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Search & Seizure

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. Scarborough[515]
(printed April 28, 1994)

The defendant claimed that his right to be free from illegal searches and seizures was violated under both the New York[516] and United States[517] 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 warrant[529] or was recognized under one of the exceptions to the exclusionary rule.[530]

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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]

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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

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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

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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).