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## Search and Seizure

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motion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry"<sup>1108</sup> 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<sup>1109</sup>  
(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."<sup>1110</sup> Therefore, the search warrants were in violation of the federal<sup>1111</sup> and state<sup>1112</sup> 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.<sup>1113</sup> Defendant appealed his conviction to the

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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.

appellate division, which affirmed the conviction.

Defendant then appealed to the court of appeals, which held that the canine sniff did not constitute a search under the fourth amendment of the Federal Constitution,<sup>1114</sup> but did constitute a search under article I, section 12 of the New York State Constitution.<sup>1115</sup> The court further held that although a canine sniff is indeed a search, pursuant to the state constitution, such a procedure “may be used without a warrant or probable cause, provided that the police have a reasonable suspicion that a residence contains illicit contraband.”<sup>1116</sup>

In its analysis under the Federal Constitution, the court of appeals concluded that the canine sniff did not constitute a search within the meaning of the fourth amendment. The court noted that the United States Supreme Court addressed the constitutionality of a canine sniff of a defendant’s luggage at an airport in *United States v. Place*.<sup>1117</sup> In *Place*, the Court held that the canine sniff did not constitute a search within the meaning of the fourth amendment because a canine sniff “is much less intrusive than a typical search” and “discloses only the presence or absence of narcotics . . . .”<sup>1118</sup> Thus, in light of the limited information disclosed, the Supreme Court held that a canine sniff is not a search within the meaning of the fourth amendment.<sup>1119</sup>

Subsequent to *Place*, the United State Court of Appeals for the Second Circuit, in *United States v. Thomas*,<sup>1120</sup> had occasion to address the issue of a canine sniff at a residential dwelling, and held that a canine sniff outside defendant’s apartment did constitute a search under the fourth amendment because there is a heightened expectation of privacy at a residence as opposed to an airport.<sup>1121</sup>

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1114. *Id.* at 23, 564 N.E.2d at 1056, 563 N.Y.S.2d at 390.

1115. *Id.* at 25, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392.

1116. *Id.* at 26, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392 (citation omitted).

1117. 462 U.S. 696 (1983).

1118. *Id.* at 707.

1119. *Id.*

1120. 757 F.2d 1359 (2d Cir. 1985).

1121. *Id.* at 1366-67.

The New York Court of Appeals, in the instant case, held that the defendant's rights under the Federal Constitution were not violated.<sup>1122</sup> The court stated that "[s]ince the 'canine sniff' conducted outside his apartment could reveal only the presence or absence of illicit drugs, it did not constitute a search within the meaning of the Fourth Amendment."<sup>1123</sup> The court rejected the Second Circuit's conclusion that the holding in *Place* is inapplicable to canine sniffs in residences. The court stated that since a canine sniff only reveals evidence of criminality, the heightened expectation of privacy in a residence is irrelevant.<sup>1124</sup>

The New York Court of Appeals, however, while disagreeing with the Second Circuit holding under existing federal law, found that the court's reasoning did apply in its own analysis under the New York State Constitution.

In *People v. Price*,<sup>1125</sup> the New York Court of Appeals addressed the issue of whether a canine sniff of luggage at an airport constituted a search. The court in *Price*, just as the Supreme Court in *Place*, declined to find that the canine sniff constituted a search. However, the *Price* court focused on the reduced expectation of privacy that a person has with regard to the luggage he places in the hands of a common carrier,<sup>1126</sup> while the *Place* court primarily focused on the search's discriminative and non-intrusive character.<sup>1127</sup>

In *Dunn*, the court of appeals refused to adopt the *Place* rationale as a matter of state constitutional law. The court stated that "this Court has not hesitated to interpret article I, § 12 independently of its Federal counterpart . . . ."<sup>1128</sup> Rather, extending the rationale articulated in *Price*, the court concluded that whether a given procedure is a search depends upon "whether there has been an intrusion into an area where an individual has a

1122. *Dunn*, 77 N.Y.2d 19, 23, 564 N.E.2d 1054, 1056, 563 N.Y.S.2d 388, 390 (1990).

1123. *Id.*

1124. *Id.* at 23-24, 564 N.E.2d at 1056-57, 563 N.Y.S.2d at 390-91.

1125. 54 N.Y.2d 557, 431 N.E.2d 267, 446 N.Y.S.2d 906 (1981).

1126. *Id.* at 563, 431 N.E.2d at 270, 446 N.Y.S.2d at 909.

1127. *Place*, 462 U.S. at 705-07.

1128. *Dunn*, 77 N.Y.2d at 24, 564 N.E.2d at 1057, 563 N.Y.S.2d at 391.

reasonable expectation of privacy.”<sup>1129</sup> It thus concluded that the use of the canine outside the defendant’s apartment, was a search under the state constitution because the police obtained information “regarding the contents of a place that has traditionally been accorded a heightened expectation of privacy.”<sup>1130</sup>

Finally, in determining whether the search violated the state constitution, the court stated:

Given the uniquely discriminate and nonintrusive nature of such an investigative device, as well as its significant utility to law enforcement authorities, we conclude that [a canine sniff] may be used without a warrant or probable cause, provided that the police have a *reasonable suspicion* that a residence contains illicit contraband.<sup>1131</sup>

In affirming the appellate division’s decision, four judges joined Judge Titone, and two judges concurred in the result, concluding that the sniff did not constitute a warrantless search. The court held that in light of the reasonable suspicion of the police who had received information regarding the defendant’s drug involvement the canine sniff did not infringe upon the defendant’s rights under the state constitution.<sup>1132</sup>

## SUPREME COURT, APPELLATE DIVISION

### FOURTH DEPARTMENT

People v. Offen<sup>1133</sup>  
(decided July 13, 1990)

Defendant appealed his conviction of criminal possession of a

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<sup>1129.</sup> *Id.* at 25, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392.

<sup>1130.</sup> *Id.* (citation omitted).

<sup>1131.</sup> *Id.* at 26, 564 N.E.2d at 1059, 563 N.Y.S.2d at 393 (emphasis added).

<sup>1132.</sup> *Id.*

<sup>1133.</sup> 163 A.D.2d 890, 558 N.Y.S.2d 415 (4th Dep’t), *appeal denied*, 76 N.Y.2d 942, 564 N.E.2d 681, 563 N.Y.S.2d 71 (1990).