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Search and Seizure: People v. Sierra

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Although no violation of a federal constitutional right was contended, the leading federal case on this issue is *Terry v. Ohio*.²⁶⁴⁰ The Supreme Court in *Terry* held that

where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.²⁶⁴¹

In comparison, the United States Supreme Court standard is less stringent than the New York standard. According to the Supreme Court standard, as long as the officer acts reasonably, the search of an alleged perpetrator will be lawful. Therefore, although in *Monegro*, the defendant's conduct may have been explained as innocent, nonetheless, a federal court may have determined that the officers responded reasonably. In New York, however, a higher burden must be satisfied in order to justify police pursuit. While the *Monegro* court found that the case did not satisfy the New York standard, a federal court, based on the same or similar facts as in the case at hand, may reach a different result pursuant to *Terry*.

People v. Sierra²⁶⁴²
(decided May 27, 1993)

Defendant appealed the denial of a motion to suppress physical evidence on the ground that the police officers lacked probable

2640. 392 U.S. 1 (1968) (holding that a police officer may "stop and frisk" an individual if reasonable and articulable facts exist that lead to the conclusion that criminal activity may be afoot).

2641. *Id.* at 30.

2642. 190 A.D.2d 202, 599 N.Y.S.2d 6 (1st Dep't), *appeal granted*, 81 N.Y.2d 1082, 619 N.E.2d 681, 601 N.Y.S.2d 603 (1993).

cause in pursuing and arresting him.²⁶⁴³ The defendant's claim falls within the purview of the Federal²⁶⁴⁴ and New York State Constitutions.²⁶⁴⁵ The court held that the defendant's immediate flight upon the officers' non-threatening approach was one of the factors that justified the pursuit and arrest of the defendant, and that the physical evidence discarded during his flight was not a result of unlawful police conduct.²⁶⁴⁶ Therefore, the motion to suppress the physical evidence was properly denied because the circumstances surrounding the pursuit and arrest of the defendant established the necessary reasonable suspicion justifying the pursuit by the officers.²⁶⁴⁷ The officers' belief that a crime was about to occur, coupled with the defendant's flight, justified the pursuit and gave the officers the authority to "recover and inspect" the bag discarded by the defendant.²⁶⁴⁸

While Police Officers Acevedo and Sanchez were nearing an intersection, known to them as a place where the sale of drugs was prevalent, they observed a Caucasian male exit a jeep which had New Jersey license plates, and approach the defendant who beckoned, "over here, over here."²⁶⁴⁹ Based upon this

2643. *Id.* at 203, 599 N.Y.S.2d at 6.

2644. U.S. CONST. amend. IV. This provision provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

2645. N.Y. CONST. art. I, § 12. This provision provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

2646. *Sierra*, 190 A.D.2d at 209, 599 N.Y.S.2d at 10.

2647. *Id.*

2648. *Id.* at 205, 599 N.Y.S.2d at 7.

2649. *Id.* at 204, 599 N.Y.S.2d at 7. At the suppression hearing, Officer Acevedo testified that the Washington Heights area that he and his partner

observation, the officers testified that they were under the impression that a drug transaction was imminent.²⁶⁵⁰ After the Caucasian male saw the officers and fled, Officer Acevedo asked the defendant, who had remained, to come to the police car.²⁶⁵¹ The defendant then reached into his pocket while backing away from the officers and began to run.²⁶⁵² After refusing to adhere to the officers' command to stop, Officers Acevedo and Sanchez gave chase and apprehended the defendant about one-hundred yards away.²⁶⁵³ During his attempt to flee, however, the defendant threw a paper bag on a pile of garbage.²⁶⁵⁴ After recovering the discarded bag and discovering that it contained cocaine, the defendant was placed under arrest.²⁶⁵⁵ Upon these facts, including the admission of the cocaine into evidence, the defendant was convicted of criminal possession of a controlled substance.²⁶⁵⁶

The issue of justifiable pursuit and detention by police was addressed by the New York Court of Appeals in *People v. De Bour*.²⁶⁵⁷ In *De Bour* the court established a general standard for determining whether there has been a reasonable search or seizure. The court of appeals stated that a court must first consider "whether or not the police action was justified in its inception and secondly whether or not that action was reasonably

were patrolling was known as a location for the buying and selling of drugs, especially to people coming from New Jersey. *Id.*

2650. *Id.*

2651. *Id.*

2652. *Id.*

2653. *Id.*

2654. *Id.*

2655. *Id.*

2656. *Id.* at 203, 599 N.Y.S.2d at 6.

2657. 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976). In *De Bour*, the court held that the police had an articulable reason to request information from defendant based on the belief that he might have been involved in narcotics. *Id.* at 220, 352 N.E.2d at 570, 386 N.Y.S.2d at 383. The court further held that there was no constitutional violation when the police, after noticing a bulge on the defendant, asked him to open his jacket because the intrusion was minimal and limited in scope. *Id.* at 221, 352 N.E.2d at 570, 386 N.Y.S.2d at 383. The police request for information was lawful and the subsequent intrusion, which revealed a gun, was reasonable. *Id.*

related in scope to the circumstances which rendered its initiation permissible.”²⁶⁵⁸ The *De Bour* court went on to state that in evaluating police action, a court must weigh “the interferences it entails against the precipitating and attending conditions” Thus, “various intensities of police action are justifiable as the precipitating and attendant factors increase in weight and competence.”²⁶⁵⁹

As noted by the *Sierra* court, the four-tier analysis set out in *De Bour* is applied more often than the general standard.²⁶⁶⁰ However, in *People v. Howard*,²⁶⁶¹ the court stated that for an officer to pursue a fleeing individual after making a lawful inquiry, the officer must have probable cause to believe that the “individual has committed . . . or is about to commit a crime.”²⁶⁶² Nonetheless, according to the *Sierra* court, the standard set out in *Howard* “has generated much confusion by

2658. *Id.* at 215, 352 N.E.2d at 566, 386 N.Y.S.2d at 379.

2659. *Id.* at 223, 352 N.E.2d at 571, 386 N.Y.S.2d at 384.

2660. *Sierra*, 190 A.D.2d at 205, 599 N.Y.S.2d at 8. The four levels set out by the *De Bour* court dealing with the varying intensities of justifiable police actions are: (1) in order to request information from an individual the police officer must have “some objective credible reason for that interference not necessarily indicative of criminality,” (2) the common law right of inquiry “is activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion in that a policeman is entitled to interfere with a citizen to the extent necessary to gain explanatory information, but short of a forcible seizure,” (3) if the police officer has a reasonable suspicion “that a particular person has committed, is committing or is about to commit a felony or misdemeanor,” he can forcibly stop and detain that individual, (4) “a police officer may arrest and take into custody a person when he has probable cause to believe that person has committed a crime, or offense in his presence.” *De Bour*, 40 N.Y.2d at 223, 352 N.E.2d at 571-72, 386 N.Y.S.2d at 384-85.

2661. 50 N.Y.2d 583, 408 N.E.2d 908, 430 N.Y.S.2d 578 (1980), *cert. denied*, 449 U.S. 1023 (1980). In *Howard*, the court held that the officers were justified in asking defendant for information after observing him behave suspiciously while carrying a woman’s vanity case. *Id.* at 589, 408 N.E.2d at 912, 430 N.Y.S.2d at 583. However, the fact that defendant ran away and abandoned the vanity on a pile of rubbish did not establish an intentional abandonment to justify a warrantless search and seizure of the contents of the vanity. *Id.* at 593, 408 N.E.2d at 915, 430 N.Y.S.2d at 585-86.

2662. *Id.* at 586, 408 N.E.2d at 910, 430 N.Y.S.2d at 581.

fostering an unrealistic approach to rapidly escalating street encounters” between police officers and private citizens.²⁶⁶³

In *People v. Leung*,²⁶⁶⁴ the court of appeals reaffirmed the general standard stated in *De Bour*, holding that the police officer’s reasonable suspicion of criminality was a sufficient justification for pursuit and apprehension.²⁶⁶⁵ The reasonable suspicion standard is generally applied over the probable cause standard to justify the arrest and apprehension of a fleeing individual, but there has been disagreement with specific cases regarding whether a reasonable suspicion existed to justify pursuit.²⁶⁶⁶ It has been suggested, however, that the confusion as

2663. *Sierra*, 190 A.D.2d at 205, 599 N.Y.S.2d at 8.

2664. 68 N.Y.2d 734, 497 N.E.2d 687, 506 N.Y.S.2d 320 (1986). In *Leung*, the police observed defendant give another man a brown envelope resembling the kind of bag typically used in drug transactions. *Id.* at 735, 497 N.E.2d at 687-88, 506 N.Y.S.2d at 321. Upon inquiry by the police officers, the defendant immediately fled and the officers followed in pursuit. *Id.* While fleeing, the defendant discarded a loaded weapon, providing probable cause for his arrest. *Id.* The court held that the “initial approach and subsequent pursuit and detention of defendant constituted legitimate, justifiable police conduct, manifestly the recovery of the gun discarded during flight was also lawful.” *Id.* at 736, 497 N.E.2d at 688, 506 N.Y.S.2d at 322.

2665. *Id.*; see also *People v. Rivera*, 175 A.D.2d 78, 572 N.Y.S.2d 327 (1st Dep’t 1991) (finding that an experienced police officer’s pursuit of a defendant believed to be engaged in a drug transaction was justified on grounds of reasonable suspicion); *People v. Jones*, 118 A.D.2d 86, 503 N.Y.S.2d 740 (1st Dep’t 1986) (stating that police officers pursuit and apprehension of defendant was justified because they had an objective credible reason that a crime had occurred).

2666. *Sierra*, 190 A.D.2d at 206, 599 N.Y.S.2d at 8; see also *Rivera*, 175 A.D.2d 78, 572 N.Y.S.2d 327 (finding sufficient suspicion of criminality to pursue fleeing defendant after observing him engage in hand motions with another person which the officer believed to be part of a drug transaction). *But see* *People v. Holmes*, 181 A.D.2d 27, 585 N.Y.S.2d 718 (1st Dep’t 1992) (finding reasonable suspicion did not exist to pursue fleeing suspect where police observed defendant on a corner of a known drug location with a bulge in his jacket).

to whether there is a reasonable suspicion to justify the pursuit and detention of a fleeing individual has been resolved.²⁶⁶⁷

In *People v. Martinez*,²⁶⁶⁸ the New York Court of Appeals stated that despite the language of *Howard*, the rule is “that the objective evidence necessary to support a stop and seizure short of an arrest is reasonable suspicion.”²⁶⁶⁹ While this standard is in accord with *De Bour* and *Leung*, it is clear that flight alone is not enough to create a reasonable suspicion of criminality.²⁶⁷⁰ When flight is accompanied with other circumstances such as the time, location, and reaction by defendant, the necessary reasonable suspicion to justify pursuit and arrest is established.²⁶⁷¹

Hence, in finding the pursuit and detention of the defendant proper, the *Sierra* court relied on the high crime location of the event, the fact that the automobile was registered in New Jersey, the reaction of the passenger upon noticing the police officers and

²⁶⁶⁷. *Sierra*, 190 A.D.2d at 206, 599 N.Y.S.2d at 8; *See People v. Madera*, 189 A.D.2d 462, 468, 596 N.Y.S.2d 766, 771 (1st Dep’t 1993) (Ross, J., dissenting).

²⁶⁶⁸. 80 N.Y.2d 444, 606 N.E.2d 951, 591 N.Y.S.2d 823 (1992). In *Martinez*, while patrolling a drug area, the police saw defendant reach into a store window and pull out a box used by drug dealers to hide drugs. *Id.* at 446, 606 N.E.2d at 951, 591 N.Y.S.2d at 823. After one of the officers, dressed in plain clothes, approached the defendant and displayed his badge, the defendant ran into a grocery store. *Id.* at 446, 606 N.E.2d at 952, 591 N.Y.S.2d at 824. The officers chased defendant and saw him pass the box off to another person. *Id.* The officer then seized the box and removed drugs that were contained therein. *Id.* The court held that the pursuit was based on reasonable suspicion of criminal activity; that the box was abandoned by defendant; and that the discovery of the drugs upon opening box established probable cause to arrest the defendant. *Id.* at 448-49, 606 N.E.2d at 953, 591 N.Y.S.2d at 825.

²⁶⁶⁹. *Id.* at 448, 606 N.E.2d at 953, 591 N.Y.S.2d at 825; *see also People v. Cantor*, 36 N.Y.2d 106, 112-13, 324 N.E.2d 872, 877, 365 N.Y.S.2d 509, 516 (1975) (stating that “[r]easonable suspicion is the quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe criminal activity is at hand.”).

²⁶⁷⁰. *Martinez*, 80 N.Y.2d at 448, 606 N.E.2d at 953, 591 N.Y.S.2d at 825.

²⁶⁷¹. *Id.* Since the pursuit of defendant was justified, once the defendant abandoned the box containing drugs, his right to object to the opening of the box was lost and his motion to suppress the evidence was properly denied. *Id.*

the defendant's flight.²⁶⁷² However, as the sole dissenter in *Sierra*, Justice Rosenberger asserted that under these circumstances an "ordinary prudent and cautious person" would not conclude that there was a reasonable suspicion of criminality.²⁶⁷³ He also criticized the majority and trial court for basing its decision not to suppress the evidence on the ethnicity of the defendant and passenger of the Jeep.²⁶⁷⁴

Under New York State law, once the pursuit and detention is deemed lawful police conduct, subsequent recovery of discarded objects will also be deemed lawful.²⁶⁷⁵ The pursuit of a fleeing individual is a lawful seizure within the meaning of the State Constitution where the police pursuit is based upon a reasonable suspicion of criminality. Therefore, physical evidence discarded during a police pursuit will be admitted into evidence where the pursuit is justified by a reasonable suspicion of criminality.

2672. *Sierra*, 190 A.D.2d at 209, 599 N.Y.S.2d at 10; *see also* *People v. Fields*, 171 A.D.2d 244, 576 N.Y.S.2d 94 (1st Dep't 1991). In *Fields*, the court concluded that the circumstances in conjunction with the officers observation provided a reasonable suspicion that a drug transaction was about to take place. *Id.* at 247-48, 576 N.Y.S.2d at 96. Therefore, the officers were justified in pursuing the defendants and in recovering the plastic bag containing cocaine which was discarded by the defendants during flight. *Id.* at 249, 576 N.Y.S.2d at 97.

2673. *Id.* at 212, 599 N.Y.S.2d at 12. (Rosenberger, J., dissenting).

2674. *Id.* at 213, 599 N.Y.S.2d at 13. (Rosenberger, J., dissenting).

2675. *Id.* at 208, 599 N.Y.S.2d at 9; *see also* *People v. Martinez*, 80 N.Y.2d 444, 606 N.E.2d 951, 591 N.Y.S.2d 823 (1992). In *Martinez*, the court stated that "[o]nce defendant abandoned the box [during lawful police pursuit], he lost his right to object to the opening of the box and the drugs discovered upon opening box provided the police with probable cause to arrest him." *Id.* at 449, 606 N.E.2d at 953, 591 N.Y.S.2d at 825; *People v. Leung*, 68 N.Y.2d 734, 497 N.E.2d 687, 506 N.Y.S.2d 320 (1986). In *Leung*, the court stated that "[g]iven that the initial approach and subsequent pursuit and detention of defendant constituted legitimate, justifiable police conduct, . . . the recovery of the gun discarded during flight was also lawful." *Id.* at 736, 497 N.E.2d at 688, 506 N.Y.S.2d at 322; *cf.* *People v. Boodle*, 47 N.Y.2d 398, 391 N.E.2d 1329, 418 N.Y.S.2d 352 (1979) (holding illegal police conduct did not provoke defendant into revealing the evidence seized and since defendant was acting independently the purpose of the exclusionary rule would not be served by excluding the evidence).

Even though the court in *Sierra* did not address the Federal Constitution,²⁶⁷⁶ it is important to note that the standard for determining whether a seizure has occurred is different under federal law than it is under New York State law. In *California v. Hodari*,²⁶⁷⁷ the United States Supreme Court held that for a seizure to occur there must be a show of authority to which the subject yields or an application of physical force to restrain movement.²⁶⁷⁸ A seizure occurs where a police officer physically arrests someone or where an individual is arrested by yielding to the police officer's authority.²⁶⁷⁹ On the other hand, a seizure does not occur where there is a show of authority to which the subject does not yield.²⁶⁸⁰ Therefore, physical evidence, such as drugs, abandoned while the defendant is being pursued by a police officer is admissible into evidence.²⁶⁸¹ Under federal law, because pursuit of a fleeing individual is not considered a seizure, the Fourth Amendment of the Federal Constitution is not controlling.

SECOND DEPARTMENT

People v. Beriguettes²⁶⁸²
(decided December 27, 1993)

Defendant claimed that his right to be free from unreasonable searches and seizures pursuant to the State²⁶⁸³ and Federal²⁶⁸⁴

²⁶⁷⁶ U.S. CONST. amend. IV.

²⁶⁷⁷ 499 U.S. 621 (1991). In *Hodari*, the police approached several youths who were huddled around a car. *Id.* at 622. Once the youths saw the police approaching they fled and the officers chased them. *Id.* at 622-23. During the chase, one of the youths discarded cocaine which the officer seized. *Id.* at 623. Subsequently, he arrested defendant. *Id.* The Court held that the defendant was not seized when he discarded cocaine and, therefore, the evidence was admissible and not subject to the exclusionary rule. *Id.* at 629.

²⁶⁷⁸ *Id.* at 625.

²⁶⁷⁹ *Id.*

²⁶⁸⁰ *Id.* at 629.

²⁶⁸¹ *Id.*

²⁶⁸² ___ A.D.2d ___, 605 N.Y.S.2d 759 (2d Dep't 1993)