

APPENDIX 1

695 Fed.Appx. 20

This case was not selected for publication in West's Federal Reporter.

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION

United States v. Serrano

United States Court of Appeals, Second Circuit. August 16, 2017 695 Fed.Appx. 20 (Approx. 5 pages)

COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

United States Court of Appeals,
Second Circuit.

UNITED STATES of America, Appellee,

v.

Andy SERRANO, Defendant-Appellant,

16-1024-cr

August 16, 2017

Synopsis

Background: After denial of defendant's motion to suppress evidence of the firearm and his post-arrest statement, defendant was convicted in the United States District Court for the Southern District of New York, Preska, Chief Judge, of being a felon in possession of a firearm. Defendant appealed.

Holdings: The Court of Appeals held that:

- 1 defendant was not seized within meaning of the Fourth Amendment during interaction with police;
- 2 defendant lacked standing to challenge search of handbag in which gun was discovered; and
- 3 defendant's post-arrest statement was not inadmissible fruit of the poisonous tree.

Affirmed.

West Headnotes (3)

Change View

1 Arrest

Police officers' approach to defendant **and** their ensuing conversation with him, under the circumstances, was not a "seizure" within meaning of the Fourth Amendment, since interaction was akin to a casual, consensual encounter, given that officers did not touch defendant, display any weapons, receive any his possessions or identification, or give him any orders, but instead, they simply had asked



35

3511

35k60.4

35k60.4(2)

Arrest

On Criminal Charges

What Constitutes a Seizure or Detention

Particular cases

SELECTED TOPICS

Searches and Seizures

Standing to Object

Defendant Challenged Warrantless Search

Arrest

On Criminal Charges

Police Officer's Seizure of Defendant's Jacket

Secondary Sources

s 690:1. Case law developments

18C West's McKinney's Forms Criminal Procedure Law § 690:1

...In Moss v. Spitzer, 19 A.D.3d 599, 798 N.Y.S.2d 482 (2d Dep't 2005), leave to appeal denied, 5 N.Y.3d 714, 806 N.Y.S.2d 165, 840 N.E.2d 134 (2005), an Article 78 proceeding was brought in order to proh...

s 30:3. Standing to make motion

2 Criminal Procedure in New York § 30:3 (2d)

...Article 710 of the New York State Criminal Procedure Law sets forth those grounds where motions to suppress may be made, and it is on those specific grounds where a motion can be made. In People v. Lop...

s 173:17. Seizure of persons-What police conduct constitutes seizure

31 Carmody-Wait 2d § 173:17

...The safeguard against unreasonable seizure of the person applies not only to traditional arrests but also to brief detentions. For example, the stop of an automobile and the detention of its occupants ...

See More Secondary Sources

Briefs

Respondent's Brief On The Merits

2007 WL 1090397

Bruce Edward BRENDLIN, Petitioner, v. CALIFORNIA, Respondent.
Supreme Court of the United States
Apr. 09, 2007

...1. At 1:30 a.m. on November 27, 2001, sheriff's deputy Robert Brokenbrough observed a car with expired registration tags traveling on South Barrett Road in Sutter County, California. (JA 34-35, 49.) Dep...

BRIEF FOR THE UNITED STATES

1992 WL 512091

U.S. v. Padilla (Xavier V.)
Supreme Court of the United States
Dec. 17, 1992

...The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 960 F.2d 854. The oral rulings and minute orders of the district court (Pet. App. 22a-34a) are unreported. The judgment of the cou...

Brief for the Petitioner

2007 WL 832182

Bruce Edward BRENDLIN, Petitioner, v. THE STATE OF CALIFORNIA, Respondent.
Supreme Court of the United States
Mar. 05, 2007

...FN* Counsel of Record The simple question in this case is whether, for purposes

defendant for his identification
and what he was doing in the
neighborhood. U.S. Const.
Amend. 4.

2 Searches and Seizures

Defendant failed to
demonstrate that his rights
were violated by search of
handbag in which police officers
discovered a gun, and
therefore he lacked standing to
challenge search of the
handbag, where not only did
defendant lack ownership of the
handbag, but he did not
otherwise manifest a legitimate
expectation of privacy in it, as
he had given the handbag to
someone else and was
observed walking away from
the handbag and the other
person when police arrived.
U.S. Const. Amend. 4.



349

Searches and Seizures

349IV

Standing to Object

349k164

Particular concrete applications

3 Criminal Law

Defendant's post-arrest
statement could not be
considered fruit of the
poisonous tree given that he
was not stopped by police in
violation of the Fourth
Amendment. U.S. Const.
Amend. 4.



110

Criminal Law

110XVII

Evidence

110XVII(M)

Statements, Confessions, and
Admissions by or on Behalf
of Accused

110XVII(M)18

Effect of Prior Illegality

110k413.7

Illegal Arrest or Detention

110k413.8

In general

*21 Appeal from a judgment of the **United States** District Court for the Southern District of New York (Preska, C.J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Attorneys and Law Firms

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For Appellee: REBEKAH A. DONALESKI **AND** BRIAN R. BLAIS, Assistant **United States** Attorneys, for Preet Bharara, **United States** Attorney for the Southern District of New York.

PRESENT: AMALYA L. KEARSE, JOHN M. WALKER, Jr., PETER W. HALL, Circuit Judges.

SUMMARY ORDER

Following a bench trial before then-Chief Judge Preska, Defendant-Appellant **Andy Serrano** was found guilty of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He challenges a pre-trial ruling by Judge Duffy denying his motion to suppress evidence of the firearm **and** his post-arrest statement. We assume the parties' familiarity with the underlying facts, procedural history, **and** issues on appeal.

On appeal from a district court's ruling on a motion to suppress evidence, "we review legal conclusions *de novo* and findings of fact for clear error." **United States v. Freeman**, 735 F.3d 92, 95 (2d Cir. 2013). We also review *de novo* mixed questions of law **and** fact. *Id.* (citing **United States v. Lucky**, 569 F.3d 101, 105–06 (2d Cir. 2009)). We "pay special deference to the district court's factual determinations going to witness credibility." **United States v. Jiau**, 734 F.3d 147, 151 (2d Cir. 2013).

of the Fourth Amendment, a police officer who seizes a car by means of a traffic stop also seizes any passengers who are ...

See More Briefs

Trial Court Documents

Santiago v. City of New York

2002 WL 34681550
SANTIAGO, v. CITY OF NEW YORK, et al.
Defendant(s).
Supreme Court, New York.
Mar. 05, 2002

...Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion(s) and/or cross-motion(s), as indicated below: Upon the foregoing papers, the foregoing motion(s) [and/or cross...

Serrano first contends that the district court erred in determining that reasonable *22 suspicion existed to stop him. He asserts that he was seized within the meaning of the Fourth Amendment the moment police first approached him **and** that such a seizure was not supported by reasonable suspicion because it was based solely on an unreliable, anonymous tip. **Serrano** overlooks the fact that the district court found that he was not seized within the meaning of the Fourth Amendment until he was arrested **and** that there was probable cause for the arrest.¹

For the purposes of the Fourth Amendment, a police encounter becomes a seizure when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). "Not every encounter between a police officer **and** an individual is a seizure implicating the fourth amendment's protections." *United States v. Lee*, 916 F.2d 814, 819 (2d Cir. 1990). Indeed, "a police officer is free to approach a person in public **and** ask a few questions; such conduct, without more, does not constitute a seizure." *Id.* (citing *Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion of White, J.)); *see also United States v. Peterson*, 100 F.3d 7, 11 (2d Cir. 1996). In determining whether a seizure has occurred, this Court considers "the overall coercive effect of the police conduct." *Lee*, 916 F.2d at 819. "Examples of circumstances that might indicate a seizure ... would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 554, 100 S.Ct. 1870.

1 Here, the district court did not err in concluding that **Serrano** was not seized within the meaning of the Fourth Amendment until Officer Santiago was directed to arrest him. At the suppression hearing, **Serrano** testified that he was stopped when he was walking into a store **and** an officer—Officer Santiago—tapped him on the shoulder, directed him out of the store, **and** took him to the side of the building, where he was questioned. The district court found this testimony not credible, based in part on the fact that **Serrano's** affidavit in support of his motion to suppress did not include such an assertion **and** in part on the testimony of Officers Santiago **and** McLaurin that when they first saw **Serrano and** approach him, **Serrano** was standing by a fence. The district court held that the officers' approach to **Serrano and** their ensuing conversation with him in those circumstances—without touching him, or displaying weapons, or receiving any of his possessions or identification, or giving him any orders—was not a seizure within the meaning of the Fourth Amendment. We agree. Up to that point, the officers had simply asked **Serrano** for his identification **and** what he was doing in the neighborhood. This type of interaction between law enforcement **and Serrano** is akin to a casual, consensual encounter **and** is not a Fourth Amendment seizure. *See* *23 *United States v. Glover*, 957 F.2d 1004, 1009 (2d Cir. 1992) (concluding that it was "plain that no seizure had occurred" where police approached the defendant in a public place **and**, "in a non-threatening manner, asked [the defendant] certain questions, requested identification, **and** asked whether [he] would consent to have his bags searched for narcotics" while not displaying any "weapons ... **and** there was no physical contact between the officers **and** [the defendant]"). Under the circumstances presented here, a reasonable person would have felt free to terminate the encounter **and** leave. *Cf. Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991) ("[A] seizure does not occur simply because a police officer approaches an individual **and** asks a few questions.").

2 **Serrano** next argues that the district court erroneously concluded that he lacks standing to challenge the search of the handbag containing the gun. "When considering a claimed violation of Fourth Amendment rights, the burden is on the defendant to establish that his own rights under the Fourth Amendment were violated." *United States v. Paulino*, 850 F.2d 93, 96 (2d Cir. 1988). "In order to prevail on a contention that a search violated the Fourth Amendment, an accused must show that he had a legitimate expectation of privacy in a searched place or item." *United States v. Rahme*, 813 F.2d 31, 34 (2d Cir. 1987). While ownership **and** possession of the searched item are important considerations in determining whether a legitimate expectation of privacy exists, neither is dispositive. *Id.* "The absence of possession, however, may often result in a finding that an accused had no legitimate expectation of privacy because the absence of a right to exclude others from access is an important factor militating against a legitimate expectation of privacy." *Id.*

Here, **Serrano** failed to demonstrate that *his rights* were violated by the search of the handbag. First, as the district court noted, **Serrano's** evidence **and** claims concerning

ownership of the bag are thoroughly inconsistent **and** difficult to credit. In his affidavit in support of his motion to suppress, **Serrano** repeatedly referred to the handbag as though it belonged to Colon. In fact, he even directly referred to the handbag as “Christina’s.” By using language inconsistent with ownership, moreover, **Serrano’s** affidavit implies that he was deliberately attempting to distance himself from the handbag. While **Serrano** contends that although he may have been “non-committal on the ownership of the [handbag] containing the firearm” in his sworn affidavit supporting his motion to suppress **and** that he “unequivocally stated that he owned” the bag at the hearing on his motion, we nonetheless are required to afford great deference to the district court’s credibility determinations. *See Jiau*, 734 F.3d at 151. Because the court’s factual findings concerning ownership are largely based on **Serrano’s** lack of credibility **and** he has not demonstrated that such factual determinations are clearly erroneous, we will not disturb the district court’s conclusions in this regard. The district court properly concluded that **Serrano** did not establish ownership of the bag.

Second, not only did **Serrano** lack ownership of the bag, but he did not otherwise manifest an expectation of privacy in it. In particular, **Serrano** gave the bag to Colon **and** was observed walking away from the bag **and** Colon when the police arrived. *See, e.g., Rawlings v. Kentucky*, 448 U.S. 98, 105–06, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980) (holding that defendant lacked standing to challenge search of friend’s purse that he had placed narcotics in because he had not demonstrated a legitimate expectation of privacy in the purse). Considered in conjunction with **Serrano’s** ²⁴ lack of ownership, the district court properly determined that **Serrano** had not established a legitimate expectation of privacy in the handbag. **Serrano** thus lacks standing to contest the search of the bag.

3 Finally, **Serrano** contends that his post-arrest statement should have been suppressed as fruit of an illegal search **and** seizure. Because **Serrano** was not stopped in violation of the Fourth Amendment, however, his post-arrest statement cannot be considered tainted fruit. *Cf. United States v. Thompson*, 35 F.3d 100, 105 (2d Cir. 1994) (discussing that evidence “indirectly obtained through a Fourth Amendment violation may be excludable as ‘fruit of the poisonous tree’ ” (quoting *Wong Sun v. United States*, 371 U.S. 471, 484–87, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963))).

We have considered all of **Serrano’s** remaining arguments on appeal **and** find them to be without merit. For the foregoing reasons, the district court’s order denying his motion to suppress **and** the judgment of conviction are **AFFIRMED**.

All Citations

695 Fed.Appx. 20

Footnotes

- 1 We note that rather than challenge whether probable cause existed justifying his arrest, **Serrano** contends that the officers lacked reasonable suspicion to briefly detain **and** question him. Because we conclude that **Serrano** was not seized until the order was given to arrest him, however, we need not entertain this argument. In any event, because the decision to arrest **Serrano** was not made until *after* the officers observed the gun, at that time—because they believed (in light of the anonymous tip) that the gun belonged to both Christina Colon (**Serrano’s** associate) **and Serrano**—the officers had probable cause for **Serrano’s** arrest.

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Document

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