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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF KENNETH S.,

Appellant. (Papers Sealed)

No. 40

20 Eagle Street
Albany, New York 12207
February 17, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next matter on the
2 calendar is number 40, Matter of Kenneth S.

3 MR. ROGERS: May it please the court.
4 Raymond Rogers for appellant. I'd like to reserve
5 one minute for rebuttal.

6 CHIEF JUDGE DIFIORE: You have one minute,
7 sir.

8 MR. ROGERS: At 1:45 p.m., at a bus stop in
9 Manhattan, Kenneth S. was approached by two police
10 officers, and they approached him for two reasons;
11 first, the officers believed his presence in the area
12 violated a parole condition that the family court had
13 set for his release in a previous case. And
14 secondly, the officers believed that he might have
15 been truant here.

16 After a brief discussion with Kenneth, the
17 officers decided to take him into custody and to transport
18 him to the precinct, where they planned to call his mother
19 and inform his mother that he had been in this area in
20 violation of the parole order. The police, at no point,
21 intended to take him to school for a truancy violation.
22 Now - - -

23 JUDGE GARCIA: I'm sorry, counselor, but
24 they did have a reason to believe he was truant.

25 MR. ROGERS: They did, they did.

1 JUDGE GARCIA: And is the record clear that
2 the only reason they put him in the car was to take
3 him because of the order?

4 MR. ROGERS: Yes, it is, because the
5 officer testified that when he decided to take him
6 into custody, he ordered Kenneth to step over by the
7 car; he was specifically asked - - - and I believe
8 it's on page 86 of the appendix, he specifically
9 asked, why were you taking him into custody? He
10 says, I was taking him to the precinct to inform his
11 mother that he was in this area in violation of the
12 parole order. Never said he was taking him to school
13 - - -

14 JUDGE STEIN: That's not what happened,
15 ultimately, right?

16 MR. ROGERS: That's - - - that's right, but
17 we're saying that - - -

18 JUDGE STEIN: So - - -

19 MR. ROGERS: - - - at that point, it was an
20 illegal detention, at that point; and everything that
21 happened after that - - -

22 JUDGE STEIN: Because of what he had in his
23 mind, what if - - - what if two minutes later, his
24 partner there said, you know, we - - - we can't take
25 him to the precinct, we've got it take him to his

1 parents, or to the school, or someplace else. Would
2 that invalidate, would that make the original stop -
3 - -

4 MR. ROGERS: If his partner had said that,
5 that would be the case; but what the police do and
6 what their intent is is controlling here; this court,
7 recently, in People v. Reid, 2014 case - - -

8 JUDGE STEIN: But - - - but what I just - -
9 - the example I just gave you would be the same
10 thing, where the original intent was to take him to
11 the precinct at the time that he took custody of him,
12 but then that changed before he got - - - actually
13 put him in the car and started driving. So then why
14 is it the initial intent that is - - - that is what
15 matters here?

16 MR. ROGERS: Because there was never
17 intention to take him to the - - - to school in this
18 case.

19 JUDGE STEIN: No, I understand that, but it
20 was - - - something changed from the time that the -
21 - - that the juvenile was stopped to the time that he
22 was actually taken to the precinct. Here, what
23 changed, allegedly, was the discovery of this - - -
24 or the suspicion of this weapon.

25 MR. ROGERS: Right, they grabbed his bag,

1 they ordered him to take his book bag off, one of the
2 officers felt it, and felt through it what appeared
3 to be a gun.

4 JUDGE STEIN: Wasn't that the real question
5 here, I mean, the - - -

6 MR. ROGERS: Well, that's the last issue in
7 the case, but we think that they - - - they had no
8 right to do that; they had no right to remove the bag
9 from him.

10 JUDGE GARCIA: But counsel, let's - - -
11 just to go back to my point, on A158 of the record,
12 it says, "Merino (ph.) - - - it was his intention to
13 bring him in as a truant and notify his mother that
14 he was at the precinct."

15 MR. ROGERS: Was - - - that was with the
16 family court - - - the family court said?

17 JUDGE GARCIA: Right.

18 MR. ROGERS: Yes, but I think when you look
19 at his actual testimony, he did discuss whether he
20 should be in school with him, but what his testimony,
21 as far as he said, I was going to take it to the
22 precinct in order to contact his mother. But it's
23 also our position, you cannot take a truant to the
24 precinct.

25 JUDGE GARCIA: Yeah, but - - -

1 MR. ROGERS: The law is very clear on that.
2 Now, the City is arguing that you can take a truant
3 to the precinct, but we think the law is very clear
4 that you cannot do that. You could only take - - -

5 CHIEF JUDGE DIFIORE: You're suggesting
6 that his subjective unacted-upon intent controls
7 here?

8 MR. ROGERS: It does; this court's decision
9 in People v. Reid, in that case, the police officer
10 stopped the car, had probable cause to arrest the
11 driver for drunk driving, but the officer testified,
12 he did not intend to do so; he could have done so - -
13 -

14 JUDGE STEIN: And he never did, correct?

15 MR. ROGERS: He - - - he did not because he
16 found contraband in the car.

17 JUDGE GARCIA: But he searched him before
18 the arrest in that case, so it wasn't a search
19 incident to arrest, right?

20 MR. ROGERS: But they argued it was a
21 proper search incident to arrest.

22 JUDGE GARCIA: Right, but he hadn't
23 arrested him. But here, they have arrested the
24 juvenile.

25 MR. ROGERS: That's - - - that's subsequent

1 to that, that's after the discovery of the gun. What
2 we're saying is, the intent prior to that - - - prior
3 to - - - when he still has the backpack on his back,
4 at that point, the truancy rationale was drops out of
5 this case. Once he says, we're taking him to the
6 precinct, that's it; this is not a truancy stop. If
7 you're not taking a juvenile to school, you're not
8 making a truancy stop; that's the only place you
9 could take a juvenile.

10 JUDGE GARCIA: I'm sorry, so you're
11 challenging the pat-down that finds the bag rather
12 than the search of the bag in the car.

13 MR. ROGERS: We are challenging the search
14 of the bag in the car; that's the last issue in the
15 case, that's correct. But we are saying that he
16 cannot be transported to the precinct; that's the
17 second issue in our brief.

18 JUDGE STEIN: What if he didn't say it but
19 he thought it, so - - -

20 MR. ROGERS: He - - - as long as that's his
21 intent, that's - - - that's what it was in People v.
22 Reid. You know, he had that intent, and it was the
23 same in Reid, the court followed the ruling of the
24 U.S. Supreme Court in Knowles v. Iowa, where the
25 officer could have made a custodial arrest for the

1 traffic offense, but decided not to and just write
2 the citation. Another officer - - -

3 JUDGE FAHEY: I - - - I had thought - - - I
4 had thought in Reid that he had formed no intention
5 of the police officers to arrest him until the search
6 revealed a knife; I thought that's - - - let me just
7 finish - - - I thought that's the way happened in
8 Reid. That - - - that's not exactly what we have
9 here, and it seems to me that - - - that what you are
10 talking about here is an officer's intent to carry
11 out a possible subsequent action should therefore be
12 the eliminated basis for an initial stop; is that
13 what you are arguing?

14 MR. ROGERS: No, we're saying that - - -

15 JUDGE FAHEY: Go ahead.

16 MR. ROGERS: That, I mean, try to put it as
17 simply as I can, is that if you're not taking him to
18 the - - - to school, you're not making a truancy
19 stop. And when he says, I do not intend to take him
20 to school, it's just that - - - in the Knowles v.
21 Iowa case, the officer said, I'm not going to make a
22 custodial arrest, I'm only going to write a citation,
23 therefore you can't do a search incident to arrest,
24 even though he could have.

25 Here, he could've taken him to school, but

1 he - - - but he said he did not intend to do so; so
2 we don't think that it was a proper truancy stop for
3 that reason.

4 Now, we also - - - even assuming it was a
5 proper truancy stop, the last issue in the case involves
6 the search of the bag. At that point, they've removed the
7 bag from his back, one of the officers has felt it, has
8 felt what appears to be a gun, and now that makes the case
9 very much like this court's decision in Marrhonda G.,
10 which we cited in our brief, where the court said - - -
11 rejected following People v. Diaz, decided the same day,
12 the plain-touch doctrine, and said - - - and that was a
13 runaway case, Marrhonda was, so similar to a truancy case,
14 said the officers could not open and search the bag.

15 And this court has recently, in the Jenkins
16 case, Jimenez - - - Jimenez case, has held that once the
17 defendant has been put in handcuffs and the bag is no
18 longer within the grabbable area, exigent circumstances do
19 not exist. In this case, he's - - - Kenneth is put in
20 handcuffs, his hands are cuffed behind his back, he's
21 placed in the police car, and another officer is sitting
22 next to him in the back seat of the police car, and the
23 bag is on the other side. Under those circumstances - - -
24 and that's when the bag is searched, opened and searched
25 in the car. Under those circumstances, it's our view it

1 was not within his grabbable area and - - -

2 CHIEF JUDGE DIFIORE: So is your position
3 that the moment he is handcuffed that all officer
4 safety issues, preservation issues are dissipated,
5 gone?

6 MR. ROGERS: I don't know that - - - that
7 every case with the handcuffs, although that's often
8 going to be a very important factor; it's going to be
9 very hard to grab much when your hands are cuffed
10 behind your back. I'm not saying that there's never
11 a case in which, you know, you might have
12 circumstances in which the bag is still nearby, but
13 here, where there's a police officer sitting right
14 next to him and his hands are cuffed behind his back,
15 it's - - - it's just impossible for him to get them
16 bag.

17 The U.S. Supreme Court has held something
18 similar in Arizona v. Gant; once the individual is
19 handcuffed, placed in a car, realistically, he's not
20 getting out of the car; he's not going to be able to
21 get into a bag.

22 JUDGE GARCIA: But wasn't Gant in search of
23 the car itself - - - was Gant the search of the car?

24 MR. ROGERS: That was the search of the car
25 itself.

1 JUDGE GARCIA: After he was out and
2 handcuffed in another car.

3 MR. ROGERS: Right. But this court's - - -

4 JUDGE GARCIA: And you say that's analogous
5 to someone sitting in the back seat with a police
6 officer with a bag that they have reason to believe
7 that there's something in it that might be dangerous?

8 MR. ROGERS: I think it is, when his hands
9 are cuffed behind his back; I don't know - - -

10 JUDGE GARCIA: That's a handcuff rule then.

11 MR. ROGERS: Pardon?

12 JUDGE GARCIA: That's a handcuff rule.

13 MR. ROGERS: Well, his handcuff rule and
14 the police officer is sitting right next to you,
15 between you and the bag. I don't know how he's going
16 to overpower that police officer and get into that
17 bag.

18 JUDGE RIVERA: Does it matter if he's
19 handcuffed in front or in back?

20 MR. ROGERS: I think it does matter a
21 little bit.

22 JUDGE RIVERA: Is the record clear that
23 he's handcuffed behind him?

24 MR. ROGERS: Yes, yes, it is.

25 JUDGE RIVERA: No doubt about that in this

1 case?

2 MR. ROGERS: No doubt.

3 JUDGE RIVERA: Uh-huh.

4 MR. ROGERS: No doubt.

5 JUDGE RIVERA: Would it matter if the bag
6 was between - - - if the officer put the bag between
7 - - -

8 MR. ROGERS: That's certainly a closer
9 case.

10 JUDGE RIVERA: - - - the youth and himself?

11 MR. ROGERS: It's a closer case, although I
12 don't think an officer can remove a bag from
13 someone's grabbable area, put it in the exclusive
14 control of the police, and then put it back just to
15 defeat the constitutional requirement; I don't think
16 that can be done. But, assuming that it happened
17 that way, that it was still near him, I think it's a
18 closer case; but that's not so here.

19 JUDGE RIVERA: I know your light is off,
20 but just very quickly, what should the officer have
21 done?

22 MR. ROGERS: Well, with regards to - - -

23 JUDGE RIVERA: He's handcuffed him behind
24 his back, he puts him in the car, he sits in the car
25 with the bag; is it your position he should just not

1 open the bag at that time?

2 MR. ROGERS: That's correct.

3 JUDGE RIVERA: Even though they believe
4 there's a gun in it?

5 MR. ROGERS: Not at that time, that's
6 correct. They can get a warrant; that's what this
7 court said in Marrhonda G., where the officers felt
8 the gun through the bag and said, if they wanted to
9 obtain a warrant for it, they could. Or the Jenkins
10 case.

11 JUDGE RIVERA: So they can't inventory
12 search it when they get to the precinct; they still
13 need to get a warrant.

14 MR. ROGERS: Well, there's no inventory
15 search issue here, that's a - - - that's a
16 possibility that - - - that it could be an inventory
17 search.

18 Thank you.

19 CHIEF JUDGE DIFIORE: Thank you, sir.
20 Counsel.

21 MR. STERNBERG: May it please the court,
22 Ronald Sternberg from the Office of the Corporation
23 Counsel of New York City, on behalf of the
24 Respondent, Presentment Agency.

25 I would, Your Honors, disagree with my

1 colleague; I think the only issue in this case is the
2 search of the - - - of the backpack.

3 JUDGE STEIN: Could the officer have put
4 the backpack in the front seat?

5 MR. STERNBERG: First of all, Your Honor,
6 what I think my colleague misunderstands is, this is
7 not a grabbable area case. There are exceptions to
8 the warrantless search rule; this court outlined them
9 in Marrhonda. In Marrhonda, all the court did was
10 say, a plain touch does not - - - is not an exception
11 to the warrantless search, but there are exceptions
12 to the warrantless search, one of them - - - of a
13 closed container pursuant to an arrest, one is
14 consent, one is grabbable area, and one is search
15 incident to a lawful arrest. We are not dealing with
16 grabbable area here.

17 JUDGE STEIN: It has to be exigent
18 circumstances; you agree with that?

19 MR. STERNBERG: We are dealing with a
20 search incident - - -

21 JUDGE STEIN: And isn't whether it's in the
22 grabbable area one of the factors, one of the
23 considerations that - - - that you would take into
24 account as to whether the circumstances were exigent?

25 MR. STERNBERG: I think what this court did

1 in the Smith case, Your Honor, is - - - is kind of
2 belied that, because what the court said in Smith
3 was, if the - - - if there is reasonable cause to
4 believe that the closed container contains a gun, and
5 there was - - - that's an exigent - - -

6 JUDGE STEIN: Even if - - - even if the
7 officers are not - - -

8 MR. STERNBERG: That in itself is an
9 exigent circumstance.

10 JUDGE STEIN: Even if the person in custody
11 has no way of getting to that - - - to that, and it's
12 in a - - - it's in a backpack, and it's in - - - you
13 know, it's out his reach, and - - -

14 MR. STERNBERG: Yes, yes, Your Honor, what
15 we're saying is - - -

16 JUDGE STEIN: Why would that be exigent?

17 MR. STERNBERG: What is exigent in this
18 circumstance is the reasonable belief of the police
19 officers in this situation that the backpack
20 contained a gun, and the fact that at that time that
21 the juvenile was arrested and handcuffed, at that
22 time, he had access to the bag; that's precisely what
23 this court said in Smith.

24 JUDGE RIVERA: Isn't it a greater danger
25 the gun on the cop that's closer to the youth?

1 MR. STERNBERG: I'm sorry, Your Honor.

2 JUDGE RIVERA: I'm sorry, isn't the greater
3 danger the gun that the police officer has that's
4 closer to the youth in the bag?

5 MR. STERNBERG: That the gun - - - that the
6 officer is wearing?

7 JUDGE RIVERA: Yes, yes. If the officers
8 are not worried about that, how are they worried
9 about the gun in the bag?

10 MR. STERNBERG: Well, that's true in every
11 situation, Your Honor, and there's nothing that - - -

12 JUDGE RIVERA: But I'm talking about this
13 situation; I understand your point about some other
14 situations.

15 MR. STERNBERG: It - - - there's - - -
16 there's nothing in the record indicating anything
17 about the officer's gun. This was a search incident
18 to arrest. What I would suggest, Your Honors, and -
19 - - and I don't think - - -

20 JUDGE STEIN: Well, you're saying that what
21 happened when they actually got in the car, at the
22 time they were in the car, and they decided to open
23 and search the bag, that's irrelevant; is that your -
24 - - is that your position?

25 MR. STERNBERG: What I'm saying is, in

1 Jimenez, this court had two - - - set forth two
2 requirements for a valid search incident to an
3 arrest. The first requirement is spatial and
4 temporal proximity between the search and the arrest.
5 The second is exigent circumstances. The burden is
6 on the prosecution - - - in this case, the
7 Presentment Agency - - - to satisfy both of those
8 prongs, and both of those prongs were satisfied;
9 there's temporal and spatial proximity, the car was
10 there, and there was a reason that the officer and
11 the appellant was in the car. The reason is that at
12 the time of the arrest, there was a crowd gathering,
13 there was evidence of a crowd, there's evidence of
14 shouting, there's evidence that - - - that there was
15 even threatening gestures towards the police
16 officers, and the police officer made - - - the
17 police officers made a reasonable decision, it's not
18 safe out here - - - in addition to the fact that
19 there is probably a gun in the backpack, it's not
20 safe out here, we're going to move you to the car,
21 which was right next to it.

22 JUDGE RIVERA: Did they open the bag and
23 look - - - did he open the bag and look in before
24 they - - - the car moved away? Was the car
25 stationary at the time?

1 MR. STERNBERG: I don't think the record is
2 clear on that. What the officer testified is - - -
3 to is, we - - - they - - - we got into the car and I
4 immediately opened the bag. Whether it was moving at
5 that particular moment, I don't know.

6 JUDGE ABDUS-SALAAM: So I - - - I'm just -
7 - - I just want to be clear, Mr. Sternberg, the
8 exigent circumstances that you are referencing are
9 the ones created by the crowd gathering - - -

10 MR. STERNBERG: No.

11 JUDGE ABDUS-SALAAM: - - - and having to
12 get the youth inside the car?

13 MR. STERNBERG: The exigent circumstance
14 which justifies the search incident to the arrest is
15 the reasonable belief of the police officers that the
16 backpack contained a weapon. That is the exigent
17 circumstance which justifies a search incident to - -
18 -

19 JUDGE RIVERA: Well, why is - - - it's not
20 their security; it's not the officer's security? Are
21 you saying the knowledge - - - the belief that
22 there's a gun gets you to "and I'm concerned about my
23 safety"?

24 MR. STERNBERG: Underlying that exigent
25 circumstance is the safety this court, again, said in

1 Jimenez. Underlying the exigent circumstance is - -
2 - are two possib - - - two probabilities. One, the
3 safety of the officers, the appellant, and the crowd.

4 JUDGE RIVERA: Uh-huh.

5 MR. STERNBERG: And two, the possibility of
6 destruction of the weapon; we don't have the second
7 possibility, we certainly have the first possibility.

8 JUDGE RIVERA: But aren't we then back to
9 the grabbable area, whether not the defendant can
10 reach this gun, or somehow can do something related
11 to the gun that puts at jeopardy - - - or puts at
12 risk the officer's security?

13 MR. STERNBERG: We have - - - we have
14 certainly argued on and demonstrated in our brief
15 that under the facts of this case, the fact that the
16 appellant was - - - was handcuffed behind his back,
17 does not necessarily mean that the gun was in the
18 exclusive control of the police officers. That's at
19 the end of our brief, we argued, we demonstrated that
20 that's a possibility; we don't rely on that. What we
21 say is that the exigent circumstance is the gun and
22 the possibility that it could have been within his
23 grabbable area at the moment he was arrested; again,
24 that's precisely what this court said in Smith, it's
25 all of a piece. The fact that he was in the car

1 because, it was temporally and spatially related - -
2 -

3 JUDGE RIVERA: So it's the fact that - - -
4 that they know the bag - - - I'm sorry, that the gun
5 is in this bag; is that what you are saying?

6 MR. STERNBERG: I'm sorry, Your Honor.

7 JUDGE RIVERA: I'm sorry, is it - - - so
8 you're saying that the exigent circumstance is just
9 that they know there's a gun in the bag.

10 MR. STERNBERG: Precisely.

11 JUDGE RIVERA: Or they have a reasonable
12 belief.

13 MR. STERNBERG: Which they have a
14 reasonable basis - - -

15 JUDGE RIVERA: Okay. So let me ask you
16 this; so let's say it's one of these bags that's
17 clear, and they exist, some of these backpacks that
18 are clear, I could see the gun, but it's - - - it's
19 got a padlock, a lock, there's no way to get to it;
20 have they got exigency circumstances - - - exigent
21 circumstances?

22 MR. STERNBERG: I think it would be, Your
23 Honor, because what - - - because I'm - - - I'm
24 saying that the gun creates the exigency, it's a - -
25 - it's a different case - - -

1 JUDGE RIVERA: But isn't the point of the
2 gun that you can access the gun, and that's what
3 creates the risk?

4 MR. STERNBERG: Access it at the time of
5 the arrest.

6 JUDGE RIVERA: Yes, that's what I'm saying

7 - - -

8 MR. STERNBERG: So if it's locked - - -

9 JUDGE RIVERA: So it's a clear bag, it's
10 absolutely locked, there's no way to open that thing,
11 your hands are behind your back - - -

12 MR. STERNBERG: Different facts.

13 JUDGE RIVERA: How does it matter that I
14 can see the gun?

15 MR. STERNBERG: Different facts and that
16 probably would - - - would change the circumstance,
17 if there's absolutely no possibility at that moment
18 that he's arrested that he could reach it, maybe it -
19 - -

20 JUDGE RIVERA: Does the standard have to be
21 absolute possibility?

22 MR. STERNBERG: I'm sorry.

23 JUDGE RIVERA: Is the standard absolute
24 possibility, which sounds to me like there's
25 absolutely no possible way he could reach it; is that

1 what you are saying? Is the rule - - -

2 MR. STERNBERG: I thought - - - I thought
3 that's what you were saying, Your Honor, and if there
4 was absolutely no possible way for that gun to be
5 reached by the defendant, at that particular moment
6 in time, that would change the facts, and that may -
7 - - may not make it an exigent circumstance with - -
8 - warranting a search.

9 JUDGE ABDUS-SALAAM: You don't need to open
10 a clear bag; you can see the gun, it's in plain sight
11 at that point, right? I mean, you don't - - - you
12 don't need to open it; you see the gun, so there's no
13 need to open it.

14 MR. STERNBERG: True, Your Honor,

15 JUDGE GARCIA: Different facts - - -

16 MR. STERNBERG: But - - - but again - - -

17 JUDGE GARCIA: I'm sorry, counsel - - -

18 MR. STERNBERG: If - - - if - - - if it's a
19 loaded - - - if it's a possibility that - - -

20 JUDGE RIVERA: Once in plain view, you
21 could perhaps seize it; he's talking about actually
22 opening the bag and taking it without - - -

23 MR. STERNBERG: But - - - but if it's a
24 possibility that it's a loaded gun, again, these are
25 hypotheticals, obviously - - -

1 JUDGE RIVERA: Okay.

2 MR. STERNBERG: But if it's a possibility
3 of a loaded gun, even assuming there's a clasp on it,
4 it may warrant it being opened because anything could
5 happen; we're taking the defendant. At this point,
6 we obviously have - - -

7 JUDGE GARCIA: But I have a different
8 scenario. Same scenario we have here, backpack is on
9 his shoulder, there's a scuffle, backpack falls off;
10 this happens pretty quickly. They put the defendant
11 in the car with the cop, the backpack is on the
12 street, but it's fast; can they search the bag? Same
13 facts.

14 MR. STERNBERG: I'm sorry, Your Honor.

15 JUDGE GARCIA: So here, the backpack is
16 here, right, in my scenario. There's a scuffle, as
17 there was here little bit, right, the backpack falls
18 off in the course of them making this arrest because
19 of the scuffle, but this happens very quickly. They
20 get the defendant into the back seat of the car with
21 a police officer, the other police officer picks up
22 the bag, can he search it?

23 MR. STERNBERG: Spatial and temporal
24 proximity is - - - is critical, and I would say if -
25 - - if the backpack had fallen off in the midst of

1 the scuffle, it was laying on the street, and they
2 put him in the police car, I would - - - I would - -
3 - I would make an argument that they could do the
4 search; it's different facts, but there's certain - -
5 - there's spatial and temporal proximity, and there's
6 - - - and there's an exigent circumstance if they
7 reasonably believe that there is a gun in the
8 backpack.

9 JUDGE RIVERA: So the - - - so the exigency
10 isn't whether the individual who is arrested can
11 actually reach the gun?

12 MR. STERNBERG: I would - - - I would make
13 a distinction between exigent circumstance and
14 grabbable area, two different exceptions to the
15 warrant - - - search without a warrant. It does not
16 necessarily have to be in the - - - in the
17 appellant's grabbable area, it has to be reasonably
18 believed to be a gun.

19 JUDGE GARCIA: But we rejected that it
20 Jimenez.

21 MR. STERNBERG: I - - - I don't think you
22 did, Your Honor, I - - - because Jimenez - - -
23 totally different facts. The facts that separate
24 this particular case is the fact that the appellant
25 was arrested upon probable cause to believe that the

1 backpack contained a gun, and that was, the police
2 officers heard the sound, the police officers
3 observed a bulge in the pack, the police officers
4 felt the handle and the trigger guard of the gun, and
5 that was all confirmed by the appellant's reaction to
6 the police officers. He was nervous, he denied that
7 there was anything in the backpack, so everything led
8 the officers to believe that there was a gun, and
9 there was probable cause to arrest him for that. And
10 the Smith case says that under those circumstances,
11 the search of a closed container incident to the
12 arrest is appropriate.

13 JUDGE GARCIA: So your position is he's
14 arrested here for possession of a weapon.

15 MR. STERNBERG: That's the only reason he
16 was arrested, Your Honor.

17 CHIEF JUDGE DIFIORE: Thank you, sir.

18 MR. STERNBERG: Thank you, Your Honors.

19 JUDGE GARCIA: Do you agree with that,
20 counsel, that he's arrested for possession of a
21 weapon in this case?

22 MR. ROGERS: I do not; I still think it's a
23 - - - it's a truancy stop, at this point.

24 Under the Marrhonda case, Marrhonda says,
25 the touching of the bag, the outside touching, even

1 if you could feel a gun in it - - - and in that case,
2 actually, two police officers felt that bag and said,
3 it felt like a gun to me in there; this court said
4 that wasn't a probable cause to open it, so I think
5 it's still a truancy stop.

6 JUDGE ABDUS-SALAAM: Wasn't there another
7 fact in Marrhonda that's a little different here; the
8 bag was a few feet away from this - - - from the
9 young woman who was stopped. In this case, the bag
10 is - - - I mean, it's not exactly right next to the
11 juvenile, but it's close.

12 MR. ROGERS: Right, I don't think - - - in
13 Marrhonda, I don't think she's handcuffed. There's
14 no indication in that opinion that - - - that she was
15 handcuffed. She's at the runaway office, so I don't
16 think she is, whereas Kenneth is in handcuffs, and
17 really can't reach it.

18 Picking up on Judge Garcia's hypothetical, I
19 think that does make it like Gant v. Arizona; you've got
20 the bag outside the car now, and you've got the suspect
21 inside the car, handcuffed. And in Gant v. Arizona, they
22 said, once he's handcuffed inside the car, that's it, he
23 can't - - - it's so unlikely he can get out of the car to
24 get anything.

25 JUDGE GARCIA: And didn't the Appellate

1 Division find in this case that the police lawfully
2 detained the appellant as a suspected truant?

3 MR. ROGERS: Yes, that's - - - that's why I
4 say, I think it's still a truancy at that matter - -
5 - at that point; I do.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 MR. ROGERS: Thank you.

8 (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Kenneth S., No. 40 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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