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Search and Seizure: People v. Diaz

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et al.: Search and Seizure

People v. Diaz[2263]
(decided April 8, 1993)

Defendant claimed that his right to be free from illegal searches and seizures was violated under both the New York[2264] and United States[2265] Constitutions when he was arrested and charged with possession of cocaine after a police officer had conducted a pat-down search of the defendant for a weapon.[2266] The New York Court of Appeals held that the warrantless search of the defendant's pocket during the protective pat-down was illegal and did indeed violate both the state and federal constitutions.[2267]

On the evening of June 29, 1989, while patrolling the lower eastside of Manhattan, two New York City police officers observed groups of people passing objects to one another during a span of 20 minutes.[2268] The officers approached the defendant while he was standing next to a stopped automobile, and they called him over to their car.[2269] The officers became fearful that the defendant had a weapon because he refused to take his hands out of his pockets when he was requested to do so.[2270] As the defendant approached the police car, one of the officers noticed a bulge in the defendant's pants and immediately grabbed him to conduct a search for a weapon.[2271] The officer did not find a

2263. 81 N.Y.2d 106, 612 N.E.2d 298, 595 N.Y.S.2d 940 (1993).

2264. N.Y. CONST. art. I, § 12. Article I, section 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.*

2265. 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.*

2266. *Diaz*, 81 N.Y.2d at 108, 612 N.E.2d at 299-300, 595 N.Y.S.2d at 941-42.

2267. *Id.* at 107, 612 N.E.2d at 299, 595 N.Y.S.2d at 941.

2268. *Id.* at 108, 612 N.E.2d at 299, 595 N.Y.S.2d at 941.

2269. *Id.*

2270. *Id.*

2271. *Id.*

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weapon during his search, but did find 18 vials of crack cocaine.[2272] The defendant was subsequently arrested.[2273]

In reaching its conclusion that the search conducted was illegal, the court found that it did not fall into one of the exceptions to the "Fourth Amendment's warrant requirement."[2274] The court stated that although the original search for a weapon by the officer was a permissible exception to the warrant requirement,[2275] its scope of inquiry of a search is very narrow and limited in nature.[2276] "Once an officer has concluded that no weapon is present, the search is over and there is no authority for further intrusion."[2277]

The court rejected the prosecution's argument that the "plain view" doctrine, which allows the police to seize illegal objects within their sight, to be extended to situations where the police discovered illegal objects through their sense of touch.[2278] In its

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2272. *Id.* at 108, 612 N.E.2d at 299-300, 595 N.Y.S.2d at 941-42.

2273. *Id.*

2274. *Id.* at 109, 612 N.E.2d at 300, 595 N.Y.S.2d at 942; *see also* Payton v. New York, 445 U.S. 573, 587 (1980) (holding that warrant is not necessary when contraband is found in a public place); United States v. Martinez-Fuerte, 428 U.S. 543, 566-67 (1976) (holding a warrant is not needed to search a car stopped at police checkpoint if police have probable cause to believe there is illegal contraband in vehicle); Chimel v. California, 395 U.S. 752, 763 (1969) (holding that a warrant is not required incident to an arrest to search and seize evidence on a person "in order to prevent its concealment or destruction").

2275. *Diaz*, 81 N.Y.2d at 109, 612 N.E.2d at 300, 595 N.Y.S.2d at 942; *see* Terry v. Ohio, 392 U.S. 1, 25-26 (1967) (holding that no warrant is needed to search a lawfully detained suspect for weapons).

2276. *Diaz*, 81 N.Y.2d at 109, 612 N.E.2d at 300, 595 N.Y.S.2d at 942.

2277. *Id.*; *see also* Ybarra v. Illinois, 444 U.S. 85, 92-94 (1979) (stating that "a law enforcement officer, for his own protection and safety, may conduct a patdown to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted"); *Terry*, 392 U.S. at 21-24 (holding that if an individual is acting suspicious and an officer has reason to believe that person is armed and dangerous, "it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm").

2278. *Diaz*, 81 N.Y.2d at 110, 612 N.E.2d at 301, 595 N.Y.S.2d at 943. Under the plain view doctrine, the police are allowed to seize objects without a warrant if they have probable cause to believe the object is the "instrumentality

reasoning, the court distinguished between the "plain view doctrine," which is an exception to a warrantless seizure, and the "plain touch doctrine," which is an exception to a warrantless search, by stating that "the owner of an item concealed by clothing or other covering retains a legitimate expectation that the item's existence and characteristics will remain private."[2279] Under the plain view doctrine, it has been held that a person who holds out contraband in public view has no "legitimate expectation that the item's existence and characteristics within remain private."[2280] The court further reasoned that the sense of touch is much less reliable than sight and thus is not as conclusive in determining whether a certain item is indeed criminal.[2281] Finally, the court reasoned that a "plain touch" exception would allow "pinching, squeezing or probing" that would go beyond what the narrow parameters of a pat-down search encompasses.[2282]

In their dissenting opinion, Justices Simons and Bellacosa argued that a warrant was not required in this situation because the search conducted by the officer was incident to an arrest.[2283] The dissent stated that if the police have probable cause to arrest a suspect before a search is conducted, all objects seized during a

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of a crime" and three conditions are met. First, the police must be in a lawful position when viewing the object; second, the police must have lawful access to that object; and third, the object must be immediately identified as illegal in nature by the officer. *Id.*

2279. *Id.* at 111, 612 N.E.2d at 301, 595 N.Y.S.2d at 943. (stating that "the discovery and seizure of contraband in plain view involves no intrusion on the individual's constitutional rights beyond that already authorized by the warrant or some exception to the warrant requirement").

2280. *Id.*

2281. *Id.* at 112, 612 N.E.2d at 302, 595 N.Y.S.2d at 944.

2282. *Id.* at 109, 612 N.E.2d at 300, 595 N.Y.S.2d at 942. "Under both the State and Federal Constitutions, the protective pat-down exception to the warrant requirement authorizes a limited search of lawfully detained suspects to determine whether a weapon is present." *Id.*

2283. *Id.* at 113, 612 N.E.2d at 303, 595 N.Y.S.2d at 945 (Simons, J. and Bellacosa, J., dissenting). The majority stated that because no argument was made by the prosecutor that the search and seizure was incident to a lawful arrest, they could not pass on that question in this case. *Id.* at 109-10, 612 N.E.2d at 300-01, 595 N.Y.S.2d at 942-43 n.1.

search are admissible as evidence against that suspect.[2284] In this particular case, the dissent argued that the circumstances surrounding the officers gave rise to probable cause to arrest the defendant, and therefore the cocaine was admissible evidence.[2285] The dissent argued that since the officers had probable cause to arrest defendant, it is unnecessary to consider whether the "plain touch" theory justifies the search.[2286]

The United States Supreme Court, in *Minnesota v. Dickerson*,[2287] granted certiorari to cure the conflict among state and federal courts[2288] regarding whether contraband found during a protective pat-down, authorized by *Terry*, is constitutional under the Fourth Amendment, and can be used as evidence against the person that is searched.[2289] In *Dickerson*, police officers observed the defendant avoiding their marked patrol car after he had left a known crack-house.[2290] The behavior of the defendant heightened the suspicions of the officers that he was involved in illegal activities.[2291] The officers stopped the defendant to question him and conducted a protective

2284. *Id.* at 113, 612 N.E.2d 303, 595 N.Y.S.2d at 945 (Simons, J. and Bellacosa, J., dissenting).

2285. *Id.* (Simons, J. and Bellacosa, J., dissenting).

2286. *Id.* (Simons, J. and Bellacosa, J., dissenting).

2287. 113 S. Ct. 2130 (1993).

2288. The court noted that the following jurisdictions have found that objects seized during a protective pat-down are admissible: United States v. Norman, 701 F.2d 295 (4th Cir. 1983), *cert. denied*, 464 U.S. 820 (1983); United States v. Williams, 822 F.2d 1174 (D.C. Cir. 1987); United States v. Buchannon, 878 F.2d 1065 (8th Cir. 1987); United States v. Coleman, 969 F.2d 126 (5th Cir. 1992); United States v. Salazar, 945 F.2d 47 (2d Cir. 1991) *cert. denied*, 112 S. Ct. 1975 (1992); People v. Chavers, 658 P.2d 96 (Cal. 1983); State v. Guy, 492 N.W.2d 311 (Wis. 1992), *cert. denied*, 113 S. Ct 3020 (1993). The following jurisdictions do not recognize the seizure of objects other than weapons during a protective pat-down: State v. Collins, 679 P.2d 80 (Ariz. 1983); People v. McCarthy, 296 N.E.2d 862 (Ill. 1973); State v. Rhodes, 788 P.2d 1380 (Okla. 1990); State v. Broadnax, 654 P.2d 96 (Wash. 1982). *Id.* at 2134-35 n.1.

2289. *Dickerson*, 113 S. Ct. at 2134.

2290. *Id.* at 2133.

2291. *Id.*

pat-down.[2292] Although the officer did not feel a weapon, he did feel a lump in Dickerson's pocket, examined it with his fingers, and concluded it was crack cocaine.[2293] The officer reached into his pocket and pulled out a small bag containing crack cocaine.[2294] The defendant was subsequently arrested and charged with possession of a controlled substance.[2295]

The Supreme Court held that a properly conducted search, "limited to those areas which a weapon may be placed or hidden"[2296] under the narrow guidelines of *Terry*, that reveals contraband will be allowed as evidence against that person.[2297] The Court reasoned by analogy to the plain view doctrine, that an object *immediately* apparent to an officer as contraband, during an already authorized search, has no expectation of privacy.[2298] The warrantless seizure of such contraband is premised on it being in "plain view."[2299] Under the circumstances surrounding the seizure in *Dickerson*, the Court held that the evidence taken from the defendant was not admissible because the officer testified he did not immediately know what the defendant possessed in his pocket during the pat-down search.[2300] The

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2292. *Id.*

2293. *Id.* at 2133-34.

2294. *Id.*

2295. *Id.* at 2134.

2296. *Id.* at 2136 (holding that officers may search glove compartment for weapons during protective pat-down if they believe suspect is dangerous (quoting Michigan v. Long, 463 U.S. 1032, 1049 (1983))).

2297. *Dickerson*, 111 S. Ct. at 2136.

2298. *Id.* at 2137; *see also* Coolidge v. New Hampshire, 403 U.S. 443 (1971) ("Where the initial intrusion that brings the police within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate.").

2299. *Dickerson*, 111 S. Ct. at 2137.

2300. *Id.* at 2139; *see Coolidge*, 403 U.S. at 465-66 where the Supreme Court stated that in certain circumstances the seizure of evidence inadvertently discovered by police will be admitted if the original intrusion is supported by a recognized exception to the warrant requirement. *Id.* at 465. The Court further stated

> Thus the police inadvertently come across evidence while in hot pursuit of a fleeing suspect. And an object that comes into view during a search incident to arrest that is appropriately limited in scope under existing

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Court found that the officer, by examining the lump in defendant's pocket with his fingers, went beyond what was authorized under *Terry*, and therefore, it was an illegal search and seizure under the Fourth Amendment.[2301]

The Supreme Court, in reaching its holding, rejected the same arguments put forth against an expansion of the plain view doctrine that the New York Court of Appeals embraced.[2302] First, the Supreme Court pointed out that *Terry* found the sense of touch is sufficiently reliable to reveal the nature of an object.[2303] The Supreme Court reasoned that if an officer's sense of touch is sufficient to detect a weapon, it is equally adept at detecting contraband.[2304] Secondly, the Supreme Court stated that the plain touch doctrine is not an overly intrusive search of a person.[2305] The Supreme Court reasoned that the seizure of contraband immediately identified in an authorized pat down is not a further intrusion of privacy.[2306] Therefore, the Supreme Court will allow the seizure of objects, other than weapons, during a warrantless pat-down search, when the officer conducting the search instantly recognizes the object as contraband.[2307]

While New York does not recognize any search of a suspected criminal beyond that for the concealment of weapons, the United States Supreme Court has held that under limited circumstances, objects that are instantly recognizable as contraband during a warrantless pat-down search may be admissible as evidence against that person.

> law may be seized without a warrant. Finally, the "plain view" doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object. (citations omitted)

Id. at 465-66.

2301. *Dickerson*, 111 S. Ct. at 2139.

2302. *Id.* at 2137.

2303. *Id.*

2304. *Id.*

2305. *Id.* at 2137-38.

2306. *Id.* at 2138.

2307. *Id.* at 2137.