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SEARCH AND SEIZURE

N.Y. CONST. art. I, § 12:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

COURT OF APPEALS

People v. Batista¹
(decided October 16, 1996)

The appellate division unanimously affirmed the defendant's conviction of murder in the second degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.² The defendant, Hector Batista, appealed to the New York State Court of Appeals and argued that the defendant's right to be free from illegal search and seizure

1. 88 N.Y.2d 650, 672 N.E.2d 581, 649 N.Y.S.2d 356 (1996).

2. *Id.* at 653, 672 N.E.2d at 582, 649 N.Y.S.2d at 357.

under both the Federal³ and New York State⁴ Constitutions had been violated.⁵ The New York State Court of Appeals affirmed the order of the appellate division holding that the action of the police officer in touching the defendant's sweatshirt was reasonable and therefore the defendant's claimed rights were not violated.⁶

It was approximately 3:00 a.m. when uniformed police officers, Rhonda and Caban, were patrolling a neighborhood in the Bronx in a marked police car.⁷ The officers stopped a taxicab after seeing it run through a red light.⁸ The officers' attention was drawn to the only passenger in the cab, the defendant, as he shifted his seat from behind the driver to the middle of the back seat.⁹ In order to see the occupant's hands, officer Rhonda shined his flash light into the cab and "noticed that the defendant was 'wearing a large object protruding from his chest.'"¹⁰ Based on the fact that the officer wore a bulletproof vest every day, and had seen his colleagues wear them as well, the officer was familiar with the appearance of bulletproof vests.¹¹ When the officer asked the defendant what he was wearing, the defendant replied, "I don't have anything on."¹² Officer Rhonda then touched the defendant's chest and

3. U.S. CONST. amend. IV. The Fourth Amendment states in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" *Id.*

4. N.Y. CONST. art. I, § 12. Article I, section 12 provides in pertinent part that: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . but upon probable cause" *Id.*

5. *People v. Batista*, 88 N.Y.2d 650, 651, 672 N.E.2d 581, 649 N.Y.S.2d 356 (1996).

6. *Id.* at 651, 672 N.E.2d at 581-82, 649 N.Y.S.2d at 356-57.

7. *Id.* at 651, 672 N.E.2d at 582, 649 N.Y.S.2d at 357.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

felt a vest.¹³ At trial, the officer testified that up to the point of the actual search, he did not fear for his safety.¹⁴

After the officer touched the defendant's chest, the defendant "'tensed up' and threw his hands to his sides with his palms on the seat."¹⁵ The officer, noticing a bulge in the right hand pocket of the defendant's leather coat, "'grabbed the pocket, felt a gun, and called to his partner for assistance.'"¹⁶ The weapon found on the defendant was a loaded, nickel-plated .380 caliber semi-automatic handgun.¹⁷ This gun was later discovered to have been the gun used in the murder of a sixteen year old boy approximately three weeks earlier.¹⁸

The court's analysis began by explaining that "[t]he touchstone of any analysis of a governmental invasion of a citizen's person under the 'Fourth Amendment and the constitutional analogue of New York State is reasonableness.'"¹⁹ The court further stated that the inquiry regarding reasonableness turns upon the facts of each case.²⁰

In *People v. Chestnut*,²¹ two anticrime patrol police officers were in plain clothes and traveling in an unmarked taxi when they observed two males and a female huddled in a phone booth.²² They followed one of the males, Anthony Hernandez, and observed him conversing with the defendant.²³ The officers

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 653, 672 N.E.2d at 582, 649 N.Y.S.2d at 357.

17. *Id.*

18. *Id.*

19. *Id.* at 653, 672 N.E.2d at 582-83, 649 N.Y.S.2d at 357-58 (citing *People v. Chestnut*, 51 N.Y.2d 14, 22 n.7, 409 N.E.2d 958, 962 n.7, 431 N.Y.S.2d 485, 490 n.7 (1980); *People v. Moore*, 32 N.Y.2d 67, 69, 295 N.E.2d 780, 782, 343 N.Y.S.2d 107, 110 (1973)).

20. *Id.* (citing *Chestnut*, 51 N.Y.2d at 22, 409 N.E.2d at 962, 431 N.Y.S.2d at 490). In *Chestnut*, the court further explained that the "events must be viewed and considered as a whole, remembering that reasonableness is the key principle when undertaking the task of balancing the competing interests presented." *Id.* at 23, 409 N.E.2d at 963, 431 N.Y.S.2d at 491.

21. 51 N.Y.2d 14, 409 N.E.2d 958, 431 N.Y.S.2d 485 (1980).

22. *Id.* at 17, 409 N.E.2d at 959, 431 N.Y.S.2d at 487.

23. *Id.*

then observed Hernandez give something to the defendant.²⁴ The officers agreed that Hernandez fit the description of the perpetrator of a recent robbery.²⁵ One officer, after identifying himself, ordered the trio, including the defendant, to lay face down on the ground.²⁶ Without touching the men, the officer questioned, "'[w]here is the gun?'"²⁷ The defendant replied, "'[i]t's right here'"²⁸ as he pointed to his pocket.²⁹ The officer recovered a silver plated revolver and the men were arrested.³⁰

The actions of the officers in *Chestnut* were held to be reasonable.³¹ The *Chestnut* court stated that ordering the suspects to lie on the ground was nothing more than "maintain[ing] the status quo until additional information could be elicited."³² The court also concluded that the question "'[w]here is the gun?'" was justified to protect the welfare of the officers.³³

In *People v. Moore*,³⁴ the defendant reported that Dotson, the man she had been living with, had been "harassing her for several days and had just menaced her with a knife."³⁵ After Dotson was arrested, he told the arresting officer that the defendant was his wife and she was sick.³⁶ Dotson also said that the defendant had a gun.³⁷ When the arresting officer arrived at the police station, where the defendant awaited him, he searched

24. *Id.*

25. *Id.*

26. *Id.* at 18, 409 N.E.2d at 960, 431 N.Y.S.2d at 487.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 22, 409 N.E.2d at 962, 431 N.Y.S.2d at 490.

32. *Id.*

33. *Id.* at 22-23, 409 N.E.2d at 962, 431 N.Y.S.2d at 490.

34. 32 N.Y.2d 67, 295 N.E.2d 780, 343 N.Y.S.2d 107 (1973).

35. *Id.* at 68, 295 N.E.2d at 781, 343 N.Y.S.2d at 109. The defendant was stopped at an intersection when Dotson entered her car. *Id.* Dotson grabbed her by the wrist and placed a knife to her throat. *Id.*

36. *Id.*

37. *Id.*

the defendant's handbag and found a gun.³⁸ The court held that the search was reasonable,³⁹ noting that there is no "ready test" for reasonableness.⁴⁰ Instead, a balancing test between the "need to seize" and the "invasion which the seizure entails" is employed.⁴¹

In determining whether the actions of the police officers were reasonable, the *Batista* court noted that a "'frisk' defined as a 'pat down' of the outer clothing of a suspect, may be justified on less than what would be required for an arrest."⁴² The *Batista* court, using the language from *People v. Rivera*,⁴³ explained:

[i]f we recognize the authority of the police to stop a person and inquire concerning unusual street events we are required to recognize the hazards involved in this kind of public duty. The answer to the question propounded by the policeman may be a bullet; in any case the exposure to danger could be very great. We think the frisk is a reasonable and constitutionally permissible precaution to minimize that danger.⁴⁴

38. *Id.* at 68, 295 N.E.2d at 781, 343 N.Y.S.2d at 110.

39. *Id.* at 71, 295 N.E.2d at 784, 343 N.Y.S.2d at 113.

40. *Id.* at 69, 295 N.E.2d at 782, 343 N.Y.S.2d at 110.

41. *Id.* ("In the final analysis, the test is whether the facts available to the officer at the moment of the seizure would warrant a person of reasonable caution in believing that the action taken was appropriate.") *Id.*

42. *People v. Batista*, 88 N.Y.2d 650, 653, 672 N.E.2d 587, 583, 649 N.Y.S.2d 356, 358 (1996) (citing *People v. Rivera*, 14 N.Y.2d 441, 446, 201 N.E.2d 32, 35, 252 N.Y.S.2d 458, 463 (1964)). The *Rivera* court described the frisk as "... a contact or patting of the outer clothing of a person to detect by the sense of touch if a concealed weapon is being carried." *Id.*

43. 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964). In *Rivera*, defendant and his companion were seen by a detective as they walked up to the front of a bar and grill, looked in the window, walked a few steps, came back and looked in the window again. *Id.* at 444, 201 N.E.2d at 33-34, 252 N.Y.S.2d at 460-61. When the defendant saw the detective, he said something to his friend and the two started to quickly walk away when the detective stopped them. *Id.* The detective testified that he patted the outside of the defendant's clothing for his own protection and felt a hard object that felt like a gun. *Id.* The detective found a fully loaded .22 caliber handgun. *Id.*

44. *Batista*, 88 N.Y.2d at 654, 672 N.E.2d at 583, 649 N.Y.S.2d at 358 (quoting *Rivera*, 14 N.Y.2d 441, 446, 201 N.E.2d 32, 35, 252 N.Y.S.2d 458, 462-63).

An officer does not have to fear for his safety at the time of a search.⁴⁵ However, an officer "must have knowledge of some fact or circumstance that supports a reasonable suspicion that the suspect is armed or poses a threat to safety."⁴⁶ For example, in *People v. Carney*,⁴⁷ the court held that "a citizen's report that two men were suspicious, without more, does not provide adequate grounds for a frisk."⁴⁸ A police officer's conclusion that a person looked suspicious would not justify a frisk.⁴⁹ Thus, a similar conclusion drawn by a lay person would not logically justify a frisk either.⁵⁰

Similarly, under a federal constitutional analysis, in *Terry v. Ohio*,⁵¹ the Supreme Court stated, "[a]nd in justifying the

45. *Batista*, at 654, 672 N.E.2d at 583, 649 N.Y.S.2d at 358. The court stated:

[W]e attach no significance to the fact that at the suppression hearing the arresting officer did not articulate any feeling of fear for his own safety or for the safety of others at the time of the search. There was in this situation good cause for such fear and that alone may be sufficient in a proper case.

Id. (quoting *People v. Moore*, 32 N.Y.2d 67, 72, 295 N.E.2d 780, 784, 343 N.Y.S.2d 107, 113).

46. *Batista*, at 654, 672 N.E.2d at 583, 649 N.Y.S.2d at 358.

47. 58 N.Y.2d 51, 444 N.E.2d 26, 457 N.Y.S.2d 776 (1982). After leaving the scene of a shooting connected with an attempted robbery, Officer Morris was stopped by a patron of an establishment called "Fat Man's Bar." *Id.* at 53, N.E.2d at 27, 457 N.Y.S.2d at 777. The man stated that he had heard about the shooting that had just occurred and there were two "suspicious" black men that just entered the bar. *Id.* The officer went to the bar and after the man pointed out the defendant and his friend, the officer frisked the men. *Id.* The officer however, never asked the man why he believed these two men were suspicious and he did not make any inquiry or observation of his own of these two men. *Id.* A gun was found on one of the men, however, the victim of the shooting did not identify the two men as the men who attempted to rob him. *Id.*

48. *Id.* at 54, 444 N.E.2d at 28, 457 N.Y.S.2d at 778.

49. *Id.*

50. *Id.*

51. 392 U.S. 1 (1968). Officer McFaden had been a policeman for 39 years. *Id.* at 5. He testified that while he was on patrol his attention was drawn to two unfamiliar men. *Id.* "He testified that after observing their elaborately casual and oft-repeated reconnaissance of the store window . . . he suspected the two men of 'casing a job, a stick-up'. . ." and that he feared

particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."⁵² The Supreme Court also explained that "[t]his demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence."⁵³

In *Batista*, although the officer did not fear for his safety at the time of the search, the court concluded that the search was justified by a reasonable suspicion that the defendant was armed or dangerous.⁵⁴ The court recognized that the officer's attention was alerted by the defendant's "unusual movement."⁵⁵ Additionally, the court noted that the officer's "suspicion was arisen" by the defendant's denial to wearing a bulletproof vest.⁵⁶

"they may have a gun." *Id.* at 6. While the two men were talking with a third, the officer identified himself, grabbed the defendant, spun him around to face the others, and patted down the outside of his clothing. *Id.* at 7. A pistol was found in the defendant's coat pocket, but the officer was unable to remove it from the pocket. *Id.* The men were told to go into the store in front of which they had been standing and face the wall with their arms raised. *Id.* The defendant was ordered to remove his coat completely since the officer was unable to get the gun from out of the pocket. *Id.* The other two men were frisked as well, and another gun was found on one of the other men. *Id.*

52. *Id.* at 21.

53. *Id.* at 21 n.18.

54. *People v. Batista*, 88 N.Y.2d 650, 654, 672 N.E.2d 581, 583, 649 N.Y.S.2d at 356, 358.

55. *Id.*

56. *Id.* "Although a bulletproof vest is not, itself, illegal, this Court has expressly noted the inherent linkage between a vest and possession of a firearm." *Id.* at 655, 672 N.E.2d at 583, 649 N.Y.S.2d at 358 (citing *People v. Smith*, 59 N.Y.2d 454, 452 N.E.2d 1224, 465 N.Y.S.2d 896 (1983)). In *Smith*, the defendant did not pay when he exited a subway gate. *Id.*, 452 N.E.2d at 1225, 465 N.Y.S.2d at 897. A detective observed the defendant wearing a bulletproof vest. *Id.* at 454, 452 N.E.2d at 1226, 465 N.Y.S.2d at 898. After denying wearing a vest, the defendant was arrested. *Id.* The court held that the detective's search of the defendant's briefcase did not constitute a violation of the defendant's rights under either the United States Constitution or the New York State Constitution. *Id.* at 454, 452 N.E.2d at 1225, 465 N.Y.S.2d at 897.

The federal law and state law regarding searches and seizures are similar in more than just wording. Both laws recognize that ". . . whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."⁵⁷ Additionally, a reasonable suspicion for a search is required to justify such search under the federal and state constitutional provisions.

People v. Gonzalez⁵⁸
(decided May 2, 1996)

On December 14, 1990, defendant William Gonzalez was convicted of second degree murder, first degree manslaughter and first degree attempted robbery in connection with a failed holdup and shooting of a Bronx taxicab driver.⁵⁹ Gonzalez was sentenced to a prison term of 25 years to life for the murder conviction, 8 1/3 to 25 years for the manslaughter conviction and 5 to 15 years for the attempted robbery conviction.⁶⁰ These prison terms were to be served concurrently.⁶¹ Gonzalez appealed to the Appellate Division, First Department, on the grounds that the trial court acted improperly when it failed to suppress evidence that was acquired by New York police detectives in violation of Gonzalez's right to be free from unreasonable searches and seizure.⁶² These rights are enumerated in the Fourth Amendment of the United States Constitution⁶³ and in Article I section 12 of the New York State Constitution.⁶⁴

57. People v. Ingle, 36 N.Y.2d 413, 418, 330 N.E.2d 34, 42, 369 N.Y.S.2d 67, 72 (citing Terry v. Ohio, 392 U.S. at 16).

58. 88 N.Y.2d 289, 667 N.E.2d 323, 644 N.Y.S.2d 673 (1996).

59. People v. Gonzalez, 210 A.D.2d 83, 620 N.Y.S.2d 31, 32 (1st Dep't), rev'd 88 N.Y.2d 289, 667 N.E.2d 323, 644 N.Y.S.2d 673 (1996).

60. *Id.*

61. *Id.*

62. Gonzalez, 88 N.Y.2d at 291, 667 N.E.2d at 324, 644 N.Y.S.2d at 674.

63. U.S. CONST. amend. IV. The Fourth Amendment provides in pertinent part: "The right of the people to be secure in their persons, houses,