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Search and Seizure: People v. Gonzales

NEW YORK COUNTY

People v. Gonzales[3048]
(decided June 14, 1993)

The defendant claimed that his statutory[3049] and constitutional rights[3050] to be protected against warrantless searches and seizures were violated, whereby an officer stopped and frisked him based on a description which did not match the one obtained from an anonymous tip transmitted over the police radio. In addition, the defendant claimed that the officer improperly performed the "pat down" by using a "hard frisk," which caused drugs to "pop out" of the defendant's waistband.[3051] The hearing court held that the police acted on reasonable suspicion because "not only was the defendant the only one at the scene who

3048. N.Y. L.J., Sept. 30, 1993, at 21 (Crim. Ct. New York County June 14, 1993).

3049. N.Y. CRIM. PROC. LAW § 140.50(1), (3) (McKinney 1992). Section 140.50(1) of the Criminal Procedure Law provides in pertinent part: "[a] police officer may stop a person in a public place located within a geographical area of such officer's employment when he reasonably suspects that such person is committing, has committed or is about to commit either . . . a felony or . . . a misdemeanor . . . , and may demand of him his name, address and an explanation of his conduct. *Id.* Section 140.50(3) of the Criminal Procedure Law provides in pertinent part: "When upon stopping a person under circumstances prescribed in subdivision[] one . . ., and a police officer . . . reasonably suspects that he is in danger of physical injury, he may search such person for a deadly weapon or any instrument, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons . . . . *Id.*

3050. U.S. CONST. amend. IX. The Fourth Amendment provides in pertinent part: "The right of the people to be secure . . . 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.*; N.Y. CONST. art. I, § 12. Section 12 provides in pertinent part: "The right of the people to be secure . . . 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.*

3051. *Gonzales*, N.Y. L.J., at 21.

matched the description; he was the only person at the scene."[3052] The court further held that the way in which the pat down had been conducted did not violate defendant's constitutional rights, reasoning that because the defendant wore various layers of clothing, a light touch would not have indicated presence of a weapon to the officer.[3053] Since the officer's search had been limited to the outside of the defendant's garments and to the ascertainment of whether a weapon was present, the frisk was within state and federal constitutional limitations.[3054]

Officer Michael Connor testified at the *Mapp/Huntley* hearing that on April 10, 1993, he and four other officers were on foot patrol.[3055] Officer Connor was standing on the southeast corner of 110th Street and Lexington Avenue when he received a radio transmission, based on an anonymous tip, describing a person with a gun as a "male black" wearing a black rain coat and a gray hat, and carrying a "reddish" umbrella.[3056] It was also reported in the radio broadcast that the suspect was located on the corner of 109th Street and Lexington Avenue, and the gun was alleged to be in his jacket pocket.[3057] At the time of the transmission, Officer Connor spotted the defendant on the next corner.[3058] The defendant was wearing a grayish colored rain suit and a baseball hat, and was holding a "reddish" umbrella.[3059] The officers did not see anyone else on the corner, and the officers approached the defendant without drawing their guns.[3060] Upon approaching the suspect, Officer Connor noted that under the rain suit, the defendant wore a suede jacket, a shirt and another pair of pants.[3061]

3052. *Id.* (citations omitted).
3053. *Id.*
3054. *Id.*
3055. *Id.*
3056. *Id.*
3057. *Id.*
3058. *Id.*
3059. *Id.*
3060. *Id.*
3061. *Id.*

While one officer began to frisk the defendant to determine whether he was carrying a weapon, the defendant kept trying to lower his left arm, preventing the officer from feeling his waist.[3062] Officer Connor and a third officer took over the frisk, forcing the defendant to keep his arms elevated.[3063] As Officer Connor proceeded with the frisk, eight packets of heroin fell from the clothing at defendant's waist.[3064] The defendant was arrested and charged with criminal possession of a controlled substance in the seventh degree.[3065] He now argues that the drugs seized from him should be suppressed.[3066]

First, the suppression court found that the specificity of the radio transmission, and the degree to which the defendant matched the description, provided the police with the "reasonable suspicion" needed to properly stop and frisk the defendant.[3067] The court stated that "[a] description may be sufficiently specific and congruous even where every detail is not accurate" to establish reasonable suspicion.[3068] The court found that the

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3062. *Id.*

3063. *Id.*

3064. *Id.*

3065. *Id.* This charge was reduced from criminal possession of a controlled substance in the third degree. *Id.* at 21 n.1.

3066. *Id.* at 21.

3067. *Id.*

3068. *Id.* (citing People v. Washington, 182 A.D.2d 520, 521, 582 N.Y.S.2d 416, 417 (1st Dep't) (finding that the officer had a reasonable basis to assume that the defendant had committed the crime, because the officer immediately arrived at the scene and saw the defendant, who fit the general description of the broadcast and who was also the only individual in the vicinity)), *appeal denied*, 80 N.Y.2d 840, 600 N.E.2d 651, 587 N.Y.S.2d 924 (1992); *see also* People v. Fernandez, 58 N.Y.2d 791, 793, 445 N.E.2d 639, 640, 459 N.Y.S.2d 256, 257-58 (1983) (stating that because there was an unusual identifying element in that defendant was carrying a white shirt and was standing in the same geographic area described in the tip, there was reasonable suspicion despite the fact that defendant's hairstyle and height were not identical to the tip's description). *Cf.* People v. DeBour, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976) (finding, in the companion case of *People v. LePene*, that the information communicated by an anonymous tip was not sufficient to establish reasonable suspicion to frisk the defendant, because the description of the suspect lacked specificity). In *DeBour*, the court of appeals enunciated the standard that "the information possessed by the

defendant not only matched the anonymous tip, but he was the only person at the location at the time of the radio transmission.[3069] Furthermore, the court found that Officer Connor acted reasonably by not drawing his gun, even though the arrest occurred in a high crime area.[3070] Therefore, these facts provided the police with the reasonable suspicion necessary to stop and frisk the defendant.[3071]

In reaching its conclusion, the court relied on the reasoning of several New York State court decisions. The court found that "[t]he facts of the instant proceeding . . . even more compelling than those of *People v. Salaman*[3072] and *People v. Olsen.*"[3073] In *Salaman*, the court of appeals justified a stop and frisk, which was based on an officer's independent observations, corroborated with information received from an anonymous tip.[3074] The arresting officer had received an anonymous tip that a black male wearing a beige overcoat and maroon hooded sweatshirt was at South Fifth Avenue and West Third Street in the City of Mount Vernon with a gun.[3075] Although approximately twenty-five people were in the area, the defendant was the only person matching the description given by the anonymous tip.[3076]

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police along with the attendant circumstances including any exigencies must be evaluated in order to assess the legality of the police action." *Id.* at 223, 352 N.E.2d at 572, 386 N.Y.S.2d at 385.

3069. *Gonzales*, N.Y. L.J. at 21; *see also* People v. Middleton, 119 A.D.2d 593, 595, 500 N.Y.S.2d 763, 765 (2d Dep't) (stating that "[h]aving arrived at the scene almost immediately and having spotted the defendant, who fit the general description of the broadcast and was also the only individual in the area, the officer had a reasonable basis to suspect that the defendant might be the perpetrator of the crime") (citations omitted), *appeal dismissed*, 68 N.Y.2d 915, 501 N.E.2d 609, 508 N.Y.S.2d 1036 (1986).

3070. *Gonzales*, N.Y. L.J., at 21.

3071. *Id.*

3072. 71 N.Y.2d 869, 870, 522 N.E.2d 1048, 1049, 527 N.Y.S.2d 750, 751 (1988).

3073. 93 A.D.2d 824, 460 N.Y.S.2d 828 (2d Dep't 1983); *Gonzales*, N.Y. L.J., at 21.

3074. *Salaman*, 71 N.Y.2d at 870, 522 N.E.2d at 1048, 527 N.Y.S.2d at 751.

3075. *Id.*

3076. *Id.*

Balancing the degree of intrusion of the police conduct against the "precipitating and attending circumstances,"[3077] the court found the officer was justified in believing the defendant was in fact armed.[3078] The court also noted that the officer could not have acted unreasonably, because he did not draw his gun and it was night time in a high crime area.[3079]

Similarly, in *Olsen*, the Appellate Division, Second Department held that to sustain conduct that is more intrusive than detaining a suspect for questioning, the "quality of the information [received] must be otherwise established."[3080] The court concluded that when an officer is able to corroborate "by personal observation," details received by an anonymous tip which are "so specific and congruous with that which was actually encountered," the information may be assumed to be reliable.[3081] The court found that the initial information communicated to the officer, "a man with a gun," was too general, and was therefore insufficient to justify the stop and frisk.[3082] However, the informant's additional information, "there were three people at the end of the bar and . . . the one in

3077. *Id.* (citing People v. DeBour, 40 N.Y.2d 210, 223, 352 N.E.2d 562, 571, 386 N.Y.S.2d 375, 384 (1976)). *See also* People v. James, 194 A.D.2d 558, 558, 598 N.Y.S.2d 334, 335 (2d Dep't) (stating that it is "well settled that '[a]ny inquiry into the propriety of police conduct must weigh the degree of the intrusion it entails against the precipitating and attending circumstances'") (citations omitted), *appeal denied*, 82 N.Y.2d 720, 622 N.E.2d 318, 602 N.Y.S.2d 817 (1993);

3078. *Salaman*, 71 N.Y.2d at 870, 522 N.E.2d at 1048, 527 N.Y.S.2d at 751.

3079. *Id.*

3080. People v. Olsen, 93 A.D.2d 824, 460 N.Y.S.2d 828, 829 (2d Dep't 1993).

3081. *Id.* at 824, 460 N.Y.S.2d at 830; *see also* People v. Stewart, 41 N.Y.2d 65, 69, 359 N.E.2d 379, 387, 390 N.Y.S.2d 870, 870 (1976). Without independent corroboration by the police an "anonymous tip giving a general description" will not warrant a stop and frisk and will only give the police the "common law power to inquire for purposes of maintaining the status quo until additional information can be acquired." *Id.*

3082. *Olsen*, 93 A.D.2d at 824, 460 N.Y.S.2d at 830.

the middle, wearing blue jeans and a blue jacket had a gun," was more specific, thereby justifying a stop and frisk.[3083]

The United States Supreme Court has applied a similar level of review in deciding when an anonymous tip reaches the level of reasonable suspicion under the Fourth Amendment.[3084] In *Alabama v. White*,[3085] the Court found that an anonymous tip, corroborated by police observations, provided the reasonable suspicion necessary for an investigatory stop.[3086] In *White*, police received an anonymous tip that a woman possessing cocaine was leaving her home, in a brown Plymouth station wagon with broken taillights, to go to Dobey's Motel.[3087] Two officers followed the woman to Dobey's Motel, where they asked her to step out of her car.[3088] The officers told her that she was suspected of carrying cocaine, and she consented to a search of her car.[3089] The officers found marijuana in a locked attaché case, and upon arresting her, found cocaine in her purse.[3090]

In *White*, the Court found reasonable suspicion to make a lawful stop and search, and stated that

> [r]easonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors — quantity and quality — are considered in the totality of the circumstances — the whole picture, that must be taken into account when evaluating whether there is reasonable suspicion.[3091]

Although an anonymous tip may not be reliable, the Court reasoned that further police investigation to verify criminal activity, will authorize a stop.[3092]

3083. *Id.*
3084. *See* Alabama v. White, 496 U.S. 325 (1990); Adams v. Williams, 407 U.S. 143 (1972).
3085. *White*, 496 U.S. at 325.
3086. *Id.* at 326-27.
3087. *Id.* at 327.
3088. *Id.*
3089. *Id.*
3090. *Id.*
3091. *Id.* at 330 (citing United States v. Cortez, 449 U.S. 411, 417 (1981)).
3092. *Id.* at 329.

The Court applied the "totality of the circumstances" test,[3093] which "critically" considers the informant's veracity, reliability and basis of knowledge for determining probable cause.[3094] However, the *White* Court required a lesser standard to determine reasonable suspicion by finding the "critical" factor to be relevant, rather than "highly relevant."[3095] The Court found that although all of the informant's details were not accurate, there was sufficient indicia of reliability based on the officer's immediate corroboration of the informant's tip.[3096]

The *Gonzales* court also addressed the defendant's contention that the frisk was improper because it was not a "pat-down," but instead a "hard frisk."[3097] The court held that under the circumstances, the manner in which the frisk had been conducted was proper under the New York and United States Constitutions.[3098] The court found that it was necessary for the officer to firmly pat down the defendant's clothes to determine if the defendant possessed a weapon.[3099] The hard frisk was justified for two reasons. First, the defendant wore various layers of clothing, which would not permit a light frisk to reveal any concealed weapons.[3100] Second, the defendant had been uncooperative during the first attempt at the pat down by constantly putting his arms down, thereby preventing a proper protective search.[3101]

The *Gonzales* court distinguished the facts of *People v. Diaz*[3102] and *Minnesota v. Dickerson*[3103] to find the frisk permissible pursuant to the State and Federal Constitutions.[3104] In *Diaz*, the New York Court of Appeals rejected the extension

3093. Illinois v. Gates, 462 U.S. 213 (1983).
3094. *Id.* at 328.
3095. *Id.*
3096. *Id.* at 331-32.
3097. *Gonzales*, N.Y. L.J., at 21.
3098. *Id.*
3099. *Id.*
3100. *Id.*
3101. *Id.*
3102. 81 N.Y.2d 106, 612 N.E.2d 298, 595 N.Y.S.2d 940 (1993).
3103. 113 S. Ct. 2130 (1993).
3104. *Gonzales*, N.Y. L.J., at 21.

of the "plain view" doctrine to a "plain touch" exception to the warrant requirement.[3105] The court held that an officer may not seize drugs felt during a frisk, because "[t]he narrow scope of intrusion authorized during a protective pat-down may not exceed what is necessary to ascertaining the presence of weapons."[3106] The court reasoned that the theory behind the justification for the plain view exception could not be logically extended to concealed items.[3107] If an item is concealed, there still exists a legitimate expectation that the item will remain private.[3108] Therefore, the court of appeals held that an officer cannot reach into the clothes of a suspect simply because the officer felt something that might be incriminating.[3109] In *Gonzales*, the court distinguished *Diaz* by reasoning that Officer Connor's search was only an intrusion of the outside of the defendant's garments, and was therefore within the limits of the New York Constitution.[3110]

On the other hand, the Supreme Court has expanded the plain view exception to plain touch. In *Dickerson*, the Court found that "[i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for

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3105. *Diaz*, 81 N.Y.2d at 107, 612 N.E.2d at 299, 595 N.Y.S.2d at 941.

3106. *Id.* at 109, 612 N.E.2d at 300, 595 N.Y.S.2d at 942 (citing Terry v. Ohio, 392 U.S. 1, 25-26 (1968) (holding that a search for weapons without probable cause to arrest must be limited to "that which is necessary for the discovery of weapons which might be used to harm the officers or others nearby")).

3107. *Id.* at 110, 612 N.E.2d at 301, 595 N.Y.S.2d at 943.

3108. *Id.* at 110-11, 612 N.E.2d at 301, 595 N.Y.S.2d at 943. The court stated many reasons for not expanding the plain view exception to plain-touch including: (1) the identity and criminal nature of a concealed item is not going to be discernible with a mere touch or pat, (2) knowledge of what an item is from feeling it stems from the officer's experience which cannot be equated with the information perceived when an item is in plain view, and (3) the courts feared that the expansion of the plain-view doctrine would "blur[] the limits [of a] *Terry* search." *Id.* at 112, 612 N.E.2d at 302, 595 N.Y.S.2d at 944.

3109. *Id.* at 109, 612 N.E.2d at 300, 595 N.Y.S.2d at 942.

3110. *Gonzales*, N.Y. L.J., at 21.

weapons . . . ."[3111] Therefore, the when the Court recognized the plain touch exception under the United States Constitution, it limited this exception to the exploration of weapons.[3112] Once it has been determined that no weapon is present, the reason for the search ceases to exist and therefore, evidence obtained after the initial search for weapons is suppressible.[3113] In *Gonzales*, the court distinguished *Dickerson* by finding that Officer Connor had limited the search of the defendant to the "ascertainment of whether a weapon was present."[3114] It was during this lawful search that the drugs fell out and the officer properly seized the evidence.[3115] When Officer Connor conducted the legal search for weapons, and the drugs subsequently fell out, Connor was not expected nor required to "turn his back or to return the drugs to the defendant."[3116]

Accordingly, the suppression court in *Gonzales* found that the stop of the defendant was based on reasonable suspicion, and the manner in which the defendant was frisked fell within the scope of state and federal constitutional protections, therefore, the evidence could not be suppressed.[3117]

3111. Minnesota v. Dickerson, 113 S. Ct. 2130, 2137 (1993); *see also* United States v. Ocampo, 650 F.2d 421,429 (2d Cir. 1981) (holding that a bag's contents could be examined under the "plain feel" version of the "plain view" doctrine); United States v. Ceballos, 719 F. Supp. 119, 122 (E.D.N.Y. 1989) (holding that "evidence revealed by touch in the course of a frisk is admissible, under what the Second Circuit has characterized as the 'plain feel' version of the 'plain view' doctrine if the feel was proper").

3112. *Dickerson*, 113 S. Ct. at 2136.

3113. *Id.* at 2138-39.

3114. *Gonzales*, at 21.

3115. *Id.*

3116. *Id.*

3117. *Id.*