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## Court of Appeals of New York, People v. Mundo

Cover Page Footnote

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**COURT OF APPEALS OF NEW YORK****People v. Mundo<sup>1</sup>**  
(decided November 19, 2002)

Jose Mundo was convicted of criminal possession of a controlled substance in the first degree and third degree.<sup>2</sup> Mundo appealed his conviction, arguing that the cocaine should have been suppressed because his rights under both the United States<sup>3</sup> and New York State<sup>4</sup> Constitutions were violated. Mundo argued that the backseat of his car was considered a limited area, and therefore, the arresting officer should not have been permitted to search it.<sup>5</sup> The Appellate Division and the New York Court of Appeals affirmed.<sup>6</sup>

The Court of Appeals held that the police officers could have reasonably concluded that a weapon located within the vehicle presented an actual and specific danger to their safety.<sup>7</sup> Additionally, the court held that the “blatant disregard of the officers’ directions, the obvious lack of concern for the safety of

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<sup>1</sup> 780 N.E.2d 522 (N.Y. 2002).

<sup>2</sup> *Id.* at 523.

<sup>3</sup> U.S. CONST. amend. IV 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. . . .”

<sup>4</sup> 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. . . .”

<sup>5</sup> *Mundo*, 780 N.E.2d at 523.

<sup>6</sup> *Id.* at 524.

<sup>7</sup> *Id.*

others, in addition to defendant's suspicious acts, created a perceptible risk to the officers that a weapon located within the vehicle would be a specific danger to their safety."<sup>8</sup>

Two officers on patrol observed the vehicle in which Mundo was a passenger making a right turn on a steady red light.<sup>9</sup> The vehicle had Florida license plates, thus leading the officers to assume the driver was unaware that a right turn on a steady red light is prohibited, and therefore, initiated a traffic stop for the purpose of notifying the driver of the law.<sup>10</sup> As the officers approached Mundo's vehicle, however, it pulled away.<sup>11</sup> During the ensuing chase, one of the officers noticed the individual sitting in the backseat was attempting to hide something beneath his seat.<sup>12</sup> After two cycles of stopping and pursuing the vehicle, the officers managed to stop the vehicle, remove each occupant, and pat them down.<sup>13</sup> Fearful the individual sitting in the backseat was hiding a gun, the officer searched that part of the vehicle.<sup>14</sup> However, when he smelled a strong odor of cocaine emanating from the access panel to the trunk, the officer extended the search to the trunk and found a bag containing almost a kilogram of cocaine.<sup>15</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 523.

<sup>10</sup> *Mundo*, 780 N.E.2d at 523.

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

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

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

<sup>15</sup> *Mundo*, 780 N.E.2d at 523.

The Appellate Division affirmed the trial court's decision denying defendant's motion to suppress the drugs recovered from the trunk.<sup>16</sup> The Court of Appeals affirmed, holding that the possibility of a weapon in the car presented an "actual and specific danger" to the officer's safety.<sup>17</sup> Since the officer had probable cause to search the vehicle, the court held the concomitant search for narcotics to be reasonable.<sup>18</sup>

In its analysis, the New York Court of Appeals discussed *Michigan v. Long*,<sup>19</sup> where the United States Supreme Court held that an intrusion by the police "could be justified purely on the theoretical basis that harm could occur after the investigation is terminated and the suspect is permitted to reenter his vehicle."<sup>20</sup> Although the New York Court of Appeals departed from the Supreme Court's reasoning, the Court of Appeals was careful to emphasize that the possibility exists in some instances that a weapon in a vehicle presents an "actual and specific danger" to the officer's safety.<sup>21</sup>

Conversely, in *People v. Torres*,<sup>22</sup> the defendant pleaded guilty to third degree criminal possession of a weapon after his motion to suppress the physical evidence was denied. The New York Court of Appeals held that the officer's entry into the

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<sup>16</sup> *Mundo*, N.Y.S.2d at 307 (App. Div. 1st Dep't 2001).

<sup>17</sup> *Mundo*, 780 N.E.2d at 524.

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

<sup>19</sup> 463 U.S. 1032 (1983).

<sup>20</sup> *Mundo*, 780 N.E.2d at 524.

<sup>21</sup> *Id.*

<sup>22</sup> 543 N.E.2d 61 (N.Y. 1989).

defendant's car was an encroachment upon his privacy interest because, as a matter of law, there was no justification for conducting a further, more intrusive search after the two men were frisked and the officers recognized the lack of immediate threat to them.<sup>23</sup> Essentially, the precedent the court sought to fashion was that once the officers have taken steps to secure their own physical safety, they limit their ability to make a subsequent intrusion to the inquiry permitted by New York's Constitution.<sup>24</sup>

In *People v. Carvey*,<sup>25</sup> the New York Court of Appeals broadened the *Torres* decision by requiring a "substantial likelihood of a weapon [present] in a car" coupled with a specific danger to the officer before a search can be conducted. Reasonable suspicion alone, the court stated, does not suffice.<sup>26</sup> The court justified its decision on the grounds that the bulletproof vest the defendant was wearing suggested his readiness to use a deadly weapon.<sup>27</sup> Signs of threat, therefore, are substantial reasons eliciting probable cause to search a vehicle. For example, in *People v. Robinson*,<sup>28</sup> police officers pulled over the cab in which the defendant was a passenger because the officers reasonably suspected that the cab was being robbed. One of the officers approached the vehicle and shined his flashlight into the car. He noticed the defendant, seated in the back, wearing a bulletproof

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<sup>23</sup> *Id.* at 65.

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

<sup>25</sup> 680 N.E.2d 150 (N.Y. 1997).

<sup>26</sup> *Id.* at 152.

<sup>27</sup> *Id.* at 153.

<sup>28</sup> 767 N.E.2d 638 (N.Y. 2001).

vest.<sup>29</sup> Thereafter, he ordered the defendant out of the cab and noticed a gun on the floor where the defendant had been sitting.<sup>30</sup> The court held the confiscation of the gun was justifiable.<sup>31</sup> It concluded that where an officer has probable cause to believe a driver has committed a traffic infraction, stopping him does not violate New York's Constitution.<sup>32</sup> The story simply does not end when the police stop a vehicle for a traffic violation.<sup>33</sup> Instead, when a suspect's acts reasonably arouse the officer's attention, the officer may conduct a search of the vehicle even though the officer pulled over the suspect for a wholly different reason than what the suspect is prosecuted for.

Nonetheless, the right of police officers to extend the investigation beyond the initial stop does not mean anyone can be subjected to a search at the officer's discretion. In *People v. Johnson*,<sup>34</sup> the court held that the officer's observation of the defendant purchasing a gun at a store justified his questioning of the defendant.<sup>35</sup> However, because the defendant did not present a danger to the officer, the court decided that the intrusiveness of ordering the defendant to open his coat was improper.<sup>36</sup> Conversely, in *People v. Ellis*,<sup>37</sup> the court found that a stop based

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<sup>29</sup> *Id.* at 640.

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

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

<sup>32</sup> *Id.* at 642 (citing N.Y. CONST. art. I, § 12).

<sup>33</sup> *Robinson*, 767 N.E.2d at 645.

<sup>34</sup> 429 N.E.2d 824 (N.Y. 1981).

<sup>35</sup> *Id.* at 825.

<sup>36</sup> *Id.* at 826.

<sup>37</sup> 465 N.E.2d 826 (N.Y. 1984).

on suspicious conduct that leads to a further investigation was constitutional. In *Ellis*, the defendant could not produce any form of identification after being pulled over for a traffic infraction. The officers then patted him down, and in the course of doing so, found two bullets and marijuana in his coat pocket.<sup>38</sup> Thereafter, the officers immediately searched the vehicle for a weapon. They found a gun when they broke into defendant's locked glove compartment.<sup>39</sup> The court held that once the officers found the bullets, they could have reasonably inferred that a weapon was being concealed.<sup>40</sup> Additionally, the court held that if there is probable cause to stop a vehicle, then every part of the vehicle may be searched, including its locked parts.<sup>41</sup>

Both the United States Supreme Court and the New York Court of Appeals have found that there may be instances where a police officer has probable cause to search belongings inside a vehicle. Generally, what the New York Court of Appeals would accept as a valid search will likewise be accepted by the United States Supreme Court. When an individual, either expressly or impliedly, gives the impression that he may be concealing a weapon, both Courts have stated that an officer has probable cause to search the vehicle. The difference in *Long*, however, is that an officer is permitted to neutralize a situation before it escalates, an

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<sup>38</sup> *Id.* at 827.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 828.

<sup>41</sup> *Id.*



approach the New York Court of Appeals perceives to be far-fetched.<sup>42</sup>

The Court of Appeals, in *Torres*, rejected *Long*'s approach, reasoning that the purely theoretical basis of harm that can occur to an officer after an investigation is completed is not a plausible reason to permit an extended search.<sup>43</sup> *Torres* stated that in *Long*, the officer's availability of alternatives in dealing with the situation extinguished his imminent danger leading to probable cause to conduct the search.<sup>44</sup> Although *Torres* does represent the trend of the Court of Appeals, the court expanded that trend in its decision in *Carvey*. In *Carvey*, the New York Court of Appeals stated:

There may well be circumstances where, following a lawful stop, facts revealed during a proper inquiry or other information gathered during the course of the encounter lead to the conclusion that a weapon located within the vehicle presents an actual and specific danger to the officer's safety sufficient to justify a further intrusion, notwithstanding the suspect's inability to gain immediate access to that weapon.<sup>45</sup>

In *People v. Blankymsee*,<sup>46</sup> officers responding to a phony

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<sup>42</sup> *Torres*, 543 N.E.2d at 65 (holding that it is unrealistic to make the assumption that a suspect who is about to be released, upon reentry in to his vehicle, will retrieve his weapon and threaten the officer's safety).

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

<sup>44</sup> *Id.*

<sup>45</sup> 680 N.E.2d at 151.

<sup>46</sup> No. N11185-01, 2003 N.Y. Misc. LEXIS 736 (Supreme Court, Queens County June 3, 2003).

prank call of “shots fired” noticed a jeep parked near the place where the call was made from with its engine and headlights on.<sup>47</sup> When one of the officers approached the vehicle and shined his flashlight inside, he immediately noticed a gun.<sup>48</sup> The officer reached in, confiscated the gun, and arrested the defendant.<sup>49</sup> At trial, the court established that the officer’s initial approach for identification was lawful. Once the officer saw the gun in the car, probable cause was established to arrest the defendant.<sup>50</sup> Unsurprisingly, when an officer searches someone suspected of concealing a weapon, but drugs are found instead, the New York courts have deemed the search valid.<sup>51</sup>

The federal approach to searches and seizures is wholly different in origin than New York’s approach. In *Terry v. Ohio*,<sup>52</sup> the United States Supreme Court acknowledged the authority of a police officer to make a forcible stop of a person when the officer has reasonable suspicion that the individual has engaged in criminal wrongdoing. *Terry*, however, did not discuss whether a protective search for weapons can extend to an area beyond the person in the absence of probable cause to arrest.<sup>53</sup> Given the facts

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<sup>47</sup> *Id.* at \*2.

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

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *See, e.g.,* *People v. Norman*, 757 N.Y.S.2d 294 (2003) (deciding that even if there was insufficient evidence that the drugs were in open view, the officers could have reasonably concluded that a weapon in the cab presented an actual and specific danger because there were suggestions that the defendant was fleeing from the scene of a crime).

<sup>52</sup> 392 U.S. 1 (1968).

<sup>53</sup> *Long*, 463 U.S. at 1034.

presented in *Long*, the Court concluded that according to *Terry*, it makes sense for an officer to neutralize a threat of physical harm.<sup>54</sup> The foundation for the Court's decision rests in part on the "risk confronting a police officer as he approaches a person seated in a car."<sup>55</sup>

According to a study introduced by the Court, approximately 30% of police shootings occurred when an officer approached a suspect seated in an automobile.<sup>56</sup> The Supreme Court is not, however, saying that an officer can search a suspect whenever he conducts an investigative stop.<sup>57</sup> The rule only applies if the officer has a reasonable belief, based on specific facts, that his life is in danger.<sup>58</sup> Part of the reason to allow area searches incident to an arrest is because "that arrestee, who may not himself be armed, may be able to gain access to weapons to injure officers or others nearby, or otherwise to hinder legitimate police activity."<sup>59</sup> Although this inference is remotely possible, the Court nevertheless reasoned that it does not matter that the defendant is in the officer's control. We can assume, the Court maintained, that a *Terry* suspect may break away from police control and retrieve a weapon from inside his car, or he may also

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<sup>54</sup> *Id.* at 1047.

<sup>55</sup> *Id.* at 1048.

<sup>56</sup> See Bristow, Study, *Police Officer Shootings— A Tactical Evaluation*, 54 J. CRIM. L. C. & P. S. 93 (1963) (discussing statistics regarding police officer shootings).

<sup>57</sup> *Long*, 463 U.S. at 1050.

<sup>58</sup> *Id.* at 1049.

<sup>59</sup> *Id.* at 1050.

go back to his car, if he is not arrested, and have access to his weapon.<sup>60</sup>

Whereas the United States Supreme Court's presumption favors the police officer, the New York Court of Appeals decided to deny the officer the same level of protection. Heeding its decisions in *Torres* and *Carvey*, the court in *Mundo* declined to adopt the United States Supreme Court's decision in *Long*.<sup>61</sup> The Court of Appeals, however, did recognize that there may be circumstances in which, after a stop, an officer may conclude that a weapon is being concealed.<sup>62</sup> But the court in *Mundo* was still faced with the task of distinguishing between the *Torres* decision and the court's expanded version in *Carvey*. Whereas *Torres* found the officer's search to violate the defendant's constitutional rights, *Carvey* held that the lack of the officer's probable cause to search the defendant's vehicle led to other circumstances that permitted the search, and therefore, the officer's actions were constitutional. "The crucial distinction between the constitutional search in *Carvey* and the unconstitutional search in *Torres* is found in the heightened sense of danger and imminent harm, present in *Carvey*, arising directly from the existence and discovery of an article immediately associated with the presence and use of a firearm."<sup>63</sup> In *Mundo*, the court held that the blatant disregard of the officers' directions, the lack of concern for the safety of the

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<sup>60</sup> *Id.* at 1052.

<sup>61</sup> *Mundo*, 780 N.E.2d at 524.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 526 (Ciparick, J., dissenting).

public, coupled with the defendant's suspicious acts, created a perceptible risk to the officers that a weapon located within the car was a specific danger to their safety.<sup>64</sup> The court's decision, then, encompasses *Long's* holding while rejecting its reasoning.

In conclusion, federal and New York holdings are alike with respect to the outcome of factually similar cases. Under both the United States Supreme Court and the New York Court of Appeals decisions, an officer may, upon probable cause, search the vehicle of a suspect pulled over for an investigative stop. The New York Court of Appeals, however, provides a two prong test to determine whether the search is constitutional. The best way to conduct a constitutional search according to the Court of Appeals would be if the officer had probable cause to search the suspect. However, in the absence of probable cause, the Court of Appeals permits an officer to search a suspect if the officer is confronted with an "actual and specific danger" to his safety.<sup>65</sup>

In its application, the United States Supreme Court goes one step further by providing a justification for an officer to conduct the search. The federal courts, like the New York courts, acknowledge that when an officer's life is in danger, he need not wait until the situation escalates. Instead, he may conduct a search, provided he has exhausted all other alternatives in dealing with the suspect. This approach, however, is viewed as nothing more than a far-fetched theoretical assumption.

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<sup>64</sup> *Id.* at 524.

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

In *People v. Mundo*, Judge Wesley concluded there was a dangerous risk to the officers and properly admitted the evidence.<sup>66</sup> Therefore, a trial judge in New York State must question whether an officer is at risk and whether he has probable cause to search the suspect's vehicle before deciding that the search was constitutional. The judge need not base his decision on the theory that a suspect may manage to pry away from the officer and retrieve a weapon from his vehicle.

*Avinoam Cohen*