State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711 or gspencer@nycourts.gov.

To be argued Wednesday, March 29, 2017

No. 48 People v Everett B. McMillan

Everett McMillan was arrested on a parole warrant in his Queens apartment in July 2009 by two police detectives assigned to the Joint Apprehension Warrant Squad, which tracks down and apprehends parole violators. A woman informed the detectives by phone that he was at his residence and that her son had told her McMillan had a gun in his car. After the arrest, one of the detectives used McMillan's key to get into his car and conducted a warrantless search, finding a handgun and ammunition in a backpack under the driver's seat. The detective had McMillan's certificate of release to parole supervision, which included his consent to the search and inspection of his person, residence and property by his parole officer. Supreme Court denied McMillan's motion to suppress the gun and ammunition, finding the search was valid. He was convicted of criminal possession of a weapon in the second degree and related charges, and was sentenced as a persistent violent felony offender to 20 years to life in prison.

On appeal, McMillan argued that the police detective's warrantless search of his car was not authorized under People v Huntley (43 NY2d 175), which held that a search or seizure "which may be unreasonable with respect to a parolee if undertaken by a police officer may be reasonable if undertaken by the parolee's own parole officer," and that the validity of a search of a parolee turns on "whether the conduct of the parole officer was rationally and reasonably related to the performance of the parole officer's duty." The Court said the reasonableness of a police officer's search of a parolee would be determined by "the familiar requirement of a showing of probable cause."

The Appellate Division, Second Department found the search justified and affirmed the conviction. "Under the circumstances of this case, the detective's search of the car was 'rationally and reasonably related to the performance of the parole officer's duty' by dint of the detective's parole responsibilities as a member of the Joint Apprehension Warrant Squad," it said, quoting Huntley. Here, no relevant distinction exists between the detective and the defendant's parole officer.... At the time of the search, the detective was aware that the defendant had violated the terms of his parole, that as a result a warrant had been issued for the defendant's arrest..., that the defendant had consented in writing to a search of his person and property," and that "a known source had said that she had been told that the defendant had just been in the car with a gun...."

McMillan argues the detective "had no parole supervision responsibility and had never even spoken with appellant's parole officer. The conditions of appellant's parole did not permit parole searches to be conducted by anyone other than his own parole officer.... Since appellant's parole officer was not present for, let alone involved in, the warrantless search of his car, and the search was initiated for an investigative purpose -- a 'gun call' -- that was unrelated to appellant's parole supervision, the search fell outside the Huntley exception."

For appellant McMillan: A. Alexander Donn, Manhattan (212) 693-0085
For respondent: Queens Assistant District Attorney John M. Castellano (718) 286-5801

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No. 49 People v Stanley Hardee

In July 2010, three Manhattan police officers stopped Stanley Hardee on Lexington Avenue for speeding and weaving through traffic without signaling. When the officers surrounded his car, they said Hardee appeared to be nervous and kept looking around from them to his front-seat passenger and to the empty back seat. They asked him to stop looking around and to step out of the car, but he did not comply until they repeated the request two or three times. They frisked him, finding no weapon or contraband, and he continued to look over his shoulder toward the back seat of the car. One officer testified that Hardee's behavior suggested he might fight or flee so he decided to handcuff him but, with one wrist cuffed, Hardee began to resist. Another officer testified that Hardee's demeanor, repeated glances at the back seat, and refusal to follow directions led him to believe there was a weapon in the car. The officer picked up a shopping bag from the floor behind the passenger seat and, feeling something heavy, he looked in and saw a handgun. After Supreme Court denied his motion to suppress the gun, Hardee pled guilty to criminal possession of a weapon in the second degree and was sentenced as a persistent violent felony offender to 16 years to life in prison.

The Appellate Division, First Department affirmed in a 4-1 decision. "The testimony supports the trial court's finding that the facts available to the officers, including defendant's furtive behavior, suspicious actions in looking into the back seat on multiple occasions and refusal to follow the officers' legitimate directions, went beyond mere nervousness," the majority said. "Rather, defendant's actions both inside and outside of the vehicle created a 'perceptible risk' and supported a reasonable conclusion that a weapon that posed an actual and specific danger to their safety was secreted in the area behind the front passenger seat, which justified the limited search of that area, even after defendant had been removed from the car and frisked...."

The dissenter said, "Evidence that ... defendant behaved in a very nervous manner, looked several times toward the back seat of the car, and failed to comply with the officers' directives, was not sufficient to lead to a reasonable conclusion that a weapon located within the car presented an actual and specific danger to the officers' safety so as to justify a limited search of the car after defendant had been removed from the car and frisked without incident. There was no testimony that defendant looked in the specific direction of the bag or even the floor.... In the absence of objective indicators that could lead to a reasonable conclusion that there was a substantial likelihood that a weapon was located in defendant's car, the search was unlawful since no actual and specific danger threatened the safety of the officers...."

For appellant Hardee: Rachel T. Goldberg, Manhattan (212) 577-2523 ext. 529
For respondent: Manhattan Assistant District Attorney Jessica Olive (212) 335-9000

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To be argued Wednesday, March 29, 2017

No. 50 People v Andrew R. Bushey

Andrew Bushey was charged with driving while intoxicated, aggravated unlicensed operation of a vehicle, and driving with a suspended registration after he was stopped by a Buffalo State College police officer in August 2014. He had made a mistaken, but legal turn from Elmwood Avenue onto the circular driveway leading to the Albright-Knox Art Gallery, where the officer was parked. Bushey continued around the circle and turned back onto Elmwood. As he passed by, the officer ran his license plate number through a Department of Motor Vehicles database and found that his registration was suspended for unpaid parking tickets. The officer stopped Bushey and arrested him after he failed field sobriety tests.

Buffalo City Court dismissed the charges, finding the officer had "no reasonable suspicion or cause for the stop." The court said, "[T]here were no traffic violations committed by Mr. Bushey. He was driving appropriately. The only unusual thing he did was he turned into the entrance and the loop to the art gallery..., which the officer has testified is not an uncommon mistake in that block on Elmwood Avenue. He continued to drive appropriately out of the circle, made two right-hand turns and pulled over appropriately when the officer signaled. And I do not believe that the officer had any cause to run his license plate or any reasonable suspicion to stop Mr. Bushey, and that he was looking for possible reasonable suspicion by running the plate, and I find that to be violative of the principles under [People v] Ingle [36 NY2d 413]."

Erie County Court reversed and reinstated the charges, saying "the plate check of the defendant's vehicle was lawful, and therefore, the defendant's vehicle was lawfully stopped."

The prosecution argues that running Bushey's plate number through the database was not an unlawful search. Ingle "dealt with an arbitrary stop of a motor vehicle for a routine traffic check. This court held that such an intrusion was inappropriate absent some justification for the stop. The facts in the instant case, which involved a mere plate check, are distinguishable.... An officer's observation of a defendant's license plate cannot be considered a search since a license plate is open to the public view.... The defendant has no expectation of privacy with respect to the license plate...."

Bushey argues, "Allowing law enforcement officers to search for personal information on a restricted electronic database *without a warrant or any suspicion whatsoever* to *manufacture* the reasonable suspicion necessary to stop (and seize) a vehicle results in an unacceptable invasion of the constitutionally protected right to be free from unreasonable searches and seizures." He says the "date of birth, social security number, medical restrictions" and other "personal information contained on electronic databases ... is entitled to some level of privacy, even if minimal, because the expectation in the privacy of such personal information would be accepted as reasonable by contemporary society."

For appellant Bushey: Barry Nelson Covert, Buffalo (716) 849-1333
For respondent: Erie County Assistant District Attorney Raymond C. Herman (716) 858-2424