Touro Law Review

Volume 9 | Number 3 Article 56

1993

Search & Seizure

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.

The Appellate Division, Second Department, held that airport searches conducted at security checkpoints may be conducted absent "a warrant provided that they are only so intrusive as is reasonable in light of all the circumstances, including the overriding state interest in preventing aircraft hijacking."[1780] Therefore, the court concluded that neither the consent nor emergency exception to the warrant requirement need be proved in order to justify a warrantless airport security search of a package and its contents when it is "reasonably suspected" to contain weapons or explosives.[1781]

The defendant, Deborah Waring, activated the magnetometer, a metal detecting device which all passengers walk through before boarding an airplane, three times despite opportunities to remove any metal items which the machine might have been detecting.[1782] Because she was not able to pass through the mechanism successfully, she consented to a manual search of her person with a "hand wand."[1783] Pursuant to this search, the security officer observed a suspicious bulge under the defendant's clothing and immediately performed a "pat down" search intended to discover any weapons or explosives the defendant may have concealed.[1784] The officer discovered a package in the small of the defendant's back which he seized.[1785] The defendant then agreed

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(2) The search must not be primarily motivated by intent to arrest and seize evidence.

(3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

Id. at 177-78, 347 N.E.2d at 609, 383 N.Y.S.2d at 248.

1778. *See* U.S. CONST. amend. IV, cl. 2; N.Y. CONST. art. I, § 12. The Warrant Clause of the United States and the New York Constitutions contain identical language: "[N]o 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."

1779. *Waring*, 174 A.D.2d at 17, 579 N.Y.S.2d at 426.

1780. *Id.* at 21, 579 N.Y.S.2d at 428.

1781. *Id.* at 17, 579 N.Y.S.2d at 426.

1782. *Id.*

1783. *Id.*

1784. *Id.*

1785. *Id.*

to move to security room where she initially explained to the officer that the package contained money belonging to another individual who instructed her not to allow anyone to open it.[1786] After a second officer arrived and requested permission to open the package, it was searched and found to contain cocaine.[1787] The defendant was subsequently arrested.[1788]

The defendant's motion to suppress the cocaine as well as the statements made to the arresting officer were denied by the hearing court. In upholding the search of the defendant's package "because it was reasonable under all of the circumstances," the hearing court found it necessary to determine whether the circumstances surrounding the search warranted the application of the emergency exception to the warrant requirement.[1789] The Appellate Division, Second Department, concurred with this reasoning and affirmed the lower court's ruling stating definitively that, "searches and seizures which occur at airport security check points are to be examined in light of special rules which have evolved. . . . [They] are not, in other words, governed by the same standards as would be applied to searches conducted on the street, or in any other public or private place."[1790]

In support of its holding that the warrantless search of defendant's package was valid without the need to address the consent and emergency exceptions, the court discussed three theories upon which courts have upheld the search of carry-on luggage and airline passengers. First, the court noted that New York and numerous sister states have justified the warrantless search of carry-on luggage based on an "implied consent" theory.[1791] The

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1786. *Id.* at 17-18, 579 N.Y.S.2d at 426.

1787. *Id.* at 18, 579 N.Y.S.2d at 426. The court acknowledged that while the record indicated that after initial protestations the defendant subsequently consented to the search of the package, it noted that the hearing court's decision failed to expressly find that the defendant had in fact consented to the search. *Id.*

1788. *Id.*

1789. *Id.* at 18, 579 N.Y.S.2d at 426.

1790. *Id.* at 19, 579 N.Y.S.2d at 427.

1791. *Id.*; *See* People v. Heimel, 812 P.2d 1177, 1181 (Colo. 1991) (en banc) (stating that there is no need for reasonable suspicion or probable cause on part of airport security when passenger voluntarily subjects himself to

court noted that this theory is premised on the contention that passengers implicitly consent to a search when they attempt to board an airplane or otherwise enter a "sterile" area within the airport.[1792] Thus, the search of carry-on luggage is permitted even absent reasonable suspicion or probable cause to believe that the package contains a weapon.[1793] The court noted that this theory evolved from the realization that the likelihood of such a search is common knowledge among airline passengers.[1794]

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screening process at an airport designed to further important government interest in safe air travel); People v. Price, 54 N.Y.2d 557, 563, 431 N.E.2d 267, 270, 446 N.Y.S.2d 906, 909 (1981) (court stated that it is "common knowledge that all airline passengers and their luggage are subject to being searched," and that while major purpose of such searches is to protect against potential hijackings, these searches are also reasonable when "contraband is discovered in areas where a person would normally have a reasonable expectation of privacy"); People v. Kuhn, 33 N.Y.2d 203, 208, 306 N.E.2d 777, 779, 351 N.Y.S.2d 549, 552 (1973) (court held that the use of a magnetometer to indicate the presence of metal constitutes reasonable and constitutional search justified by overwhelming interest in air traffic safety and minimal level of intrusion into an individual's privacy); State v. Kelsey, 679 P.2d 335 (Or. Ct. App. 1984) (airport security officer had probable cause to seize boxes after defendant revoked his consent to search because of defendant's "suspicious behavior," coupled with officer's experience and training in explosives and drugs); *cf.* State v. Salit, 613 P.2d 245 (Alaska 1980) (Air Transportation Security Act of 1974 does not permit search of garment that successfully passed x-ray examination without consent of owner unless bag has been reasonably thought to be abandoned); State v. Wiley, 752 P.2d 102 (Haw. 1988) (by submitting luggage to airport search, defendant did not consent to warrantless search after being arrested since it would not be necessary to public air safety); *see also* United States v. $124,570 U.S. Currency, 873 F.2d 1240, 1247 (9th Cir. 1989) (warning that implied consent to search is limited to search for weapons only and not more generalized search for contraband); United States v. Lopez-Pages, 767 F.2d 776, 779 (11th Cir. 1985).

1792. *Waring*, 74 A.D.2d at 19, 579 N.Y.S.2d at 427.

1793. *Id.*

1794. *Id.*; *See Price*, 54 N.Y.2d at 563, 431 N.E.2d at 270, 446 N.Y.S.2d at 906 (airline passengers' right of privacy are reduced when luggage is surrendered to common carrier since "[i]t is common knowledge that all airline passengers and their luggage are subject to being searched"); People v. Brown, 113 A.D.2d 893, 894, 493 N.Y.S.2d 557, 811 (2d Dep't 1985) (court found that existence of two signs clearly warning passengers of an X-ray search, combined with common knowledge that passengers and their baggage are

Justification for this lowered standard of individual constitutional protection is the danger that is inherent in armed persons gaining access to airplanes.[1795]

A second theory advanced by the *Waring* court in support of the warrantless search of the defendant was based on administrative search exception to the warrant requirement.[1796] An administrative search is one which is "conducted as part of a general regulatory scheme [in furtherance of an administrative purpose,] rather than an investigation to secure evidence of crime . . . ."[1797] The court observed that this theory is founded on the existence of federal regulations[1798] which require airports

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subject to searches made X-ray search of defendant's luggage both reasonable and constitutional). Notice of such searches is considered to be communicated through prominently displayed signs that warn that searches shall be conducted of all who continue past a designated point in the airport. *See* United States v. Lopez-Pages, 767 F.2d 776, 779 n.2 (9th Cir. 1989) (alternatively held that sign posted where all persons may view it sufficiently informed perspective passengers that their presentation at security checkpoint was implied consent to be searched); *Brown*, 113 A.D.2d at 894, 493 N.Y.S.2d at 811 (two signs posted adequately warned passengers of X-ray search and no evidence of arbitrary or coercive security tactics support conclusion of voluntary consent).

1795. *Id.* (citing United States v. Bell, 464 F.2d 667, 675 (2d Cir.) (Friendly, J., concurring), *cert. denied*, 409 U.S. 991 (1972)).

1796. *Waring*, 174 A.D.2d at 19, 579 N.Y.S.2d at 427.

1797. United States v. Edwards, 498 F.2d 496, 498 n.5 (2d Cir. 1974); *see also* United States v. $124,570 United States Currency, 873 F.2d 1240, 1243 (9th Cir. 1989) (administrative searches designed to further legitimate governmental interest, such as air traffic safety, do not require search warrants and are constitutionally permissible as part of enforcement of regulatory scheme); United States v. Davis, 482 F.2d 893, 908 (9th Cir. 1973) (search of defendant's briefcase without warrant did not violate Fourth Amendment based on screening procedures required by federal regulation to protect airlines from potential hijackers).

1798. *See* Air Transportation Safety Act of 1974, Pub. L. No. 93-366, 88 Stat. 415 (1974), *codified as amended*, 49 U.S.C. §§ 1356, 1357, 1371, 1372, 1472, 1516) (1982 & Supp. III 1985); 14 C.F.R. 107.11(b)(5) (1988); 14 C.F.R. 121.538 (1988). The Air Transportation Safety Act enables the Federal Aviation Administration to establish and enforce security measures aimed at the prevention of air piracy, and provides the necessary statutory grounds upon which reasonable searches, consistent with legislative goals, are excepted from the warrant requirement. *See* United States v. $124,570 United States Currency, 873 F.2d 1240, 1243 (9th Cir. 1989) (search of defendant's

to maintain adequate security programs, thus there has arisen a "widespread practice" of conducting warrantless searches in airports throughout the country.[1799] This practice has been cited with approval by the United States Supreme Court in *National Treasury Employees Union v. Von Raab*.[1800] In *Von Raab*, the Supreme Court stated that in light of the "Federal Government's practice of requiring the search of all passengers seeking to board commercial airliners . . . without any basis for suspecting any particular passenger of untoward motives[,] . . . the lower courts have consistently concluded that such [administrative] searches are reasonable under the Fourth Amendment."[1801] The Supreme Court noted that over 9.5 billion passengers have been screened, and in excess of 10 billion pieces of luggage inspected, in the fifteen years since the program was enacted.[1802] Therefore, the *Waring* court found it difficult to fathom how a person could claim a "reasonable expectation of privacy in a package which is being brought onto an airplane or through an airport sterile area."[1803]

The last theory the *Waring* court discussed, compared the airport security search with the border search exemption to the warrant requirement.[1804] Traditionally, international borders

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briefcase without search warrant did not violate Fourth Amendment based on screening procedures required by federal regulations to protect airlines from potential hijackers); *Davis*, 482 F.2d at 910 (administrative searches designed to further legitimate governmental interest, such as air traffic safety, do not require search warrants and are constitutionally permissible as part of enforcement of regulatory scheme).

1799. *Waring*, 174 A.D.2d at 19, 579 N.Y.S.2d at 427. *See $124,570 U.S. Currency*, 873 F.2d at 1244 (under the administrative search doctrine, "court places its stamp of approval on an entire class of similar searches").

1800. 489 U.S. 656 (1989).

1801. *Id.* at 675 n.3; *see Davis*, 482 F.2d at 913 ("We have held that, as a matter of constitutional law, a prospective passenger has a choice: he may submit to a search of his person and immediate possessions as a condition to boarding; or he may turn around and leave."); *$124,570 U.S. Currency*, 873 F.2d at 1247 ("Passengers rushing to board a plane can fairly be said to have consented to a search for weapons and explosives . . . .").

1802. *Von Raab*, 489 U.S. at 675 n.3.

1803. *Waring*, 174 A.D.2d at 20, 579 N.Y.S.2d at 428.

1804. *Id.* at 21, 579 N.Y.S.2d at 428.

have been regarded as "critical zone[s]" exempted from warrant requirements because of the "vital national interest in preventing illegal entry and smuggling, particularly of narcotics."[1805] The *Waring* court acknowledged that the "historic reasons for exempting border searches from the warrant requirement . . . do not closely resemble the contemporary reasons for exempting domestic airport searches from that requirement."[1806] However, the court focused on the mode of travel, rather than the destination, and the intensified concern for traveler safety in its support of employing the border exception by analogy.[1807]

Although the *Waring* court considered these three theories to justify warrantless searches of persons who present themselves as passengers for commercial airline trips, it declined to determine whether they should be applied in this case.[1808] Instead, the court held that, "regardless of the exact approach taken, airport security checkpoint searches may be conducted without a warrant provided that they are only so intrusive as is reasonable in light of all the circumstances, including the overriding State interest in preventing aircraft hijacking."[1809] Having compared the circumstances at bar to previous inquiries into the reasonableness of similar circumstances, the court unanimously held that the search

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1805. United States v. Moreno, 475 F.2d 44, 51 n.8 (5th Cir.), *cert. denied*, 414 U.S. 840 (1973). Like the international border, the airport security checkpoint may also be considered a critical zone because it is the point through which all potential passengers, who have deleterious intentions, must pass before being in a position to threaten the safety of those on board an airplane. *Id.* at 51; *see also* United States v. Herzbrun, 723 F.2d 773, 775 (11th Cir. 1984).

1806. *Waring*, 174 A.D.2d at 20, 579 N.Y.S.2d at 428.

1807. *Id.*

1808. *Id.* at 21, 579 N.Y.S.2d at 428.

1809. *Id.*; *see also* United States v. Edwards, 498 F.2d 496 (2d Cir. 1974). In *Edwards*, the Second Circuit stated that "[t]he reasonableness of a warrantless search depends, as many of the airport search opinions have stated, on balancing the need for a search against the offensiveness of the intrusion." *Id.* at 500. It noted that "a consensus . . . [is] emerging [among the circuits] that an airport search is not to be condemned as violating the Fourth Amendment simply because it does not precisely fit into one of the previously recognized categories for dispensing with a search warrant, but only if the search is 'unreasonable' on the facts." *Id.* at 498.

of the defendant did not exceed the scope of what was reasonable under the circumstances, and was in furtherance of the safety purposes for such security measures.[1810]

Lastly, the court distinguished the instant case from *People v. Kuhn*,[1811] where the New York Court of Appeals stated that a single activation of a magnetometer did not constitute reasonable suspicion to justify a more comprehensive search of a potential airplane passenger.[1812] In *Waring*, the court noted that the defendant triggered the device three separate times and the security officer noticed a bulge under her sweater, which indicated that something was being secreted.[1813] The court also distinguished its own decision in *People v. Smith*,[1814] from *Waring*.[1815] In *Smith*, the search of an airfreight package was held unconstitutional because reasonable suspicion of the presence of explosives could not be solely based upon general warnings of terrorist activity, where x-rays failed to detect any metal within the package.[1816] The *Smith* court also held that the emergency exception to the warrant requirement was not applicable.[1817] Contrarily, the *Waring* court held that reasonable suspicion was clearly substantiated by the circumstances,[1818] and, therefore, concluded

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1810. *Waring*, 174 A.D.2d at 21-22, 579 N.Y.S.2d at 428-29.

1811. 33 N.Y.2d 203, 306 N.E.2d 777, 351 N.Y.S.2d 649 (1973).

1812. *Id.* at 210, 306 N.E.2d at 780, 351 N.Y.S.2d at 654. The *Kuhn* court went on to state that a further search could be authorized only if the passenger consents. If no consent is given, the passenger would be barred from boarding the airplane, and therefore, would no longer present a "threat as a potential hijacker." *Id.*

1813. *Waring*, 174 A.D.2d at 22, 579 N.Y.S.2d at 429.

1814. 135 A.D.2d 190, 525 N.Y.S.2d 244 (2d Dep't 1988).

1815. *Waring*, 174 A.D.2d at 22, 579 N.Y.S.2d at 429.

1816. *Smith*, 135 A.D.2d at 192, 525 N.Y.S.2d at 245.

1817. *Id.* at 192-93, 525 N.Y.S.2d at 246. The court looked at the fact that the investigating officer obviously did not view the package as a serious bomb threat, since he did not call the bomb squad, instead electing to open the box himself to "check it out further" and "identify the items inside." *Id.*

1818. *Waring*, 174 A.D.2d at 22, 579 N.Y.S.2d at 429. Looking at the fact in this case, the court observed that the package contained a metallic object, and therefore, the suspicion that it might contain a bomb or weapon was much greater than that in *Smith*. *Id.*

that the applicability of the emergency exception was not a question that needed to be reached.[1819]

Therefore, under the State and Federal Constitution, a warrantless search of a passenger and her luggage by a security officer at an airport security checkpoint is valid provided that the intrusion by the officer is reasonable, based on the totality of the circumstances. Such a search is also reasonable, at least under the Federal Constitution, based on numerous other exceptions to the warrant requirement including the emergency exception, border exception, and administrative search exception.

THIRD DEPARTMENT

Claim of Atkinson v. B.C.C.[1820]
(decided July 9, 1992)

Claimant argued that her employer, a private corporation under contract with a governmental corporation, violated the prohibitions against unreasonable search and seizures of the Federal[1821] and New York State[1822] Constitutions by requiring her to furnish a urine specimen for drug testing without a reasonable suspicion of drug use.[1823] The court rejected the claimant's argument and held that the search was conducted by a non-governmental entity and therefore does not violate constitutional rights.[1824]

Claimant's former employer B.C.C. Associated Inc., (B.C.C.) provides money counting services under contract with the New York City Triborough Bridge and Tunnel Authority. Claimant was a cashier whose duty consisted of counting daily receipts and

1819. *Id.* at 22-23, 579 N.Y.S.2d at 429.

1820. 185 A.D.2d 415, 586 N.Y.S.2d 319 (3d Dep't 1992).

1821. U.S. CONST. amend. IV.

1822. N.Y. CONST. art. I, § 12.

1823. *Atkinson*, 185 A.D.2d at 416, 586 N.Y.S.2d at 321.

1824. *Id.*; *see also* People v. Adler, 50 N.Y.2d 730, 409 N.E.2d 888, 431 N.Y.S.2d 412, *cert. denied*, 449 U.S. 1014 (1980). The *Adler* Court held that "[i]t is well settled that a search by a private person, even an unlawful search, does not implicate Fourth Amendment considerations." *Id.* at 736-37, 409 N.E.2d at 891, 431 N.Y.S.2d at 415.