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Search and Seizure

a search upon the arrestee's arrival at the place of detention,

(ii) later investigation establishes that this item is of evidentiary value, and

(iii) the item remains in police custody as a part of the arrestee's inventoried property, then it is permissible for the police, without a warrant, to retrieve that object and thereafter deal with it as an item of evidence.[1070]

The court stated that defendant's property fit within this criteria even though it was maintained by a county jail instead of the police.[1071] Therefore, the court found that defendant's argument must also be rejected under federal constitutional law.

The court stated further that the facts of this case did not require a decision on "whether, as a matter of State constitutional law, we would subscribe to the perceived Federal law on the subject."[1072]

Seelig v. Koehler[1073]
(decided May 8, 1990)

Petitioners brought an article 78 proceeding to block the implementation of a random urinalysis drug testing program, asserting that the testing violated their right against unreasonable searches and seizures as protected by the federal[1074] and state[1075] constitutions.[1076] The court of appeals held that the random drug urinalysis testing of correction officers was not violative of either the federal or state constitution because petitioners had a diminished expectation of privacy that was outweighed by the state's substantial interest in ensuring that correction officers are drug

1070. *Id.* at 383-84, 553 N.E.2d at 241, 553 N.Y.S.2d at 652 (quoting 2 W. LAFAVE, SEARCH AND SEIZURE, § 5.3(b) at 491 (2d ed. 1987)); *see also* United States v. Edwards, 415 U.S. 800 (1973).

1071. *Natal*, 75 N.Y.2d at 384, 553 N.E.2d at 241, 553 N.Y.S.2d at 652.

1072. *Id.*

1073. 76 N.Y.2d 87, 556 N.E.2d 125, 556 N.Y.S.2d 832, *cert. denied*, 111 S. Ct. 134 (1990).

1074. U.S. CONST. amend. IV.

1075. N.Y. CONST. art. I, § 12.

1076. *Seelig*, 76 N.Y.2d at 91, 556 N.E.2d at 126, 556 N.Y.S.2d at 833.

free.[1077]

The New York City Commissioner of Correction (Commissioner) sought to implement a random urinalysis drug testing program for all uniformed correction officers. Previously, the Department of Correction utilized a testing program based on reasonable suspicion. However, a serious drug abuse problem was documented among a considerable number of correction officers. Seeking to rectify the problem, the Commissioner promulgated the random testing at issue.[1078] The union, representing the correction officers and its president, brought an article 78 proceeding to block the implementation of the program. The union claimed that the testing would constitute an unreasonable search and seizure in violation of the fourth amendment of the United States Constitution and article I, section 12 of the New York State Constitution.[1079]

The court began its analysis with a discussion of *Patchogue-Medford Congress of Teachers v. Board of Education*,[1080] a case involving an attempt to drug test all probationary school teachers in the school district. In *Patchogue*, the court of appeals held that "reasonable suspicion is an appropriate standard[ ] . . . " and urinalysis drug testing could only proceed on that basis.[1081] The court, in *Patchogue*, disallowed mandatory testing for teachers, stating that random searches must be "closely scrutinized, and [are] generally only permitted when the privacy interests implicated are minimal, the government's interest is substantial, and safeguards are provided to insure that the individual's reasonable expectation of privacy is not subjected to unregulated discretion."[1082]

One year later, in *Caruso v. Ward*,[1083] the court addressed the issue of the constitutionality of random drug testing, this time fo-

1077. *Id.* at 90, 556 N.E.2d at 126, 556 N.Y.S.2d at 833.

1078. *Id.* at 89, 556 N.E.2d at 125, 556 N.Y.S.2d at 832.

1079. *Id.* at 89-91, 556 N.E.2d at 125-26, 556 N.Y.S.2d at 832-33.

1080. 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987).

1081. *Id.* at 69, 510 N.E.2d at 330, 517 N.Y.S.2d at 462.

1082. *Id.* at 70, 510 N.E.2d at 331, 517 N.Y.S.2d at 462 (citing People v. Scott, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984)).

1083. 72 N.Y.2d 432, 530 N.E.2d 850, 534 N.Y.S.2d 142 (1988).

cusing on the employees of the Organized Crime Control Bureau (OCCB). The court held that the OCCB drug testing program was constitutional when imposed upon crime control employees in light of the presence of certain factors of their employment which distinguished individuals employed in crime control from individuals employed in teaching.[1084]

In applying the balancing test of *Patchogue* to the facts in *Caruso*, the court first explained that even though both OCCB members and teachers are employed in the public sector and, thus, have certain diminished privacy expectations, OCCB members, as police officers, incur even further diminished privacy expectations.[1085] The court noted that the officers had already submitted to numerous drug tests in order to determine their fitness for membership in the OCCB and, therefore, the officers' privacy expectations were already significantly reduced.[1086] The court found that while the state has some interest in ensuring that teachers are not using drugs, the state has an even greater interest in ensuring that the OCCB members, who must enforce and uphold the law, are drug free.[1087] Therefore, because OCCB members are faced with the presence of drugs and large sums of money on a daily basis, they may be more tempted to use drugs than teachers; consequently, there is justification for the heightened state interest. Additionally, the court noted that OCCB members are "effectively on duty 24 hours a day," resulting in a heightened state interest in OCCB members' personal lives.[1088]

In *Seelig*, the court applied the three-part test utilized in *Patchogue* to the drug testing program proposed by the New York City Department of Correction for its correction officers. It began by analyzing the privacy expectations of the correction officers. Finding that prison guards voluntarily sacrifice certain cherished freedoms "[b]y choosing to work in the paramilitary milieu of the City Correction Department,"[1089] the court stated

1084. *Id.* at 441, 530 N.E.2d at 855, 534 N.Y.S.2d at 147.
1085. *Id.* at 439, 530 N.E.2d at 853, 534 N.Y.S.2d at 145.
1086. *Id.* at 439-40, 530 N.E.2d at 854, 534 N.Y.S.2d at 146.
1087. *Id.* at 441, 530 N.E.2d at 854, 534 N.Y.S.2d at 146-47.
1088. *Id.* at 441, 530 N.E.2d at 854, 534 N.Y.S.2d at 147.
1089. *Seelig*, 76 N.Y.2d at 96, 556 N.E.2d at 129, 556 N.Y.S.2d at 836.

that the guards possessed a diminished privacy expectation because of certain aspects of employment in this "tough public job[]."[1090] The court explained that guards are among a group of employees whose privacy expectations are "markedly diminished by such factors as the employees' voluntary pursuit of a position they know to be pervasively regulated for reasons of safety and the employees' acceptance of severe intrusions upon their privacy."[1091]

The court compared the privacy expectations of correction officers with the privacy expectations of the employees of the OCCB in *Caruso*. Although both correction officers and OCCB members voluntarily submit to both random and suspicion based urinalysis prior to achieving tenure, the correction officers are also subjected to regular searches of their bodies, their lockers and their vehicles. Thus, the court found that the correction officers' privacy expectations are even less than those of the OCCB members.[1092]

The court then focused on the state's interest and found that a substantial interest existed in employing drug free jail guards in order to protect the public safety. The court was primarily concerned with the state's interest in employing corruption-free jail guards. "Jail guards . . . daily toil among incarcerated individuals, many of whom will pay any price and do any deed to escape or to ameliorate their confinement."[1093] Because the prison is viewed as "fraught with serious security dangers,"[1094] prison employees must possess the "acutest sensory awareness, undulled by the use of illicit drugs[ ]"[1095] so that they may respond instantaneously to any crisis. The court duly noted the failed efforts of the Commissioner in attempting to stem the tide of drug use among correction officers and held that the state's interest in ensuring the public safety outweighed the guards' privacy

1090. *Id.* at 93, 556 N.E.2d at 128, 556 N.Y.S.2d at 835.

1091. *Id.* at 91, 556 N.E.2d at 127, 556 N.Y.S.2d at 834 (quoting Seelig v. Koehler, 151 A.D.2d 53, 62, 546 N.Y.S.2d 828, 833 (1st Dep't 1989)).

1092. *Id.* at 93, 556 N.E.2d at 127, 556 N.Y.S.2d at 834.

1093. *Id.* at 93, 556 N.E.2d at 128, 556 N.Y.S.2d at 835.

1094. *Id.* (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)).

1095. *Id.*

expectations.[1096]

Finally, the court reviewed the procedural safeguards found to be present in the Department of Correction drug testing program. It found that there was no "unregulated discretion" as was prohibited by the *Caruso* and *Patchogue* cases.[1097] The court stated that the protocols of the program "assiduously protect the residual privacy expectations of the guards."[1098]

Chief Judge Wachtler, joined by Judges Kaye and Titone, dissented, and argued that *Caruso v. Ward*[1099] carved out a narrow exception that only permitted random drug testing of OCCB employees because of their daily exposure to drugs, drug deals and large sums of money. The dissent noted that correction officers, unlike OCCB employees, are in a controlled environment, do not carry guns and are not exposed to the "staggering" amounts of drugs and money that OCCB members witness.[1100] Moreover, the dissent found that correction officers were already subjected to close supervision and constant scrutiny. Judge Wachtler concluded his discussion by stating his dismay that the once narrow exception carved out by *Patchogue*, and applied in *Caruso*, was being converted by the majority "into a broad one without tolerable, predictable or even durable limits."[1101]

On the federal level, in *National Treasury Employees Union v. Von Raab*,[1102] the Supreme Court held that "suspicionless" drug testing of United States Customs Service (Customs Service) employees who applied "for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry a firearm, is reasonable."[1103] The Customs Service had implemented a drug testing program for

1096. *Id.* at 90, 556 N.E.2d at 126, 556 N.Y.S.2d at 833.

1097. *Id.* at 96, 556 N.E.2d at 129, 556 N.Y.S.2d at 836.

1098. *Id.*

1099. 72 N.Y.2d 432, 530 N.E.2d 850, 534 N.Y.S.2d 142 (1988).

1100. *Seelig*, 76 N.Y.2d at 99-100, 556 N.E.2d at 132, 556 N.Y.S.2d at 839 (Wachtler, C.J., dissenting).

1101. *Id.* at 100, 556 N.E.2d at 132, 556 N.Y.S.2d at 839 (Wachtler, C.J., dissenting).

1102. 489 U.S. 656 (1989).

1103. *Id.* at 679.

employees who desired positions that either required the carrying of weapons, were directly involved in drug interdiction or enforcement of related laws, or involved the handling of classified information. The rationale for the testing was that any of these positions required persons who were drug free. The program was challenged by the National Treasury Employees Union and its president as a violation of the fourth amendment of the United States Constitution. The Court stated that although the fourth amendment required probable cause and the use of a warrant to prevent unreasonable search and seizures, when "intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests."[1104] The Court found that the drug testing served specific governmental needs beyond the normal need for law enforcement. The drug testing was designed to deter drug use among agents eligible for promotion to sensitive positions within the Customs Service, thus preventing promotion of drug users to those positions.[1105] The Court also noted that the test results could not be used in the criminal prosecution of an employee without his consent, thus reasoning that general privacy was protected. In weighing the privacy interests of Customs Service employees, the Court found that these interests were diminished in light of the fact that Customs Service employees are considered the front line of defense against illegal drugs. Consequently, the Court stated that such employees "reasonably should expect effective inquiry into their fitness and probity."[1106]

The Court then addressed the governmental interest, finding that "the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment."[1107] The Court held that "[t]he Government's compelling interests in preventing the pro-

1104. *Id.* at 665-66 (citing Skinner v. Railway Labor Executive's Ass'n, 489 U.S. 602, 619-20 (1989)).

1105. *Id.* at 666.

1106. *Id.* at 672.

1107. *Id.* at 670.

motion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry"[1108] outweighed the diminished privacy interests of custom agents seeking promotion to the listed positions.

When a urinalysis drug testing program is challenged as a violation of article I, section 12 of the New York State Constitution, the New York courts utilize the same balancing test as the federal courts when the fourth amendment of the United States Constitution is implicated. The New York courts take into consideration an additional criterion of whether the testing program employs procedural safeguards that effectively prevent employees from being subjected to unregulated discretion.

People v. Dunn[1109]
(decided November 29, 1990)

Defendant appealed his conviction of various drug related offenses on the ground that the search warrants in question were "improperly issued insofar as they were based on the result of a 'canine sniff' conducted outside his apartment door, which he asserted constituted an unlawful, warrantless search unsupported by probable cause."[1110] Therefore, the search warrants were in violation of the federal[1111] and state[1112] constitutions.

Prompted by information that drugs were being kept in an apartment leased by defendant, police arranged to have a trained narcotics dog perform a canine sniff in the hallway outside defendant's apartment. The canine's response indicated that drugs were inside the apartment. Consequently, the police obtained a search warrant, culminating in the seizure of large quantities of drugs. The defendant was subsequently convicted on various drug related charges.[1113] Defendant appealed his conviction to the

1108. *Id.* at 679.

1109. 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990), *cert. denied*, 111 S. Ct. 2831 (1991).

1110. *Id.* at 22, 564 N.E.2d at 1056, 563 N.Y.S.2d at 390.

1111. *See* U.S. CONST. amend. IV.

1112. *See* N.Y. CONST. art. I, § 12.

1113. *Dunn*, 77 N.Y.2d at 22, 564 N.E.2d at 1056, 563 N.Y.S.2d at 390.