



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 14 | Number 3

Article 57

1998

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

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Constitutional Law Commons](#), [Criminal Procedure Commons](#), [Fourth Amendment Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

(1998) "Search and Seizure, Supreme Court, Appellate Division, Second Department: People v. King," *Touro Law Review*. Vol. 14: No. 3, Article 57.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol14/iss3/57>

This New York State Constitutional Decisions 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 editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

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. King²⁵⁸
(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

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).

first degree.²⁵⁹ Defendant's conviction resulted from court ordered DNA blood test that placed him at the scene of a May 1991 rape.²⁶⁰ The court order granting this DNA blood testing, however, was based on probable cause evidence for an August 1991 rape.²⁶¹ Defendant appealed his conviction claiming that the prosecution's use of the DNA blood test analysis from the August rape in his May rape trial violated his constitutionally protected right against unreasonable searches and seizures.²⁶²

The Appellate Division, Second Department, held that the police had demonstrated probable cause with respect to the August rape, and that once the blood sample was lawfully removed from the defendant's body, the defendant no longer had any privacy claims with respect to the blood.²⁶³ Therefore, the police were free to test the sample against the evidence from the May rape.²⁶⁴

On May 21, 1991, defendant, Jermaine King, entered the apartment of the "May victim."²⁶⁵ King used a knife to force the

²⁵⁹ *Id.* at 115, 663 N.Y.S.2d at 613. The New York statute for rape in the first degree is embodied in New York Penal Law § 130.35. N.Y. PENAL LAW § 130.35 (McKinney 1996). The New York statute for sodomy in the first degree is embodied in New York Penal Law § 130.50. NY PENAL LAW § 130.50 (McKinney 1996). The New York statute for burglary in the first degree is embodied in New York Penal Law 140.30. N.Y. PENAL LAW § 140.30 (McKinney 1996).

²⁶⁰ *King*, 232 A.D.2d at 115, 663 N.Y.S.2d at 613.

²⁶¹ *Id.* at 114, 663 N.Y.S.2d at 612.

²⁶² *Id.* The Fourth Amendment to the United States Constitution provides in relevant part that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated . . ." U.S. CONST. amend. IV. The New York State Constitution's corollary to the Fourth Amendment is Article I, § 12 which provides in relevant part that "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 . . ." N.Y. CONST. art. I, § 12.

²⁶³ *King*, 232 A.D.2d at 117-18, 663 N.Y.S.2d at 614.

²⁶⁴ *Id.* at 117, 663 N.Y.S.2d at 614.

²⁶⁵ *Id.* at 112, 663 N.Y.S.2d at 611.

victim to engage in intercourse and oral sex with him.²⁶⁶ Following the rape, King stole \$140 from the apartment.²⁶⁷ The police, during their investigation, collected evidence from the scene including the sheets from the victim's bed, her nightshirt and underpants.²⁶⁸ The victim described her attacker, to the police, as a young, tall, thin African American male.²⁶⁹

Several months later, in August 1991, the police responded to another rape and robbery call.²⁷⁰ The victim of this incident also described her attacker as a young, tall, thin black male.²⁷¹ Additionally, the "August victim" reported that her attacker had a strange "industrial" body odor.²⁷² The detectives investigating the second rape also collected physical evidence including the victim's nightgown.²⁷³

During the August attack, the assailant made several remarks that indicated that the assailant had personal knowledge of the victim's recent visitors and activities around the apartment.²⁷⁴ Furthermore, a neighbor reported that he saw King near the building's trash cans immediately following the rape.²⁷⁵ A search of the building's basement uncovered a knife and the clothing worn by the attacker during the assault.²⁷⁶ The police interviewed King, a resident of the same building as the August victim, and received "permission from a visiting aunt to search the King apartment."²⁷⁷ The police removed mothballs from King's

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 113, 663 N.Y.S.2d at 611.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 114, 663 N.Y.S.2d at 612.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 116, 663 N.Y.S.2d at 613-14.

²⁷⁷ *Id.* at 113, 663 N.Y.S.2d at 611.

dresser which the August rape victim later identified as the "industrial odor" she smelled during her assault.²⁷⁸

A forensics expert advised the District Attorney that the evidence collected at both the May and August crime scenes contained sufficient semen material to conduct a DNA analysis.²⁷⁹ The District Attorney determined that there was not sufficient corroborating evidence to establish probable cause for a court order in regard to the May rape.²⁸⁰ However, based on the evidence gathered at the scene and witness' statements the District Attorney obtained a court order directing King to submit a blood sample for DNA analysis in connection with the August rape.²⁸¹

After obtaining the blood sample in December 1992, the crime lab discovered that the evidence from the August rape did not contain sufficient material for a DNA comparison.²⁸² However, the DNA test results revealed a positive match with the stained clothing taken at the May rape scene.²⁸³ King was subsequently arrested for the May 1991 rape.²⁸⁴ Prior to trial, the defendant filed a motion to suppress the DNA evidence²⁸⁵ alleging that no probable cause existed to support the DNA testing in regard to the May rape.²⁸⁶

²⁷⁸ *Id.* at 113, 663 N.Y.S.2d at 611-12.

²⁷⁹ *Id.* at 113, 663 N.Y.S.2d at 612.

²⁸⁰ *Id.* "Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place The legal conclusion is to be made after considering all of the facts and circumstances together." *People v. Bigelow*, 66 N.Y.2d 417, 423, 488 N.E.2d 451, 455, 497 N.Y.S.2d 630, 634 (1985).

²⁸¹ *King*, 232 A.D.2d at 114, 663 N.Y.S.2d at 612.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.* King alleged that the probable cause was based upon "evidence seized as a result of an illegal arrest and interrogation, and an unlawful search of his apartment." *Id.* Defendant also claimed that the authorities were aware

The trial court conducted a suppression hearing on the DNA evidence and concluded that there was sufficient probable cause to order the testing in regard to the August rape.²⁸⁷ The court went on to observe that “[t]his court is unaware of, and the defendant does not cite, any authority which supports the proposition that probable cause must be shown anew for each subsequent use to which a blood sample might be put once it has been lawfully taken.”²⁸⁸ Following his conviction, King appealed again arguing that use of the DNA evidence violated his Fourth Amendment Constitutional rights.²⁸⁹

The Appellate Division, Second Department, began its analysis by reviewing the “well settled” standard for court ordered blood testing.²⁹⁰ The New York Court of Appeals in the *In re Abe A.*²⁹¹ held that before a court will order a suspect to submit a blood sample:

[T]he People [must] establish (1) probable cause to believe the suspect has committed the crime, (2) a “clear indication” that relevant material evidence will be found, and (3) the method used to secure it is safe and reliable. In addition, the issuing court must weigh the seriousness of the crime, the importance of the evidence to the investigation and the unavailability of less intrusive means of obtaining it, on the one hand, against concern for the suspect’s constitutional right to be free from the bodily intrusion on the other.²⁹²

Applying these factors the Appellate Division, Second Department, concluded that sufficient probable cause existed for

that the August crime scene evidence did not contain sufficient material for DNA testing and that the prosecution acted in bad faith when it obtained the blood testing order. *Id.* at 117, 663 N.Y.S.2d at 614.

²⁸⁷ *Id.* at 114-15, 663 N.Y.S.2d at 612.

²⁸⁸ *Id.* at 115, 663 N.Y.S.2d at 613.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 116, 663 N.Y.S.2d at 613.

²⁹¹ 56 N.Y.2d 288, 437 N.E.2d 265, 452 N.Y.S.2d 6 (1982).

²⁹² *Id.* at 291, 437 N.E.2d at 266, 452 N.Y.S.2d at 7.

the court to order DNA testing of King's blood.²⁹³ The court reasoned that King matched the description given by the August victim, he lived in the same building as the August victim, providing him with access to information mentioned by the perpetrator during the attack, and the defendant was seen near the building's trash cans shortly after the attack. Additionally, the police found the assailants clothing and knife in the basement of the building.²⁹⁴ The court was also convinced that the evidence from the suppression hearing indicated that the District Attorney and the criminal laboratory both believed that sufficient DNA material was present on the nightgown removed from the August crime scene when they obtained the court order for blood testing.²⁹⁵ It is important to note that the defendant did not claim the method of blood sampling was unsafe or unreliable.²⁹⁶

Next, the court addressed the prosecution's use of the DNA test results in the May rape trial. The Appellate Division, Second Department, noted that the "overriding" function of the Fourth Amendment and Article I § 12 of the New York State Constitution "is to protect personal privacy from unwarranted intrusion by the government."²⁹⁷ The court observed that once

²⁹³ *King*, 232 A.D.2d at 116, 663 N.Y.S.2d at 614.

²⁹⁴ *Id.* at 116, 663 N.Y.S.2d at 613-14.

²⁹⁵ *Id.* at 117, 663 N.Y.S.2d at 614. The court placed the burden on the defendant to show that the Westchester County Department of Laboratories and Research initial evaluation was either erroneous or untruthful. *Id.* Additionally, the defendant could not show that the District Attorney did act in bad faith. *Id.*

²⁹⁶ *Id.* at 116, 663 N.Y.S.2d at 614.

²⁹⁷ *Id.* at 117, 663 N.Y.S.2d at 614. "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State '[T]he security of one's privacy against arbitrary intrusion by the police' . . . being 'at the core of the Fourth Amendment' and 'basic to a free society.'" *Schmerber v. California*, 384 U.S. 757, 767 (1966) (citation omitted). In *Schmerber*, following an automobile accident, the defendant was convicted of driving under the influence. *Id.* at 758. The Supreme Court held the use of the defendants' blood test results at trial, taken over his objection, did not violate the defendants' privilege against self incrimination. *Id.* at 761. Furthermore, the Court held that use of the sample

the stringent standards set forth by the New York Court of Appeals in *In re Abe A*²⁹⁸ have been met the “personal privacy interest must yield to the greater governmental interest demonstrated.”²⁹⁹ The court held that once a sample has been obtained through proper judicial process, defendant “can no longer assert either privacy claims or unreasonable search and seizure arguments with respect to the sample. “Privacy . . . [is] no longer relevant once the sample has already lawfully been removed from the body”³⁰⁰ Testing of the “sample does not involve any further search and seizure of a defendants person” and thus the defendant has no further expectation of privacy.³⁰¹

The Fourth Amendment to the United States Constitution and Article I § 12 of the New York State Constitution protect people from unreasonable searches by the government. However, once the government demonstrates probable cause to believe that an individual has committed a crime and demonstrates a “clear indication” that relevant evidence will be found our constitutionally protected right must yield to the “greater governmental interest.”³⁰²

did not violate defendants right to be free from unreasonable searches and seizures. *Id.* at 772.

²⁹⁸ 56 N.Y.2d 288, 437 N.E.2d 265, 452 N.Y.S.2d 6 (1982).

²⁹⁹ *King*, 232 A.D.2d at 117, 663 N.Y.S.2d at 614.

³⁰⁰ *Id.* at 117-18, 663 N.Y.S.2d at 614.

³⁰¹ *Id.* at 118, 663 N.Y.S.2d at 614.

³⁰² *Id.* at 117, 663 N.Y.S.2d at 614.

SUPREME COURT

BRONX COUNTY

People v. Johnson³⁰³
(printed November 3, 1997)

On October 17, 1996, Police Officers Clark and Collopy were on patrol when they received a radio communication advising them to report to an apartment regarding a sexual assault.³⁰⁴ Upon their arrival, the officers spoke to a woman who claimed that her eight-year-old daughter had been raped on several occasions over a month ago.³⁰⁵ Moreover, the mother notified the officers that she and her daughter saw the alleged perpetrator outside the building moments ago.³⁰⁶ The mother and the victim provided the officers with a detailed description of the rapist's identity.³⁰⁷ When the officers walked out of the building, they saw a man who purportedly matched this description.³⁰⁸ The officers proceeded to approach the defendant and requested his identification.³⁰⁹ After defendant advised the police that he did not have his identification, the police informed him that he resembled a criminal suspect and the officers asked if he would come with them to the witness's apartment.³¹⁰ After defendant agreed to accompany the officers, they went to the apartment

³⁰³ N.Y. L.J., Nov. 3, 1997, 30 (Sup. Ct. Bronx County).

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*