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Searches and Seizures

because the petitioner's job was "safety sensitive," the reasonable suspicion requirement could be circumvented.[268]

In conclusion, the *Briggs* court held that regardless of what the petitioner's personal beliefs were with regard to the return-to-work drug policy, the petitioner was required to adopt the position the agent had negotiated for his union.[269] Pursuant to the collective bargaining agreement between the two entities, it was agreed that the drug testing policy was permissible.[270] As a result,[271] the petitioner's right to be free from an unreasonable search pursuant to the Fourth Amendment was held not to be infringed. Thus, citing to the Federal Constitution, *Briggs* stands for the proposition that the New York State Constitution goes no further than federal constitutional doctrine in protecting employee's in "safety sensitive" jobs from drug testing.

People v. Owens[272]
(decided February 3, 1995)

The defendant, charged with criminal possession of a weapon,[273] moved to have evidence, specifically a gun and several statements made to the arresting police officers, suppressed.[274] The defendant argued that the evidence taken by the police officers was gained during a "pre-text stop" of defendant's vehicle, and as such, should not serve as a basis for seizure of the gun or defendant's subsequent statements to the police officers.[275] The court suppressed the evidence, holding

268. *Briggs*, 635 N.Y.S.2d at 688.
269. *Id.*
270. *Id.*
271. *Id.*
272. 164 Misc. 2d 15, 623 N.Y.S.2d 719 (Sup. Ct. New York County 1995).
273. *See* N.Y. CRIM. PROC. LAW § 265.02 (McKinney 1989). This section provides in pertinent part: "A person is guilty of criminal possession of a weapon in the third degree when: . . . (4) he possesses any loaded firearm." *Id.*
274. *Owens*, 164 Misc. 2d at 15-16, 623 N.Y.S.2d at 720.
275. *Id.* at 18, 623 N.Y.S.2d at 721.

that the stop of defendant's vehicle was, in fact, a pre-text stop that violated the defendant's Fourth Amendment[276] right to be free from unreasonable searches and seizures as guaranteed under the United States Constitution.[277] Although the court excluded the evidence of the gun and the defendant's statements, the court issued a scathing indictment of the exclusionary rule and urged the New York State Legislature and the New York Court of Appeals to reconsider the rule.[278]

Two police officers observed the defendant park his van and enter a store known for criminal activity.[279] The officers then observed the defendant exit the store, make an adjustment to his waistband (consistent with adjusting a gun or possibly a harmless gesture), and proceeded to follow the defendant.[280] While following the defendant, the defendant failed to signal for a left turn and the officers pulled his vehicle over.[281] As one officer approached the car, he observed the defendant making "furtive" movements and heard metal hitting metal.[282] The officer asked the defendant to exit the van, and upon looking inside the van, observed a gun.[283] The defendant was then placed under arrest.[284]

The court began its discussion by stating several well settled, relevant propositions of law. First, a police officer may stop a

276. U.S. CONST. amend. IV. The Fourth Amendment provides 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 . . . but upon probable cause . . . ." *Id.* A similar provision appears in Article I, section 12 the N.Y. CONST. art I, § 12. This section provides 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 . . . but upon probable cause . . . ." *Id.* The Court in the present case did not discuss the New York State Constitutional provisions as the Federal exclusionary rule is well settled in case law.

277. *Owens*, 164 Misc. 2d at 18, 623 N.Y.S.2d at 721.

278. *Id.*

279. *Id.* at 16, 623 N.Y.S.2d at 720.

280. *Id.*

281. *Id.* at 17, 623 N.Y.S.2d at 720.

282. *Id.* at 17, 623 N.Y.S.2d at 720-21.

283. *Id.* at 17, 623 N.Y.S.2d at 721.

284. *Id.*

vehicle for a traffic infraction.[285] Without a traffic infraction, however, an officer may only stop a vehicle based on a reasonable suspicion that the occupant has committed, is about to commit, or is committing a crime.[286] Second, although a traffic infraction may justify an officer in stopping a vehicle and even arresting the occupant,[287] a routine stop for a traffic infraction may not be used as the basis to search a vehicle.[288] Finally, the court stated that "police officers may not use a traffic infraction as a 'mere pre-text' to investigate the defendant on an unrelated matter."[289]

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285. *Id.* at 18, 623 N.Y.S.2d at 721 (citing People v. Ingle, 36 N.Y.2d 413, 414, 330 N.E.2d 39, 40, 369 N.Y.S.2d 67, 69 (1975)).

286. *Owens*, 164 Misc. 2d at 18, 623 N.Y.S.2d at 721. *See* People v. Sobotker, 43 N.Y.2d 559, 563, 373 N.E.2d 1218, 1220, 402 N.Y.S.2d 993, 996 (1978) (finding that the stopping of a vehicle will result in an impermissible seizure unless the police had a reasonable suspicion that an occupant of the vehicle had committed, is committing or will commit an act in violation of the law).

287. *Owens*, 164 Misc. 2d at 18, 623 N.Y.S.2d at 721. *See* N.Y. CRIM. PROC. LAW § 140.10(1)(a) (McKinney 1992). This statute provides in pertinent part: "a police officer may arrest a person for . . . [a]ny offense when he has reasonable cause to believe that such person has committed such offense in his presence . . . ." *Id. See also* N.Y. VEH. & TRAF. LAW § 155 (McKinney 1986 & Supp. 1995). This provision provides in pertinent part that traffic violations "shall be deemed misdemeanors and all provisions of law relating to misdemeanors . . . shall apply." *Id.*

288. *Owens*, 164 Misc. 2d at 18, 623 N.Y.S.2d at 721. *See* People v. Class, 63 N.Y.2d 491, 493, 472 N.E.2d 1009, 1010, 483 N.Y.S.2d 181, 182 (1984), *rev'd*, 475 U.S. 106 (1986) (holding that it is a violation of both the Federal and New York State Constitutions for a police officer to enter a vehicle without permission when the purpose of the stop was a traffic infraction); People v. Guzman, 116 A.D.2d 528, 530, 497 N.Y.S.2d 675, 677 (1st Dep't 1986) (finding that when stopping a car for a traffic infraction it is permissible for an officer to request that the driver step out of the vehicle, but it is not permissible for him to search the interior without some prior notice of criminality or danger).

289. *Owens*, 164 Misc. 2d at 18, 623 N.Y.S.2d at 721. *See* People v. Melendez, 195 A.D.2d 856, 857, 600 N.Y.S.2d 776, 777 (3d Dep't 1993) (stating that although a police officer may stop a vehicle for a traffic infraction, he may not use this stop as a pretext for other unrelated purposes); People v. Smith, 181 A.D.2d 802, 803, 581 N.Y.S.2d 240, 241 (2d Dep't 1992) (holding that in stopping a cab for an alleged traffic violation, the police

The court determined that "the police may not use traffic infractions to justify a stop of an individual when the police action is motivated by other reasons, namely, some suspicion that falls short of reasonable suspicion."[290] With that, the court held that the officers in the present case had made a pre-text stop of the defendant's vehicle, which was, "insufficient in law in this State to serve as a predicate for the seizure of the gun involved here."[291] The court noted that it was bound by law to suppress the evidence in this case.[292] Although the exclusionary rule was born out of the United States Supreme Court and subsequently adopted by New York, the court felt that it was only bound by

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used this infraction as a pretext to search the cab for items belonging to the passenger); People v. Vasquez, 173 A.D.2d 580, 581, 570 N.Y.S.2d 164, 165 (2d Dep't), *appeal denied*, 78 N.Y.2d 1130, 586 N.E.2d 71, 578 N.Y.S.2d 888 (1991) (concluding that the police officers used the Vehicle and Traffic Law as a pretext to search a double parked car and order the passengers from the vehicle); People v. Camarre, 171 A.D.2d 1002, 1004, 569 N.Y.S.2d 223, 224 (4th Dep't), *appeal denied*, 78 N.Y.2d 953, 578 N.E.2d 447, 573 N.Y.S.2d 649 (1991) (finding that an impermissible search and arrest resulted where the record indicated that the police had decided to stop and arrest the defendant before the alleged traffic violation occurred); People v. Watson, 157 A.D.2d 476, 549 N.Y.S.2d 27 (1st Dep't), *appeal denied*, 75 N.Y.2d 971, 555 N.E.2d 628, 556 N.Y.S.2d 256 (1990) (stating that the evidence seized as fruits of a traffic stop were inadmissible because the police were motivated to stop the car based on their belief that criminal activity had ocurred); People v. Mikel, 152 A.D.2d 603, 604-05, 543 N.Y.S.2d 712, 714 (2d Dep't 1989) (holding that evidence obtained by police after they stopped a car based on the fact that the passenger was not wearing a seat belt should be suppressed, because the court determined the stop was a mere pretext for an interrogation of the occupants); People v. Llopis, 125 A.D.2d 416, 417, 509 N.Y.S.2d 135, 136 (2d Dep't 1986) (holding that evidence seized pursuant to a traffic stop should be suppressed because there was no indication in the record that the police officer stopped the vehicle for the sole purpose of issuing a traffic summons).

290. *Owens*, 164 Misc. 2d at 18, 623 N.Y.S.2d at 721.

291. *Id.*

292. *Id. See* Mapp v. Ohio, 367 U.S. 643 (1961) (holding that evidence gained in violation of the Fourth Amendment is not admissible). The court in *Owens* was bound to suppress the evidence based on the precedent established by *Mapp* and those subsequent New York cases that adopted the *Mapp* rule, as authority for excluding evidence.

"the mandates of current State law."[293]

After this cursory treatment of the exclusionary rule, the court embarked on a lengthy criticism of the rule. The court noted that the rationale behind the rule was to prevent or deter police officers from violating constitutional principles by suppressing evidence seized in violation of the constitution.[294] However, the court concluded that in the decades following the rule's adoption, the rule has not effectuated this purpose because "it does not deter police officers from violating what most of them view as overly technical and unrealistic rules and thus does not protect innocent citizenry from unconstitutional intrusion."[295] The court reasoned that the rule only applies when contraband is found, and therefore, ironically, the rule protects only the guilty, not the innocent victim who has been intruded upon by a search that does not find contraband.[296]

The court noted that an unintended consequence of the application of the exclusionary rule has resulted in police officers and defendants "tailoring their testimony in a given case to meet constitutional standards, rather than adher[ing] to them."[297] However, the court failed to explain how the wrong-doing of the police justifies weakening a rule that protects citizens from constitutional infractions by the police. The court described incidents in which officers would seize contraband that they knew would be suppressed in court but viewed their actions as carrying out their law enforcement mandate because whatever contraband was seized was then off the streets.[298] "In any event, as indicated, the result, as in the instant case, neither protects the innocent nor does justice and this suppression rule which this court is obliged to follow here, thus both fails in its attempt to protect the citizenry and fails to deter unconstitutional police action."[299]

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293. *Owens*, 164 Misc. 2d at 18, 623 N.Y.S.2d at 721.
294. *Id.* at 19, 623 N.Y.S.2d at 722.
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.*

The court discussed a recent decision, *People v. Nickelson*,[300] which similarly criticized the exclusionary rule. In *Nickelson*, police officers observed the defendant entering a cab, and making furtive movements in the passenger area.[301] Although the vehicle had not violated any traffic laws, the officers pulled the cab over because they suspected that the driver was going to be robbed by the passenger.[302] Upon inspection, the officers recovered a gun from a magazine pouch behind the driver's seat.[303] The court held that furtive movements could not amount to a reasonable suspicion of criminal activity and suppressed evidence of the gun.[304]

The court stated that it "reluctantly" suppressed the evidence based only upon appellate court holdings that furtive movements do not constitute reasonable suspicion.[305] Moreover, the court expressed regret that it could not take into account the officers' vast experience, training and judgment, indicating that this judgment and experience is typically not given the weight it deserves in the "sterile environment of a post-arrest judicial assessment"[306] of the officers actions.[307] The *Nickelson* court stated that the courts, in conducting these assessments, tend to ignore those very character traits which, instead, should be given the highest regard both by the judiciary and society.[308]

The *Nickelson* court also noted that the United States "is the only country in the western world to apply a mandatory exclusionary rule that has the effect of barring the introduction of objectively probative and relevant evidence."[309] The court pointed out that other western countries balance such factors as the seriousness of the officers' violation, the seriousness of the

300. N.Y. L.J., July 27, 1994, at 22.
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*

crime involved, and the effect of excluding the evidence.[310]

The court, in *Owens*, not only complained of the rule's application and its effects, but also suggested an alternative to the rule.[311] The court discussed the United States Supreme Court case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[312] which held that a cause of action exists for damages suffered from a law enforcement agent's violation of the Fourth Amendment.[313] In light of the Supreme Court's decision, the *Owens* court suggested that a citizen who suffers an illegal search and seizure may recover damages as a result of that search and seizure, and that the mandatory exclusionary rule could be replaced by balancing the seriousness of the crime involved against the police actions.[314] The court supported this approach because it would "better serve the needs of society and the individual."[315]

The *Owens* court concluded its analysis by discussing the absolute suppression rule.[316] The court stated that although both the Federal and New York State Constitutions seek to provide reasonable protection to both the guilty and the innocent, they should not "lean over so far backward as to have justice fall flat on its back."[317] In order to fully illustrate this fact, the court referred to the current state of the absolute suppression rule in New York today as "archaic."[318]

The court stated that the rule serves more to protect the guilty individual from charges of possession of guns, drugs, etc., and from use of this evidence at trial than it does to protect the

310. *Id.*

311. *Owens*, 164 Misc. 2d at 22, 623 N.Y.S.2d at 724.

312. 403 U.S. 388 (1971).

313. *Id.* at 397 ("[W]e hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents violation of the Amendment.").

314. *Owens*, 164 Misc. 2d at 22, 623 N.Y.S.2d at 724.

315. *Id.*

316. *Id.* at 21, 623 N.Y.S.2d at 723.

317. *Id.* at 21, 623 N.Y.S.2d at 724.

318. *Id.* at 21, 623 N.Y.S.2d at 723.

citizenry.[319] Moreover, the court indicated that the rule as it is today is "worse than ineffective"[320] because it is providing protection to the guilty.[321] The court also indicated that the current rule is not acting as a deterrent to illegal police action because the guilty are going unpunished and the victims are being left without remedy.[322]

Based on these conclusions the court urged the New York State Court of Appeals and the New York State Legislature to eliminate the absolute suppression rule as it stands today.[323] The court stated that a practical remedy should be developed for those individuals whose Fourth Amendment rights have been violated, providing they are "also found not culpable."[324] Finally, the *Owens* court pointed out that a remedy such as this would lead to a more balanced approach to providing protections of individual rights and the seizing of illegal contraband.[325]

QUEENS COUNTY

People v. Woodson[326]
(decided July 7, 1995)

The defendant argued that a urine sample, blood sample, and medical records obtained while the defendant was unconscious in a hospital, through a grand jury subpoena issued less than

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319. *Id.* *See* Arizona v. Evans, 866 P.2d 869, 871 (Ariz.), *cert. granted*, 114 S. Ct. 2131 (1994). *Evans* was one of those extraordinary cases which put the exclusionary rule in a bad light. In *Evans* the Court suppressed drugs seized by the police in the "execution of an arrest warrant" because the warrant had been quashed a few days earlier, but a clerical error caused it to remain in the police computer. *Id.* Therefore, despite the fact that the police acted in good faith, the evidence was suppressed. *Id.*

320. *Owens,* 164 Misc. 2d at 22, 623 N.Y.S.2d at 723.

321. *Id.*

322. *Id.*

323. *Id.* at 22-23, 623 N.Y.S.2d at 724.

324. *Id.*

325. *Id.*

326. 165 Misc. 2d 784, 630 N.Y.S.2d 670 (Sup. Ct. Queens County 1995).