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County of Nassau v. Canavan

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EXCESSIVE FINES

United States Constitution Amendment VIII:

[E]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

New York Constitution Article I, Section 5:

[E]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted . . .

SUPREME COURT OF NEW YORK

NASSAU COUNTY

County of Nassau v. Canavan[1]
(decided August 22, 2001)

Michaele Canavan was arrested by Nassau County Police for driving while intoxicated. Subsequent to her arrest, Nassau County commenced a civil forfeiture action targeting the vehicle she was driving at the time of her arrest, pursuant to the Nassau County Administrative Code.[2] Canavan argued that seizure of her automobile constituted an excessive fine in violation of her rights

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[1] 2001 N.Y. Misc. LEXIS 551 (Sup. Ct. Nassau County Aug 22, 2001). This opinion is uncorrected and will not be published in the official reports.

[2] *Id* at **3; Nassau County Administrative Code, § 8-7.0 (g) 3, states in pertinent part, "[T]he County of Nassau may commence a civil action for forfeiture to the County of Nassau of the proceeds of a crime, substituted proceeds of a crime or instrumentality of a crime seized incident to an arrest for a misdemeanor crime or petty offense or upon conviction for such misdemeanor crime or petty offense against any person having an interest in such property."; *see also* Nassau County Administrative Code, § 8-7.0 (g) 1 (d) stating in pertinent part, "'Instrumentality of a crime means any property, other than real property . . . whose use contributes directly and materially to the commission of any offense."; *see also* Charlie LeDuff, *Nassau Joins In Seizing Cars In D.W.I Cases,* N.Y. TIMES, February 25, 1999, at B1.

under the Eighth Amendment of the United States Constitution and its parallel counterpart of the New York State Constitution, Article I, Section 5, because it represented a greater penalty then would have been assessed for the offense to which she plead guilty.[3] Nassau County contended that the seizure was constitutionally permissible.[4]

Nassau County Police seized the defendant's automobile subsequent to her arrest for driving while intoxicated and speeding.[5] The arresting officer's deposition stated that the defendant had a blood alcohol content of .15%, which warranted the charge of driving while intoxicated.[6] However, the defendant plead guilty to driving while impaired by the consumption of alcohol, a traffic infraction.[7] In addition, the defendant plead guilty to speeding.[8] She was sentenced to pay a fine of three hundred dollars for the charge of driving while impaired and one hundred dollars for speeding.[9] Furthermore, the defendant had to complete a drinking-driver program and her license was suspended for ninety days.[10]

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[3] U.S. CONST. amend. VIII. Provides in pertinent part: "[E]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." N.Y. CONST. art. I, § 5 provides in pertinent part: "[E]xcessive bail shall not be required, nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted . . . ."; *Canavan*, 2001 N.Y. Misc. LEXIS 551, at **3-4. The defendant stated in her affidavit that her car was worth approximately $6,500.00 and the maximum fine that could have been imposed on her for driving while impaired was $500.00. *Id.* at **8.

[4] *Canavan*, 2001 N.Y. Misc. LEXIS 551, at **4.

[5] *Id.* at **2.

[6] *Id; see also* N.Y. VEH. & TRAF. LAW § 1192.2 (McKinney 1997), stating in pertinent part, "[N]o person shall operate a motor vehicle while such person has .10 of one per centum or more by weight of alcohol in the persons blood. . . ."

[7] *Canavan*, 2001 N.Y. Misc. LEXIS 551, at **2; *see* N.Y. VEH. & TRAF. LAW § 1192.1 (McKinney 1997), stating in pertinent part, "[N]o person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the consumption of alcohol."

[8] *Canavan*, 2001 N.Y. Misc. LEXIS 551, at **3; *see also* N.Y. VEH. & TRAF. LAW § 1180 (McKinney 1997), stating in pertinent part, "[N]o person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing."

[9] *Canavan*, 2001 N.Y. Misc. LEXIS 551, at **2-3.

[10] *Id.* at **3.

The *Canavan* court commenced its analysis noting that the Eighth Amendment to the United States Constitution and the corresponding section of the New York State Constitution provides that the government shall not impose excessive fines.[11] Furthermore, when property is seized in a civil forfeiture proceeding, the court must apply an Eighth Amendment Excessive Fines Clause analysis when the statute authorizing the seizure has as one of its objectives punishment.[12] Therefore, the court reasoned that if the forfeiture constitutes payment to a governmental entity as punishment for an offense, the statute or regulation that authorizes the forfeiture is subject to review under the Excessive Fines Clause of the Eighth Amendment.[13] The *Canavan* court concluded that the seizure and forfeiture of vehicles under the pertinent Nassau County Administrative Code serves both a punitive and deterrent purpose, therefore, the seizure and forfeiture is subject to an Excessive Fines Clause review.[14]

The *Canavan* court noted that in *Austin v. United States*,[15] the United States Supreme Court did not delineate a test or standard for conducting an Excessive Fines Clause review.[16] Although the Court applied the Excessive Fines Clause to the facts of the case, the Court declined to establish a multifactor test for determining whether forfeiture is constitutionally excessive, delegating this task to the lower courts.[17] In *Austin,* the petitioner was indicted for possession of narcotics and the United States filed an *in rem* action seeking forfeiture of petitioner's mobile home and auto body shop.[18] The question to be answered in this case was whether forfeiture could be considered punishment.[19] The *Austin* court held that "forfeiture generally and statutory *in rem* forfeiture in particular historically, have been understood, at least in part, as

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[11] *Id.*

[12] *Canavan*, 2001 N.Y. LEXIS 551 at **4-5; *see also Austin* 509 U.S. 602, 618 (1993).

[13] *Id.*.

[14] *Id.* at **5.

[15] 509 U.S. at 602.

[16] *Canavan*, 2001 N.Y. LEXIS 551 at **5.

[17] 509 U.S. at 622.

[18] *Id.* at 604.

[19] *Id.* at 610.

punishment."[20] Consequently, following the *Austin* decision, several tests were developed and adopted by the United States Supreme Court, lower federal courts and New York State courts to determine whether forfeiture is excessive.[21]

The *Canavan* court adopted the proportionality-instrumentality test formulated by the Second Circuit, in *United States v. Milbrand.*[22] This test was also applied by the Appellate Division, Third Department in *In the Matter of Attorney-General of the State of New York v. One Green 1993 Four Door Chrysler.*[23] The *Milbrand* court stated:

> [T]he factors to be considered by a court in determining whether a proposed in rem forfeiture violates the Excessive Fines Clause should include (1) the harshness of the forfeiture . . . in comparison to (a) the gravity of the offense, and (b) the sentence that could be imposed on the perpetrator of such an offense; (2) the relationship between the property

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[20] *Id.* at 618.

[21] *See* United States v. Bajakajian, 524 U.S. 321, 334 (1998) (holding "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."); United States v. Milbrand, 58 F.3d 841, 847 (2d Cir. 1995), *cert. denied* 516 U.S. 1182 (1996) (holding the "appropriate excessiveness analysis entails a multi-factor test combining the principles of both instrumentality and proportionality."); United States v. Chandler, 36 F.3d 358, 365 (4th Cir. 1994), *cert. denied* 514 U.S. 1082 (1995). (holding "in determining excessiveness of an *in rem* forfeiture under the Eighth Amendment, a court must apply a three-part instrumentality test"); In the Matter of Attorney-General v. One Green 1993 Four Door Chrysler, 217 A.D.2d 342, 346, 636 N.Y.S.2d 868, 872 (3rd Dep't 1996) (adopting a combination of the instrumentality and proportionality tests); Grinberg v. Safir, 181 Misc. 2d 444, 458, 694 N.Y.S.2d 316, 327 (Sup. Ct. 1999), *aff'd*, 266 A.D.2d 43, 698 N.Y.S. 218 (1st Dep't 1999) (holding the forfeiture at issue not to be excessive under any of the three tests: proportionality, instrumentality or a mixed instrumentality-proportionality analysis).

[22] 58 F.3d at 848 (holding that the government's seizure of defendant's land, which was used to grow marijuana, did not violate the Excessive Fines Clause of the Eighth Amendment).

[23] 217 A.D.2d at 348, 636 N.Y.S 2d at 872, (applying the *Milbrand* factors, determining that the seizure of defendant's automobile, which was used to carry and conceal a controlled substance, did not violate the Excessive Fines Clause of the Eighth Amendment).

> and the offense, including whether use of the property in the offense was (a) important to the success of the illegal activity, (b) deliberate and planned or merely incidental and fortuitous, and (c) temporally or spatially extensive; and (3) the role and degree of culpability of the owner of the property.[24]

The *Canavan* court determined that the second and third *Milbrand* factors were satisfied because the defendant's offense, combined with her in-fact ownership of the vehicle, met the requirements of the second and third factors of the *Milbrand* test.[25] In analyzing the first factor of the *Milbrand* test, the *Canavan* court was required to determine whether the forfeiture of Canavan's automobile was overly harsh.[26] The *Canavan* court determined that although loss of the automobile was a major inconvenience, there was no claim by the defendant or indication by the circumstances that ownership of the automobile was vital to Canavan's daily life.[27] Although the *Canavan* court conceded that the value of the automobile was much greater than the fine actually imposed,[28] after applying the combination instrumentality-proportionality factors of *Milbrand*, the court held that the forfeiture of the defendant's vehicle did not constitute an excessive fine under either the United States or New York State Constitutions.[29]

In a decision rendered one year before *Milbrand,* the Fourth Circuit, in *United States v. Chandler*,[30] developed a three-part

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[24] *Milbrand*, 58 F.3d at 847-48 (combining the principles of both proportionality and instrumentality).

[25] *Canavan*, 2001 N.Y. LEXIS 551, at **6-7 ("[W]ithout the car there would have been no offense, and the decision to drive after drinking can be nothing but deliberate").

[26] *Id.* at **7.

[27] *Id.* at **8.

[28] *Id.* The defendant stated in her affidavit that her car was valued at $6,500.00. She was fined $400.00 by the criminal court and received a ninety-day license suspension. The maximum fine that could have been imposed for driving while impaired was $500.00, the maximum jail time was fifteen days and the maximum period of license suspension was ninety days. *Id.*

[29] *Id.* at **10.

[30] 36 F.3d 358 (4th Cir. 1994).

instrumentality test to be applied when determining the excessiveness of an *in rem* forfeiture under the Eighth Amendment.[31] The *Chandler* test considers the following factors:

> (1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the offender. In measuring the strength and extent of the nexus between the property and the offense, a court may take into account the following factors: (1) whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous; (2) whether the property was important to the success of the illegal activity; (3) the time during which the property was illegally used and the special extent of its use; (4) whether its illegal use was an isolated event or had been repeated; and (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offense.[32]

Although the United States Supreme Court declined in *Austin* to establish a multifactor test for determining whether a forfeiture is constitutionally excessive, the Court established a proportionality test five years later in *United States v. Bajakajian*.[33] In *Bajakajian*, the defendant attempted to leave the United States while in possession of over $10,000.00 without satisfying the

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[31] *Id.* at 365 (rejecting a proportionality test in favor of an instrumentality test, determined that the government seizure of defendant's land, which was used as an instrument in carrying out numerous drug transactions, did not violate the Excessive Fines Clause of the Eighth Amendment).

[32] *Id.* The court further clarified that,

> No one factor is dispositive but, to sustain a forfeiture against an Eighth Amendment challenge, the court must be able to conclude, under the totality of circumstances, that the property was a substantial and meaningful instrumentality in the commission of the offense, or would have been, had the offensive conduct been carried out as intended.

[33] 524 U.S. at 321.

reporting requirement, as mandated by federal law.[34] Federal law also required that a person convicted of willfully violating this reporting requirement shall forfeit to the government "any property . . . involved in such offense."[35] At the time of his arrest, the respondent was in possession of $357,144.00.[36] The government sought full forfeiture of the respondent's currency as authorized by 18 U.S.C. § 982 (a) (1).[37] In its analysis, the court stated, "[T]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[38] Accordingly, the Court held that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."[39] Under the Court's newly established test, the forfeiture of respondent's entire $357,144.00 would violate the Excessive Fines Clause because it is "grossly disproportional" to the appropriate punishment for the offense committed.[40]

The Federal and New York State Constitutions are essentially identical in language, both providing for the protection against government imposition of excessive fines as mandated by their respective Excessive Fines Clauses.[41] Both constitutions require an Excessive Fines Clause analysis when the government seeks forfeiture of property.[42] The difference, however, between the federal and state court analysis is the particular Excessive Fines Clause test that each court applies. In the federal courts, prior to the decision in *Bajakajian*, the United States Supreme Court had not yet established a test to analyze forfeitures under the Excessive

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[34] *Id.* at 324.

[35] *Id. See* 18 U.S.C. § 982 (a) (1) (2002).

[36] *Bajakajian,* 524 U.S. at 324.

[37] *Id.* at 326.

[38] *Id.* at 334.

[39] *Id.* The Court further stated, "[I]f the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." *Id.* at 337.

[40] *Id.* at 337.

[41] U.S. CONST. amend. VIII., N.Y. CONST. art. I § 5.

[42] *See* Grinberg v. Safir, 181 Misc. 2d 444, 457, 694 N.Y.S.2d 316, 326-27 (Sup. Ct. N.Y. County 1999) (holding "New York's Excessive Fines Clause requires the same analysis as the Federal, and provides no greater protection.").

Fines Clause of the United States Constitution.[43] Lower federal courts in the Fourth and Second Circuits did, however, establish two distinct tests, as delineated in the *Chandler* and *Milbrand* decisions.[44] However, since *Bajakajian*, the Second Circuit, in *United States v. United States Currency In The Sum Of Fifty Seven Thousand Eight Hundred Thirty Five Dollars*,[45] disregarded the previously applied instrumentality test and adopted the "grossly disproportional" standard set forth in *Bajakajian.*[46]

New York State courts have recently decided cases dealing with the forfeiture of automobiles from persons arrested for driving while intoxicated or driving while impaired. In *Grinberg v. Safir,*[47] the defendant was charged with driving while intoxicated.[48] He challenged New York City's vehicle forfeiture policy as an excessive fine, in violation of the Federal and New York State Constitutions.[49] In rendering its decision, the *Grinberg* court adopted all three tests stating, "[W]hile the forfeiture sought may be deemed a 'fine,' it is not excessive when analyzed under any of the three tests advanced for measuring excessiveness: proportionality, instrumentality or a mixed instrumentality-proportionality analysis."[50] The *Grinberg* court held that the City's forfeiture policy did not violate the Excessive Fines Clause.[51] However, the courts in *Canavan* and *One Green 1993 Four Door Chrysler* opted for a more narrow construction; both adopted the combination instrumentality-proportionality test as delineated in *Milbrand.*

In *One Green 1993 Four Door Chrysler,* New York State Police stopped an automobile occupied by, and owned by one of

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[43] *Austin*, 509 U.S. at 622.

[44] *See Chandler,* 36 F.3d at 358 (establishing the instrumentality test); *Milbrand*, 58 F.3d at 841 (establishing the combination instrumentality-proportionality test).

[45] No. 97-6023, 1998 U.S. App. LEXIS 23529 (2d Cir. Sept. 18, 1998)

[46] *Id.* at *6 (requiring the district court ascertain whether full forfeiture of defendant's currency that defendant failed to report was grossly disproportional to the gravity of the defendant's offense).

[47] *Grinberg*, 181 Misc. 2d at 458, 694 N.Y.S.2d at 327.

[48] *Id* at 447, 694 N.Y.S.2d at 319.

[49] *Id.* at 457, 694 N.Y.S.2d at 327.

[50] *Id.* at 458, 694 N.Y.S.2d at 327.

[51] *Id.* at 459, 694 N.Y.S.2d at 328.

the respondent's for a traffic infraction.[52] Prior to stopping the respondent's vehicle, the police had suspected them of possessing and selling cocaine.[53] After stopping the respondents, the police discovered what was later determined to be 5.4 grams of cocaine on the floor of the automobile and 2.9 grams in the personal possession of one of the respondents, who was the actual owner of the vehicle.[54] The petitioners initiated a forfeiture proceeding against the seized vehicle because it was used to carry and conceal a controlled substance.[55] The court agreed that, pursuant to *Austin*, the forfeiture is subject to the restrictions imposed regarding governmental seizure of property under both the Federal and New York State Constitutions.[56] In analyzing the excessiveness of the governmental seizure of the respondent's vehicle, the court determined that the appropriate criteria to employ are both the instrumentality and proportionality tests.[57] The court held that the forfeiture of the respondent's vehicle was not excessive and did not violate her constitutional rights.[58]

In conclusion, the federal and New York State courts differ in the tests that are applied to determine if forfeiture is excessive under the Excessive Fines Clause of the United States and New York State Constitutions. Accordingly, in New York State cases, a proportionality-instrumentality analysis was performed in both *Canavan* and *One Green 1993 Four Door Chrysler*, while the state court in *Grinberg*, analyzed its case utilizing all three tests; proportionality, instrumentality and the combination proportionality-instrumentality test.[59] The federal courts differ in

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[52] *One Green 1993 Four Door Chrysler*, 217 A.D.2d at 344, 636 N.Y.S.2d at 870.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.* at 345, 636 N.Y.S.2d. at 870.

[57] *One Green 1993 Four Door Chrysler*, 217 A.D.2d at 346, 636 N.Y.S.2d. at 871. (stating "the test enunciated in *Milbrand* properly balances the remedial and punitive elements and applies the relevant factors necessary for making an excessiveness determination under the Eighth Amendment").

[58] *Id.* at 348, 636 N.Y.S.2d. at 872.

[59] *See Canavan*, 2001 N.Y. Misc. LEXIS 551 at **6; *One Green 1993 Four Door Chrysler,* 217 A.D.2d at 346, 636 N.Y.S.2d at 871; *Grinberg,* 181 Misc. 2d at 458, 694 N.Y.S.2d at 327.

their application of the excessiveness analysis as well. Thus, the *Chandler* court used only the three-part instrumentality test, while the court in *Milbrand* employed a combination proportionality-instrumentality test.[60] In *Bajakajian*, the United States Supreme Court utilized a proportionality test but went a bit further by stating that the punishment must be "grossly disproportional" to the offense regarding forfeiture in order to be in violation of the Eighth Amendment.[61] Similarly, the Second Circuit in *United States Currency in the Sum of Fifty Seven Thousand Eight Hundred Dollars*, utilized the grossly disproportional standard set forth in *Bajakajian*.[62]

Based on the recent federal and state cases, it appears that the trend is to apply either in whole or in part, the proportionality test as set forth by the United States Supreme Court in *Bajakajian*.

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[60] *See Milbrand*, 58 F.3d at 847; *Chandler*, 36 F.3d at 365.

[61] *See Bajakajian*, 524 U.S. at 334.

[62] *See United States Currency in the Sum of Fifty Seven Thousand Eight Hundred Thirty Five Dollars*, No. 97-6023, 1998 U.S. App. LEXIS 23529 at *6.