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Searches and Seizure

However, the court reasoned that were it to conclude that the sniff constituted a search, it would have been proper because the "[s]heriffs had sufficient information to support a reasonable suspicion that the package contained contraband."[1104] Therefore, the *Offen* court declared that it did not have to determine whether the x-ray constituted an illegal search because the sniff "constituted probable cause that the package contained narcotics and thus was sufficient to support the issuance of the warrant."[1105]

Therefore, under the New York State Constitution, unlike its federal counterpart, a canine sniff will most likely be determined to be a search. However, if the court finds that the police acted with sufficient information to formulate a claim of probable cause, then the warrantless sniff will be deemed proper and is sufficient to support the subsequent issuance of a search warrant.

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT

People v. Jaiman[1106]
(decided January 29, 1991)

A criminal defendant claimed that his right to be protected against illegal searches and seizures under the state[1107] and federal[1108] constitutions was violated when the police, lacking

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under the fourth amendment. The court stated that "[s]ince the dog does nothing more 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." *Id.* at 561, 431 N.E.2d at 269, 446 N.Y.S.2d at 908.

1103. 54 N.Y.2d 557, 431 N.E.2d 267, 446 N.Y.S.2d 906 (1981).

1104. *Offen*, 78 N.Y.2d at 1091, 585 N.E.2d at 372, 578 N.Y.S.2d at 123.

1105. *Id.* at 1091, 585 N.E.2d at 372, 578 N.Y.S.2d at 123 (citing People v. Dunn, 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990)).

1106. 169 A.D.2d 589, 565 N.Y.S.2d 13 (1st Dep't), *appeal denied*, 78 N.Y.2d 968, 580 N.E.2d 419, 574 N.Y.S.2d 947 (1991).

1107. N.Y. CONST. art. I, § 12.

1108. U.S. CONST. amend. IV.

reasonable suspicion, pursued him and subsequently seized the gun he discarded as well as the bullets they found on his person. The court concluded that the plain clothed officers were not justified in their pursuit and seizure of the defendant when the defendant looked towards their unmarked patrol car, placed his hand inside his waistband and ran inside an abandoned building, holding that these observations "did not attain the level of 'reasonable suspicion' of criminal activity."[1109] Thus, the gun and bullets were suppressed as the "fruits of an unlawful seizure."[1110]

Four plain clothed officers were on patrol in an unmarked car in a known drug area for the purpose of detecting and preventing possible street crimes. As they drove near an abandoned building, they observed the defendant, Jaiman, with two or three other persons, standing near the top of a stoop. Once the car was within twenty feet of the building, the defendant looked in its direction. He then shoved his right hand into his waistband and "turned [and] ran into the building. The others on the stoop also ran into the building."[1111] At no time did the officers see a gun or a bulge in the area of Jaiman's waistband.

The officers pursued the group into the building. Officers Lent and Harris followed the defendant down a dimly lit hallway, where he suddenly stopped. At the suppression hearing, Officer Lent testified that he was approximately fifteen feet from the defendant when he "heard the sound of a heavy metal object hitting the ground" near where the defendant was standing.[1112] The de-

1109. *Jaiman*, 169 A.D.2d at 590, 565 N.Y.S.2d at 15.

1110. *Id.* at 589, 565 N.Y.S.2d at 14. *See also* People v. Lawrence, 145 A.D.2d 375, 536 N.Y.S.2d 61 (1st Dep't 1988), *appeal granted*, 73 N.Y.2d 898, 535 N.E.2d 1350, 538 N.Y.S.2d 810 (1989). In *Lawrence*, plain clothed police in an unmarked car responded to a radio call that shots had been fired at a specific address. Upon arrival, the defendant, after making eye contact with the police, bolted into the building. The court held that the eye contact and subsequent flight into the building did not give the police reasonable suspicion that the defendant committed a crime. *Id.* at 377-78, 536 N.Y.S.2d at 63. Therefore, the police pursuit and the stop and frisk of the defendant were "unsupportable," resulting in suppression of the evidence obtained. *Id.*

1111. *Jaiman*, 169 A.D.2d at 589, 565 N.Y.S.2d at 14.

1112. *Id.* at 590, 565 N.Y.S.2d at 14.

fendant then turned around and slowly walked towards the exit, passing Officer Lent on his way. Officer Harris stopped the defendant in the hallway, frisked him and discovered seven bullets in his pants pocket. Meanwhile, Officer Lent found a loaded .38 caliber revolver on a staircase some twelve feet below where the defendant had been standing.[1113] The defendant was subsequently convicted of criminal possession of a weapon in the third degree.[1114]

The court, in an unanimous decision, reversed the defendant's conviction. The court stated that in evaluating the correctness of the police action, it must consider "whether [the police action] was reasonably related in scope to the circumstances giving rise to the encounter."[1115]

After reviewing the record the court concluded that the "objectively credible observations and beliefs of the police officers did not attain the level of 'reasonable suspicion' of criminal activity or that the officers were in danger of physical injury, necessary predicates for the pursuit and frisk of defendant."[1116] Instead, the court stated that, at most, the police had only a common law right to inquire[1117] because the officers "did not act upon reliable confirmed information that a crime had occurred or

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1113. *Id.*

1114. *Id.* at 589, 565 N.Y.S.2d at 13.

1115. *Id.* at 590, 565 N.Y.S.2d at 14.

1116. *Id.* at 590-91, 565 N.Y.S.2d at 14-15.

1117. *Id.* at 591, 565 N.Y.S.2d at 15. In *People v. DeBour*, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976), the court stated that the common law right to inquire is "activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion in that a policeman is entitled to interfere with a citizen to the extent necessary to gain explanatory information, but short of seizure." *Id.* at 223, 352 N.E.2d at 572, 386 N.Y.S.2d at 385. *See also* New York's "stop and frisk" law, which states:

> In addition to the authority provided by this article for making an arrest without a warrant, a police officer may stop a person in a public place located within the 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) a felony or (b) a misdemeanor defined in the penal law, and may demand of him his name, address and an explanation of his conduct.

N.Y. CRIM. PROC. LAW § 140.50(1) (McKinney 1981).

was about to occur. Nor did they observe criminal conduct."[1118] Rather, the court concluded, the police were "confronted with conduct by [the] defendant just as susceptible of an innocent interpretation as of a culpable interpretation."[1119] Therefore, the defendant had a constitutional right not to respond to the police inquiry and "may walk, or even run away and without probable cause, the police may not pursue, search or seize such person."[1120] Therefore, suppression of the evidence was warranted and the defendant's indictment was dismissed.

The *Jaiman* decision comports with current New York decisional law. In *People v. Howard*,[1121] the court held that the police "may not pursue, absent probable cause to believe that the individual has committed, is committing, or is about to commit a crime, seize or search the individual or his possessions, even though he ran away."[1122] The court further held that when the individual is cornered by his pursuers in a building, and while looking for a means of escape drops or throws a package, he has not "intentionally abandoned the package so as to make a warrantless search and seizure permissible."[1123]

The *Howard* court stated that the question of abandonment, while partly a matter of property law, is "essentially a matter of constitutional law."[1124] Thus, like all constitutional rights, the presumption against waiver must be shown by evidence of "'an intentional relinquishment . . . of a known right or privilege.'"[1125] Thus, proof supporting abandonment should give

1118. *Jaiman*, 169 A.D.2d at 591, 565 N.Y.S.2d at 15.

1119. *Id.*

1120. *Id.*

1121. 50 N.Y.2d 583, 408 N.E.2d 908, 430 N.Y.S.2d 578, *cert. denied*, 449 U.S. 1023 (1980).

1122. *Id.* at 586, 408 N.E.2d at 910, 430 N.Y.S.2d at 581. *See also Lawrence*, 145 A.D.2d at 377, 536 N.Y.S.2d at 62 (defendant's flight alone not justification for pursuit without additional indicia of criminal activity).

1123. *Howard*, 50 N.Y.2d at 586, 408 N.E.2d at 910, 430 N.Y.S.2d at 581. In *Jaiman*, the door at the end of the hallway was sealed shut, thus, the defendant could not escape without passing the pursuing officers. 169 A.D.2d at 590, 565 N.Y.S.2d at 14.

1124. *Howard*, 50 N.Y.2d at 593, 408 N.E.2d at 915, 430 N.Y.S.2d at 585.

1125. *Id.* (quoting Foulke v. New York Cons. R.R. Co., 228 N.Y. 269,

rise to "the exclusive inference of the throwing away."[1126]

In *People v. Cantor*,[1127] the court stated that in order for the courts to consider the propriety of the search and the resulting admissibility of the evidence subsequently acquired, the focus must be "on the initial seizure of the defendant's person . . . ."[1128] The *Cantor* court defined "seizure" as the physical or constructive detention of an individual "by virtue of a significant interruption of his liberty of movement as a result of police action . . . ."[1129] Thus, if it is found that the stop of the defendant is unlawful, the evidence obtained as a result of the stop would be suppressed "absent an independent establishment of probable cause."[1130]

According to *Cantor*, determining whether a seizure is reasonable "requires weighing the government's interest in the detection and apprehension of criminals against the encroachment involved with respect to an individual's right to privacy and personal security."[1131] In conducting such an inquiry, the court "must con-

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273, 127 N.E. 237, 238 (1920)).

1126. *Id.* In People v. Boodle, 47 N.Y.2d 398, 391 N.E.2d 1329, 418 N.Y.S.2d 352, *cert. denied*, 444 U.S. 969 (1979), the court found that there was no abandonment when an individual discards an object as "a spontaneous reaction to a sudden and expected confrontation with police." *Id.* at 404, 391 N.E.2d at 1332, 418 N.Y.S.2d at 356. *See also* People v. Bennett, 170 A.D.2d 516, 517, 566 N.Y.S.2d 316, 317 (2d Dep't) (defendant did not abandon pouch containing crack when he discarded it while fleeing from police as it was a spontaneous reaction to sudden and unexpected confrontation with police), *appeal denied*, 77 N.Y.2d 958, 573 N.E.2d 580, 570 N.Y.S.2d 492 (1991).

1127. 36 N.Y.2d 106, 342 N.E.2d 872, 365 N.Y.S.2d 509 (1975).

1128. *Id.*; at 111, 324 N.E.2d at 876, 365 N.Y.S.2d at 515.

1129. *Id.*; *see also* People v. De Bour, 40 N.Y.2d 210, 216, 352 N.E.2d 562, 567, 386 N.Y.S.2d 375, 380 (1976) (definition of seizure of person for constitutional purposes means significant interruption of liberty of movement); People v. McPherson, 165 A.D.2d 818, 819, 560 N.Y.S.2d 161, 162 (2d Dep't 1990) (for constitutional purposes, seizure is defined as significant interruption of movement).

1130. *Cantor*, 36 N.Y.2d at 111, 324 N.E.2d at 876, 365 N.Y.S.2d at 515.

1131. *Id.* at 111, 324 N.E.2d at 876, 365 N.Y.S.2d at 514. The *Cantor* court noted that the purpose of "[t]he proscription against unreasonable searches and seizures is . . . to prevent random, unjustified interference with private citizens . . . ." *Id.* at 112, 324 N.E.2d at 876, 365 N.Y.S.2d at 515.

sider whether or not the action of the police was justified at its inception and whether or not it was reasonably related in scope to the circumstances which rendered its initiation permissible."[1132] Furthermore, the *Cantor* court defined reasonable suspicion as "the quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe criminal activity is at hand."[1133] Consequently, the police officer must be able to articulate specific facts that prompted him or her to intrude on the individual's person in order to act under reasonable suspicion.[1134]

If reasonable suspicion is lacking it does not mean that the police officer cannot approach an individual suspected of criminal activity. Instead, the New York courts recognize a common law right to inquire that "is activated by a founded suspicion that criminal activity is afoot and permits a . . . policeman . . . to interfere with a citizen to the extent necessary to gain explanatory information, but short of forcible seizure."[1135] While the police

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1132. *Id.* at 111, 324 N.E.2d at 876, 365 N.Y.S.2d at 514. In People v. Sobotker, 43 N.Y.2d 559, 373 N.E.2d 1218, 402 N.Y.S.2d 993 (1978), the court stated that although subsequent events may prove an officer's hunch correct, hindsight alone should not provide the governing criteria as it would result in the deterioration of "a vital constitutional safeguard of our personal security . . . ." *Id.* at 565, 373 N.E.2d at 1221, 402 N.Y.S.2d at 996-97. The court further reasoned that "[a]lmost any series of indiscriminate seizures is bound to produce some instances of criminality that might otherwise have gone undetected or unprevented." *Id.* at 565, 373 N.E.2d at 1221, 402 N.Y.S.2d at 997.

1133. *Cantor*, 36 N.Y.2d at 112-13, 324 N.E.2d at 877, 365 N.Y.S.2d at 516.

1134. *Id.* at 113, 324 N.E.2d at 877, 365 N.Y.S.2d at 516. In People v. De Bour, the court argued that police officers cannot seize individuals, physically or constructively, without some articulable justification. *De Bour*, 40 N.Y.2d at 216, 352 N.E.2d at 567, 386 N.Y.S.2d at 380. In so doing, the court "rejected the notion that behavior which is susceptible of innocent as well as culpable interpretation, will constitute probable cause." *Id.*

1135. *De Bour*, 40 N.Y.2d at 223, 352 N.E.2d at 572, 386 N.Y.S.2d at 385. *See also Cantor*, 36 N.Y.2d at 114, 324 N.E.2d at 878, 365 N.Y.S.2d at 517 (minimum requirement for lawful detentive stop is founded on suspicion that criminal activity is afoot); *McPherson*, 165 A.D.2d at 819, 560 N.Y.S.2d at 162-63 (common law right to inquire permits limited interference with defendant's liberty provided officer had founded suspicion that criminal

have this right to inquire, the *Howard* court noted that an individual also has the constitutional right not to respond.[1136] Not only may that individual remain silent, he or she may also walk or run away, and absent probable cause, the police may not pursue, search or seize that individual.[1137]

In *California v. Hodari*,[1138] the United States Supreme Court addressed the issue of whether a seizure occurs with respect to a show of authority by police even though the subject of the police pursuit does not yield. The Court held that it did not.[1139] In *Hodari*, the police observed a group of youths, including the defendant, huddled around a car parked at the curb. Once the youths saw the unmarked police car approaching, they fled. One of the officers pursued the defendant on foot, taking a circuitous route, bringing the defendant and the officer face to face. The defendant did not see the officer until the officer was almost upon him. Just before he was tackled by the officer, the defendant discarded a rock which turned out to be crack cocaine.[1140]

The defendant sought to suppress the crack as the fruit of an illegal seizure. The Supreme Court concluded that the defendant was not seized until he was tackled by the police officer and, therefore, the cocaine abandoned while fleeing was not the fruit of an illegal seizure.[1141] The Court rejected the defendant's claim that the police officer's show of authority when shouting "halt" restrained the defendant's liberty, thus constituting a seizure within the meaning of the Fourth Amendment.[1142]

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activity is afoot).

1136. *Howard*, 50 N.Y.2d at 590, 408 N.E.2d at 913, 430 N.Y.S.2d at 584.

1137. *Id.* at 586, 408 N.E.2d at 910, 430 N.Y.S.2d at 581.

1138. 111 S. Ct. 1547 (1991).

1139. *Id.* at 1550.

1140. *Id.* at 1549.

1141. *Id.* at 1552. The Court noted that the State of California conceded that the officer did not have reasonable suspicion to justify stopping the defendant. *Id.* at 1549 n.1. However, the Court thought it contradicted "proverbial common sense" to consider it unreasonable to stop, even for a brief inquiry, youths who flee upon the sighting of police. *Id.*

1142. *Id.* at 1550. The defendant was relying on Terry v. Ohio, 392 U.S. 1 (1968), where the Court concluded that "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a

Instead, the Court argued that the common law defined seizure as "not merely grasping, or applying physical force to, the animate or inanimate object in question, but actually bringing it within physical control."[1143]

The Court also rejected the defendant's reliance on *United States v. Mendenhall*.[1144] The *Mendenhall* test provided that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[1145] However, the *Hodari* Court stated that the defendant failed to read the test carefully. It argued that *Mendenhall* established an *objective* test for seizure effected by a "show of authority" and, thus, the defendant's *subjective* perception of restriction of liberty by the officer's words is irrelevant.[1146] Furthermore, the Court stated that the *Mendenhall* test only "states a *necessary*, but not a *sufficient* condition for seizure . . . ."[1147]

The *Hodari* Court, while declaring that the defendant abandoned the crack cocaine while fleeing from the police,[1148] did not define when abandonment occurs. In *Abel v. United States*,[1149] the Court stated that when a person throws away personal property without the intent to reclaim it, it is deemed abandoned.[1150] Therefore, in *United States v. Jones*,[1151] the test for abandonment of personal property was described as "whether an individual has retained any reasonable expectation of privacy in the object."[1152] Furthermore, the "existence of police pursuit

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citizen may we conclude that a 'seizure' has occurred." *Id.* at 19 n. 16.

1143. *Hodari*, 111 S. Ct. at 1549-50.

1144. 446 U.S. 544 (1980).

1145. *Id.* at 554. The Court listed some probable circumstances constituting a seizure including "the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.*

1146. *Hodari*, 111 S. Ct. at 1551.

1147. *Id.*

1148. *Id.* at 1552.

1149. 362 U.S. 217 (1960).

1150. *Id.* at 241.

1151. 707 F.2d 1169 (10th Cir.), *cert. denied*, 464 U.S. 859 (1983).

1152. *Id.* at 1172.

. . . at the time of abandonment does not of itself render the abandonment involuntary."[1153]

Yet, in dicta, the Court implied that it would have been willing to permit, as reasonable, the pursuit of an individual fleeing upon sight of the police because only "[t]he wicked flee when no man pursueth."[1154] Therefore, the subsequent seizure of the individual would not have violated the rules proscribed in *Terry v. Ohio*.[1155]

In *Terry*, the Court stated that the police can make an investigative stop of a person which will not constitute an unlawful seizure providing the "officer's action was justified at its inception, and [that] it was reasonably related in scope to the circumstances which justified the interference in the first place."[1156] However, this reasonable suspicion must be supported by articulable facts that criminal activity is afoot.[1157] This requires that the officer make specific reasonable inferences drawn from the facts in light of his experience, and not base his actions on an "unparticularized suspicion or 'hunch.'"[1158]

Consequently, under federal law, especially after the Court's decision in *Hodari*, an individual fleeing from the police is not seized until he or she is apprehended by physical force regardless of whether the pursuit is reasonable. Thus, any objects discarded during the pursuit are admissible into evidence. Conversely, under New York law, when a person flees a police presence, the subsequent police pursuit, absent other reasonable suspicion, may render the seizure illegal and, thus, objects discarded during the pursuit will not be admitted into evidence. However, because *Jaiman* preceded *Hodari*, there *may be a change in approach* to this issue by the New York courts.

1153. *Id.*; *see also* United States v. Anderson, 754 F. Supp. 442, 443-44 (E.D. Pa. 1991) (the court stated that in order for the pistol the defendant discarded while fleeing the police to be suppressed, he "must show he was forced to dispose of it by the unlawful conduct of the officers.") *Id.* at 444.

1154. *Hodari*, 111 S. Ct. at 1549 n.1 (quoting Proverbs 28:1).

1155. 392 U.S. 1 (1968).

1156. *Id.* at 20, 30.

1157. *Id.* at 21.

1158. *Id.* at 27.