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## Search and Seizure

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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

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

1130. *Id.* (citation omitted).

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

1132. *Id.*

1133. 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).

controlled substance on the ground that a canine sniff and x-ray of a package sent to defendant constituted an unreasonable search and seizure in violation of the federal and state constitutions. The court held that the brief detention of the package was not sufficient to constitute a seizure and that the canine sniff was not a search under either the federal or state constitutions.<sup>1134</sup>

Acting upon information received from two confidential sources, the Livingston County Sheriff's Department instructed U.P.S. to hold a package until the authorities could arrange for a canine sniff to determine if the package contained cocaine. The canine responded positively to the package, after which the authorities obtained a warrant and searched defendant's residence and automobile as well as the package. This resulted in defendant's arrest for possession of controlled substances.

As to whether the sniff constituted a search, the court reasoned that "[a]lthough defendant had a privacy interest in the contents of the package, the minimal intrusion . . . was not unreasonable."<sup>1135</sup> The court noted that the informants had provided fairly specific details which warranted the reasonable belief that the package contained cocaine, and concluded that the canine sniff was not a search under either the federal or state constitution. In holding that the warrantless seizure was not unconstitutional the court reasoned that the police acted diligently in arranging the canine sniff and that the delay in delivery was an insignificant one.

The *Offen* court relied on *People v. Price*<sup>1136</sup> in holding that the canine sniff was not a search within the meaning of article I, section 12 of the New York State Constitution. In *Price*, the court of appeals addressed the issue of whether the use of a canine sniff to determine the presence of drugs in a defendant's luggage constituted a search within the meaning of the fourth amendment of the Federal Constitution. The court held that a canine sniff is not a search within the meaning of the fourth amendment, and stated that "[s]ince the dog does nothing more

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1134. *Id.* at 891, 558 N.Y.S.2d at 416-17.

1135. *Id.* at 891, 558 N.Y.S.2d at 416.

1136. 54 N.Y.2d 557, 431 N.E.2d 267, 446 N.Y.S.2d 906 (1981).

than smell the air surrounding the luggage in order to detect odors emanating from that luggage, there was no intrusion or search of the luggage.”<sup>1137</sup>

The court in *Price* reasoned that although defendant had a reasonable expectation of privacy in his closed luggage, he had no such expectation of privacy in the air surrounding his suitcase. In the absence of such an expectation, the court stated there is no protection under the fourth amendment from a canine sniff. Although the *Price* court did not discuss the implications of a canine sniff under the New York State Constitution, the court stated that “we hold that there is no violation of defendant’s rights under either Federal or State law . . . .”<sup>1138</sup> This implies that the New York State Constitution affords the same protection under the search and seizure provision of article I, section 12 as the Federal Constitution affords under the search and seizure provision of the fourth amendment. Notably, in *Offen*, the fourth department construed *Price* as standing for the proposition that a canine sniff is not a search under the New York State Constitution.<sup>1139</sup>

The United States Supreme Court has held that a canine sniff is not a search within the meaning of the fourth amendment. In *United States v. Place*,<sup>1140</sup> drug enforcement agents seized defendant’s luggage, which they suspected contained narcotics. They then proceeded to have the luggage subjected to a canine sniff. Ninety minutes elapsed between the seizure and the canine sniff. The dog reacted positively to one of the suitcases, but because it was late Friday afternoon, the agents held the baggage until Monday, when they were able to obtain a search warrant. The suitcase contained cocaine, and defendant was convicted of possession of cocaine. The Supreme Court held that a sniff does not constitute a search within the meaning of the fourth amendment because it is far less intrusive than a typical search.<sup>1141</sup> Also, a sniff discloses only whether or not the

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1137. *Id.* at 561, 431 N.E.2d at 269, 446 N.Y.S.2d at 908.

1138. *Id.* at 564, 431 N.E.2d at 270, 446 N.Y.S.2d at 909.

1139. *Offen*, 163 A.D.2d at 891, 558 N.Y.S.2d at 416-17.

1140. 462 U.S. 696 (1983).

1141. *Id.* at 707.

package contains contraband, and therefore the information obtained by authorities is limited.<sup>1142</sup> However, the Court held that the seizure of the luggage violated defendant's fourth amendment rights because ninety minutes elapsed between the seizure and the canine sniff. The Court stated that this was an unreasonable amount of time and in violation of *Terry v. Ohio*.<sup>1143</sup>

The *Offen* court applied the principles of *Terry* in holding that a warrantless seizure of the package was permissible.<sup>1144</sup> In *Terry*, a police officer observed three men who he suspected, based on his experience, were preparing to commit a robbery. The officer confronted the men and, fearing that they were armed, conducted a "pat down" of the men's outer clothing. This resulted in the discovery of concealed guns on two of the men.<sup>1145</sup> They were subsequently convicted of possession of concealed weapons. The issue before the Supreme Court was "whether the admission of the revolvers in evidence violated petitioners' rights under the Fourth Amendment."<sup>1146</sup> The Court held that when an officer has reasonable grounds, based on his experience, to believe that an individual he suspects of criminal activity may be armed, and when after identifying himself as a police officer, he is fearful for his own safety or the safety of others, "he is entitled . . . to conduct a carefully limited search . . . in an attempt to discover weapons which might be used to assault him."<sup>1147</sup> *Terry* stands for the proposition that a warrant is not needed when a limited search is based on reasonable suspicion.

In its discussion of the constitutional issues, the fourth department relied on both federal and state precedents. The court did not enunciate any greater rights conferred by the New York State Constitution in this case, inferring that the federal and state

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1142. *Id.*

1143. 392 U.S. 1 (1968).

1144. *Offen*, 163 A.D.2d at 891, 558 N.Y.S.2d at 416.

1145. *Terry*, 392 U.S. at 6-7.

1146. *Id.* at 8.

1147. *Id.* at 30.

constitutions afford identical rights under the respective search and seizure provisions when a canine sniff of a package is challenged as unconstitutional.<sup>1148</sup>

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1148. *Offen*, 163 A.D.2d at 891, 558 N.Y.S.2d at 416 (4th Dep't 1990); see *People v. Dunn*, 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990) (discussing residential canine sniffs), *cert. denied*, 111 S. Ct. 2830 (1991) .