Touro Law Review

Volume 11 | Number 3 Article 67

1995

Search & Seizure

> home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.[264]

Using these considerations, the Court determined that the defendant's barn and the area immediately surrounding it were not within the curtilage, and it was proper to enter upon it.[265]

The New York Court of Appeals refused to follow the "open fields" doctrine enumerated in *Oliver v. United States*,[266] thereby affording defendants greater protection from unreasonable searches and seizures under New York law than they receive under federal law.

FOURTH DEPARTMENT

People v. LaMendola[267]
(decided November 16, 1994)

The People brought this action to appeal the decision by the Genesee county court to suppress evidence obtained from pen registers[268] having the capability of monitoring conversations.[269] In making this determination, the county court retroactively applied the rule stated in *People v. Bialostok*,[270] holding that pen

---

264. *Id.*

265. *Id.*

266. 466 U.S. at 178-79 (holding that there is no legitimate expectation of privacy in "open fields").

267. 206 A.D.2d 207, 619 N.Y.S.2d 901 (4th Dep't 1994).

268. A "pen register" is an instrument that "records or decodes electronic or other impulses that identify the numbers dialed or otherwise transmitted on a telephone line." *Id.* at 208, 619 N.Y.S.2d at 902. *See* N.Y. CRIM. PROC. LAW § 705.00 (McKinney Supp. 1995).

269. *LaMendola*, 206 A.D.2d at 208, 619 N.Y.S.2d at 902.

270. 80 N.Y.2d 738, 610 N.E.2d 374, 594 N.Y.S.2d 701 (1993). In *Bialostok*, pen registers were utilized to determine the nature of defendant's illegal betting. *Id.* at 742, 610 N.E.2d at 375-76, 594 N.Y.S.2d at 702-03. The court held that where a pen register has the capacity to monitor telephone conversations, although malfunctioning, such pen registers will be treated as an

registers which have the capability of monitoring conversations can only be authorized by a search warrant.[271] The issue on appeal was "whether the rule enunciated in *Bialostok* should be applied retroactively."[272] The Appellate Division, Fourth Department, held that because there were federal constitutional concerns invoked in the *Bialostok* rule, the county court correctly applied the rule retroactively and, as a result, the evidence in issue was properly suppressed.[273]

A large volume of incoming phone calls were recorded at the defendant's residency with the use of the pen registers on, and just prior to, the dates of scheduled football and basketball games.[274] Such phone calls coincided with the times the defendant told a confidential informant he could place bets for the various games.[275] A search warrant was obtained from a magistrate judge for the sole purpose of allowing police to monitor the defendant's telephone through the use of pen registers.[276] Based upon the information acquired from the pen registers and an investigator's observations, a search warrant was obtained.[277] Subsequently, the defendant requested information as to whether the pen registers, which the police utilized to record phone numbers from the defendant's phone, also had the "capability of monitoring conversations."[278] The District Attorney conceded that although inactive at the time of use, the pen registers did have the capability to record conversations.[279] The defendant subsequently moved to suppress the evidence because "no warrant had been issued for the pen registers that had the capacity to be used as an eavesdropping device."[280] The

---

eavesdropping device in which a search warrant is required. *Id.* at 743, 610 N.E.2d at 376, 594 N.Y.S.2d at 703.

271. *Id.*

272. *LaMendola*, 206 A.D.2d at 208, 619 N.Y.S.2d at 902.

273. *Id.* at 210, 619 N.Y.S.2d at 903.

274. *Id.* at 208, 619 N.Y.S.2d at 902.

275. *Id.*

276. *Id.*

277. *Id.* at 209, 619 N.Y.S.2d at 902.

278. *Id.*

279. *Id.*

280. *Id.*

county court, applying the *Bialostok* rule retroactively, granted defendant's motion to suppress.[281]

Expressing a fear that retroactive use of the *Bialostok* rule would "jeopardize many pending investigations," the People contended that the *Bialostok* rule should only be applied prospectively.[282] The People also asserted that because no federal constitutional concerns were expressed in *Bialostok*, the rule should be applied only prospectively.[283] However, the defendant argued that the rule is based on federal constitutional concerns and should be applied retroactively.[284]

In determining whether to apply *Bialostok* retroactively or prospectively, the *LaMendola* court had to decide, pursuant to *People v. Mitchell*,[285] whether the *Bialostok* rule was based on federal or state constitutional concerns.[286] The New York Court of Appeals stated in *Mitchell* that "[i]f no Federal constitutional principles are involved . . . the question of retroactivity is one of State law."[287] Under New York law, if a new rule is based solely on state constitutional concerns, then a court must examine the three factors set forth in *People v. Pepper*[288] to determine

---

281. *Id.* at 208, 619 N.Y.S.2d 902.

282. *Id.* at 209, 619 N.Y.S.2d 902.

283. *Id.* at 209, 619 N.Y.S.2d at 902-03.

284. *Id.* at 209, 619 N.Y.S.2d at 902.

285. 80 N.Y.2d 519, 606 N.E.2d 1381, 591 N.Y.S.2d 990 (1992). In *Mitchell*, the court was presented with the question of whether a new rule pertaining to the questioning of jurors could be applied retroactively. *Id.* at 525, 606 N.E.2d at 1384, 591 N.Y.S.2d at 993. The court decided that if federal constitutional concerns were addressed by the rule, the question of retroactivity would be one of federal law. *Id.* at 526, 606 N.E.2d at 1384, 591 N.Y.S.2d at 993. Otherwise, state law would dictate the law on retroactivity. *Id.*

286. *LaMendola*, 206 A.D.2d at 209, 619 N.Y.S.2d at 903.

287. *Mitchell*, 80 N.Y.2d at 526, 606 N.E.2d at 1384, 591 N.Y.S.2d at 993.

288. 53 N.Y.2d 213, 423 N.E.2d 366, 440 N.Y.S.2d 889, *cert. denied*, 454 U.S. 967 (1981). In *Pepper*, the defendants moved to retroactively apply a new rule which stated that once an accusatory instrument has been filed, right to counsel can only be waived in the presence of counsel. *Id.* at 217, 423 N.E.2d at 367, 440 N.Y.S.2d at 890. The New York Court of Appeals, basing

whether such rule should be applied retroactively or prospectively.[289] However, the *LaMendola* court noted that if a new rule encompassed federal constitutional principles, then, pursuant to *Griffith v. Kentucky*,[290] such a rule would be applied retroactively.[291]

In *LaMendola*, the Appellate Division, Fourth Department, agreeing with the county court, held that in *Bialostok*, "'the issue of statutory construction . . . was not based on a violation of the [state] statute and did not rest solely on State law.'"[292] The appellate division concurred with the county court's decision that *Bialostok* was based on both state and federal constitutional concerns against illegal searches and seizures.[293] Thus, pursuant to *Griffith*, the appellate division held that the *Bialostok* rule should be applied retroactively and thus defendant's motion to suppress was upheld.[294]

The federal bright-line test, as dictated by *Griffith*, is in contrast to the factors enunciated in the New York State

---

its decision on the evaluation of three factors, held that the rule could be applied retroactively. *Id.* at 221-22, 423 N.E.2d at 369, 440 N.Y.S.2d at 892.

289. *Id.* at 217, 423 N.E.2d at 367, 440 N.Y.S.2d at 890. The three factors set forth from the *Pepper* court which are to be considered include: "(1) the purpose to be served by the new standards, (2) the extent of the reliance by law enforcement authorities on the old standards, and (3) the effect on the administration of justice of a retroactive application of the new standards." *Id.* at 220, 423 N.E.2d at 369, 440 N.Y.S.2d at 892.

290. 479 U.S. 314 (1987). In *Griffith*, the defendant's appeal claimed that the prosecutor used race-based peremptory challenges. *Id.* at 317. The United States Supreme Court held that the use of peremptory challenges based on race denied the defendant of equal protection. *Id.* The Court explained that a new rule is to be applied retroactively to those cases which are still pending on direct review or not yet final. *Id.* at 328. *See* Batson v. Kentucky, 476 U.S. 79, 86 (1986) (holding that racially discriminatory peremptory challenges to strike black venire persons "denied the protection that a trial by jury is intended to secure").

291. *Griffith*, 479 U.S. at 328. The court established that a newly formed rule is to be applied retroactively to all cases pending on direct review. *Id.*

292. *LaMendola*, 206 A.D.2d at 209, 619 N.Y.S.2d at 903 (quoting *Bialostok*, 80 N.Y.2d at 745, 610 N.Y.2d at 377, 594 N.Y.S.2d at 704).

293. *Id.*

294. *Id.* at 210, 619 N.Y.S.2d 903.

retroactivity test adopted in *Pepper* for determining whether a rule is to be applied retroactively. Federal law takes a rigid approach and inquires only to whether the new rule is grounded in federal principles and according to federal law. If the new rule is based on federal constitutional concerns, then it is applied retroactively without exception. However, New York's rule on retroactivity takes a more practical approach and inquires not only to what the purpose of the new rule is, but also as to its practical effects upon the judicial system and the individuals who may have relied upon the old rule.

It may be stated, and rightly so, that the factors articulated in *Pepper* present the possibility that a rule which should be applied retroactively will not be so applied because of its practical effect on the administration of justice and the reliance upon it by the defendants. This is perhaps a weakness, however, it provides a degree of judicial discretion that is sometimes needed when the rights of individuals are involved. The functional difference in the two rules is that the state rule provides a means for determining the degree of protection a defendant is entitled, whereas the federal bright-line test relies on the constitutional guarantees inherent in the Constitution and its amendments.

People v. Saurini[295]
(decided February 4, 1994)

Defendant appealed the denial of his motion to suppress evidence on the grounds that the warrantless entry onto his property by deputy sheriffs violated his constitutional protection against unreasonable searches and seizures pursuant to both the New York State Constitution[296] and the United States

295. 201 A.D.2d 869, 607 N.Y.S.2d 518 (4th Dep't 1994).

296. N.Y. CONST. art. I, § 12. This provision provides 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 . . . ." *Id.*