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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.*

door of the victim.³¹¹ When they arrived, she immediately identified the defendant, as the assailant.³¹²

Based on the foregoing, defendant alleged that the police “obtained his identification by exploiting an illegal seizure of his person.”³¹³ Defendant further alleged that his constitutional rights to be free from unreasonable search and seizures had been violated.³¹⁴ The court held that the victim’s identification of defendant was not a result of the police officers “unconstitutional seizure of his person.”³¹⁵ First, the court did not find a violation pursuant to the United States Constitution.³¹⁶ In accordance with the Fourth Amendment, in order to be deemed a “seizure,” the government agents must have “either subjected a person to a physical contact; or the person seized submitted to the agents show of authority.”³¹⁷ As a practical matter, a “show of authority” occurs when, an individual submits or complies with an officer who, for example, displays his badge and orders the individual to “stop.”³¹⁸ Since the inquiry made by the officers in this instance amounted to neither a “physical contact” nor a “show of authority,” the plaintiff’s theory that his constitutional rights had been violated under the Fourth Amendment of the United States Constitution failed.³¹⁹

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.* U.S. CONST. amend. IV. The Fourth Amendment states 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 . . . but upon probable cause” N.Y. CONST. art. I, § 12. Article I, § 12 provides in pertinent part: “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches, shall not be violated . . . but upon probable cause” *Id.*

³¹⁵ *Johnson*, N.Y. L.J., Nov. 3, 1997, at 30.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

This case can be distinguished from the United States Supreme Court's decision in *California v. Hodari D.*³²⁰ The issue in *Hodari D.* was whether Mr. Hodari's Fourth Amendment rights were violated when he discarded drugs after taking flight.³²¹ The Court held that the officers pursuit did in fact constitute the requisite "show of authority" requiring defendant to "halt."³²² In view of the fact that defendant failed to comply with the injunction, he was not "submitting to an assertion of authority" and therefore his Fourth Amendment rights were not violated.³²³ In sum, since the cocaine was discarded prior to the seizure, the evidence (cocaine) was admissible.³²⁴

Under the New York State Constitution, however, in addition to a "physical contact," a "show of authority" occurs when a police officer or other government agent "significantly interrupts" an individual's "liberty of movement."³²⁵ In this regard, "the test is whether a reasonable man would have believed, under the circumstances, that the officer's conduct was a significant limitation on his or her freedom."³²⁶ In determining if there was a "significant limitation" on an individual's "liberty of movement," the court will look at both the police officer's conduct and "whether a reasonable man would have believed that the conduct was a significant limitation on his or her freedom."³²⁷

First, in New York, a police encounter initiated with a civilian is analyzed under a "four tiered method": (1) when seeking to request information from a civilian, the police officer's "request

³²⁰ 499 U.S. 621 (1991). Two California officers saw several youths huddled around a parked car. *Id.* at 622. Once the youths saw the police car approaching, they took flight. *Id.* at 623. One officer remained in the car while the other gave chase on foot. *Id.* Shortly after tossing away a package of cocaine, defendant was tackled to the ground by the police officer. *Id.*

³²¹ *Id.*

³²² *Id.* at 629.

³²³ *Id.* Mr. Hodari was, however, seized at the time of the tackle. *Id.*

³²⁴ *Id.*

³²⁵ *Johnson*, N.Y. L.J., Nov. 3, 1997, at 30.

³²⁶ *Id.*

³²⁷ *Id.*

must be supported by objective, credible reason, not necessarily indicative of criminality”; (2) the common-law right is “activated by rounded suspicion that the criminal activity is afoot and permits a somewhat greater intrusion”: (3) an officer may stop and detain a person with force for investigative purposes if there exists a “reasonable suspicion that a person has committed or is about to commit a crime”; (4) when a police officer has “probable cause to believe a person is committing or about to commit a crime, he may lawfully make an arrest.”³²⁸

In this instance, the court held that, notwithstanding the police officer’s having arguably a “reasonable suspicion” within the meaning of the third tier, their actions did not reach the intrusion permitted.³²⁹

³²⁸ *Id.*

³²⁹ *Id.* See also *People v. De Bour*, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976). In *De Bour*, defendant was walking in the direction of two police officers at 12:15 a.m. *Id.* at 213, 352 N.E.2d at 565, 386 N.Y.S.2d at 378. When defendant was within approximately thirty five feet of the officers he decided to cross the street. *Id.* The officers then followed defendant and when they reached him, the officers asked, “what he was doing in the neighborhood.” *Id.* Mr. De Bour responded, “that he had just parked his car and he was going to a friend’s house.” *Id.* As the officers asked him for identification, the police noted a bulge about the defendant’s waist. *Id.* Defendant was then asked to unzip his jacket. *Id.* Defendant was subsequently arrested for gun possession. *Id.* at 214, 352 N.E.2d at 565, 386 N.Y.S.2d at 378. Thereafter, defendant moved to suppress the evidence. *Id.* The police officers testified that they believed that defendant was involved with narcotics and was trying to avoid apprehension. *Id.* The court viewed the initial encounter between the officers and the defendant was lawful at the inception and “the subsequent intrusion was reasonably limited in scope and intensity.” *Id.* But see *People v. La Pena*, 49 A.D.2d 604, 370 N.Y.S.2d 192 (2d Dep’t 1975). The police were notified by an anonymous phone call that there was a black man with a gun, dressed in a red shirt, located at a bar. *Id.* at 605, 370 N.Y.S.2d at 193. When the police went to the bar and saw a black man dressed in a red shirt they yelled “freeze” and instructed the defendant to raise his hands. *Id.* Upon frisking the defendant, the police discovered a gun. *Id.* Defendant moved to suppress this evidence. *Id.* Based upon these facts, the court held that the police officers did not have a “reasonable suspicion” to question the defendant as the information provided by the anonymous caller was not sufficient to justify the search and seizure. *Id.* at 608, 370 N.Y.S.2d at 198.

In addition to the forgoing, the court will determine “whether a reasonable man would have believed that the conduct was a significant limitation on his or her freedom.”³³⁰ The court in this matter relied on *People v. Bora*.³³¹ As previously mentioned, pursuant to the interpretation of the New York State Constitution,³³² the issue is “whether the defendant’s liberty of movement was interrupted.”³³³ “The test is whether a reasonable person would have believed, under the circumstances, the officer’s conduct was a significant limitation on his or her freedom.”³³⁴ In determining the answer to this inquiry, the *Bora* court weighed the following facts individually: “was the officer’s gun drawn, was the individual prevented from moving, how many verbal commands were given, what was the content and tone of the commands, how many officers were involved and where the encounter took place.”³³⁵ The court held that although some language by police officers may be forceful enough so as to

³³⁰ *Id.*

³³¹ 83 N.Y.2d 531, 634 N.E.2d 168, 611 N.Y.S.2d 796 (1994). In *Bora*, the police responded to a radio call which stated that a man was selling narcotics at a specific location. *Id.* at 534, 634 N.E.2d at 170, 611 N.Y.S.2d at 798. Shortly thereafter, the police reported to the location and identified defendant as the only person who fit the description of the suspect. *Id.* As the police officer approached the suspect, the suspect walked away. *Id.* The officer then directed the defendant to “stop.” *Id.*

³³² N.Y. CONST. art. I, § 12. Article I, This article provides in pertinent part that: “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches, shall not be violated . . . but upon probable cause” *Id.*

³³³ 83 N.Y.2d at 534, 634 N.E.2d at 170, 611 N.Y.S.2d at 798.

³³⁴ *Id.* See *People v. Hicks*, 68 N.Y.2d 234, 500 N.E.2d 861, 508 N.Y.S.2d 163. Police officers approached two men who fit the description of two robbers. *Id.* at 237, 500 N.E.2d at 862, 508 N.Y.S.2d at 164. Subsequently, the police officers detained the men and brought them back to the crime scene. *Id.* Defendant contended that this action by the police violated his constitution protection against unreasonable searches and seizures. *Id.* The Court of Appeals used the test “what would a reasonable man, innocent of any crime, would have thought had he been in the defendant’s position.” *Id.* at 166, 500 N.E.2d at 864, 508 N.Y.S.2d at 166.

³³⁵ 83 N.Y.2d at 534-36, 634 N.E.2d at 170, 611 N.Y.S.2d at 798

constitute a seizure, in view of the circumstances in this case, the language did not reach that level.³³⁶ Significantly, this court clearly recognizes the possibility that “some language” may reach a level of forcefulness so as to constitute a seizure.”³³⁷

In *People v. Johnson*,³³⁸ the Supreme Court, Bronx County, decided that the officers had at least an “articulable suspicion” that defendant was in fact the individual whom the victim recognized outside of her apartment.³³⁹ Therefore, the police officers had a significant basis to have a reasonable suspicion to conduct investigative detention.³⁴⁰ Although the officers in all likelihood could have detained the individual based upon the “reasonable suspicion,” they conducted a less intrusive search and seizure by mere inquiry.³⁴¹ “Thus, a reasonable innocent man in the defendant’s position would not perceive his compliance with the officers request as a significant interference

³³⁶ *Id* at 534-36, 634 N.E.2d at 170-71, 611 N.Y.S.2d at 798-99.

³³⁷ *Id.* Cf. *People v. Townes*, 41 N.Y.2d 97, 359 N.E.2d 402, 390 N.Y.S.2d 893 (1976). Police officers observed the defendant and his companion aimlessly walking around the city. *Id* at 98, 359 N.E.2d at 403, 390 N.Y.S.2d at 895. The police officers did not specify why, but they decided to follow the two individuals. *Id.* The police officer did not see defendant do anything other than walk around the city looking at stores and people. *Id.* After following the two men for approximately one hour, the police officer approached the two individuals. *Id.* With his gun drawn and his badge out, the police officer yelled, “freeze.” *Id.* Though the facts are sketchy, it was apparent that defendant had a gun in his possession. *Id* at 100, 359 N.E.2d at 404, 390 N.Y.S.2d at 896. Defendant contended that the incident between himself and the police officers “constituted an unconstitutional seizure of his person and the weapon should therefore be suppressed.” *Id.* at 100, 359 N.E.2d at 405, 390 N.Y.S.2d at 896. While the court ultimately denied defendant’s motion to suppress the evidence, the Court of Appeals found that there was a “significant interruption with the defendant’s freedom of movement.” *Id* at 101, 359 N.E.2d at 405, 390 N.Y.S.2d at 896. The court held that the officer’s actions were unconstitutional since having his gun dawn and shouting “freeze” was not reasonably related in scope to the circumstances which rendered the stop permissible.” *Id.*

³³⁸ *Johnson*, N.Y. L.J., Nov. 3, 1997, 30 (Sup. Ct. Bronx County)..

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.*

with his liberty.”³⁴² Notwithstanding the result in *Johnson*, the New York Constitution gives less deference to the states police power to conduct a search and seizure as compared to the United States Constitution.³⁴³ While the United States Constitution requires either a physical restraint or a “submission to a show of authority”, the New York Constitution goes further in allowing an action to be based upon an officer merely giving a verbal command.³⁴⁴ Hence, when viewing search and seizure violations under the New York Constitution, the court will place the officers action under greater scrutiny than it would under the United States Constitution.

SUPREME COURT

NEW YORK COUNTY

People v. Rodgers³⁴⁵
(decided June 4, 1997)

Defendant, Richard M. Rodgers, was indicted on counts of manslaughter, criminal possession of a controlled substance, and criminal possession of a hypodermic instrument.³⁴⁶ In a pre-trial suppression hearing, defendant argued that his rights under both the Federal³⁴⁷ and New York State³⁴⁸ Constitutions, protecting

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ 173 Misc. 2d 482, 661 N.Y.S.2d 452 (Sup. Ct. New York County 1997).

³⁴⁶ *Id.* at 483, 661 N.Y.S.2d at 453.

³⁴⁷ U.S. CONST. amend. IV. The Fourth Amendment states:

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 things to be seized.

Id.