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CRIMINAL TERM

BRONX COUNTY

People v Campanioni³⁸²
(printed June 24, 1994)

Defendant, David Campanioni, claimed that his state³⁸³ and federal³⁸⁴ constitutional right to be free from unreasonable searches and seizures was violated when police officers seized his gun pursuant to an unlawful automobile search.³⁸⁵ The Bronx County Criminal Term granted the defendant's motion to suppress the evidence because the seizure of the gun was obtained as the fruit of the unlawful search and seizure of the defendant's automobile.³⁸⁶

Based on the contradictory testimony of the two arresting police officers, the court found that the officers had stopped the defendant at a corner because his car was missing a license plate.³⁸⁷ However, the purpose for the stop was unclear because one officer claimed that the license plate was not visible, whereas the other officer testified that the license plate was observed in the rear window.³⁸⁸ There was also contradictory testimony as to whether the defendant produced automobile ownership papers.³⁸⁹ After requesting defendant's license and registration, one of the

382. N.Y. L.J., June 24, 1994, at 25 (Crim. Term, Bronx County 1994).

383. N.Y. CONST. art. I, § 12. Article I, section 12 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.*

384. U.S. CONST. amend. IV. The Fourth Amendment states in pertinent part: "The right of the people to be secure in their person, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . ." *Id.*

385. *Campanioni*, N.Y. L.J., June 24, 1994, at 25.

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* It was later determined that Campanioni recently purchased the automobile at a police auction. *Id.*

police officers asked the defendant if he had a gun.³⁹⁰ The defendant admitted he was in possession of a gun.³⁹¹ The police officer then removed him from the car, and then took the gun from the defendant's right pocket.³⁹² Whether the search was conducted before or after the arrest was also contradicted by the police officers' testimony.³⁹³ After listening to the contradicting testimony, the *Campanioni* court concluded that the search was illegal and that the evidence should be suppressed.³⁹⁴

Analysis under both the New York State and Federal Constitutions led the court to determine the conduct of the police officers was a violation of the defendant's right to be free from illegal searches and seizures.³⁹⁵ The *Campanioni* court initially stated that two issues had to be decided in order to determine whether the search and seizure was constitutional.³⁹⁶ First, whether the police officer's routine traffic stop of defendant's automobile was lawful.³⁹⁷ Second, the court addressed the issue of whether the seizure of the gun from the defendant was lawful.³⁹⁸

With regard to the first issue, the *Campanioni* court relied on *People v. Sobotker*³⁹⁹ to determine whether a police officer is justified in conducting a lawful routine traffic check.⁴⁰⁰ The *Sobotker* court held that it is necessary for police officers to have

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.* See *People v. Berrios*, 28 N.Y.2d 361, 270 N.E.2d 709, 321 N.Y.S.2d 884 (1971) (shifting the burden of proof to the People in a possessory narcotics and gambling case).

398. *Campanioni*, N.Y. L.J., June 29, 1994, at 25.

399. 43 N.Y.2d 559, 373 N.E.2d 1218, 402 N.Y.S.2d 993 (1978).

400. *Campanioni*, N.Y. L.J., June 29, 1994, at 25. See *Sobotker*, 43 N.Y.2d at 563, 373 N.E.2d at 1220, 402 N.Y.S.2d at 995. A routine traffic check on a highway is justified "only when it is conducted pursuant to 'nonarbitrary, nondiscriminatory, uniform' traffic procedures or when there is specific cause or reasonable suspicion that a motorist is about to violate a law." *Id.*

a reasonable suspicion of criminal activity in order to stop an automobile.⁴⁰¹ It is not enough that the police officer has a "hunch" that there is criminal activity.⁴⁰² In *Campanioni*, the court noted that the police officers had no reason to suspect criminal activity before they stopped the defendant in his car.⁴⁰³ In fact the court noted that one of the police officers testified that the defendant was acting like a normal person who had done nothing wrong when he was stopped by the police.⁴⁰⁴ Without more, the court concluded that the police officers were not sufficiently credible enough to satisfy the prosecution's burden of proof⁴⁰⁵ and, thus, the defendant's motion to suppress the gun should have been granted.⁴⁰⁶ The court then ruled that, based on the unlawful traffic stop, the gun seized by the officers was the "fruit" of an unlawful search.⁴⁰⁷

Additionally, the court examined an alternative claim raised by the People to validate the search and seizure.⁴⁰⁸ The police officers contended that the defendant consented to the search and, thus, the search and seizure was lawful.⁴⁰⁹ The court rejected this claim, relying on *People v. Gonzalez*⁴¹⁰ to define the

401. *Id.* at 564, 373 N.E.2d at 1220, 402 N.Y.S.2d at 996. Reasonable suspicion is defined as "the quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe that criminal activity is at hand." *Id.*

402. *Id.*

403. *Campanioni*, N.Y. L.J., June 29, 1994, at 25.

404. *Id.* The defendant was acting nervously and the police officers "conceded that such purported 'nervous' movements were typical of people who have broken no law when stopped by the police." *Id.*

405. *Id.* The court noted that at a suppression hearing, the prosecution has the burden of proof to show that the police conduct was lawful. *Id.* The court explained that where the police officers are not credible, the prosecution has not satisfied their burden. *Id.* See *People v. Berrios*, 28 N.Y.2d 361, 270 N.E.2d 709, 321 N.Y.S.2d 884 (1971).

406. *Campanioni*, N.Y. L.J., June 24, 1994, at 25.

407. *Id.*

408. *Id.*

409. *Id.*

410. 39 N.Y.2d 122, 347 N.E.2d 575, 383 N.Y.S.2d 215 (1976). In *Gonzalez*, federal agents arrested Mr. Gonzalez outside of his apartment for possession and sale of drugs, kicked in the Gonzalez' apartment door, arrested

meaning of voluntary consent.⁴¹¹ The *Campanioni* court cited to several factors to be considered in determining whether a consent was voluntary, including “the extent to which the individual was restrained; the individual’s personal background, including his age and prior experience with law enforcement officers; whether or not the individual was cooperative, and whether he was advised of his right to refuse consent.”⁴¹² Relying on these factors, the court held that the defendant had not voluntarily consented to a search.⁴¹³

Although the analysis for state and federal search and seizure provisions are similar in form and analysis, the level of intrusion varies slightly. Under New York case law, absent evidence of a crime, a police officer cannot justify a search of an automobile during a traffic stop.⁴¹⁴ However, the Fourth Amendment of the United States Constitution permits a police officer a greater level of “intrusion.”⁴¹⁵ Thus, under the New York Constitution, the

Mrs. Gonzalez inside for possession, and performed a routine search for drugs. *Id.* at 125, 347 N.E.2d at 578, 383 N.Y.S.2d at 217. After the arrests the federal agents threatened to separate the newly married couple forever, and subject them to severe sentencing laws unless they consented to a “full blown search of the apartment.” *Id.* at 126, 347 N.E.2d at 578, 383 N.Y.S.2d at 218. Accordingly, they agreed to sign for the search. *Id.* at 126-27, 347 N.E.2d at 579, 383 N.Y.S.2d at 212. The court held such coercion was impermissible. *Id.* at 127-31, 347 N.E.2d at 577-82, 383 N.Y.S.2d at 218-21.

411. *Campanioni*, N.Y. L.J., June 24, 1994, at 25. *See Gonzalez*, 39 N.Y.2d at 128, 347 N.E.2d at 580, 383 N.Y.S.2d at 219. The *Gonzalez* court presented a method to determine whether a consent was voluntary:

Consent to search is voluntary when it is a true act of the will, an unequivocal product of an essentially free and unconstrained choice. Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle No one circumstance is determinative of the voluntariness of consent. Whether consent has been voluntarily given or is only a yielding to overbearing official pressure must be determined from the circumstance

Id.

412. *Id.*

413. *Id.*

414. *See People v. Berrios*, 28 N.Y.2d 361, 270 N.E.2d 709, 321 N.Y.S.2d 884 (1971).

415. *Campanioni*, N.Y. L.J., June 24, 1994, at 25. *Cf. New York v. Class*, 45 U.S. 106, 117 (1986) (holding the search and seizure permissible when two

seizure was impermissible, but the result may be different under the Federal Constitution.

People v. James⁴¹⁶
(printed December 30, 1994)

Defendant moved to suppress physical evidence⁴¹⁷ and statements obtained in violation of his state constitutional rights against unreasonable searches and seizures⁴¹⁸ and self-incrimination.⁴¹⁹ The Bronx County Criminal Court, in denying defendant's motion to suppress, held that defendant had standing to challenge the police stop of the livery cab.⁴²⁰ In addition, the court held that the police had probable cause to arrest the defendant.⁴²¹ Finally, the court held that defendant's consent to search the car was voluntary.⁴²²

On April 10, 1993, two police officers, on routine patrol,⁴²³ spotted a livery cab operating with a broken rear brake light.⁴²⁴ The officers directed the cab driver to pull over to the side of the road.⁴²⁵ As the cab was approaching a stop, one officer observed the passenger "lean forward, place his arms behind his back and

police officers, in an attempt to obtain the VIN number from a car after the defendant removed himself from his vehicle, observed and seized a gun underneath the driver's seat).

416. N.Y. L.J., Dec. 30, 1994, at 22 (Crim. Term, Bronx County 11994).

417. *Id.* The evidence obtained by the police included marijuana and a gun, a Walter PPK 380. *Id.*

418. N.Y. CONST. art. I, § 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" *Id.*

419. N.Y. CONST. art. I, § 6. Section 6 states in pertinent part: "No person shall . . . be compelled in any criminal case to be a witness against himself" *Id.*

420. *James*, N.Y. L.J., Dec. 30, 1994, at 22.

421. *Id.*

422. *Id.*

423. *Id.* The officers were in the vicinity of East 161st Street and Melrose Avenue. *Id.*

424. *Id.*

425. *Id.*

then bring them forward.”⁴²⁶ Once the cab stopped, the officers exited their vehicle and defendant exited the cab with his hands in the air stating “I’m just smoking some weed. I’m high on some weed.”⁴²⁷ The officer on the driver’s side pointed his flashlight toward the back seat of the cab and saw part of a gun stuffed between the back and seat cushion.⁴²⁸ Subsequently, the gun was seized and the defendant arrested.⁴²⁹ As the officers searched defendant incident to his arrest, they recovered a bag of marijuana in the defendant’s pants pocket.⁴³⁰ The cab driver was eventually issued a summons for the violation.⁴³¹

The court in *James* first stated that, according to *People v. Ingle*,⁴³² police officers who stop a car and detain its occupants have, in effect, seized that car and those occupants, regardless of the length of the detention.⁴³³ In determining whether the police stop was reasonable, the *James* court further relied on *People v. John B.B.*,⁴³⁴ in which the New York Court of Appeals held that such a determination must be examined in light of an individual’s constitutional rights and the state’s interest.⁴³⁵ Further, in *People v. Knight*,⁴³⁶ the Appellate Division, First Department held that regardless of any issue of privacy, a passenger of a livery cab has

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. 36 N.Y.2d 413, 330 N.E.2d 39, 369 N.Y.S.2d 67 (1975).

433. *Id.* at 418, 330 N.E.2d at 42, 369 N.Y.S.2d at 72.

434. 56 N.Y.2d 482, 438 N.E.2d 864, 453 N.Y.S.2d 158 (1982).

435. *Id.* at 487, 438 N.E.2d at 867, 453 N.Y.S.2d at 161. In response to a series of recent burglaries in a local, remote area, the police utilized a “roving roadblock” for vehicles to ascertain the occupant’s identity and to gather information about the burglaries. *Id.* at 486, 438 N.E.2d at 866, 453 N.Y.S.2d at 160. As a result of these roadblocks, the police discovered items in one vehicle which were reported stolen. *Id.* The court held that these stops were “uniform, nonarbitrary and nondiscriminatory and did not violate the defendant’s rights against unreasonable searches and seizures.” *Id.* at 488-89, 438 N.E.2d at 867, 453 N.Y.S.2d at 161.

436. 138 A.D.2d 294, 526 N.Y.S.2d 102 (1st Dep’t 1988).

standing to challenge a police stop.⁴³⁷ Thus, the court in *James* relied on the *Knight* decision and ruled that the defendant had standing.⁴³⁸ The court further recognized that pursuant to the decision in *People v. Millan*,⁴³⁹ defendant had standing to challenge the police seizure of the gun as well.⁴⁴⁰

The second issue the *James* court considered was whether the police stop of the cab based on a traffic violation was lawful.⁴⁴¹ In *Ingle*, the New York Court of Appeals held that a police officer may stop a car when there is a traffic violation or when the police have a reasonable suspicion that there has been criminal activity.⁴⁴² Because the officers noticed that the cab had a broken tail light, the *James* court ruled that the officers had the right to stop the cab.⁴⁴³

Another constitutional issue before the *James* court was whether the officers had probable cause to arrest defendant for possession of the gun and marijuana.⁴⁴⁴ The court relied on *People v. Sobotker*,⁴⁴⁵ in which the New York Court of Appeals ruled that, before the police can stop someone in a public place, an officer must have reasonable suspicion, which is "the quantum of knowledge sufficient to believe criminal activity is at hand."⁴⁴⁶ Furthermore, the court relied on *People v. Carney*,⁴⁴⁷ where the New York Court of Appeals ruled that any seizure,

437. *Id.* at 296, 526 N.Y.S.2d at 104.

438. *James*, N.Y. L.J., Dec. 30, 1994, at 22.

439. 69 N.Y.2d 514, 508 N.E.2d 903, 516 N.Y.S.2d 168 (1987) (rejecting the idea that automobile passengers have no standing to challenge a police search as "offend[ing] fundamental tenets of fairness inherent in New York criminal jurisprudence").

440. *James*, N.Y. L.J., Dec. 30, 1994, at 22.

441. *Id.*

442. *Ingle*, 36 N.Y.2d at 416, 330 N.E.2d at 41, 369 N.Y.S.2d at 71 (1975); *People v. Clemente*, 195 A.D.2d 300, 600 N.Y.S.2d 12 (1st Dep't 1993) (finding a valid police stop where defendant was passenger in an automobile which had a defective headlight).

443. *James*, N.Y. L.J., Dec. 30, 1994, at 22.

444. *Id.*

445. 43 N.Y.2d 559, 373 N.E.2d 1218, 402 N.Y.S.2d 993 (1978).

446. *Id.* at 564, 373 N.E.2d at 1220, 402 N.Y.S.2d at 996.

447. 58 N.Y.2d 51, 444 N.E.2d 26, 457 N.Y.S.2d 776 (1982).

arising from reasonable suspicion, must be based on “‘specific’ facts so that its propriety may be measured by the ‘detached, neutral scrutiny of a judge.’”⁴⁴⁸

Relying on such precedent, the *James* court stated several reasons why the officers had probable cause to believe that the defendant had unlawfully possessed the gun and drugs. First, defendant quickly exited the cab and admitted to being under the influence of drugs.⁴⁴⁹ Second, in light of the automobile assumption, the court noted that it was reasonable for the police to conclude the gun belonged to defendant.⁴⁵⁰ Third, the court found that it was reasonable for the police officers to believe that defendant possessed marijuana based on defendant’s mental state at the time of search.⁴⁵¹ Based on what the officers knew at the time of the search, the *James* court ruled that probable cause existed to arrest the defendant.⁴⁵²

In rejecting defendant’s Fourth Amendment claim that the police use of a flashlight constituted a search, the court cited to the United States Supreme Court decision in *Texas v. Brown*.⁴⁵³ In *Brown*, the Supreme Court held that a search is not being conducted where an officer shines a flashlight into the window of an automobile.⁴⁵⁴ Furthermore, in *Millan*, the New York Court of Appeals upheld similar police conduct as not constituting a search.⁴⁵⁵ Thus, the court in *James* held that shining the flashlight was not a search and, thus, the seizure of the gun was lawful under the plain view doctrine.⁴⁵⁶

The plain view doctrine allows law enforcement officials to seize items without a search warrant if three conditions are

448. *Id.* at 57, 444 N.E.2d at 29, 457 N.Y.S.2d at 779 (Fuchsberg, J., concurring) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).

449. *James*, N.Y. L.J., Dec. 30, 1994, at 22.

450. *Id.*

451. *Id.*

452. *Id.*

453. 460 U.S. 730 (1983).

454. *Id.* at 740.

455. *Millan*, 69 N.Y.2d at 519, 508 N.E.2d at 905, 516 N.Y.S.2d at 170 (1987).

456. *James*, N.Y. L.J., Dec. 30, 1994, at 22.

satisfied: the officer is lawfully in a position to view the item; the police have lawful access to the item; and the incriminating nature of the object is immediately apparent.⁴⁵⁷ Thus, the court in *James* upheld the seizure of the gun under the plain view doctrine.⁴⁵⁸

Finally, the *James* court ruled that defendant's statement that he was under the influence of drugs was a voluntary statement and was not obtained in violation of defendant's right to counsel.⁴⁵⁹ In *People v. Simpson*,⁴⁶⁰ the Appellate Division, First Department held that a defendant's statement is voluntary when it is in response to police questioning of another witness which is not meant to induce or provoke the defendant to speak.⁴⁶¹ In *James*, the court noted that defendant spontaneously made the statements before the police had an opportunity to question him.⁴⁶² Thus, the court denied defendant's request to suppress the statements.⁴⁶³

In the federal courts, a seizure is defined as the application of physical force or "a submission to the assertion of authority."⁴⁶⁴ This definition is not as broad as New York's definition, where the defendant need not be physically restrained to be "seized." Under federal law, in order for an individual to have standing to challenge a search or seizure violation, a defendant must demonstrate that he or she has a "reasonable expectation of

457. *People v. Diaz*, 81 N.Y.2d 106, 110, 612 N.E.2d 298, 301, 595 N.Y.S.2d 940, 943 (1984) (citing *Horton v. California*, 496 U.S. 128, 129 (1990)).

458. *James*, N.Y. L.J., Dec. 30, 1994, at 22.

459. *Id.*

460. 190 A.D.2d 593, 600 N.Y.S.2d 12 (1st Dep't 1993). In *Simpson*, the defendant was arrested and charged with attempted burglary. *Id.* The defendant spoke up after hearing an officer question a building superintendent about whether the defendant had permission to be on the premises. *Id.* The court held that any statements made were not "the product of custodial interrogation." *Id.*

461. *Id.*

462. *James*, N.Y. L.J., Dec. 30, 1994, at 22.

463. *Id.*

464. *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

privacy” in the area which was searched.⁴⁶⁵ The federal court’s test for standing is essentially the same as New York’s test in that both require a criminal defendant to show a “legitimate expectation of privacy in the invaded place.”⁴⁶⁶

Furthermore, the analysis of automobile stops is similar under federal law. In *Delaware v. Prouse*,⁴⁶⁷ the Supreme Court engaged in a similar balancing of the state’s interest and the intrusion upon the rights of the individual.⁴⁶⁸ The purpose of utilizing a balancing test is to ensure the “reasonableness” of police conduct as it relates to private citizens.⁴⁶⁹

The doctrine of plain view has been heavily relied upon by federal courts. The Supreme Court has set out standards for the doctrine of plain view in the case of *Horton v. California*.⁴⁷⁰ The doctrine does not increase the scope of the search but it does allow officers to seize evidence which was not the actual target of the search, so long as it satisfies the same three requirements used by the New York courts.

465. *United States v. Salvucci*, 448 U.S. 83, 91-92 (1980). This standing test is derived from the Supreme Court’s decision in *Katz v. United States*, 389 U.S. 347 (1967) (outlining the scope of the Fourth Amendment’s protection) (Harlan, J., concurring).

466. *People v. Ponder*, 54 N.Y.2d 160, 166, 429 N.E.2d 735, 737, 445 N.Y.S.2d 57, 59 (1981).

467. 440 U.S. 648 (1979) (holding random stops to check driver’s license and registration unconstitutional). In *Prouse*, a patrolman pulled over the defendant to “check the driver’s license and registration” because he “saw the car in the area and wasn’t answering any complaints, so [he] decided to pull them off.” *Id.* at 650-51. The officer smelled smoke as he approached the car and found marijuana on the car floor. *Id.* at 648. The Supreme Court held that the seizure of the marijuana violated defendant’s Fourth Amendment rights. *Id.* at 663. The Court found that the legitimate governmental interest in this law enforcement practice was unreasonable and did not outweigh the “intrusion on the individual’s Fourth Amendment interests.” *Id.* at 654.

468. *Id.*

469. *Id.* at 653-54.

470. 496 U.S. 128 (1990). The police had a warrant to search defendant’s home for weapons and proceeds from a robbery. *Id.* at 130-31. While conducting their search, an officer seized a machine gun, two stun guns, and other items linking the defendant to the robbery. *Id.* at 131. However, these items were not listed in the search warrant. *Id.* The Court found no Fourth Amendment violation. *Id.* at 142.

With respect to the issue of probable cause, the Supreme Court held that probable cause is defined as "evidence which would 'warrant a man of reasonable caution in the belief' that a felony has been committed."⁴⁷¹ Similarly, in New York, for police officers to have probable cause for arrest, the officers must first have sufficient knowledge to believe criminal activity is afoot.⁴⁷²

For the federal courts, as well as for the courts of New York courts, the seminal case in the area of Fifth Amendment law is *Miranda v. Arizona*.⁴⁷³ In *Miranda*, the Supreme Court attempted to devise a rule to eliminate much of the physical and mental coercion utilized by law enforcement officials to get suspects to incriminate themselves.⁴⁷⁴ The Court's remedy consisted of a set of warnings which must be given to a suspect before custodial interrogation.⁴⁷⁵ In *Rhode Island v. Innis*,⁴⁷⁶ the

471. *Wong Sun v. United States*, 371 U.S. 471, 479 (1963) (citing *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

472. See *Sobotker*, 43 N.Y.2d 559, 373 N.E.2d 1218, 402 N.Y.S.2d 993 (1978).

473. 384 U.S. 436 (1966). Defendant, a suspect in a kidnapping and rape case, was questioned by two police officers for two hours without being apprised of his right to counsel or his right against self-incrimination. *Id.* at 492. He signed a written confession which contained a typed paragraph to the effect that the confession was voluntary and made with "full knowledge" of all legal rights, including the right against self-incrimination. *Id.* at 491-92. The Court concluded that defendant's signing of this statement did not constitute "the knowing and intelligent waiver required to relinquish constitutional rights." *Id.* at 492.

474. *Id.* at 452 (recognizing use of false lineups and "reverse lineups" to procure confessions from unwary defendants).

475. *Id.* at 444. The decision describes *Miranda* warnings as follows: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.*

476. 446 U.S. 291 (1980). The police apprehended the defendant who was wanted in the shotgun murder of a taxi driver. He was advised of his *Miranda* rights and requested to speak with a lawyer. *Id.* at 294. Three officers transported defendant to the police station in a "caged wagon." *Id.* En route, two of the officers made statements to each other such as "there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves" and "it would

Supreme Court elaborated as to what constitutes interrogation for the purposes of requiring *Miranda* warnings. The *Innis* court held that interrogation refers to express questioning and "any words or actions on the part of the police . . . that the police should know is reasonably likely to elicit an incriminating response from the suspect."⁴⁷⁷

Many of the principles of unreasonable searches and seizures and self-incrimination are similar in both the federal courts and the New York State courts. Although there are some differences in their interpretation and application, both court systems promote the same policy objectives: protecting the privacy of all citizens against arbitrary intrusion by the government and preventing coerced statements due to illegal action on the part of law enforcement officials. Therefore, the outcome under federal law would most likely be the same as decisions made by New York courts.

CRIMINAL COURT

KINGS COUNTY

People v. Thomas⁴⁷⁸
(printed September 12, 1994)

The defendant filed a motion to suppress physical evidence, alleging that the police officers who gathered the evidence did not have reasonable suspicion of either the commission of an unlawful act, or the presence of danger to justify the search of the defendant's knapsack.⁴⁷⁹ The defendant claimed that seizure of his knapsack and the automatic weapon found therein violated

be too bad if [a child] would pick up the gun, maybe kill herself." *Id.* at 294-95. Defendant interrupted the officers and told them to let him lead them to the gun. *Id.* at 295. The Court held that this conversation between the officers did not constitute express or implied questioning. *Id.* at 291.

⁴⁷⁷. *Id.* at 301.

⁴⁷⁸. N.Y. L.J., Sept. 12, 1994, at 32 (Crim. Ct. Kings County).

⁴⁷⁹. *Id.*

his constitutional rights against unreasonable searches and seizures.⁴⁸⁰ The defendant's claim falls under both the New York State Constitution⁴⁸¹ and the United States Constitution.⁴⁸² The Criminal Court, Queens County, granted the defendant's motion to suppress and held that the police officers did not establish the requisite suspicion to justify the arrest of the defendant.⁴⁸³ The court, therefore, concluded that the physical evidence obtained was a result of unlawful police conduct.⁴⁸⁴

While on patrol in Kings County, police officers Falconite and Canny observed a car cross the double yellow lines and make a left turn without signaling.⁴⁸⁵ After they noticed these infractions, the officers stopped the vehicle.⁴⁸⁶ Officer Falconite approached on the left side of the car and asked the driver for his license, registration, and insurance card while Officer Canny approached on the passenger side of the car.⁴⁸⁷ While Officer Falconite was speaking with the driver, he observed the defendant in the rear seat on the right side of the vehicle.⁴⁸⁸ Upon learning that the driver did not have a valid drivers license, Officer Falconite testified that he opened the left rear door to tell

480. *Id.* See *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (holding that evidence illegally obtained by state officials is not admissible in state trial as Fourth Amendment protection is applied to the states through the Fourteenth Amendment).

481. 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. . . ." *Id.*

482. U.S. CONST. amends. IV, XIV. The Fourth Amendment 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" *Id.* The Fourteenth Amendment provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law" *Id.*

483. *Thomas*, N.Y. L.J., Sept. 12, 1994, at 32.

484. *Id.*

485. *Id.*

486. *Id.*

487. *Id.*

488. *Id.*

the passenger that the vehicle was not a licensed livery cab.⁴⁸⁹ The officer then observed what appeared to be a black knapsack on the rear floor of the vehicle and subsequently ordered the defendant to exit from the motor vehicle.⁴⁹⁰ As the defendant exited the vehicle, the officer grabbed the knapsack.⁴⁹¹ In response, the defendant turned to the officer and demanded the return of his bag.⁴⁹² According to Officer Falconite's testimony, he handcuffed the defendant as the defendant attempted to take his knapsack.⁴⁹³ He further testified that the knapsack opened and he recovered a semi-automatic pistol with six bullets in the weapon's clip.⁴⁹⁴

In determining whether the search conducted was constitutional, the court relied on several New York State decisions. In *People v. Woods*,⁴⁹⁵ the Appellate Division, Second Department held that a police officer may stop a motor vehicle if there is a showing that the officer observed a violation of the Vehicle and Traffic Law or that the occupants have been or will engage in criminal activity.⁴⁹⁶ Further, the New York Court of

489. *Id.* On cross examination, the officer's testimony was impeached by use of his Grand Jury testimony, in which the officer testified that he opened the door of the vehicle for safety reasons. *Id.*

490. *Id.*

491. *Id.* The officer testified that the knapsack felt heavy as he lifted it with his right hand, and in cradling the bag with his other hand, he felt what seemed to be a firearm in a holster. *Id.*

492. *Id.*

493. *Id.*

494. *Id.*

495. 189 A.D.2d 838, 592 N.Y.S.2d 748 (2d Dep't 1993).

496. *Id.* at 841, 592 N.Y.S.2d at 750. Despite the arresting officer's testimony that he had followed the vehicle to ascertain the driver's identity, the court held that the defendant's vehicle was stopped based on a traffic violation, namely the officer's observation of the vehicle's tinted windows. *Id.* at 842, 592 N.Y.S.2d at 751. See *People v. Petti*, 182 A.D.2d 720, 720, 582 N.Y.S.2d 270, 271 (2d Dep't 1992) (holding that the police officers were justified in stopping defendant's vehicle since they witnessed numerous Vehicle and Traffic Law violations); *People v. Greene*, 135 A.D.2d 449, 451, 522 N.Y.S.2d 860, 861-62 (1st Dep't 1987) (holding that absent a reasonable suspicion that defendant was engaged in criminal acts or posed a danger, the forcible detention and frisk of the defendant violated his constitutional rights).

Appeals has held that when a vehicle is stopped, a police officer can lean into a motor vehicle to speak to the occupants⁴⁹⁷ as well as direct a driver to step out of the vehicle after a lawful stop.⁴⁹⁸ Similarly, in *Pennsylvania v. Mimms*,⁴⁹⁹ the United States Supreme Court held that a police officer is permitted to order the driver out of a vehicle for questioning, out of the concern for the police officer's safety.⁵⁰⁰

However, the *Thomas* court held that the present situation required a more substantial basis for the police officers' actions.⁵⁰¹ The court explained that the officers had to establish the presence of "some articulable facts which initially, or during the course of the encounter, established reasonable suspicion that [the defendant was] involved in criminal acts or pose[d] some danger to the officer[s]."⁵⁰² Instead, the court in *Thomas* noted an absence of a reasonable suspicion throughout the entire investigation.⁵⁰³ The court focused on the fact that the defendant made "no overt gestures or comments that would, even by the

497. See *People v. Vasquez*, 106 A.2d 327, 331, 483 N.Y.S.2d 244, 248 (1st Dep't 1984) (stating that leaning into a car to speak to the passenger was not a violation of defendant's rights), *aff'd*, 66 N.Y.2d 968, 969, 489 N.E.2d 757, 758, 498 N.Y.S.2d 788, 789 (1985), *cert. denied*, 475 U.S. 1109 (1986).

498. See *People v. Robinson*, 74 N.Y.2d 773, 774, 543 N.E.2d 733, 733, 545 N.Y.S.2d 90, 90 (holding that directing a driver to exit a lawfully stopped motor vehicle is not a violation of the Fourth Amendment "because [of] the inherent and inordinate danger to investigating police officers . . ."), *cert. denied*, 493 U.S. 966 (1989).

499. 434 U.S. 106 (1977).

500. *Id.* at 110-11. The United States Supreme Court held that the defendant was lawfully detained and the order to exit the vehicle was reasonable, thus, permissible under the Fourth Amendment. *Id.* See *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (stating that the standard inquires into whether "a man of reasonable caution" would believe the action taken at the moment of the search and seizure was appropriate).

501. *Thomas*, N.Y. L.J., Sept. 12, 1994, at 32.

502. *Id.* See *People v. Harrison*, 57 N.Y.2d 470, 479, 443 N.E.2d 447, 452, 457 N.Y.S.2d 199, 204 (1982) (holding that a "dirty" rental car did not establish the requisite reasonable suspicion of criminal activity).

503. *Thomas*, N.Y. L.J., Sept. 12, 1994, at 32.

farthest stretch of one's imagination, establish a reasonable suspicion of an unlawful act."⁵⁰⁴

In its analysis, the *Thomas* court determined that the "[p]eople failed to establish that the defendant had intentionally abandoned the knapsack since the officer grabbed the bag before the defendant had exited the motor vehicle."⁵⁰⁵ In contrast, in *People v. Burns*,⁵⁰⁶ the Appellate Division, Second Department held that the police officer's unintentional contact with the defendant's bag justified a search for its contents.⁵⁰⁷ Still, the *Thomas* court distinguished the facts in *Burns* from those in the case at bar. The court noted that this case was not a situation in which "a helpful police officer accidentally or unintentionally comes in 'cradling' contact with a container and makes a brief initial contact with its exterior."⁵⁰⁸ The *Thomas* court concluded that the "seizure and inspection of [the defendant's] personal effects was a significant invasion of his constitutional right to privacy,"⁵⁰⁹ since the officer did not accidentally or unintentionally open the knapsack.⁵¹⁰ Therefore, the court granted the defendant's suppression motion.⁵¹¹

Similar to New York case law, the Supreme Court has held that in order to seize an item in plain view, the item must be "suspicious" at the time the officer is viewing the item and that items not suspicious in nature cannot be validly seized.⁵¹² Furthermore, the Supreme Court has ruled, in *New York v. Class*,⁵¹³ that when police officers lean into a car to remove papers blocking the Vehicle Identification Number and observe a

504. *Id.*

505. *Id.* See *People v. Scott*, 82 N.Y.2d 729, 731, 621 N.E.2d 689, 689, 602 N.Y.S.2d 322, 322 (1993) (holding that defendant abandoned a bag in a taxi when he attempted flight from arresting officer).

506. 182 A.D.2d 633, 582 N.Y.S.2d 234 (2d Dep't 1992).

507. *Id.* at 633-34, 582 N.Y.S.2d at 235.

508. *Thomas*, N.Y. L.J., Sept. 12, 1994, at 32.

509. *Id.*

510. *Id.*

511. *Id.*

512. See *Texas v. Brown*, 460 U.S. 730, 739 (1982).

513. 475 U.S. 106 (1986).

gun, seizure of such weapon is permissible.⁵¹⁴ Thus, even where an officer is justified in leaning into an automobile and informing a driver of a traffic violation, any items noticeable in the car must still be "suspicious" in nature in order for officers to seize such items.

NEW YORK COUNTY

People v. Scarborough⁵¹⁵
(printed April 28, 1994)

The defendant claimed that his right to be free from illegal searches and seizures was violated under both the New York⁵¹⁶ and United States⁵¹⁷ Constitutions when he was arrested after a "full blown" search of his locker contents.⁵¹⁸ The Criminal Court, New York County, held that the "full blown" search of the defendant's work locker, notwithstanding the defendant's limited consent to a visual inspection, was violative of both the state and federal constitutions.⁵¹⁹ Consequently, the court held that the seizure of property therein was illegal and the evidence should have been suppressed.⁵²⁰

On July 30, 1993, while employed as a peace officer by Barneys New York, Special Police Officer Rivera received a telephone call from a confidential informant naming the

514. *Id.* at 109.

515. N.Y. L.J., Apr. 28, 1994, at 29 (Crim. Ct. New York County 1994).

516. 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 and seizures, shall not be violated. . . ." *Id.*

517. U.S. CONST. amend. IV. The Fourth Amendment 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 . . ." *Id.*

518. *Scarborough*, N.Y. L.J., Apr. 28, 1994, at 29.

519. *Id.*

520. *Id.*

defendant as one of two individuals who had allegedly stolen watches from the store, and, subsequently, placed them in his locker.⁵²¹ Upon this information, Special Police Officer Rivera, in the presence of a union delegate as required by store policy,⁵²² asked the defendant to comply with an inspection of his locker.⁵²³ The defendant thereafter complied with the officer's request, stating "No problem," and at which time the officer visually inspected the contents of the locker.⁵²⁴ Following the limited visual inspection, the officer asked to examine one of the items again, namely sneakers with paper packed in them, to which request the defendant objected.⁵²⁵ Upon the officer's insistence, the defendant once again, without responding, removed the sneakers from the locker and the paper stuffed therein and, in turning them upside down, "two watches fell to the floor."⁵²⁶ The defendant was subsequently arrested.⁵²⁷

The court initially stated that "[a]t issue in every suppression hearing is whether the defendant possessed a legitimate expectation of privacy in the area searched. . . ." ⁵²⁸ However, even if the defendant maintained such an expectation, the court concluded that the search could nevertheless be found reasonable if the search was conducted with a warrant⁵²⁹ or was recognized under one of the exceptions to the exclusionary rule.⁵³⁰

521. *Id.*

522. *Id.* As part of Barneys New York's store procedures, all employees are assigned a locker and supplied with the combination lock. *Id.* Both the employee and Barneys have knowledge of the combination, however, inspection of the locker, without the employee's consent, is limited to when the employee is effectively terminated. *Id.* Under all other circumstances, the employee and/or a union delegate must be present when the search is performed. *Id.*

523. *Id.*

524. *Id.*

525. *Id.* The defendant stated to the police officer, "I showed you these sneakers before." *Id.*

526. *Id.*

527. *Id.*

528. *Id.*

529. *Id.* See *People v. Belton*, 55 N.Y.2d 49, 52, 432 N.E.2d 745, 746, 447 N.Y.S.2d 873, 874 (1982) ("By interposing the requirement of a warrant issued judicially, upon information attested by oath or affirmation and which

The *Scarborough* court, in reaching its holding that the defendant had a reasonable expectation of privacy, relied on the two-part test elicited by Justice Harlan in *Katz v. United States*,⁵³¹ wherein he stated that two requirements needed to be satisfied in determining whether the defendant maintained an expectation of privacy.⁵³² The first requirement is that "a person must have exhibited an actual (subjective) expectation of privacy."⁵³³ The second requirement includes a finding that "the expectation be one that society is prepared to recognize as 'reasonable.'"⁵³⁴ Moreover, the Supreme Court reasoned that when a person clearly seeks to protect something that is purely private, even when the area might be publicly vulnerable, he may be constitutionally protected under the Fourth Amendment.⁵³⁵

In applying the *Katz* test to the case at bar, the *Scarborough* court ruled that although the limited inspection of the defendant's locker was reasonable,⁵³⁶ the defendant had a subjective expectation of privacy when he previously stuffed his sneaker with paper "so as to secure and secrete its contents."⁵³⁷ Furthermore, "in light of the defendant's knowledge of previous locker inspections," the court found it was "clear that the only reason for stuffing the sneaker was to prevent others . . . from determining the nature and contents of the sneaker."⁵³⁸

establishes probable cause, the [New York] State Constitution protects the privacy interests of people of our State . . .").

530. *Scarborough*, N.Y. L.J., Apr. 28, 1994, at 29.

531. 389 U.S. 347 (1967) (Harlan, J., concurring).

532. *Id.* at 361.

533. *Id.*

534. *Id.* .

535. *Id.* at 351.

536. The court analogized the defendant's expectation of privacy with that of the defendant in *People v. Belton*, 55 N.Y.2d 49, 432 N.E.2d 745, 447 N.Y.S.2d 873 (1982). In the *Belton* case, the court found the police officer's search of the defendant's jacket pocket reasonable, "as incident to [his] arrest," after a routine speeding stop alerted the officer to the defendant's possession of marijuana. *Id.* at 51-52, 432 N.E.2d at 746, 447 N.Y.S.2d at 874.

537. *Scarborough*, N.Y. L.J., Apr. 28, 1994, at 29.

538. *Id.*

The *Scarborough* court stated that although the visual inspection of the locker and the sneakers by the officer was reasonable,⁵³⁹ the scope of the inquiry was limited to the reasonableness of the defendant's subjective expectation of privacy as compared to an objectively recognized exception by society.⁵⁴⁰ "With respect to the locker, the defendant exhibited a subjective expectation that the locker contents would remain private by locking it and . . . one could conclude that such expectation was objectively reasonable."⁵⁴¹ The court also noted that the defendant's reasonable expectation to privacy was reasonable in an objective nature as well as subjective.⁵⁴²

After determining that the defendant had a reasonable expectation of privacy, the court examined whether the search was still valid based upon the defendant's consent to the search.⁵⁴³ Relying on the New York Court of Appeals decision in *People v. Whitehurst*,⁵⁴⁴ the court recognized that the burden

539. *Id.* The court found that the defendant's consent, given voluntarily as evidenced by his statements, provided the officer with the authority to conduct a limited visual inspection of his locker. *Id.*

540. *Id.* See *Katz v. United States*, 389 U.S. 347 (1967); *People v. Mercado*, 68 N.Y.2d 874, 875, 501 N.E.2d 27, 29, 508 N.Y.S.2d 419, 421 (1986) ("[The Fourth Amendment] does not protect every subjective expectation of privacy, but only those that society recognizes as reasonable . . ."); see also *People v. Kuhn*, 33 N.Y.2d 203, 209, 306 N.E.2d 777, 780, 351 N.Y.S.2d 649, 653 (1973) ("In determining the reasonableness of the intrusion, it should be tested by 'balancing the need to search against the intrusion which the search entails.'" (citation omitted)).

541. *Scarborough*, N.Y. L.J., Apr. 28, 1994, at 29.

542. *Id.* "The courts have consistently held that an expectation of privacy in containers is one which [society deems] reasonable." *Id.* See *People v. Smith*, 59 N.Y.2d 454, 458, 452 N.E.2d 1224, 1227, 465 N.Y.S.2d 896, 899 (1983) ("Although probable cause to believe that the person arrested has committed a crime will justify the search of his person . . . it will not necessarily justify the search of a container accessible to him.").

543. *Id.*

544. 25 N.Y.2d 389, 391, 254 N.E.2d 905, 906, 306 N.Y.S.2d 673, 674 (1969). "Initially, the defendant carries the burden of *proof* when he challenges the legality of a search and seizure . . . but the People have the burden of *going forward* to show the legality of the police conduct in the first instance." *Id.* at 391, 254 N.E.2d at 906, 306 N.Y.S.2d at 674. See *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968) ("When a prosecutor seeks to rely upon

of proof is on the People to show whether defendant's consent was voluntary.⁵⁴⁵ Moreover, the court determined that the voluntariness of the defendant's consent was "based upon the totality of the circumstances"⁵⁴⁶ Although the defendant's consent may have reasonably been inferred with respect to the limited visual *inspection*, the court found that he did not consent to a "full blown" locker *search*.⁵⁴⁷ While "[n]o one circumstance is determinative of the voluntariness of consent," the court further reasoned that the defendant's objection to the subsequent search of his locker contents and defendant's failure to respond to the officer's request for a subsequent search of his sneaker demonstrated the involuntary nature of his consent.⁵⁴⁸

The *Scarborough* court cited *People v. Guzman*⁵⁴⁹ for the proposition that limited consent to a search does not automatically allow a "full blown" search.⁵⁵⁰ The *Guzman* court found that the defendant's detention for a speeding violation did not permit the officer to inspect the contents of his automobile which was unrelated to the violation and an inspection of which

consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given.").

545. *Scarborough*, N.Y. L.J., Apr. 28, 1994, at 29.

546. *Id.*; see *People v. Sora*, 176 A.D.2d 1172, 1174, 575 N.Y.S.2d 970, 972 (3d Dep't 1991) ("The voluntariness of defendant's consent is a question of fact to be determined from the totality of the circumstances").

547. *Scarborough*, N.Y. L.J., Apr. 28, 1994, at 29; see *People v. Cohen*, 58 N.Y.2d 844, 846, 446 N.E.2d 774, 775, 460 N.Y.S.2d 18, 19 (1983) (holding that defendant's consent to initial entry into apartment did not extend to subsequent inspections the following day).

548. *Scarborough*, N.Y. L.J., Apr. 28, 1994, at 29. See *Whitehurst*, 25 N.Y.2d at 392, 254 N.E.2d at 906, 306 N.Y.S.2d at 675 ("[A]n affirmative response . . . would constitute a constitutional waiver.").

549. 153 A.D.2d 320, 551 N.Y.S.2d 709 (4th Dep't 1990).

550. See *Cohen*, 58 N.Y.2d at 846, 446 N.E.2d at 775, 460 N.Y.S.2d at 19 ("[T]he defendant's consent to initial entry did not extend to the ones the police effected on the following morning"); see also *People v. Estrella*, 160 A.D.2d 250, 251, 553 N.Y.S.2d 358, 359 (1st Dep't 1990) (holding that because "[the defendant] was under arrest at the time is not, by itself, sufficient to vitiate the otherwise voluntary nature of his consent and cooperation").

would constitute a serious invasion of his privacy.⁵⁵¹ Thus, the court found the following exchange between the police officer and the defendant, “[d]o you mind if I take a *look in your vehicle?*” . . . “[n]o, I don’t mind, go ahead,” only allowed the officer to inspect the defendant’s car and not a complete search of the car which would entail removing the rear seat.⁵⁵²

The court, in *Scarborough*, similarly rejected the prosecutor’s argument that the defendant’s voluntary consent to the locker inspection should extend to the contents of containers therein.⁵⁵³ In reaching this conclusion, the court relied on testimony that the defendant was directed to remove the sneakers from his locker.⁵⁵⁴ The court distinguished between a voluntary inspection, to which request the defendant replied “No problem,” and a “full blown” search of the contents of the locker and its containers, to which the defendant protested.⁵⁵⁵

The United States Constitution also supports the concept of a limited search based on a limited consent.⁵⁵⁶ Under the Fourth

551. *Guzman*, 153 A.D.2d at 322, 551 N.Y.S.2d at 711. The court further stated that:

Although under certain circumstances a police officer who has validly arrested an occupant of an automobile may contemporaneously search the passenger compartment including any containers found therein, this right is limited only to situations where the police ‘have reason to believe that the car may contain evidence *related to the crime*’

Id. at 323, 551 N.Y.S.2d at 711.

552. *Id.* at 324, 551 N.Y.S.2d at 712. In *People v. Grajales*, 136 A.D.2d 564, 523 N.Y.S.2d 560 (2d Dep’t 1988), the Second Department found that the officer’s search, predicated on immigration offenses, did not afford them the right to search the apartment further without the consent of the defendant. *Id.* at 565, 523 N.Y.S.2d at 561.

553. *Scarborough*, N.Y. L.J., Apr. 28, 1994, at 29.

554. *Id.* For consent to be considered voluntary, the circumstances under which it was given must be examined and, it must not be the result of “official coercion, actual or implicit, overt or subtle.” *Id.*

555. *Id.*

556. See *United States v. White*, 541 F. Supp. 1114, 1117 (N.D. Ill. 1982) (“If a search is conducted pursuant to a consent, any part of the search not within the bounds of the consent is unlawful.”); *United States v. Taibe*, 446 F. Supp. 1142, 1147 (E.D.N.Y. 1978) (holding that the extent of a search conducted pursuant to a voluntary consent is limited by the bounds of the actual consent).

Amendment's protection from unreasonable searches and seizures, and article I, section 12, of the New York State Constitution, an officer's search is limited to either the infraction for which the defendant is being investigated, absent a warrant or exception under the Exclusionary Rule, or, alternatively, to the "scope and duration" of the defendant's consent.⁵⁵⁷ The language of both provisions precluding unlawful searches and seizures is identical.⁵⁵⁸

Under federal constitutional law, as well as New York constitutional law, it appears that as long as the officer acts in compliance with an objectively reasonable societal expectation of privacy, the search will be lawful. Therefore, both the New York State and the United States Constitutions prohibit police officers from conducting "full blown" searches of a defendant's property and containers therein, where there is a reasonable expectation of privacy and the consent has been limited.

557. See *People v. Guzman*, 153 A.D.2d 320, 551 N.Y.S.2d 709 (4th Dep't 1990).

558. See *People v. Smith*, 59 N.Y.2d 454, 460, 452 N.E.2d 1224, 1228, 465 N.Y.S.2d 896, 900 (The court of appeals has "repeatedly recognized that the similar language used in section 12 of article 1 of the State Constitution means that it should be interpreted in the same manner as the Fourth Amendment . . .") (Jasen, J., concurring).