COURT OF APPEALS OF NEW YORK

People v. Moore[1]
(decided February 21, 2006)

Calvin Moore was convicted of criminal weapon possession in the second degree.[2] The Kings County Supreme Court rejected Moore's contention that the police officers' actions constituted an unjustified seizure for want of reasonable suspicion, and thus violated the Fourth and Fourteenth Amendments of the United States Constitution[3] and article I, section 12 of the New York State Constitution.[4] Accordingly, Moore's motion to suppress the evidence was denied.[5] On appeal, the appellate division upheld the conviction holding that Moore's conduct warranted a forcible detention.[6] Thereafter, the New York Court of Appeals reversed the judgment, holding that although the anonymous tip supported the police officers' common-law right of inquiry, Moore's ensuing conduct did not satisfy the requisite "reasonable suspicion" to warrant the gunpoint seizure.[7]

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[1] 847 N.E.2d 1141 (N.Y. 2006).

[2] People v. Moore, 785 N.Y.S.2d 536 (App. Div. 2d Dep't 2004).

[3] U.S. CONST. amend. IV states in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."; U.S. CONST. amend. XIV, § 1 states in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

[4] N.Y. CONST. art. I, § 12 provides in pertinent part: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ."

[5] *Moore*, 847 N.E.2d at 1142.

[6] *Moore*, 785 N.Y.S.2d at 537 ("[T]he officers possessed reasonable suspicion for the forceable [sic] stop and frisk.").

[7] *Moore*, 847 N.E.2d at 1143-44.

On the morning of November 12, 1997, an anonymous phone tip informed police of "a dispute involving a male Black with a gun, described as approximately 18 years of age, wearing a gray jacket and red hat."[8] Upon arrival at the scene, "within approximately one minute of receiving the radio call[,]"[9] the two responding police officers saw no dispute, but did see defendant Moore, who matched the aforementioned description "with no similar individuals in the vicinity."[10] After exiting their marked vehicle, the officers began walking toward Moore, who began to walk away.[11] The officers then drew their guns and yelled "police, don't move."[12] Moore continued to walk away before stopping a short distance later at a closed gate.[13] The officers then ordered Moore to put his hands up.[14] Only after making a movement toward his waistband did Moore comply.[15] A subsequent frisk resulted in the recovery of a loaded gun.[16]

The appellate division affirmed the denial of Moore's motion

> Indeed, the very right to be let alone-the right of citizens not to be stopped at gunpoint by police, based on anonymous tips-is the distinguishing factor between the level of intrusion permissible under the common-law right of inquiry and the right to stop forcibly. If merely walking away from the police were sufficient to raise the level of suspicion to reasonable suspicion-and a suspect who attempted to move could be required to remain in place at the risk of forcible detention- the common-law right of inquiry would be tantamount to the right to conduct a forcible stop and the suspect would be effectively seized whenever only a common-law right of inquiry was justified.

[8] *Id*. at 1141.
[9] *Id*.
[10] *Id.* at 1142.
[11] *Id*.
[12] *Moore*, 847 N.E.2d at 1142.
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] *Moore*, 785 N.Y.S.2d at 537.

to suppress, reasoning that the reasonable suspicion requirement was satisfied because Moore reached toward his waistband, which thus validated the "forceable [sic] stop and frisk[.]"[17] Notwithstanding, the New York Court of Appeals reversed, reasoning that both the officers' gunpoint seizure upon arrival at the scene and the subsequent frisk constituted forcible stops and detentions—the latter of which occurred prior to the reasonable suspicion created by Moore's reach toward his waistband.[18] Furthermore, the court explained that in the absence of indicia validating the tip's veracity and the informant's reliability, the anonymous tip only merited the common-law right of inquiry, and was thus insufficient to justify the first seizure.[19]

The *Moore* court appropriately relied on *Florida v. J. L.*,[20] where the United States Supreme Court unanimously held that an anonymous tip is insufficient to justify a stop and frisk absent an affirmative averment by the informant with which to corroborate the tip's reliability, or some other "indicia of reliability."[21] In *J. L.*, an anonymous informant reported that "a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun."[22] The police officers arrived at said bus stop and merely saw a person matching the description.[23] Without any corroboration or reason to

[17] *Id.*

[18] *Moore*, 847 N.E.2d at 1142.

[19] *Id.* at 1143 (holding that the tip "was insufficient to afford the police reasonable suspicion of criminal activity" because it "did not provide any predictive information.").

[20] 529 U.S. 266 (2000).

[21] *Id.* at 269.

[22] *Id.* at 268.

[23] *Id.*

suspect criminal activity, the officers "told him to put his hands up on the bus stop, frisked him, and seized a gun from J. L.'s pocket."[24] The Court distinguished an anonymous tip that articulates the subject's identity from an anonymous tip that sets forth a basis by which to substantiate its reliability *vis a vis* independent corroboration; *J. L.* fell under the former.[25] The preservation of Fourth Amendment protections makes corroboration compulsory to safeguard from potential harassment, intrusiveness, and embarrassment.[26] The Court reasoned that subsequent revelations do not retroactively validate a search because reasonable suspicion cannot support detention *nunc pro tunc*.[27]

In *Moore*, the New York Court of Appeals applied a "graduated four-level test"[28] that the court first set forth twenty years earlier in *People v. De Bour*.[29] In *De Bour*, the court held that a search and seizure, prompted by an anonymous tip, was invalid and

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[24] *Id.*

[25] *J. L.*, 529 U.S. at 272.

> An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

[26] *See id.* (explaining that an exception otherwise could lead to targeting "person[s] simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun.").

[27] *Id.* at 271. The court clarified that the mere fact "[t]hat the allegation . . . turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for suspecting *J. L.* of engaging in unlawful conduct: The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search." *Id. Nunc pro tunc* is the Latin term meaning "now for then." BLACK'S LAW DICTIONARY 1100 (8th ed. 2004).

[28] *Moore*, 847 N.E.2d at 1142.

[29] 352 N.E.2d 562 (N.Y. 1976).

deficient of reasonable suspicion when said tip provided neither exigencies nor extrinsic circumstances for corroboration.[30] Louis De Bour was approached on the street by two police officers who "inquired as to what he was doing in the neighborhood,"[31] and subsequently "noticed a slight waist-high bulge in defendant's jacket."[32] De Bour complied with the officers' request to unzip his jacket and a revolver was found "protruding from his waistband," for which he was arrested.[33]

The *De Bour* court developed a four-level test that circumscribed the parameters of permissible police conduct and the correlating requisite degrees of justification.[34] The first, and least stringent level, is the request for information, which requires "some objective credible reason for that interference not necessarily indicative of criminality," and merely permits its namesake.[35] The second level is the "common-law right to inquire," which requires a founded suspicion of criminality, and permits the police to "interfere with a citizen to the extent necessary to gain explanatory information" but prohibits a forcible seizure.[36] The third level authorizes a forcible stop and detention and requires reasonable suspicion of criminal conduct.[37] The fourth level is arrest and

[30] *Id.* at 572.
[31] *Id.* at 565.
[32] *Id.*
[33] *Id.*
[34] *De Bour*, 352 N.E.2d at 571-72.
[35] *Id.*
[36] *Id.* at 572 (citing People v. Cantor, 324 N.E.2d 872, 878 (N.Y. 1975); People v. Rosemond, 257 N.E.2d 23, 26 (N.Y. 1970); People v. Rivera, 201 N.E.2d 32, 35 (N.Y. 1964)).
[37] *Id.* (citing N.Y. CRIM PROC. LAW § 140.50 (McKinney 2006); Terry v. Ohio, 392 U.S.

requires the officer to have "probable cause to believe that person has committed a crime . . . ."[38]

In applying the four-part test, the *De Bour* court found that the police conduct clearly amounted to a forcible detention—which falls under the third level—but that there was no reasonable suspicion of criminality to support the detention for two reasons: (1) the officers conceded that immediately upon seeing the defendant, they failed to search for any other people that may have fit the informant's description,[39] and (2) the defendant's "conduct was neither suspicious nor furtive . . . ."[40] Both reasons speak to the lack of, and necessity for, grounds for reasonable suspicion.

Additionally, the *Moore* court relied on *People v. Holmes*[41] to elucidate the potentially obscure distinctions regarding what conduct, and the extent to which that conduct is permissible amongst the various levels. In *Holmes*, the court held that the defendant's presence at a "known narcotics location[,]" with "an unidentified bulge in the pocket of his jacket[,]" followed by his flight, did not justify police pursuit.[42] Under *De Bour*, the standard for pursuit is level three—a forcible stop and detention—and therefore requires law enforcement to have "reasonable suspicion that a crime has been, is being, or is about to be committed."[43] However, the defendant's

1, 30 (1968); *Cantor*, 324 N.E.2d 872, 878 ("The minimum requirement for a lawful detentive stop is a founded suspicion that criminal activity is afoot.")).

[38] *Id*. (citing N.Y. CRIM PROC. LAW § 140.10).

[39] *De Bour*, 352 N.E.2d at 571.

[40] *Id*.

[41] 619 N.E.2d 396 (N.Y. 1993).

[42] *Id*. at 398.

[43] *Id*. at 397.

conduct, the court explained, prior to the pursuit was equivocal and did not amount to reasonable suspicion of criminal activity that could justify pursuit.[44] The court reasoned that if equivocal circumstances "could combine with flight to justify pursuit, then in essence the right to inquire would be tantamount to the right to seize . . . ."[45] However, circumstances that could give rise to reasonable suspicion include the "exchanging [of] a small plastic bag for money,"[46] or "removing a Hide-a-Key box, known to be used as a drug stash."[47]

In conclusion, *People v. Moore* illustrates that the protections afforded by the New York State Constitution, respecting the adequacy of anonymous tips, mirror those of the United States Constitution. The New York Court of Appeals applied the federal standard set forth in *J. L.* to both of the two seizures in *Moore*—the first being the gunpoint seizure and the second being the ensuing frisk. With respect to the gunpoint seizure, the court applied the federal standard set forth in *J. L.* finding that such a seizure (level three under *De Bour*) required reasonable suspicion.[48] Thus, Moore's failure to comply with the police officers' initial command to halt was irrelevant because his constitutional protections, under both the federal and New York standards, were already violated *vis a vis* the first seizure. The court rejected the state's argument that the anonymous tip supported the reasonable suspicion requirement

[44] *Id.*
[45] *Id.* at 398.
[46] *Holmes*, 619 N.E.2d at 398 (citing People v. Matienzo, 609 N.E.2d 138 (N.Y. 1993)).
[47] *Id.* (citing People v. Martinez, 606 N.E.2d 951 (N.Y. 1992)).
[48] *Moore*, 847 N.E.2d at 1142.

because the tip failed to "provide any predictive information . . . ."[49] A well reasoned dissent by Justice Smith agreed that neither the anonymous tip nor Moore's flight, when independently considered, provided reasonable suspicion.[50] However, Justice Smith reasoned that "it does not logically follow that suspicion is unreasonable when both grounds exist together."[51] The dissent went on to explain that society's interest outweighs the "temporary interference with [the defendant's] liberty" when these grounds are conjunctively considered.[52]

Although the facts of *J. L.* are strikingly similar to those of *Moore*, a considerable distinction exists in that Moore fled, whereas *J. L.* did not. It remains to be seen whether or not flight, in combination with the circumstances of the case at bar, could constitute reasonable suspicion under the federal standard. Under current New York jurisprudence, it clearly does not.

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[49] *Id*. at 1143.
[50] *Id*. at 1145 (Smith, J., dissenting).
[51] *Id*.
[52] *Id*.