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Search & Seizure

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.

the handling of more than $10,000 daily.[1825] Prior to accepting employment, claimant was required to sign an agreement consenting to security techniques such as video surveillance, polygraph tests and urinalysis, and agreed that any information from the safeguard procedures may be a cause for dismissal.[1826]

In March 1990, as part of a random drug testing of B.C.C. employees, claimant was required to furnish a urine specimen. The test results came back positive for cocaine, and claimant was discharged.[1827] Upon a determination that claimant was terminated from her employment due to misconduct, claimant's unemployment insurance benefits were denied.[1828] That determination was upheld by the Unemployment Insurance Appeals Board, and claimant appealed from the Board's decision.[1829]

The court noted that "[a] search by a private person or a non-governmental entity does not violate constitutional rights."[1830] The issue, then, was whether B.C.C.'s contract with the Triborough Bridge and Tunnel Authority was sufficient to make the actions of B.C.C. a state action. State action can be established by one of two theories: the actor was performing a public function, or there was a sufficient nexus between the private actor and a public entity. The plaintiff argued under both theories.

In addressing the public function theory, the court turned to the Supreme Court decision in *Rendell-Baker v. Kohn.*[1831] The Supreme Court noted in *Rendell-Baker* the question was not whether a private group was serving a "public function" but "whether the function performed has been 'traditionally the exclusive prerogative of the State."[1832] *Rendell-Baker* involved a private school whose income came primarily from public

1825. *Atkinson*, 185 A.D.2d at 415, 586 N.Y.S.2d at 320-21.
1826. *Id.* at 415, 586 N.Y.S.2d at 321.
1827. *Id.*
1828. *Id.*
1829. *Id.*
1830. *Id.*
1831. 457 U.S. 830 (1982).
1832. *Id.* at 842 (quoting Blum v. Yaretsky, 457 U.S. 991, 1011 (1982)).

grants.[1833] The Supreme Court held that education is not exclusively a service provided by the state, and therefore it is not a public function.[1834] The *Atkinson* court similarly found that that providing services for counting toll receipts did not constitute a function that is traditionally the exclusive prerogative of the state.[1835] Plaintiff's claim under the public function failed.

The plaintiff was also unsuccessful under the nexus theory. The United States Supreme Court in *Blum v. Yaretsky*[1836] explained that "'[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State,'" there must be a "'sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.'"[1837] Similarly, The New York Court of Appeals in *Sharrock v. Dell Buick-Cadillac*,[1838] that purely private conduct "does not rise to the level of constitutional significance absent a significant nexus" to the State.[1839] The *Atkinson* court found no evidence of the Authority's involvement in B.C.C.'s decision to test its employees for drugs.[1840] There was therefore no connection between the drug testing and the state. Accordingly, B.C.C.'s policy of drug testing its employees does not constitute state action.[1841]

1833. *Id.* at 834.

1834. *Id.* at 842.

1835. *Atkinson*, 185 A.D.2d at 415, 586 N.Y.S.2d at 321.

1836. 457 U.S. 991 (1982).

1837. *Id.* at 1004 (quoting Jackson v. Metropolitan Edison Co. 419 U.S. 345, 350 (1974)).

1838. 45 N.Y.2d 152, 158, 379 N.E.2d 1169, 1172, 408 N.Y.S.2d 39, 42 (1978).

1839. *Id.* (citing The Civil Rights Cases, 109 U.S. 3, 11 (1879))

1840. *Atkinson*, 185 A.D.2d at 416, 586 N.Y.S.2d at 321.

1841. *Id.* The third department in *Atkinson*, also rejected claimant's alternative argument that her discharge amounted to discrimination against the disabled in violation of the State Human Rights Law. *See also Claim of Atkinson*, 185 A.D.2d at 416, 586 N.Y.S.2d at 321. The court held that there has been no showing that the basis of claimant's discharge was her disability due to drug dependency. *Id.*; N.Y. EXEC. LAW §§ 292(21), 296(1) (McKinney 1993).

Therefore, under the Federal and New York State Constitutions a search by a private person or non-governmental entity does not violate constitutional rights. There must be a significant nexus between the private conduct and the state.

KINGS COUNTY

People v. Postall[1842]
(decided January 7, 1992)

Defendant, a United States Postal Service police officer was indicted for second degree murder. He claimed that his rights to be protected from unreasonable searches and seizures under the Fourth Amendment of the United States Constitution[1843] and article I, section 12 of the New York State Constitution[1844] were violated when his superior, a U.S. Postal Service police inspector, searched his locker without his consent, a search warrant, or reasonable suspicion to conduct the search.[1845] In a decision on a motion to suppress, the court held that the evidence obtained from the locker must be suppressed because the search was unreasonable despite a Postal Service regulation permitting Postal inspectors to search employees' lockers without their consent.[1846] Upon examination of the facts, the court determined that the People did not establish a reasonable nexus between the incident under investigation and the locker search that produced the evidence in question.[1847]

1842. 153 Misc. 2d 167, 580 N.Y.S.2d 975 (Sup. Ct. Kings County, 1992).

1843. U.S. CONST. amend. IV, 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.*

1844. N.Y. CONST. art. I, § 12, 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.*

1845. *Postall*, 153 Misc. 2d at 169-70, 580 N.Y.S.2d at 977.

1846. *Id.* at 170, 580 N.Y.S.2d at 977.

1847. *Id.* at 168-70, 580 N.Y.S.2d at 976-77.