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Marcia Miller

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Appellate Division, Fourth Department, People v. Park

Cover Page Footnote
19-2

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SUPREME COURT, APPELLATE DIVISION FOURTH DEPARTMENT

People v. Park[1] (decided May 3, 2002)

Jung Park, Jr. pleaded guilty to criminal possession of a controlled substance in the third degree.[2] However, Park appealed his conviction and argued that the stop of his vehicle for failure to wear a seatbelt was a pretext to conduct a narcotics investigation.[3] Thus, Park asserted the initial stop was in violation of the Fourth Amendment of the Federal Constitution[4] and Article 1, Section 12 of the New York State Constitution,[5] and therefore, the evidence seized should be suppressed.[6] However, the appellate division rejected Park's contentions and affirmed his conviction.[7]

While driving his vehicle, Park was stopped by the police for violating the traffic code.[8] Prior to this encounter, the Vice Squad observed the defendant's car at a house that was under

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[1] 294 A.D.2d 887, 741 N.Y.S.2d 824 (4th Dep't 2002).

[2] *Id.* at 887, 741 N.Y.S.2d at 825; *see also* N.Y. PENAL LAW § 220.16 (McKinney 2002) which states in pertinent part:

> Criminal possession of a controlled substance in the third degree—A person is guilty of criminal possession of a controlled substance in the third degree when he knowingly and unlawfully possesses: (1) A narcotic drug with intent to sell it; . . . Criminal possession of a controlled substance in the third degree is a class B felony.

[3] *Park*, 294 A.D.2d at 888, 741 N.Y.S.2d at 825.

[4] 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 . . . ."

[5] N.Y. CONST. art. I, § 12 provides in pertinent part: "the right of the people to be secure in their persons, papers, houses, and effects, against unreasonable searches and seizures . . .."

[6] *Park*, 294 A.D.2d at 888, 741 N.Y.S.2d at 825.

[7] *Id.* at 888, 41 N.Y.S.2d at 826.

[8] N.Y. VEH & TRAF. LAW § 1229-c (3) (McKinney 2002) states:

> Operation of vehicles with safety seats and safety belts—(3) No person shall operate a motor vehicle unless such person is restrained by a safety belt approved by the commissioner. No person sixteen years of age or over shall be a passenger in the front seat of a motor vehicle unless such person is restrained by a safety belt approved by the commissioner.

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surveillance for drug activities.[9] This information was relayed to the officer, who stopped Park and his passenger for violating Section 1229-c (3) of the Vehicle and Traffic Law for failing to wear their seatbelts.[10] The officer asked Park whether "[Park] had a gun or 'anything' else on him."[11] Park then offered the officer marijuana.[12] As a result, Park was arrested for unlawful possession of drugs and the officer conducted a search, which led to the discovery of cocaine.[13] The defendant subsequently pleaded guilty to criminal possession of a controlled substance in the third degree.[14]

The defendant appealed, arguing that the seized narcotics should have been suppressed.[15] Although the defendant conceded that there was probable cause to stop his vehicle, he argued that the primary reason the officer stopped his vehicle was to perform an investigatory search.[16] Park therefore concluded that the officer's pretextual motives violated both his Federal and New York State Constitutional rights against unreasonable searches and seizures.[17]

The appellate division held the initial stop was constitutional based upon the New York Court of Appeals recent adoption of the federal standard in *People v. Robinson*.[18] In *People v. Robinson*, the court followed *Whren v. United States*,[19] which held that when an officer has probable cause to believe a defendant has violated the traffic code, the stop is reasonable under the Fourth Amendment, and all evidence discovered during the stop and incident to the arrest is admissible.[20] Accordingly, Article I, Section 12 of the New York State Constitution, which prohibits unreasonable searches and seizures, would also not be violated "where a police officer has probable cause to believe that the

[9] *Park*, 294 A.D.2d at 888, 741 N.Y.S.2d at 825.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Park*, 294 A.D.2d at 888, 741 N.Y.S.2d at 825.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] 97 N.Y.2d 341, 765 N.E.2d 844, 739 N.Y.S.2d 147 (2001).
[19] 517 U.S. 806 (1996).
[20] *Id.* at 819.

driver of an automobile has committed a traffic violation, even though the officer may have used the stop as a pretext for something else."[21]

The appellate division explained there was no dispute that Park and his passenger violated Vehicle and Traffic Law Section 1229-c (3) seatbelt requirement.[22] Thus, the initial stop was proper.[23] Furthermore, the information given to the officer by the Vice Squad regarding its observance of the defendant's vehicle provided the officer with "a 'founded suspicion that criminality was afoot.'"[24] This information created reasonable suspicion and provided the basis for the officer questioning the defendant regarding weapons.[25] In addition, the cocaine was discovered in a search incident to an arrest because the defendant had been arrested for unlawful possession prior to the officer conducting the search.[26] Consequently, Park's arguments regarding the officer's pretextual motivation for making the traffic stop and the subsequent finding of cocaine, which led to Park's arrest, were all foreclosed with respect to any invalidation on constitutional grounds as being reasonably dependent on the actual motivations of the individual officer in conducting the stop itself.[27] Lastly, the court opined that Park spoke freely to the officers, "waiving his *Miranda*[28] rights."[29] Thus, the court held although the officers

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[21] *Park*, 294 A.D.2d at 888, 741 N.Y.S.2d at 825 (quoting *Robinson*, 97 N.Y.2d at 349, 765 N.E.2d at 642, 739 N.Y.2d at 151).

[22] *Id.*

[23] *Id.*

[24] *Id.* (quoting People v. Hollman, 79 N.Y.2d 181, 191, 590 N.E.2d 204, 210, 581 N.Y.S.2d 619, 625 (1992)).

[25] *Id.*

[26] *Park*, 294 A.D.2d at 888, 741 N.Y.S.2d at 825.

[27] *Id.*

[28] Miranda v. Arizona, 384 U.S. 436, 471 (1966). Miranda holds that a defendant must be warned before any questioning that he has the right to remain silent, and that anything he says can be used against him in a court of law. *Id.* A defendant must also be told that he has the right to an attorney, and if he cannot afford one, one will be appointed for him (prior to any questioning, if he so desires). *Id.* Once a defendant has been read his *Miranda* rights, a defendant may knowingly and intelligently waive these rights and agree to answer questions or make a statement. *Id.* at 474. However, the evidence obtained as a result of interrogation will be used against him at trial, unless it is shown that the defendant did not knowingly and intelligently waive these rights. *Id.* at 476. To constitute an effective waiver, the accused must have been offered counsel, but

discussed Park's options if he cooperated, they did not promise Park that he would be treated leniently. The court therefore affirmed the lower court's ruling.[30]

The United States Supreme Court in *Whren v. United States* held that the Fourth Amendment controls an officer's stop of an automobile.[31] Therefore, the stop must not be unreasonable and probable cause must exist to believe that a traffic violation has occurred.[32] The Court additionally explained that a search incident to an arrest is not rendered invalid because an officer uses a traffic violation as a ploy to conduct a narcotics search.[33] Therefore, "subjective intent alone does not make an otherwise lawful arrest invalid or unconstitutional and plays no role in ordinary, probable cause Fourth Amendment analysis."[34]

Recently, the New York Court of Appeals in *People v. Robinson*[35] held that an officer has effectuated a reasonable basis to make a stop once the officer is able to articulate material facts to establish reasonable cause for believing that someone has violated a law.[36] In *Robinson*, the defendant was a passenger in a taxicab, which the police officers observed speeding through a red light.[37] The officers, after stopping the taxicab, noticed the defendant was wearing a bulletproof vest and that a gun was lying on the floor under the defendant's seat.[38] Robinson was arrested and charged with criminal possession of a weapon and unlawfully wearing a bulletproof vest.[39] Robinson argued the evidence should be suppressed because the officers used a traffic infraction as a pretext to search the taxicab, and such a search violated the Fourth Amendment of the United States Constitution and Article 1,

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intelligently and understandingly rejected the offer. *Id.* at 475. Presuming waiver from a silent record is impermissible. *Id.*

[29] *Park,* 294 A.D.2d at 887, 741 N.Y.S.2d at 825.

[30] *Id.*

[31] *Whren*, 517 U.S. at 810.

[32] *Id.*

[33] *Id.* at 812.

[34] *Id.* at 813.

[35] 97 N.Y.2d at 341, 767 N.E.2d at 638, 741 N.Y.S.2d at 147.

[36] *Id.* at 353, 767 N.E.2d at 645, 741 N.Y.S.2d at 154.

[37] *Id.* at 346, 767 N.E.2d at 640, 741 N.Y.S.2d at 149.

[38] *Id.* at 346-47, 767 N.E.2d at 640, 741 N.Y.S.2d at 149.

[39] *Id.*

Miller: Search and Seizure

Section 12 of the New York Constitution.[40] In *Robinson,* the New York Court of Appeals adopted the standard articulated by the Supreme Court in *Whren v. United States* and explained that once an officer establishes probable cause to temporarily stop an individual for a traffic violation, the seizure does not constitute a violation of Article 1, Section 12 of the New York State Constitution, even where the officers' acts are based upon a pretextual motivation.[41] The *Robinson* court additionally espoused that determinations of neither the officers' primary motivation or "what a reasonable traffic officer would have done under the circumstances is relevant"[42] and noted that it has never held that a pretextual stop was violative of Article I, Section 12.[43] Moreover, the court explained that the protections of Article I, Section 12 of the New York State Constitution beyond those of the Federal Constitution have not been dependent upon challenging police authority to act when a law or regulation had been violated and probable cause existed for the officer to make a stop that subsequently led to an arrest.[44]

In *People v. Holloman* the New York Court of Appeals explained that the New York law regarding if an officer acts properly in initiating contact with the defendant prior to his arrest.[45] The four-part "*De Bour* method"[46] states:

> If a police officer seeks simply to request information from an individual, that request must be supported by an objective, credible reason, not necessarily indicative of criminality. The common-law right of inquiry, a wholly separate level of contact, is activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion. Where a police officer has reasonable suspicion that a particular person was involved in a felony or misdemeanor, the officer is

[40] *Robinson,* 97 N.Y.2d at 347, 767 N.E.2d at 640, 741 N.Y.S.2d at 149.
[41] *Id.* at 349, 767 N.E.2d at 642, 741 N.Y.S.2d at 151.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 351, 767 N.E.2d at 643, 741 N.Y.S.2d at 152.
[45] *Hollman,* 79 N.Y.2d at 184, 590 N.E.2d at 205, 581 N.Y.S.2d at 620.
[46] *De Bour,* 40 N.Y.2d at 220, 352 N.E.2d at 569, 386 N.Y.S. at 381.

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> authorized to forcibly stop and detain that person. Finally, where the officer has probable cause to believe that a person has committed a crime, an arrest is authorized.[47]

In *Hollman*, an undercover officer at a bus terminal observed the defendant carrying an orange bag and looking around.[48] The defendant then went up the escalator, and later came down the escalator with a companion who carried a black knapsack.[49] Hollman and his companion boarded a bus fifteen minutes later.[50] The officer approached the defendant after he observed the defendant place the two bags in the overhead bins, a few seats ahead of where they were seated.[51] The officer identified himself as a narcotics officer and requested permission to question the men. After being informed the bags did not belong to anyone on the bus and that the two defendants were not traveling together, the officer searched the bags.[52] During the search, the officer found crack cocaine in one of the bags and empty vials and white powder in the other knapsack.[53] The officer placed Hollman under arrest for the unlawful possession of a controlled substance, the criminal use of drug paraphernalia and the endangerment of a child's welfare.[54] The trial court found that the officer's observations provided him with reasonable suspicion that criminal activity was afoot, and the New York Court of Appeals affirmed.[55]

The New York Court of Appeals explained that the *De Bour* test, which relates to an officer who is engaged in his official criminal law enforcement capacity, means that a "policeman's right to request information while discharging his law enforcement duties will hinge on the manner and intensity of the interference, the gravity of the crime involved and the circumstances attending the encounter."[56] Therefore, a police officer is allowed in his

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[47] *Id.* at 185, 590 N.E.2d at 206, 581 N.Y.S.2d at 621.
[48] *Hollman,* 79 N.Y.2d at 185, 590 N.E.2d at 206, 581 N.Y.S.2d at 621.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 186, 590 N.E.2d at 206, 581 N.Y.S.2d at 621.
[52] *Id.*
[53] *Hollman,* 79 N.Y.2d at 186, 590 N.E.2d at 210, 581 N.Y.S.2d at 621.
[54] *Id.*
[55] *Id.*
[56] *Id.* at 189, 590 N.E.2d 208, 581 N.Y.S.2d 623.

official capacity as a law enforcement officer to require a person to answer questions relating to identity or destination, so long as the officer is acting within reasonable limits in approaching the individual and not acting whimsically or in a capricious fashion.[57] As the court further reasoned, the distinction rests on the "content of the questions, the number of questions asked, and the degree to which the language and nature of the questions transform the encounter from a merely unsettling one to an intimidating one."[58] Based upon this analysis, the court affirmed Hollman's conviction.

Similar to the defendant Hollman, Jung Park, Jr. was approached by an officer and questioned about illegal activity. However, Park was stopped for a traffic infraction, not suspicious behavior. Based on the information that the officer received from the Vice Squad, reasonable suspicion that criminality was afoot was established. [59] Therefore, according to the *De Bour* test, the officer was well within his right to engage in a higher degree of intrusion inherent in the common-law inquiry.[60] Moreover, once Park offered the officer marijuana, probable cause to arrest Park and to conduct a search incident to an arrest was present.[61]

Generally, the New York courts apply the federal standard recently adopted in *Robinson*,[62] however the employment of the *De Bour* method is still used to initially determine whether an officer acted reasonably in stopping the suspect.[63] As the New York Court of Appeals explained in *Hollman*, there is a common-law right of inquiry that law enforcement officers have based upon a

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[57] *Id.* at 190-91, 590 N.E.2d at 209, 581 N.Y.2d at 624.

[58] *Hollman,* 79 N.Y.2d at 192, 590 N.E.2d at 210, 581 N.Y.S.2d at 625.

[59] *Park*, 294 A.D.2d at 888, 741 N.Y.S.2d at 825.

[60] *Id.* In *Hollman*, the court explained the difference between a request for information and a common-law inquiry. The court stated the difference rests upon the types of questions posed by the officer (the tone and focus of the inquiry), the answers received to the officer's questions, whether the officer has any concrete indication that criminality is afoot and whether the person being questioned believes that he is being suspected of some criminal activity. *Id.* at 191, 590 N.E.2d at 210, 581 N.Y.S.2d at 625. *See also,* People v. Moore, 47 N.Y.2d 911, 393 N.E.2d 489, 419 N.Y.S.2d 495 (1979); People v. Cantor, 36 N.Y.2d 106, 324 N.E.2d 872, 365 N.Y.S.2d 509 (1975); People v. Rosemond, 26 N.Y.2d 101, 104, 257 N.E.2d 23, 25, 308 N.Y.S.2d 836, 838 (1970).

[61] *Park*, 294 A.D.2d at 888, 741 N.Y.S.2d at 825.

[62] *Robinson,* 97 N.Y.2d at 341, 767 N.E.2d at 638, 741 N.Y.S.2d at 147.

[63] *Hollman*, 79 N.Y.2d at 190, 590 N.E.2d at 209, 581 N.Y.S.2d at 624.

suspicion that is indicative of criminality being afoot when acting as public servants.[64] Whereas, the federal courts strictly employ the *Whren* standard in assessing the reasonableness of an officer's conduct in stopping an individual, neither the federal nor New York State courts take into account an officer's motives for making the stop, so long as the officer had probable cause to believe that the defendant had violated the law. It is the officer's subsequent conduct after making the stop that is assessed in determining whether Article 1, Section 12 of the New York State Constitution has been violated.[65]

Based on the aforementioned analysis, it can be concluded that the Fourth Amendment of the United States Constitution, and Article 1, Section 12 of the New York Constitution are identical and afford the same protections with respect to the stop of an automobile for a traffic infraction. Both clauses provide citizens with protection from unreasonable searches and seizures.

Marcia Miller

[64] *Id.* at 191, 590 N.E.2d at 210, 581 N.Y.S.2d at 625.
[65] *Robinson,* 97 N.Y.2d at 350, 767 N.E.2d at 638, 741 N.Y.S.2d at 152.