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COURT OF APPEALS

STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 44

STEPHEN DEPROSPERO,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
February 12, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 44, People v.  
2 DeProspero.

3 Counselor, would you like any rebuttal  
4 time?

5 MR. POLICELLI: Yes, Your Honor, about a  
6 minute or two.

7 CHIEF JUDGE LIPPMAN: Which one? A minute  
8 or two?

9 MR. POLICELLI: Two.

10 CHIEF JUDGE LIPPMAN: Two; you've got it.  
11 Go ahead, counselor.

12 MR. POLICELLI: Thank you. Good afternoon,  
13 Your Honors. My name is Frank Policelli and I'm from  
14 Utica, New York. I represent Mr. DeProspero on this  
15 appeal.

16 CHIEF JUDGE LIPPMAN: Counselor, what's the  
17 expectation of privacy for what's inside the camera  
18 in this case? Why would he have an expectation of  
19 privacy?

20 MR. POLICELLI: Because it's not needed  
21 anymore for evidence in the pending criminal case, so  
22 once that property is no longer needed, then the  
23 person - - -

24 CHIEF JUDGE LIPPMAN: If it hasn't been  
25 examined, and it says reasonable period of time, why

1           - - - why shouldn't that be examined in the normal  
2 course? Maybe there are some more urgent matters  
3 that were looked at first; why does he all of a  
4 sudden get an expectation of privacy because the  
5 computer case is closed?

6           MR. POLICELLI: Because once the case is  
7 terminated, then the status of the expectation of  
8 privacy in the property changes.

9           JUDGE READ: But what about the idea that  
10 you're not supposed to return it with contraband?

11          MR. POLICELLI: Well, that's true, but the  
12 contraband has to be readily apparent. It has to - -  
13 - you can't - - -

14          CHIEF JUDGE LIPPMAN: If no one's looked at  
15 it, how would you know whether it's contraband or  
16 not?

17          MR. POLICELLI: You're going to have to  
18 search a closed container or you're going to have to  
19 search the container - - -

20          JUDGE SMITH: Suppose they seize - - -

21          MR. POLICELLI: - - - for contraband.

22          JUDGE SMITH: Suppose they seize some white  
23 powder, and before they've tested it he takes a plea,  
24 and then he says, okay, give me my white powder back.  
25 I mean, are you saying they can't say, well, let me

1 just check and see whether it's talcum powder or  
2 cocaine?

3 MR. POLICELLI: The cases say that for the  
4 plain view contraband exception, it has to be readily  
5 apparent. If the item has another use, like a camera  
6 - - -

7 CHIEF JUDGE LIPPMAN: But let's say - - -

8 MR. POLICELLI: - - - then it's not readily  
9 apparent.

10 JUDGE SMITH: White powder?

11 CHIEF JUDGE LIPPMAN: Let's say it's not so  
12 apparent. Is it - - - is it - - - from the law  
13 enforcement side, do we want to have another, sort  
14 of, intrusion, you know, in regard to the kind of  
15 conduct that came out in the computer? Is that - - -  
16 they just say, oh, you can have it back; we're  
17 finished with this. Or is there even a  
18 responsibility to be checking that and looking at it  
19 and making sure it's clean before it's given back?

20 MR. POLICELLI: The problem is, under our  
21 statutory scheme for the securing of evidence under  
22 690, it's the court's responsibility to determine  
23 what happens with the property, especially once the  
24 criminal - - -

25 CHIEF JUDGE LIPPMAN: Let me ask you this.

1 MR. POLICELLI: - - - proceedings have  
2 terminated.

3 CHIEF JUDGE LIPPMAN: What is - - - but the  
4 prosecutor is asking to look at it. He doesn't want  
5 to - - -

6 MR. POLICELLI: He's not asking the court.

7 CHIEF JUDGE LIPPMAN: No, no, he doesn't  
8 want to give it back - - -

9 MR. POLICELLI: Right.

10 CHIEF JUDGE LIPPMAN: - - - till it's  
11 checked out.

12 MR. POLICELLI: But he doesn't have the  
13 jurisdiction to search it again without going to the  
14 court.

15 CHIEF JUDGE LIPPMAN: Why is it not  
16 pursuant to the original warrant? Why isn't it the  
17 same - - - if anything, after the first case, why  
18 isn't there more of an imperative that the camera be  
19 searched by the appropriate authority?

20 MR. POLICELLI: Your Honors, because our  
21 statutory scheme for search warrants - - -

22 CHIEF JUDGE LIPPMAN: How so? How - - -  
23 how so?

24 MR. POLICELLI: - - - limits it. Well, if  
25 you look - - -

1 CHIEF JUDGE LIPPMAN: What about the terms  
2 of this particular warrant; how is it limited?

3 MR. POLICELLI: Well, because the terms of  
4 this particular warrant specifically calls for the  
5 property to be subject to the court's order, whenever  
6 it's - - -

7 JUDGE GRAFFEO: Did that apply to your  
8 client as well - - -

9 MR. POLICELLI: No.

10 JUDGE GRAFFEO: - - - under 690.55 and  
11 under the terms of this warrant?

12 MR. POLICELLI: You mean as far as - - -

13 JUDGE GRAFFEO: Were you supposed to go  
14 back and get a court order in order to acquire the  
15 property?

16 MR. POLICELLI: You mean the lawyer for the  
17 defendant who's asking for the property returned?

18 JUDGE GRAFFEO: Yes.

19 MR. POLICELLI: I suppose that's a method,  
20 but he chose not to have that method, and it was the  
21 prosecutor's responsibility.

22 JUDGE GRAFFEO: Does 690.55 require the  
23 defense attorney to get a court order - - -

24 MR. POLICELLI: I - - -

25 JUDGE GRAFFEO: - - - to repossess the

1 property?

2 MR. POLICELLI: I don't think so. I think  
3 that, in this particular situation, he may have  
4 needed a court order, but if you go to the district  
5 attorney and ask for property to be returned and he  
6 returns it and nobody goes to the judge for an order,  
7 it's the district attorney's responsibility. He has  
8 the temporary custody of the property and he needs to  
9 go to the court and say listen, before I return this  
10 property I need to search it again for contraband.

11 CHIEF JUDGE LIPPMAN: But let me ask you a  
12 question; again, why isn't the predicate for the  
13 search not diminished, but really has grown since the  
14 time of the warrant, given what was found in the  
15 computer. Why is there something - - - why is there  
16 a - - - why is there a need for a new exercise of  
17 authority; that's what I'm not - - -

18 MR. POLICELLI: Because, Your Honor, I  
19 submit that the expectation of privacy in the  
20 property has been restored to what it was before it  
21 was seized, now that it's no longer needed for a  
22 pending prosecution.

23 JUDGE READ: So it's the conclusion of the  
24 prosecution at that point?

25 MR. POLICELLI: Yes.

1                   JUDGE READ: Even though the warrant has no  
2 expiration date on it? Because you're saying,  
3 effectively - - -

4                   MR. POLICELLI: Well - - -

5                   JUDGE READ: - - - at that point, when the  
6 prosecution's concluded, then the defendant has an  
7 expectation of privacy in the camera?

8                   MR. POLICELLI: Yes. And I don't think  
9 that warrants are limitless. Even in the statutory  
10 scheme itself when it was first enacted, before the  
11 age of computers, we limited the execution of the  
12 warrant to ten days.

13                   CHIEF JUDGE LIPPMAN: Isn't there a  
14 compelling public interest, as opposed to his own  
15 interest in that camera? From a policy perspective,  
16 why would we - - - why would law enforcement assume  
17 that there's not going to be another introduction of  
18 child pornography into the public domain?

19                   MR. POLICELLI: Well, because they had  
20 their opportunity to search the property once it was  
21 seized when the criminal prosecution was pending, and  
22 it was the opinion, according to our record in this  
23 case, of the district attorney and the defense lawyer  
24 that before returning the property everything had  
25 already been searched. And because it's a

1 jurisdictional issue, once that property is searched  
2 after the criminal proceedings have terminated,  
3 there's no jurisdiction.

4 JUDGE GRAFFEO: Well, does it matter that  
5 there's no bad faith on behalf of the People? I  
6 mean, it appears the prosecutor didn't know that they  
7 didn't do the full forensic evaluation.

8 MR. POLICELLI: I suppose that the argument  
9 could be made that if a prosecutor makes a good faith  
10 mistake as to his jurisdiction that somehow that  
11 could be an exception to the warrant, but I haven't  
12 seen any law under our New York State Constitution  
13 that allows for a good faith exception.

14 JUDGE PIGOTT: As you can tell, this is a  
15 difficult case, from your point of view, by the facts  
16 itself. Can you give me an example or give this  
17 court an example of where - - - let's take child  
18 pornography out of it, in whatever contraband or  
19 whatever the police had pursuant to a warrant - - -  
20 where the invasion of privacy would be clearer? I'm  
21 trying to think what a person is deprived of once  
22 there's been a search warrant executed, property  
23 taken, and then they say my expectation of privacy  
24 has been violated after the - - -

25 MR. POLICELLI: Well, because this court

1 has held under the New York State Constitution that  
2 expectations of privacy do not depend on the place -  
3 - -

4 JUDGE PIGOTT: Right.

5 MR. POLICELLI: - - - being searched.

6 JUDGE PIGOTT: Well, I'm picturing - - -  
7 you know, let's assume on the camera you had pictures  
8 of your wife in various forms of undress, so that  
9 would be a violation of my privacy. So they - - -  
10 you know, they had no right to go looking into my  
11 camera because - - - you know, because of that  
12 reason. So I'm trying to picture - - - it's hard to  
13 see the harm here, is my problem.

14 MR. POLICELLI: But - - - well, I  
15 understand, and my position is the harm here, I  
16 think, goes deeper into the separation of powers in  
17 jurisdiction as to who has the right to order  
18 searches of property. And I think that it - - -

19 CHIEF JUDGE LIPPMAN: But there's no - - -  
20 the issue, I think, is what has changed since the  
21 original validity of the search? Why - - - why do we  
22 - - - why is this some further intrusion? That's  
23 what I'm not getting.

24 MR. POLICELLI: Because once the proceeding  
25 has terminated - - - the criminal proceeding for

1 which that property was being held as evidence  
2 against the defendant is over and - - -

3 JUDGE SMITH: Well, how do you know that  
4 the warrant is tied to a particular criminal  
5 proceeding? There was no proceeding in existence, I  
6 guess, at the time the warrant was executed, right?  
7 He hadn't been arrested or indicted; he hadn't been  
8 charged.

9 MR. POLICELLI: You mean the original - - -  
10 when the warrant - - - well, originally, the warrant  
11 was executed and there was one - - - it was searched,  
12 one image was found - - -

13 JUDGE SMITH: I understand.

14 MR. POLICELLI: - - - he pled guilty.

15 JUDGE SMITH: I understand, but how do you  
16 know - - - I mean, I understand in this case you do  
17 know, but how do we - - - as a formal matter, how do  
18 you tie the warrant to a particular criminal  
19 proceeding, so you say that as soon as that  
20 proceeding is over the warrant loses its effect and  
21 jurisdiction is lost?

22 MR. POLICELLI: Well, Your Honor, I think  
23 that it's incumbent upon the law enforcement that  
24 once they have the property and they search it, then  
25 you - - -

1 JUDGE SMITH: Okay. But you can - - - my  
2 point, you can - - - not in this case, or maybe in  
3 this case, you can see that one search warrant might  
4 generate two or five or twenty cases, right?

5 MR. POLICELLI: Right.

6 JUDGE SMITH: So how do you know when the  
7 last case is over?

8 MR. POLICELLI: When you've - - - when the  
9 investigators have said they've completed searching  
10 the property.

11 JUDGE SMITH: So they lose - - - when the  
12 investigators have - - - and when did the  
13 investigators say that in this case?

14 MR. POLICELLI: Well, they did it  
15 originally when - - -

16 JUDGE SMITH: Actually, the people who were  
17 searching never - - - never finished. They - - - it  
18 was at the back of the line somewhere and they never  
19 got around to it, right? In fact - - - I mean, the  
20 prosecutor thought they had done it, but they hadn't.

21 MR. POLICELLI: Right, and so then he asked  
22 them to search it again.

23 JUDGE PIGOTT: Well, if - - - every search  
24 warrant has a return, right?

25 MR. POLICELLI: Right.



1 in my brief. And I don't see any difference between  
2 where the property is located as far as the  
3 expectation of privacy is concerned.

4 JUDGE GRAFFEO: Where, though, is the right  
5 to a return of contraband? I guess - - -

6 MR. POLICELLI: There is no right to a  
7 return of contraband, but Your Honor, the contraband  
8 is not in plain view. They have to search for the  
9 contraband. The contraband was a deleted image  
10 inside the camera. So you can't say that, ah-hah,  
11 there's a camera; we know that this is containing  
12 contraband, because the camera has another useful  
13 purpose. In all the cases that talk about contraband  
14 - - -

15 JUDGE SMITH: So what if it was a - - -  
16 what if it were seven glassine envelopes?

17 MR. POLICELLI: Then it's in plain view and  
18 it's contraband.

19 JUDGE SMITH: Because you can - - - well,  
20 why? How do you - - -

21 MR. POLICELLI: Because they have no other  
22 useful purpose.

23 JUDGE SMITH: It could be aspirin. How do  
24 you know it's a - - - how do you know it's a drug  
25 just because it's in a glassine envelope?

1                   MR. POLICELLI: Well, what does the  
2 glassine envelope have - - - what other useful  
3 purpose does it have?

4                   JUDGE SMITH: Okay. So you - - - so it's  
5 not - - - well, I'm going to change it now; it's not  
6 a glassine envelope, it's a jar of white powder and  
7 the powder hasn't been tested. How do you know it's  
8 contraband?

9                   MR. POLICELLI: Well, Your Honor, I think  
10 that - - -

11                  JUDGE SMITH: Well, under your theory, he  
12 gets the white powder back, right? We're not allowed  
13 - - - they're not allowed to say let us send it to  
14 the chemist before we give it to you.

15                  MR. POLICELLI: Well, I would assume that  
16 the seizure of a jar of white powder would have been  
17 readily apparent to the investigators at that time to  
18 test. Now, if you're asking me well, what happens if  
19 they miss it; can they go back - - -

20                  JUDGE SMITH: No, but what happens if they  
21 don't test it? They don't - - - the lab's closed and  
22 the guy takes a plea and then they never - - -  
23 haven't bothered to test it. Now he says okay, I  
24 took my plea, give me my white powder back.

25                  MR. POLICELLI: Well, I think that in that

1 case there's no other purpose that could be argued  
2 for the white powder to come back.

3 JUDGE RIVERA: In this case - - -

4 JUDGE SMITH: Maybe it's sugar; he wants to  
5 put it in his coffee.

6 JUDGE RIVERA: But counsel, can I ask you  
7 about the warrant? I want to go back to the warrant.  
8 It says, "The Court will further authorize the police  
9 agency to retain said property for the purpose of  
10 further analysis and examination." How, if at all,  
11 does that affect your privacy argument?

12 MR. POLICELLI: Well, because that's only  
13 when the criminal proceeding is pending.

14 JUDGE RIVERA: Um-hum.

15 MR. POLICELLI: That's my position.

16 CHIEF JUDGE LIPPMAN: Why can't it be the  
17 first criminal proceeding? Why can't there be a  
18 number of - - - as Judge Smith said, why can't there  
19 be five criminal proceedings coming out of this  
20 property?

21 MR. POLICELLI: Out of the one warrant?

22 CHIEF JUDGE LIPPMAN: Yeah. Yeah.

23 MR. POLICELLI: Well - - -

24 CHIEF JUDGE LIPPMAN: Why not?

25 MR. POLICELLI: Because then they would all

1 be pending. But it's once that you're done with the  
2 property - - -

3 CHIEF JUDGE LIPPMAN: Where does it say  
4 that?

5 MR. POLICELLI: I think that it - - - I  
6 think that it says it in all the cases cited in the  
7 briefs that talk about return of property.

8 CHIEF JUDGE LIPPMAN: Say what? Say - - -  
9 what are you saying they say?

10 MR. POLICELLI: That once the criminal  
11 proceeding is terminated, property should be returned  
12 unless it's contraband. And the - - -

13 CHIEF JUDGE LIPPMAN: Well - - -

14 MR. POLICELLI: - - - question comes down,  
15 well, what is contraband, and contraband is something  
16 that the criminality is - - -

17 CHIEF JUDGE LIPPMAN: Even - - -

18 MR. POLICELLI: - - - readily apparent.

19 CHIEF JUDGE LIPPMAN: Even if it still  
20 flows from the original warrant, it ends - - - it  
21 ends, period; you have to give it back? Why - - -  
22 why is it - - -

23 MR. POLICELLI: It flows from the original  
24 warrant that you have a pending prosecution.

25 JUDGE READ: Well, I guess the DA here



1           that affect the case? How - - - how does the  
2           predicate from the original warrant continue to apply  
3           here, and if so, why?

4                   MR. MCNAMARA: Well, before we even get to  
5           the warrant, I would submit to you that the People  
6           have an interest in not distributing contraband. And  
7           in this case - - -

8                   CHIEF JUDGE LIPPMAN: Agreed.

9                   MR. MCNAMARA: Okay. I believe that the  
10          warrant still did - - -

11                   CHIEF JUDGE LIPPMAN: Are you saying that  
12          the People have a public interest that they have to -  
13          - -

14                   MR. MCNAMARA: Absolutely.

15                   CHIEF JUDGE LIPPMAN: - - - uphold, versus  
16          the expectation of privacy?

17                   MR. MCNAMARA: Well, absolutely. And in  
18          this case - - -

19                   CHIEF JUDGE LIPPMAN: So his property - - -

20                   JUDGE SMITH: But even if it had been  
21          seized illegally you'd say - - - if I seize  
22          contraband illegally, I don't - - - I don't give it  
23          back. I mean, if - - - you know, if I seize an  
24          illegal gun from an unlicensed person, you don't give  
25          him back his gun.

1 MR. MCNAMARA: Right, we don't give back  
2 cocaine when the case - - -

3 CHIEF JUDGE LIPPMAN: Yeah, but you agree  
4 this is not contraband in its obvious sense.

5 MR. MCNAMARA: I would disagree with that,  
6 Your Honor. I believe that what's - - -

7 CHIEF JUDGE LIPPMAN: You would disagree?

8 MR. MCNAMARA: - - - what's inside of it is  
9 contraband, absolutely; the child pornography - - -

10 JUDGE SMITH: You don't know that - - -

11 MR. MCNAMARA: - - - pictures are  
12 contraband.

13 JUDGE SMITH: - - - until you've done some  
14 - - - but you don't know that - - -

15 JUDGE RIVERA: But you have to go looking  
16 for it.

17 CHIEF JUDGE LIPPMAN: Eventually, it's  
18 contraband.

19 MR. MCNAMARA: Absolutely.

20 CHIEF JUDGE LIPPMAN: Not yet, but you  
21 don't know it.

22 MR. MCNAMARA: Well, in this case - - -

23 CHIEF JUDGE LIPPMAN: So how could it - - -  
24 I guess what we want to know is: so why is it that  
25 you're able to search that it becomes contraband?

1           That then you know, once you see it, these pictures;  
2           what's the balancing here?

3                       MR. MCNAMARA:   Okay.  In this case we had  
4           probable cause that there was contraband in it.  It  
5           wasn't just searching; it wasn't a blind search.  We  
6           had probable cause that was based upon the  
7           information that we had in the search warrant in the  
8           first place.

9                       CHIEF JUDGE LIPPMAN:  That comes from your  
10          original predicate - - -

11                      MR. MCNAMARA:  Yes.

12                      CHIEF JUDGE LIPPMAN:  - - - for the  
13          warrant?

14                      MR. MCNAMARA:  I mean, we knew from the  
15          investigation that the defendant had downloaded at  
16          least three child pornography videos.

17                      JUDGE PIGOTT:  So why did you take the plea  
18          before you were confident of all of your - - -

19                      MR. MCNAMARA:  Honestly, because my  
20          assistant felt that they had tested it, and he was  
21          wrong.

22                      JUDGE SMITH:  He was running into speedy  
23          trial problems also, wasn't he?

24                      MR. MCNAMARA:  That was his - - - that was  
25          his concern.  He was four and a half months into a

1 speedy trial issue, and he had numerous cases that  
2 came from this case.

3 JUDGE PIGOTT: If he - - - I can't picture  
4 the Utica police station, but if he picks the camera  
5 up and he's walking out the door and then somebody  
6 says, you know what, we never searched that thing, I  
7 mean, can you go take it?

8 MR. MCNAMARA: No, I think once we made a  
9 deci - - - if we had handed the - - - any of this  
10 property back to the defendant and he'd walked out  
11 the door, no, absolutely, it's - - -

12 JUDGE PIGOTT: Then you'd have to go and  
13 get another warrant?

14 MR. MCNAMARA: Then we'd have to get  
15 another warrant.

16 JUDGE RIVERA: So how long after you asked  
17 for it can you take before you actually search? How  
18 long? Where is it an unreasonable delay?

19 MR. MCNAMARA: It depends on the facts of  
20 the case, I would submit, Your Honor. In this case,  
21 I mean, when you really look at it, we're talking  
22 about a four-month delay, as it pertains to the first  
23 prosecution. Then there was a plea. Then there was  
24 no reason for us to search it. And then we waited  
25 thirty days for the - - - you know, to see whether or

1 not he was going to appeal. And then we searched - -  
2 - so we - - -

3 CHIEF JUDGE LIPPMAN: Does the first case  
4 end this? Can there be multiple proceedings, as we  
5 were talking about with your adversary?

6 MR. MCNAMARA: No, the first case doesn't  
7 end, and I thought those were very good questions  
8 before, because in this case, although - - -

9 CHIEF JUDGE LIPPMAN: Or do you have to  
10 bring them all at one time, even if one is over, or  
11 can there just be continuing cases coming in?

12 MR. MCNAMARA: I don't believe we have to  
13 bring them all at one time. And as a matter of fact,  
14 in this case, although we didn't make this decision,  
15 we could have used this computer to try to identify  
16 the individual who was actually putting the child  
17 pornography on the Internet and prosecute that  
18 individual. We could have, but we didn't choose to  
19 look at whether or not there was any criminal  
20 liability on the corporation of the peer-to-peer  
21 network that was allowing this, to determine whether  
22 or not, you know, we wanted to pursue some charges  
23 against him. So the argument that all of a sudden  
24 this defendant snaps his fingers and says I want my  
25 property back, that somehow or another that evidence

1 no longer can stay in the possession of the  
2 government - - -

3 JUDGE RIVERA: Well, he didn't snap his  
4 fingers, right?

5 MR. MCNAMARA: Well - - -

6 JUDGE RIVERA: He's convicted - - -

7 MR. MCNAMARA: - - - he asked his lawyer to  
8 - - -

9 JUDGE RIVERA: - - - he went through a  
10 sentencing process, right? He didn't snap his  
11 fingers.

12 MR. MCNAMARA: But I don't think that - - -

13 JUDGE SMITH: Why - - -

14 MR. MCNAMARA: - - - just him asking gets -  
15 - - reinvents a right of expectation of privacy in  
16 it. I mean, sure - - -

17 JUDGE RIVERA: Why doesn't that privacy end  
18 once you end the prosecution? I mean, the privacy -  
19 - - excuse me - - - get restored? Why doesn't he  
20 have that strong argument that he should have the  
21 expectation of privacy in his property once you've  
22 terminated your prosecution?

23 MR. MCNAMARA: Well, first of all, the case  
24 law doesn't suggest that. He lost his expectation of  
25 privacy, I would submit to the court, when the police

1 entered his home and took it.

2 JUDGE SMITH: Isn't there - - -

3 MR. MCNAMARA: He lost his exp - - -

4 JUDGE SMITH: Isn't there something other  
5 than privacy involved here? Doesn't - - - I mean,  
6 this is a prohibition against unlawful searches and  
7 seizures.

8 MR. MCNAMARA: Correct.

9 JUDGE SMITH: And when you're talking about  
10 the seizure part, it's not just privacy; it's the  
11 right to possess your own property. He had that  
12 interest, didn't he?

13 MR. MCNAMARA: Right, but the warrant  
14 itself took that away when we took it from the house.

15 JUDGE SMITH: Not forever.

16 MR. MCNAMARA: No, not forever.

17 JUDGE RIVERA: When is it restored?

18 MR. MCNAMARA: Excuse me, Your Honor?

19 JUDGE RIVERA: At what point is it  
20 restored?

21 MR. MCNAMARA: I think - - -

22 JUDGE RIVERA: Isn't his privacy or  
23 possessory interest - - - when is it restored?

24 MR. MCNAMARA: Like I said, I think, like  
25 anything, when we're talking about the Fourth

1 Amendment, it's what's reasonable. And in this case,  
2 I don't think it's reasonable. I think in this case  
3 we had a right to continue to possess his property  
4 until he finished - - -

5 JUDGE SMITH: Why wouldn't it have been - -  
6 -

7 MR. MCNAMARA: - - - serving his sentence.

8 JUDGE SMITH: Why wouldn't it have been  
9 more reasonable for you to search the computer the  
10 day he first asked for it back instead of - - - you  
11 wait thirty days for the - - - to be sure he's not  
12 going to file an appeal, which you know pretty well  
13 he's not going to file. Why couldn't you have taken  
14 those thirty days to take a look and see what's in  
15 there?

16 MR. MCNAMARA: I - - - I don't have a good  
17 answer for that. They sh - - - they could have; I  
18 don't - - -

19 JUDGE RIVERA: What if you start looking  
20 and you find something and you prosecute him, he's  
21 sentenced, he asks for it back, you say, okay, we  
22 didn't finish looking, we're going to go back; we're  
23 going to look some more. You find something, you  
24 prosecute him. What stops you from doing that?

25 MR. MCNAMARA: Double jeopardy, speedy

1 trial, statute of limitations.

2 JUDGE GRAFFEO: Is - - -

3 MR. MCNAMARA: All those things would stop  
4 us.

5 JUDGE GRAFFEO: Is there a need for a rule  
6 that distinguishes between what's apparent contraband  
7 and what is more obscure? You know, I mean, all this  
8 electronic - - - this could be an iPhone - - -

9 MR. MCNAMARA: Absolutely.

10 JUDGE GRAFFEO: - - - and we'd be looking  
11 at the same type of thing.

12 MR. MCNAMARA: Um-hum.

13 JUDGE GRAFFEO: I mean, there's all this  
14 new electronic equipment. Is there a need for a  
15 different rule?

16 MR. MCNAMARA: I don't think there's a need  
17 for a different rule. I think that the rule should  
18 be that - - - just what we did in this case. It was  
19 a limited search; it was not an extensive search.  
20 The sole purpose for the search was to identify the  
21 property that had contraband in it. And we weren't  
22 going to give that property back, whatever, whether  
23 it was a CD, a DVD, or in this case, it was the  
24 memory card from a camera. We weren't going to give  
25 that back.

1 CHIEF JUDGE LIPPMAN: So it doesn't matter  
2 whether you know that it's contraband, you know, at  
3 that point? You have to look at it and then you know  
4 and that's within this reasonable search under the  
5 original warrant that you're - - -

6 MR. MCNAMARA: Yes, Your Honor.

7 JUDGE PIGOTT: I would suspect the argument  
8 is not so much whether they get it back as to whether  
9 they get prosecuted for it. I'd bet he'd be more  
10 than happy to let you keep his camera and get the  
11 eighteen years back.

12 But you said that you thought you had a cha  
13 - - - you could hold it until he finished his  
14 sentence; isn't that a little bit long?

15 MR. MCNAMARA: No, I don't think so, Your  
16 Honor, because we do that now in murder cases. We  
17 don't give property back that we take from a  
18 defendant. We keep it the duration of the sentence  
19 that the defendant's serving, just in case the  
20 defendant wins on appeal. If the defendant makes a  
21 440 motion that's granted, if the defendant has a  
22 habeas corpus proceeding and it's successful, we're  
23 going to need that evidence for the subsequent  
24 prosecution. So I mean, in murder cases, which, you  
25 know, obviously are the ones where we keep the

1 evidence the longest, we always keep the evidence.

2 And in our - - -

3 CHIEF JUDGE LIPPMAN: Are you keeping it to  
4 search it or you're keeping it for whatever might  
5 come up - - -

6 JUDGE GRAFFEO: For the retrial.

7 CHIEF JUDGE LIPPMAN: - - - that it might  
8 be needed for?

9 MR. MCNAMARA: Sometimes we do search it  
10 for the second trial, especially when we're talking  
11 about these cold cases.

12 CHIEF JUDGE LIPPMAN: And you have an  
13 unlimited right to search it till a sentence is  
14 finished?

15 MR. MCNAMARA: I would think we have a  
16 right to search it for what was originally granted in  
17 the warrant.

18 CHIEF JUDGE LIPPMAN: Under the original  
19 warrant?

20 MR. MCNAMARA: Under the original warrant.

21 CHIEF JUDGE LIPPMAN: So all warrants go  
22 until they finish serving their sentence? Is that  
23 the rule? I mean, that can't be quite the rule, is  
24 it?

25 MR. MCNAMARA: I'm not asking for that to

1 be the rule.

2 CHIEF JUDGE LIPPMAN: What are you - - -

3 MR. MCNAMARA: I'm saying - - -

4 CHIEF JUDGE LIPPMAN: What are you - - -

5 MR. MCNAMARA: - - - it's what's

6 reasonable.

7 CHIEF JUDGE LIPPMAN: What are you asking -

8 - - reasonable is your test?

9 MR. MCNAMARA: What I'm asking for?

10 CHIEF JUDGE LIPPMAN: Yeah. What's the

11 test?

12 MR. MCNAMARA: What I would ask - - -

13 CHIEF JUDGE LIPPMAN: What's the - - -

14 MR. MCNAMARA: What I - - -

15 CHIEF JUDGE LIPPMAN: What's the test in a

16 situation like this? You have the property, you

17 don't know what's in it, you don't know whether it's

18 really, in essence, contraband; what's the test?

19 MR. MCNAMARA: Well, in this case we did

20 know what was in it, but what I think the test is - -

21 -

22 CHIEF JUDGE LIPPMAN: Well, you didn't know

23 you were going to find what you found, right?

24 MR. MCNAMARA: No, we didn't know we'd find

25 that. But we - - -

1 CHIEF JUDGE LIPPMAN: Otherwise you would  
2 have searched a lot earlier, right? So what's the  
3 test?

4 MR. MCNAMARA: I think the test should be  
5 that the government has the right, before they return  
6 property, to do a search of it to ensure that they're  
7 not giving back contraband, and that the search has  
8 to be limited in scope and reasonable. That would be  
9 what I would suggest.

10 CHIEF JUDGE LIPPMAN: And the time period?

11 MR. MCNAMARA: Well, it depends when we  
12 give it back.

13 JUDGE SMITH: In this case he got about six  
14 months jail and ten years probation, something like  
15 that?

16 MR. MCNAMARA: Um-hum.

17 JUDGE SMITH: Why - - - you could have kept  
18 it for the ten years, then.

19 MR. MCNAMARA: I think that would be an  
20 argument. I'm trying to be reason - - - we were  
21 trying to be reasonable, and I'm trying to be  
22 reasonable.

23 JUDGE SMITH: Well, what's - - -

24 MR. MCNAMARA: I think the six months would  
25 - - -

1                   JUDGE SMITH:  What's unreasonable about  
2                   that?  You can certainly imagine a set of  
3                   circumstances when nine years down the road you say,  
4                   this guy, you know, he has probation revoked, now  
5                   he's petitioned for habeas, we need the evidence.  
6                   What's wrong with that?

7                   MR. MCNAMARA:  I agree with you, Your  
8                   Honor, but in this case we were trying to be very  
9                   reasonable from every step of it.  Even giving it  
10                  back, we were being reasonable.

11                  JUDGE PIGOTT:  I suppose at some point that  
12                  the defendant could petition to have it returned, and  
13                  then you'd have to show cause why you're keeping it,  
14                  and the arguments you've just made might be part of  
15                  it, and there might be other reasons why they would  
16                  be entitled to it back.

17                  MR. MCNAMARA:  Correct, Your Honor.

18                  CHIEF JUDGE LIPPMAN:  Did he have to  
19                  petition to have it returned?

20                  MR. MCNAMARA:  That's not the policy in our  
21                  county.  We return property all the time.  I mean - -  
22                  -

23                  CHIEF JUDGE LIPPMAN:  On request?

24                  MR. MCNAMARA:  Upon request - - -

25                  CHIEF JUDGE LIPPMAN:  There's no reason to

1 - - -

2 MR. MCNAMARA: - - - and we search it to  
3 ensure that it doesn't have contraband. I mean, a  
4 month ago I returned a wallet to a mom whose son was  
5 shot and killed by the Utica police approximately ten  
6 years ago. It was determined that that shooting was  
7 justified, and she went to my community liaison, she  
8 asked if she could have her wallet - - - her son's  
9 wallet back, and I had the police bring it to me  
10 personally, I opened the wallet and made sure that  
11 there were no drugs, there was nothing in there that  
12 would be considered contraband, and she came to my  
13 office and I handed it to her. I didn't make her sue  
14 me or I didn't make her go get a court order. I - -  
15 - you know, I did what I thought was right in that  
16 case and just and fair and gave it back. And I  
17 think, you know, that's what we were trying to do  
18 here.

19 CHIEF JUDGE LIPPMAN: Okay, counselor.  
20 Thank you, counselor.

21 MR. MCNAMARA: Thank you very much, Your  
22 Honor.

23 CHIEF JUDGE LIPPMAN: Rebuttal time,  
24 counselor?

25 MR. POLICELLI: Yes, Your Honor. I think

1 the most important point here is that if you're going  
2 to keep property and search it, then you go to the  
3 judge and get an order, because now you've got a new  
4 predicate or you have the judge make the decision  
5 that you can keep the property and search it, whether  
6 the criminal proceedings are terminated or not.

7 CHIEF JUDGE LIPPMAN: Again, I ask you  
8 again, why isn't this within the original predicate  
9 of the original warrant? Why isn't this very much  
10 within the predicate?

11 MR. POLICELLI: Because I submit to the  
12 court that once the criminal proceeding is terminated  
13 and thirty days goes by and the defendant asks for  
14 his property - - -

15 CHIEF JUDGE LIPPMAN: You get it back,  
16 period.

17 MR. POLICELLI: Unless you've got - - -  
18 unless you go to the judge with a new predicate or a  
19 new reason to keep the property to search it.

20 CHIEF JUDGE LIPPMAN: It can't be under the  
21 original predicate anymore?

22 MR. POLICELLI: I don't think so. And the  
23 reason is because if that was the case, then there  
24 would be no time limits on the validity of using  
25 search warrants that were issued at a particular

1 date.

2 And the other thing, if I've got a few more  
3 seconds, Your Honor?

4 CHIEF JUDGE LIPPMAN: Sure, go ahead,  
5 counselor.

6 MR. POLICELLI: You know, we talk about the  
7 expectation of privacy in the property being  
8 restored, because when your property has been taken  
9 for a criminal prosecution, obviously there's a  
10 diminished expectation of privacy in that property,  
11 but once it's over and the person asks for that  
12 property back, the expectation of privacy has been  
13 restored. If you want to keep it, go to the judge.  
14 If you've got a speedy trial problem, I'm pretty sure  
15 that the clock can be stopped by the prosecutor  
16 asking for more time to search under the original  
17 search warrant. But the most important thing is that  
18 due to separation of powers, it's the court's call to  
19 issue the warrant.

20 CHIEF JUDGE LIPPMAN: Okay, counselor.  
21 Thank you. Thank you both. Appreciate it.

22 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of THE PEOPLE OF THE STATE OF NEW YORK v. STEPHEN DEPROSPERO, No. 44 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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