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RENSSELAER COUNTY

People v. Holmes[364]
(decided March 31, 1995)

Defendant, convicted of criminal possession of a controlled substance, charged that the search warrant was not proper due to its inability to demonstrate the foundation for the competence of the information from the confidential informant[365] and that the police went beyond of the warrant's bounds when they searched the defendant.[366] Therefore, defendant moved for suppression on the grounds that the search violated his Federal[367] and State[368] Constitutional rights.[369] The court, however, denied the motion finding that the warrant was neither defective[370] nor beyond its limits.[371] The court found that in issuing the warrant, the judge

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364. 165 Misc. 2d 276, 626 N.Y.S.2d 944 (Co. Ct. Rensselaer County 1995).

365. *Id.* at 279, 626 N.Y.S.2d at 946-47.

366. *Id.* at 279, 626 N.Y.S.2d at 947. *See* N.Y. CRIM. PROC. LAW § 690.15 (McKinney 1992). This section provides in pertinent part:

> 1. A search warrant must direct a search of one or more of the following:
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> (a) A designated or described place or premises; (b) A designated or described vehicle, as that term is defined in section 10.00 of the penal law; (c) A designated or described person.
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> 2. A search warrant which directs a search of a designated or described place, premises or vehicle, may also direct a search of any person present thereat or therein.

Id.

367. 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, and no warrants shall issue, but upon probable cause, supported by oath or affirmation . . . ." *Id.*

368. 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, and no warrants shall issue, but upon probable cause supported by oath or affirmation . . . ." *Id.*

369. *Holmes*, 165 Misc. 2d at 280, 626 N.Y.S.2d at 947.

370. *Id.*

371. *Id.* at 281-82, 626 N.Y.S.2d at 948.

had ample proof as to the dependability and foundation for the information given by the confidential informant.[372]

In addition, ruling on a second challenge, the court held that the police action was reasonable and that the defendant was within the area and class of people the warrant was issued to search.[373] The court upheld the constitutionality of New York Criminal Procedure Law section 690.15(2),[374] noting that the search of a location may also include a search of the people therein or thereat, and that this was consistent with both state and federal constitutional law.[375] Both the Federal and State Constitutions address the issue of particularity and probable cause as it pertains to warrants.[376] Moreover, the court also upheld the reasonableness of the search based on the legal and social context in which the particular case lies.[377]

During a ten day surveillance operation at a suspected drug location at 3 Middleburgh Street, Officers McMahon and Teal of the Troy Police Department noticed many people coming and going from that location.[378] On January 7, 1992, Officer McMahon was told, by a confidential informant, of a person, mentioned by name, who was selling drugs on the second floor of that same house.[379] Officer McMahon electronically outfitted the informant and gave him twenty dollars to purchase drugs.[380] He was searched before entering the house and again upon exiting and he was in sight of the police officers at all possible moments.[381] Upon exiting, it was discovered that he no longer had the twenty dollars; but instead he had a bag with white powder which field tested for cocaine.[382] While in the house, a conversation was taped where the informant referred to the

372. *Id.* at 280, 626 N.Y.S.2d at 947.
373. *Id.* at 281-82, 626 N.Y.S.2d at 948.
374. N.Y. CRIM. PROC. LAW § 690.15(2) (McKinney 1992).
375. *Id.*
376. *Id.* at 280, 626 N.Y.S.2d at 947.
377. *Id.* at 281, 626 N.Y.S.2d at 948.
378. *Id.* at 277, 626 N.Y.S.2d at 945.
379. *Id.*
380. *Id.*
381. *Id.*
382. *Id.*

defendant as Terry (the name previously given to the police), asked him for "twenty," then thanked the defendant and was told "no problem."[383]

Based upon these facts, a search warrant was issued on January 8, 1992.[384] It was issued to search for the party named by the informant, to search the second floor apartment at 3 Middleburgh Street, and to search for "any other person therein or thereat to whom such property described above may have been transferred or delivered to also any other area the residents may have custody or control of . . . ."[385] Once inside, Sergeant Sprague, a member of the police department's Emergency Response Team, encountered the defendant two or three steps from the landing on his way down.[386] He told the defendant to lie down while he forcibly opened the door to his apartment.[387] The defendant did not say anything to Sergeant Sprague or any other member of the police department.[388] Another officer handcuffed the defendant and brought him inside the second floor apartment front room, where, at that time, he was placed on the floor and patted down for weapons, including squeezing a "fanny pack" that he was wearing around his waist.[389] Once the premises were secured, Captain George Maring of the Troy Police Drug Unit entered the building.[390] Captain Maring ordered that the defendant be brought into the second floor apartment, where his "fanny pack" was unzipped and searched.[391] Inside the bag there were several small baggies containing what tested out to be cocaine.[392] At that time, the defendant was brought to the police station and charged with the crime.[393]

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383. *Id.* at 277-78, 626 N.Y.S.2d at 945-46.
384. *Id.* at 278, 626 N.Y.S.2d at 946.
385. *Id.*
386. *Id.*
387. *Id.*
388. *Id.*
389. *Id.*
390. *Id.*
391. *Id.*
392. *Id.*
393. *Id.*

After a conviction for criminal possession of a controlled substance in the third degree, the appellate division remanded the case to the Rensselaer County Court for a suppression hearing.[394] The appellant charged that the search warrant was not proper because the informant was not reliable and neither was the basis of his knowledge.[395] In addition, the appellant charged that the search of his person exceeded the scope of the warrant.[396]

The court first considered the charge that the warrant was defective based on the unreliability of the confidential informant and his information.[397] Defendant relied on *People v. Martinez*[398] and *People v. Griminger*,[399] where the *Aguilar-Spinelli* two-prong test was employed. The court had to examine the methods involved in applying this test to determine if the affidavit for the search warrant was sufficient.[400]

Throughout history the courts have had to weigh the importance of an individual's guarantee of personal rights against the government's attempt to enforce the laws.[401] One of the most

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394. *Id.* at 277, 626 N.Y.S.2d at 945.

395. *Id.* at 279, 626 N.Y.S.2d at 946-47.

396. *Id.* at 280, 626 N.Y.S.2d at 947.

397. *Id.* at 279, 626 N.Y.S.2d at 946-47.

398. 80 N.Y.2d 549, 607 N.E.2d 775, 592 N.Y.S.2d 628 (1992). In a case involving drugs a search warrant was issued without having the informant appear before the judge to be questioned. *Id.* at 551, 607 N.E.2d at 776, 592 N.Y.S.2d at 629. The court held that probable cause is lacking where the confidential informant's reliability has not been established. *Id.* at 552, 607 N.E.2d at 777, 592 N.Y.S.2d at 630. Therefore, neither prong of the *Aguilar-Spinelli* test was satisfied. *Id.*

399. 71 N.Y.2d 635, 524 N.E.2d 409, 529 N.Y.S.2d 55 (1988). In a case involving drugs, the County Court held that although a confidential informant failed to satisfy the first prong of the *Aguilar-Spinelli* test it was irrelevant because the *Gates* test was the proper test to determine reliability. *Id.* at 638, 524 N.E.2d at 410, 529 N.Y.S.2d at 56. The court of appeals reversed this decision and held that the *Aguilar-Spinelli* test should be applied in order to "prevent the disturbance of the rights of privacy and liberty upon the word of an unreliable hearsay informant." *Id.* at 641, 524 N.E.2d at 412, 529 N.Y.S.2d at 58.

400. *Holmes*, 165 Misc. 2d at 279-80, 626 N.Y.S.2d at 947.

401. People v. Hanlon, 36 N.Y.2d 549, 555, 330 N.E.2d 631, 635, 369 N.Y.S.2d 677, 681 (1975). The court combined two cases to determine whether information given by an informant was adequate to justify a search

difficult situations for the courts to reconcile was the use of hearsay to show probable cause in order to obtain a search warrant.[402] It was not until 1960, in *Jones v. United States*,[403] that the Supreme Court first approved the use of hearsay for this purpose.[404] In subsequent cases the *Aguilar-Spinelli* two-prong test evolved as a method for a magistrate to evaluate whether hearsay information received from an undisclosed informant was sufficiently reliable as a basis to issue a search warrant.[405]

The first prong of the *Aguilar-Spinelli* test is known as the "veracity" test, and it deals with the trustworthiness of the informant.[406] The person applying for the warrant is required to show how he formulated his opinion that the information was reliable and that the informant himself was dependable.[407] This could be satisfied by an independent investigation that would corroborate the informant's story or by his previous record of supplying reliable information.[408] The second prong, the basis of knowledge test, places the burden on the affiant to show how the informant obtained his information.[409] This can be done by "providing such a detailed description of the suspect's criminal activity as to constitute self-verification."[410]

Unlike New York courts, the United States Supreme Court has gone further and adopted the more liberal *Gates* test.[411] The Supreme Court stated that the *Aguilar-Spinelli* test had "been applied in a rigid, inflexible manner to the detriment of law

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warrant. *Id.* at 553, 330 N.E.2d at 633, 369 N.Y.S.2d at 679. In both cases, the court held that the "affidavits were sufficient to establish probable cause" pursuant to the requirements of the *Aguilar-Spinelli* test. *Id.* at 557, 330 N.E.2d at 636, 469 N.Y.S.2d at 683.

402. *Id.* at 556, 330 N.E.2d at 635, 469 N.Y.S.2d at 681.

403. 362 U.S. 257 (1960).

404. *Hanlon*, 36 N.Y.2d at 556, 330 N.E.2d at 635, 469 N.Y.S.2d at 681.

405. *Id.* at 556, 330 N.E.2d at 635, 469 N.Y.S.2d at 681-82.

406. *Id.*

407. *Id.*

408. *Id.* at 557, 330 N.E.2d at 635-36, 369 N.Y.S.2d at 683.

409. *Id.* at 556, 330 N.E.2d at 635, 369 N.Y.S.2d at 682.

410. *Id.*

411. People v. Griminger, 71 N.Y.2d at 635, 639, 524 N.E.2d 409, 410-11, 529 N.Y.S.2d 55, 56-57 (1988).

enforcement,"[412] whereas the *Gates* test employs a less stringent "totality-of-the-circumstances approach."[413] However, in believing that *Gates* did not give a "sufficient measure of protection,"[414] the New York State Constitution adopted *Aguilar-Spinelli* as their standard for a magistrate to employ when issuing a search warrant.[415]

Once the facts have been presented to a neutral magistrate, it is his job to evaluate them and decide if the warrant should be issued.[416] Most warrant requests are not written with unlimited time, in the quiet atmosphere of a law office. Instead, they are more likely to be done by the police in the heat of a potentially volatile situation.[417] As a result, they must be evaluated "in the clear light of everyday experience and accorded all reasonable inferences."[418] It is with this view that the New York Court of Appeals took the position in *People v. Hanlon* that once the rigors of the process have been fairly and sincerely met and a warrant has been issued, "the *bona fides* of the police will be presumed and the subsequent search upheld in a marginal or doubtful case."[419]

In applying the *Aguilar-Spinelli* test in *Holmes*, the court found that both prongs were satisfied.[420] This decision was based on the fact that the information presented to the magistrate was reliable and that there was an adequate basis for it: 1) the informant made his drug purchase under police control, 2) he was searched and his property was checked before and after entering the premises, and 3) the transaction was monitored and the defendant was referred to by the same name given to the

412. *Id.* at 640, 524 N.E.2d at 411, 529 N.Y.S.2d at 57.

413. *Id.* at 639, 524 N.E.2d at 410-11, 529 N.Y.S.2d at 57.

414. *Id.*

415. *Id.* at 639, 524 N.E.2d at 411, 529 N.Y.S.2d at 57.

416. People v. Hanlon, 36 N.Y.2d 549, 559, 330 N.E.2d 631, 637, 369 N.Y.S.2d 677, 684 (1975).

417. *Id.* at 559, 330 N.E.2d at 637, 369 N.Y.S.2d at 685.

418. *Id.*

419. *Id.* at 558, 330 N.E.2d at 637, 369 N.Y.S.2d at 684.

420. People v. Holmes, 165 Misc. 2d 276, 279, 626 N.Y.S.2d 944, 947 (Co. Ct. Rensselaer County 1995).

police prior to the exchange.[421] *Holmes* employed the principle stated in *Hanlon* that when a judge is faced with a questionable case, he must support "the bona fides of the police."[422] The *Holmes* court affirmed the issuing judge's decision to support the bona fides by stating that there was "sufficient factual demonstration" in granting the warrant.[423]

The second issue raised on appeal was that the police exceeded the limits of the warrant when they searched the defendant.[424] Pursuant to the informant's information, the police obtained a warrant permitting them to search the person named by the informant, in addition to the second floor apartment at 3 Middleburgh Street and "any other person therein or thereat to whom such property described above may have been transferred or delivered to . . . ."[425]

The court relied on *People v. Nieves,*[426] in interpreting section 690.15(2) of the Criminal Porcedure Law, which authorizes a search warrant for a designated place to include the people "therein or thereat."[427] The court in *Nieves* found the section to be constitutionally permissible under both the Fourth Amendment of the United States Constitution and Article one section twelve of the New York State Constitution.[428] The court, in *Nieves,* dealt with the issue of "whether mere presence at a specified place may be a sufficiently particular description of a person in a search warrant to meet the standards of the Fourth Amendment."[429]

In *Nieves*, a search warrant was issued in connection with a restaurant that housed a gambling operation.[430] The warrant was issued for "[E]lizar Vidal and any other persons occupying said

421. *Id.* at 279-80, 626 N.Y.S.2d at 947.
422. *Id.* at 280, 626 N.Y.S.2d at 947 (emphasis omitted).
423. *Id.* at 279, 626 N.Y.S.2d at 947.
424. *Id.* at 280, 626 N.Y.S.2d at 947.
425. *Id.* at 278, 626 N.Y.S.2d at 946.
426. 36 N.Y.2d 396, 330 N.E.2d 26, 369 N.Y.S.2d 50 (1975).
427. *See supra* note 366.
428. *Nieves*, 36 N.Y.2d at 400, 330 N.E.2d at 30, 369 N.Y.S.2d at 56.
429. *Id.*
430. *Id.* at 397-98, 330 N.E.2d. at 29, 369 N.Y.S.2d at 54.

premises . . . . "[431] Upon entering the premises, the police found Vidal, the defendant and a third person.[432] After asking them to empty their pockets, contraband was recovered.[433] Defendant moved to suppress the evidence on the grounds that he was not named in the search warrant and that his constitutional rights had been violated.[434] The court held that there must be particularity in order for the law enforcement officer to know who to search and exactly what items to look for.[435] This is to preserve "the core of the Fourth Amendment"[436] and to protect the right to privacy from arbitrary searches.[437] *Nieves* points out that the unique specific details of each case will dictate to what length the Federal and State Constitutions can be interpreted.[438] In *Nieves,* the court determined that the warrant was too general, since it implied that all occupants of the restaurant, be they patrons or not, could be searched.[439] Therefore, in accordance with this conclusion, all of the evidence found on the defendant had to be suppressed.[440]

In *Wolf v. People*,[441] the Supreme Court found for the first time that evidence secured through a federal illegal search and seizure should be suppressed.[442] The decision was not based on an interpretation of the explicit words of the Fourth Amendment, nor was it based on congressional legislation resulting from the

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431. *Id.* at 398, 330 N.E.2d at 29, 369 N.Y.S.2d at 54.
432. *Id.* at 399, 30 N.E.2d at 30, 369 N.Y.S.2d at 55.
433. *Id.*
434. *Id.*
435. *Id.* at 401, 330 N.E.2d at 31, 369 N.Y.S.2d at 57.
436. *Id.*
437. *Id.*
438. *Id.* at 402, 330 N.E.2d at 32, 369 N.Y.S.2d at 58.
439. *Id.* at 403-04, 330 N.E.2d at 33, 369 N.Y.S.2d at 59.
440. *Id.* at 406, 330 N.E.2d at 35, 369 N.Y.S.2d at 62.
441. 338 U.S. 25 (1945). The question examined in this case is whether "a conviction by a State court for a State offense den[ies] the 'due process of law' . . . solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law . . . ." *Id.* at 25-26.
442. *Id.* at 28.

congressional interpretation of the Constitution.[443] Rather, it was implied by the judiciary.[444] The Court stated that since "most of the English-speaking world does not"[445] adhere to this exclusion of evidence obtained illegally, "we must hesitate to treat this remedy as an essential ingredient of the right [of privacy]."[446] It cannot be thought of "as a departure from basic standards"[447] to allow the police, under the watchful eye of the public, to remand those found with incriminating evidence in a search.[448] The Court went on to say that if a state did not strictly adhere to the Due Process Clause, it could rely on other equally effective methods.[449] A community could more easily exert pressure on the local police to change their methods than could local opinion to try to persuade authority "exerted throughout the country."[450] *Wolf* held that "in a prosecution in a State court for a State crime, the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."[451]

Marron v. United States[452] discussed the importance of the Fourth Amendment in ensuring the protection of fundamental rights against general searches.[453] In *Marron*, a warrant was issued to search a location and, in particular, to seize "intoxicating liquors and articles for their manufacture"[454] during prohibition. As a result of the search, the agents confiscated a ledger showing inventories of liquor and other items and a number of bills for gas, electric, and the like. [455] Although the warrant did not specifically refer to these items, the Court held that the authority of the officers to seize items

443. *Id.*
444. *Id.*
445. *Id.* at 29.
446. *Id.*
447. *Id.* at 31.
448. *Id.*
449. *Id.*
450. *Id.* at 32-33.
451. *Id.* at 33.
452. 275 U.S. 192 (1927).
453. *Id.* at 195.
454. *Id.* at 193.
455. *Id.* at 194.

extended to all parts of the premises were involved in maintaining the nuisance. [456]

The *Holmes* court relied on *People v. Easterbrook*[457] to determine what class of people may fall under the scope of the warrant. In *Easterbrook*, a warrant was issued to conduct a search within an apartment and "any other person who may be found to have such property in his possession or under his control or to whom such property may have been delivered."[458] The defendant, in *Easterbrook,* was apprehended and searched as he was leaving the apartment.[459] According to the *Holmes* court, the court of appeals found that the defendant in *Easterbrook* was "within the area and class of individuals authorized to be searched since the language"[460] used permitted the warrant to go beyond the threshold of the location mentioned.[461]

The defendant, in *Holmes,* relied on *People v. Green*,[462] where the defendant was searched and found to have a bag of heroin on his person after he left an apartment named in a search warrant.[463] However, the police had a warrant for the defendant "therein" his own apartment.[464] The court held that arresting him nineteen blocks away from his house was not within the scope of the warrant, and that a search done at that distance from his apartment would have made it a general warrant.[465] The case was remanded to determine if probable cause could apply to the arrest.[466]

The *Holmes* court examined issues of both particularity and probable cause in determining if the warrant issued had exceeded

456. *Id.* at 199.
457. 35 N.Y.2d 913, 324 N.E.2d 367, 364 N.Y.S.2d 899 (1974).
458. *Id.* at 914, 324 N.E.2d at 367, 364 N.Y.S.2d at 899.
459. *Id.*
460. People v. Holmes, 165 Misc. 2d 276, 281, 626 N.Y.S.2d 944, 948 (Co. Ct. Rensselaer County 1995).
461. *Id.*
462. 33 N.Y.2d 496, 310 N.E.2d 533, 354 N.Y.S.2d 933 (1974).
463. *Id.* at 498, 310 N.E.2d at 534, 354 N.Y.S.2d at 934-35.
464. *Id.* at 498, 310 N.E.2d at 534, 354 N.Y.S.2d at 934.
465. *Id.* at 499, 310 N.E.2d at 534, 354 N.Y.S.2d at 935.
466. *Id.* at 500, 310 N.E.2d at 535, 354 N.Y.S.2d at 936.

its constitutional limitations.[467] The holding stated that with regard to particularity, it is necessary that the performing officer be able to "ascertain and identify"[468] the people he is allowed to search and the items he is allowed to retrieve.[469] In addition, the issuing judge in *Holmes* was able to be particular by focusing on the facts given to him by the police and the affidavit of the informant: the high drug activity at the premises to be searched, the surveillance that revealed a frequent number of people coming and going, and the monitored conversation in which the defendant's name was mentioned when the drug was purchased.[470]

The court held that based on these facts, it was "reasonable" for the defendant to be considered a person "within the area and class of individuals" that the warrant was directed to pursue.[471] Based on the holding in *Easterbrook*, being within the apartment house would allow the warrant to encompass all parties who are further than the threshold of the premises.[472] Therefore, the defendant, who was first seen on the steps, would fall into this category.[473] The court also discussed the fact that the defendant did not make any statement to the police to deny his connection to the premises.[474] Furthermore, although the defendant was not seen departing the premises, it was a reasonable assumption for the police to believe that he was leaving, because he was coming down the steps and was in the vicinity of the threshold.[475] As a result, in compliance with the warrant, he could have been a person to whom drugs were transferred or delivered.[476]

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467. People v. Holmes, 165 Misc. 2d 276, 280, 626 N.Y.S.2d 944, 947 (Co. Ct. Rensselaer County 1995).

468. *Id.*

469. *Id.*

470. *Id.* at 279-80, 626 N.Y.S.2d at 947.

471. *Id.* at 281-82, 626 N.Y.S.2d at 948.

472. *Id.*

473. *Id.*

474. *Id.* at 282, 626 N.Y.S.2d at 948.

475. *Id.*

476. *Id.*

With regard to the issuance of warrants, both federal and state constitutional law employ identical language.[477] The goal of both laws is to prevent general searches and protect an individual's rights.[478] The difference lies in the interpretation. The Supreme Court developed the *Aguilar-Spinelli* test, then determined that it was too rigid and began to use the more liberal *Gates* test.[479] New York State, however, continues to use the *Aguilar-Spinelli* test to assist their magistrates in evaluating the facts given to them by the police in a request to issue a search warrant.[480]

477. *See supra* notes 367 and 368.
478. *Holmes*, 165 Misc. 2d at 280, 626 N.Y.S.2d at 948.
479. *See supra* notes 411-415 and accompanying text.
480. *Id.*