peace.”⁷⁰ Notably, “statutes in all [fifty] [s]tates and the District of Columbia permit warrantless misdemeanor arrests by at least some (if not all) peace officers without requiring any breach of the peace, as do a host of congressional enactments.”⁷¹

Declining to adopt “a modern arrest rule,” the Court concluded that Atwater’s arrest was lawful under the Fourth Amendment.⁷² After the police officer observed Atwater and her children without seatbelts on, he was permitted, though not required, to arrest her.⁷³ Moreover, the arrest was not “made in an ‘extraordinary manner, unusually harmful to her privacy or physical interests.’”⁷⁴

It is important to note, as did the court in *Abdul-Akim*, that the Supreme Court’s decision in *Atwater* was limited to the issue of whether an arrest for a minor traffic offense was lawful under the United States Constitution and did not involve the more specific situation involving a search of a vehicle subsequent to an arrest for a

⁶⁷ *Id.* at 336. In addition to analyzing the common law, the Court also examined “specifically American evidence.” *Id.* However, “[n]either the history of the framing era nor subsequent legal development indicates that the Fourth Amendment was originally understood, or has traditionally been read, to embrace Atwater’s position.” *Atwater*, 532 U.S. at 322.

⁶⁸ *Id.* at 337 (internal citations omitted).

⁶⁹ *Id.* at 340 (“[T]he Fourth Amendment, as originally understood, [did not forbid] peace officers to arrest without a warrant for misdemeanors not amounting to or involving breach of the peace.”).

⁷⁰ *Id.*

⁷¹ *Id.* at 344.

⁷² *Atwater*, 532 U.S. at 346, 354 (reaffirming that “[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender”).

⁷³ *Id.* at 354.

⁷⁴ *Id.* (quoting *Whren v. United States*, 517 U.S. 806, 818 (1996)).

traffic infraction.⁷⁵

In *Virginia v. Moore*,⁷⁶ the Supreme Court was presented with the issue of whether an arrest for driving with a suspended license and a subsequent search of the arrestee's person violated the Fourth Amendment when the applicable state law required the officer to issue a summons.⁷⁷ David Lee Moore was arrested for driving with a suspended license and was subsequently searched.⁷⁸ The arresting officers recovered cocaine from Moore's person and charged him with possession and intent to distribute.⁷⁹ Moore moved to "suppress the evidence from the arrest search," arguing that because the arrest was illegal under state law, the search following that arrest was also unlawful.⁸⁰ However, the Court rejected Moore's claim.⁸¹

⁷⁵ See *Abdul-Akim*, 2010 WL 1856007, at *11; *Atwater*, 532 U.S. at 323. Although *Atwater* did not involve a search, a number of Supreme Court decisions have clarified when a search incident to an arrest is constitutionally permissible. See, e.g., *Arizona v. Gant*, 129 S. Ct. 1710, 1719 (2009); *United States v. Robinson*, 414 U.S. 218, 235 (1973). A law enforcement officer may conduct a search of a person where that person has been subjected to a lawful arrest. *Robinson*, 414 U.S. at 235 ("[I]n the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."). Recently, the Court provided clarification as to when a search of a vehicle may be conducted following an occupant's arrest. See *Gant*, 129 S. Ct. at 1719. First, in *Gant*, the Court held that law enforcement officers are authorized "to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Id.* This means, therefore, that a police officer cannot automatically conduct a search of a vehicle every time an occupant of a vehicle is arrested. *Id.* Second, the Court concluded that "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Id.* (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004)). Notably, the Court acknowledged that "[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence." *Id.* However, it is important to note that this decision placed restrictions on police officers' ability to conduct a warrantless search of a vehicle incident to an arrest. *Gant*, 129 S. Ct. at 1719. *Gant* did not affect the holding of *South Dakota v. Opperman*, wherein the Court held that warrantless inventory searches of vehicles that have been impounded are constitutional. 428 U.S. 364, 372 (1976). In *Opperman*, the Court held that "inventories pursuant to standard police procedures are reasonable" under the Fourth Amendment. *Id.* at 372-73 (noting that the "Court has consistently sustained police intrusions into automobiles impounded or otherwise in lawful police custody where the process is aimed at securing or protecting the car and its contents").

⁷⁶ 553 U.S. 164 (2008).

⁷⁷ *Id.* at 166-67.

⁷⁸ *Id.*

⁷⁹ *Id.* at 167.

⁸⁰ *Id.* at 167-68.

⁸¹ *Moore*, 553 U.S. at 178.

At the outset, the Court addressed the issue of the arrest based upon the misdemeanor traffic violation, stating that “when an officer has probable cause to believe a person committed even a minor crime in his presence, . . . [t]he arrest is constitutionally reasonable.”⁸² The Court then addressed the issue of Virginia’s law requiring an officer to issue a summons for a traffic violation and recognized that a “[s]tate is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional.”⁸³ Next, Moore asserted that even if the arrest was constitutionally permissible, the subsequent search of his person was not.⁸⁴ This argument was rejected, as it has long been “recognized . . . that officers may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence.”⁸⁵ After the officers placed Moore under arrest, a search was justified in order to protect the officers from harm.⁸⁶ Put simply, “When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their safety.”⁸⁷

The United States Court of Appeals for the Fifth Circuit has reinforced the principle that an arrest for a traffic violation does not violate the Fourth Amendment.⁸⁸ In *Lockett v. New Orleans City*,⁸⁹ Shawn Lockett sued the City of New Orleans for false arrest after he was pulled over for speeding and subsequently frisked and arrested for reckless driving.⁹⁰ The Fifth Circuit rejected Lockett’s claim for false arrest, finding that “because the [police officers] had probable cause to believe that Lockett had been driving in violation of the speed limit, the arrest did not violate a clearly established

⁸² *Id.* at 171 (citing *Atwater*, 532 U.S. at 354).

⁸³ *Id.* at 174.

⁸⁴ *Id.* at 176.

⁸⁵ *Id.* at 176-77 (“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.” (quoting *Robinson*, 414 U.S. at 235)).

⁸⁶ *Moore*, 553 U.S. at 177 (citing *Robinson*, 414 U.S. at 235) (“The interests justifying search are present whenever an officer makes an arrest.”).

⁸⁷ *Id.* at 178.

⁸⁸ See *Lockett v. New Orleans City*, 607 F.3d 992, 998 (5th Cir. 2010) (per curiam).

⁸⁹ *Id.* at 992.

⁹⁰ *Id.* at 995-97.

constitutional right.”⁹¹ Moreover, the holding set forth in *United States v. Robinson*⁹² was utilized in rejecting Lockett’s claim that he was subjected to an illegal search.⁹³

Under federal case law, it is clear that if probable cause exists to believe that a person has committed an offense, then an arrest of that person is constitutionally permissible. This is true even where the offense committed is minor, such as speeding or failing to stop at a stop sign. Furthermore, a search incident to that arrest is reasonable and will not violate the Fourth Amendment.

The New York courts have taken a position contrary to that of the federal courts.⁹⁴ In *People v. Marsh*,⁹⁵ the New York Court of Appeals suppressed evidence obtained from a search following an arrest based upon an outstanding warrant.⁹⁶ The defendant’s person was searched after he was arrested pursuant to an arrest warrant for a prior speeding offense.⁹⁷ Subsequently, the defendant was “charged, tried and convicted for possession of a policy slip.”⁹⁸

Although it is generally disfavored, a police officer is statutorily permitted to make an arrest for a traffic violation.⁹⁹ However, despite this authorization afforded to law enforcement, “The authority of the police to search a traveler on the highway may not be made to turn on whether the officer, [i]n the exercise of his discretion, forthwith arrests the traffic offender instead of merely summoning him to court.”¹⁰⁰ Furthermore, even though an officer may conduct a search incident to a lawful arrest,

[T]he [New York State] Legislature never intended to authorize a search of a traffic offender unless, when the vehicle is stopped, there are reasonable grounds

⁹¹ *Id.* at 998.

⁹² 414 U.S. 218.

⁹³ *Lockett*, 607 F.3d at 1001.

⁹⁴ *People v. Abdul-Akim*, No. 5518/09, 2010 WL 1856007, at *9 (N.Y. Sup. Ct. May 6, 2010) (“The New York Court of Appeals has on several occasions addressed the question of custodial arrests for minor traffic infractions in the context of examining the legality of searches incident to such arrests, and has expressed a preference for the issuance of an appearance ticket in lieu of arrest.”).

⁹⁵ 228 N.E.2d 783 (N.Y. 1967).

⁹⁶ *Id.* at 787.

⁹⁷ *Id.* at 785.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Marsh*, 228 N.E.2d at 785.

for suspecting that the officer is in danger or there is probable cause for believing that the offender is guilty of a crime rather than merely a simple traffic infraction.¹⁰¹

This is because “A motorist who exceeds the speed limit does not thereby indicate any propensity for violence or iniquity, and the officer who stops the speeder has not even the slightest cause for thinking that he is in danger of being assaulted.”¹⁰²

In sum, the court concluded that

[N]o search for a weapon is authorized as incident to an arrest for a traffic infraction, regardless of whether the arrest is made on the scene or pursuant to a warrant, unless the officer has reason to fear an assault or probable cause for believing that his prisoner has committed a crime.¹⁰³

To hold otherwise “would preclude consideration of the reasonableness of any particular search, and so would take away the protection that the [C]onstitution is designed to provide.”¹⁰⁴

Seven years later, the New York Court of Appeals upheld a search following an arrest for driving without a valid license.¹⁰⁵ In *People v. Troiano*,¹⁰⁶ the defendant was arrested based on an arrest warrant for “the misdemeanor charge of driving while licensed suspended.”¹⁰⁷ After the arresting police officer searched the defendant’s person, he found a loaded revolver in the waistband of the defendant’s pants.¹⁰⁸ The New York Court of Appeals denied the defendant’s motion to suppress the firearm, stating that “once the arrested person is taken to the place of detention a full inventory search is merited for his protection and that of his property, as well as for the safety of his custodians and fellow-prisoners.”¹⁰⁹ However,

¹⁰¹ *Id.* at 786.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *See* *People v. Troiano*, 323 N.E.2d 183, 185 (N.Y. 1974).

¹⁰⁶ *Id.* at 183.

¹⁰⁷ *Id.* at 184.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 185 (citing *People v. Perel*, 315 N.E.2d 452, 456 (N.Y. 1974)).

the court recognized that “There is, perhaps, an area of traffic violation ‘arrest’ where a full-blown search is not justified, but it might seem to be confined to a situation where an arrest was not necessary because an alternative summons was available or because the arrest was a suspect pretext.”¹¹⁰

In *People v. Howell*,¹¹¹ the New York Court of Appeals acknowledged and applied the exception set forth in *Troiano*.¹¹² In *Howell*, the defendant was arrested for reckless driving and a subsequent search of his person revealed that he was carrying a loaded revolver.¹¹³ The court pointed out that there existed “no testimony or finding as to what circumstances led the police officer” to believe that “the defendant might be armed.”¹¹⁴ In granting the defendant’s motion to suppress the revolver, the court stated that “the police conduct [] [fell] within [the *Troiano*] rule” since the arrest was based on mere erratic driving by the defendant.¹¹⁵ An arrest under these circumstances “was neither called for nor the preferred procedure.”¹¹⁶

More recently, the appellate division invalidated a search

¹¹⁰ *Troiano*, 323 N.E.2d at 185. Judge Rabin, in his concurring opinion, distinguished *Troiano* from *Marsh*, stating: “The warrant authorized Marsh’s arrest for speeding, a traffic infraction not a crime, and since there was no reason for the arresting officer to fear an assault, or probable cause to believe Marsh had committed a crime, no search for a weapon was authorized.” *Id.* at 186 (Rabin, J., concurring) (citing *People v. Coleman*, 250 N.E.2d 237, 237 (N.Y. 1969)). *Troiano*, on the other hand, “was arrested on a misdemeanor violation of the Vehicle and Traffic Law and not for a mere infraction.” *Id.* (“Although the nature of the offense itself does not raise the likelihood of violence, the fact that it is in the misdemeanor category separates and distinguishes it from a very great number of traffic infractions committed by virtually everyone who ventures outdoors.”). Moreover, “the search in [*Troiano*] is distinguishable from that in *Marsh* in that the extent of the search necessary to uncover the weapon was entirely consonant with its purpose of securing the officer’s safety and preventing an escape.” *Id.*

Had Marsh been taken into custody for a misdemeanor traffic offense, a frisk appropriate to the discovery of weapons would have been authorized[;] [however] [i]t is doubtful that this rationale would authorize the removal of the book of matches from Marsh’s pocket, and it is certain that a search for weapons supplies no reason for opening the match cover and seizing the paper enclosed within it.

Id.

¹¹¹ 403 N.E.2d 182, 183 (N.Y. 1980).

¹¹² *Id.* at 183.

¹¹³ *Id.* at 182-83.

¹¹⁴ *Id.* at 183.

¹¹⁵ *Id.* at 182-83.

¹¹⁶ *Howell*, 403 N.E.2d at 182 (internal citations omitted).

following a stop for a traffic infraction.¹¹⁷ In *People v. Barreras*,¹¹⁸ the defendant was convicted of “criminal possession of a controlled substance” after he was pulled over for failing to stop at a stop sign.¹¹⁹ After being pulled over, the defendant produced a valid license, registration, and insurance documents.¹²⁰ Nonetheless, the officer, “without advising defendant that he could refuse the request, then asked the defendant if he would ‘mind’ if the officer looked through the car.”¹²¹ While searching the defendant’s car, the officer found what he believed to be cocaine and marijuana.¹²² The defendant was subsequently arrested and taken to the precinct, where he was issued a summons for the traffic violation.¹²³ Finding that “[o]nce defendant’s papers were all found to be in order, the officers, without more, were obligated to issue the stop-sign summons and allow defendant to resume his journey[,]” the court granted the defendant’s motion to suppress the evidence obtained as a result of the search of his vehicle.¹²⁴

In a civil case brought against New York City, the court was presented with the issue of whether a police officer is required to issue a summons when a traffic law has been violated.¹²⁵ In *Santiago v. City of New York*,¹²⁶ the plaintiff was stopped, arrested, and charged with “speeding, interfering with the safe operation of other vehicles, and following too closely.”¹²⁷ The defendant moved to dismiss the plaintiff’s claims, arguing that “the plaintiff was properly stopped, detained, arrested and prosecuted for the traffic infractions.”¹²⁸ The court denied the defendant’s motion and, in making its determination, recognized that

¹¹⁷ See *People v. Barreras*, 677 N.Y.S.2d 526, 529 (App. Div. 2d Dep’t 1998).

¹¹⁸ *Id.* at 526.

¹¹⁹ *Id.* at 527-28.

¹²⁰ *Id.* at 528.

¹²¹ *Barreras*, 677 N.Y.S.2d at 529.

¹²² *Id.*

¹²³ *Id.* at 528-29.

¹²⁴ *Id.* at 529-30.

¹²⁵ See *Santiago v. City of New York*, No. 7161/00, 2002 WL 484139, at *4 (N.Y. Sup. Ct. Feb. 26, 2002) (“After a stop for a traffic offense committed [i]n the officer’s presence, is a police officer obligated to merely issue a traffic summons and release the motorist, or does said officer have an *unfettered* discretion to make an arrest?”).

¹²⁶ *Id.* at *1.

¹²⁷ *Id.*

¹²⁸ *Id.*

An ever-growing body of persuasive commentary in other decisions suggest that police officers do *not*, absent some aggravating circumstance, have an unfettered discretion to make a full custodial arrest for a traffic offense and must instead merely issue a traffic summons and allow the motorist to leave.¹²⁹

Moreover, the court acknowledged that the “evolution of the law” has “demonstrate[d] an increasing erosion of what initially appears to be a clear and absolute statutory right of a police office[r] to make a custodial arrest for a traffic infraction.”¹³⁰ In conclusion, the court denied the defendant’s motion to dismiss and held that the police officers were required to issue a citation for any traffic violations committed by Santiago.¹³¹

Based on the above analysis of New York case law regarding arrests and searches following traffic violations, it is clear that the court in *Abdul-Akim* properly determined that the arrest for the cell phone infraction and the subsequent search of the vehicle were unlawful. At first glance, the holding in *Abdul-Akim* is contrary to New York statutory law permitting arrests for traffic violations. However, an evaluation of the current case law in New York plainly demonstrates that an arrest based upon a mere traffic infraction is disfavored and, more importantly, unconstitutional. Concluding that the Legislature, in enacting the cell phone law, “could not have thought it was giving police officers the right arbitrarily to arrest drivers for such a violation, to seize their vehicles, and to conduct intrusive searches,” the court correctly suppressed the weapon obtained as a result of the search.¹³²

However, it is also equally clear that Ayala’s arrest based upon the traffic violation was lawful under the Fourth Amendment. Federal case law has made it clear that a police officer can arrest an individual for a traffic infraction without violating any constitutional rights. It is important to note that the court in *Abdul-Akim* did not

¹²⁹ *Id.* at *11 (emphasis in original).

¹³⁰ *Santiago*, 2002 WL 484139, at *12. The court noted that this case did not involve “a search incident to an arrest[.]” but, nevertheless, analyzed cases concerning this particular issue. *See id.* (emphasis in original).

¹³¹ *Id.* at *15.

¹³² *Abdul-Akim*, 2010 WL 1856007, at *11 (citing *People v. Marsh*, 228 N.E.2d 783, 786 (N.Y. 1967)).

analyze the constitutionality of the inventory search following Ayala's arrest for the traffic infraction under federal law. Rather, the court stopped its analysis at *Atwater* and found it not to be controlling authority. It seems reasonable to conclude that the inventory search of Ayala's vehicle was constitutional under the Fourth Amendment.¹³³ The court noted that "Both the manner of the search, and the procedure through which a record of the seized property was made, fully compl[ied] with the governing authority."¹³⁴ Therefore, the police conduct in this case was lawful under federal law since an arrest based upon a traffic violation is constitutional under the Fourth Amendment and an inventory search of a vehicle in police custody is an exception to the warrant requirement under the Fourth Amendment.

Nonetheless, as the court acknowledged, "New York State courts are bound to exercise independent judgment in determining the scope and effect of the rights guaranteed by the New York State Constitution. Decisions of the Supreme Court limiting similar guarantees in the Constitution of the United States do not bind New York courts."¹³⁵

Clearly . . . [the New York] Court of Appeals maintains a more protective view of an individual's rights under our New York State Constitution as those rights protect all citizens from being the subject of an "unreasonable search and seizure" by the police

¹³³ However, it can be argued that the police officers in *Abdul-Akim* acted unreasonably when they impounded Ayala's car since there was a licensed driver present in the vehicle who could have driven the car after Ayala was arrested. If it is determined that the decision to impound was in fact unreasonable, the result may well be that Ayala's federal constitutional rights were violated.

¹³⁴ *Id.* (citing *South Dakota v. Opperman*, 428 U.S. 364, 372-73 (1976)). However, the court did not speak at length about this issue since it ultimately granted the defendants' motion. *Id.*

¹³⁵ *Id.* at n.10 (citing *People v. Alvarez*, 515 N.E.2d 898, 899 (N.Y. 1987)). See also *People v. Bradford*, No. 10-0023, 2010 WL 3170721, at *6 (N.Y. Cnty. Ct. May 21, 2010).

[D]espite the Supreme Court rulings, state courts are free to protect the privacy interests of their citizens by imposing higher standards on searches and seizures than required by the Federal Constitution. Thus, a state may choose to regulate arrests in a manner more restrictive than the requirements of the 4th Amendment as interpreted by the Supreme Court.

Id.

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following an arrest for a vehicle and traffic law violation.¹³⁶

Based on this basic principle, the firearm was properly suppressed as having been illegally obtained in violation of Ayala's state constitutional rights.

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¹³⁶ *Bradford*, 2010 WL 3170721, at *6.

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