



1994

## Search and Seizure: People v. Moore

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### Recommended Citation

(1994) "Search and Seizure: People v. Moore," *Touro Law Review*. Vol. 10: No. 3, Article 95.  
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol10/iss3/95>

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reasonably within the curtilage<sup>3009</sup> and therefore not subject to either jurisdiction's application of the open fields doctrine.

## CRIMINAL COURT

### BRONX COUNTY

People v. Moore<sup>3010</sup>  
(printed September 24, 1993)

The defendants claimed that their New York State constitutional right against unreasonable searches and seizures<sup>3011</sup> was violated when the police, after seizing and frisking the defendants, searched the defendant's car with the aid of a flashlight and seized a gun, despite the absence of probable cause.<sup>3012</sup> The court held that the police overstepped the bounds of a reasonable search and violated the defendant's rights under the New York State Constitution, article I, section 12.<sup>3013</sup>

Police Officer Robert Kissh was doing routine patrol in a high crime area.<sup>3014</sup> According to his testimony, at about 6:00 a.m. he noticed the defendant's car double-parked in front of a "known drug social club."<sup>3015</sup> Officer Kissh observed the driver, Mr. Moore, engage in a conversation with a known drug dealer.<sup>3016</sup> When Kissh and his partner approached the area, the

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3009. *Saurini*, \_\_\_ A.D.2d at \_\_\_, 607 N.Y.S.2d at 519.

3010. N.Y. L.J., Sept. 24, 1993, at 23 (Crim. Ct. Bronx County).

3011. N.Y. CONST. art. 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, 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.*

3012. *Moore*, N.Y. L.J., at 24.

3013. *Id.*

3014. *Id.* at 23.

3015. *Id.*

3016. *Id.*

known drug dealer left.<sup>3017</sup> Officer Kissh asked Moore for his license, registration, and insurance card while his partner stood at the passenger side of the car.<sup>3018</sup> Officer Kissh testified that Moore appeared to be intoxicated and jumped out of his car.<sup>3019</sup> The officer grabbed Moore with his right hand while reaching into the car and shone a flashlight into the front area of the car and observed a gun.<sup>3020</sup>

Officer Kissh's testimony was contradicted by the testimony of defendant Franco, the other person in the car with Moore, who had no prior criminal record.<sup>3021</sup> The officer's testimony was also contradicted by Adam Wilmore, the supposed known drug dealer who spoke with Moore.<sup>3022</sup> Wilmore was a sixty-nine-year-old auto worker, an honorably discharged former member of the United States Armed Services, and had no prior criminal history.<sup>3023</sup> However, the court decided the case based upon the facts as stated by officer Kissh.<sup>3024</sup>

The court held that the police violated the defendant's right against unreasonable searches and seizures under the New York State Constitution, article I, section 12.<sup>3025</sup> The court stated that

3017. *Id.*

3018. *Id.*

3019. *Id.*

3020. *Id.*

3021. *Id.* at 24.

3022. *Id.* at 23.

3023. *Id.*

3024. *Id.* at 24. According to their corroborating testimonies, Mr. Wilmore was the man who had been talking to Mr. Moore when Officer Kissh approached the car with his partner. *Id.* at 23. In contrast to Officer Kissh's testimony, they testified that Moore's car was not double-parked but was parked on the street. *Id.* Additionally, when Officer Kissh asked defendant Moore for his license and registration, Mr. Moore simply replied that he did not have his license whereupon the officer ordered defendants Moore and Franco out of the car. *Id.* After the defendants complied with Officer Kissh's order, Mr. Wilmore noticed that the one of the bumpers was lower on the right side and proceeded to fix it with Mr. Moore. *Id.* at 23-24. Mr. Wilmore stated that while Officer Kissh was observing Mr. Wilmore and the defendants were repairing the bumper, Officer Kissh's partner was inside the car with a flashlight and eventually emerged with a gun in his possession. *Id.* at 24.

3025. *Id.*

once the defendants had been lawfully seized and frisked, it was unreasonable to reach into the defendant's car and search it with a flashlight.<sup>3026</sup> The defendants were stopped for a traffic infraction, and the court held that absent probable cause that the defendant had committed or was committing a crime, the officers could not search the car.<sup>3027</sup> The gun found in defendant Moore's car was not within his reach since he was already seized outside the car and thus posed no threat to the safety of the officers.<sup>3028</sup> The court reasoned that because Officer Kissh and his partner had already seized and "isolated the [defendants] before the search, the search was not reasonably related to the need to protect the officers."<sup>3029</sup>

The court relied on *People v. Torres*,<sup>3030</sup> which held that under the New York State Constitution, article I, section 12, once the occupants had been frisked outside the car, the police were prohibited from searching the car and seizing evidence therefrom absent probable cause to believe "that there was . . . immediate

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3026. *Moore*, N.Y. L.J., at 24.

3027. *Id.* Officer Kissh's own testimony established that he observed the gun only by reaching into the car and using a flashlight to search the floor of the car after he and his partner had already seized both defendants outside the car. *Id.* at 23.

3028. *Id.* at 24.

3029. *Id.* (citing *People v. Jackson*, 79 N.Y.2d 907, 909, 590 N.E.2d 240, 241, 581 N.Y.S.2d 655, 656 (1992)).

3030. 74 N.Y.2d 224, 543 N.E.2d 61, 544 N.Y.S.2d 796 (1989). In *Torres*, the police received an anonymous phone call describing an alleged homicide suspect, his location, the car he was driving, and a shoulder bag containing the gun. *Id.* at 226, 543 N.E.2d at 62, 544 N.Y.S.2d at 797. Shortly thereafter, two plain clothed detectives seized the defendant and his companion, and conducted a subsequent search of the front seat, which revealed a gun in a shoulder bag. *Id.* Although the initial seizure and frisking of the defendant was lawful because it ensured the protection of the detectives' safety, the subsequent search into the car exceeded the bounds of reasonableness. *Id.* at 230-31, 543 N.E.2d at 65, 544 N.Y.S.2d at 800-01. The court of appeals found that although the detectives may have had a reasonable basis for suspecting the presence of a gun in the car, such suspicion did not rise to the required level of probable cause for the intrusion. *Id.* at 231, 543 N.E.2d at 65-66, 544 N.Y.S.2d at 801.

threat to their safety.”<sup>3031</sup> The court reasoned that because the shoulder bag containing the gun was not within reach of the defendant, there was “no justification for conducting a further, more intrusive search extending to the removal of personal effects on the front seat of defendant’s car.”<sup>3032</sup> The court of appeals further emphasized that “[a] police officer’s entry into a citizen’s automobile and his inspection of personal effects located within are significant encroachments upon that citizen’s privacy interests.”<sup>3033</sup> The court refused to apply the less stringent federal search and seizure standard and elected to provide greater protection for its citizens from unreasonable search and seizure under the New York State Constitution.<sup>3034</sup>

In its analysis, the court also relied on *People v. Goldring*.<sup>3035</sup> In *Goldring* the court held that an officer’s observation of a crack vial with the aid of a flashlight in the ashtray of a car stopped for a traffic infraction “does not render [that] observation . . . a ‘search’ within the meaning of the Federal or [New York] State Constitutions.”<sup>3036</sup>

The court also relied on *People v. Jackson*.<sup>3037</sup> The court in *Jackson* reasoned that because the plastic bag was “well within

3031. *Id.* at 227, 543 N.E.2d at 63, 544 N.Y.S.2d at 798. The court reaffirmed its “long-standing precedent, [that] such intrusions must be both justified in their inception and reasonably related in scope and intensity to the circumstances which rendered their initiation permissible.” *Id.* at 230, 543 N.E.2d at 65, 544 N.Y.S.2d at 800 (citing *People v. De Bour*, 40 N.Y.2d 210, 215, 352 N.E.2d 562, 566, 386 N.Y.S.2d 375, 379 (1976)).

3032. *Id.* at 227, 543 N.E.2d at 63, 544 N.Y.S.2d at 798.

3033. *Id.* at 229-30, 543 N.E.2d at 65, 544 N.Y.S.2d at 800 (citations omitted).

3034. *Id.* at 228, 543 N.E.2d at 63, 544 N.Y.S.2d at 798.

3035. 186 A.D.2d 675, 675, 588 N.Y.S.2d 639, 639 (2d Dep’t 1992).

3036. *Id.* (citations omitted). The defendant was stopped by a police officer for a traffic violation. *Id.* After having stopped the defendant the police officer, who was using a flashlight, saw a crack vial in the ashtray of defendant’s car. *Id.* The crack vial was not in the officer’s plain view. *Id.*

3037. 79 N.Y.2d 907, 590 N.E.2d 240, 581 N.Y.S.2d 655 (1992). In *Jackson*, after the police officers stopped the defendant’s car in response to a radio run, the officers saw a plastic bag on the floor of the car under the defendant’s feet. *Id.* at 908, 590 N.E.2d at 241, 581 N.Y.S.2d at 656. The officer reached into the car, picked up the bag and shone his flashlight onto it.

defendant's immediate reach[.]" it was reasonably necessary to shine the flashlight through the plastic bag to ensure that the bag "did not contain a weapon or some other instrumentality that posed a threat to the sergeant's or his fellow officers' safety . . . ."3038

The court of appeals, in *People v. Bennett*,<sup>3039</sup> held that an officer's observation of a roll of clear plastic bags on the dashboard of a car with the aid of a flashlight provided reasonable suspicion for the officer to detain and question the defendant.<sup>3040</sup> Additionally, the defendant's incriminating replies

*Id.* The officer believed that marihuana was in the bag and the officers arrested the defendant. *Id.*

3038. *Id.*

3039. 70 N.Y.2d 891, 519 N.E.2d 289, 524 N.Y.S.2d 378 (1987).

3040. *Id.* at 893, 519 N.E.2d at 291, 524 N.Y.S.2d at 380. In *Bennett*, the police officers, who were responding to a radio call, observed two cars, one on the shoulder of the road and the other on the driveway of a closed store, stopped approximately one hundred yards from the reported intersection. *Id.* at 892, 519 N.E.2d at 290, 524 N.Y.S.2d at 379. As the officers pulled their police vehicle behind the car on the shoulder and approached it, the defendant who was talking with the driver, returned to his own car and the second car drove away. *Id.* One of the officers approached the vehicle and inspected the vehicle with the aid of a flashlight to look for any indication of an accident. *Id.* They inquired of the defendant whether he had been in an accident and whether he had a driver's license or vehicle registration. *Id.* at 892, 519 N.E.2d at 290-91, 524 N.Y.S.2d at 379-80. After the defendant replied in the negative to both questions, the officer noticed a roll of plastic zip-lock bags on the dashboard. *Id.* At this point, the court reasoned that because the officer knew that similar types of plastic bag were often used in drug dealing, the officer had a reasonable suspicion to detain and further question the defendant. *Id.* at 892-93, 519 N.E.2d at 291, 524 N.Y.S.2d at 380. In response, the defendant told the officer that he used the bags for his coin collection. *Id.* at 892, 519 N.E.2d at 291, 524 N.Y.S.2d at 380. The officer also observed a black pouch and asked the defendant twice what was in it. *Id.* at 892-93, 519 N.E.2d at 291, 524 N.Y.S.2d 380. The defendant opened the pouch and pulled from it a smaller bag that had "speed" in it as admitted by the defendant at that time. *Id.* at 893, 519 N.E.2d at 291, 524 N.Y.S.2d at 380. In affirming the defendant's conviction of criminal possession of a controlled substance, the court of appeals reasoned that "[o]nce [the] defendant made the incriminating replies to [the officer's] inquiries, there existed probable cause for defendant's arrest and justification for the subsequent search of defendant's person and vehicle

to the officer's routine inquiries gave rise to probable cause for a subsequent search of the defendant and his car.<sup>3041</sup>

According to federal law, as illustrated in *New York v. Class*,<sup>3042</sup> wherein a defendant was outside his car after being stopped for a traffic infraction, a subsequent search for the Vehicle Identification Number (VIN) that inadvertently led to the seizure of a gun which was underneath the driver's seat, was reasonable under the Fourth Amendment.<sup>3043</sup> The Court's primary justification for the search and seizure was that police officers must make sure that "an individual being detained [not] have . . . access to a dangerous weapon" to protect the officers' safety.<sup>3044</sup> The Court further reasoned that because the governmental "intrusion was minimal . . . probable cause stemmed from directly observing [defendant] commit a violation of the law."<sup>3045</sup>

The Supreme Court permits the police to conduct searches of vehicles and requires reasonable suspicion of criminal activity, such as a traffic infraction, to support the search.<sup>3046</sup> In contrast, the New York Court of Appeals prohibits such searches and adopts a more protective standard to guard an individual's right against unreasonable police search and seizure.<sup>3047</sup>

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incident to an arrest." *Id.* (citing *People v. Belton*, 55 N.Y.2d 49, 54-55, 432 N.E.2d 745,748, 447 N.Y.S.2d 873, 876 (1982)).

3041. *Id.*

3042. 475 U.S. 106 (1986).

3043. *Id.* at 115-16.

3044. *Id.* at 116 (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977)).

3045. *Id.* at 117-18.

3046. *Id.* at 117-19.

3047. *See Torres*, 74 N.Y.2d at 228, 543 N.E.2d at 63, 544 N.Y.S.2d at 798.