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No. 9:19-cv-00777 (GTS)

ORIGINAL

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IN THE

SUPREME COURT OF THE UNITED STATES

HERMAN ROBINSON – PETITIONER

VS.

**DONITA MCINTOSH, SUPERINTENDENT
CLINTON CORRECTIONAL FACILITY – RESPONDENT**

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI.

Herman Robinson, DIN # 15A2163

Clinton Correctional Facility

P.O. Box 2001

Dannemora, New York 12929-2001

Questions Presented

- 1.) Did the Schenectady County Police Department violate Petitioner's Fourth Amendment right against illegal search and seizure?
- 2.) Did the Schenectady County Supreme Court violate Petitioner's due process right to a fair trial by admitting illegally seized evidence?

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Jurisdictional Statement

This Court has jurisdiction under 28 U.S.C. § 1254(1) to issue a writ of certiorari. To review the order of U.S. Court of Appeals Second Circuit dated January 11th, 2023 and for the rehearing dated March 8th, 2023

Constitutional Provisions at issue

4th Amendment

6th Amendment

14th Amendment

New York State Constitution, Article 1 § 12.

Statement of the Case

On December 10th 2013, Schenectady County Police Department was called to Petitioner's residence to perform a wellness check. After being granted consent by Petitioner's live-in girlfriend to locate and render aid to Petitioner; whom she believed was attempting suicide, police entered via battering ram and searched the small 3 bedroom residence. Upon conclusion of the initial search the residence

was determined to be unoccupied at which time Sergeant Daryl Mallard (herein after Sgt. Mallard) noticed a spiral notebook on a bed in Petitioner's bedroom. Sgt. Mallard turned the notebook so that he could read what was written on the page, after doing so he ordered a second search of the unoccupied residence.

During the second search Patrolman Timothy Rizzo (hereinafter Ptl. Rizzo) located some prescription medication bottle in the same bedroom as the notebook. Ptl. Rizzo gathered a few bottles and proceeded to the front porch where Petitioner's girlfriend, Ms. Tonya Clark (hereinafter Ms. Clark) was told to wait and questioned her about the pills and if she knew of anywhere else Petitioner may be. At that moment Petitioner was located inside a parked car in the backyard and emergency medical technicians were called. Upon arrival of the EMT's Ptl. Rizzo informed EMT Sean Muniz (hereinafter Mr. Muniz) of a potential opiate overdose of morphine and hydrocodone, information Mr. Muniz confirmed after examining Petitioner's pupils.

While aid was being rendered, an officer reentered Petitioner's residence under the false pretense of discovering what the Petitioner may have ingested. During this non-consensual, warrantless entry, the officer entered the bedroom where both the pills and the notebook were found. After reading the page in the

notebook, left in a position to be read by Sgt. Mallard, the officer returned to the back yard and invited other officers to enter the residence. What followed was a warrantless, non-consensual seizure of the notebook, an indictment, a trial, and conviction using this illegally obtained "evidence".

Argument

It is well settled that 'any evidence seized from a defendant in violation of his Fourth Amendment right is excluded from a criminal trial, and fruits of such evidence are excluded as well.' see Alderman v. U.S., 394 U.S. 165 March 10th, 1969.

The initial entry into Petitioner's residence was lawful under consent and exigent circumstance exceptions to the warrant requirement. Ms. Clark who, from prior experiences believed the Petitioner may be attempting suicide called police and granted access to the residence, to locate Petitioner. Given the circumstances Ms. Clark's only concern was that officers find Petitioner (see¹ T.T. Page 559. Line 14. Appendix B). 'Scope of search must be strictly tied to and justified by circumstances which rendered its initiation permissible'. See Terry v. Ohio, 392 U.S. 1 June 10th 1968. Officer's search of Petitioner's residence should have been

limited to areas where a person can be found but that was not the case here.

After the initial search resulted in the residence being occupied by no one other than the officers, Sgt. Mallard made the decision to exceed the scope of consent. Instead of continuing to search for Petitioner Sgt. Mallard, having noticed

[Footnote:¹ T.T. = Trial Transcript]

a notebook on a bed, proceeded to search the notebook's contents. A reasonable

person would not believe that an adult human being could be found under a

notebook laying on a bed. Unable to read the contents of the notebook Sgt.

Mallard 'spun' the notebook around bringing its contents into easy view. (See T.T.

page 93. Line 16 Appendix C). In an attempt to create probable cause for his

actions, Sgt. Mallard testified that by his reading the notebook it confirmed his

suspensions that Petitioner was inside the residence. Sgt. Mallard already knew

Petitioner was not inside the residence from the first search, '... the business of

policemen and firemen is to act, not to speculate or meditate on whether the report

is correct...' See Wayne v. United States, 318 F.2d 205 April 4th, 1963.

'Taking action, unrelated to the objectives of the authorized intrusion, which expose to view concealed portions of the apartment or its contents, did produce a new invasion of Respondent's/Defendant's privacy unjustified by the

exigent circumstance that validated the entry...' See Arizona v. Hicks, 480 U.S.

321 March 3, 1987. The scope and duration of permissible police conduct is

limited by, and must be reasonably related to, the exigencies of the situation.

Hicks, also held in part that: "the distinction between 'looking' at a suspicious object in plain view and 'moving' it even a few inches is much more than trivial for purposes of the Fourth Amendment." There was no reasonable suspicion that the notebook held any information of Petitioner's whereabouts. Sgt. Mallard's objective was to prevent a suicide not investigate a suicide, therefore his actions regarding the notebook were unreasonable and beyond the scope of consent.

During the second search of Petitioner's unoccupied residence ordered by Sgt. Mallard after his perusal of the notebook; Ptl. Rizzo collected some pill bottles located in the same bedroom as the notebook. Ptl. Rizzo brought the medication outside to question Ms. Clark about the fill date and contents. After obtaining the information from Ms. Clark, (See T.T. Page 1419, Lines 15-25. Page 1420, Lines 2-3. Appendix D), Petitioner was located inside a car parked in the backyard. At this point consent terminated because the purpose of consent had been accomplished. Minutes after Petitioner was located, EMS worker Mr. Muniz arrived and was informed by Ptl. Rizzo of the information about the medication found in Petitioner's bedroom. (See T.T. Page 130. Lines 8-13 Appendix E). Mr. Muniz confirmed the information he received from Ptl. Rizzo, (See Appendix E Page 133 Lines 2-6), with the arrival of Schenectady Fire Department and the on-

scene doctor's administration of two doses of Narcan any exigent circumstances had ended. Under the false pretense of finding what Petitioner may have ingested, Ptl. Rizzo reenters the residence and searched the notebook which had been disturbed by Sgt. Mallard and left in a position where its contents can be read. This entry, without the consent of Petitioner or Ms. Clark, was made absent any other exception to the warrant requirement. 'A warrantless search is per se unreasonable under the Fourth Amendment, absent certain exceptions to the warrant requirement.' See Katz v. United States, 389 U.S. 347 December 18th 1967.

Following Ptl. Rizzo's unlawful entry, evidence technician Detective John Ericson, (hereinafter Det. Ericson), arrives with the sole purpose of seizing the notebook, without a warrant or consent from Ms. Clark. "It is essential predicate to any valid warrantless seizure of incriminating evidence under plain view doctrine that police not violate Fourth Amendment in arriving at the place from which evidence could be plainly viewed.' See. Horton v. California, 496 U.S. 128 June 4th, 1990. There was no threat that notebook would be removed or destroyed by Petitioner or Ms. Clark, Petitioner was being taken to the hospital and Ms. Clark was not allowed inside the residence. "Where there is ample time for law enforcement to secure a warrant, warrantless seizure of evidence, even if it is in

plain view, is forbidden.' See New York State Constitution. Article 1, §12.

During trial testimony Det. Ericson admitted that he had not been granted access to the residence by Petitioner or Ms. Clark and that he did not have a warrant. (T.T. Page 228, Lines 7-19. Appendix F) Det. Ericson also admitted that he did not have permission or warrant to collect the notebook (See T.T Page 229, Lines 20-24. Appendix F). 'It is a basic principle of Fourth Amendment Law that searches and seizures inside a home without warrant are presumptively unreasonable.' See Brigham City v. Stuart, 547 U.S. 398 May 22, 2006. Det. Ericson erroneously classified Petitioner's residence as a "crime scene" to justify his nonconsensual, unconstitutional entry and seizure of the notebook. The crime for which Det. Ericson based his justification was suicide. 'Although suicide was a crime at common law which was followed by the forfeiture of the offender's property, this is not the case in New York. The Penal Law does not define suicide as a crime. However, the promoting, causing, or aiding of another person to commit suicide does constitute a crime. Promoting a suicide attempt is covered in Penal Law § 125.15 and Penal Law § 125.25.' See 6 New York Criminal Practice § 58.02[4]. (See also Appendix F Page 234. Lines 18-23.). See also Act of May 5th, 1919 Ch. 414 §1, 1919 N.Y. Laws 1193

Among the many attempts that have been made to justify the unlawful conduct of Schenectady County Police Officers on the day in question. Detective Joseph McCabe, (Hereinafter Det. McCabe), who also entered the residence without consent or warrant, testified that suicide was a crime but when asked about his knowledge of that "crime" ever being prosecuted in this country, an objection was made and a ruling deemed the question 'not relevant'. (See T.T. Page 58, Lines 2-10. Appendix G). Given the fact that suicide as a crime was the cause for violating the Petitioner's Fourth Amendment Rights the question was absolutely relevant. Det. McCabe's testimony supports Petitioner's claim of unlawful entry and seizure of the notebook (Appendix G Page 329. Lines 9-20.) While Ms. Clark testified she gave Det. McCabe permission to search, (See Appendix B. Page 616. Lines 7-25.) this consent cannot justify the illegal seizure because Det. McCabe arrived after the seizure had already taken place. (See Appendix G. Page 328. Lines 11-17.)

The admittance of this illegally seized notebook into evidence at Petitioner's trial was in violation of Petitioner's due process right under the Sixth and Fourteenth Amendments.

- 1.) Rule excluding illegally seized evidence is of constitutional origin.
- 2.) All evidence obtained by searches and seizures in violation of the constitution

is Constitutionally inadmissible in state courts.

3.) Evidence obtained by unconstitutional search was inadmissible, in state prosecution, and vitiated conviction, under the Fourteenth Amendment.

See. Mapp v. Ohio, 367 U.S. 643 June 19th, 1961.

Not only did the trial court admit the illegally seized evidence, it erroneously denied Petitioner's motion to preclude the notebook. In the trial court's order and decision, while misstating the facts of the case, held that officer's reading of the notebook was in furtherance of a crime, a crime Petitioner has shown does not exist, Attempted Suicide. (See Order and Decision Appendix H). Trial court's order and decision also states that Ms. Clark gave consent on three separate occasions (See appendix H Page 2. Footnote¹) which is factually false. Ms. Clark gave consent for officers to enter and locate Petitioner, the alleged consent to Det. McCabe is questionable.

Conclusion

From Sgt. Mallard exceeding the scope of consent by disturbing the notebook, leaving its contents apparent, to Ptl. Rizzo's unlawful re-entry into Petitioner's residence and search of the notebook, and Det. Ericson's unconstitutional seizure of the notebook. The conduct of these officers gravely violated the Fourth Amendment. The admittance of the illegally obtained evidence gravely impair Petitioner's right to a fair and impartial trial. For these reasons.

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: May 11, 2023