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Supreme Court, Monroe County, People ex rel. Gordon v. O'Flynn

Cover Page Footnote

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SUPREME COURT OF NEW YORK

People *ex rel.* Gordon v. O'Flynn¹
(decided April 21, 2004)

Tyrone Gordon petitioned the court for a writ of habeas corpus to suppress evidence in parole revocation proceedings. During a hearing, held after his preliminary parole revocation proceeding, Gordon contended that the evidence submitted to the parole board was obtained through an illegal search and seizure, in violation of his federal and state constitutional rights.² Petitioner based his challenge on the long held view in New York “that the Fourth Amendment exclusionary rule applies in parole revocation proceedings.”³ However, the United States Supreme Court has held that the exclusionary rule generally applies only to criminal prosecutions, not to state parole revocation proceedings.⁴ The court was confronted with determining which constitution should

¹ 775 N.Y.S.2d 507 (N.Y. Sup. Ct. 2004).

² 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.

N.Y. CONST. art. I, § 12 provides, 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, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

³ *Gordon*, 775 N.Y.S.2d at 508 (citing *People ex rel. Piccarillo v. New York State Bd. of Parole*, 397 N.E.2d 354 (N.Y. 1979)).

⁴ *Id.* (citing *Pennsylvania Bd. of Prob. v. Scott*, 524 U.S. 357, 363 (1998)).

apply, and further, whether the exclusionary rule applied by federal courts only to criminal proceedings takes precedence over its expansive treatment by New York courts.⁵ The court determined that the federal decision governs⁶ and denied Gordon's petition.

During the late evening hours of September 25, 2003, Tyrone Gordon was spotted by a law enforcement officer in a high crime area of the City of Rochester.⁷ The police officer observed Gordon burying a plastic bag and later retrieving the bag before riding off on his bicycle.⁸ The officer observed no other suspicious conduct but believed that the behavior involving the plastic bag was consistent with criminal drug activity.⁹ Upon this basis, he radioed for several units to stop Gordon.¹⁰ One of several squad cars responding to the call pursued Gordon whose conduct seemed quite ordinary and required only that the police continue observation.¹¹ Yet pursuit ensued and concluded with Gordon discarding the plastic bag.¹² At no time did any of the officers see the contents of the plastic bag, which was later found to contain cocaine.¹³ Gordon brought a habeas corpus petition seeking to suppress the evidence submitted to the parole board.¹⁴

⁵ *Id.* at 509.

⁶ *Id.*

⁷ *Id.*

⁸ *Gordon*, 775 N.Y.S.2d at 509.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 510.

¹² *Id.*

¹³ *Gordon*, 775 N.Y.S.2d at 509.

¹⁴ *Id.* at 508.

Gordon's state constitutional right to be free from pursuit without reasonable suspicion of criminal activity was violated.¹⁵ Police suspicions were unfounded and required only a verbal inquiry into Gordon's conduct.¹⁶ "Yet the police activity . . . involved pursuit of petitioner, using a squad car to drive into the park area, and use of the spotlight and an order to defendant, who was on his bicycle, to effectively 'pull-over.'"¹⁷ Until there were sufficient indications of criminal activity, Gordon had a right to continue riding his bicycle¹⁸ and under the New York State Constitution, he retained the right not to respond, or to remain silent,¹⁹ to any police inquiries. Once the court concluded that Gordon's state constitutional rights were violated, it analyzed the exclusionary rule as applied to administrative proceedings under the federal and New York state constitutions.

In *United States v. Calandra*, the United States Supreme Court decided "whether a witness summoned to appear and testify before a grand jury may refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure."²⁰ The Court held that a grand jury proceeding is "an

¹⁵ *Id.* at 511.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Gordon*, 775 N.Y.S.2d at 511.

¹⁹ N.Y. CONST. art. I, § 6 states, in pertinent part: "nor shall he or she be compelled in any criminal case to be a witness against himself or herself. . . ."

²⁰ 414 U.S. 338, 339 (1974). Federal agents searched the defendant's place of business using a warrant issued upon suspicion of illegal gambling operations, but later found to be invalid. *Id.* at 340. They seized a card implicating loansharking activities. *Id.* at 341. Subpoened by a special grand jury, Calandra refused to testify and moved to suppress the evidence. *Id.* The Sixth Circuit affirmed the lower court's ruling that the exclusionary rule could bar

ex parte investigation to determine whether a crime has been committed” and who committed it,²¹ that its “investigative power must be broad,”²² and that witnesses cannot interfere with its inquiry.²³ The primary purpose of the exclusionary rule is to deter future unlawful police activity and thus uphold the Fourth Amendment protection against unreasonable searches and seizures.²⁴ However, the rule is not applicable in all proceedings, but is restricted to those where its purpose is most effectively served – primarily, where a criminal sanction would be imposed on the victim of the search.²⁵ “Permitting witnesses to invoke the exclusionary rule . . . would precipitate adjudication of issues . . . reserved for trial on the merits and would delay and disrupt grand jury proceedings.”²⁶ This damage to the function of the grand jury was weighed against the deterrent effect on police misconduct and the Court found that inadmissibility of illegally seized evidence in a subsequent criminal trial negated any concerns.²⁷ Concluding that grand jury questions based on illegally seized evidence are a derivative use of the fruits of a previous wrong and “work no new Fourth Amendment wrong,”²⁸ the Court held that the exclusionary rule is inapplicable to a grand jury proceeding.

questioning based on the illegally seized evidence. *Id.* at 342. The Supreme Court reversed. *Id.*

²¹ *Id.* at 343-44.

²² *Id.* at 344.

²³ *Id.* at 345.

²⁴ *Id.* at 347.

²⁵ *Calandra*, 414 U.S. at 348.

²⁶ *Id.* at 349.

²⁷ *Id.* at 351.

²⁸ *Id.* at 354.

In *United States v. Janis*, the Court focused on the application of the exclusionary rule to a federal civil tax proceeding.²⁹ Evidence was seized in reliance on a warrant that was later declared invalid. The Court found that “exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion.”³⁰ In its analysis, the Court stressed that it had never before applied the exclusionary rule to either a state or federal civil proceeding.³¹ Additionally, the Court noted that the rule is not a constitutional right; rather, it was created as a remedy to safeguard Fourth Amendment rights.³² The Court found that “admission of the evidence is unlikely to encourage violations of the Fourth Amendment. The admission of evidence in a federal civil proceeding is simply not important enough to state criminal law enforcement officers to encourage them to violate Fourth

²⁹ 428 U.S. 433 (1976). State officers obtained a warrant to search defendant’s apartment on suspicion of illegal bookmaking operations. *Id.* at 434. They seized wagering records and approximately \$5000 cash. *Id.* at 436. As a matter of police procedure, the IRS was notified. *Id.* Based on the wagering records, the IRS assessed taxes of some \$89,000 and levied the seized cash as partial satisfaction. *Id.* at 437. Once the search warrant was declared invalid, Janis filed a claim for refund of the seized cash. *Id.* at 438. The district court found she was entitled to her money. *Id.* at 439. When the government counterclaimed for the balance of its assessment, the question devolved to the issue of whether illegally obtained evidence may be used in formulating a tax assessment that is the basis of a federal civil tax proceeding. *Id.*

³⁰ *Id.* at 454.

³¹ *Id.* at 447.

³² *Id.* at 446 (quoting *Calandra*, 441 U.S. at 348).

Amendment rights.”³³ “There comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches.”³⁴ The Court held that the “exclusionary rule should not be extended to forbid the use in the civil proceeding of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign.”³⁵

INS v. Lopez-Mendoza further illustrates the Court’s denial of the exclusionary rule in administrative actions.³⁶ Here, the Court decided “whether an admission of unlawful presence in this country made subsequent to an allegedly unlawful arrest must be excluded as evidence in a civil deportation hearing.”³⁷ The Court considered several factors in its analysis of whether the cost of deterrence tipped in favor of applying the exclusionary rule. First, a deportation procedure is a civil matter that may be conducted in the absence of the respondent.³⁸ “The purpose of deportation is . . . to put an end to a continuing violation of the immigration laws.”³⁹

³³ *Id.* at 458.

³⁴ *Janis*, 428 U.S. at 459.

³⁵ *Id.* at 460.

³⁶ 468 U.S. 1032 (1984). Two Mexican citizens ordered deported by the INS challenged the legality of their arrests. *Id.* at 1034. One also objected to the admissibility of his admission of illegal entry. *Id.* The Ninth Circuit applied the exclusionary rule to his case and vacated his deportation order. *Id.* Respondent’s case was remanded to the INS Board of Appeals to determine whether his admitted illegal entry, though not objected to as evidence at the deportation hearing, would be admissible as the fruit of an unconstitutional arrest. *Id.* at 1034-35.

³⁷ *Id.* at 1034.

³⁸ *Id.* at 1038-39.

³⁹ *Id.* at 1039.

The identity of a defendant can never be suppressed as the fruit of an unlawful arrest.⁴⁰ Release of an unregistered alien subverts public policy⁴¹ and deportation hearings are a streamlined efficient procedure of implementing the law.⁴² Most importantly, “the INS has its own comprehensive scheme for deterring Fourth Amendment violations by its officers.”⁴³ The Court held that “the exclusion of credible evidence gathered in connection with peaceful arrests . . . need not be suppressed in an INS civil deportation hearing.”⁴⁴

In *Pennsylvania Board of Probation and Parole v. Scott*,⁴⁵ the Court held the exclusionary rule did not apply. After completing a minimum sentence for third-degree murder, defendant Scott was released from prison.⁴⁶ However, he “violated several conditions of his parole by possessing firearms, consuming alcohol, and assaulting a co-worker.”⁴⁷ Parole officers performed a search of Scott’s residence without requesting or obtaining consent.⁴⁸ The evidence obtained was introduced at Scott’s parole violation hearing and was challenged as an unreasonable search under the Fourth Amendment.⁴⁹ The contest was rejected and the

⁴⁰ *Id.*

⁴¹ *Lopez-Mendoza*, 468 U.S. at 1047.

⁴² *Id.* at 1049.

⁴³ *Id.* at 1044.

⁴⁴ *Id.* at 1051.

⁴⁵ 524 U.S. 357 (1998).

⁴⁶ *Id.* at 359-60.

⁴⁷ *Id.* at 360.

⁴⁸ *Id.* A warrantless search was conducted pursuant to Gordon’s parole agreement. *Id.*

⁴⁹ *Id.* at 360.

evidence admitted.⁵⁰ Consequently, Scott's parole was revoked and he was reincarcerated.⁵¹ The lower "court ruled that the search violated respondent's Fourth Amendment rights because it was conducted without the owner's consent and was not authorized by any state statutory or regulatory framework ensuring the reasonableness of searches by parole officers."⁵² Additionally, the court found that deterrence benefits derived from the exclusionary rule overcame its costs.⁵³

The ruling in this case was affirmed by the Pennsylvania Supreme Court as an exception to its bar against application of the exclusionary rule in parole revocation hearings.⁵⁴ The court reasoned that the bar invited flagrant illegal conduct on the part of parole officers aware of an individual's parole status.⁵⁵ Scott petitioned the Supreme Court to determine whether the exclusionary rule applied to parole revocation proceedings.⁵⁶

Initially, the Court said "that the government's use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution."⁵⁷ Referring to its decision in *Calandra*,⁵⁸ the Court deemed the exclusionary rule to be a judicial remedy invoked when its deterrence benefits outweigh its social

⁵⁰ *Scott*, 524 U.S. at 360.

⁵¹ *Id.* at 360-61.

⁵² *Id.* at 361.

⁵³ *Id.*

⁵⁴ *Id.* at 361.

⁵⁵ *Scott*, 524 U.S. at 362.

⁵⁶ *Id.*

⁵⁷ *Id.* at 362.

⁵⁸ *Calandra*, 414 U.S. at 354 (holding , in a grand jury proceeding, the exclusionary rule is not a bar to questioning based on illegally seized evidence).

costs.⁵⁹ Therefore, the Court has “repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials.”⁶⁰ Thus, the exclusionary rule does not apply to grand jury proceedings, civil tax proceedings, and civil deportation proceedings.⁶¹ In *Scott*, the Court again declined to “extend the operation of the exclusionary rule beyond the criminal trial context.”⁶² Seeing only minimal deterrence benefits regarding parole revocations since the rule already bars unconstitutional searches in the criminal trial context, the Court held “that the federal exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees’ Fourth Amendment rights.”⁶³ The Court reasoned that a rule precluding consideration of highly reliable probative evidence would allow those who have already been regarded as lawbreakers to escape the consequences of their further unlawful actions.⁶⁴ The costs to law enforcement and the truth-finding process would then be exceedingly high as compared to the benefits of deterring illegal behavior on the part of law enforcement officials.⁶⁵

In reaching its conclusion, the Court saw parolees as convicted criminals accorded a limited measure of freedom, conditioned upon adherence to the state’s strict terms of release.⁶⁶

⁵⁹ *Scott*, 524 U.S. at 363.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 364.

⁶³ *Id.*

⁶⁴ *Scott*, 524 U.S. at 364.

⁶⁵ *Id.* at 364-65.

⁶⁶ *Id.* at 365.

Thus, the state has a strong interest in ensuring that a parolee, aware that noncompliance will result in a return to prison, complies with the conditions of his release.⁶⁷ If this conditional liberty is abused, the state should not be hampered from offering evidence of a violation.⁶⁸ Additionally, parole revocation hearings are traditionally informal, flexible administrative proceedings⁶⁹ designed to be “predictive and discretionary”⁷⁰ where there is no right to counsel.⁷¹ Permitting the exclusionary rule would change the nature of these nonadversarial administrative proceedings.⁷²

Looking at the deterrence benefits, the Court determined that an officer unaware of a subject’s parole status would hardly seek to disregard Fourth Amendment dictates and disrupt his primary goal of obtaining a conviction.⁷³ The same holds true for police officers aware of their subject’s status.⁷⁴ Parole officers are involved in a supervisory relationship and concerned primarily with the question of whether their parolees should remain free.⁷⁵ However, they are also aware that illegally obtained evidence would be challenged as inadmissible in a criminal trial.⁷⁶ It is unlikely they would seek purposefully to engage in such

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Scott*, 524 U.S. at 364, 366.

⁷⁰ *Id.* at 366, 367.

⁷¹ *Id.* at 366.

⁷² *Id.*

⁷³ *Id.* at 367.

⁷⁴ *Scott*, 524 U.S. at 368.

⁷⁵ *Id.*

⁷⁶ *Id.* at 369.

detrimental conduct.⁷⁷ Balancing these countervailing interests, the Court concluded, “parole boards are not required by federal law to exclude evidence obtained in violation of the Fourth Amendment.”⁷⁸

New York jurisprudence long held to the proscription of admitting illegally seized evidence at parole revocation hearings. Distinctions between the administrative proceeding of parole revocation and a criminal action were believed to undermine the deterrent effect of the exclusionary rule. The state could not be seen as committing a crime to secure a criminal conviction. *People ex rel. Piccarillo v. New York State Board of Parole*⁷⁹ examined the right to revoke parole founded upon illegally obtained evidence. The Court of Appeals in this instance determined that the exclusionary rule does apply to parole revocation hearings.⁸⁰ It perceived its task as defining the nature of the parole revocation proceeding.⁸¹ Parole revocation hearings are administrative proceedings with serious consequences. Specifically, parole revocation is just as much a deprivation of liberty as is a conviction in a criminal action.⁸² The exclusionary rule provides incentive for law enforcement personnel to remain within constitutional limitations, whether obtaining evidence for a

⁷⁷ *Id.* at 368-69.

⁷⁸ *Id.* at 369.

⁷⁹ 397 N.E.2d 354 (N.Y. 1979).

⁸⁰ *Id.* at 358.

⁸¹ *Id.* at 356.

⁸² *Id.*

criminal trial or administrative proceeding.⁸³ Parolees do “not relinquish all constitutionally guaranteed rights”⁸⁴ even though they are “legally in custody and subject to supervision.”⁸⁵ Freedom “from unreasonable search and seizures, guaranteed by both Federal and State Constitutions . . . remains inviolate.”⁸⁶ Yet parole boards have a pressing need to consider all relevant evidence when deciding a parolee’s status.⁸⁷ However, illegal official activity when condoned in an administrative proceeding would undermine deterrence in any realm.⁸⁸

Other cases concerning the exclusionary rule depended solely upon federal law in their interpretation. *Finn’s Liquor Shop v. State Liquor Authority* held that the exclusionary rule applied to hearings before the State Liquor Authority.⁸⁹ Stating that the function of the rule is to compel respect for Fourth Amendment guarantees,⁹⁰ the Court of Appeals of New York saw no distinction in the admissibility of evidence between a liquor license suspension/bond forfeiture and criminal proceeding.⁹¹ State agencies must conduct their investigative and enforcement activities within the confines of the Fourth Amendment if the exclusionary rule is to be effective in deterring official

⁸³ *Id.* at 357 (quoting *Finn’s Liquor Shop v. State Liquor Auth.*, 249 N.E.2d 440, 442 (N.Y. 1969)).

⁸⁴ *Piccarillo*, 397 N.E.2d at 357.

⁸⁵ *Id.*

⁸⁶ *Id.* See U.S. CONST. amend. IV; N.Y. CONST. art. I, § 12.

⁸⁷ *Id.* at 358.

⁸⁸ *Id.*

⁸⁹ 249 N.E.2d 440 (N.Y. 1969).

⁹⁰ *Id.* at 442.

⁹¹ *Id.*

misconduct.⁹² Therefore, evidence obtained illegally, in violation of the Fourth Amendment, cannot be used to support the authority of a state agency.

*People v. McGrath*⁹³ illustrates New York's dependence upon the federal interpretation of the exclusionary rule. Relying upon United States Supreme Court rulings in *Mapp v. Ohio*⁹⁴ and *Calandra*, the New York Court of Appeals allowed evidence obtained from an illegal wiretap to form the basis of grand jury testimony and a subsequent criminal contempt finding. Holding that the wiretap violated state law, the court still "refused to suppress the defendant's testimony given in response to questions based upon information derived through the wiretap, viewing the defendant's testimony as an independent act calculated to obstruct the investigation of the murder conspiracy conducted by the Grand Jury, rather than as fruit of the illegal surveillance."⁹⁵ In the consolidated case, which also dealt with an illegal wiretap, two police officers were charged with perjury before a grand jury and were suspended from duty.⁹⁶ In both cases, the information obtained through the wiretaps, and their fruits in the form of testimony, was deemed admissible before the grand jury.⁹⁷ Whether the evidence was admissible in the civil contempt

⁹² *Id.* at 442, 442-43.

⁹³ 385 N.E.2d 541 (N.Y. 1978).

⁹⁴ 367 U.S. 643 (1961) (holding that evidence obtained in a search and seizure violative of the Fourth Amendment is inadmissible in both state and federal courts).

⁹⁵ *McGrath*, 385 N.E.2d at 545.

⁹⁶ *Id.* at 546.

⁹⁷ *Id.* at 547.

proceeding and the civil disciplinary proceeding depended upon whether the taint of the original unlawful conduct extended to an intervening event.⁹⁸ The court held that the Grand Jury testimony was sufficiently independent of the prohibited police conduct and rejected the contention that the illegal wiretap could be a defense to criminal contempt.⁹⁹ The “intervening willful act of perjury, together with the insubstantial benefit to be gained at the expense of the truth-finding process by application of the exclusionary rule militates against suppression of . . . live testimony.”¹⁰⁰ The decision was based solely on federal constitutional law.

Given this difference between the United States Supreme Court decision of *Scott* and the New York Court of Appeals judgment in *Piccarillo*, as well as the lack of a separate state constitutional ruling, the *Gordon* court chose to follow *Scott*. The court in *Gordon* relied on the 1938 Constitutional Convention’s refusal to adopt an exclusionary rule for Art. I, Section 6 violations¹⁰¹ and “found no case in which the Court of Appeals referred to *Piccarillo* as involving an interpretation of the State Constitution broader than its federal counterpart.”¹⁰² Rather, as the exclusive policy making body of the New York judiciary, the court has addressed the exclusionary rule solely in a federal context.¹⁰³ “Accordingly, the Supreme Court’s decision in *Scott* is held to

⁹⁸ *Id.* at 548.

⁹⁹ *Id.* at 548-49.

¹⁰⁰ *McGrath*, 385 N.E.2d at 551.

¹⁰¹ *Gordon*, 775 N.Y.S.2d at 514.

¹⁰² *Id.* at 513.

¹⁰³ *Id.*

abrogate *Picarillo*, and the court finds that no separate state constitutional rule has been created which calls for application of the exclusionary rule to parole revocation proceedings.¹⁰⁴ Thus, there is no difference between federal and state application of the exclusionary rule to parole revocation hearings.

In conclusion, the Fourth Amendment of the United States Constitution and Article I, Section 12 of the New York Constitution afford the same protection against illegal search and seizures in a criminal action. However, the exclusionary rule afforded to defendants in a criminal trial context is unavailable in a parole revocation proceeding under both the federal and state constitutions. Differences occur only in determining the validity of a search and seizure. In *Gordon*, New York statutory regulations regarding pursuit and flight¹⁰⁵ led to suppression of evidence in the criminal prosecution with respect to a parole violation, but did not exclude the same evidence from admission to a parole revocation hearing. In fact, the court ruled that the evidence was admissible, regardless of the means employed in obtaining it. Concerns of protecting the privacy interests of parolees via the exclusionary rule are far outweighed by social policy concerning the lack of consequences for conduct by individuals more likely to engage in crime and the need to protect the public.

Hannah Abrams

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 510. See *People v. Howard*, 408 N.E.2d 908 (N.Y. 1980) (holding that pursuit absent probable cause constitutes a limited detention, violating the federal and state constitutions).