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### Third Department, Rossi v. City of Amsterdam

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## SEARCH AND SEIZURE

### *U.S. CONST. amend IV.*

*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 and affirmation, particularly describing the place to be searched, and the persons or things to be seized.*

### *N.Y. CONST. art. I, § 12*

*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 and affirmation, particularly describing the place to be searched, and the persons or things to be seized.*

## SUPREME COURT, APPELLATE DIVISION THIRD DEPARTMENT

Rossi v. City of Amsterdam<sup>1</sup>  
(decided July 27, 2000)

In July of 1996, the City of Amsterdam Police Department, in Montgomery County New York, was involved in an investigation of the sale of drugs from a residence on McDonnell Street.<sup>2</sup> The investigating officer applied for a “no-knock” search warrant for the residence.<sup>3</sup> The investigating officer directed a different officer to check and verify the address of the targeted residence.<sup>4</sup> The officer erroneously reported the address as Nine McDonnell, while the intended house was actually located at

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<sup>1</sup> 274 A.D.2d 874, 712 N.Y.S.2d 79 (3d Dep’t 2000).

<sup>2</sup> *Id.* at 874, 712 N.Y.S.2d at 81.

<sup>3</sup> *Id.* A “no-knock” warrant is also referred to as a forceable entry warrant. When a “no-knock” warrant is issued the police will first survey the targeted area. The surveillance is done to become familiar with the area, and also to ensure that the accuracy of the warrant. Ultimately the police will use a device such as a battering ram to crash through the door. *Id.*

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

Eleven McDonnell Street.<sup>5</sup> Therefore, when the search warrant was issued it contained all the correct information with the exception of the street address.<sup>6</sup>

The Amsterdam Police Department requested that the Montgomery Sheriff's Department assist in the execution of the search warrant.<sup>7</sup> The supervising police officer along with another officer and a lieutenant from the Sheriff's department drove by the targeted residence in order to familiarize themselves with the location.<sup>8</sup> When making the drive-by, the officers relied on the incorrect address and did not utilize the physical description of the residence.<sup>9</sup>

On July 8, 1996, a joint team of the Amsterdam Police Department and the Montgomery Sheriff's Department executed the search warrant on the plaintiffs' residence.<sup>10</sup> The plaintiffs' residence, Nine McDonnell Street, was divided into three apartments.<sup>11</sup> As a result of the improper search warrant, all three residents commenced this action against both the City of Amsterdam ("City") and the County of Montgomery ("County").<sup>12</sup> The plaintiffs asserted causes of action for assault, battery, false imprisonment, negligence and the violation of their civil rights under 42 U.S.C. §1983.<sup>13</sup> Additionally, the plaintiffs alleged that the issuance of the search warrant violated their rights guaranteed

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* In addition to containing the wrong address the search warrant and accompanying affidavits contained a physical description of the premises. *Id.*

<sup>7</sup> *Rossi*, 274 A.D.2d at 874, 712 N.Y.S.2d at 81.

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

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

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

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

<sup>12</sup> *Rossi*, 274 A.D.2d at 874, 712 N.Y.S.2d at 81.

<sup>13</sup> 42 U.S.C. § 1983 (2000). The statute provides in pertinent part that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

*Id.*

under the Fourth Amendment of the United States Constitution<sup>14</sup> and Article I, § 12 of the New York State Constitution.<sup>15</sup>

Soon after the suit was commenced the City and the County each moved for summary judgment.<sup>16</sup> The plaintiffs filed motions in opposition, and in addition moved for summary judgment against the City.<sup>17</sup> The trial court granted the County's motion for summary judgment, reasoning that the County merely assisted the City, and was thus immune from liability.<sup>18</sup> The trial court denied summary judgment for both the City and the plaintiffs, as there were triable issues of fact which remained.<sup>19</sup> Both the plaintiffs and the City appealed the trial court's denial of their respective motions for summary judgment.<sup>20</sup>

The Appellate Division, Third Department dismissed the § 1983 claim against the City, and otherwise affirmed the decision of the trial court.<sup>21</sup> The Appellate Division found that despite containing the wrong address, the search warrant was nonetheless facially valid.<sup>22</sup> Therefore, the warrant in this case was consistent with both the Federal<sup>23</sup> and New York<sup>24</sup> Constitutions' requirement

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<sup>14</sup> U.S. CONST. amend IV. This section 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 and affirmation, particularly describing the place to be searched, and the persons or things to be seized.

*Id.*

<sup>15</sup> N.Y. CONST. art. I § 12. This section 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 and affirmation, particularly describing the place to be searched, and the persons or things to be seized.

*Id.*

<sup>16</sup> *Rossi*, 274 A.D.2d at 874, 712 N.Y.S.2d at 81.

<sup>17</sup> *Id.*

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

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

<sup>20</sup> *Id.*

<sup>21</sup> *Rossi*, 274 A.D.2d at 874, 712 N.Y.S.2d at 81.

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

<sup>23</sup> U.S. CONST. amend IV.

of probable cause. The identical language of both Constitutions affords individuals identical protection and requires probable cause for a valid search warrant.<sup>25</sup>

It is established case law that a search warrant may still be valid despite minor discrepancies.<sup>26</sup> However, when the warrant is deemed valid it is done so only with regard to the intended suspect or an intended location,<sup>27</sup> not the public as a whole.<sup>28</sup> Therefore, it is reasonable to infer that a valid such warrant cannot be construed as an absolute limitation to all citizens' constitutionally protected rights. However, a situation might exist, nonetheless, where a valid search warrant is executed, and an individual's constitutional rights are nonetheless violated. Similarly, a police officer executing such a warrant will not necessarily be immune from liability if a reasonably competent officer would not have acted accordingly.<sup>29</sup>

In the *Rossi* case the City applied for a "no-knock," or a forceable entry search warrant.<sup>30</sup> This type of search warrant is significantly harsher than a conventional warrant.<sup>31</sup> The New York State Legislature reluctantly amended the Code of Criminal procedure law to include forceable entry search warrants.<sup>32</sup> Due to the harshness of this statute, the police must incur the additional obligation of a thorough and precise investigation when securing the "no-knock" warrant.<sup>33</sup> "[T]o do less is not only a violation of our civil liberties, but is also a fraud upon this court."<sup>34</sup> The officers in *Rossi* admitted that they did not take any precautions to

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<sup>24</sup> N.Y. CONST. art. I § 12.

<sup>25</sup> *People v. Nieves*, 36 N.Y.2d 396, 402, 330 N.E.2d 26, 32 (1975).

<sup>26</sup> *See, e.g., People v. Davis*, 537 N.Y.S.2d 93, 94, 146 A.D.2d 942, 943 (3d Dep't 1989).

<sup>27</sup> CRIM. PROC. LAW §§ 690.15 (1)(a), (c) (1996), stating in pertinent part: "A search warrant must direct a search of . . . (a) A designated or described place or premises; (c) A designated or described person." *Id.*

<sup>28</sup> CRIM. PROC. LAW § 690.15 (1)(c) (1996).

<sup>29</sup> *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

<sup>30</sup> *Rossi*, 274 A.D.2d at 874, 712 N.Y.S.2d at 81.

<sup>31</sup> *Herman v. State of New York*, 78 Misc. 2d 1025, 1031, 357 N.Y.S.2d 811, 816 (Ct. Cl. 1974).

<sup>32</sup> *Id.* (noting that "[I]n the tumultuous times in which we live we must yield some individual civil liberties in order to protect the majority of our citizens").

<sup>33</sup> *Id.*

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

ensure the soundness of the home to be searched other than checking the street address number.<sup>35</sup> The court held that the City officers utilizing only reasonable efforts should have identified the proper home to be searched.<sup>36</sup> It is certainly troubling that in a situation when officers should act with extreme caution and discretion, they failed to do so. It is even more troubling that a court can conclude that the end result of such imprudent actions is a valid search, satisfying probable cause pursuant to the Federal<sup>37</sup> and State<sup>38</sup> Constitutions. Consequently, in other situations where a search warrant contained an incorrect address, the officers were issued another warrant.<sup>39</sup>

The court in *Rossi* cited five New York decisions where search warrants were deemed valid despite having certain minor defects.<sup>40</sup> However, it must be noted that all five cases discussed by the court differ significantly in several aspects from the *Rossi* case. First, the cases discussed are each linked by a commonality, they are all criminal matters involving criminal defendants.<sup>41</sup> In each of these cases the defendants were challenging the validity of the respective search warrants, and in each case the court held them to be valid.<sup>42</sup> The court in *Nieves*<sup>43</sup> discusses the necessary

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<sup>35</sup> *Rossi*, 274 A.D.2d at 874, 712 N.Y.S.2d at 81.

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

<sup>37</sup> U.S. CONST. amend IV.

<sup>38</sup> N.Y. CONST. art I § 12.

<sup>39</sup> *People v. Mato*, 83 N.Y.2d 406, 408, 633 N.E.2d 446, 446 (1994). The facts of this case are similar to those of *Rossi*. In this case an undercover officer prepared information which was used to obtain a search warrant. However, the officer provided an errant street address and as a result an innocent family of four was arrested. The officers subsequently were issued another search warrant. Most importantly, there was no contention made that the original warrant was valid. *Id.*

<sup>40</sup> *Rossi*, 274 A.D.2d at 874, 712 N.Y.S.2d at 81. See *Nieves*, 36 N.Y.2d 396; *People v. Brooks*, 54 A.D.2d 333, 388 N.Y.S.2d 450 (1976); *Robinson*, 68 N.Y.2d 541; *People v. Rainey*, 14 N.Y.2d 35, 248 N.Y.S.2d 33, 197 N.E.2d 527 (1964); *People v. Wallace*, 238 A.D.2d 807, 656 N.Y.S.2d 513 (1997).

<sup>41</sup> *Rossi*, 274 A.D.2d at 874, 712 N.Y.S.2d at 81. The five cases involving defective search warrant were ultimately tried in criminal court, and the defendants were seeking that the warrants be deemed invalid. They were not seeking civil remedies. *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Nieves*, 36 N.Y.2d at 402, 330 N.E.2d at 32.

criteria for a warrant to be valid.<sup>44</sup> Specifically, “the executing officer can reasonably ascertain the person or places authorized to be searched.”<sup>45</sup> The court in *Nieves* continues that the warrant must enable the searcher to reasonably identify the target of the warrant.<sup>46</sup> In each case referred to, the criminal defendant challenging the warrant was also the intended target of each warrant.<sup>47</sup> In each of these cases the defect contained in the warrant was so slight that it did not misdirect the executing officer.<sup>48</sup> Consequently, the officers always executed the warrant on the intended party.

Secondly, in *Rossi* the extent of the warrant’s defect was so great that it ultimately lead to an unintended party being served.<sup>49</sup> The level of error in the other cases did not rise to the severity as it did in *Rossi*. For example, in *People v. Davis*,<sup>50</sup> the officer’s sole error was describing the residence to be searched as being “on the left” rather than the right side of the building.<sup>51</sup> The courts have upheld the validity of search warrants provided that the warrant reasonably leads to the intended target.<sup>52</sup> However, in *Rossi*, the most significant piece of information – the address relied upon by the officer – was in error. The result, unlike any of the cases cited in *Rossi*, was that the officers executed the search warrant on the wrong residence. Moreover, in cases where the search warrants contained wrong addresses, the officers have been issued new warrants.<sup>53</sup>

The decision of the Appellate Division in *Rossi* appears to be simple and straight forward. The court dismissed the plaintiffs §1983 claim, reasoning that the plaintiffs could not establish there

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<sup>44</sup> *Id.* at 401, 330 N.E.2d at 31.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Rossi*, 712 N.Y.S.2d at 81.

<sup>48</sup> *Id.* The court only cites criminal cases. This strongly suggests that the defects of the warrants were only slight, as the intended targets were ultimately apprehended during the execution of each warrant. *Id.*

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

<sup>50</sup> *Davis*, 537 N.Y.S.2d at 93.

<sup>51</sup> *Id.* at 94. The court explained that officer Johnson obtained the apartment information while he was on surveillance, and he could not further pinpoint the apartment without endangering the operation. *Id.*

<sup>52</sup> *People v. Robinson*, 68 N.Y.2d 541, 552, 503 N.E.2d 485, 490 (1986).

<sup>53</sup> *Mato*, 83 N.Y.2d at 408, 633 N.E.2d at 446.

to be an underlying official municipal policy responsible for the transgression.<sup>54</sup> The plain language of §1983 supports the court's contention that a prima facie case will only be established if the given municipality somehow condones the actions of its officials.<sup>55</sup> "It is well settled that a plaintiff will only succeed under a § 1983 claim if the plaintiff can establish that the occurrence was: (1) an official policy or custom, and one that (2) causes the plaintiff to be subjected to a denial of a right conferred by the Federal Constitution."<sup>56</sup> Moreover, the Supreme Court has held that a §1983 claim will not be recognized under a theory of *respondeat superior*.<sup>57</sup> *Respondeat Superior* is a doctrine whereby a defendant may be held liable without having acted negligently. Ordinarily an employer is held vicariously liable for an employee's torts, provided that the employee is acting within the scope of his employment.<sup>58</sup> However, the legislative history of §1983 strongly necessitates the finding that Congress did not intend claims to be brought against municipalities under a theory of vicarious liability.<sup>59</sup> The Court concluded that a municipality will only be liable under § 1983 when the actions of its employees "may fairly be said to represent official public policy."<sup>60</sup>

While the logic of the court in *Rossi* is widely accepted, it is troubling to resolve the court's reasoning with the underlying facts and its ultimate decision. When the court granted the City's motion to dismiss, it reasoned that since a § 1983 claim may not "be predicated upon a *respondeat superior* theory," the claim must be dismissed.<sup>61</sup> The difficulty of this case stems from the apparent municipal policy and custom which led to the violation of the plaintiffs' constitutional rights. The warrant application and accompanying affidavits listed the wrong address as the suspect's

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<sup>54</sup> 712 N.Y.S.2d at 83.

<sup>55</sup> 42 U.S.C. 1983 (2000), stating in pertinent part "under color of any statute, ordinance, regulation, custom, or usage . . ."

<sup>56</sup> *Weimer v. City of Johnson*, 249 N.Y.S.2d 624, 626, 249 A.D.2d 608, 609 (3d Dep't 2000).

<sup>57</sup> *Monnel v. Department of Social Services*, 436 U.S. 658, 691 (1978).

<sup>58</sup> JOSEPH W. GLANNON, *THE LAW OF TORTS* § 7.18 (3d ed. 1995).

<sup>59</sup> *Monnel*, 436 U.S. at 691.

<sup>60</sup> *Id.* at 694.

<sup>61</sup> *Rossi*, 712 N.Y.S.2d at 83.



residence.<sup>62</sup> Additionally, the police department did not require the physical description of the target residence to contain a photo of the residence.<sup>63</sup> Despite the obvious inadequacies, as well as the admitted technical errors, the search warrant was facially valid pursuant to the court's interpretation of the Federal<sup>64</sup> and State<sup>65</sup> Constitutions. While the court concludes that the search warrant satisfies both Federal and State Constitutions, the court only cites to New York authority.<sup>66</sup> Nevertheless, the rights conferred by either Constitutions may be ascertained by the study of the other.<sup>67</sup> The reason the two Constitutions contain identical language is that their respective purposes are identical, namely, to protect against the general warrants which were utilized in England and the Colonies.<sup>68</sup>

The court determined that the police officer's preparation of the warrant was in accordance with the City's warrant requirement. Therefore, it must also be said to be within the custom or official municipal policy of the City.<sup>69</sup> Moreover, as a result of this incident, the Police Department corrected the procedure in which a search warrant is obtained. The City employed a checklist, which included the attachment of a photo to a search warrant to ensure that a similar unfortunate episode does not occur again.<sup>70</sup> The change of the City's procedural requirement is a clear indicator that the police officer's actions were a direct result of the City's prior insufficient policy and custom regarding search warrants. Thus, it is difficult to reconcile the court's dismissal of the plaintiff's § 1983 claim, as the officers' actions appear consistent with the City's custom.

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<sup>62</sup> *Id.* at 81. The suspects address was 11 McDonnell Street, however, the officer listed the address as 9 McDonnell Street, which was actually the plaintiffs' residence. *Id.*

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

<sup>64</sup> U.S. CONST. amend IV.

<sup>65</sup> N.Y. CONST. art. I, § 12.

<sup>66</sup> *Rossi*, 712 N.Y.S.2d at 81.

<sup>67</sup> *Nieves*, 36 N.Y.2d at 400.

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

<sup>69</sup> *Rossi*, 712 N.Y.S.2d at 83.

<sup>70</sup> *Id.*

Both the New York<sup>71</sup> and Federal<sup>72</sup> Constitutions attempt to protect persons against unreasonable searches and seizures. In fact, as discussed previously, the language used in the two constitutions is identical in this respect.<sup>73</sup> In order for any search warrant to be valid, an officer, with a reasonable effort, must be able to ascertain the intended target of the search warrant. The New York courts have held that warrants may satisfy the probable cause requirement of the constitution despite having certain minor defects.<sup>74</sup> It is not necessary that a search warrant be read “hypertechnically,” instead a warrant may be “accorded all reasonable inferences.”<sup>75</sup> However, in *Rossi*, when the court held the warrant to be facially valid,<sup>76</sup> the result appears to be a much greater diminution in individuals’ constitutionally protected rights. The court essentially holds that the most basic method of identifying a residence, an address, is no longer a necessary element of a valid search warrant.<sup>77</sup> However maverick this holding appears, it is consistent with recent federal court decisions.<sup>78</sup> Therefore, despite the seeming broad protection afforded by the respective constitutions both the Federal and New York State courts have adopted a lower standard of constitutional protection.

*Aron Rattner*

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<sup>71</sup> N.Y. CONST. art. I § 12.

<sup>72</sup> U.S. CONST.. amend IV.

<sup>73</sup> See *Nieves*, 36 N.Y.2d at 400.

<sup>74</sup> *Robinson*, 68 N.Y.2d at 552.

<sup>75</sup> *Id.*

<sup>76</sup> *Rossi*, 712 N.Y.S.2d at 81

<sup>77</sup> *Id.*

<sup>78</sup> *Salmon v. Schwartz*, 948 F.2d 1131, 1140 (10th Cir. 1991).

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