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Search and Seizure, Supreme Court, Appellate Division, First Department: People v. Smith

arrest warrant and in so doing finds narcotics in plain view, his conduct will be evaluated, and not his identity.[171]

People v. Smith[172]
(decided May 15, 1997)

Defendant, William Smith, also known as Frank Mills, was convicted after a jury trial in the Supreme Court, New York County, of grand larceny in the third and fourth degree, fourteen counts of offering a false instrument for filing in the first degree, and criminal possession of a forged instrument in the second degree.[173] Defendant was sentenced to concurrent terms of three and one-half years to seven years on the third degree grand larceny conviction, two years to four years on the fourth degree grand larceny and the criminal possession of a forged instrument in the second degree convictions, and one and one-half years to three years on each of the offering a false instrument for filing in the first degree convictions.[174]

Defendant appealed his conviction on the grounds that his right to be free from illegal search and seizure under the Federal[175] and

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[171] *Id.* at 98, 664 N.Y.S.2d at 591.

[172] 658 N.Y.S.2d 259 (1st Dep't), *appeal denied*, 90 N.Y.2d 911, 686 N.E.2d 232, 663 N.Y.S.2d 520 (1997).

[173] *Id.* at 260. The New York statute for grand larceny in the third and fourth degree is embodied in New York Penal Law §§ 155.35 and 155.30 respectively. N.Y. PENAL LAW §§ 155.35, 155.30 (McKinney 1996). The New York statute for offering a false instrument in the first degree is embodied in the New York Penal Law § 175.35. N.Y. PENAL LAW § 175.35 (McKinney 1996). The New York statute for criminal possession of a forged instrument in the second degree is embodied in the New York Penal Law § 170.25. N.Y. PENAL LAW § 170.25 (McKinney 1996).

[174] *Smith,* 658 N.Y.S.2d at 260.

[175] U.S. CONST. amend. IV. The Fourth Amendment 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 . . . ." *Id.*

New York State Constitutions[176] had been violated.[177] Defendant based his appeal on the lower court's refusal to suppress the physical evidence recovered during a warrantless entry of his home.[178] The First Deparment with one dissenting opinion, affirmed the convictions, holding that a defendant may consent to a warrantless search of his home by conduct as well as words.[179]

At approximately 4:00 P.M., an individual, Sherrill, walked into the New York City Midtown South police precinct and advised Police Officer Gallo that a man named "Will" had assaulted him, and that Will was "staying" in an apartment at 330 West 36th Street.[180] Officer Gallo accompanied Sherrill to the involved apartment where they found the front door wide open.[181] Sherrill identified the defendant, who could be seen through the open door, as the assailant.[182] Officer Gallo knocked on the door and questioned the defendant who admitted to arguing with Sherrill.[183] Officer Gallo asked the defendant for identification and defendant checked his pockets and stated he had no identification.[184] Defendant walked toward a dresser and Gallo followed.[185] Officer Gallo testified that he wanted to see the defendant's hands in case a weapon was retrieved.[186] The defendant produced a wallet, pulling a card from it and then

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[176] N.Y. CONST. art. I, § 12. Article I, § 12 of the New York State Constitution provides in pertinent part the following: "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 reasonable cause. . . ." *Id.*

[177] *Smith,* 658 N.Y.S.2d at 259.

[178] *Id.* at 261.

[179] *Id.* (citing People v. Satornino, 153 A.D.2d 595, 596, 544 N.Y.S.2d 224, 225 (2d Dep't 1989)).

[180] *Smith,* 658 N.Y.S.2d at 260.

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

placing the card back in the wallet.[187] Defendant then produced a welfare identification card which bore his photograph and the name "Frank Mills."[188] Officer Gallo requested that the defendant produce the other card which turned out to be another welfare identification card bearing the defendant's photograph and the name "William Smith."[189] Officer Gallo then placed the defendant under arrest.[190]

The United States Supreme Court evaluated a warrantless search and seizure, in *Payton v. New York*, holding that "the Fourth Amendment, made applicable to the states by the Fourteenth Amendment, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest."[191] The Court in *Payton* asserted that a nonconsensual warrantless entry, by the police, can be made, only, in exigent circumstances.[192]

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[187] *Id.*

[188] *Id.*

[189] *Id.* at 261.

[190] *Id.*

[191] 445 U.S. 573 (1980) (reversing a murder conviction in which the police without a warrant forced entry into the suspects home, in order to effect a routine felony arrest with no exigent circumstances, and seized a .30 caliber shell casing which was used as physical evidence in the defendant's trial).

[192] *Id.* at 581. *See* BLACKS LAW DICTIONARY at 574 (6th ed. 1990). Exigent circumstances are defined as:

> situations that demand unusual or immediate action. Exigent circumstances' in relation to warrantless arrest or search refers generally to those situations where law enforcement agents will be unable or unlikely to effectuate an arrest, search or seizure for which probable cause exists unless they act swiftly and without seeking prior judicial authorization.

Id. *See also* People v. Cloud, 79 N.Y.2d 786, 587 N.E.2d 270, 579 N.Y.S.2d 632 (1991) (holding that an exigency existed when police had information that a suspect was in a hotel room with guns and hostages); People v. Rosario, 179 A.D.2d 442, 579 N.Y.S.2d 12 (1st Dep't 1992) (holding that a warrantless entry was justified by a rape suspect asserting that he had another girl inside).

In the case at bar the court used the defendant's words and conduct to determine that the officer's entry was consensual.[193] The Appellate Division cited the holding in *People v. Satornino*[194] in which the court held that a defendant's mother consented to a warrantless entry into the home when she advised police detectives "that her son was in his bedroom and pointed to the room."[195] In affirming the trial courts' ruling here, the court found the defendant's actions of engaging in a discussion with Officer Gallo, complying with the request for identification without hesitation and not objecting to the officer's entry or continued presence in the apartment as indicative that the defendant "implicitly consented" to the officer's entry.[196] The First Department, in analyzing Officer Gallo's actions, found that "[a] consensual entry is a compelling inference from these facts."[197] The Appellate Division in concluding the entry to be consensual did not have to address whether or not Officer Gallo's safety concerns constituted exigent circumstances that establish a constitutionally permissible warrantless entry.[198]

The dissent asserted that the conviction should be overturned as the defendant did not consent to Officer Gallo's entry into the house and that there was no exigency.[199] Quoting *Payton* the dissent asserted that "'the Fourth Amendment has drawn a firm

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[193] *Smith*, 658 N.Y.S.2d at 261.

[194] 153 A.D.2d 595, 596, 544 N.Y.S.2d 224, 225 (2d Dep't 1989).

[195] *Id.*

[196] *Smith*, 658 N.Y.S.2d at 261.

[197] *Id.* (citing People v. Davy, 654 N.Y.S.2d 309, 309 (1st Dep't 1997) (holding that "[t]he People met their burden that the defendant consented to a police entry into his apartment when he voluntarily spoke with them and gave them his gun"); People v. Gonzalez, 222 A.D.2d 453, 634 N.Y.S.2d 538 (2d Dep't 1995), *lv. denied*, 88 N.Y.2d 848, 667 N.E.2d 344, 644 N.Y.S.2d 694 (1996); People v. Washington, 209 A.D.2d 817, 619 N.Y.S.2d 360 (3d Dep't 1994), *lv. denied*, 85 N.Y.2d 944, 651 N.E.2d 931, 627 N.Y.S.2d 1006 (1995); People v. Schof, 136 A.D.2d 578, 523 N.Y.S.2d 179 (2d Dep't 1988); *cf.*, People v. Richardson, 88 N.Y.2d 1026, 673 N.E.2d 1252, 651 N.Y.S.2d 25 (1996)).

[198] *Smith*, 658 N.Y.S.2d at 261.

[199] *Id.* at 261-63 (Tom, J., dissenting).

line at the entrance to the house'" and articulated the constitutional principle that, absent exigency or consent, searches and seizures in a home without a warrant are presumed unreasonable and violative of the Constitution.[200]

Additionally, the dissent pointed out that "[a]t no time did the officer request permission to enter, and at no time was permission granted" and that the defendant's conduct did not imply consent, "such as opening wider the already opened door, or gesturing, or stepping back from the door suggestive of an invitation."[201] The dissent distinguished the body of New York law, in which the courts found consensual entry,[202] from the case under review in that the defendant made "[n]o objective manifestations connoting even an implicit consent . . . ."[203]

In analyzing the propriety of the officer's safety concerns as existence of exigent circumstances the dissent explained that "the police by themselves cannot by their own conduct create the appearance of exigency."[204] The dissent argued that "at the door to the apartment, Gallo observed no indication of any weaponry; and defendant made no erratic or threatening moves;" therefore, no exigency existed.[205]

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[200] *Id.* at 262 (citing Payton v. New York, 445 U.S. 573, 586 (1980)).

[201] *Id.*

[202] *Id.* at 263 (Tom, J., dissenting) (citing People v. Murphy, 55 N.Y.2d 819, 432 N.E.2d 140, 447 N.Y.S.2d 437 (1981); People v. Gonzalez, 222 A.D.2d 453, 634 N.Y.S.2d 538 (2d Dep't 1995), *lv. denied*, 88 N.Y.2d 848, 667 N.E.2d 344, 644 N.Y.S.2d 694 (1996); People v. Washington, 209 A.D.2d 817, 619 N.Y.S.2d 360 (3d Dep't 1994), *lv. denied*, 85 N.Y.2d 944, 651 N.E.2d 931, 627 N.Y.S.2d 1006 (1995); People v. Satornino, 153 A.D.2d 595, 544 N.Y.S.2d 224 (2d Dep't 1989); People v. Schof, 136 A.D.2d 578, 523 N.Y.S.2d 179 (2d Dep't 1988); People v. Dubois, 140 A.D.2d 619, 528 N.Y.S.2d 660 (2d Dep't 1988); People v. Davis, 120 A.D.2d 606, 502 N.Y.S.2d 80 (2d Dep't 1986)).

[203] *Id.* (Tom, J., dissenting).

[204] *Id.* at 262 (Tom, J., dissenting) (quoting People v. Levan, 62 N.Y.2d 139, 146, 464 N.E.2d 469, 471, 476 N.Y.S.2d 101, 104 (1984)).

[205] *Id.* (Tom, J., dissenting) (citing People v. Cloud, 79 N.Y.2d 786, 587 N.E.2d 270, 579 N.Y.S.2d 632 (1991) (finding an exigency existed when a suspect was thought to be in a hotel room with guns and hostages); People v. Rosario, 179 A.D.2d 442, 579 N.Y.S.2d 12 (1st Dep't 1992) (holding that an

While the statutory language of the federal law and state law, involving search and seizure, is very similar. the courts have held that both laws recognize "the basic constitutional principle that, absent exigency or consent, searches and seizures within a home without a warrant are presumptively unreasonable and a violation of the . . . Fourth Amendment of the Constitution."[206]

SUPREME COURT, APPELLATE DIVISION

SECOND DEPARTMENT

People v. Hichez[207]
(decided June 23, 1997)

The Appellate Division, Second Department, affirmed the defendant's conviction of burglary in the second degree, grand larceny in the third degree, criminal possession of stolen property in the third degree and reckless endangerment in the second degree but modified the sentencing of all charges.[203] The defendant, Abraham Hichez, contends that his arrest was in violation of *Payton v. New York*,[209] and therefore any evidence

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exigency existed when a rape suspect asserted that he had another girl in the room)).

[206] *Smith*, 658 N.Y.S. at 262 (Tom, J., dissenting) (citing Payton, 445 U.S. 573, 586 (1980)).

[207] 659 N.Y.S.2d 488 (2d Dep't 1997).

[203] *Id.* at 489.

[209] 445 U.S. 573 (1980). In *Payton*, defendants contended that the New York statute allowing police officers to make a felony arrest inside a person's home without a warrant and with force was in contradiction to the Fourth Amendment of the United States Constitution as applied to the states by the Fourteenth Amendment. *Id.* at 574. The revised statute, N.Y. CRIM. PROC. LAW §§ 140.15(4), 120.80 (McKinney 1971) provides in pertinent part:

> In order to effect such an arrest, a police officer may enter premises in which he reasonably believes such a person to be present, under the same circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 120.80, if he were attempting to make such arrest pursuant to a warrant of arrest.