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### Supreme Court, Bronx County, People v. Barnville

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**SUPREME COURT OF NEW YORK  
BRONX COUNTY**

People v. Barnville<sup>1</sup>  
(decided February 23, 2005)

Melik Barnville was “charged with criminal sale of a controlled substance in the third degree, criminal sale of a controlled substance on or near school grounds, and criminal possession of a controlled substance in the third degree.”<sup>2</sup> Barnville made a motion to suppress a bag of drugs recovered by the police<sup>3</sup> pursuant to a “warrantless visual body cavity search.”<sup>4</sup> The court, applying the Supreme Court’s three-part test<sup>5</sup> established in *Schmerber v. California*,<sup>6</sup> held that the search violated the state and federal constitutions.<sup>7</sup> Specifically, there was no clear evidence that drugs

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<sup>1</sup> 794 N.Y.S.2d 847 (Sup. Ct. 2005).

<sup>2</sup> *Id.* at 849. A *Mapp* hearing for this matter took place on October 29, 2004 and November 1, 2004, in which detectives Robert Rodriguez and Patrick Donnellan testified for the government. *Id.* The purpose of a *Mapp* hearing is to determine if physical evidence was obtained illegally by law enforcement officers and thus, would be inadmissible at the criminal defendant’s trial. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>3</sup> *Barnville*, 794 N.Y.S.2d at 849.

<sup>4</sup> *Id.* at 853.

<sup>5</sup> *Id.* at 859-63; See *infra* note 37. The Supreme Court’s three-part test requires the following: a clear indication that the evidence will be found, an exigent circumstance, and that the manner and method of extraction be reasonable. *Schmerber v. California*, 384 U.S. 757, 770-71 (1966).

<sup>6</sup> *Schmerber*, 384 U.S. at 757.

<sup>7</sup> *Barnville*, 794 N.Y.S.2d at 853. See U.S. CONST. amend. IV stating, in pertinent 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, and no Warrants shall issue, but upon probable cause . . . .”; N.Y. CONST. art. I, § 12 stating, in pertinent 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, and no warrants shall issue, but upon probable

would be found on Barnville, no exigency existed, and the search was conducted unreasonably.<sup>8</sup> Accordingly, Barnville's motion to suppress the recovered drugs was granted.<sup>9</sup>

Detectives Donnellan and Rodriquez, members of a narcotics enforcement team, were observing pedestrians at approximately 9:30 p.m. near a building located at 1220 College Avenue.<sup>10</sup> While observing Barnville, Donnellan witnessed June Milling hand Barnville money, presumably for drugs.<sup>11</sup> Then, while Barnville "was facing out toward the street in Donnellan's direction," Barnville placed his hand behind him and held it there for a few seconds.<sup>12</sup> However, Donnellan did not know if Barnville's hand was in "his pants or his belt area or [in his underwear]."<sup>13</sup> Donnellan's testimony stated that his view of Barnville and Milling was clear and unobstructed; the streetlights were on, it was a clear night, and not many people were in the area.<sup>14</sup>

After viewing the transaction with Milling, Donnellan radioed Rodriguez instructions regarding Barnville's description and location.<sup>15</sup> Specifically, Donnellan told Rodriguez to get Barnville and to look in his back pockets and the inside of his underwear for hidden contraband.<sup>16</sup> Subsequently, Rodriguez stopped Barnville,

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cause . . . ."

<sup>8</sup> *Barnville*, 794 N.Y.S.2d at 860-63.

<sup>9</sup> *Id.* at 853.

<sup>10</sup> *Id.* at 849.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (quoting Donnellan's testimony).

<sup>13</sup> *Barnville*, 794 N.Y.S.2d at 849 (quoting Donnellan's testimony).

<sup>14</sup> *Id.* at 850.

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

<sup>16</sup> *Id.*

searched “his outer garments, [and] his pockets,” and transported him to the police precinct to process the arrest.<sup>17</sup> However, at the precinct, Donnellan was informed that no narcotics were found on Barnville.<sup>18</sup> Since Donnellan still believed Barnville possessed drugs, he told his team to re-check Barnville’s pants’ pockets and his belt area.<sup>19</sup> Then, if nothing was found, Donnellan presumed that Barnville had the drugs “boosted.”<sup>20</sup>

Although strip searches usually occur in the precinct cell, Barnville was strip-searched in the back of the overflow cell located directly in front of the precinct desk.<sup>21</sup> The strip search was conducted in front of other prisoners and during at least one other strip search in the same cell.<sup>22</sup> Rodriguez conducted the strip search and “testified that it is ‘standard procedure’ to conduct strip searches ‘on all narcotics arrests’ because a person arrested for a narcotics offense ‘can place narcotics in different areas of their body.’ ”<sup>23</sup> However, once Barnville was naked, Rodriguez stated that “he was unable to see any evidence of drugs and that the defendant did not walk in a way that showed he was holding something in his rectum.”<sup>24</sup>

Next, Rodriguez asked Barnville to “ ‘turn around, squat and

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<sup>17</sup> *Id.* (quoting Rodriguez’s testimony).

<sup>18</sup> *Barnville*, 794 N.Y.S.2d at 851.

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

<sup>20</sup> *Id.* Donnellan “defined ‘boost’ as ‘slang for drug dealers that take the drugs, like, say, crack, in a plastic bag and put it up in their rear area.’ ” *Id.*

<sup>21</sup> *Id.* The overflow cell was designed to accommodate arrestees who needed to be held overnight in overcrowded conditions. *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Barnville*, 794 N.Y.S.2d at 851 (quoting Rodriguez’s testimony).

<sup>24</sup> *Id.* at 852.

cough.’ ”<sup>25</sup> Barnville bent down and Rodriquez observed a “cellophane wrapper” protruding from Barnville’s rectum.<sup>26</sup> Next, Rodriguez instructed Barnville to take the object out of his rectum and Barnville resisted by pushing it further into his body.<sup>27</sup> Afterward, Barnville became unruly and Rodriquez, with the help of a female officer and others, handcuffed and placed Barnville “face down on the floor.”<sup>28</sup> Once Barnville was subdued, another officer attempted to remove the object, but failed due to Barnville’s resistance.<sup>29</sup> Finally, without any mention of obtaining a search warrant, Rodriguez’s supervisor instructed him to take Barnville to the hospital to have the object removed.<sup>30</sup> According to Rodriguez, under these circumstances it was “standard procedure” to bring the person to the hospital in order to remove the object and avoid having it burst inside him.<sup>31</sup> At the hospital, Barnville’s pants were pulled down and Rodriguez removed a bag of crack-cocaine from Barnville’s feces-covered underwear.<sup>32</sup>

The New York Supreme Court found that the warrantless visual body-cavity search, conducted at the precinct, was illegal pursuant to the New York State and United States constitutions.<sup>33</sup>

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<sup>25</sup> *Id.* (quoting Rodriguez’s testimony).

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

<sup>27</sup> *Id.*

<sup>28</sup> *Barnville*, 794 N.Y.S.2d at 852.

<sup>29</sup> *Id.* at 852-53.

<sup>30</sup> *Id.* at 853.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Barnville*, 794 N.Y.S.2d at 853. It is worthwhile to note that the court found the government’s policy of visually examining the rectum of every person arrested on a drug charge, without considering that individual’s specific circumstances, to be unconstitutional. *Id.* at 857 (citing *Samicola v. County of Westchester*, 229 F. Supp. 2d 259, 273-74

Further, the drugs obtained from Barnville's feces, at the hospital, were the fruits of the illegal search, and therefore Barnville's motion to suppress the drug evidence was granted.<sup>34</sup> First, the court established that the warrantless search of Barnville was not a "strip search," but rather a "visual body-cavity search."<sup>35</sup> Next, the court concluded that the search was incident to Barnville's arrest because the sole purpose of the search was to find evidence of narcotics.<sup>36</sup> Given the characteristics of the search in question, the court determined its constitutionality by applying the three-part test established in *Schmerber*.<sup>37</sup>

The first part of the test requires that the police have a 'clear indication' the incriminating evidence will be found within the body of the arrestee . . . . The second . . . part of the test requires exigent circumstances

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(S.D.N.Y. 2002) (additional citations omitted)). However, this did not end the court's analysis because the government argued that the search conducted on Barnville was incident to his arrest and was based on observations of a possible drug transaction. *Id.* at 859. Thus, *Barnville's* holding relies on *Schmerber* and *More*. *Id.* at 857.

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

<sup>35</sup> *Id.* at 853-54. "This opinion cites cases based on the scope of the search rather than the label that has been placed on the search by the court." *Id.* at 854 n.6. Accordingly, the court explained that a "strip search requires only that a person remove his or her clothing and does not include an examination, either visually or manually, of the anus or genitals." *Id.* at 853 (citing *Daugherty v. Campbell*, 33 F.3d 554, 555 n.2 (6th Cir. 1994); *Blackburn v. Snow*, 771 F.2d 556, 561 n.3 (1st Cir. 1985)) (additional citation omitted). Further, the court established that a "visual body-cavity search 'usually means a visual inspection of a naked body, including genitals and anus, without any contact.' " *Id.* at 854 (citing *N.G. v. Connecticut*, 382 F.3d 225, 228 n.4 (2d Cir. 2004); *Blackburn*, 771 F.2d at 561 n.3)) (additional citations omitted).

<sup>36</sup> *Barnville*, 794 N.Y.S.2d at 856-57. The court noted that the government conceded that the search was conducted incident to Barnville's arrest and that there was no testimony to suggest that the search was performed for another purpose. *Id.* at 856.

<sup>37</sup> *Id.* at 854-55 (citing *People v. More*, 764 N.E.2d 967, 969-70 (N.Y. 2002)). Notwithstanding the purpose of the search being incident to the arrest of Barnville, the court noted that even if the search was for security purposes it would be similarly unconstitutional under *Bell v. Wolfish*, 441 U.S. 520 (1979). *Barnville*, 794 N.Y.S.2d at 857 n.7. Specifically, "a balancing of the four *Bell* factors show[ed] that the invasion of the defendant's personal rights as a result of the strip/body cavity search outweighed the need 'for the particular search.' " *Id.* (quoting *Bell*, 441 U.S. at 559).

justifying the absence of a warrant . . . . The third part of the test requires that the method used to extract the evidence be reasonable and that the extraction method be performed in a reasonable manner.<sup>38</sup>

In *Barnville*, the government's warrantless visual body-cavity search failed all three parts of the *Schmerber* test.<sup>39</sup> Specifically, the court found that the government had no clear indication that Barnville was carrying drugs in his rectum because the detectives never heard that Barnville stored drugs in his rectum nor did they notice Barnville "walking or otherwise acting in a manner that would suggest that he had secreted anything in his anus."<sup>40</sup> Moreover, because the search "was conducted pursuant to a universal policy of searching all narcotics arrestees, without any regard to the defendant's particular circumstances," the claim that an exigent circumstance existed was negated.<sup>41</sup> Finally, the court found that the search was conducted in a manner that was humiliating and unreasonable.<sup>42</sup> Not only did the search take place in the view of others, it was alleged that a woman officer was present and there was no evidence that the search procedure followed any guidelines or was under any control.<sup>43</sup> Given the government's complete failure under the *Schmerber* test, the court

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<sup>38</sup> *Barnville*, 794 N.Y.S.2d at 855 (citing *Schmerber*, 384 U.S. at 770-72).

<sup>39</sup> *Id.* at 859-63.

<sup>40</sup> *Id.* at 860-61. Moreover, the court noted that absent specific information that Barnville stored drugs in his rectum, prior experience with other drug dealers does not meet the clear indication prong of the *Schmerber* test. *Id.* at 861 (citing *Moss v. Virginia*, 30 Va. App. 219 (Va. Ct. App. 1999)).

<sup>41</sup> *Id.* at 861. Further, the court points out that the police cannot create the exigent circumstance and thus, "waiting almost an hour without seeking a warrant so [the police] could . . . claim exigency" is not sufficient. *Id.*

<sup>42</sup> *Id.* at 862-63.

<sup>43</sup> *Barnville*, 794 N.Y.S.2d at 862-63.

held that the government needed a warrant and Barnville's motion to suppress the drugs was granted.<sup>44</sup>

In *Schmerber v. California*, the United States Supreme Court established a three-part test to determine the constitutionality of the government's warrantless intrusion into the human body.<sup>45</sup> In *Schmerber*, the question at issue was whether the defendant's blood alcohol evidence was the product of an unconstitutional search and seizure.<sup>46</sup> Schmerber was arrested at a hospital for driving an automobile while under the influence of alcohol.<sup>47</sup> Probable cause for driving while intoxicated was clearly established because the police officer at the scene "smelled liquor on petitioner's breath, and testified that petitioner's eyes were 'bloodshot, watery, [and had] sort of a glassy appearance.'"<sup>48</sup> While at the hospital, a police officer instructed a physician to take a sample of Schmerber's blood; an analysis of the sample subsequently revealed that he was intoxicated.<sup>49</sup> Although Schmerber alleged that he refused to consent to the blood test, the results were admitted as evidence and Schmerber was convicted.<sup>50</sup> Schmerber argued that he was denied his Fourth Amendment right to be free from unreasonable searches

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<sup>44</sup> *Id.* at 863 (citing *More*, 764 N.E.2d at 969-70). Although the drugs could not be considered as evidence, the court denied Barnville's motion to suppress the money recovered at the time of his arrest. *Id.*

<sup>45</sup> *Schmerber*, 384 U.S. at 769, 770, 771.

<sup>46</sup> *Id.* at 766-67.

<sup>47</sup> *Id.* at 758. Schmerber was in the hospital because he sustained injuries from an automobile accident in which he was driving. *Id.* The facts stated that Schmerber had been drinking at a tavern and bowling alley prior to the accident. *Id.* at 759 n.2.

<sup>48</sup> *Id.* at 769.

<sup>49</sup> *Id.* at 758-59.

<sup>50</sup> *Schmerber*, 384 U.S. at 759.



and seizures.<sup>51</sup>

The Supreme Court held that the intrusion into Schmerber's body to draw blood for alcohol testing did not violate the Fourth Amendment's bar against unreasonable searches and seizures.<sup>52</sup> The Court recognized that at the center of the Fourth Amendment's protections is a concern for an individual's human dignity and privacy.<sup>53</sup> Thus, the Fourth Amendment "forbid[s] any such intrusions on the mere chance that desired evidence might be obtained."<sup>54</sup> To this end, the Court required that the government have a "clear indication" that the evidence sought would be found.<sup>55</sup> Next, during the warrantless intrusion into the human body, the Court required the presence of an emergency such that the delay in obtaining a warrant would threaten the availability of the evidence being sought.<sup>56</sup> Lastly, the Court required that the search be conducted in a reasonable manner.<sup>57</sup>

The Court held that the extraction of Schmerber's blood satisfied Schmerber's three-part test.<sup>58</sup> Specifically, the Court found that there was a "clear indication" that alcohol would be found in Schmerber's blood test.<sup>59</sup> Additionally, the Court concluded that an emergency existed since blood alcohol levels diminish over time and

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 772.

<sup>53</sup> *Id.* at 769-70.

<sup>54</sup> *Id.* at 770.

<sup>55</sup> *Schmerber*, 384 U.S. at 770.

<sup>56</sup> *Id.* (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)).

<sup>57</sup> *Id.* at 771.

<sup>58</sup> *Id.* at 772.

<sup>59</sup> *Id.* at 770.

any delay could destroy the evidence.<sup>60</sup> Finally, the last part of the test was satisfied because the blood alcohol test was reasonable by the fact that it is commonplace in our society and it was conducted by a physician using accepted medical practices.<sup>61</sup>

In *People v. More*, the New York Court of Appeals determined the admissibility of drugs, pursuant to the Fourth Amendment, when those drugs were the product of a warrantless strip search incident to an arrest.<sup>62</sup> More was arrested after the police entered an apartment and saw More sitting on the couch next to a table containing drugs and drug paraphernalia.<sup>63</sup> Subsequent to the arrest, the police conducted a strip search of More in a bedroom.<sup>64</sup> During the strip search, the police recovered a plastic bag containing drugs from More's rectum.<sup>65</sup>

The defendant in *More* moved to suppress the drugs seized from his rectum.<sup>66</sup> The court turned to the three-part test established in *Schmerber v. California* as the controlling authority for a "seizure involving an intrusion into the human body."<sup>67</sup> The court concluded

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<sup>60</sup> *Schmerber*, 384 U.S. at 770-71.

<sup>61</sup> *Id.* at 771-72.

<sup>62</sup> *More*, 764 N.E.2d at 968. The court stated that "the dispositive issue on this appeal is the validity of that seizure under the Fourth Amendment of the United States Constitution." *Id.* It is worthwhile to note that although the court refers to the search as a "strip search," the search consisted of an intrusion into the human body and thus, is analogous to *Barnville's* "visual body cavity search."

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* Defendant alleged that the "body cavity search was 'illegal and effected in the absence of probable cause, in the absence of a warrant and in the absence of any exigency.' "

*Id.*

<sup>67</sup> *More*, 764 N.E.2d at 968.

that the body cavity search was unreasonable and invalid.<sup>68</sup> In making its determination, the court focused on the failure of the government to prove that an exigent circumstance existed.<sup>69</sup> Specifically, the court reasoned that the record was “devoid of any evidence from which an officer ‘might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant’ posed a threat to the officer’s personal safety or of the destruction of the evidence.”<sup>70</sup>

In conclusion, New York courts look to the *Schmerber* test to determine if a warrantless visual body cavity search incident to an arrest, is valid pursuant to article I, section 12 of the New York State Constitution.<sup>71</sup> Although *More* never discussed a state constitutional claim, it is reasonable to infer that the New York Court of Appeals’ silence stems from the understanding that when determining the reasonableness of warrantless intrusions into the human body, the federal standard controls in New York.<sup>72</sup> Thus, there is no evidence that someone who is subject to a search as “invasive and degrading”

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<sup>68</sup> *Id.* at 969.

<sup>69</sup> *Id.* at 969-70.

<sup>70</sup> *Id.* at 970 (quoting *Schmerber*, 384 U.S. at 770). Additionally, the court suggested that the police officers had the means to incapacitate and keep the defendant under surveillance. *Id.* There was also no danger that the defendant would dispose of the drugs or that the drugs would be “absorbed into defendant’s body.” *Id.*

<sup>71</sup> See *Barnville*, 794 N.Y.S.2d at 853, 857. This inference hinges on the fact that *Barnville*’s finding of both a New York state and federal constitutional violation was determined by applying the controlling authority established in *More* and *Schmerber*’s Fourth Amendment challenges.

<sup>72</sup> *Sarnicola*, 299 F. Supp. 2d at 275 (recognizing that “there is no indication that the New York State Constitution affords any greater protection for strip searches than the Fourth Amendment of the U.S. Constitution”) (citing *Murcia v. County of Orange*, 226 F.Supp.2d 489, 501 (S.D.N.Y. 2002)). Thus, *Sarnicola* concluded that a search “that violates the Federal Constitution necessarily violates the State Constitution.” *Sarnicola*, 299 F.Supp.2d at 275.

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as the search conducted in *Barnville*, is afforded any greater protection under the New York State Constitution.<sup>73</sup>

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<sup>73</sup> *More*, 764 N.E.2d 967, 969 (quoting *People v. Luna*, 535 N.E.2d 1305, 1308 (N.Y. 1989)) (additional citations omitted).

