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Touro Law Review

Volume 10 | Number 3

Article 90

1994

Search and Seizure: People v. Mondello

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Recommended Citation

(1994) "Search and Seizure: People v. Mondello," *Touro Law Review*: Vol. 10: No. 3, Article 90.
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol10/iss3/90>

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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.

juror.²⁸⁴⁶ The appellate division also ruled that the defendant's right against unreasonable search and seizure was not violated because the defendant was not yet under arrest when he made his statement to the police.²⁸⁴⁷

During voir dire, the defendant's counsel made peremptory challenges of all but one of the black prospective jurors, and did not challenge persons of any other race.²⁸⁴⁸ Thus, when the defense counsel challenged the last black potential juror, Juror No. 2, the court determined that there was a prima facie showing of racial discrimination.²⁸⁴⁹ When the court inquired as to his reasons for the challenge, defense counsel gave subjective reasons for the peremptory challenge of Juror No. 2, stating that he did not like that juror.²⁸⁵⁰ In response to further inquiry by the court as to a racially-neutral reason for the peremptory challenge, defense counsel stated that his act was only a "*quid pro quo*" to the prosecutor's discriminatory challenges.²⁸⁵¹ Finally, after further prompting by the court, defense counsel claimed that Juror No. 2 was influenced by the publicity of the case.²⁸⁵² The trial court, however, found no support in the record that Juror No. 2 would be unduly influenced by the surrounding publicity and, therefore, denied the peremptory challenge.²⁸⁵³

It is well settled that the Federal and New York State Constitutions prohibit the use of purposeful, racially discriminatory peremptory challenges by criminal defendants.²⁸⁵⁴

2846. *Id.* at 463, 594 N.Y.S.2d at 289.

2847. *Id.* at 462, 584 N.Y.S.2d at 289.

2848. *Id.*

2849. *Id.*

2850. *Id.* at 462-63, 594 N.Y.S.2d at 289.

2851. *Id.* at 463, 594 N.Y.S.2d at 289.

2852. *Id.*

2853. *Id.*

2854. *See People v. Kern*, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990) *cert. denied*, 498 U.S. 824 (1990). In *Kern*, the New York State Court of Appeals held that *Batson v. Kentucky*, 476 U.S. 79 (1986) applied to the use of peremptory challenges by the defense. *Id.* at 653, 554 N.E.2d at 1243, 555 N.Y.S.2d at 655. It reasoned that both the Civil Rights Clause and the Equal Protection Clause of the State Constitution prohibited the use of peremptory challenges by the defense to exclude persons of a particular race

In *Georgia v. McCollum*,²⁸⁵⁵ the United States Supreme Court reasoned that the harm to the excluded juror, the defendant, and to the community would occur regardless of whether the defense or prosecution used a discriminatory peremptory challenge.²⁸⁵⁶ The *McCollum* Court set forth a four-part test for determining whether the Federal Constitution prohibited criminal defendants from using racially discriminatory peremptory challenges.²⁸⁵⁷ The Court in *McCollum* concluded that a court cannot allow jurors to be excluded by a racially-discriminatory peremptory challenge, "be it at the hands of the State or the defense."²⁸⁵⁸ The Court also noted that the criminal defendant does not have a constitutionally protected right to a peremptory challenge.²⁸⁵⁹

from the jury. *Id.* at 650-658, 554 N.E.2d at 1241-46, 555 N.Y.S.2d at 653-658. Specifically, the *Kern* court applied the *Batson* reasoning to find that to allow racially-based peremptory challenges would harm the excluded juror, the defendant, and society. *Id.* at 654, 554 N.E.2d at 1243, 555 N.Y.S.2d at 655.

2855. 112 S. Ct. 2348 (1992).

2856. *Id.* at 2353.

2857. *Id.* The Court stated that the following must be considered:

First, whether a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner inflicts the harms addressed by *Batson*. Second, whether the exercise of peremptory challenges by a criminal defendant constitutes state action. Third, whether prosecutors have standing to raise this constitutional challenge. And fourth, whether the constitutional rights of a criminal defendant nevertheless preclude the extension of our precedents to this case.

Id.

2858. *Id.* at 2354. The public perception would be that the State had excused jurors because of race. *Id.* at 2356.

2859. *Id.* at 2358. The *McCollum* court stated that peremptory challenges "are but one state-created means to the constitutional end of an impartial jury and a fair trial. This court repeatedly has stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial." *Id.* See N.Y. CRIM. PROC. LAW § 270.25 (McKinney 1993) (New York legislated the requirement that peremptory challenges be afforded to all parties in all criminal cases); N.Y. CIV. RIGHTS LAW § 13 (McKinney 1992) (New York Bill of Rights includes a right that every person who qualifies under the law can serve on a jury and that this right shall not be abridged based on race, creed, color, national origin or gender and the abridgment of such right upon any of these basis' is a misdemeanor). *Id.*

In *Mondello*, there was prima facie evidence of discrimination because the defendant only peremptorily challenged black prospective jurors.²⁸⁶⁰ When a criminal defendant attempts to exclude prospective jurors based on their race, both the New York State and United States Constitutions apply the *Batson* test requiring the prosecutor to establish a prima facie case of discrimination and the defendant to offer race-neutral reasons for the challenges. The *Mondello* court followed both state and federal precedent that prohibit both the prosecution and the defense from exercising racially discriminatory peremptory challenges.²⁸⁶¹ In *Mondello*, since there was a prima facie showing of discrimination by the defendant, the trial court seated the juror in spite of defendant's objections.²⁸⁶² The appellate division, deferred to the trial court's finding that the defense's racially-neutral reasons were a mere pretext for a racially-discriminatory purpose.²⁸⁶³

The defendant's second claim, that a statement he made to the police before he was read his *Miranda* rights should have been suppressed pursuant to the exclusionary rule, was also found to be without merit.²⁸⁶⁴ A police officer approached Mondello with his gun drawn, because the defendant's hands were out of view

2860. *Mondello*, 191 A.D.2d at 462, 594 N.Y.S.2d at 289; see also *People v. Green*, 181 A.D.2d 693, 581 N.Y.S.2d 357 (2d Dep't 1992) (finding prima facie evidence of racially discriminatory peremptory challenges where black defendant exercised 11 out of 13 peremptory challenges to exclude white prospective jurors); cf. *People v. Childress*, 81 N.Y.2d 263, 614 N.E.2d 709, 598 N.Y.S.2d 146 (1993). In *Childress*, the court held that the prima facie prong of the *Batson* analysis requires defendant to demonstrate that facts exist which imply that the prosecutor is attempting to exclude members of a particular race from the jury panel using peremptory challenges. However, the mere challenge of 2 of 3 potential black jurors, without more, may be found by the trial judge to fall short of this standard. *Id.*

2861. *Mondello*, 191 A.D.2d at 462, 594 N.Y.S.2d at 289.

2862. *Id.* at 462, 589 N.Y.S.2d 289. In *Mondello*, the prosecutor was able to show a prima facie case of racially discriminatory use of defense's peremptory challenges. The court found that the defense's "proffered excuse was a pretext offered in an attempt to cover this discrimination. *Id.* at 463, 589 N.Y.S.2d 289. Thus, the court seated the juror so no discrimination would occur. *Id.*

2863. *Id.*

2864. *Id.*

and because the defendant was believed to be armed and dangerous.²⁸⁶⁵ The defendant voluntarily consented to go to the police station, where the defendant made his statement.²⁸⁶⁶ The defendant argued that he had been placed under arrest, and since no *Miranda* warnings had been given to him before he made his statement, the statement should be suppressed.²⁸⁶⁷ The appellate court, however, agreed with the trial court that the defendant was not under arrest when the police officer approached with gun drawn because it was reasonable to believe that the defendant was armed and dangerous.²⁸⁶⁸

The appellate division relied on the analysis of its prior decision, *People v. Finlayson*,²⁸⁶⁹ stating that the reasonableness of the protective means by which the police officer approached was an important consideration in resolving search and seizure issues.²⁸⁷⁰ In *Finlayson*, the Appellate Division, Second Department, held that a police officer can hold a suspect at gunpoint if there is a reasonable suspicion that a person has committed a crime and a frisk is not feasible.²⁸⁷¹ Therefore, the *Finlayson* court held that evidence obtained as a result of the defendant's detention at gunpoint was admissible.²⁸⁷² The *Finlayson* court balanced a suspect's right to liberty²⁸⁷³ against a police officer's right to perform his duties without fear of unreasonable harm.²⁸⁷⁴

2865. *Id.* at 463, 594 N.Y.S.2d at 290.

2866. *Id.* at 463-64, 594 N.Y.S.2d at 290.

2867. *Id.* at 463-464, 594 N.Y.S.2d at 289-290.

2868. *Id.* at 464, 594 N.Y.S.2d at 290.

2869. 76 A.D.2d 670, 431 N.Y.S.2d 839 (2d Dep't 1980) *cert. denied*, 450 U.S. 931 (1981).

2870. *Id.* at 678, 431 N.Y.S.2d at 846. "To reconcile the officer's right of self-protection with the citizen's right to personal liberty we need only look, once again, to the constitutional standard of reasonableness." *Id.*

2871. *Id.* at 678-679, 431 N.Y.S.2d at 846-847. There is no arrest merely because an officer approaches a person with gun drawn. *Id.* at 678, 431 N.Y.S.2d at 846.

2872. *Id.* at 682, 431 N.Y.S.2d at 849.

2873. *Id.*

2874. *Id.* at 678, 431 N.Y.S.2d at 846.

Similarly, in *People v. Chestnut*,²⁸⁷⁵ the New York Court of Appeals reasoned that a police officer investigating a crime has the right to “ensure their safety,”²⁸⁷⁶ and that “the presence of [a] drawn gun [does not necessarily] transform [a] stop and frisk of [a] defendant into an arrest.”²⁸⁷⁷ In *Chestnut*, police officers were justified in approaching the defendant with guns drawn and ordering the defendant to lie on the ground because they had reason to believe a crime had been committed.²⁸⁷⁸ The court held that a statement made by the defendant in response to the officer’s question was admissible even though no *Miranda* warnings were given because the stop and frisk was not custodial interrogation.²⁸⁷⁹

Thus, New York State and Federal case law recognize that an officer’s safety is a factor to be considered in resolving Fourth Amendment issues. It is the standard of reasonableness that is used to judge a police officer’s action in dealing with the public.²⁸⁸⁰ The *Mondello* court followed this precedent by finding that a police officer’s approach with gun drawn did not effect an arrest requiring probable cause and *Miranda* warnings, in order to admit the defendant’s statement.

2875. 51 N.Y.2d 14, 409 N.E.2d 958, 431 N.Y.S.2d 485 (1980) *cert. denied*, 449 U.S. 1018 (1980).

2876. *Id.* at 21, 409 N.E.2d at 961, 431 N.Y.S.2d at 489.

2877. *Id.* at 21, 409 N.E.2d at 962, 431 N.Y.S.2d at 489. *See People v. Price*, 194 A.D.2d 634, 599 N.Y.S.2d 45 (2d Dep’t 1993) (holding that police can approach suspect with guns drawn to protect themselves where there is reasonable belief that suspect is dangerous); *People v. Hardy*, 146 A.D.2d 800, 537 N.Y.S.2d 279 (2d Dep’t 1989) (holding that police officer’s approach with gun drawn did not convert a confrontation into an arrest when officer acted reasonably towards an armed and dangerous suspect).

2878. 51 N.Y.2d at 22, 409 N.E.2d at 962, 431 N.Y.S.2d at 490.

2879. *Id.* at 23 n.8, 409 N.E.2d at 463 n.8, 431 N.Y.S.2d at 490 n.8.

2880. *See Terry v. Ohio*, 392 U.S. 1 (1968); *People v. De Bour*, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976).