

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 48

EVERETT B. MCMILLAN,

Appellant.

20 Eagle Street
Albany, New York
March 29, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

A. ALEXANDER DONN, ESQ.
Attorney for Defendant-Appellant
111 John Street
9th Floor
New York, NY 10038

JOHN M. CASTELLANO, ADA
QUEENS COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
125-01 Queens Boulevard
Kew Gardens, NY 11415

Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Good afternoon, everyone.
2 Okay. The first matter on this afternoon's calendar is
3 appeal number 48, the People of the State of New York v.
4 Everett B. McMillan.

5 Counsel.

6 MR. DONN: May it please the court. Alex Donn of
7 Appellate Advocates for appellant Everett McMillan.

8 I'd like, with the court's permission, to reserve
9 three minutes for rebuttal time.

10 CHIEF JUDGE DIFIORE: You may, sir.

11 MR. DONN: Thank you.

12 The parole search in this case was unlawful
13 because it was conducted entirely by a New York City police
14 detective rather than appellant's own parole officer.
15 Therefore - - -

16 CHIEF JUDGE DIFIORE: So he's part of this task
17 force.

18 MR. DONN: Yes.

19 CHIEF JUDGE DIFIORE: Does that not give him the
20 same authority and rights to enforce the policies and the
21 rules of the parole department?

22 MR. DONN: It - - - it does not, Your Honor. In
23 further - - -

24 CHIEF JUDGE DIFIORE: Why is that?

25 MR. DONN: I - - - for the reasons that - - -

1 that this court explained very clearly in People v.
2 Huntley, which is - - - which is good law.

3 The - - - the parole warrant officer who arrested
4 appellant in this case was not his own parole officer, was
5 not acting as his own parole officer, was not standing in
6 for his own parole officer. The - - - the person who
7 arrested him conducted the search, had one job and one job
8 only, and that was to investigate and apprehend parole
9 absconders. And at - - -

10 JUDGE STEIN: You - - - you agree that as a
11 parole - - - as a parolee, he at a reduced expectation of
12 privacy, correct?

13 MR. DONN: Absolutely.

14 JUDGE STEIN: So under Huntley, the combination
15 of his parolee status and the information that the police
16 officer had regarding, you know, the tip about the - - -
17 the gun in the car, put that together, why wouldn't that
18 suffice, even if it wasn't enough just that he was a
19 parolee?

20 MR. DONN: Because, as this court explained in
21 Huntley, we don't just put things together like that in
22 this context. Basic - - - because - - -

23 JUDGE STEIN: Well, but Huntley says, if there
24 was - - - if there was probable cause, the police officer,
25 of course, could do it. So - - -

1 MR. DONN: Absolutely. And we could - - -

2 JUDGE STEIN: - - - doesn't this get pretty close
3 to probable cause?

4 MR. DONN: It - - - it certainly doesn't
5 establish probable cause. Probable cause wasn't preserved;
6 probable cause was waived. The People told the court
7 before the hearing, the only reason we're here is because
8 of the - - - the parole warrant, the parole case.

9 And just to jump back to - - -

10 JUDGE STEIN: Just to step back for a second.

11 MR. DONN: Yeah.

12 JUDGE STEIN: As I - - - as I see the record, the
13 People didn't argue probable cause by itself; they - - -
14 they argued it in combination. And in fact, that's how the
15 Appellate Division ruled.

16 MR. DONN: Well, I - - - I think that this was
17 decided both at the trial level and in the Appellate
18 Division under Huntley. This was considered to be a parole
19 search. And I think that it is tempting in this case to
20 kind of blur the lines and say, we got a little bit
21 something, we got a little bit something else.

22 What Huntley set fourth was very clear. What
23 they said is, and actually, these - - - these are basically
24 their words. The standard for evaluating the
25 reasonableness of a search of a parolee by a police officer

1 remains the familiar standard of probable cause, period.
2 Not, sort of diluted because he's - - - he's a parolee,
3 not, but we can kind of cut corners because he's a parolee;
4 that's it. Probable cause - - -

5 JUDGE ABDUS-SALAAM: So the warrant - - - the
6 warrant for his arrest, because he had absconded, or was in
7 violation of his parole, would not have been enough. That
8 wouldn't have created probable cause here.

9 MR. DONN: Absolutely not. And - - - and in
10 Huntley itself, the - - - the defendant in Huntley was
11 arrested on a parole warrant, in Huntley. And despite that
12 fact, this court, in Huntley, bent over backwards to say
13 the relationship that this parolee has with his own parole
14 officer is critical to lower - - - to this lesser standard.
15 And in fact, in Huntley - - -

16 JUDGE ABDUS-SALAAM: Did it have - - - would the
17 parole officer have had to have been his parole officer;
18 could it not have been the parole officer who was assigned
19 to this squad? You're saying none of those officers,
20 parole officers assigned to this squad, could have arrested
21 him on the warrant?

22 MR. DONN: Well, what this court said in - - -
23 and I think there's a little bit of room. The - - - the
24 only room I see for any kind of variation on the - - - on
25 the identity of the individual who can conduct or direct

1 this search is, you know, it has to be someone who has
2 responsibility for supervising this parolee's parole.

3 That said, you could have a situation where his
4 own parole officer is on vacation, hands the case of to
5 another field officer who has that dual responsibility that
6 this court discussed in Huntley.

7 And critically, it's tempting to say, look,
8 what's the difference. A parole officer arrests him, a
9 parole - - - or a parole warrant officer arrests him;
10 what's the difference? They search, he's got a gun, right.
11 The difference is that - - - that the parole officer, the
12 field officer who supervises him has a dual purpose. And
13 this court discussed - - -

14 JUDGE RIVERA: Yeah, but at - - - when - - - when
15 he goes to arrest him, that purpose is not in play. That
16 purpose is irrelevant. This is a law enforcement purpose
17 that's being addressed, the arrest on the warrant.

18 MR. DONN: For the arrest, Your Honor. But - - -
19 but for the ensuing search, at least what this court said
20 in Huntley, that - - -

21 JUDGE GARCIA: But I think that's someone - - -
22 I'm having trouble with that application of Huntley, and I
23 think this goes back to Judge Stein's point, because
24 Huntley says what you quoted, which is this is a familiar
25 requirement of the showing of probable cause. But then it

1 says right after that, "Even under that test, however, the
2 fact of parole status may well be significant in individual
3 cases."

4 It's, I think, pretty clearly saying parole
5 status is part of the "probable cause analysis". They're
6 labeling it, but it's a reasonableness analysis. It then
7 goes on to say, "Where, however, as here, the search and
8 seizure is undertaken by even parolee's own officer."

9 So Huntley sets out kind of a general rule, and
10 then goes on to apply it to those facts with the parolee,
11 and the parolee's officer, and the purpose of the search.
12 But the general rule is a reasonableness rule looking at
13 probable cause, but saying even in that probable cause
14 analysis for a parolee, the fact that that person is a
15 parolee will - - - may be significant in the probable cause
16 analysis.

17 And I think, to get back to what Judge Stein was
18 saying, you have all these facts here; violation, the phone
19 call, you have all - - - they know the person who's making
20 the call, and it's a parolee, and it's being executed in a
21 warrant where he's violated and has violated. Why doesn't
22 that get you to the Huntley reasonableness test?

23 MR. DONN: Your Honor has said a lot, and I'd
24 like to respond. Very quickly on the facts - - -

25 JUDGE GARCIA: Your light is on, sorry.

1 MR. DONN: Very - - - very quickly on the facts.
2 I'd refer to our reply brief as to whether or not they knew
3 the woman who called; they didn't - - - Herlihy didn't know
4 - - - know her name. But more important, on what I think
5 you've raised as the critical question in this case, which
6 is probable cause versus - - - versus Huntley, and where
7 are we, and I think, as long as we know which world we're
8 in, and what standard we're dealing with, the defendant
9 wins either way.

10 If - - - if what I believe I just heard Your
11 Honor say was, essentially, look, it was a detective. I
12 think, I don't want to paraphrase, but I think what I just
13 heard you say was, it was a detective. Huntley, as in the
14 reduced standard of a parole search, clearly doesn't apply
15 to this case, Huntley. But - - - but I think I heard you
16 say, but maybe probable cause does.

17 JUDGE GARCIA: It's all the facts. So it's a
18 detect - - - you want to categorize it, but it's a
19 detective here who's working with a warrant squad, who's
20 working with the parole officers on a violator of parole.
21 So it's hard for me to apply a reasonableness test which
22 takes into account all these factors and then see it as
23 compartmentalized.

24 So it's a - - - it's not his parole officer, and
25 it's a detective - - - it's all one set of facts on a

1 reasonableness analysis for a parolee, it seems.

2 MR. DONN: It's one set of facts, but there are
3 two very different standards. And I think the People
4 approach this hearing from the very get go as, it's only
5 about Huntley. They never said probable cause, probable
6 cause is diminished; they said, at the beginning of the
7 hearing, he waived all his rights. This is only about
8 parole. They never said the words probable cause. They
9 never said the words automobile exception in the entire
10 hearing.

11 The court issues its decision; it's all about
12 Huntley. Anything the People would have you believe about
13 probable cause in this case, in addition to the merits,
14 it's double hearsay, we didn't know anything about the son,
15 the - - - the police didn't even ask the son if he had sent
16 the supposed hearsay text message.

17 The probable cause argument is a ruse to distract
18 from Huntley. But it was also waived and not preserved.
19 Which leaves us with Huntley, which is the preserved
20 argument at the core of this case. And we're looking at
21 Huntley, and flatly, the exception to the warrant
22 requirement for a parolee's own parole officer, which is
23 very clearly stated in Huntley, and supported by a lot of
24 discussion of the policy reasons, was simply not met in
25 this case.

1 And any alternative argument - - - I just add,
2 that this is something like the fourth alternative argument
3 to Huntley that the People have thrown out in this case.
4 When you go back to - - -

5 JUDGE RIVERA: What about - - - what about the
6 agreement that he signs that he is - - - he allows his
7 property and himself to be searched at any time?

8 MR. DONN: Thank you for mentioning the
9 agreement. Your - - -

10 JUDGE RIVERA: I mean, your light is off, so
11 quick or on rebuttal, one of the two.

12 MR. DONN: Very - - - very quickly.

13 May I respond now - - -

14 JUDGE RIVERA: Yes.

15 MR. DONN: - - - on - - - on the agreement?

16 The agreement, on its face, tells us whatever
17 McMillan's actual expectation of privacy was. I'm not
18 sure, and I don't believe that Huntley dealt with this
19 actual agreement. The decision doesn't make that clear.

20 But regardless of whether or not the court would
21 ever do something and move away from Huntley, we know that
22 this defendant, this parolee, had a reasonable expectation
23 that the search provision, search item number 4, was what
24 dictated his - - - his decreased - - - he does have a
25 decreased expectation of privacy. And this tells you

1 exactly what it was. And the search that was conducted
2 violated that condition. And I may well have more to say
3 about that document on reply.

4 CHIEF JUDGE DIFIORE: Thank you, sir.

5 Counsel.

6 JUDGE STEIN: Counsel, would - - - would you
7 respond to the argument that - - - that we - - - we can't
8 look at probable cause because that - - - that wasn't - - -
9 that wasn't raised here?

10 MR. CASTELLANO: Well, first of all, I believe it
11 was raised. In fact, defense counsel raised it
12 specifically at the hearing. He specifically mentions
13 probable cause. And the People kind of countered that.
14 It's really more of a credibility question at that point.

15 But - - - so I think probable cause can be
16 addressed here. But regardless, the touchstone of the
17 Fourth Amendment is reasonableness - - - I'm sorry, is the
18 reasonableness of the search overall. And here, the search
19 was reasonable based on the severely diminished expectation
20 of privacy of the defendant in - - - as a parolee, and in
21 his car, based on - - - on a high degree of individualized
22 suspicion possessed by the police at the time - - -

23 JUDGE RIVERA: So - - - so do you reach that
24 threshold because of the phone call?

25 MR. CASTELLANO: The - - - the phone - - - the

1 phone - - -

2 JUDGE RIVERA: If there had been no phone call -

3 - -

4 MR. CASTELLANO: Yes.

5 JUDGE RIVERA: They just go to arrest - - -

6 MR. CASTELLANO: Um-hum.

7 JUDGE RIVERA: - - - and they have the keys, can
8 they search the car?

9 MR. CASTELLANO: I believe - - - I believe they
10 could do what - - - if we're talking about under the Fourth
11 Amendment, under Samson and Knights - - -

12 JUDGE RIVERA: Well, that - - - that was your
13 argument. I'm - - -

14 MR. CASTELLANO: Yes.

15 JUDGE RIVERA: - - - I'm staying with that
16 argument.

17 MR. CASTELLANO: Then right, absolutely. They
18 could search the car under Samson and Knights.

19 JUDGE RIVERA: Based on what? What gives them -
20 - -

21 MR. CASTELLANO: The - - -

22 JUDGE RIVERA: - - - authority to search the car
23 if what he was doing was going, pursuant to this arrest
24 warrant, to arrest him?

25 MR. CASTELLANO: Because they could perform a

1 search that a pa - - - that a parole - - - that a parole
2 officer could do. So just as in Samson - - -

3 JUDGE RIVERA: But why is that? Because you're a
4 member of this team?

5 MR. CASTELLANO: Well, there's different facts
6 that are going on here.

7 JUDGE RIVERA: No, no. Why - - - why is that?

8 MR. CASTELLANO: If I - - - if I may, there's a
9 Fourth Amendment analysis, and then there's what's going on
10 in this case, which is even better than - - -

11 JUDGE RIVERA: No, no, but you said - - -

12 MR. CASTELLANO: - - - the cases under the Fourth
13 Amendment.

14 JUDGE RIVERA: - - - the reason they can - - -
15 unless I misunderstood you, please - - -

16 MR. CASTELLANO: Yes.

17 JUDGE RIVERA: - - - please just clarify for me.

18 MR. CASTELLANO: Okay.

19 JUDGE RIVERA: They could search the car under
20 the Fourth Amendment because he's acting like the parole
21 officer, or he's a member of the team; what's the reason?

22 MR. CASTELLANO: No. Under the Fourth Amendment,
23 he can do the search because it's objectively reasonable.
24 Because under all the facts and circumstances, the
25 diminished expectation of privacy, and in this case there's

1 individualized suspicion, but not necessary, the supreme
2 court says in Samson - - -

3 JUDGE RIVERA: So it's because he's a parolee.

4 MR. CASTELLANO: Yes - - -

5 JUDGE RIVERA: He can search the car because he's
6 a parolee.

7 MR. CASTELLANO: - - - in part because he's a
8 parolee.

9 JUDGE RIVERA: How - - - how does that get past
10 Huntley?

11 MR. CASTELLANO: Huntley - - - well, Huntley is -
12 - - is an interpretation of the Fourth Amendment. So to
13 the extent that Huntley has now - - - we have new cases
14 since then, it's a forty-year-old case, two cases from the
15 Supreme Court. It should be reevaluated in that light.
16 But secondly - - -

17 JUDGE RIVERA: You mean Samson?

18 MR. CASTELLANO: Sorry?

19 JUDGE RIVERA: Samson?

20 MR. CASTELLANO: In Samson, yes. Knights and
21 Samson.

22 JUDGE RIVERA: Okay. But in Samson, don't they
23 have a particular agreement? Hasn't he signed a particular
24 agreement that includes peace officers?

25 MR. CASTELLANO: There was a particular agreement

1 in that case, except that the overarching analysis was
2 reasonable. And the court's - - -

3 JUDGE RIVERA: I understand. But in Huntley,
4 there was an agreement too. And the court said that
5 agreement is not enough to diminish these expectations of
6 the parolee to the extent that the search could be
7 appropriate, right?

8 MR. CASTELLANO: No, I - - -

9 JUDGE RIVERA: You've still got to satisfy - - -

10 MR. CASTELLANO: Your Honor, the search - - -

11 JUDGE RIVERA: - - - the threshold burden.

12 MR. CASTELLANO: If I may, the search was upheld
13 in Huntley. And - - -

14 JUDGE RIVERA: No, I understand. But I'm saying
15 the language in Huntley makes it clear that merely signing
16 the agreement doesn't mean that you can simply just go in
17 and search at any time. Right.

18 MR. CASTELLANO: Absolutely true.

19 JUDGE RIVERA: I don't know if this agreement
20 differs. I don't know if you know if the current agreement
21 is different from the one in Huntley.

22 MR. CASTELLANO: I don't know if this agreement
23 was different from the one in Huntley. It may well be,
24 because it has a different division.

25 JUDGE RIVERA: It's been a long time. Yeah.

1 MR. CASTELLANO: And it's - - - it's got a
2 specific provision in it that doesn't talk about parole
3 officers, as - - - as I'm sure Your Honor is aware. But
4 the - - - this decision in Samson is clear. A completely
5 suspicionless search was upheld at Hampton - - - in
6 Sampson. And they make a distinction between the
7 diminished expectation of privacy that comes about as a
8 result of the defendant's status, as a parolee alone, even
9 without a consent agreement.

10 At page 851 and 852 of the decision, it
11 specifically says, as a result of his status alone as a
12 parolee, he has a severely - - - they used the word
13 severely, diminished expectation of privacy. Then they go
14 on to talk about the consent agreement, and they decide, as
15 a result of that, he has no expectation of privacy, no
16 legitimate expectation of privacy.

17 JUDGE RIVERA: But Huntley recognized the
18 diminished expectation of privacy. I don't know that
19 there's new law in Samson from that.

20 So where is the line? Because I'm - - - it
21 almost sounds like you're saying, as long as the officer is
22 going to check on a parolee or arrest a parolee, then the
23 officer - - - the police officer, obviously not the parole
24 officer, that, the law is very clear on that, can then
25 search this car. It's not even his home where he's

1 actually arrested; it's his car that's outside.

2 MR. CASTELLANO: Right. Samson and Knights are
3 one thing.

4 JUDGE RIVERA: Yes.

5 MR. CASTELLANO: But to affirm in this case, the
6 court doesn't need to go nearly as far as those cases. All
7 the court needs to do is to say that in a situation like
8 this, where the police are executing a warrant on behalf of
9 parole, and in the course of that learn new information, in
10 conjunction with parole, they learn new information after -
11 - - when that officer is not available, that cre - - - that
12 really constitutes probable cause or at least reasonable
13 suspicion, that they're allowed to act on that. And to
14 take into account - - -

15 JUDGE RIVERA: So then the case turns on that
16 phone call.

17 MR. CASTELLANO: Much of this - - -

18 JUDGE RIVERA: They didn't have the phone call -
19 - -

20 MR. CASTELLANO: Much of it turns on - - -

21 JUDGE RIVERA: - - - you might agree it's at
22 least a close case.

23 MR. CASTELLANO: It's - - - I'm sorry, Your
24 Honor?

25 JUDGE RIVERA: If - - - without the phone call,

1 it sounds like - - -

2 MR. CASTELLANO: Without the phone call - - -

3 JUDGE RIVERA: - - - you might agree - - -

4 MR. CASTELLANO: - - - I don't think it's the - -

5 -

6 JUDGE RIVERA: - - - it's a close case.

7 MR. CASTELLANO: I don't think it's a close case

8 under the Fourth Amendment - - -

9 JUDGE RIVERA: Um-hum.

10 MR. CASTELLANO: - - - but you could say, under
11 Huntley, it was - - - it is closer. Here's - - - here's
12 the big distinction with Huntley, if I can just say that.
13 Huntley is not a case that deals with new information
14 acquired during the course of the execution of the warrant.
15 Huntley deals only with parole officers. There's no police
16 officers who are involved in Huntley in any way.

17 And the court - - -

18 JUDGE FAHEY: Let - - - let me ask this.

19 MR. CASTELLANO: Yes.

20 JUDGE FAHEY: Do - - - do we have to - - - take a
21 step back to Samson a second.

22 MR. CASTELLANO: Yeah.

23 JUDGE FAHEY: Do we have to adapt the reasoning
24 in Samson to uphold the search?

25 MR. CASTELLANO: Absolutely not.

1 JUDGE FAHEY: Why not?

2 MR. CASTELLANO: Because here, you - - - you have
3 the unique circumstances where this is in the process of
4 the execution of a warrant, the police are acting, not only
5 at the behest of parole, but with the parole. There's a
6 specific parole warrant officer assigned to this case. And
7 the only reason he's not there at the time that all this
8 goes down is because he happens to be off duty when they
9 get the call that specifically said the defendant is
10 returning to the premises and he's got a gun in his car.
11 That's why they act then.

12 And even then, they're still in contact with the
13 parole officer at the time - - - both before and after the
14 arrest.

15 So the case really comes down to this. First of
16 all, could a parole - - - could a parole officer have
17 conducted this search. And I don't think - - -

18 JUDGE RIVERA: What was the detective's reason
19 for searching the car?

20 MR. CASTELLANO: I'm sorry, Your Honor.

21 JUDGE RIVERA: What - - - what did the detective
22 give as his reason for searching the car?

23 MR. CASTELLANO: He - - - he - - - well, he spoke
24 about the landlord asking him to get - - -

25 JUDGE RIVERA: Well, that's about moving the car.

1 The search of the car for the gun.

2 MR. CASTELLANO: Well, the search of the car, he
3 leaned inside - - - he - - - he did look - - - he was
4 looking for the gun at that point in order to secure it
5 before he moved the car. But in any event, the subjective
6 motivation of the officer is not relevant. It's not
7 relevant under Knights and Samson. Knights and Sam - - -
8 Knights specifically says the subjective motivation of the
9 officer is not relevant.

10 JUDGE RIVERA: No, no. My question is about what
11 role he was serving at that point. Did he have his hat on
12 as stepping into the shoes of the parole officer, or as a
13 police officer?

14 MR. CASTELLANO: But - - - but that's really an
15 inquiry into the subjective motivation of the officer. And
16 that's - - -

17 JUDGE RIVERA: Was that the basis - - -

18 MR. CASTELLANO: - - - that is unnecessary - - -

19 JUDGE RIVERA: - - - for the authority; aren't we
20 sort of tracking back to the basis for the authority?

21 MR. CASTELLANO: I'm sorry, Your Honor, could you
22 say that again?

23 JUDGE RIVERA: Aren't - - - aren't we tracking
24 back to the basis of the authority?

25 MR. CASTELLANO: Well, there's really - - -

1 there's really two lines of authority here, to be clear.
2 There's one under the Fourth Amendment, where police
3 officers are allowed to do an objectively reasonable search
4 if all the facts and circumstances justify it. And - - -
5 and they do here.

6 The second line of authority, which really
7 applies in this case, and makes it even better than the
8 ordinary case, better than Samson and Knights, the second
9 line of authority is through the parole officers, because
10 they're acting on behalf of the parole officers when they
11 conduct this search. And it may - - -

12 JUDGE ABDUS-SALAAM: You disagree then, with - -
13 - with your adversary that it had to be his parole officer,
14 not just one of the officers who was assigned to the
15 warrant squad.

16 MR. CASTELLANO: Absolutely not. And just - - -
17 just from a policy or practicality point of view of holding
18 to that - - - to that effect, if - - - if the defendant
19 absconds from Queens and he's found in Buffalo, what that
20 would mean is that in order to do a search attended to the
21 execution of the warrant at that time, of his premises, or
22 of his car that was outside, they'd have to fly his own
23 parole officer up from Queens to Buffalo just to do that
24 search.

25 JUDGE RIVERA: Well, let me ask you this. Let's

1 assume for one moment that we disagree that a police
2 officer, under these circumstances, would have had the
3 authority to search the car. Let's just, for one moment,
4 go with that.

5 I assume your position then is, because he's
6 stepping into the shoes of the parole officer, he's working
7 on this particular team, that he could then, clothed with
8 the authority of the parole officer, search the car.

9 MR. CASTELLANO: Yes.

10 JUDGE RIVERA: Is that correct? Okay.

11 So on that second - - - just on that second
12 track, is that then an end-run - - -

13 MR. CASTELLANO: I - - - I don't believe so.

14 JUDGE RIVERA: - - - around our holdings
15 regarding the authority parole officer has versus the
16 authority a police officer might have?

17 MR. CASTELLANO: No, Your Honor. Because the
18 search is justified here in either event.

19 JUDGE RIVERA: Okay.

20 MR. CASTELLANO: The - - - the interest of parole
21 and the interest of police coincide at this point; they
22 merge. Because at this point, the defendant has violated
23 the no-firearm provision of the - - - of the specific
24 provision of the cert - - - of the certificate of release.
25 And that is a parole violation, and obviously, it's also a

1 new crime.

2 So the interests are really merged here. And it
3 would have been derelict on the part of any probation - - -
4 of any parole officer not to do the search in this case,
5 knowing specifically that there was a violation of the
6 no-firearm provision, and not to actually do the search in
7 this case really would have been - - - they would've been
8 remiss in their duties.

9 The question is, is there some benefit to the - -
10 - to the defendant, to the society at large, from
11 preventing a police officer from doing the search under the
12 circumstances of this case.

13 JUDGE FAHEY: Here - - - here's the problem
14 though, from a policy point of view. And I'm not sure - -
15 - there may be areas of law that I haven't seen - - - I
16 can't imagine this factual scenario hasn't happened, but
17 let's presume that your - - - you're arresting someone on a
18 parole warrant for a violation, and that means - - - and
19 you're a police officer going to execute it. And let's say
20 you can go ahead and do that.

21 While you're executing it, you see someone else
22 in the same place committing a crime, manufacturing drugs,
23 or whatever, when - - - when you're executing the parole
24 warrant. You would have never been able to see them; you
25 would have never been able to get a warrant to go into that

1 house to search that but for the parole violation that's
2 being executed.

3 So on the basis of the lowered standard, you're
4 able to conduct a search and arrest non-parolees for a
5 crime that they committed, because this is the danger in -
6 - - in your argument, and this is the danger of what I see.
7 Because for you to have gotten a warrant before would have
8 had to have been reviewed by a judge before you could've
9 gone forward. But here, that wouldn't have had to take
10 place.

11 So it would give you access and searches that you
12 simply wouldn't be eligible to get. And - - -

13 MR. CASTELLANO: Well - - -

14 JUDGE FAHEY: Go ahead.

15 MR. CASTELLANO: If I may - - -

16 JUDGE STEIN: Yeah.

17 MR. CASTELLANO: Under the Executive Law, any
18 police officer can - - -

19 JUDGE FAHEY: Can execute a warrant.

20 MR. CASTELLANO: - - - execute a warrant.

21 JUDGE FAHEY: But - - - but to get the warrant in
22 the first place, you're still - - - there still has to be a
23 judicial review for those non-parolees. The parolee gives
24 up that right; the parolees waive that right already. You
25 see the problem?

1 MR. CASTELLANO: If - - - if I may, I don't - - -

2 JUDGE FAHEY: Okay.

3 MR. CASTELLANO: I'm not sure that I do.

4 JUDGE FAHEY: No, that's all right.

5 MR. CASTELLANO: The - - - but I - - - I think
6 the - - - I think in that particular circumstance - - -

7 JUDGE FAHEY: Um-hum.

8 MR. CASTELLANO: - - - that you'd have a plain
9 view exception to the warrant requirement, because you'd
10 have the police officer on location - - -

11 JUDGE FAHEY: But you wouldn't be there - - -

12 MR. CASTELLANO: - - - just finding - - -

13 JUDGE FAHEY: - - - but for the - - - excuse me.
14 But you would not be present in - - - in a place where the
15 crime was taking place but for the execution of the parole
16 warrant.

17 MR. CASTELLANO: But that's a completely lawful
18 operation on the part - - -

19 JUDGE FAHEY: Totally. Totally.

20 MR. CASTELLANO: - - - under the Executive Law
21 and under the terms of the warrant itself. If I may, thank
22 you.

23 JUDGE STEIN: Would - - - would a parole officer
24 be able to make an arrest of a third person under those
25 circumstances?

1 MR. CASTELLANO: I believe so, yes. Because they
2 are lawfully on the premises, they - - - they observe, in
3 plain view, contraband, and the individuals who are
4 responsible for that contraband could be arrested.
5 Absolutely.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 MR. CASTELLANO: Thank you, Your Honor.

8 CHIEF JUDGE DIFIORE: Mr. Donn?

9 MR. DONN: Your Honor, I just have to correct a
10 quick fact first. The - - - the detective, the New York
11 City police detective who - - - who conducted the search in
12 this case had never spoken to appellant's own parole
13 officer, ever. He had had cont - - -

14 JUDGE STEIN: But assuming that it doesn't have
15 to be that very parole officer, then the question becomes,
16 you know, could it be somebody specifically designated to
17 step in for that parole officer while he or she is on
18 vacation, or could it be somebody in this special unit
19 whose job it was to - - - to issue or execute on parole
20 warrants. But - - -

21 MR. DONN: Yes, and I think - - -

22 JUDGE STEIN: - - - let's assume that it doesn't
23 have to be the very parole officer.

24 MR. DONN: Yes, well, my adversary just said that
25 he had been in contact with appellant's parole officer, and

1 he had been in contact only with the warrant officer, very
2 different relationship, as this court explained in Huntley,
3 dual purpose - - - the - - - the parole guidelines explain
4 that a parole officer, a field parole officer has two jobs,
5 peace officer and caseworker. The - - - the detective who
6 arrested appellant in this case and conducted the search
7 was not a - - - a case worker. He - - -

8 JUDGE STEIN: But where do we draw that line?
9 What - - - so if he was on the phone with the parole
10 officer but the parole officer wasn't physically present,
11 that would be okay?

12 MR. DONN: I think there are - - - there are
13 closer cases down the road; this isn't one. But if there
14 is some communication with the actual parole officer - - -

15 JUDGE STEIN: When? Five minute, an hour, that
16 day, what - - - what - - -

17 MR. DONN: That may be a - - -

18 JUDGE STEIN: - - - what are we talking about?

19 MR. DONN: - - - that may be a case that this
20 court gets some day, but when it's just a New York City
21 police officer who's never even spoken once with the actual
22 parole officer, it clearly fails.

23 JUDGE RIVERA: But he knows - - - he knows why
24 he's there, right? He's got the parole warrant, it's for
25 these violations, they've been trying to find him earlier

1 on the day, knows why he's there, and then the call comes
2 in, and now, they're also made aware of at least some
3 allegation that - - - that the parolee has a gun or had a
4 gun at one point in the car earlier that day.

5 MR. DONN: Yes. And to answer the question your
6 - - - Your Honor posed my adversary, the - - - what
7 Detective Herlihy said when he was asked why did you look
8 in the car, he said, I was looking for the gun in the gun
9 call. At - - - at that point, defendant had already been
10 arrested, he was already in a police car, and there was no
11 reason not to get a - - - a warrant. I think we can lose -
12 - -

13 JUDGE RIVERA: Did - - -

14 JUDGE ABDUS-SALAAM: Who's - - -

15 JUDGE RIVERA: I'm sorry, did defense counsel, as
16 the People say, argue probable cause?

17 MR. DONN: Defense counsel never argued probable
18 cause. He - - - he did say the words "probable cause" in
19 the course of making a convoluted argument, essentially,
20 that the parole exception was - - - was not met here.

21 I would refer the court to the two pages right
22 before the hearing begins, and the argument at the end.
23 Any argument - - - any argument other than the Huntley
24 parole search in this case is waived, completely
25 unreserved, and - - -

1 JUDGE ABDUS-SALAAM: Counsel - - -

2 MR. DONN: - - - and frankly, a distraction.

3 JUDGE ABDUS-SALAAM: Okay. I - - - I think you
4 did mention that. But on that point about the practicality
5 of waiting for the parole officer who is actually dealing
6 with this particular parolee, doesn't that - - - does it
7 make sense that you wouldn't want to have to wait for that
8 one particular person?

9 MR. DONN: To be clear, we're not saying that he
10 couldn't have been arrested on a parole warrant; he could
11 have been arrested, but - - - but no, I don't think that
12 there's anything - - -

13 JUDGE ABDUS-SALAAM: He couldn't search his car
14 because it's not his parole officer?

15 MR. DONN: I don't think there's any - - -

16 JUDGE ABDUS-SALAAM: His personal parole officer.

17 MR. DONN: I don't think that there is any reason
18 why they wouldn't need a warrant, if - - - if they've
19 already arrested him on the parole warrant. The gun is - -
20 - is or is not inside the car. At that point, there's no -
21 - - there's no exigency, there's no urgency, there's no
22 danger. The Huntley exception doesn't apply since it's a
23 police - - -

24 JUDGE RIVERA: If - - - if we disagree with you
25 about the question of this argument over probable cause, do

1 you lose?

2 MR. DONN: No. No. You mean on - - -

3 JUDGE RIVERA: Why not?

4 MR. DONN: - - - on the preservation aspect - - -

5 JUDGE RIVERA: If you can take - - - if you could
6 take - - -

7 MR. DONN: If - - -

8 JUDGE RIVERA: - - - take your argument as you
9 can't take the phone call into consideration, they should
10 have gotten this warrant, they were - - - they - - - even a
11 police officer coming into this situation doesn't have
12 probable cause. It's - - - right, Judge Garcia was asking
13 you about this before.

14 MR. DONN: Right.

15 JUDGE RIVERA: So if we disagreed with you on
16 that - - -

17 MR. DONN: Right. If - - - if - - - let's see.
18 I get kind of my head spinning with it. I mean, if - - -
19 if we're looking at - - - if we assume that an argument
20 that the police had probable cause in this case was
21 preserved - - -

22 JUDGE RIVERA: Um-hum.

23 MR. DONN: - - - and could the court, you know,
24 on the merits - - - I think it's a double hearsay problem.
25 I refer the court to the record. But - - - Detective

1 Herlihy, he didn't know the name of - - - of the woman who
2 made the call. It was double hearsay because she was
3 reporting something that she was allegedly receiving from
4 her son, whose name she never provided to Detective
5 Herlihy. He - - - he didn't give that information at the
6 hearing.

7 Even upon arriving at the house where - - - where
8 appellant was to be found, and meeting the person who
9 actually was - - -

10 JUDGE RIVERA: There, you're arguing that there
11 is no probable cause. Let's assume we disagree with you,
12 do you then lose?

13 MR. DONN: I'm - - - I mean, if the People - - -

14 JUDGE RIVERA: You have an officer in this
15 situation who has probable cause to search. What - - -

16 MR. DONN: I'm sorry. If - - - if the People
17 preserved their probable cause argument, and if they, in
18 fact, had probable cause - - -

19 JUDGE RIVERA: Yes.

20 MR. DONN: - - - then I guess we would lose. But
21 neither of those things are true.

22 Thank you, counsel.

23 (Court is adjourned)

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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 People v. Everett b. McMillan, No. 48 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

Date: April 03, 2017