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Appellate Division, Third Department, People v. Kelley

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Appellate Division, Third Department, People v. Kelley

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**SUPREME COURT APPELLATE DIVISION,
THIRD DEPARTMENT**

People v. Kelley¹
(decided June 19, 2003)

Sasha Kelley was convicted of criminal possession of a controlled substance in the third degree.² Kelley's conviction was the result of a plea agreement — a guilty plea in return for the minimum indeterminate sentence of four and a half to nine years in prison.³ The defendant appealed his conviction claiming that the strip search that revealed his possession of crack cocaine was in violation of the United States Constitution⁴ and the New York Constitution.⁵ These provisions assure every citizen the right to be free from an unreasonable search and seizure.⁶ Kelley's objections were premised on the assumption that a person charged and held at a correctional facility has a constitutional right to be free from warrantless strip searches absent probable cause.⁷

¹ 762 N.Y.S.2d 438 (N.Y.A.D. 3d Dep't 2003).

² *Id.* at 439.

³ *Id.*

⁴ 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, and no Warrants shall issue, but upon probable cause. . . ."

⁵ N.Y. CONST. art. 1, § 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, and no warrants shall issue, but upon probable cause. . . ."

⁶ *Kelley*, 762 N.Y.S.2d at 440.

⁷ *Id.*

The defendant based his argument on *People v. More*,⁸ where the New York Court of Appeals held unconstitutional a body cavity search conducted at the scene and incident to arrest.⁹ In *Kelley*, the Appellate Division rejected defendant's argument, distinguished this case and upheld Kelley's conviction, reasoning the circumstances surrounding the arrest created a "reasonable suspicion that defendant was concealing weapons or contraband on his person, permitting the officers to conduct a strip search prior to housing defendant."¹⁰ The court stated that because the search was conducted in relation to the "administrative concerns and penological interests related to the housing of inmates," the appellant's contentions of unconstitutionality were unfounded.¹¹

Kelley was arrested and charged with several traffic infractions pursuant to Vehicle and Traffic Law Section 155.¹² At the time of the arrest, the police officers at the scene noted the defendant exhibited nervous behavior and falsely answered their

⁸ 764 N.E.2d 967 (N.Y. 2002). In *More*, the defendant was arrested for possession of a controlled substance, resisting arrest and false personation. *Id.* at 968. Subsequent to the arrest, police performed a body cavity search on the defendant and his female companion prior to taking them to the station. *Id.* The trial and appellate courts agreed that the search was legally performed and not in violation of the defendant's constitutional rights. *Id.* The Court of Appeals reversed, holding the body cavity search unreasonable, invalid and unconstitutional. Therefore, the evidence of the drugs found by means of the search should have been suppressed. *Id.* at 970.

⁹ *Kelley*, 762 N.Y.S.2d at 440.

¹⁰ *Id.* at 441.

¹¹ *Id.* at 440.

¹² *Id.* at 439. Kelley was arrested for driving without a license, driving an uninspected vehicle and failure to have a drivers side rear view mirror. *Id.* These offenses, not classified as misdemeanors or felonies, are defined as traffic infractions.

questions.¹³ In addition, they surmised that his illegal drug related activity and his presence in the city of Kingston without his parole officer's knowledge placed him in violation of the conditions of his parole.¹⁴ Once at the police station, officers performed a strip search revealing 130 "twisties" of crack cocaine located between Kelley's buttocks.¹⁵ He was charged with criminal possession of a controlled substance in the third and fourth degrees.¹⁶ Judgment was entered upon his guilty plea of criminal possession in the third degree.¹⁷ On appeal, the defendant claimed evidence of the crack cocaine should be suppressed as a result of an illegal search in violation of his state and federal constitutional rights.¹⁸

The *Kelley* court rejected appellant's assertion that his case was similar to the facts in *People v. More*.¹⁹ In *More*, the court held that a body cavity search that is a mere incidental action to the arrest is unconstitutional.²⁰ Instead, the *Kelley* court distinguished the defendant's case and concluded that the search performed at the police station did not violate Kelley's constitutional rights.²¹ The court held that the determining factor of constitutionality is the

¹³ *Id.* at 440. There was a minor in the car about which he told the officer false information, and he contradicted information obtained by the police officer. *Id.* at 441.

¹⁴ *Kelley*, 762 N.Y.S.2d at 441. Kelley admitted to the officers that he had smoked marijuana earlier in the day. The officers also found evidence of marijuana use in the car. *Id.* at 440.

¹⁵ *Id.* at 439.

¹⁶ *Id.* at 440.

¹⁷ *Id.* at 439.

¹⁸ *Id.* at 440.

¹⁹ *Kelley*, 762 N.Y.S.2d at 440.

²⁰ *More*, 764 N.E.2d at 969.

²¹ *Kelley*, 762 N.Y.S.2d at 440.

objective reasonable suspicions of the arresting officers.²² Relying on the decisions in *Sarnicola v. County of Westchester*²³ and *Huck v. City of Newburgh*,²⁴ the *Kelley* court held that the record in the case at hand provided the requisite objective reasonable suspicion in conjunction with the totality of the circumstances to justify the search.²⁵ The court, therefore, made it clear that Kelley's constitutional rights were not violated. The *Kelley* court also explained that a correctional facility maintains the right to perform such searches in protection of its "administrative concerns and penological interests related to the housing facility."²⁶ As the court in *Weber v. Dell*²⁷ held:

²² *Id.* at 441.

²³ 229 F. Supp. 2d 259 (S.D.N.Y. 2002). In *Sarnicola*, the plaintiff claimed she was subjected to an unconstitutional strip search. *Id.* at 261. The arrest was in connection with a drug sting operation. *Id.* at 264. The court held the search was unconstitutional because it was done without individualized reasonable suspicion that Sarnicola was in possession of weapons or contraband. *Id.* at 268.

²⁴ 712 N.Y.S.2d 149 (N.Y.A.D. 2d Dep't 2000). In *Huck*, the issue was whether the plaintiff's constitutional rights were violated when a strip search was performed at the City of Newburgh police station. *Id.* at 344. The plaintiff was arrested for having a dog without a license. *Id.* Upon arrest, she was strip searched at the police station pursuant to official policy that all detainees are searched prior to detainment. *Id.* The court held since neither the arresting officer nor the person performing the search suspected the plaintiff of having either contraband or weapons, the search was unreasonable and a constitutional violation. *Id.* at 345.

²⁵ *Kelley*, 762 N.Y.S.2d at 440.

²⁶ *Id.*

²⁷ 804 F.2d 796 (2d Cir. 1986). In *Weber*, the issue was whether a jail policy authorizing body cavity searches is constitutional when there is reasonable suspicion that the arrestee is concealing contraband. *Id.* at 797. Mrs. Weber had called the police to report an incident involving her son wherein he was attacked and barely escaped bodily injury. *Id.* at 798. When the police did not respond to her request for police protection for her son, she called the dispatcher back and asked what she would need to do in order to obtain the protection she was requesting. *Id.* Weber then complied and falsely reported a shooting in order to get her desired emergency attention of the police department. *Id.* The police

[i]ndividuals charged with a misdemeanor or other minor offense and held at a local correctional facility have a constitutional right to be free from warrantless strip searches ‘unless the officials have a reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest.’²⁸

There is no substantial difference in the wording of the Fourth Amendment to the United States Constitution and Article One, Section Twelve of the New York State Constitution. Thus, the protection each provides to an individual is virtually the same; a search that violates one most likely violates the other.²⁹ Differences in the outcome of cases concerning the issue arise due to changing circumstances surrounding the search. Two such issues are presented in the *Kelley* case: when a strip search has been conducted in connection with a charge of a misdemeanor offense and when there is a strip search in connection with the housing of an individual in a correctional facility.³⁰ Neither the federal nor the New York State constitutional provisions regarding

arrived at the Weber residence and placed Mrs. Weber under arrest for falsely reporting an incident. *Id.* at 799. Mrs. Weber brought the claim alleging violation of her Fourth Amendment right in response to the strip/body cavity search performed on her at the county jail. *Id.* The court concluded that her rights were, in fact violated. *Id.* It reasoned that the officials were without reasonable suspicion to perform the search. *Id.*

²⁸ *Id.*

²⁹ *Sarnicola*, 229 F. Supp. 2d at 275. The court stated, “[t]here is no indication that the New York State Constitution affords any greater protection for strip searches than the Fourth Amendment of the U.S. Constitution . . . By the same token, it affords no less.” *Id.*

³⁰ *Kelley*, 762 N.Y.S.2d at 438.

search and seizure specifically mention the right to be free from a strip search per se. Several cases on the issue have been decided and help to shed some light on the matter.

New York State courts have held that in order for an officer to subject a person to a strip search, the officer must have a reasonable suspicion of the defendant's wrongdoing. In *People v. Marsh*,³¹ the New York Court of Appeals held that taking an individual into custody for traffic violations on a warrant for arrest would violate the legislature's intent of treatment of such misdemeanor offenders and, therefore, the defendant's rights had been violated.³²

Marsh was taken into custody on a warrant that was issued for a traffic violation.³³ When the arrest was made, the arresting officer searched the defendant and found a sheet of paper folded in a matchbook in his pocket that implicated him in the playing of policy.³⁴ This evidence eventually led to his conviction for

³¹ 228 N.E.2d 783 (N.Y. 1967). In *Marsh*, police officers arrested the defendant for violating the state's gambling law after they stopped him on an arrest warrant issued for a misdemeanor traffic violation. *Id.* at 785. The piece of paper that implicated him on the playing of policy crime was discovered through a search at the scene of arrest. *Id.* The court held the search violated the defendant's right against unreasonable search and seizure. *Id.* The court reasoned the Legislature never intended a search to be conducted while in the process of arrest for a traffic violation. *Id.* at 786. Also, it argued the lack of reasonableness of a police officer performing a search when one is not necessary for a routine, proper execution of a warrant. *Id.* The court ordered the defendant's conviction reversed and granted his motion to suppress the evidence. *Id.* at 787.

³² *Id.* at 785.

³³ *Id.*

³⁴ *Id.*

possession of a policy slip.³⁵ The defendant appealed, claiming that this evidence was uncovered through an illegal search.³⁶ The Court of Appeals reversed the defendant's conviction and found that the officer was not entitled to search the defendant based solely on the fact that the defendant committed a traffic violation. In reaching this conclusion, the court reasoned:

[t]he Legislature never intended to authorize a search of a traffic offender unless when the vehicle is stopped, there are reasonable grounds for suspecting that the officer is in danger or there is probable cause for believing that the offender is guilty of a crime other than a simple traffic infraction."³⁷

Both the federal and New York State Constitutions prohibit unreasonable search and seizure, and their decision was guided by that provision in those documents.³⁸

Likewise, a federal court concluded that the plaintiff's Fourth Amendment rights were similarly violated in *Weber v. Dell*.³⁹ In *Weber*, the plaintiff was subjected to a strip/body cavity search after being arrested on a misdemeanor offense.⁴⁰ Weber had been placed under arrest for filing a false police report and resisting arrest.⁴¹ The district court found Ms. Weber's rights had

³⁵ *Id.*

³⁶ *Marsh*, 228 N.E.2d at 785.

³⁷ *Id.* at 786.

³⁸ *Id.*

³⁹ 804 F.2d 796 (2d Cir. 1986).

⁴⁰ *Id.* at 798.

⁴¹ *Id.* at 799.

not been violated. The sheriff's "reasonable grounds" for performing the search was the high percentage of people who are arrested that carry contraband. His justification had no connection to the particular arrestee herself.⁴² The appellate court reversed, stating that prison officials are precluded from performing strip/body cavity searches of individuals arrested for misdemeanors or other minor crimes absent the reasonable suspicion that the arrestee is concealing weapons or other contraband in connection with the crime charged.⁴³ The Fourth Amendment guarantees these protections.⁴⁴

In *People v. Taylor*,⁴⁵ the court found that a strip search in connection with an arrest of a defendant for violation of an open container ordinance did not violate the defendant's constitutional rights.⁴⁶ The defendant was walking down the street when the arresting officer stopped him and asked for identification.⁴⁷ When he was unable to produce any, the officer placed the defendant

⁴² *Id.* at 799-800.

⁴³ *Id.* at 802.

⁴⁴ *Weber*, 804 F.2d at 802.

⁴⁵ 741 N.Y.S.2d 822 (N.Y.A.D. 3rd Dep't 2002). In *Taylor*, a police officer approached the defendant who was carrying an open container of alcohol while walking down the street. *Id.* at 823. The defendant was unable to produce identification upon request by the officer. *Id.* When he was placed under arrest and handcuffed, the officer noticed drug paraphernalia protruding from his shirt pocket. *Id.* At the police station, the defendant was subjected to a strip search. *Id.* Taylor claimed the search violated his Fourth Amendment rights and his rights under the New York State Constitution. *Id.* The court disagreed and found that there was reasonable suspicion by the officer to subject the defendant to a strip search after his arrest. *Id.* at 824. His constitutional rights were not violated. *Id.*

⁴⁶ *Id.* at 823.

⁴⁷ *Id.*

under arrest.⁴⁸ At this point, the officer noticed a crack pipe in Taylor's pocket.⁴⁹ At the police station, the officer conducted a strip search and found several baggies of rock cocaine.⁵⁰ The court held that neither the state nor the federal search and seizure provisions had been violated.⁵¹ The court wrote, "[t]he Court of Appeals has determined that N.Y. Constitution, article I, §12 imposes some limits on such searches not found under the Fourth Amendment. . . . The lawful custodial arrest being a constitutionally reasonable intrusion upon the defendant's privacy, the search incident requires no additional justification."⁵²

In *More*, the Court of Appeals discussed the Fourth Amendment protections against such unreasonable searches. More was convicted of possession of a controlled substance in the third and fifth degrees, resisting arrest and false personation.⁵³ The police had entered the tenant's apartment and noticed drug paraphernalia on a table.⁵⁴ This prompted the officers to handcuff and pat down More to conduct a search for weapons.⁵⁵ The police did not find any weapons as a result of the search.⁵⁶ At this point, the police began a strip search.⁵⁷ The result of this search was the discovery of several baggies of a rock-like substance in the

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Taylor*, 741 N.Y.S.2d at 823.

⁵¹ *Id.*

⁵² *Id.* at 824.

⁵³ *More*, 764 N.E.2d at 968.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

defendant's rectum. The substance was later confirmed to be cocaine.⁵⁸ More moved to suppress this evidence at trial by challenging the legality of the strip search.⁵⁹ The court denied the motion and the defendant was convicted.⁶⁰ The appellate division affirmed, and the case went to the Court of Appeals for review.⁶¹

The Court of Appeals reversed, holding the body cavity search of the defendant was unreasonable and invalid. The court wrote that the record was "devoid of any evidence from which an officer 'might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant' posed threat to the officer's personal safety or of the destruction of the evidence."⁶² In order for the officers to have legally performed the strip search under the Fourth Amendment they would have had to show that there was a "clear indication" that the evidence would have been found.⁶³

⁵⁸ *More*, 764 N.E.2d at 967.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 970.

⁶³ *More*, 764 N.E.2d at 969.

The United States Supreme Court, in *Bell v. Wolfish*,⁶⁴ held visual inspection of an inmate's body cavities as part of a strip search does not violate the Fourth Amendment.⁶⁵ The Court reasoned the Fourth Amendment only prohibits unreasonable searches. In the custodial setting of a prison, officials have the right to continue the practice of body cavity inspection when performing a strip search after every contact by an inmate with someone from outside of the institution.⁶⁶ A prison official's right to perform a body cavity or strip search is preserved because of the prison's interest in maintaining security within the facility. The Court stated, however, that the Fourth Amendment still requires a balancing of the need for the search against the invasion of personal rights.⁶⁷ Regarding whether prison officials can perform visual body cavity inspections, the Court concluded, "[b]alancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can."⁶⁸

⁶⁴ 441 U.S. 520 (1979). In *Bell*, the issue before the court was the constitutionality of visual body cavity searches of inmates following visits from people outside of the facility. *Id.* at 558. The petitioners were several inmates at the Metropolitan Correctional Center in New York City. *Id.* at 528. They filed a complaint against the facility concerning the facility's conditions and a number of practices of the correctional center's officials. *Id.* at 527. The Supreme Court concluded that the facility's body cavity search policy did not violate the inmates' constitutional rights. *Id.* The Court reasoned that there must be a balancing of reasonableness. In determining the rights of an inmate, one must balance the need for the search with the rights of the individual. *Id.* at 559.

⁶⁵ *Id.* at 558.

⁶⁶ *Id.*

⁶⁷ *Id.* at 559.

⁶⁸ *Id.* at 560.

In conclusion, the Fourth Amendment of the United States Constitution and Article I, Section Twelve of the New York State Constitution both afford citizens protection against unreasonable search and seizure. Each clearly states, “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. . . .”⁶⁹ Both federal and state courts have had many opportunities to struggle with and interpret various matters concerning the constitutionality of searches ranging from strip searches of individuals arrested on misdemeanor charges to body cavity searches of inmates at correctional facilities.

The conclusion the courts have arrived at is that if there is particularized reasonable suspicion of criminal activity and a police officer feels that he is in danger or that the defendant is hiding contraband, then the search is constitutional and not in violation of the defendant’s rights. As explained in *Sarnicola*, the particularized reasonable suspicion test is objective.⁷⁰ The court must determine whether, “[a] reasonable officer could have particularized suspicion considering the totality of the circumstances” that a strip search is necessary.⁷¹ After *Sarnicola*, this test was consistently followed.⁷² The courts have held strip searches performed upon arrest for a traffic violation are only

⁶⁹ U.S. CONST. amend. IV; N.Y. CONST. art. 1, § 12.

⁷⁰ *Sarnicola*, 229 F. Supp. 2d at 269.

⁷¹ *Id.*

⁷² *Id.*

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justified if done out of an individualized reasonable suspicion of concealed weapons or contraband.⁷³

Additionally, the courts agree that if the search is performed in a prison setting, an individual's rights are necessarily limited by the correctional facility's need to maintain a safe environment and need to protect the institution's penological interests. While search and seizure provisions protect the rights of individuals, they do not provide absolute protection. As with most laws and constitutional amendments, there are limitations.

Elyssa Lane

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