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Searches and Seizure

stated that "the government may not use an administrative inspection scheme to search for criminal violations."[1283] Administrative searches that are conducted without valid purposes allow the state to circumvent the Fourth Amendment's warrant requirement. Because the evidence was obtained as a result of an illegal search, defendant's motion to suppress was granted.[1284]

FAMILY COURT

NEW YORK COUNTY

In re Marrhonda G.[1285]
(decided July 25, 1991)

Defendant, a juvenile, was arrested and charged with weapons possession.[1286] At her pre-trial suppression hearing, she argued that her right to be protected against unreasonable searches and seizures was violated because the police, without a warrant, opened her closed duffel bag and removed four weapons and 150 rounds of ammunition.[1287] The court held that the defendant's right against unreasonable searches and seizures was not violated.[1288] The court analyzed this case under the "plain touch" doctrine -- a corollary to the "plain view" doctrine.[1289]

The defendant was being detained at the Youth Services Unit office in Manhattan after a Port Authority police officer suspected that she was a runaway and sought to verify the information she provided him.[1290] Defendant was ordered to "put down" the duffel bag she was carrying and "to sit down in

1283. *Burger*, 482 U.S. 691 at 724 (Brennan, J., dissenting).

1284. For a more detailed discussion of this issue, see the cases analysis of People v. Keta, *supra* notes 1159-207 and accompanying text.

1285. 575 N.Y.S.2d 425 (Fam. Ct. New York County 1991).

1286. *Id.* at 427.

1287. *Id. See* N.Y. CONST. art. I, § 12; U.S. CONST. amend. IV.

1288. *Marrhonda*, 575 N.Y.S.2d at 432.

1289. *Id.* at 429-31.

1290. *Id.* at 427.

a chair in the back of the room."[1291] The defendant was separated from her bag by approximately 15 feet.[1292] Upon approaching the defendant to speak with her, another officer picked up the bag "'to put it someplace . . . off the floor'" and felt "'the butt of [a] gun[,] the trigger guard and then . . . the rest of the gun . . . .'"[1293] The officer who had originally detained the youth was called over to feel the bag, and after verifying that the object in the bag felt like a gun, the two men opened defendant's duffel bag and recovered the contraband and some clothing.[1294]

Initially, the court determined that the officer who detained the youth "had the [requisite] probable cause to believe respondent was a runaway, and that respondent's detention at the youth facility was lawful" under the so-called "runaway statute."[1295] The court concluded that the officer's actions in touching the bag to move it off a walkway floor was lawful and the officers' testimony to that effect was "not . . . 'patently tailored to nullify constitutional objections' . . . nor simply a contrived setup for an impermissible search."[1296] The court found that the initial touching was "essentially inadvertent."[1297] The only remaining issue to be resolved was whether or not the officers were justified in opening defendant's duffel bag to retrieve its contents.[1298]

First, the court reviewed the law to determine if the search of

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1291. *Id.*

1292. *Id.*

1293. *Id.*

1294. *Id.* at 427-28.

1295. *Id.* at 428; *see* N.Y. FAM. CT. ACT § 718 (McKinney 1983). Section 718(b) provides, in pertinent part:

> [A] police officer is authorized to take a child who has run away from home or who, in the reasonable opinion of the officer, appears to have run away from home, to a facility certified for such purpose by the division for youth or to a facility approved by the state department of social services.

Id.

1296. *Marrhonda*, 575 N.Y.S.2d at 428 (citations omitted) (quoting People v. Garafolo, 44 A.D.2d 86, 88, 353 N.Y.S.2d 500, 502 (2d Dep't 1974)).

1297. *Id.*

1298. *Id.* at 428-29.

respondent's duffel bag was "incident" to a lawful arrest.[1299] In this area of inquiry the court noted that New York, pursuant to its constitution, has adopted a more restrictive method of interpreting "incident" than is utilized under federal law.[1300] To justify a closed bag search in New York, the "bag must be within the 'grabbable area' and exigent circumstances must be present, i.e., the need to protect the safety of the public or the arresting officers, or to protect evidence from destruction or concealment."[1301] The court found that the warrantless search of the interior of defendant's bag was not justified as being incident to a lawful arrest because the bag and the respondent were separated by approximately fifteen feet.[1302]

Notwithstanding this finding, the court continued its inquiry to determine if there was an "alternative constitutional theory" upon which to validate the entry into respondent's duffel bag.[1303] Locating such a theory, the court, for the first time in New York, extended the "plain view" doctrine, recognized under the Fourth Amendment[1304] and also under the New York State Constitution, to include the doctrine of "plain touch." The "plain touch" doctrine is a counterpart to the "plain view" doctrine and has been extended under the Fourth Amendment by four United States Circuit Courts of Appeal.[1305] Utilizing the "plain touch"

1299. *Id.*

1300. *Id.* at 429; *see* People v. Belton, 55 N.Y.2d 49, 51, 432 N.E.2d 745, 745, 447 N.Y.S.2d 873, 873 (1982) ("The identical wording of [the federal fourth amendment and the New York State Constitution article I, § 12] does not proscribe our more strictly construing the State Constitution than the Supreme Court has construed the Federal Constitution.").

1301. *Marrhonda*, 575 N.Y.S.2d at 429.

1302. *Id.*

1303. *Id.*

1304. *See* Arkansas v. Sanders, 442 U.S. 753 (1979) (holding that police must have a search warrant to search luggage during a proper search of an automobile); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (warrantless search of car in driveway was not permissible even incident to lawful arrest).

1305. *Marrhonda*, 575 N.Y.S.2d at 431 (citing United States v. Williams, 822 F.2d 1174 (D.C. Cir. 1987); United States v. Norman, 701 F.2d 295 (4th Cir.), *cert. denied*, 464 U.S. 820 (1983); United States v. Russell, 655 F.2d 1261 (D.C. Cir. 1981), *cert. denied*, 457 U.S. 108 (1982); United States v. Ocampo, 650 F.2d 421 (2d Cir. 1981); United States v. Portillo, 633 F.2d

doctrine, the court denied respondent's motion to suppress the weapons seized from her duffel bag.[1306]

In reaching this conclusion, the court analogized the facts of *Marrhonda* to those of *United States v. Williams*.[1307] In *Williams*, an officer opened a closed paper bag and withdrew its contents after he felt the presence of controlled substances from the outside of the bag.[1308] The *Williams* court concluded that "no warrant is needed for an opening of a container whose unlawful contents becomes known through a lawful touching of the outside,"[1309] and unanimously upheld the denial of defendant's motion to suppress the use of the controlled substances as evidence at his trial.[1310] However, in an effort to preserve traditional Fourth Amendment concerns, the court in *Williams* set forth three conditions which must be satisfied before the "plain touch" doctrine can properly be invoked: (1) "an officer [must be] legally authorized to touch the container in the first place[;]"[1311] (2) the 'touch' is limited to the "initial contact with the container[;]"[1312] and (3) the lawful touching must convince the officer "to a reasonable certainty" that the container holds contraband or evidence of a crime.[1313]

Applying these conditions to the facts in *Marrhonda*, the court found that:

> [The] initial contact with respondent's bag, in picking it up to move it off the floor, was legally permissible[;] [the officer's]

1313 (9th Cir. 1980), *cert. denied*, 450 U.S. 1043 (1981); United States v. Diaz, 577 F.2d 821 (1978)).

1306. *Marrhonda*, 575 N.Y.S.2d at 432.

1307. 822 F.2d 1174 (D.C. Cir. 1987).

1308. *Id.* at 1177.

1309. *Id.* at 1184.

1310. *Id.* at 1190.

1311. *Id.* at 1184. The court explained that the officer must "lawfully occupy the vantage point from which [his] observations are made . . . ." *Id.*

1312. *Id.* The court stated that an officer is "not free to continue to manipulate [the container] in an attempt to discern the contents." *Id.*

1313. *Id.* at 1184. The court, in *Marrhonda*, noted that the third condition requires more than "traditional 'probable cause'" to be satisfied – the "'level of conviction must be objectively reasonable in light of the officer's past experience and training, and capable of verification by a reviewing court.'"

> feel of the gun butt and trigger guard and the rest of the gun was essentially simultaneous and did not involve any improper degree of manipulation or exploration[; and his] touch of the bag made him 'certain' (whether that be defined as "reasonably certain" or 'virtually certain') that he felt a weapon.[1314]

The court also found that "the officer's certitude [was] 'objectively reasonable' and 'capable of verification' by the court" because the weapon touched was described with specificity, the officer was highly trained and experienced and the court was able to view the bag and its contents because they were introduced into evidence and used in a re-enactment of the incident.[1315] In light of the foregoing, the court held that the "seizure of the weapons and ammunitions was proper and therefore the motion to suppress was denied."[1316]

Marrhonda, 575 N.Y.S.2d at 431 (quoting *Williams*, 822 F.2d at 1185).

1314. *Marrhonda*, 575 N.Y.S.2d at 432.

1315. *Id.*

1316. *Id.*