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Search and Seizure, Supreme Court, Appellate Division, Second Department: People v. Hichez

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.

obtained must be suppressed.[210] In addition, defendant contends that there was error under *People v. De George*,[211] when the prosecution commented on the defendant's refusal to answer questions concerning a specific robbery during a police interrogation.[212]

The Appellate Division, Second Department, affirmed the County Court of Westchester County's conviction holding that there was no violation under *Payton* because the defendant consented to the police officer's entry.[213] The court further held that there was error because of the prosecutor's comment on the defendant's silence concerning a particular robbery. However, "the error was harmless beyond a reasonable doubt" because of the curative jury instruction and of minimal probative value when weighed against the overwhelming evidence of the defendant's guilt.[214] In addition, the court ordered that the sentences be vacated with respect to grand larceny in the third degree and criminal possession of stolen property in the third degree because, as a matter of law, they were not violent felonies and therefore should not have been sentenced as such.[215] Finally, as a

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Id. The Fourth Amendment provides:

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

U.S. CONST. amend. IV.

[210] *Hichez*, 659 N.Y.S.2d at 489.

[211] 73 N.Y.2d 614, 541 N.E.2d 11, 543 N.Y.S.2d 11 (1989). In *De George*, the defendant claimed that the admission of his silence as impeachment and direct evidence was in violation of the Federal and New York State Constitutions. *Id.* at 618. U.S. CONST. amend. V. The Fifth Amendment states in pertinent part that: "[N]or shall any person be compelled in any criminal case to be a witness against himself . . . ." *Id.* N.Y. CONST. art. I, § 6. This section provides in pertinent part: "[N]or shall he be compelled in any criminal case to be a witness against himself . . . ." *Id.*

[212] *Hichez*, 659 N.Y.S.2d at 489.

[213] *Id.*

[214] *Id.*

[215] *Id.*

matter of discretion, the court held that the sentence of twenty-five years to life was too excessive and thus reduced it to fifteen.[216]

The arresting officer entered defendant's house to affect the arrest without a warrant, however, the officer testified that the entry was consensual.[217] Furthermore, the prosecutor commented to the jury that the defendant refused to answer questions when the police questioned him about a specific robbery.[218] Finally, defendant received a sentence for grand larceny in the third degree and criminal possession of stolen property in the third degree as if they were violent felonies when as a matter of law they are not.[219]

The court reasoned that there was no *Payton* violation because the hearing court gave credit to the arresting officer's testimony that the entry was consensual.[220] In *Payton*, New York detectives having probable cause to believe that Payton murdered a gas station manager, entered defendant's apartment to affect an arrest without a warrant.[221] After the officers heard music emanating from the apartment and there was no response from knocks on the metal door, they called for reinforcements.[222] Thirty minutes later the officers entered the apartment to find no one there, however, in plain view was a .30 caliber shell that was later used at trial against the defendant.[223] Defendant claimed that the warrantless entry was a violation of his constitutional rights under the Fourth Amendment.[224]

New York courts distinguish between seizures of the person and seizures of property based on two different levels of

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[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] Payton v. New York, 445 U.S. 573, 577 (1980).
[222] *Id.*
[223] *Id.*
[224] *Id.* at 574.

intrusiveness.[225] The Supreme Court disagreed with New York by stating that any difference is "one[] of degree rather than kind" but agreed with the Second Circuit's 1978 position with respect to the Fourth Amendment.[226] Moreover, the Court quoted Judge Leventhal of the United States Court of Appeals for the District of Columbia as saying, "greater burden is placed . . . on officials who enter a home or dwelling without consent. Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment."[227]

Because the hearing court found consent based on the officer's testimony and that testimony was established on record, the *Hichez* court did not disturb the holding of the lower court,[228] following the principles set forth in *People v. Thomas*.[229]

The *Hichez* court held that it was improper for the prosecutor to comment on the defendant's silence when he was questioned by police regarding a specific robbery.[230] In *People v. DeGeorge*,[231] the defendant was convicted of assault and criminal use of a

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[225] *Id.* at 589. The two different levels of intrusiveness are exemplified by the entrance into one's home for the purpose of arrest which is distasteful and can be accomplished in public. *Id.* However, a search of ones home is more intrusive into one's privacy which people expect not to be invaded by those uninvited. *Id.* at 580 n.13.

[226] *Id.* at 588-89. The court stated that:

> To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present.

Id. (quoting United States v. Reed, 572 F.2d 412,423 (D.C. Cir. 1978)).

[227] *Id.* at 587.

[228] People v. Hichez, 659 N.Y.S.2d 488, 489 (2d Dep't 1997).

[229] People v. Thomas, 223 A.D.2d 612, 636 N.Y.S.2d 830 (2d Dep't 1996). The court held that there was no merit in the defendant's contention because the "hearing court's determination on issues of credibility should be accorded great weight on appeal and should not be disturbed unless clearly unsupported by the record." *Id.* Since there was probable cause and consent there was no *Payton* violation. *Id.*

[230] *Hichez*, 659 N.Y.S.2d at 489.

[231] 73 N.Y.2d 614, 541 N.E.2d 11, 543 N.Y.S.2d 11 (1989).

firearm when, during a confrontation, he shot a man while inside a bar.[232] During trial the jury heard evidence that the defendant was silent immediately prior to his arrest, specifically when officers asked general questions in his presence.[233] The defendant's silence was used as direct evidence at trial to prove depraved indifference.[234] In addition, it was used to impeach the defendant's testimony on cross-examination.[235] The *DeGeorge* court held that "absent circumstances not there present, our State rules of evidence preclude the use of a defendant's pretrial silence to impeach his trial testimony."[236] Although the use of pre-arrest silence as evidence for impeachment is not a violation of the United States Constitution, in situations such as this, the *DeGeorge* court stated that the proffered evidence would have minimum probative value.[237] In addition, the court reasoned that in circumstances such as this, the defendant may have several reasons to maintain silence.[238] Moreover, the court also mentioned possibilities where silence as evidence would be more probative than prejudicial, for example when there is a duty to tell a superior.[239]

Although the *Hichez* court found the use of the defendant's silence by the prosecution to be error, it held that it was harmless error beyond a reasonable doubt.[240] The court relied on *People v. Wong*[241] where the defendant was convicted of first-degree rape, first-degree robbery, attempted first-degree robbery, first-degree

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[232] *Id.* at 616, 541 N.E.2d at 11, 543 N.Y.S.2d at 11.

[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] *Id.* at 618, 541 N.E.2d at 13, 543 N.Y.S.2d at 13.

[237] *Id.*

[238] *Id.* Among the reasons for remaining silent are awareness of his right to remain silent and that anything he says could be used at trial; defendant may think his efforts would be moot or maybe an attorney has instructed him not to speak, and it might be possible that the defendant has a mistrust of officers or believe law enforcement officers are antagonists. *Id.*

[239] *Id.* at 620, 541 N.E.2d at 14, 543 N.Y.S.2d at 14.

[240] People v. Hichez, 659 N.Y.S.2d 488-89 (2d Dep't 1997).

[241] 201 A.D.2d 688, 607 N.Y.S.2d 977 (2d Dep't 1994).

sodomy, and first-degree sexual abuse.[242] Defendant claimed that his Fifth Amendment privilege had been violated when the trial court questioned him about his pretrial silence.[243] The *Wong* court held that it was error for the trial court to question the defendant regarding his pretrial silence, however, it was harmless because the court sustained defense counsel's objection by appropriately instructing the jury to disregard it in consideration of the overwhelming evidence of guilt.[244]

In addition, the *Hichez* court further relied on *People v. Gluckowski*,[245] which held that although there was prosecutorial error, the error was harmless.[246] The *Gluckowski* court reasoned that it is well established that a defendant has the right to remain silent and the People cannot use that silence against him as direct evidence under the Fifth Amendment as well as the New York state constitution.[247]

In *Payton v. New York*,[248] the Court recognized that it was not until *Mapp v. Ohio* that the Fourth Amendment was made applicable to the states through the Fourteenth Amendment.[249] *Mapp* prohibits police from making a routine felony arrest inside a person's home without a warrant or consent.[250] The Court in *Payton* stated that "[i]t is a 'basic principle of the Fourth Amendment law' that searches and seizures inside the home without a warrant are presumptively unreasonable."[251] The New York statute that *Payton* invalidated, flew directly in the face of

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[242] *Id.*

[243] *Id.*

[244] *Id.* at 690, 607 N.Y.S.2d at 978.

[245] 174 A.D.2d 752, 571 N.Y.S.2d 336 (2d Dep't 1991). In *Gluckowski*, the defendant was convicted of second-degree manslaughter for stabbing his girlfriend to death in his apartment. *Id.* Defendant claimed that the hearing court erred by allowing the prosecutor to use his pre-arrest silence as evidence against him. *Id.* Defendant remained silent as his mother divulged his guilt to the police officer prior to his arrest. *Id.*

[246] *Id.* at 754, 571 N.Y.S.2d at 338.

[247] *Id.*

[248] 445 U.S. 573 (1980).

[249] *Id*, at 576 (citing Mapp v. Ohio, 367 U.S. 643 (1961)).

[250] *Id.*

[251] *Id.* at 586.

that basic principle.[252] At the time of Payton's arrest, the Code of Criminal Procedure allowed the police to forcibly enter a person's home to affect a felony arrest without a warrant, consent or exigent circumstances.[253] The *Hichez* court is inopposite from the holding in *Payton* in that there was no violation because the defendant consented to the entry of the officers.[254]

With respect to the Fifth Amendment right to remain silent, the *Hichez* court is again inopposite in its holding, as the New York and the United States Constitution are parallel in meaning and language.[255] The court found that even though the prosecutor's comment was error, it was harmless beyond a reasonable doubt and comported with the requirements of the Fifth Amendment through jury instructions curing any prejudicial effects.[256]

After the *Payton* decision, the New York courts' must accept the Supreme Court's interpretation of the Fourth Amendment with respect to the warrant requirement when affecting an arrest within a suspect's home.[257] In addition, there is no substantial difference between the New York State and federal law with respect to prosecutorial error of the Fifth Amendment's right to remain silent and the application of the harmless error doctrine.

People v. King[258]
(decided October 6, 1997)

Defendant, Jermaine King, was convicted of two counts of rape in the first degree, sodomy in the first degree and burglary in the

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[252] *Id.* At the time of Payton's arrest, section 178 of the Code of Criminal Procedure provided: "To make an arrest . . . the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance." *Id.* at 577 n. 6.

[253] *Id.* at 577. The Code of Criminal Procedure was the precursor to New York Criminal Procedure Law. *Id.* at 577-78.

[254] People v. Hichez, 659 N.Y.S.2d 488-89 (2d Dep't 1997).

[255] *Id.*

[256] *Id.*

[257] Payton v. New York, 445 U.S. at 602-03 (1980).

[258] 232 A.D.2d 111, 663 N.Y.S.2d 610 (2d Dep't 1997).