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Search & Seizure

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N.Y. CONST. art. I, § 12:

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.

U.S. CONST. amend. IV:

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.

COURT OF APPEALS

Delaraba v. Nassau County Police Department[1]
(decided March 22, 1994)

Plaintiff, President of the Police Benevolent Association of the Nassau County Police Department, brought an article 78 proceeding against defendants, Nassau County Police Department and its Police Commissioner, to stop the implementation of a plan requiring random drug testing of police officers assigned to the Narcotics Bureau and the Scientific Investigation Bureau.[2] Plaintiffs claimed the frequency of the testing rendered the plan

1. 83 N.Y.2d 367, 632 N.E.2d 1251, 610 N.Y.S.2d 928 (1994).
2. *Id.* at 370, 632 N.E.2d at 1252, 610 N.Y.S.2d at 929.

unreasonably intrusive and thus violated state[3] and federal[4] constitutional protection from illegal searches and seizures.[5] The New York Court of Appeals disagreed and held the drug testing program to be constitutionally valid because the plan satisfied all three prongs of the *Patchogue-Medford Congress of Teachers v. Board of Education*[6] test and was not excessively frequent so as to violate the Fourth Amendment.[7]

The drug testing program in dispute was authorized by the defendant Police Commissioner and entailed random periodic drug testing of ten of the 100 volunteer members of the Narcotics Bureau, special narcotics enforcement, and the Scientific Investigative Bureau.[8] The program did not require reasonable suspicion that an officer was abusing drugs. Furthermore, the drug testing program was to be performed on an independent trial

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3. N.Y. CONST. art. I, § 12. This section provides in relevant 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.*

4. U.S. CONST. amend. IV. The Fourth Amendment provides in relevant 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.*

5. *Delaraba*, 83 N.Y.2d at 370, 632 N.E.2d at 1252, 610 N.Y.S.2d at 929.

6. 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987). In *Patchogue-Medford*, the New York Court of Appeals held that school districts' urine tests were unconstitutional because teachers were to be examined absent a reasonable suspicion of using drugs. *Id.* at 70, 510 N.E.2d at 331, 517 N.Y.S.2d at 462. In reaching its decision, the court established a three-pronged test in order to determine whether certain requirements have been satisfied. *Id.* The court stated that "random searches conducted by the State without reasonable suspicion are closely scrutinized, and generally only permitted when [1] the privacy interests implicated are minimal, [2] the government's interest is substantial, and [3] safeguards are provided to insure that the individual's reasonable expectation of privacy is not subjected to unregulated discretion." *Id.* (citation omitted). The court held that this test was to be used when the government subjects a group of its employees to random testing instead of testing individuals based on a reasonable suspicion of drug use. *Id.*

7. *Delaraba*, 83 N.Y.2d at 375, 632 N.E.2d at 1255, 610 N.Y.S.2d at 932.

8. *Id.* at 370, 632 N.E.2d at 1252, 610 N.Y.S.2d at 929.

basis,[9] which would have involved testing ten officers each month.[10] With the plan in effect, police officers assigned to the three special units, as well as the incumbent members of the three units, would be required to sign consent forms.[11] Incumbent officers refusing to sign the consent forms would be transferred out of their unit without penalty.[12] The drug testing procedures, according to the Police Commissioner's drug testing plan, would ensure that the test sample was "unadulterated" and that the "chain of custody [was] uninterrupted."[13] Moreover, the test would be supervised by a person of the same sex as the police officer being tested.[14]

To prohibit the implementation of defendant's drug testing plan, the plaintiff commenced an article 78 proceeding and alleged the frequency of the testing to be an unconstitutional invasion of privacy.[15] Although the Appellate Division, Second Department, held that the random drug test was unreasonably intrusive,[16] the New York Court of Appeals reversed, ruling the drug testing plan constitutional.[17]

The proposed drug screening program in *Delaraba* involved both state and federal constitutional issues because random drug testing constitutes a search and seizure.[18] In order to satisfy the constitutional requirement, the *Delaraba* court analyzed the

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9. *Id.* Independent trials are a statistical method whereby "the random selection would not result in the removal of that member from the selection process for subsequent months." *Id.*

10. *Id.*

11. *Id.* at 372, 632 N.E.2d at 1253, 610 N.Y.S.2d at 930.

12. *Id.*

13. *Id.* at 373, 632 N.E.2d at 1253-54, 610 N.Y.S.2d at 930-31.

14. *Id.* at 373, 632 N.E.2d at 1254, 610 N.Y.S.2d at 931.

15. *Id.* at 370, 632 N.E.2d at 1252, 610 N.Y.S.2d at 929.

16. Delaraba v. Nassau County Police Dep't, 92 A.D.2d 655, 657, 597 N.Y.S.2d 82, 83 (2d Dep't 1993).

17. *Delaraba*, 83 N.Y.2d at 370, 632 N.E.2d at 1252, 610 N.Y.S.2d at 929.

18. *Id.* at 370-71, 632 N.E.2d at 1252, 610 N.Y.S.2d at 929. "It is well-established law that random drug screening constitutes a search and seizure within the meaning of the Federal and State Constitutions." *Id.* (citations omitted).

random drug testing program under the *Patchogue-Medford* three-prong test.[19] The *Delaraba* court also examined *Caruso v. Ward*[20] and *Seelig v. Koehler*[21] for guidance in the application of the three prongs of the *Patchogue-Medford* test.[22]

In *Caruso*, the New York Court of Appeals held that the drug screening program proposed for the Organized Crime Control Bureau [hereinafter OCCB] was constitutional.[23] Examining the first prong of the *Patchogue-Medford* test, the court reasoned that privacy expectations of police officers are generally diminished due to the nature of their jobs as public employees.[24] The *Caruso* court concluded that the privacy interests of the OCCB members were substantially diminished.[25] The privacy intrusions already in existence for members of the elite OCCB unit made the proposed drug screening seem like "just another layer of an already heightened, persistent and employee-expected scrutiny."[26] As for the second prong of the *Patchogue-Medford* test, the *Caruso* court found that the state had a substantial interest in the promotion of a drug screening program for the OCCB members.[27] The "public['s] perception of the OCCB unit

19. *Id.* at 371, 632 N.E.2d at 1252, 610 N.Y.S.2d at 929.

20. 72 N.Y.2d 432, 442, 530 N.E.2d 850, 855, 534 N.Y.S.2d 142, 147 (1988) (holding a proposed random urinalysis drug testing program for the Organized Crime Control Bureau of the New York City Police Department constitutional).

21. 76 N.Y.2d 87, 89 556 N.E.2d 125, 125, 556 N.Y.S.2d 832, 832 (upholding a proposed random urinalysis drug testing program for all corrections officers in the City of New York), *cert. denied*, 498 U.S. 847 (1990).

22. *Delaraba*, 83 N.Y.2d at 371-72, 632 N.E.2d at 1252-53, 610 N.Y.S.2d at 929-30.

23. *Caruso*, 72 N.Y.2d at 442, 530 N.E.2d at 855, 534 N.Y.S.2d at 147.

24. *Id.* at 439, 530 N.E.2d at 853, 534 N.Y.S.2d at 145.

25. *Id.* at 440, 530 N.E.2d at 854, 534 N.Y.S.2d at 146. The court concluded that the OCCB members did not have a high expectation of privacy "due to their pursuit of service in the elite unit based on conditions known in advance. . . . The officers agreed to undergo microscopic examinations of their personal lives, their financial affairs and their professional judgment calls." *Id.*

26. *Id.*

27. *Id.* at 441, 530 N.E.2d at 854, 534 N.Y.S.2d at 147.

and the entire Police Department would . . . be seriously impaired by these officers taking drugs on or off duty because, in either case, they would be violating the law they have been sworn to uphold and enforce."[28] The increased temptation by the OCCB from the daily exposure to drugs and the risks involved with an armed officer under the influence of drugs also influenced the court to rule that the drug screening program imposed in *Caruso* was constitutional.[29] In *Delaraba*, the Police Benevolent Association conceded that the first and second prongs of the *Patchogue-Medford* test were satisfied and only took issue with the third prong of the test.[30]

In *Seelig*, the New York Court of Appeals held that a random urinalysis drug-testing program conducted on correction officers was constitutional[31] due to "the particular combination of crucial circumstances comprising the paramilitary workplace milieu of jail guards, [and] their severely diminished privacy expectations under a sedulous set of testing procedures. . . ."[32] The *Seelig* court utilized the third prong of the *Patchogue-Medford* test and based its holding on the random selection process,[33] the ramifications for officers not complying with the testing procedures,[34] the state-of-the-art techniques used in collecting the test samples from the officers,[35] and the additional layers of testing employed when an officer tested positive.[36] The *Seelig*

28. *Id.* at 441, 530 N.E.2d at 854, 534 N.Y.S.2d at 146-47.

29. *Id.* at 441, 530 N.E.2d at 854, 534 N.Y.S.2d at 147.

30. *Delaraba*, 83 N.Y.2d at 373, 632 N.E.2d at 1254, 610 N.Y.S.2d at 931.

31. Seelig v. Koehler, 76 N.Y.2d 87, 89, 556 N.E.2d 125, 125, 556 N.Y.S.2d 832, 832, *cert. denied*, 498 U.S. 847 (1990).

32. *Id.* at 90, 556 N.E.2d at 126, 556 N.Y.S.2d at 833.

33. *Id.* at 95, 556 N.E.2d at 129, 556 N.Y.S.2d at 836. "A computer randomly selects 50 officers . . . every two weeks." *Id.*

34. *Id.* "A tenured officer may be discharged for refusing to comply with [the] test procedures, but only after a hearing." *Id.*

35. *Id.*

36. *Id.* "If the sample tests positive, it is retested by a more sophisticated method . . . [and] [i]f the result is unchanged, the employee who supplied the sample may choose a different State-certified laboratory to test the sample yet again." *Id.* at 95-96, 556 N.E.2d at 129, 556 N.Y.S.2d at 836.

court also noted that the protocol used in producing the test specimens ensured greater privacy than other testing programs.[37]

In *Delaraba*, the New York Court of Appeals ruled that the third prong of the *Patchogue-Medford* test was satisfied by the proposed drug-testing program because the protocols and procedural safeguards mentioned in *Seelig* were satisfied.[38] Furthermore, the court held that the required use of a supervisor of the same sex as the testing officer further ensured protection of the officer's privacy.[39] In addition to an analysis of the procedural safeguards, the court analyzed the defendant's use of an "independent trial" technique and found this technique "to be a necessary feature of effective random testing . . . ."[40]

Finally, the *Delaraba* court considered whether the frequency of the tests were so excessive as to subject the officers' "reasonable expectation of privacy to 'unregulated discretion'" and violate the Fourth Amendment.[41] The court examined the drug-testing program at issue under federal law of search and seizure and based on "'the standard of reasonableness under all the circumstances' as to 'both the inception and the scope of the [government] intrusion.'"[42] The court noted that the burden of proof for this test was on the Commissioner of Police, which required him to provide evidence that his decision to implement and design the drug-testing program was not arbitrary.[43] The court held that the Commissioner had met his burden of proof due to the corresponding similarities between this drug testing program and those approved by this court in *Caruso* and

37. *Id.* at 96, 556 N.E.2d at 129, 556 N.Y.S.2d at 836."[T]he specimen is produced in a private, closed stall, unlike the directly observed procedures elsewhere countenanced." *Id.*

38. *Delaraba*, 83 N.Y.2d at 373, 632 N.E.2d at 1254, 610 N.Y.S.2d at 931.

39. *Id.*

40. *Id.* "Clearly the best deterrent occurs when an individual remains in the pool subject to additional testing on an ongoing basis, otherwise the plan would be so watered down as to be useless." *Id.*

41. *Id.* at 374, 632 N.E.2d at 1254, 610 N.Y.S.2d at 931.

42. *Id.* (quoting Caruso v. Ward, 72 N.Y.2d 432, 437, 530 N.E.2d 850, 852, 534 N.Y.S.2d 142, 144 (1988)).

43. *Id.*

Seelig.[44] The court stated that the testing intervals could test a single employee a maximum of twelve times per year although an employee would on average be tested once every ten months, which is not so frequent as to render the plan constitutionally invalid.[45] Thus, the *Delaraba* court held that the drug-testing plan satisfied all constitutional requirements and that such a warrantless search without reasonable suspicion was in fact reasonable.[46]

Similarly, under federal law, the Supreme Court has held in *Skinner v. Railway Labor Executives' Ass'n*[47] that blood and urine testing of railroad employees involved in certain accidents was constitutional under the Fourth Amendment. The Supreme Court explained that the blood and urine testing was constitutional because "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."[48]

Furthermore, in *National Treasury Employees Union v. Von Raab*,[49] the Supreme Court stated that "where a Fourth Amendment intrusion serves special governmental needs . . . it is necessary to balance the individual's privacy expectations against the Government's interest to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."[50] The Court found that employees of the Customs Services had a diminished privacy expectation and thus were required to submit to random drug testing despite the absence of probable cause or individualized suspicion. Hence, it

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44. *Id.*

45. *Id.* at 374, 632 N.E.2d at 1254-55, 610 N.Y.S.2d at 931-32.

46. *Id.* at 375, 632 N.E.2d at 1255, 610 N.Y.S.2d at 932.

47. 489 U.S. 602 (1989).

48. *Id.* at 624.

49. 489 U.S. 656 (1988) (holding a drug testing program for Customs Services employees constitutional under the Fourth Amendment despite a lack of reasonable suspicion).

50. *Id.* at 665-66.

appears that New York and federal law analyze such drug testing procedures in a similar manner.

People v. Bora[51]
(decided May 3, 1994)

Defendant claimed that evidence discovered subsequent to a police officer's command to stop violated his state[52] and federal[53] constitutional right to be free from unreasonable searches and seizures. Defendant argued that the evidence should have been suppressed because the command to stop amounted to an unlawful seizure of his person, since the officer had directed him to stop without first having the prerequisite "reasonable basis" to believe that the defendant was involved in criminal activity.[54] The New York Court of Appeals held that the police officer's command to stop did not constitute a seizure under New York law, and thus the evidence was admissible in his prosecution for possession of a controlled substance.[55]

On June 1, 1989, two police officers received a report over their patrol car radio that a black male dressed in red and blue clothes was selling drugs on a Manhattan street corner.[56] Upon arriving at the corner, they saw Antonio Bora standing among a group of people.[57] He was the only individual matching the description given to the officers.[58] When one of the officers exited the patrol car, Bora looked in the direction of the officers,

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51. 83 N.Y.2d 531, 634 N.E.2d 168, 611 N.Y.S.2d 796 (1994).

52. N.Y. CONST. art. 1, § 12 Section 12 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. . . ."

53. 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 . . . ."

54. *Bora*, 83 N.Y.2d at 534, 634 N.E.2d at 169, 611 N.Y.S.2d at 797.

55. *Id.* at 536, 634 N.E.2d at 171, 611 N.Y.S.2d at 799.

56. *Id.* at 533, 634 N.E.2d at 169, 611 N.Y.S.2d at 797.

57. *Id.*

58. *Id.*