

**Matter of Josselin v Schriro**

2014 NY Slip Op 30094(U)

January 8, 2014

Sup Ct, New York County

Docket Number: 100650/13

Judge: Peter H. Moulton

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MOULTON  
Justice

PART 40B

JOSSELYN, GEORDAN

INDEX NO. 100650/13

- v -

DORA B. SCHIRO

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition

*Decided per attached*

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 1/8/14

[Signature]  
J.S.C.

**NON-FEDERAL MOULTON**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):



that after his phone was seized, his employer's IT department overrode the phone's passcode to search it. Thus, he claims an unreasonable search and seizure occurred in violation of the Fourth Amendment of the United States Constitution, necessitating suppression.

Respondent opposes the motion, claiming that it acted rationally and lawfully. Respondent asserts that when the phone was seized, certain unspecified messages were in plain view and therefore, the search was proper.<sup>2</sup> Corrections' counsel states that the messages demonstrated that petitioner was signing in a visitor prior to arrival time to bypass the visitor's line, in violation of Department Directive 2007R-B. Counsel further cites to messages between petitioner and visitors, contending that they demonstrate plans to introduce marijuana into the facility.

Corrections also opposes petitioner's request for the return of his phone because he cannot show that the seizure was unreasonable. Additionally, respondent asserts that "DOC is conducting an investigation and the matter may be referred to the Bronx District Attorney's office for criminal prosecution. If

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dated 1/6/14).

<sup>2</sup>No affidavit or affidavits are submitted from the individual or individuals who seized or inspected the phone. Nor does respondent describe what messages were in plain view, and what messages, if any, led to a further search for other messages.

the cellphone is returned to petitioner, such an investigation could very well be compromised."

It is undisputed that petitioner was suspended for one month for possessing an unapproved phone at work, and, for refusing to take a drug test which Corrections requested after confiscating the phone. It is also undisputed that petitioner has not been arrested and neither side has submitted proof that disciplinary charges have been filed, although respondent, who has had the phone for over 9 months now, contends that such charges are pending.<sup>3</sup>

The petition is granted solely to the extent that respondent is directed to return petitioner's cell phone to him within 10 days from service of a copy of this Order and Judgment and is otherwise denied.

### Discussion

#### A. Search and Seizure

The verified petition and petitioner's reply, dated May 30, 2013, reflect that petitioner is not challenging the initial seizure of the phone, but only the subsequent search of the

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<sup>3</sup>Respondent also asserts that petitioner is not entitled to an injunction. However, no injunction is sought. A temporary restraining order was granted restraining the removal or destruction of any information on the phone and restraining further searches of the phone.

phone.<sup>4</sup> Corrections maintains that the search of the phone did not violate the Constitution because petitioner had no reasonable expectation of privacy in the phone, in light of Operations Order 01/05 and Teletype Order No. HQ-02918-O (prohibiting unauthorized cell phones) and because the phone was seized at the front (public gate) of Rikers' Island. Corrections further argues that it had reasonable grounds to suspect the search would reveal evidence of employee misconduct, and, that the search was reasonably related to the objectives of the search and was not overly intrusive.

The analysis of whether an employer's search violates the Fourth Amendment is discussed at length in *O'Conner v Ortega* (480 US 709, 726 [1987]). The Court held:

Determining the reasonableness of any search involves a twofold inquiry: first, one must consider whether the action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place ... The search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the misconduct.

*O'Conner v Ortega*, 480 U.S. at 726 [internal quotations omitted]; see also *Matter of Cunningham v New York State Dept. of Labor*, 21 NY3d 515 [2013]).

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<sup>4</sup>Petitioner states that the "confiscation of the phone was the allowed action by DOC for its perceived unauthorized use on the facility" (petitioner's reply at 6).

Were the court to reach the issue, it would hold a hearing under CPLR § 7804 (h).<sup>5</sup> However, a hearing is unnecessary because declaratory relief is discretionary under CPLR § 3001 (see *Bower & Gardner v Evans*, 60 NY2d 781 [1983]). The court declines to address the request because any decision would be equivalent to an advisory opinion, which would be inappropriate under the circumstances (see e.g., *People v Harris*, 98 NY2d 452, 496 n 22 [2002] [Court declined to reach the issue of the propriety of sentencing guidelines because "[t]hat would require an advisory opinion in advance of a number of other procedural options in the new proceeding that might render the matter academic"]; see also *T.D. v New York State Off. of Mental Health*, 91 NY2d 860 [1997] ["it was unnecessary under the circumstances here presented to prospectively declare the regulations invalid on additional common-law, statutory, and constitutional grounds. In doing so, the Appellate Division issued an inappropriate advisory opinion"]).

Neither party has submitted any proof that a disciplinary hearing has been commenced. A hearing may never come to pass

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<sup>5</sup>Petitioner does not submit an affidavit in support of the assertion that the phone had a passcode, or, that it was by-passed. Petitioner's attorney's verification of the petition is insufficient as it is not based on personal knowledge. This failure is not fatal, however, because the answer admits that Corrections viewed certain messages on the phone.

and/or the messages may never be the subject of the hearing. To the extent that a hearing is ultimately held, and Corrections introduces evidence of the messages, petitioner may raise his search and seizure argument at the hearing (see *Matter of Cunningham v New York State Dept. of Labor*, 21 NY3d 515, *supra* [petitioner successfully challenged a hearing officer's admission of evidence at a disciplinary hearing which had been obtained by petitioner's employer using GPS devices]).<sup>6</sup>

B. Replevin

Assuming for purposes of analysis only, that respondent acted lawfully when searching the phone, respondent fails to explain how such a finding has any bearing on whether it is entitled to retain the phone. An action may be brought for wrongful detention (*Rogers v Conde*, 67 App Div 130 [1901]), which sounds in replevin (CPLR art 71; *Solomon R. Guggenheim Found. v Lubell*, 153 AD2d 143, 145 [1990], *aff'd* 77 NY2d 311 [1991]). "Traditionally and historically, replevin is based upon a tortious act and is an action ex delicto . . . This is true whether the action is founded on a trespass, an unlawful taking from plaintiff's possession, a conversion, or merely a wrongful detention" (*Smith v Scott*, 294 AD2d 11, 18 [2d Dept 2002]).

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<sup>6</sup>Any decision here would not be binding in a criminal proceeding, should one be commenced.

To sustain a cause of action for wrongful detention, petitioner is required to establish entitlement to immediate possession of the property, and that demand for the return of the property has been made and refused (*Rogers*, 67 App Div at 131, *supra*). Corrections cites nothing which indicates that petitioner had consented to retention of his phone by the fact of employment. The Orders regarding the prohibition of possession of unapproved cell phones at Corrections' facilities only permit "appropriate disciplinary action when warranted." As previously noted, petitioner was not arrested or charged with a crime.<sup>7</sup> Instead, he was suspended for one month. Respondent cites no authority which would permit it to hold the phone indefinitely as the result of "an investigation" by Corrections or the District Attorney.

Accordingly, because respondent acted arbitrarily and capriciously and in error of law when it refused to return petitioner's phone, it is

ORDERED and ADJUDGED that the petition is granted solely to the extent that respondent is directed to return petitioner's

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<sup>7</sup>A law enforcement authority has the right, incident to an arrest, to inventory property, inspect and test property or hold property as a bailment during incarceration (see e.g., *State of New York v Natal*, 75 NY2d 379 [1990]), or, hold property as evidence (*Turley v Police Dept. Of the City of New York*, 167 F3d 757 [1999]).

cell phone to him within 10 days from service of a copy of this Decision and Order; and it is further

ORDERED that the petition is otherwise denied.

This constitutes the Order and Judgment of the court.

Dated: January 8, 2014

ENTER:

  
\_\_\_\_\_  
J.S.C.

**PETER H. MOULTON**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).