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Search & Seizure

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT

People v. Holmes[1738]
(decided June 23, 1992)

Defendant appealed from a motion denying the suppression of physical evidence that was recovered after a chase by police officers on the grounds that the evidence discarded during the chase was obtained in violation of the Federal[1739] and New York State Constitutions.[1740] The court held that even though under the Federal Constitution the evidence is not tainted, under New York common law evidence secured as a result of a police chase, unsupported by a founded suspicion that criminality is afoot, is subject to the exclusionary rule.[1741] Consequently, any evidence recovered as a result of the unjustifiable police conduct must be suppressed.[1742] Therefore, the bag discarded by the defendant containing 45 vials of crack cocaine must be suppressed and the judgment reversed.[1743]

Two New York City Police Officers observed the defendant and several men gathered near a known narcotics location. Police Officer Moynihan noticed that the defendant had an unidentified bulge in the right pocket of his brown leather jacket. Police Officer Nelthrope noticed that several of the men were familiar to him as having been arrested by other officers at the same location for drug related offenses.[1744] As their patrol car approached the

1738. 181 A.D.2d 27, 585 N.Y.S.2d 718 (1st Dep't), *appeal granted*, 80 N.Y.2d 930, 589 N.Y.S.2d 857, 603 N.E.2d 962 (1992).

1739. U.S. CONST. amend. IV.

1740. N.Y. CONST. art. I, § 12.

1741. *Holmes*, 181 A.D.2d at 31, 585 N.Y.S.2d at 720.

1742. *Id.* at 32, 585 N.Y.S.2d at 721.

1743. *Id.*

1744. *Id.* at 28, 585 N.Y.S.2d at 718. At the suppression hearing, Officer Nelthrope testified that he recognized defendant as a former arrestee however,

group the defendant began to back off and then turned and walked away from the group. The officers stopped the car and Officer Moynihan called out to the defendant requesting him to come over. Defendant turned around and as Officer Moynihan started to exit the vehicle the defendant fled.[1745] The Officers pursued. When Officer Moynihan was about ten feet from the defendant he observed the defendant throw a plastic bag through a chain link fence into a courtyard. After the defendant was apprehended the bag was recovered and was found to contain 45 vials of crack cocaine.[1746]

The court first noted that the court of appeals recently reaffirmed, in *People v. Hollman,*[1747] the principles enunciated in *People v. De Bour,*[1748] which govern the evaluation of the propriety of a street encounter between police and citizens.[1749] The *De Bour* court held that a police officer may, in the absence of any concrete indication of criminality, approach a private citizen on the street for the purpose of requesting information.[1750] The basis for this inquiry need not rest on any

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the record is unclear as to the point at which he recognized him and it appears that it may not have been until after the defendant was arrested. *Id.*

1745. *Id.* at 29, 585 N.Y.S.2d at 719.

1746. *Id.*

1747. 79 N.Y.2d 181, 590 N.E.2d 204, 581 N.Y.S.2d 619 (1992). The *Hollman* Court pointed out the distinction between a "request for information" from an individual and the "common law right of inquiry." The court concluded that a "request for information" is a non-threatening encounter involving basic, questions about identity, address or destination. These questions need be supported only by an objective credible reason not necessarily indicative of criminality. In contrast is the situation where the officer asks more pointed questions that would lead the person approached to reasonably believe that he is suspected of some wrongdoing and is the focus of the officer's investigation. The latter encounter is a "common law inquiry" and must be supported by a founded suspicion that criminality is afoot. *Id.* at 185, 590 N.E.2d at 206, 581 N.Y.S.2d at 621. The court noted that in part the distinction rests on the number and content of the questions asked and the degree to which the language and nature of the questions transform the encounter from an unsettling one to an intimidating one. *Id.* at 192, 590 N.E.2d at 210, 581 N.Y.S.2d at 625.

1748. 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976).

1749. *See id.* at 213, 352 N.E.2d at 565, 386 N.Y.S.2d at 378.

1750. *Id.*

indication of criminal activity on the part of the person whom the inquiry is made, but there must be some articulable reason sufficient to justify the police action undertaken.[1751]

The court in *Holmes* held that by applying these principles to the facts, the police officers had sufficient indication that the circumstances constituted an "objective credible reason" which permitted the officers to intrude on defendant's privacy for the purpose of requesting information.[1752] However, the court found that since none of the factors within the knowledge of the police were necessarily indicative of criminality, and the defendant's behavior was not inconsistent with an innocent interpretation, the police did not have a founded suspicion that criminality was afoot.[1753] Thus, the officers were not entitled to the intrusive inquiry which took place.[1754]

The court then focused an examination of whether the police were permitted to pursue the defendant once he failed to cooperate with their inquiry and ran from the scene.[1755] The court noted that the New York Court of Appeals, in *People v. Howard,*[1756] made it clear that under the law of this State, pursuit by police officers constitutes a "limited detention" of the person pursued, and must therefore be justified at its inception by a reasonable suspicion that the person has committed or is about to commit a crime.[1757] Thus, the court discarded the prosecution's argument that even if the conduct of the police was unlawful, the taint of that unlawful behavior was attenuated when defendant

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1751. *Id.*

1752. *Holmes*, 181 A.D.2d at 29, 585 N.Y.S.2d at 719.

1753. *Id.*

1754. *Id.*

1755. *Id.*

1756. 50 N.Y.2d 583, 408 N.E.2d 908, 430 N.Y.S.2d 578, *cert. denied*, 449 U.S. 1023 (1980). The *Howard* court held that an individual to whom a police officer addresses a question has a constitutional right not to respond. He or she may remain silent or walk away. "Though the police officer may endeavor to complete the interrogation, he may not pursue, absent probable cause to believe that the individual has committed, is committing, or is about to commit a crime, seize or search the individual or his possessions, even though he ran away." *Id.* at 586, 408 N.E.2d at 910, 430 N.Y.S.2d at 581.

1757. *Id.* at 592, 408 N.E.2d at 908, 430 N.Y.S.2d at 578.

threw away the bag containing the drugs.[1758] However, the court reasoned that the fact that the officers were in continuous hot pursuit, with one of them being only 10 feet from the defendant when he discarded the drugs, compels a finding that the bag was discarded as a spontaneous reaction to the sudden and unexpected pursuit by the officers and not as an "independent act, involving a calculated risk".[1759]

In light of its decision in *California v. Hodari*,[1760] it appears that the United States Supreme Court has overruled the New York Court of Appeals' decision in *People v. Howard*, insofar as it held that the act of pursuit itself would be a limited seizure within the meaning of the Federal Constitution.[1761] In *Hodari*, the Supreme Court held that in order for a seizure to occur there must be some application of physical force, or a show of authority to which the subject yields.[1762] A show of authority without any application of physical force to which the subject does not yield is not a seizure.[1763] The *Hodari* Court reasoned that the word "seizure" conveys the meaning of an application of physical force to restrain movement.[1764] It does not apply when a police officer commands a suspect to "stop" and the suspect ignores the command and continues to flee.[1765] The Court found that an arrest requires either physical force or submission to the

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1758. *Id.*

1759. *Holmes*, 181 A.D.2d at 32, 585 N.Y.S.2d at 720-21 (quoting People v. Grant, 164 A.D.2d 170, 562 N.Y.S.2d 22, (1st Dep't 1990), *appeal dismissed*, 77 N.Y.2d 926, 569 N.Y.S.2d 603, 572 N.E.2d 44 (1991)). The *Grant* court stated that defendant's disposal of gun was a spontaneous reaction to chase by police and not an independent act of abandonment involving a calculated risk, therefore recovery of the discarded gun was tainted by illegal police conduct and the gun must be suppressed. *Grant*, 164 A.D.2d at 175-76, 562 N.Y.S.2d at 26. *See also* People v. Boodle, 47 N.Y.2d 398, 391 N.E.2d 1329, 418 N.Y.S.2d 352, *cert. denied*, 444 U.S. 969 (1979).

1760. 111 S. Ct. 1547 (1991).

1761. U.S. CONST. amend IV.

1762. *Hodari*, 111 S. Ct. at 1550.

1763. *Id.*

1764. *Id.* The Court stated that "[t]he word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful." *Id.*

1765. *Id.*

assertion of authority,[1766] while noting that at common law the word "seizure" suggested not merely grasping an object but actually bringing it within physical control.[1767] Further, street pursuits place the public at risk and compliance with police orders should be encouraged.[1768] Accordingly, unlawful orders to stop will not be deterred by sanctioning through the exclusionary rule those orders that are not obeyed.[1769]

Therefore, under the federal law, in order for a seizure to occur there must be some application of physical force or a show of authority to which the subject yields.[1770] Accordingly, any objects discarded during pursuit are admissible into evidence.[1771] Conversely, under New York Law, pursuit by police officers constitutes a "limited detention" of the person pursued, and must therefore be justified by a reasonable suspicion that the person has committed or is about to commit a crime.[1772]

Justice Kupferman concurred in a separate opinion and noted that while the majority opinion analyzed the situation well, the decision of the United States Supreme Court in *Hodari* is the better view on this issue. However, Justice Kupferman concurred on constraint.

Consequently, under the federal law, an individual fleeing from the police is not seized until he or she is apprehended by physical force regardless of whether the pursuit is reasonable. Thus, any objects discarded during the pursuit are admissible into evidence.

1766. *Id.* at 1551.

1767. *Id.* at 1549-50.

1768. *Id.* at 1551.

1769. *Id.*

1770. *Id.*

1771. *See id.* at 1552. The *Hodari* Court concluded that assuming the police officer's actions constituted a "show of authority" thereby ordering Hodari to stop, "since Hodari did not comply with that injunction[,] he was not seized until he was tackled." *Id.* Thus, "[t]he cocaine abandoned while he was running was in this case not the fruit of a seizure, and his motion to exclude evidence of it was properly denied." *Id.*

1772. *See Holmes*, 181 A.D.2d at 29, 585 N.Y.S.2d at 719; *see also* People v. De Bour, 40 N.Y.2d 210, 213, 352 N.E.2d 562, 565, 386 N.Y.S.2d 375, 378 (1976); People v. Hollman, 79 N.Y.2d 181, 185, 590 N.E.2d 204, 206, 581 N.Y.S.2d 619, 621 (1992).

Conversely, under New York law, when a person flees police presence, the subsequent police pursuit, absent other reasonable suspicion, may render the seizure illegal. Thus, objects discarded during the pursuit will not be admitted into evidence. However, as this case is on appeal, there exists the possibility that a change in New York's approach to search and seizure.

SECOND DEPARTMENT

People v. Waring[1773]
(decided Jan. 13, 1992)

A criminal defendant claimed that her state[1774] and federal[1775] constitutional right to be free from warrantless searches was violated when a Port Authority Officer, at an airport security checkpoint, conducted a search of a package concealed on her person. Because the search did not fall within the consent[1776] or emergency[1777] exceptions to the warrant requirement,[1778] the defendant contended that the evidence seized should be suppressed.[1779]

1773. 174 A.D.2d 16, 579 N.Y.S.2d 425 (2d Dep't 1992), *appeal denied*, 79 N.Y.2d 1009, 594 N.E.2d 957, 584 N.Y.S.2d 463 (1992).

1774. N.Y. CONST. art. I, § 12.

1775. U.S. CONST. amends. IV, XIV.

1776. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The United States Supreme Court stated that a warrantless search based on the consent of the individual is valid providing the consent is "voluntary." *Id.* at 227. Additionally, the Court noted that "[w]hile knowledge of the right to refuse consent is one factor to be taken into account," *id.*, such knowledge of the right to refuse consent is not a prerequisite to a finding of voluntary consent. *Id.* at 234. Thus, a question whether consent to a search is voluntarily given is based on the "totality of the circumstances." *Id.* at 227.

1777. *See* People v. Mitchell, 39 N.Y.2d 173, 347 N.E.2d 607, 383 N.Y.S.2d 246, *cert. denied*, 426 U.S. 953 (1976). The emergency exception to the warrant requirement addresses circumstances where a police officer needs to act swiftly to in order to protect life or property without time to secure a warrant. The court outlined the elements to the emergency requirement as:

(1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property.