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Search & Seizure

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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. Hollman[1441]
(February 20, 1992)

The defendants claimed that their New York Constitutional right against unreasonable searches and seizures[1442] was violated when police requested information about the contents of the defendants' bags without having a sufficient justification for making that request. The New York Court of Appeals held that under most circumstances, before requesting information about the contents of a defendant's bag police officers must have at least a "founded suspicion that criminality is afoot."[1443]

1441. 79 N.Y.2d 181, 590 N.E.2d 204, 581 N.Y.S.2d 619 (1992).

1442. N.Y. CONST. art. I, § 12.

1443. *Hollman*, 79 N.Y.2d at 191, 590 N.E.2d at 210, 581 N.Y.S.2d at 625.

The New York Court of Appeals reaffirmed and clarified its landmark decision of *People v. De Bour*[1444] which established a four level analysis for police initiated encounters with citizens.[1445] The court attempted to establish precisely what questions police officers can ask a person without turning the encounter into a constitution implicating seizure[1446] or a "common-law inquiry."[1447] In both police encounters dealt with in *Hollman* it was evident that the police did not have, at the inception of the encounter,[1448] the requisite "reasonable suspicions based on articulable facts" to make the encounters valid *Terry*-like[1449] seizures.[1450] Therefore, the court mainly focused on whether the cases fell into one of the first two *De Bour* categories, a police "request for information;" or a "common-law inquiry," both of which require a lower quantum of police information to be valid.[1451] The court held that a police question about the contents of a citizen's ordinary closed container is not a mere request for information.[1452] Such a question, therefore, must be supported by (1) a founded suspicion that criminal activity is afoot, to constitute a common-law inquiry, or (2) a reasonable suspicion that the person is involved in a crime, to constitute a seizure, depending on the circumstances.[1453]

The two appellants were Troy Hollman and Gregory Saunders.[1454] Both were arrested separately, but at the same lo-

1444. 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976).

1445. *Id.* at 223, 352 N.E.2d a7 571-73, 386 N.Y.S.2d at 384-85.

1446. U.S. CONST. amend. IV; N.Y. CONST. art. I, § 12.

1447. *Hollman*, 79 N.Y.2d at 193, 590 N.E.2d at 211, 581 N.Y.S.2d at 626.

1448. *De Bour*, 40 N.Y.2d at 215-16, 352 N.E.2d at 566, 386 N.Y.S.2d at 380 ("The police may not justify a stop by a subsequently acquired suspicion resulting from the stop.").

1449. Terry v. Ohio, 392 U.S. 1 (1967) (*Terry* stops are constitutional seizures, but since they are minimally intrusive and not unreasonable they require less than probable cause to be valid.).

1450. *Hollman*, 79 N.Y.2d at 193, 590 N.E.2d at 210, 581 N.Y.S.2d at 625.

1451. *Id.* at 193, 590 N.E.2d at 211, 581 N.Y.S.2d at 626.

1452. *Id.* at 191, 590 N.E.2d at 210, 581 N.Y.S.2d at 625.

1453. *Id.* at 184-85, 590 N.E.2d at 205-06, 581 N.Y.S.2d at 620-21.

1454. *Id.* at 185-87, 590 N.E.2d at 207-08, 581 N.Y.S.2d at 621-22.

cation, the Port Authority Bus Terminal in New York City, and by the same police officer.[1455]

The police officer observed Hollman descend, then ascend an escalator carrying an orange bag.[1456] Hollman again descended the escalator a few minutes later, accompanied by another male who was carrying a black knapsack.[1457] The two men took a position in front of a men's room and stood ten feet apart from each other, with the defendant's orange bag on the floor between them.[1458] Hollman and his companion remained in those positions for approximately twenty minutes, engaged in conversation.[1459] Next, Hollman picked up the orange bag and entered the men's room followed by his companion.[1460] The two men thereafter exited the room and boarded a bus.[1461] On the bus Hollman placed the orange bag in an overhead rack a few seats away from his seat.[1462] Hollman also moved his companion's knapsack away from directly overhead to where his orange bag was placed.[1463]

The undercover police officer who observed these events boarded the bus and identified himself to the two men. The officer apparently did not block the isle and stood facing the two men from the seat in front of them. Hollman and his companion were asked if they were traveling together, and they answered that they were not.[1464] They also denied having any luggage and answered that the two bags in the overhead rack were not their's. The officer thereupon searched the two bags and found narcotics and drug paraphernalia inside.[1465]

The officer's observations of the second case discussed in the *Hollman* decision, *Saunders*, were much more limited. Saunders

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1455. *Id.*
1456. *Id.* at 185, 590 N.E.2d at 206, 581 N.Y.S.2d at 621.
1457. *Id.*
1458. *Id.* at 185-86, 590 N.E.2d at 206, 581 N.Y.S.2d at 621.
1459. *Id.* at 186, 590 N.E.2d at 206, 581 N.Y.S.2d at 621.
1460. *Id.*
1461. *Id.*
1462. *Id.*
1463. *Id.* at 185-86, 590 N.E.2d at 206, 581 N.Y.S.2d at 621.
1464. *Id.*
1465. *Id.*

was observed carrying a gym bag while standing in line to board a bus.[1466] The defendant appeared nervous and repeatedly scanned the area. Saunders also hesitated upon catching the undercover officer's eye. The officer, accompanied by two fellow officers, only observed Saunders for about five minutes before approaching him.[1467] The undercover officer identified himself and asked the defendant to speak with them. Saunders consented and exited the line.[1468] After asking where he was going and for what purpose, the officers asked and secured from Saunders permission to open his gym bag.[1469] Narcotics were found inside the bag.[1470]

The New York Court of Appeals began it's analysis by reaffirming its support of the four tier analysis for police initiated encounters set forth in *People v. De Bour*:[1471]

> [(1)] If a police officer seeks simply to request information from an individual, that request must be supported by an objective, credible reason, not necessarily indicative of criminality. [(2)] The common-law right of inquiry, a wholly separate level of contact, is "activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion." [(3)] Where a police officer has reasonable suspicion that a particular person was involved in a felony or misdemeanor, the officer is authorized to forcibly stop and detain that person. Finally, [(4)] where the officer has probable cause to believe that a person has committed a crime, an arrest is authorized.[1472]

This four tier analysis adds to the federal two tier analysis. The United States Supreme Court only recognizes full blown custodial forceful seizures and non-custodial non-forceful seizures (*Terry*

1466. *Id.* at 187, 590 N.E.2d at 207, 581 N.Y.S.2d at 622.
1467. *Id.*
1468. *Id.*
1469. *Id.*
1470. *Id.* at 188, 590 N.E.2d at 207, 581 N.Y.S.2d at 622.
1471. *Id.* at 185, 590 N.E.2d at 206, 581 N.Y.S.2d at 621.
1472. *Id.* at 184-85, 590 N.E.2d at 205-06, 581 N.Y.S.2d at 620-21 (quoting *DeBour*, 40 N.Y.2d at 223, 352 N.E.2d at 571-73, 386 N.Y.S.2d at 384-85).

stops).[1473] The State in *Hollman*, therefore, asked the court of appeals to overrule the *De Bour* method of regulating police approaches even before a seizure has occurred, as superseded by subsequent Supreme Court decisions.[1474] In refusing to overrule *De Bour*, the court stated that the policy behind imposing standards regulating encounters between police and citizens is still sound.[1475] The divergence from Supreme Court precedent was thereby based on state common-law grounds.[1476]

1473. *Id.* at 194-95, 590 N.E.2d at 211-12, 581 N.Y.S.2d at 626-27 (citing Terry v. Ohio, 392 U.S. 1, 19 (1967); Florida v. Bostick, 111 S. Ct. 2382, 2386 (1991); Michigan v Chesternut, 486 U.S. 567, 573-74 (1988); California v Hodari, 111 S. Ct. 1547, 1550-51 (1991)). *See also* United States v. Mendenhall, 446 U.S. 544 (1980). In *Mendenhall*, Justice Stewart stated the test for a seizure as follows: "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554. This test for a seizure was again used in Florida v. Royer, 460 U.S. 491, 502 (1983), and INS v. Delgado, 466 U.S. 210, 215 (1984).

1474. *Hollman*, 79 N.Y.2d at 196, 590 N.E.2d at 212, 581 N.Y.S.2d at 627.

1475. *Id.* at 198, 590 N.E.2d at 212, 581 N.Y.S.2d at 627. In citing (without discussion) to *California v. Hodari*, (establishing that a police chase of a suspect is not a seizure), the court of appeals in *Hollman* only rejected the proposition that police encounters that amount to less than a seizure are always legal. *Id.* at 181, 590 N.E.2d at 212, 581 N.Y.S.2d at 627. Yet to be decided by the court of appeals is whether, under the New York Constitution, a police chase alone amounts to a seizure. However, given the court's adherence to the *De Bour* standard of regulating pre-seizure police activity, it may well be that under existing New York case law an unprovoked chase of an individual by police is violative of common law rights of privacy, and any evidence discovered as a result of the chase is subject to exclusion. *See* People v. Howard, 50 N.Y.2d 583, 408 N.E.2d 908, 430 N.Y.S.2d 578, *cert. denied*, 449 U.S. 1023 (1980) (pre-*Hodari* decision holding that a police chase must be supported by reasonable suspicions of criminality under the New York State and Federal Constitutions). *See also* People v. Holmes, 181 A.D.2d 27, 585 N.Y.S.2d 718 (1st Dep't), *appeal granted*, 80 N.Y.2d 930, 603 N.E.2d 962, 589 N.Y.S.2d 857 (1992) (court of appeals granted appeal of appellate division case which rejected *Hodari* on state common law grounds).

1476. *Hollman*, 79 N.Y.2d at 198, 590 N.E.2d at 212, 581 N.Y.S.2d at 627. Presumably, the court of appeals did not base its decision on state constitutional grounds because the police encounters involved by the court's own definition amount to less than a "seizure." *Id.*

Putting the issue of overruling *De Bour* aside, the main issue raised by the two cases in *Hollman* was, how far can police questioning go to still be considered merely a request for information.[1477] To resolve this issue the court looked to its prior decisions. *De Bour* itself involved a defendant who crossed the street upon seeing police walk in his direction.[1478] The police officers thereupon approached the defendant and asked him a series of questions.[1479] De Bour was first asked what he was doing in the neighborhood, and then for identification.[1480] The court of appeals held that those questions were merely "requests for information," the least intrusive of police approaches, which only require the police to have some "objective, credible reason" for it to be a lawful approach.[1481] The court of appeals in *Hollman*, in relying on the facts of *De Bour*, concluded that a request for information allows only questions relating to identity or destination, and only if asked in a brief and non-coercive manner.[1482]

In *People v. Moore*[1483] the police asked a pedestrian about the contents of a pillowcase he was carrying, and the court of appeals held that the question was only a request for information.[1484] The court in *Hollman*, however, explained that "*Moore* represents the outer contours of what is permissible during a request for information."[1485] The court explained that the fact that the defendant was carrying something "unusual," a pillowcase

1477. People v. De Bour, 40 N.Y.2d 210, 218-19, 352 N.E.2d 562, 568-69, 386 N.Y.S.2d 375, 381-82 (1976) (A request for information is questioning which police are permitted to engage in while performing their "public function duties" as opposed to their "crime prevention duties.")

1478. *De Bour*, 40 N.Y.2d at 213, 352 N.E.2d at 565, 386 N.Y.S.2d at 378.

1479. *Id.*

1480. *Id.*

1481. *Id.* at 220, 352 N.E.2d at 570, 386 N.Y.S.2d at 383.

1482. *Hollman*, 79 N.Y.2d at 190, 590 N.E.2d at 209, 581 N.Y.S.2d at 624.

1483. 47 N.Y.2d 911, 393 N.E.2d 489, 419 N.Y.S.2d 495 (1979), *aff'g for reasons stated in dissenting opinion*, 62 A.D.2d 155, 404 N.Y.S.2d 90 (1st Dep't 1978) (Silverman, J., dissenting).

1484. 62 A.D.2d at 158, 404 N.Y.S.2d at 92.

1485. *Hollman*, 79 N.Y.2d at 191, 590 N.E.2d at 209, 581 N.Y.S.2d at 624.

with a visible television inside, made it only a request for information.[1486] However, in almost all other circumstances, where the container is not so outrageously unusual, a question about the contents of a bag is not merely an informational request.[1487]

Therefore, both police inquiries about the contents of the bags in *People v. Hollman* and *People v. Saunders* would be invalid unless the officers had suspicions equaling more than just an "objective, credible reason." The court held in *Hollman* that the police activity was justified.[1488] The police were first justified in approaching Hollman because the defendant and his companion's action of standing ten feet apart with the orange bag between them gave the police an objective credible reason to question the men about their identity and where they were going.[1489] After the two denied that they were traveling together, itself a response to a valid question about destination, the police asked if they checked any luggage.[1490] This too, the court held, was merely a request for information but only because of the evasive response the defendant and his companion gave to the preceding question.[1491] This was so even though the inquiry "clearly [wa]s more directed toward possible criminality than the earlier . . . questions."[1492] The officers then had "founded suspicions" to make a common-law inquiry, the court held, when the two men denied having any bags.[1493] Commensurate with a common-law inquiry, the police were justified in asking who owned the orange and black bags, the court explained.[1494] Since no one claimed to own the two bags, the police were allowed to search them pursuant to the doctrine of abandonment.[1495]

1486. *Id.* at 191, 590 N.E.2d at 209-10, 581 N.Y.S.2d at 624-25.

1487. *Id.*

1488. *Id.* at 192, 590 N.E.2d at 210, 581 N.Y.S.2d at 625.

1489. *Id.* at 192-93, 590 N.E.2d at 210, 581 N.Y.S.2d at 625.

1490. *Id.* at 193, 590 N.E.2d at 210-11, 581 N.Y.S.2d at 625-26.

1491. *Id.*

1492. *Id.* at 193, 590 N.E.2d at 211, 581 N.Y.S.2d at 626.

1493. *Id.*

1494. *Id.*

1495. *Id.* The court of appeals did not reach the question of whether the bags were in fact abandoned and instead relied on the appellate division's determination of abandonment. *Id.* Abandonment is a mixed question of fact

In *People v. Saunders* the court held first that the officers were permitted to ask informational questions because the defendant's nervousness and scanning of the area provided an objective, articulable reason.[1496] But, since the only incriminating behavior they observed was the defendant's nervous scanning, and Saunders' responses to the informational questions were not suspicious, the police were not justified in requesting to inspect his bag.[1497] Consequently, even though Saunders probably voluntarily consented to the search of his bag, the consent was tainted by the officers' illegal conduct of requesting permission to search the bag, and was excluded.[1498]

The facts of the *Saunders* case illustrate the divergence between New York and Federal Courts in regulating police encounters. In federal court, police are permitted to accost citizens, and without using methods that a court would deem coercive, convince the citizen to "consent" to a search, or to "volunteer" incriminating information.[1499] This can sometime lead to surprising results. In *United States v. Mendenhall*,[1500] a passenger at an airport concourse was approached by narcotics agents who requested to see her airline ticket and identification.[1501] The passenger then consented to accompany the agents to a room where a full body strip search of her person was conducted.[1502] Justice Stewart, who

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and law. *Id.* at 193-94, 590 N.E.2d at 211, 581 N.Y.S.2d at 626 (citing People v. Harrison, 57 N.Y.2d 470, 477, 443 N.E.2d 447, 451, 457 N.Y.S.2d 199, 203 (1982); People v Hogya, 56 N.Y.2d 602, 604, 435 N.E.2d 1087, 1088, 45 N.Y.S.2d 472, 473 (1982)). Contrary to the trial court and the appellate division, the New York Court of Appeals generally does not have jurisdiction to review questions of fact. *See* N.Y. CONST. art. 6 § 3; People v. Bigelow, 66 N.Y.2d 417, 488 N.E.2d 451, 497 N.Y.S.2d 630 (1985).

1496. *Hollman*, 79 N.Y.2d at 194, 590 N.E.2d at 211, 581 N.Y.S.2d at 626.

1497. *Id.*

1498. *Id.*

1499. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (Under federal law, police encounters are only regulated once they become seizures and a mere request for consent to search alone has never been held to be a seizure.).

1500. 446 U.S. 544 (1980).

1501. *Id.* at 547-88.

1502. *Id.* at 548-49.

wrote the opinion of the Court, in a portion of the decision joined only by then Justice Rehnquist, held that no constitutional seizure of the defendant's person occurred and that the evidence found as a result of the strip search was admissible:[1503] "The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions."[1504] Justice Powell, with whom Chief Justice Berger and Justice Blackmun joined, in concurring, found the police activity reasonable and therefore did not reach the issue of whether a seizure had occurred.[1505] Yet Justice Powell stated in a footnote that he did not necessarily disagree with Justice Stewart and considered the facts of the case a close one.[1506]

In *INS v. Delgado*[1507] the Supreme Court held that immigration agents did not commit a seizure when they entered a factory and surveyed the employees to see if they were illegal aliens.[1508] This was so even though agents were also positioned at all the exits and a worker would have had to get past an agent in order to exit the factory.[1509] Having found no seizure, the Supreme Court held that the police activity was legal.[1510]

On the other hand, in New York, if the police had no basis for asking the question in the first place, the issues of whether a defendant consented to a search, or volunteered incriminating information, or voluntarily abandoned property, after a police question, is not even reached. As in *Saunders*, the mere asking for consent to search a bag requires under New York common law a certain degree of suspicion on the part of police, without which the question is illegally posed.[1511]

1503. *Id.* at 555.
1504. *Id.*
1505. *Id.* at 560 (Powell, J., concurring).
1506. *Id.* at 560 n.1 (Powell, J., concurring).
1507. 466 U.S. 210 (1984).
1508. *Id.* at 212.
1509. *Id.*
1510. *Id.* at 219.
1511. *Hollman*, 79 N.Y.2d at 194, 590 N.E.2d at 211, 581 N.Y.S.2d at 626.