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Search and Seizure: In re Jerry C.

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be lawful and found that “he had probable cause to believe that it was subject to seizure under the Fourth Amendment.”²⁷⁹⁶

Under both the State and Federal Constitutions, a person is protected against unreasonable searches and seizures. Both the federal and state courts have given law enforcement great latitude in order to effectively carry out its anti-crime goals. Under both federal and state law, using a flashlight to investigate the interior of an automobile which was properly stopped for a traffic infraction does not rise to the level of a “search,” and accordingly, does not require a warrant.

*In re Jerry C.*²⁷⁹⁷
(decided October 25, 1993)

The defendant appealed a denial of his motion to suppress a gun, recovered during a police pursuit.²⁷⁹⁸ The defendant’s motion to suppress the physical evidence in question occurred during his juvenile delinquency proceeding which found that his acts, “if committed by an adult, constituted the crime of criminal possession of a weapon in the second degree.”²⁷⁹⁹ A question on appeal was whether the particular facts of this case support the finding of the trial court that the police pursuit was justified, thereby eliminating the need of a search warrant.²⁸⁰⁰

Upon doing so, the officer withdrew the green balloon from the car. *Id.* The defendant was subsequently arrested. *Id.*

2796. *Id.* at 744, *see also* United States v. Dunn, 480 U.S. 294, 305 (1987) (“[T]he officers’ use of the beam of a flashlight, directed through the essentially open front of respondent’s barn, did not transform their observations into an unreasonable search within the meaning of [the] Fourth Amendment.”).

2797. 197 A.D.2d 685, 602 N.Y.S.2d 899 (2d Dep’t 1993).

2798. *Id.* at 685-86, 602 N.Y.S.2d at 900.

2799. *Id.*

2800. *Id.* at 686, 602 N.Y.S.2d at 900; *see also* N.Y. CONST. art. I, § 12.

This section 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, 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.

During the event in question, police officers had received a radio transmission which identified three gunmen involved in a drug sale at a particular location.²⁸⁰¹ Additionally, the radio report specifically described the clothing that one of the three men at the scene was wearing.²⁸⁰² Within seconds, the officers arrived at the transmitted location and observed three men, one of whom fit the description.²⁸⁰³ Upon the officer's approach, the defendant fled, without provocation.²⁸⁰⁴ After the officers gave chase, the defendant removed his gun and threw it on the sidewalk, while continuing to flee.²⁸⁰⁵ Eventually, the defendant was arrested and the gun seized.²⁸⁰⁶

Given these facts, the court held that "[t]he police radio report which provided information about the three males with guns and the [defendant's] flight together gave rise to a reasonable suspicion sufficient to justify the pursuit."²⁸⁰⁷ In coming to this decision, the court relied on a number of cases. The first of these cases is the New York Court of Appeals case of *People v. Benjamin*.²⁸⁰⁸ In *Benjamin*, as in the instant case, an officer received a radio report of "men with guns at a specified street location."²⁸⁰⁹ Upon arriving at the scene, the defendant "stepped backwards toward the curb while simultaneously reaching beneath his jacket with both hands to the rear of his waistband."²⁸¹⁰ Subsequently, the officer conducted a "pat-down" frisk of the defendant which revealed a loaded weapon.²⁸¹¹ At a suppression hearing, the defendant's motion to

Id.

2801. *Jerry C.*, 197 A.D.2d at 686, 602 N.Y.S.2d at 900.

2802. *Id.* According to the police radio report, one of the three men was described "as wearing a white and blue shirt and white shorts." *Id.*

2803. *Id.*

2804. *Id.*

2805. *Id.*

2806. *Id.*

2807. *Id.*

2808. 51 N.Y.2d 267, 414 N.E.2d 645, 434 N.Y.S.2d 144 (1980).

2809. *Id.* at 269, 414 N.E.2d at 646, 434 N.Y.S.2d at 145.

2810. *Id.*

2811. *Id.*

suppress the weapon was denied.²⁸¹² After reversal by the appellate division, the New York Court of Appeals upheld the trial court's decision not to suppress.²⁸¹³ In reaching this conclusion, the *Benjamin* court stated that "an anonymous tip of 'men with guns,' standing alone, does not justify intrusive police action, and certainly does not rise to the level of reasonable suspicion warranting a stop and frisk[.]"²⁸¹⁴ and "[t]herefore, immediately after the radio call, [the officer had at most only the common-law right to inquire, but no right or justification to subject any person at the scene to the search."²⁸¹⁵ While a radio tip by itself has minimal legal significance, "when considered in conjunction with other supportive facts, it may thus collectively, although not independently, support a reasonable suspicion justifying intrusive police action."²⁸¹⁶ In finding other supportive facts to justify the "pat-down" frisk, the *Benjamin* court relied on the common knowledge of officers that handguns are typically carried in the waistband.²⁸¹⁷ The court also found that citizens who obey the law do not normally step back and reach for a waistband where a gun may be carried.²⁸¹⁸ The court reasoned that "[a]lthough such action may be consistent with innocuous or innocent behavior, it would be unrealistic to require [the officer, who had been told that gunmen might be present, to assume the risk that the defendant's conduct was in fact innocuous or innocent[.]"²⁸¹⁹ and that "[i]t would, indeed, be absurd to suggest that a police officer has to await the glint of steel before he can act to preserve his safety."²⁸²⁰

2812. *Id.* at 269, 414 N.E.2d at 647, 434 N.Y.S.2d at 145. The defendant moved to suppress on the grounds that the "pat-down" frisk violated his "constitutional right to be free from unreasonable searches and seizures." *Id.*

2813. *Id.* at 269-70, 414 N.E.2d at 647, 648, 434 N.Y.S.2d at 145, 146.

2814. *Id.* at 270, 414 N.E.2d at 647, 434 N.Y.S.2d at 145.

2815. *Id.* at 270, 414 N.E.2d at 647, 434 N.Y.S.2d at 145-46.

2816. *Id.* at 270, 414 N.E.2d at 647, 434 N.Y.S.2d at 146.

2817. *Id.* at 271, 414 N.E. 2d at 648, 434 N.Y.S.2d at 146.

2818. *Id.*

2819. *Id.*

2820. *Id.*

Similarly, in *Jerry C.*, the recovery of the gun occurred pursuant to a radio tip and additional supportive facts. Here, the defendant ran from the officers without any provocation.²⁸²¹ Additionally, after the defendant actually drew his gun, one of the officers saw him dispose of it during the chase.²⁸²² All these factors together, justified the pursuit of the police and the recovery of the gun.

The court in *Jerry C.* also relied on *People v. Jackson*.²⁸²³ The facts in *Jackson* are almost identical to the present case.²⁸²⁴ In holding that the suppression of the defendant's gun was properly denied, the court reasoned that "the police officers in this case had sufficient predicate to approach the defendant and to make inquiry."²⁸²⁵ Additionally, the court stated that "[t]his factor, when coupled with the defendant's immediate flight upon the officers' approach, justified the officers' pursuit of the defendant."²⁸²⁶ Finally, "when the police officers saw the defendant with a gun, they had probable cause to arrest him and to seize the gun upon a lawful arrest."²⁸²⁷

This case is clearly analogous to *Jerry C.* in both fact and in law. In both *Jackson* and *Jerry C.* the police received a radio report and in both cases the defendant immediately fled.²⁸²⁸ Finally, in both cases the defendant threw away the gun, which the officers saw, during the course of the police pursuit.²⁸²⁹ Just

2821. *Jerry C.*, 197 A.D.2d at 686, 602 N.Y.S.2d at 900.

2822. *Id.*

2823. 172 A.D.2d 561, 567 N.Y.S.2d 887 (2d Dep't 1991).

2824. In *Jackson*, officers received a radio call of a man with a gun at a specified location and describing his clothing. *Id.* at 561, 567 N.Y.S.2d at 887. As the officers approached the defendant he immediately fled. *Id.* Upon chasing the defendant, he removed the gun and discarded it. *Id.* at 561-62, 567 N.Y.S.2d at 887.

2825. *Id.* at 562, 567 N.Y.S.2d at 887.

2826. *Id.* at 562, 567 N.Y.S.2d at 888.

2827. *Id.*

2828. *See Jerry C.*, 197 A.D.2d at 686, 602 N.Y.S.2d at 900; *Jackson*, 172 A.D.2d at 561, 567 N.Y.S.2d at 887.

2829. *See Jerry C.*, 197 A.D.2d at 686, 602 N.Y.S.2d at 900; *Jackson*, 172 A.D.2d at 561-62, 567 N.Y.S.2d at 887.

as the factors together in *Jackson* justified police pursuit and seizure of the gun, the same is true of *Jerry C.*

A third case which *Jerry C.* relied on is *People v. Wider*.²⁸³⁰ With minimal facts given, the court reaffirmed the rationale of the foregoing cases. Namely, and in this particular case,

[w]hile the police radio transmission which provided information about shots being fired at a particular location and the defendant's flight may not have separately justified pursuit by the police officer responding to the scene, these two factors, taken together, gave rise to a reasonable suspicion sufficient to justify that pursuit.²⁸³¹

Besides setting out the general rule of law, the case also sets up factors to determine justifications for police pursuit of defendants. In *Wider*, the court relied on factors such as the radio report, the quick response time, the observation by the officers of a group of men at a specific location, the matched description of one of the gunmen given in the radio report, and the flight of the defendant.²⁸³²

These factors can be applied to *Jerry C.* to reach the same conclusion. The officers in *Jerry C.* received a radio report, they responded within seconds of the radio report, the officers observed one of the males in the group as wearing the clothing described in the radio report, and upon approaching the group of males, the defendant fled.²⁸³³ All these factors together lead to a justification of the police pursuit which in turn justifies the recovery of the gun.

Finally, *Jerry C.* is distinguishable from *People v. Holmes*.²⁸³⁴ In *Holmes*, officers were driving in a known narcotics location and one of the officers noticed a bulge in the defendant's pocket.²⁸³⁵ As the officer got out of the police car the defendant

2830. 172 A.D.2d 573, 568 N.Y.S.2d 141 (2d Dep't 1991).

2831. *Id.* at 574, 568 N.Y.S.2d at 141-42.

2832. *Id.*

2833. *Jerry C.*, 197 A.D.2d at 686, 602 N.Y.S.2d at 900.

2834. 81 N.Y.2d 1056, 619 N.E.2d 396, 601 N.Y.S.2d 459 (1993).

2835. *Id.* at 1057, 619 N.E.2d at 396, 601 N.Y.S.2d at 460.

fled and the officers ran after him.²⁸³⁶ During the pursuit, the defendant threw a plastic bag which was later recovered by the police and identified as crack cocaine.²⁸³⁷ In its ruling in favor of suppression, the court stated that

[w]hile the police may have had an objective credible reason to approach defendant to request information — having observed him in a ‘known narcotics location’ with an unidentified bulge in the pocket of his jacket — those circumstances, taken together with defendant’s flight, could not justify the significantly greater intrusion of police pursuit.²⁸³⁸

This situation is different than that of *Jerry C.* and the cases previously mentioned. In *Holmes*, the officers were not answering to a radio report, but were instead driving through the area.²⁸³⁹ Although the defendant in *Holmes* quickly ran away as soon as the officers approached him, that factor, together with police observation of a bulge, is not enough to warrant police pursuit.

Therefore, in order to recover evidence without a warrant, there must first be a lawful police pursuit. A lawful police pursuit comes from significant factors taken together. Officers must have a reasonable suspicion to pursue. While observation of an unknown bulge together with immediate departure will not be sufficient, a police radio report with specifics to which officers respond, together with an immediate departure of the defendant from the place depicted in the radio report will suffice.

Although no violation of a federal constitutional right of the defendant was contended, it may be helpful to examine federal law on this issue. The seminal federal case is *Terry v. Ohio*.²⁸⁴⁰ The Supreme Court in *Terry* held that:

[W]here 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

2836. *Id.* at 1057, 619 N.E.2d at 397, 601 N.Y.S.2d at 460.

2837. *Id.*

2838. *Id.* at 1058, 619 N.E.2d at 398, 601 N.Y.S.2d at 461.

2839. *Id.* at 1056, 619 N.E.2d at 397, 601 N.Y.S.2d at 460.

2840. 392 U.S. 1 (1968).

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.²⁸⁴¹

Under the Supreme Court standard, it seems that as long as the officer acts reasonably, then a search of a defendant will be lawful. This standard is less stringent than the New York standard because the New York standard requires a combination of factors before a police pursuit and subsequent recovery of evidence will be allowed. Therefore, since *Jerry C.* passed the stricter New York standard, it most definitely would pass the federal standard set forth in *Terry*.

People v. Mondello²⁸⁴²
(decided March 1, 1993)

The criminal defendant claimed that his right to peremptorily challenge a potential juror during voir dire was violated when the trial court determined that the challenge was based on racially motivated grounds.²⁸⁴³ The defendant also asserted that his right to be free from unreasonable searches and seizures²⁸⁴⁴ was violated when the police took a statement from him at the station house before *Miranda* warnings were given.²⁸⁴⁵ The second department held that the trial court did not commit reversible error by denying the defendant's peremptory challenge to a black

²⁸⁴¹. *Id.* at 30.

²⁸⁴². 191 A.D.2d 462, 594 N.Y.S.2d 287 (2d Dep't 1993).

²⁸⁴³. *Id.* at 462, 594 N.Y.S.2d at 289.

²⁸⁴⁴. See U.S. CONST. amend IV, which provides that: "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.*; N.Y. CONST. art. I, § 12, which provides in 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.*

²⁸⁴⁵. *Mondello*, 191 A.D.2d at 463-64, 594 N.Y.S.2d at 289-90.