

SUPREME COURT OF THE STATE OF NEW YORK  
CRIMINAL TERM: PART K-19

P R E S E N T: HON. SEYMOUR ROTKER,  
Justice.

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THE PEOPLE OF THE STATE OF NEW YORK

- against-

Indictment No.: N10894-03

Motion: To suppress physical evidence

DERRICK PERRY

Defendant.

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ROBERT SCHWARTZ, ESQ.

For the Defendant

\_\_\_\_\_  
RICHARD A. BROWN, D.A.

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BY: DANIEL BRESNAHAN, A.D.A.

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Opposed

Upon the foregoing papers, and due deliberation had, the motion is denied. See accompanying memorandum this date.

Kew Gardens, New York  
Dated: February 24, 2005

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SEYMOUR ROTKER, J.S.C.

SUPREME COURT, QUEENS COUNTY  
CRIMINAL TERM, PART K-19

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

BY: SEYMOUR ROTKER, J.S.C.

- against -

Indictment No. N10894-03

DERRICK PERRY

Defendant.

-----X

The following constitutes the opinion, decision and order of the court.

An indictment has been filed against the defendant accusing him *inter alia* of the crime of criminal possession of a controlled substance in the third degree. The charge is that on November 30, 2003, defendant knowingly possessed a quantity of cocaine with the intent to sell the same.

Defendant, claiming to be aggrieved by an unlawful search and seizure, has moved to suppress cocaine, seized from his person on or between November 30 and December 1, 2003.

In this case, the People assert that the seizure of the cocaine from the defendant's person was incident to a lawful arrest. The People have the burden, in the first instance, of going forward to show the legality of police conduct. Defendant, however, bears the ultimate burden of proving by a preponderance of the evidence that the physical evidence should be suppressed.

A pretrial suppression hearing was conducted before me on February 8, 2005.

I give full credence to the testimony of the People's witness Police Officer Joseph Jordan.

**I make the following findings of fact:**

Police Officer Joseph Jordan, a fourteen-year veteran of the police department, was the

operator of an unmarked anti crime vehicle on November 30, 2003. Passengers in the vehicle included Sergeant McCormack, Police Officers Macaluso and Bonelli.

Officer Jordan observed a vehicle, without its headlights on, being operated in the vicinity of Mathias Avenue and Dillon Street in Queens County, New York. The operator of the vehicle was later identified as the defendant in this case. The car was pulled over. Officer Jordan asked the defendant for his driver's license and registration. The defendant did not possess these documents. He was then asked for his name and any other identification.

Jordan determined the defendant had a suspended driver's license and the vehicle he was driving was improperly registered. Defendant was taken to the police station. While driving to the 113<sup>th</sup> precinct with defendant and without advising the defendant of his "Miranda" warnings, Jordan asked the defendant several questions including whether or not he knew he had a suspended license? The defendant stated he knew his license was suspended and he was on parole for a drug charge.

At the 113<sup>th</sup> precinct, the defendant looked uncomfortable and was wiggling his body. Officer Jordan was told by Sgt. McCormack to take the defendant to the bathroom to conduct a strip search because of his actions and because he had previously been involved with drugs.

After having removed his clothing at the officer's request, defendant refused to comply with the direction that would allow a search of the defendant's rectum to take place. At that point the defendant redressed and Sgt. McCormack directed that the defendant be taken to the emergency room at Jamaica Hospital. Officer Jordan told the medical personnel at the hospital that he thought the defendant was concealing narcotics in his rectum. Defendant was examined, but refused to submit to an x-ray.

Thereafter, Officer Jordan called an assistant district attorney to obtain a search warrant and was told that the warrant would not be available before 8:00A.M. the next day. Defendant was discharged from the hospital and taken back to 113<sup>th</sup> precinct and placed in a cell. Defendant was then observed by a video monitor with his hand down the rear of his underwear in the area of his anus. Defendant removed his hand from his pants and began eating something.

Officer Jordan observed white powder on the defendant's tongue and lips. The officer attempted a second strip search. The defendant began to act in an agitated and irrational manner

and refused to comply with this second attempt at a search and began fighting with the officer. As a result of defendant's erratic and obstreperous behavior, an ambulance was called to the precinct. It was necessary to physically restrain the defendant.

The defendant, after receiving emergency medical treatment at the precinct, was taken back to Jamaica Hospital where he was still acting irrationally and was fighting and attempting to bite the medical personnel. He was foaming at the mouth and spitting at people. He seemed to be crazed. An IV was administered to the defendant. Without prompting from the police, a doctor removed a bag from defendant's rectum which contained a substance which appeared to be cocaine, as well as, a torn plastic bag. The defendant was kept in the hospital for five days.

**I make the following conclusions of law:**

The 4th Amendment of the United States Constitution and article I, § 12 of our State Constitution protects individuals "from unreasonable government intrusions into their legitimate expectations of privacy." US Const, 4th Amend; NY Const, art I, § 12; People v. Quackenbush, 88 N.Y.2d 534, 647 N.Y.S.2d 150 (1996), citing People v. Class, 63 N.Y.2d 491, 483 N.Y.S.2d 181 (1984), *revd on other grounds*, 475 US 106 (1986), quoting U.S. v. Chadwick, 433 US 1, 7, 97 S. Ct. 2476 (1977). However, the Court of Appeals has justified a warrantless search incident to an arrest in two circumstances: to protect the public's safety and safety of the officer, and to prevent evidence from being destroyed or concealed. See People v. Wylie, 244 A.D.2d 247, 666 N.Y.S.2d 1 (1<sup>st</sup> Dept. 1997), citing People v. Smith, 59 N.Y.2d 454, 465 N.Y.S.2d 896 (1983); People v. Belton, 55 N.Y.2d 49, 447 N.Y.S.2d 873 (1982); People v. Gokey, 60 N.Y.2d 309, 469 N.Y.S.2d 618 (1983).

Nevertheless, searches involving "intrusions beyond the body's surface are impermissible . . . on the mere chance that desired evidence might be obtained." See People v. More, 97 N.Y.2d 209, 738 N.Y.S.2d 667 (2002), quoting Schmerber v. California, 384 US 757 (1966). "There must exist a 'clear indication' that the desired evidence will be found. In the absence of such an indication, the Fourth Amendment mandates that the police suffer the risk that such evidence may disappear unless there is an immediate search." More, *supra* at 213, quoting Schmerber, *supra* at

769.<sup>1</sup> Thus, the first inquiry by this Court is whether, at the time the drugs were recovered a search was conducted, and if yes, whether there was a “clear indication” that narcotics would be found justifying such a search under the Fourth Amendment. In this case, the attempt to search was at the precinct and the drugs were ultimately recovered at the hospital where defendant was taken for immediate medical treatment. Thus, unlike in More where a “clear indication” was required, this standard may not be necessary for a proper search. Nevertheless, a “clear indication” that drugs would be found existed here.

Additionally, in More, the Court further held that even if there exists a “clear indication” that incriminating evidence will be recovered pursuant to a bodily intrusion, search warrants are ordinarily required, unless there is a risk that evidence will be destroyed, an exigent circumstance. Id.

The Supreme Court has applied a test of reasonableness when evaluating a body-cavity search.

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

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<sup>1</sup>In More, the search of the defendant was conducted in an apartment bedroom after the police obtained consent to enter by the tenant. During the strip search of the defendant, a plastic bag containing crack cocaine was recovered by the police who observed it protruding from the defendant’s rectum. The drugs that were recovered from the defendant’s body were suppressed by the court in More. The More Court held that the record did not contain any evidence to support a finding that the police were confronted with an emergency situation in which a delay, to obtain a warrant, would result in the destruction of evidence.

In More, “no police officer testified that, despite the available means of incapacitating defendant and keeping him under full surveillance, an immediate body cavity search was necessary to prevent his access to a weapon or prevent his disposing of the drugs.” Furthermore, there was no evidence that the drugs, wrapped in plastic, could have been absorbed into the defendant’s body.

Thus, unlike the present fact situation where the police observed defendant attempting to dispose of the drugs by ingestion, exigency did not exist in More. Additionally, More does not apply here because it addressed a search in an apartment and the Court in More specifically stated that it did not address the validity of body cavity searches conducted at a station house, detention center or correctional facility.

See Bell v. Wolfish, 441 US 520, 559 (1979) citing other cases.<sup>2</sup>

Notably, the first search of defendant at the police station and the first hospital visit was a strip search and not a body cavity search. Thus, courts review various factors to determine the reasonableness of this type of search.<sup>3</sup> During the strip search of defendant at the precinct, no evidence was recovered. Prior to the search, defendant had told the police that he was on parole for a drug charge. Additionally, while at the precinct, defendant appeared to be physically uncomfortable. He was wiggling his body in an odd fashion. As a result, the police took defendant to the bathroom to conduct a strip search. During the search, defendant refused to bend over and appeared to be pushing something up his rectum. A body cavity search was not conducted at that time because defendant failed to cooperate.

Defendant was then taken to the hospital and would not be x-rayed, therefore, no evidence was observed or recovered at that time. The police returned with defendant to the precinct. Because of defendant's conduct, the police were reasonable in conducting this initial search of defendant. In any event, even if the police conduct was not reasonable, the conduct of the police and the ultimate discovery of the drugs during the second hospital visit was so "attenuated" as to dissipate any potential taint. See Wong Sun V. United States, 371 US 471, 83 S. Ct. 407 (1963).

Factors this Court has considered to determine if any potential taint was attenuated were: the amount of time between the initial strip search and the ultimate recovery of the drugs; the intervening circumstances which occurred before the recovery of the evidence; the purpose and

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<sup>2</sup>In Bell, this issue addressed was the reasonableness of searches conducted of prisoners in detention facilities. The Court held that the searches conducted were not unreasonable and noted that these types of facilities are unique places fraught with serious security dangers and typically have problems with inmates smuggling contraband.

<sup>3</sup>Factors courts consider are: a defendant's excessive nervousness, unusual conduct, information showing pertinent criminal propensities, informant's tips, loose-fitting clothing, an itinerary suggestive of wrongdoing, discovery of an incriminating matter during a less intrusive search, lack of employment, indications of drug addiction, information derived from others arrested or searched, and evasive or contradictory answers. These factors taken together can lead to reasonable suspicion justifying a strip search based upon the totality of circumstances. People v. Kelley, 306 A.D.2d 699, 762 N.Y.S.2d 438 (3d Dept. 2003).

In Kelley a number of factors were present which justified the strip search of defendant at the precinct, who had been detained as the result of driving without a license, driving an unregistered vehicle and failure to have a driver's side rear view mirror.

flagrancy of the underlying police conduct; the extent that any illegality was exploited to obtain evidence; and the extent to which the exclusionary rule would be served by excluding the drugs recovered. See People v. Borges, 69 N.Y.2d 1031, 517 N.Y.S.2d 914 (1987); Brown v. Illinois, 422 US 590, 95 S. Ct. 2254 (1975); People v. Stith, 69 N.Y.2d 313, 514 N.Y.S.2d 201 (1987); People v. McGrath, 46 N.Y.2d 12, 412 N.Y.S.2d 801 (1978).

Here, defendant's arrest was legal and based upon probable cause. After defendant stated that he was on parole for drugs and was observed wiggling his body by the police and after the initial searches, defendant was observed in the cell reaching into the back of his pants and putting his hand to his mouth. Thereafter, the police saw a white powdery substance on defendant's lips. Moreover, the defendant started acting extremely agitated and erratic. This behavior occurred some time after the initial strip search. Thus, these factors led the police to believe defendant possessed drugs that were in danger of being destroyed. Moreover, the manner in which defendant was attempting to dispose of the drugs, by ingestion, and his behavior also gave the police cause to seek immediate medical treatment for defendant.<sup>4</sup> Thus, the doctor's recovery of the drugs from the defendant's body at the hospital was proper and suppression is not warranted.<sup>5</sup>

The foregoing constitutes the opinion, decision and order of the court.

Kew Gardens, New York  
Dated: February 24, 2005

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SEYMOUR ROTKER, J.S.C.

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<sup>4</sup>Defendant was hospitalized for approximately five days.

<sup>5</sup>The police had a "clear indication" that a search would result in the recovery of drugs. Furthermore, had the police waited for the search warrant that they had inquired about and which they had to wait for until the next morning, the evidence would have been destroyed and defendant may have suffered a drug overdose.