Touro Law Review

Volume 20
Number 1 *New York Constitutional Decisions: 2003 Compilation*

Article 17

December 2014

Appellate Division, First Department, People v. Celaj

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Cover Page Footnote

20 (1)

SUPREME COURT OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

People v. Celaj[1]
(decided June 10, 2003)

After denial of his motion to suppress a handgun discovered by police during a limited frisk, Shaban Celaj pled guilty to criminal possession of a weapon in the third degree.[2] Celaj was sentenced, as a second felony offender, to two to four years.[3] He appealed, claiming the search that revealed the gun in his possession violated his right of security in his person under both the United States Constitution[4] and the New York State Constitution.[5] The Appellate Division, First Department held that Celaj's motion to suppress the handgun had been properly denied,[6] because the circumstances surrounding the frisk comported with the guidelines for police-citizen interactions laid out by the New York Court of Appeals in *People v. De Bour*.[7] The New York Court of Appeals affirmed in a brief memorandum opinion.[8]

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[1] 760 N.Y.S.2d 482 (App. Div. 1st Dep't 2003), *aff'd mem.*, No. 65 SSM 32, 2004 N.Y. LEXIS 54, at *1 (N.Y. Jan. 12, 2004).

[2] *Id.*

[3] *Id.*

[4] U.S. CONST. amend. IV states 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. . . ."

[5] N.Y. CONST. art. I, § 12 states 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. . . ."

[6] *Celaj*, 760 N.Y.S.2d at 483.

[7] 352 N.E.2d 562 (1976).

[8] *Celaj*, 2004 N.Y. LEXIS 54, at *1 ("The determination of reasonable suspicion made by Supreme Court and affirmed by the Appellate Division

Two or three minutes after the police received a 911 call "reporting a dispute involving guns and describing two white men, one in his 60s and one in his 30s, in a red Buick Skylark at 754 Mace Avenue," Celaj was approached by two police officers as he stood in the entryway of the Mace Avenue building.[9] The red Buick was no longer there, but Celaj was at the reported location and fit the 911 description of a white man in his sixties.[10] Although the two police officers involved in Celaj's arrest relayed somewhat inconsistent accounts at the suppression hearing, the arresting officer reported seeing "a conspicuous bulge under [Celaj's] jacket in his waistband."[11] The officer testified that he believed the bulge to be a gun and lifted up Celaj's jacket.[12] There was a handgun in Celaj's waistband, leading to his arrest and indictment.[13]

In addressing Celaj's constitutional claims, the appellate division examined both federal and state precedents, beginning with the United States Supreme Court's holding in *Terry v. Ohio*.[14] In *Terry*, a police officer observed two men loitering near a store and grew suspicious that they were casing it for a robbery.[15] When the officer approached the men to investigate, he patted them down

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involves a mixed question of law and fact which is supported by evidence in the record.").

[9] *Celaj*, 760 N.Y.S.2d at 483.

[10] *Id.* at 484.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] 392 U.S. 1 (1968).

[15] *Id.* at 6.

briefly to ensure they were not armed.[16] The *Terry* Court framed the issue as "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest."[17] First, the Court rejected the contention that "frisks" do not rise to the level of Fourth Amendment protections merely because they do not always result in an arrest.[18] The *Terry* Court then established that a reasonable search for weapons to ensure police officers' safety, where the police officer has reason to believe the person is armed and dangerous, does not violate the Fourth Amendment.[19] The Court supported this distinction by reasoning that "[t]his scheme is justified in part upon the notion that a 'stop' and a 'frisk' amount[s] to a mere 'minor inconvenience and petty indignity.'"[20] A search based upon suspicion of criminal activity is more intrusive and, as such, still requires probable cause under the Fourth Amendment.[21]

Courts faced with *Terry* frisks must determine "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[22] In *United States v. Sokolow*,[23] the Court refused to draw a bright line rule reasoning that "[t]he

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[16] *Id.* at 7.
[17] *Id.* at 15.
[18] *Id.* at 16.
[19] 392 U.S. at 27.
[20] *Id.* at 10.
[21] *Id.*
[22] *Id.* at 20.
[23] 490 U.S. 1 (1989).

concept of reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules.'"[24] This objective standard requires that the police officer be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the frisk for weapons.[25]

Because the goal of the frisk is not to discover evidence of a crime, but to ensure the police officer's safety, the officer must have reason to believe the suspect is armed.[26] In *Ybarra v. Illinois*,[27] police officers obtained a search warrant for a bar in which drug sales were allegedly taking place.[28] When the officers executed the warrant, they frisked each customer in the bar,[29] leading the Supreme Court to reason that "the initial frisk of Ybarra was simply not supported by a reasonable belief that he was armed and presently dangerous . . . [because officers] neither recognized him as a person with a criminal history nor had any particular reason to believe that he might be inclined to assault them."[30]

In *Illinois v. William*,[31] the Court reasoned that "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough" for a *Terry* stop, but that high crime

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[24] *Id.* at 7 (citing Illinois v. Gates, 462 U.S. 213, 232 (1983)).
[25] *Terry*, 392 U.S. at 21.
[26] Adams v. Williams, 407 U.S. 143, 146 (1972).
[27] 444 U.S. 85 (1979).
[28] *Id.* at 88.
[29] *Id.*
[30] *Id.* at 92-93.
[31] 528 U.S. 119 (2000).

areas may be "among the relevant contextual considerations in a *Terry* analysis."[32] Factors the Court suggested for consideration include "the time of day, the number of people in the area, the character of the neighborhood, whether the officer was in uniform . . . and whether the person's behavior was otherwise unusual."[33] When faced specifically with a "gun bulge" case, the Supreme Court held that the "bulge in the jacket permitted the officer to conclude [the suspect] was armed and thus posed a serious and present danger to the safety of the officer. In these circumstances, any man of 'reasonable caution' would likely have conducted the 'pat down.'"[34]

The New York Court of Appeals considered appropriate constitutional safeguards for police-citizen encounters in *De Bour*.[35] As later clarified in *People v. Hollman*,[36] the more intrusive the police interaction with a citizen, the higher the level of suspicion required by the police officer.[37] For example, a police officer requesting basic information such as where a citizen lives or where the citizen is headed requires only "an objective credible reason, not necessarily indicative of criminality."[38] Once the police officer's questions are such that the citizen may believe "she is suspected of some wrongdoing and is the focus of the officer's

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[32] *Id.* at 124 (citing Brown v. Texas, 443 U.S. 47 (1979)).
[33] *Id.* at 129-30.
[34] Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977).
[35] 352 N.E.2d at 565.
[36] 590 N.E.2d 204 (N.Y. 1992).
[37] *Id.* at 206.
[38] *Id.* at 205.

investigation, the officer is no longer merely seeking information. This has become a common-law inquiry that must be supported by a founded suspicion that criminality is afoot."[39]

The *De Bour* court held that reasonableness was the proper standard in evaluating police-citizen encounters, explaining that "whether or not a particular search or seizure is to be considered reasonable requires a weighing of the government's interest against the encroachment involved with respect to an individual's right to privacy and personal security."[40]

The *Hollman* court explicitly declined to follow the United States Supreme Court's test for searches and seizures that do not rise to the level of Fourth Amendment searches and seizures.[41] Instead, the New York Court of Appeals chose to preserve the four-tier *De Bour* test,[42] explaining that "encounters that fall short

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[39] *Id.* at 206.

[40] *De Bour*, 352 N.E.2d at 566 (citing People v. Cantor, 324 N.E.2d 872, 876 (N.Y. 1975)).

[41] *Id.* at 212.

[42] *De Bour,* 352 N.E.2d at 571-72. The *De Bour* court explained:

> The minimal intrusion of approaching to request information is permissible when there is some objective credible reason for that interference not necessarily indicative of criminality. The next degree, the common-law right to inquire, is activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion in that a policeman is entitled to interfere with a citizen to the extent necessary to gain explanatory information, but short of a forcible seizure. Where a police officer entertains a reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor, the CPL authorizes a forcible stop and detention of that person. A corollary of the statutory right to temporarily detain for questioning is the authority to frisk if the officer reasonably suspects that he is in danger of physical injury by virtue of the detainee being armed. Finally, a police officer may arrest and take into

of Fourth Amendment seizures still implicate the privacy interests of all citizens and . . . the spirit underlying those words require[s] the adoption of a State common-law method to protect the individual from arbitrary or intimidating police conduct."[43]

In *People v. Prochilo*,[44] the Court of Appeals determined that a reasonableness inquiry involves looking at three aspects of the transaction at issue:

> Was there proof of a describable object or of describable conduct that provides a reasonable basis for the police officer's belief that the defendant had a gun in his possession? Was the manner of the police officer's approach to the defendant and the seizure of the gun from him reasonable in the circumstances? Was there evidence of probative worth that there had been a pretext stop and frisk or that the police were otherwise motivated by improper or irrelevant purpose?[45]

Specifically, the Court of Appeals held in *People v. Russ*[46] that a frisk "requires reliable knowledge of facts providing reasonable basis for suspecting that the individual to be subjected to that intrusion is armed and may be dangerous."[47] However, the

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> custody a person when he has probable cause to believe that person has committed a crime, or offense in his presence.

Id. (citations omitted).

[43] *Hollman,* 590 N.E.2d at 212.

[44] 363 N.E.2d 1380 (N.Y. 1977).

[45] *Id.* at 1381.

[46] 460 N.E.2d 1086 (N.Y. 1984)

[47] *Id.* at 1087. *See, e.g.,* People v. Benjamin, 414 N.E.2d 645, 647-48 (N.Y. 1980) noting:

> [A] stop and frisk is a more obtrusive procedure than a mere request for information or a stop invoking the common-law

court cautioned against dissecting each individual act of the police officers, holding in *People v. Chestnut*[48] that "the events must be viewed and considered as a whole, remembering that reasonableness is the key principle when . . . balancing the competing interests presented."[49]

In the instant case, Celaj challenged the trial court's denial of his motion to suppress by distinguishing his case from prior cases involving descriptions garnered from 911 callers.[50] Specifically, as Judge Ellerin noted in dissent, the description relayed to the arresting officer involved two white men and a red Buick Skylark; Celaj was approached despite the lack of any such car.[51] Without the car, Ellerin argued that "the generic description, 'white male in his 60s,' is too vague."[52] Ellerin concluded that Celaj was merely standing on the sidewalk, and "the observation of a waistband bulge alone does not satisfy the People's burden of

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> right of inquiry, and as such normally must be founded on a reasonable suspicion that the particular person has committed or is about to commit a crime. . . . [However] [i]t would, indeed, be absurd to suggest that a police officer has to await the glint of steel before he can act to preserve his safety.

See also People v. Sanders, 653 N.Y.S.2d 129 (App. Div. 2d Dep't 1997) ("The officer's observation of the defendant standing alone in the immediate vicinity of where the gunshots rang out with a prominent bulge in his waistband provided the officer with the necessary reasonable suspicion that the defendant was involved in criminal activity.").

[48] 409 N.E.2d 958 (N.Y. 1980).

[49] *Id.* at 963.

[50] *Celaj*, 760 N.Y.S.2d at 485.

[51] *Id.* at 487 (Ellerin, J., dissenting) (arguing that the "red Buick Skylark was the distinctive element in the description . . . and that element was lacking when the police arrived on the scene").

[52] *Id.*

proving a reasonable suspicion that a defendant was committing a crime."[53]

The majority, however, maintained that the "radio reports . . . provided responding officers with a reasonable assumption 'that a potential for great danger existed.'"[54] Previous cases have established that the descriptions relayed to police officers on the streets must be sufficiently specific to serve as the basis for reasonable suspicion.[55] For example, police officers looking for robbery suspects did not have an appropriate basis for reasonable suspicion when the description was that "two male blacks" committed the robbery.[56] A specific description, however, when coupled with a precise location may be enough.[57] For example, in *People v. Salaman*,[58] an anonymous tip that there was a black man with a gun at a specific intersection also included a description of

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[53] *Id.* at 488 (citing People v. Barreto, 555 N.Y.S.2d 303 (App. Div. 1st Dep't 1990)). *Cf.* Matter of Terrell W., 749 N.Y.S.2d 245 (App. Div. 1st Dep't 2002) ("[Police] observed a bulge at [defendant's] waist resembling a gun. This provided the police with reasonable suspicion.").

[54] *Celaj*, 760 N.Y.S.2d at 484 (quoting People v. Garner, 602 N.Y.S.2d 47 (App. Div. 1st Dep't 1993)).

[55] *See, e.g., Garner*, 602 N.Y.S.2d at 47 (holding that a radio report of an armed robber provided arriving police officers with "reasonable suspicion" when they encountered two men who fit the description).

[56] People v. Brown, 627 N.Y.S.2d 45, 46 (App. Div. 1st Dep't 1995).

[57] *See, e.g.*, People v. Ayala, 696 N.Y.S.2d 131 (App. Div. 1st Dep't 1999). The court found reasonable suspicion based on the officers' rapid response to an anonymous call of shots fired from a described vehicle. The officers' observation, moments later, of defendant in a car that substantially matched the description of the vehicle in the radio run, that was at the precise location described therein, and the lack of any other cars in the vicinity that matched the radio run description or of other people in the area supported the officers' reasonable suspicion. *Id.*

[58] 522 N.E.2d 1048 (N.Y. 1988).

the suspect's beige overcoat and maroon sweatshirt.[59] When the police officer arrived at the location, he "observed approximately 25 people milling about, but only defendant matched the description given."[60] The specificity of the information provided and the independent corroboration by the officer on the scene satisfied the Court of Appeals.

In Celaj's case, there was no crowd from which the police officers picked Celaj. However, there was detailed information, including the specific location of the suspects as well as a general description of them.[61] That, the appellate division reasoned, coupled with the information that the suspects were allegedly in possession of firearms, provided the responding officers with a reasonable suspicion to support the frisk.[62] This comports with the four-tiered scheme of constitutional protections as set forth by the Court of Appeals in *DeBour*.

In conclusion, the federal courts have maintained a distinction between searches within the meaning of the Fourth Amendment and frisks intended to expose possible threats to the safety of police officers.[63] Instead of probable cause, these frisks require the less stringent standard of a particularized, reasonable suspicion of possible criminal activity.[64] The New York courts have promulgated a more stringent scheme of searches and

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[59] *Id.*
[60] *Id.*
[61] *Celaj*, 760 N.Y.S.2d at 483.
[62] *Id.* at 485.
[63] *Terry*, 392 U.S. at 27.
[64] *Id.*

seizures intended to protect citizens from unconstitutional violations of their personal security. For a frisk to be constitutional, the New York Court of Appeals requires "reliable knowledge of facts providing [a] reasonable basis for suspecting that the individual . . . is armed and may be dangerous."[65]

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[65] *Russ*, 460 N.E.2d at 1087.

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