Court of Appeals and Second Circuit Disagree on Searches Incident to an Arrest

By Hon. Barry Kamins

The United States Court of Appeals for the Second Circuit recently rendered a decision dealing with searches incident to an arrest that squarely conflicts with a prior decision of the New York Court of Appeals. Which decision must a state court judge follow? What consequences will flow if a state judge ignores the federal decision? Finally, how can the conflict be resolved? This article will address these questions, which arose as a result of the Second Circuit's ruling in *U.S. v. Diaz*, (155-3776-cr, decided 4/18/17), which directly took issue with recent New York Court of Appeals precedent.

Before examining the current conflict over searches incident to an arrest, it is instructive to review a few prior disputes between these courts and how they were resolved. Twenty-six years ago, the New York Court of Appeals reminded state court judges that they are bound to follow the U.S. Supreme Court's interpretations of federal statutes and the federal Constitution. However, the Court also noted that the interpretation of a federal constitutional question by a lower federal court is not binding on state courts, although it may serve as useful and persuasive authority. Thus, if a conflict exists between the Second Circuit and the New York State Court of Appeals, a state judge is bound by the ruling of our state's highest court.

The analysis starts with *People v. Mealer*, 57 N.Y.2d 214 (1982). In *Mealer,* the defendant was under indictment for murder. The police received a report that the defendant was attempting to suborn perjury from a witness and instructed that witness to speak to the defendant, who offered the witness money to perjure himself. The Court of Appeals held that the defendant's right to counsel was not violated when the police arranged for the meeting between the witness and the defendant in which the defendant offered the witness money to change his story even though the defendant was represented by counsel at the time. In addition, the court held that evidence of the defendant's conduct could be offered at the murder trial to establish consciousness of guilt. The defendant was later convicted of murder and filed a petition for a federal writ of habeas corpus.

Two years later, the Second Circuit disagreed with the Court of Appeals and held that the defendant's right to counsel had been violated when the post-indictment statements were offered at the murder trial.[1] The court also held that the defendant's post-indictment statements could only be admitted at a separate trial for the crime of suborning perjury.

Thus, the Second Circuit's decision created a conflict because it interpreted the federal right to counsel more broadly than the Court of Appeals did and held that even if the police had a good faith basis to investigate the new crime—as the Court of Appeals had found—they were still interested in the indicted crime, which was intimately connected to it, and therefore could not seek to obtain statements from an indicted defendant.

The following year, a state trial judge was presented with the same issue that had divided the two courts. In *People v. Otero*, 127 Misc. 2d 628 (Sup. Ct., Kings Co. 1985), the prosecution sought to offer a police-arranged tape recording in which the defendant attempted to bribe a witness. The tape was made while the defendant was under indictment for murder. The court recognized that it was bound only to follow the decision by the Court of Appeals. However, it also recognized that if it admitted the bribery tape at the murder trial, the defendant would unquestionably prevail in a federal habeas proceeding on the strength of the Second Circuit decision. The court concluded that it was in the interest of all that if a conviction resulted from the trial, it should be immune from collateral attack. As a result, the court declined to follow the Court of Appeals ruling and precluded the introduction of the tape at the murder trial.

Later that year, the conflict was resolved when the issue was addressed by the U.S. Supreme Court. In *Maine v. Moulton*, 474 U.S. 159 (1985), the court, in adopting the Second Circuit's position, held that a defendant's right to counsel is violated when a defendant's post-indictment statements are introduced at trial, even though the state had legitimate reasons for recording these conversations to investigate possible uncharged offenses. However, the court also held that the introduction of the statements in a subsequent trial for the new crime would be permissible.

The Court of Appeals and the Second Circuit have disagreed on other occasions. In *People v. Lemmons*, 40 N.Y.2d 505 (1976), the Court of Appeals upheld the convictions of four defendants for gun possession premised, in part, on Penal Law Section 265.15(3). That section, known as the "car presumption," provides that, with certain exceptions, the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons occupying the vehicle.

The defendants challenged the constitutionality of the statute as applied in this case but the argument was rejected by the New York Court of Appeals. A petition was then filed for federal habeas relief. The Second Circuit, without

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deciding whether the presumption was constitutional as applied in this case, concluded that the statute was unconstitutional on its face. It held that the statute was overbroad because it could apply to individuals who had no rational connection to the car, such as hitchhikers.[2]

Once again, trial courts in this state found themselves in a quandary when presented with an issue that had divided the Second Circuit and our state's highest court. Several courts that were confronted with this issue recognized that they were not bound by the Second Circuit but took pains to explain why they were not adopting its finding that the statute was void on its face. One court found the statute unconstitutional as applied to the facts of the case[3] while another found the statute met the "as applied" test.[4] One court expressed its frustration in dealing with the conflict:

> It is apparent that the inevitable determination must be made by the Supreme Court. The problem is that such determination may be long coming, and arrests will be made under the presumption statute during such interim. The avoidance of coming to grips with the problem until such decision is rendered could be a judicial convenience, but it would be hardly equitable to place litigants in legal limbo to their mutual prejudice for an indefinite period.[5]

The following year, the United States Supreme Court resolved the conflict. In reversing, it held that the Second Circuit should not have decided the facial validity of the statute; rather, it should have only decided an "as applied" challenge. The Court upheld the statute as constitutional because, as applied to the facts, the permissive presumption of possession was entirely rational.[6]

In 2017, the conflict that divides the two courts is the search-incident-to-an-arrest doctrine. The doctrine serves two interests: protecting the safety of police officers and safeguarding any evidence of the offense that an arrestee might conceal or destroy.

There are two basic requirements for a search incident to a lawful arrest. First, the search must be contemporaneous in time with the arrest because the validity of the search depends on unity of time. The Court of Appeals has held that the arrest and the search must be "nearly simultaneous."[7]

The second requirement for this search is spatial—the search must be limited to the area within the arrestee's immediate control. This area is commonly referred to as the "grabbable area" because it is within this space that the arrestee could reach for evidence, a weapon, or fruits of the crime.[8] Obviously, the "grabbable area" can never be measured in precise feet or inches; its boundaries must be reasonable.[9] As might be expected, different courts have reached different conclusions as to what is a reasonable definition of the "grabbable area."

The New York Court of Appeals has emphasized that there must be a "robust" evidentiary showing of exigent circumstances to justify a search of a closed container incident to an arrest. In *People v. Jimenez*,[10] the court reiterated that the prosecution must clearly establish exigent circumstances before invoking this exception. The Court reminded prosecutors that they can establish exigent circumstances through a number of factors including the nature of the offense, testimony by the police that they feared for their safety or for the destruction of evidence or, finally, other objectively reasonable facts that establish the officer's concerns.[11] Courts have begun to apply *Jimenez* in determining the existence of exigent circumstances.[12]

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The issue that now divides the Court of Appeals from the Second Circuit arose in *People v. Reid*,[13] in which a police officer had probable cause to arrest a motorist for drunk driving but chose not to do so. The officer then asked the motorist to step out of the car and patted him down. In the course of doing so, he found a switchblade knife in the motorist's pocket. The motorist was then arrested.

The People argued that the pat down was incident to the arrest for the drunk driving charge, arguing that a search incident to an arrest may occur before the formal arrest, when (1) the police have probable cause to arrest before they begin the search and (2) the search is nearly contemporaneous with the formal arrest.

The Court of Appeals rejected that argument, holding that the search-incident-to-an-arrest doctrine requires proof that at the time of the search an arrest has already occurred or is about to occur. Where no arrest has yet taken place, the officer must have intended to make one if the doctrine is to be applied. Thus, a search must be incident to an actual arrest, not just to probable cause that might have led to an arrest but did not.

The Court noted that its decision was predicated on *Knowles v. Iowa*,[14] in which an officer stopped the defendant for speeding, had probable cause to arrest him under Iowa law, but chose to issue him a citation instead. The officer then searched the car, found marijuana and arrested

the driver. The Supreme Court held that the search was unlawful as violative of the search-incident-to-an-arrest doctrine.

The Second Circuit has now weighed in on this issue and held that the Court of Appeals misinterpreted *Knowles*. In *U.S. v. Diaz*, (155-3776-cr, decided 4/18/17), a police officer was conducting a vertical patrol in a trespass affidavit building. Upon entering the building the officer smelled marijuana and she proceed to climb the stairs to the third floor landing. She observed three men, one of whom was Diaz, who was sitting next to a bottle of vodka and holding a red plastic cup. As she approached Diaz, she saw clear liquid in the cup and smelled what seemed to be alcohol.

The officer testified that she did not initially intend to arrest Diaz, but only issue a summons for violating the open-container law, a violation. She did not, however, feel safe confronting Diaz while he was seated and ordered him to stand against the wall and produce his identification. Diaz stood and then, as if to retrieve something, fumbled with his hands in his jacket pocket and rearranged his waistband. Fearing for her safety, the officer frisked Diaz and felt a bulge in his pocket. She opened the pocket and discovered a loaded firearm. The defendant was then arrested.

In upholding the search as incident to an arrest, the Second Circuit disagreed with the New York Court of Appeals in its interpretation of *Knowles*. According to the Second Circuit, the New York court ignored the fact that an officer who stops a person to issue a citation faces an evolving situation in which events develop and new information comes to light. As these events develop, a police officer is entitled to change her course of action. In addition, the Second Circuit concluded that the New York court ignored the fact that the search doctrine is a bright line rule and does not require an analysis of a police officer's intent at the time of arrest.

The Second Circuit noted that in *Knowles* the search occurred *after* a citation had been issued. Thus, the Supreme Court was holding, according to the Second Circuit, that the search-incident-to-an-arrest would only be unlawful where an officer has completed the encounter by issuing a citation instead of making an arrest. No citation had been issued by the officer before Diaz was frisked; thus, the search was lawful. Similarly, in *Reid*, no summons had been issued to the driver and, therefore, the ensuing search was lawful under the Second Circuit's analysis.

Thus, the Second Circuit concluded that *Reid* was decided incorrectly. Under the Second Circuit's holding, a search incident to an arrest is lawful when (1) a police officer has probable cause to believe a crime has been committed; (2) the officer does not intend to arrest the suspect when he begins the search but the situation continues to evolve; and (3) a custodial arrest follows quickly after the search. In addition, it is irrelevant whether, at the time of the search, an officer intended to arrest the individual or merely issue a summons.

The split between the Second Circuit and the New York Court of Appeals could be resolved in a number of ways. The Second Circuit could grant an *en banc* hearing to revisit the issue or the Supreme Court could grant *certiorari*, as it has in the past to resolve similar conflicts.

Should the conflict not be resolved, however, that would leave different rules in state court as opposed to federal court—something to be avoided. That could produce a situation in which a defendant wins a motion to suppress in state court under *Reid* but loses a subsequent claim in federal court pursuant to 42 U.S.C. 1983, under *Diaz*. Hopefully a solution to this conflict can be found.

Endnotes

1. *Mealer v. Jones*, 741 F.2d 1451 (2d Cir. 1984).
2. *Allen v. County Court, Ulster County* 568 F.2d 998 (1977).
3. *People v. Alston*, 94 Misc.2d 89 (Supreme Court, Bronx Co. 1978).
4. *People v. Williams*, 93 Misc.2d 93 (Supreme Court, Queens Co. 1978).
5. *Id*.
6. *County Court of Ulster Co. v. Allen*, 442 U.S. 140 (1979). The two courts have disagreed on other issues as well, e.g. whether a defendant who knowingly and voluntarily pleads guilty may collaterally attack the conviction on the ground that he had been coerced into making a confession and that the existence of the coerced confession induced him to enter the plea of guilty. Ultimately the Supreme Court agreed with the position of the New York Court of Appeals that a defendant cannot attack a guilty plea on that ground. *McMann v. Richardson*, 397 U.S. 759 (1970). More recently, the courts have disagreed on the issue of effective appellate counsel and, specifically, the application of the standard governing ineffective assistance claims. See, e.g. *Ramchair v. Conway*, 601 F.3d 66 (2d Cir. 2010); *People v. Ramchair*, 8 N.Y.3d 313 (2007).
7. *People v. Evans*, 43 N.Y.2d 160, 400 N.Y.S.2d 810, 371 N.E.2d 528 (1977).
8. *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); *People v. Temple*, 165 A.D.2d 748, 564 N.Y.S.2d 271 (1st Dep't 1990) (sweater was within "grabbable area").
9. *People v. Lucas*, 53 N.Y.2d 678, 439 N.Y.S.2d 99, 421 N.E.2d 494 (1981) (search of entire motel room unreasonable); *People v. Crandall*, 181 A.D.2d 687, 581 N.Y.S.2d 215 (2d Dep't 1992) (area beneath couch was "grabbable area"); *People v. Johnson*, 178 A.D.2d 490, 577 N.Y.S.2d 421 (2d Dep't 1991) (dresser was within arm's reach); *People v. Wainright*, N.Y.L.J. 3/10/92 (N.Y. Crim. Ct. 1992) (area underneath stereo rack not "grabbable area").
10. *People v. Jimenez*, 22 N.Y.3d 717, 985 N.Y.S.2d 456, 8 N.E.3d 831 (2014).
11. *Matter of Kenneth S.*, 27 N.Y.3d 926, 28 N.Y.S.3d 677 (2016).
12. *People v. Gray*, 143 A.D.3d 909 (2d Dep't 2016); *People v. Diaz*, 143 A.D.3d 559 (1st Dep't 2016); *People v. Anderson*, 142 A.D.3d 713, 37 N.Y.S.3d 151 (2d Dep't 2016); *People v. Ortiz*, 141 A.D.3d 872, 35 N.Y.S.3d 536 (3d Dep't 2016); *People v. Wilcox*, 134 A.D.3d 1397, 22 N.Y.S.3d 717 (4th Dep't 2016); *People v. Alvarado*, 126 A.D.3d 803, 5 N.Y.S.3d 271 (2d Dep't 2015); *People v. Morales*, 126 A.D.3d 43, 2 N.Y.S.3d 472 (1st Dep't 2015); *People v. Febres*, 118 A.D.3d 489, 987 N.Y.S.2d 133 (1st Dep't 2014); *Matter of Tonay C.*, 119 A.D.3d 560, 987 N.Y.S.2d 893 (2d Dep't 2014); *People v. Miranda*, 44 Misc. 3d 140A, 999 N.Y.S.2d 798 (App. Term 1st Dep't 2014), *aff'd*, 27 N.Y.3d 931, 30 N.Y.S.3d 600 (2016).
13. *People v. Reid*, 24 N.Y.3d 615 (2014).
14. *Knowles v. Iowa*, 525 U.S. 113 (1998).