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# Supreme Court, New York County, Kellogg v. Travis

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# SUPREME COURT OF NEW YORK

# NEW YORK COUNTY

Kellogg v. Travis[1]
(decided May 18, 2001)

Paul Kellogg was convicted in 1994 of assault in the second degree and criminal possession of a weapon in the third degree.[2] He was sentenced to two and one third to seven years in prison.[3] After being paroled, but prior to the expiration of his sentence, Kellogg was asked to provide a blood sample for New York State's DNA data bank.[4] Kellogg challenged the applicability and raised constitutional issues regarding the 1999 Amendment to the 1994 Article 49-b New York Executive Law.[5] His challenge was based upon the presumption that this amendment was equivalent to an *ex post facto* law,[6] violated the double jeopardy[7] provisions of the United States Constitution, and posed an illegal search in violation of the Fourth Amendment[8] of the United States Constitution, as well as the New York State Constitution.[9] The court held the law to be constitutional.[10]

Six months after Kellogg was paroled, his parole officer notified him that he was required to submit a blood sample that would be placed on file with the New York State DNA data bank.[11]

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[1] 188 Misc. 2d 164, 728 N.Y.S.2d 645 (Sup. Ct. New York County 2001).

[2] *Id.* at 165, 728 N.Y.S.2d at 646.

[3] *Id.*

[4] *Id.*

[5] N.Y. EXEC. LAW § 995 (McKinney 1994 & Supp. 2002).

[6] U.S. CONST. art I, § 10, cl. 1 provides in pertinent part, "No state shall . . . pass . . . ex post facto laws."

[7] U.S. CONST. amend. V provides in pertinent part, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

[8] U.S. CONST. amend. IV provides in pertinent part, "The right of the people to be secure . . . against unreasonable searches and seizures . . . ."

[9] N.Y. CONST. art. 1, § 12 provides in pertinent part, "The right of the people to be secure . . . against unreasonable searches and seizures . . . ."

[10] *Kellogg,* 188 Misc. 2d at 169, 728 N.Y.S.2d at 649 (dismissing Kellogg's challenge to the statute).

[11] *Id.* at 165, 728 N.Y.S.2d at 646.

He was informed that his refusal would constitute a violation of his parole, which would result in his remand to prison.[12] Under protest, he permitted the blood sample to be taken.[13] New York Executive Law § 995, enacted in 1994, authorized the Commissioner of the New York State Division of Criminal Justice Services to establish a computerized state DNA identification index.[14] Section 995-(7)[15] applied to certain designated offenders of which Kellogg was a member. However, his conviction occurred prior to the enactment of the statute, and therefore Kellogg argued that § 995 did not apply to him.[16] The 1999 Amendment to Article 49-B significantly expanded the reach of the 1994 law to include not only those who committed their offense prior to the effective date of the law but also those whose sentences had not been completed at the amendment's enactment.[17] Kellogg argued that he had a vested right to be free of DNA testing.[18]

The court first addressed Kellogg's claim that this amendment was an *ex post facto* law. The court relied on the Supreme Court case of *Weaver v. Graham*[19] to define the requisite elements of an *ex post facto* law. In *Weaver,* the Supreme Court reversed the Florida Supreme Court and set forth two critical elements that must be present for a criminal or penal law to be deemed *ex post facto.* First, "it must be retrospective, that is, it must apply to events occurring before its enactment."[20] Second, "it must disadvantage the offender affected by it."[21] In *Weaver*, the petitioner plead guilty to second-degree murder and was sentenced to fifteen years in prison.[22] A Florida statute, repealing an earlier

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[12] *Id.*

[13] *Id.*

[14] *Id.* at 166, 728 N.Y.S.2d at 646.

[15] N.Y. EXEC. LAW § 995-(7), "[d]esignated offender" means a person convicted of and sentenced for any one or more of the following felonies as defined in the penal law (a): sections 120.05, 120.10, and 120.11 relating to assault . . . ."

[16] *Kellogg,* 188 Misc. 2d at 166, 728 N.Y.S.2d at 646.

[17] *Id.*

[18] *Id.*

[19] 450 U.S. 24 (1981).

[20] *Id.* at 29.

[21] *Id.*

[22] *Id.* at 25.

statute, changed the formula for deducting "gain-time credits" (time off for good behavior) from a prisoner's sentence.[23] The Supreme Court held this constituted an *ex post facto* law in that petitioner's crime occurred before the statute's effective date and therefore disadvantaged the petitioner.[24] Drawing upon the *Weaver* court's elements of an *ex post facto* law, the *Kellogg* court found that while the amendment to Executive Law § 995 did disadvantage Kellogg, it did not change the definition of any criminal conduct, nor was it punitive in nature.[25] The intent of the amendment was merely to expand the definition of persons who must comply with the statute to enable law enforcement officials to more accurately solve serious crimes.[26] Thus, the court held the amendment was not an *ex post facto* law.[27]

Kellogg next alleged that the 1999 amendment placed him in a position of double jeopardy.[28] The Fifth Amendment of the United States Constitution prevents the state from prosecuting or attempting to prosecute any person twice for the same crime.[29] In *Illinois v. Vitale,*[30] the Supreme Court held the constitutional prohibition against double jeopardy consisted of three guarantees: "(1) It protects against a second prosecution for the same offense after acquittal. [(2) It] protects against a second prosecution for the same offense after conviction. [(3)] And it protects against multiple punishments for the same offense."[31] In 1932, the Supreme Court

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[23] *Id.* Many states, including Florida, use of a statutory formula to reduce prison time by rewarding each convicted prisoner for good conduct and obedience to prison rules. In *Weaver*, this *ex post facto* law extended petitioner's required prison time by over 2 years, approximately 14% of his original 15-year sentence.

[24] *Weaver,* 450 U.S. at 36.

[25] *Kellogg,* 188 Misc. 2d at 166-67, 728 N.Y.S.2d at 647.

[26] *Id.* at 167, 728 N.Y.S.2d at 647.

[27] *Id.*

[28] *Id.*

[29] United States v. Ursery, 518 U.S. 267, 273 (1996) (citing Witte v. United States, 515 U.S. 389, 396 (1995)).

[30] 447 U.S. 410 (1980). A juvenile received a traffic citation charging failing to reduce speed to avoid an accident after the automobile he was driving struck and killed two small children. After being convicted and sentenced to pay a fine of $15, the State charged him with involuntary manslaughter. *Id.* at 411-13.

[31] *Id.* at 416.

decided *Blockburger v. Unites States*[32] and set forth a test to determine when two offenses are the same and are thus barred as successive prosecutions. The Court stated that "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[33] The guarantee at issue in *Kellogg* is highlighted by the court's third prong, namely, multiple punishments for the same offense. However, the *Kellogg* court summarily dismissed this claim plainly stating, "[p]laintiff was neither prosecuted a second time for the crimes for which he was convicted nor punished a second time for those crimes."[34]

The court allocated significant time to both the federal and state constitutional issues raised by Kellogg pertaining to his right to be free from unreasonable searches and seizures.[35] In *Skinner v. Railway Labor Executives' Association*[36] the Court discussed, in-depth, the Fourth Amendment analysis:

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[32] 284 U.S. 299 (1932). In *Blockburger*, petitioner was convicted on three of the five indicted charges for violating the provisions of the Harrison Narcotic Act. The Court concluded that if the same-elements test (that is, whether each offense contain an element not contained in the other) was applicable it would bar prosecution under the double jeopardy provision. Here, the Court held that although both sections of the Narcotic Act were violated, in fact, petitioner committed two offenses. *Id.* at 304.

[33] *Vitale,* 447 U.S. 410, 416 (quoting *Blockburger*, 284 U.S. at 304). Furthermore, since the *Blockburger* test focused on the statutory elements of each offense, the Court stated that if "each *statute* requires proof of an additional fact which the other does not, the offenses are not the same under the *Blockburger* test." The Illinois Supreme Court found the two offenses to be the same, but the Supreme Court remanded reluctant to accept their reasoning. *Id.* at 421.

[34] *Kellogg,* 188 Misc. 2d at 167, 728 N.Y.S.2d at 647.

[35] *Id.*

[36] 489 U.S. 602 (1989). The Federal Railroad Administration promulgated regulations that mandated blood and urine tests of employees involved in certain types of train accidents. *Id.* at 606. Further, regulations were adopted to allow railroads to administer breath and urine tests to employees who violated certain safety rules. *Id.* The question presented was whether these regulations violated the Fourth Amendment. The Supreme Court held that the regulations were not an undue infringement on the expectations of the employees' privacy since the Government's compelling interests outweigh the privacy concerns. *Id.*

> Our precedents teach that where, as here, the Government seeks to obtain physical evidence from a person, the Fourth Amendment may be relevant at several levels. The initial detention necessary to procure the evidence may be a seizure of the person, the detention amounts to a meaningful interference with his freedom of movement. Obtaining and examining the evidence may also be a search, if doing so infringes an expectation of privacy that society is prepared to recognize as reasonable. We have long recognized that a 'compelled intrusion into the body for blood . . .' must be deemed a Fourth Amendment search.[37]

The *Skinner* court continued its Fourth Amendment analysis opining that the chemical analysis of the sample obtained is a further invasion of privacy interests.[38] The court emphasized the similarity between drawing blood, taking a breathalyzer test, and testing urine samples.[39] However, the Court stated, the Fourth Amendment does not ban all searches, only those that are deemed unreasonable.[40] The Court's determination of what is reasonable depends upon the surrounding circumstances and the nature of the search.[41] The permissibility of a search is based upon a balancing of the individual's Fourth Amendment interests and the legitimate governmental interests.[42] In criminal cases, that balance is supported pursuant to a judicial warrant for probable cause,[43] except where special needs make the warrant and probable cause

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[37] *Skinner,* 489 U.S. at 616.

[38] *Id.*

[39] *Id.* at 617. The Court compared the physical intrusion, that is the penetrating beneath the skin, of a blood sample to the production of a deep lung breath required for a breathalyzer test. Both impose concerns about bodily integrity and as such are deemed to be a search. The Court continues its analysis that "there are few activities in our society more personal or private than the passing of urine." Not only is it a function performed in private, but also it is prohibited by law in public places. Similarly, it to must be considered a search.

[40] *Id.* at 619.

[41] *Id.*

[42] *Skinner*, 489 U.S. at 619.

[43] *Id.*

requirement impracticable.[44] An essential purpose of a warrant requirement is the protection of privacy interests.[45] A warrant, limited in its objectives and scope, assures citizens that law authorizes the intrusion.[46]

Under the New York State Constitution,[47] Kellogg had the right to be free from unreasonable searches and seizures even as a parolee.[48] In *People v. Huntley*,[49] the New York Court of Appeals agreed with the defendant that the acquired status of parolee did not mean that one had surrendered one's constitutional rights against unreasonable searches and seizures.[50] Although the court did observe that what might be unreasonable to an individual *not on parole* may be reasonable to one who is.[51] In either instance, whether an individual is on parole or not, the showing of probable cause remains the general standard by which the reasonableness of a search or seizure is to be measured.[52] In *Huntley*, the defendant's home was searched by his parole officer after a number of failures to report.[53] The search obtained evidence later used to convict the defendant of criminal possession of dangerous drugs.[54] The New York Court of Appeals, upholding the Appellate Division, reasoned that the search and seizure was rationally and reasonably related to the performance of the parole officer's duty, since a parole officer's responsibility is to prevent violations of parole.[55] Concomitantly, Kellogg would have violated his parole by refusing to comply with his parole officer's request for a blood sample.

The *Kellogg* court cited advances in technology and remarked that the amended Executive Law did not require the taking of a blood sample for DNA testing, but rather swabbing of the inside of Kellogg's cheek would have been sufficient.[56]

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[44] *Id.*
[45] *Id.* at 621-22.
[46] *Id.* at 622.
[47] N.Y. CONST. art. I, § 12.
[48] *Kellogg,* 188 Misc. 2d at 167, 728 N.Y.S. at 647.
[49] 43 N.Y.2d 175, 371 N.E.2d 794 (1977).
[50] *Id.* at 181, 371 N.E.2d at 797.
[51] *Id.* at 180, 371 N.E.2d at 796 (emphasis added).
[52] *Id.*
[53] *Id.* at 179-80, 371 N.E.2d at 796.
[54] *Huntley,* 43 N.Y.2d at 180, 371 N.E.2d at 796.
[55] *Id.* at 181, 371 N.E.2d at 797.
[56] *Kellogg,* 188 Misc. 2d at 167-68, 728 N.Y.S.2d at 647.

Nevertheless, they held the taking of Kellogg's blood was not deemed, under the Fourth Amendment, to be an unreasonable search and seizure because it was not taken to investigate Kellogg, but rather to comply with the state's DNA identification index.[57]

Under New York General Construction Law §§ 93[58] and 94,[59] Kellogg argued that the original Executive Law Article 49-b gave him the vested right to be free from DNA testing[60] and no subsequent legislation could interfere with that right.[61] Yet a careful reading of Article 49-b confirms that Kellogg had no affirmative rights under which either §§ 93 and 94 would apply.[62] Rather, Article 49-b, as originally enacted, *omitted* Kellogg from the class of designated offenders and there was no action or proceeding commenced or pending.[63]

In summary, in order for a law to be deemed *ex post facto*, and thereby unconstitutional, it must retroactively apply and disadvantage the offender by imposing greater punishment.[64] It need not

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[57] *Id.* at 648, 371 N.E.2d at 648.

[58] N.Y. GEN. CONSTR. LAW § 93 (McKinney 2001).

> Effect of repealing statute upon existing rights: The repeal of a statute or part thereof shall not affect or impair any act done, offense committed or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such repeal had not been effected.

[59] N.Y. GEN. CONSTR. LAW § 94 (McKinney 2001).

> Effect of repealing statute upon pending actions and proceedings: Unless otherwise specifically provided by law, all actions and proceedings, civil or criminal, commenced under or by virtue of any provision of a statute so repealed, and pending immediately prior to the taking effect of such repeal, may be prosecuted and defended to final effect in the same manner as they might if such provisions were not so repealed.

[60] *Kellogg*, 188 Misc. 2d at 168, 728 N.Y.S.2d at 648.

[61] *Id.*

[62] *Id.*

[63] *Id.* (emphasis added).

[64] Hock v. Singletary, 41 F.3d 1470, 1471 (11th Cir. 1995). Jeffery Hock, serving a thirty-two year sentence for second degree murder, brought a petition for a writ of habeas corpus alleging his rights were violated after a Florida

> impair a 'vested right' . . . a violation may occur when the law 'merely alters penal provisions accorded by the grace of the legislature[.] However, if a statute is merely procedural and does not affect the quantum of punishment attached to the crime, there is no *ex post facto* violation even when the statute is applied retroactively.[65]

The *ex post facto* clause does not operate to protect one against *less* punishment, but is rather a way to ensure that every citizen receives warning of newly enacted criminal statutes and their punishments.[66]

Similarly, genetic marker testing statutes have been enacted in all fifty states and have withstood federal and state constitutional challenges.[67] Nationally, reviews of these statutes have contemplated the unconstitutionality of genetic testing as a violation of the Fourth Amendment.[68] Courts have taken different approaches in consideration of this issue:

> First, some courts have applied a balancing approach weighing both the convict's expectation of privacy and the minimally intrusive nature of a blood draw against the government's interest in creating a genetic marker database to solve future

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statute was enacted that rescinded provisional credits previously awarded. *Id.* The District Court denied Hock's petition and the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's judgment. *Id.*

[65] *Id.*

[66] *Id.* at 1472 (emphasis added).

[67] Gaines v. Nevada, 998 P.2d 166, 171 (2000). Gaines was on probation after pleading guilty to a felony involving the unlawful use of coins in a gaming machine. While on probation he was arrested for burglary and forgery and entered into a plea agreement in which he pleaded guilty to one count of burglary and one count of forgery and sentenced to seventy-two months and thirty-four months respectively. Each of these sentences was to run concurrent with the reinstated sentence of forty-eight months from the previous felony charge. The District Court applied 217 days credit for time served on the first felony, but would give no credit for the subsequent burglary and forgery charges. The Nevada Supreme Court affirmed. Furthermore, Gaines was required by a Nevada statute to provide DNA for genetic market testing. Gaines alleged the statute did not apply to him, as he was not a sexual offender. The Nevada Supreme Court citing the plain language of the statute held that the statute was not overbroad, was constitutional and applied to Gaines. *Id.*

[68] *Id.*

> crimes. Second, other courts have determined that genetic marker testing falls within the "special needs" doctrine that allows searches and seizures without a warrant and without individualized suspicion.[69]

Moreover, for a court to declare a state law requiring the collection of a DNA sample as unconstitutional, a defendant would have to prove beyond a reasonable doubt the unconstitutionality of the law.[70] The court in *Kruger v. Erickson*[71] reasoned that "[t]he Constitution only protects against 'intrusions that are not justified in the circumstances, or which are made in an improper manner.'"[72] The *Kruger* court, citing *Breithaupt v. Abrams,*[73] noted that blood tests have become routine in our everyday life.[74] Thus, a blood test taken by a skilled technician "is not such 'conduct that shocks the conscience' . . . nor such a method of obtaining evidence that it offends a 'sense of justice.'"[75] Relying on Supreme Court precedent, most courts have concluded that drawing blood is "not an 'unduly extensive imposition' and that it would not be considered offensive by even the most delicate."[76] Furthermore, it has been uniformly held that the government's interest "outweighs a convict's diminished right for privacy in his genetic markers because such information provides law enforcement with a dramatic new tool that can be used to

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[69] *Id.*

[70] Lighthouse Shores, Inc. v. Town of Islip, 41 N.Y.2d 7, 11, 359 N.E.2d 337, 341, 390 N.Y.S.2d 827, 830 (1976).

[71] 875 F. Supp. 583 (D. Minn. 1994). Petitioner, an inmate at the Minnesota Correctional Facility at the time of the suit, was serving twenty years for kidnapping. He filed a § 1983 action in state court claiming that his civil rights were violated when prison officials ordered him to provide them with a blood sample for DNA analysis in accordance with a Minnesota statute. After denial of his § 1983 claim, petitioner filed a writ of habeas corpus in the district court. This court held the statute was not an *ex post facto* law nor did it violate the petitioner's Fourth Amendment rights and denied the writ of habeas corpus. *Id.*

[72] *Id.* at 588.

[73] 352 U.S. 432 (1957).

[74] *Kruger,* 875 F. Supp. at 587.

[75] *Id.*

[76] *Gaines,* 998 P.2d at 172-73.

accurately identify a criminal suspect attempting to conceal his identity."[77]

In *Kellogg*, the federal and state Fourth Amendment right analysis focused on the same elements and ultimately advanced the same proposition. This is not surprising since the United States and New York constitutional provisions are identical. Moreover, given that the legitimate governmental interest of assisting investigation and prosecution of sex crimes is served by the enactment of the New York statute, Kellogg's constitutional rights were neither violated nor compromised. As Justice Kennedy said in *Skinner*, "[a]s our precedent's indicate, not every governmental interference with an individual's freedom of movement raises such constitutional concerns that there is a seizure of the person."[78]

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[77] *Id.* at 173.
[78] *Skinner*, 489 U.S. at 618.