TOURO LAW
Touro College Jacob D. Fuchsberg Law Center

Touro Law Review

Volume 19
Number 2 *New York State Constitutional Decisions: 2002 Compilation*

Article 15

April 2015

Appellate Division, First Department, Morris v. Port Authority of New York and New Jersey

Brooke Lupinacci

Follow this and additional works at: http://digitalcommons.tourolaw.edu/lawreview

 Part of the Constitutional Law Commons, and the Fourth Amendment Commons

Recommended Citation
Lupinacci, Brooke (2015) "Appellate Division, First Department, Morris v. Port Authority of New York and New Jersey," *Touro Law Review*: Vol. 19: No. 2, Article 15.
Available at: http://digitalcommons.tourolaw.edu/lawreview/vol19/iss2/15

This Search and Seizure is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact ASchwartz@tourolaw.edu.

Appellate Division, First Department, Morris v. Port Authority of New York and New Jersey

Cover Page Footnote
19-2

This search and seizure is available in Touro Law Review: http://digitalcommons.tourolaw.edu/lawreview/vol19/iss2/15

SUPREME COURT, APPELLATE DIVISION FIRST DEPARTMENT

Morris v. Port Authority of New York and New Jersey[1]
(decided January 10, 2002)

Robert Morris, a Port Authority police officer, held a "leadership position" with the Port Authority Benevolent Association (hereinafter "the PBA") since 1997.[2] The Port Authority of New York and New Jersey (hereinafter "Port Authority") is a municipal corporation that operates Kennedy International Airport (hereinafter "Kennedy Airport").[3] The Port Authority assigns lockers at Kennedy Airport to Port Authority police officers who are stationed full time at Kennedy Airport Command.[4] The PBA initiated this action seeking declaratory and injunctive relief enjoining the Port Authority from conducting random searches of the police officers' lockers, alleging that such searches were unreasonable in light of the safeguards provided in the Search and Seizure Clause of both the Federal[5] and New York State[6] Constitutions.[7] The supreme court found that the searches at issue did not violate the officers' constitutional rights, and thus the

---

[1] 290 A.D.2d 22, 736 N.Y.S.2d 324 (1st Dep't 2002).

[2] *Id.* at 23, 736 N.Y.S.2d at 325. The PBA is a corporation that represents all Port Authority Police officers. *Id.*

[3] *Id.*

[4] *Id.* The lockers are provided to the officers to store their civilian clothing and uniforms, various personal items, and two keys are issued with each locker. *Id.* The Port Authority maintains one key to each locker and a master key which opens all the lockers. *Id.* The parties are aware that the keys retained by the Port Authority had previously been used when police officers could not locate their own keys, or in extreme circumstances, such as the death of a police officer. *Id.*

[5] 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 . . . but upon probable cause . . .."

[6] 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 . . . but upon probable cause . . .."

[7] *Morris*, 290 A.D.2d at 25, 736 N.Y.S. 2d at 326.

Published by Digital Commons @ Touro Law Center, 2014

PBA failed to establish their likelihood of success on the merits, which resulted in the denial of injunctive relief.[8]

On appeal, the primary issue was whether the police officers had a reasonable likelihood of success on the merits.[9] The Appellate Division, First Department also denied injunctive relief and affirmed the motion court's finding that the officers failed to demonstrate a likelihood of success on the merits.[10] Despite this finding, the court discussed the existence of disputed factual issues, including whether the searches conducted by the Port Authority were reasonable. Additionally, the court also addressed the reasonableness of the scope and level of the intrusions in view of the police officers' status as being employees of the government.[11] Although the court recognized that the officers had a cause of action for their constitutional claims, the court declined to rule on the ultimate merits of those assertions.[12]

The events that led to the searches in dispute began in October 1999. The Port Authority Police Department, (hereinafter "PAPD") discovered a shortage of radios at Kennedy Airport.[13] The police officers, at the end of their tours, were storing the radios in their lockers rather then returning them.[14] The PBA allegedly expressed concern about the shortage of radios. In response to

---

[8] *Id.* at 25, 736 N.Y.S.2d at 326 (citing Grant Co. v. Srogi, 52 N.Y.2d 496, 515, 420 N.E.2d 953, 962, 438 N.Y.S.2d 761, 770 (1981)). In order for a party to obtain injunctive relief, three requirements must be met: (1) the likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) after balancing of the equities in the case, the balance tips in favor of the plaintiff. *Grant Co.*, 52 N.Y.2d at 517, 420 N.E.2d at 963, 438 N.Y.S.2d at 771.

[9] *Morris*, 290 A.D.2d at 23, 736 N.Y.S.2d at 325.

[10] *Id.* at 28, 736 N.Y.S.2d at 329.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 24, 736 N.Y.S.2d at 326. Police officers who tour the command building at Kennedy Airport are required to carry two-way radios for public-safety reasons, which include the officers' ability to summon medical assistance or back-up, and in event of an aviation disaster, to coordinate crash, fire and rescue functions through police command. *Id.* The Memorandum Agreement, which governs the conditions of employment for the police officers, specifies that Kennedy Airport is to have 125 radios available. *Id.*

[14] *Morris*, 290 A.D.2d at 24, 736 N.Y.S. 2d at 326. It is important to note that this discovery followed a directive that was issued the month prior, requiring all police officers to turn in their radios to command after their tours. *Id.*

these concerns, an Inspector in the PAPD warned the police officers on a number of occasions that steps would be taken if the radios were not returned, including searches of the officers' lockers.[15] Subsequently, the PAPD opened and searched approximately fifty lockers, in the presence of PBA delegates who were ordered to be present during the search.[16] The search revealed two radios, which led to disciplinary charges being filed against those officers.[17]

On appeal, the police officers challenged the trial court's denial of their motion for a preliminary injunction to enjoin the Port Authority from conducting any additional searches of the police officers' lockers.[18] The police officers argued that such searches constituted a violation of the police officers' constitutional rights.[19] The officers further argued that the locker searches were highly intrusive, that the Port Authority acted on mere suspicion, and that the searches were not only visual, but involved the moving and inspection of personal property.[20] In addressing the constitutional issues, the court required that in order to obtain a preliminary injunction, the police officers had to demonstrate to the court the likelihood of success on the merits;

---

[15] *Id.*

[16] *Id.*

[17] *Id.* After this search, the Inspector issued a memorandum advising all police officers in the Kennedy Airport Command that the shortage of radios was due to the fact that the officers were storing them in their lockers and, as a result, periodical searches would continue until all the radios were accounted for. *Id.* at 24, 736 N.Y.S.2d at 326. However, approximately 50 radios were turned in following a short time after the initial search and despite an additional search that followed two weeks later, no further radios were discovered. As it turns out, the Inspector later noted that not all 125 radios were available for use on every tour because "some [were] permanently assigned to fire trucks and particular police officers such as fire marshals, abandoned car detail and motor vehicle inspections." Furthermore, the Inspector failed to provide any numerical data in regard to how many of the 125 radios were unavailable or out for repair on average at any given time or as to the number of radios "permanently assigned." *Id.* at 25, 736 N.Y.S.2d at 326.

[18] *Id.* at 24, 736 N.Y.S.2d at 326.

[19] *Morris,* 290 A.D.2d. at 25, 736 N.Y.S.2d at 328.

[20] *Id.* at 27, 736 N.Y.S.2d at 328. The officers further suggested that a less intrusive way to manage the radios would have been to set up a system where each officer, as he/she left the command building for a tour, signed a radio out, and then back in, when finished with the tour. *Id.*

irreparable harm in the absence of injunctive relief; and that a balancing of the equities lies in their favor.[21] In this situation, the court determined injunctive relief was properly denied because the officers failed to satisfy the first prong of these requirements.[22]

The First Department then examined the constitutional claims asserted by the officers. The court noted that the safeguard against unreasonable searches and seizures is designed to protect the personal privacy and dignity of citizens against unjustifiable invasions by the state. [23] Additionally, the court pointed out that this protection extends to unreasonable searches conducted by the government, even in situations where the government acts as an employer.[24]

The relevant parts of the Fourth Amendment of the United States Constitution and the New York State Constitution Article I Section 12 are identical. Both provisions provide that the "right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ."[25] In addition to using identical language, both provisions fail to describe what constitutes an "unreasonable" search of a government employee. This is precisely the issue that the United States Supreme Court confronted in *O'Connor v. Ortega*.[26]

In *O'Connor,* the United States Supreme Court discussed the federal standard for determining whether a search is reasonable under the Fourth Amendment in the government employee context.[27] The Supreme Court held that in cases of searches conducted by a public employer, "[there must be a balancing] of the invasion of the employee's legitimate expectations of privacy against the government's need for supervision, control and the efficient operation of the workplace."[28] The Court further held that

---

[21] *Id.* at 26, 736 N.Y.S.2d at 327 (citing Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860, 862, 552 N.E.2d 166, 167, 552 N.Y.S.2d 918, 919 (1990)).

[22] *Id.* at 27, 736 N.Y.S.2d at 328.

[23] *Id.* (citing Matter of Caruso v. Ward, 83 N.Y.2d 367, 371, 632 N.E.2d 1251, 1253, 610 N.Y.S.2d 928 (1994)).

[24] *Morris,* 290 A.D.2d at 27, 736 N.Y.S.2d at 328 (citing Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989)).

[25] U.S. CONST. amend. IV; N.Y. CONST. art. I, § 12.

[26] 480 U.S. 709 (1987).

[27] *Id.* at 725-26.

[28] *Id.* at 719-20.

a public employer may have "special needs" which will allow it to dispense with probable cause and warrant requirements when conducting workplace searches for, "legitimate, work-related, non-investigatory intrusions as well as investigations of work-related misconduct."[29]

In *O'Connor*, a doctor in a state hospital was suspected of indecent practices in his management of the hospital's residency program.[30] While on paid administrative leave during an investigation of the various charges of wrongdoing, hospital personnel entered the doctor's office and repeatedly searched it.[31] The doctor commenced an action against the hospital administration, alleging that the warrantless search of his office violated the Fourth Amendment.[32] On cross-motions, summary judgment was entered for the hospital, however the circuit court reversed and ordered partial summary judgment for the doctor on the issue of liability.[33] The United States Supreme Court affirmed in part and reversed in part, ruling that neither party was entitled to

---

[29] *Id.* at 724-25. The court further noted that, "[where] a careful balancing of governmental and private interests strongly suggests that the public interest is best served by the Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard." *Id.* at 722-23 (citing New Jersey v. T.L.O., 469 U.S. 325, 341 (1985)).

[30] *Id.* at 712. The particular concerns of the hospital involved the doctor's acquisition of a computer for use in the residency program. *Id.* Officials believed that the computer had been financed by the possibly coerced contributions of residents, even though the doctor contended that it was donated. *Id.* Additionally, hospital officials were concerned with charges that the doctor sexually harassed two female hospital employees, and had taken inappropriate disciplinary action against a resident. *Id.*

[31] *O'Connor,* 480 U.S. at 713. The reason for the search of the doctor's office is unclear. Hospital administration claimed that the search was conducted to secure state property. *Id.* The doctor contends that the purpose of the search was to secure evidence to use against him in administrative disciplinary proceedings. *Id.* During the search, several items were seized from the doctor's desk and file cabinets, including a card, photograph and book of poetry sent to the doctor by a former resident. *Id.* These items were all used later in a proceeding before the board to impeach the credibility of the former resident, who testified on the doctor's behalf. *Id.* Other items were seized including billing documentation of one of the doctor's private patient's under a Medicaid program. *Id.*

[32] *Id.* at 714.

[33] *Id.*

summary judgment.[34] The majority found that the doctor had a reasonable expectation of privacy in his office; subject to Fourth Amendment protection.[35] Additionally, the Court found that there was a genuine issue as to the reasonableness of the inception and scope of the search, therefore barring summary judgment.[36] The Supreme Court declined to rule on the issue of whether the search of the doctor's office and seizure of his belongings was proper. Rather, the Court articulated the standard of reasonableness for the district court to adhere to when making its determination of whether the search was reasonable.[37]

It is clear from reviewing the First Department's decision in *Morris* that it adopted the identical standard for testing the reasonableness of a search of a government employee as outlined by the Supreme Court in the *O'Connor* case. The First Department concluded that a public employer's intrusions on the constitutionally protected privacy interests of public employees for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, "should be judged by the standard of reasonableness under all the circumstances."[38] Furthermore, under this standard, "both the inception and the scope of the intrusion must be reasonable."[39] The court further stated that a search is justified at its inception when there are reasonable grounds to suspect that a search will reveal evidence that the employee is guilty of some work-related misconduct, or that the search is necessary for a non-investigatory, work-related purpose.[40] Moreover, the court deemed a search permissible in scope when

---

[34] *Id.* at 727.

[35] *Id.* at 718-19.

[36] *O'Connor*, 480 U.S. at 728.

[37] *Id.* at 726. The standard of reasonableness is to be judged under all the circumstances. Under this reasonableness standard both the inception and scope of the intrusion must be reasonable: "Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the . . . action was justified at its inception,' second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id.* (quoting New Jersey v. T.L.O., 469 U.S. 809 (1984)).

[38] *Morris*, 290 A.D.2d at 27, 736 N.Y.S.2d at 328 (citing *O'Connor*, 480 U.S. at 725-26).

[39] *Id.*

[40] *Id.*

"the means adopted are reasonably related to the objectives of the search and are not excessively intrusive given the nature of the misconduct."[41]

After examining the reasonableness standard set forth in *O'Connor*, the court examined how the New York Courts have determined whether a search is reasonable. In *Matter of Caruso v. Ward,*[42] the New York Court of Appeals held that where the employees in question are police officers, their special status becomes a factor in determining reasonableness because, "it is within the State's power to regulate and control the conduct of its police officers even when the conduct involves the exercise of a constitutionally protected right."[43] The court further held that, "the privacy expectations of police officers must be regarded as even further diminished by virtue of their membership in a paramilitary force, the integrity of which is a recognized and important State concern."[44]

In briefly highlighting the constitutional assertions in *Caruso,* the First Department gave credence to the court's finding in *Ward.* The *Morris* court emphasized that the status of the police officers was to be an integral part in determining reasonableness of the searches at issue because of the diminished expectation of privacy, as well as the importance of maintaining the integrity of the police force in the midst of "turbulent times," when reliable communication is crucial.[45]

In conclusion, it is clear that the relevant parts of the Fourth Amendment of the United States Constitution and the New York State Constitution Article I § 12 are identical. Both provisions provide that the right of the people to be secure in their persons. . .

---

[41] *Id.*

[42] 72 N.Y.2d 432, 530 N.E.2d 850, 534 N.Y.S.2d 142 (1988).

[43] *Id.* at 439, 530 N.E.2d at 853, 534 N.Y.S.2d at 143 (citing Matter of Morrisette v. Dilworth, 59 N.Y.2d 449, 452 N.E.2d 1222, 465 N.Y.S.2d 894 (1983)).

[44] *Id. at* 429, 530 N.E.2d at 853, 534 N.Y.S.2d at 439; *see also Morrisette*, 59 N.Y.2d at 452, 452 N.E.2d at 1223, 465 N.Y.S.2d at 895 (holding that it is within the State's power to regulate conduct of its police officers even when that conduct involves the exercise of a constitutionally protected right, and further noted that the state has a legitimate concern and interest in maintaining the independence and integrity of the police force).

[45] *Morris*, 290 A.D.2d at 28, 736 N.Y.S.2d at 329.

against unreasonable searches and seizures, shall not be violated . . . ."[46] In addition to having identical wording, both provisions are unclear as to what constitutes an "unreasonable" search of a government employee. After the decision in *Morris v. Port Authority of N.Y. and N.J.*,[47] it is apparent that federal and state courts apply the same balancing test when determining whether a search of a government employee is reasonable under the safeguards provided in both the Federal and State Search and Seizure Clauses. The Fourth Amendment, as interpreted by the Supreme Court in *O'Connor v. Ortega*,[48] is not violated by a search of a government employee, so long as the search is reasonable at the time of the search's inception and that the scope of the search is not overly intrusive of the employee's legitimate expectations of privacy.[49] In applying the balancing test, the Court established that probable cause and warrant requirements may be dispensed with due to the fact that public employers have special needs, provided that the search is based on a reasonable suspicion that it will reveal evidence of employee misconduct.[50] In *Morris*, the Appellate Division adopted the balancing test described by the United States Supreme Court. Consequently, in New York, probable cause and warrant requirements may be dispensed with if a public employer has a reasonable suspicion that a search will reveal evidence of employee misconduct. However, the court must balance the reasonableness of the scope of the search at its inception against the governmental employee's legitimate expectation of privacy.[51]

Brooke Lupinacci

[46] *See supra* notes 5-6.
[47] 290 A.D.2d 22, 736 N.Y.2d 324 (1st Dep't 2002).
[48] 480 U.S. 709 (1987).
[49] *Id.* at 719-20
[50] *Id.*
[51] *Morris*, 290 A.D.2d at 28, 736 N.Y.S.2d at 328.