ARTICLES

THE DE BOUR/MCINTOSH LESSON ON THE IMPORTANCE OF STATE COMMON LAW

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From the inception of our American democratic form of governance, state constitutions have historically reflected the concerns and beliefs of their citizens, evidenced by the fact that eighteen state constitutions predated and influenced the drafting of our federal Constitution.1 I believe that this early desire to retain significant local control over governmental affairs explains, in part, why we have fifty state governments rather than an exclusively federal form of governance. In many instances, the language used in state constitutions with reference to certain rights and obligations is broader or more specific than what is contained in the federal Constitution, and often there may be no federal counterpart for certain subjects.2 This is clearly the case in New York where the length, the spectrum of subject matter, and the complexity of provisions far exceed that of the federal Constitution.3 As a result, the New York Court of Appeals has been a national leader in recognizing the benefits that can be derived from examining the nature of rights and the boundaries of protections addressed in a state constitution.4

When considering the panoply of rights enjoyed in the United States, most people think of the Bill of Rights and landmark U.S. Supreme Court cases, rather than New York state courts and our

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3 See Kaye, supra note 1, at 850–51.
state constitution and common law. For example, a citizen’s right to be free from unreasonable police searches and seizures is most closely associated with the Fourth Amendment to the U.S. Constitution. But federal court interpretations of Fourth Amendment protections only extend so far; a person cannot rely on the Fourth Amendment in the context of an investigatory police encounter that does not rise to the level of a seizure. This is one area where states can extend—and New York has seen fit to provide—greater rights within its borders than those guaranteed by the federal Constitution. As former Chief Judge Judith Kaye of the New York Court of Appeals described, there is a “floor of federal constitutional rights as defined by the United States Supreme Court,” but states can rise above that floor by interpreting their own common law and state constitutions to amplify those rights.

When appropriate, the Court of Appeals has relied on our well-established common-law traditions and the New York State Constitution in defining the legal parameters of governmental actions, particularly in situations involving police conduct. I was indoctrinated in the importance of the common law within months of my arrival at the New York Court of Appeals in connection with police activity that occurred in my own county. By contrasting two cases involving so-called “bus sweeps,” I hope to highlight the evolving relationship between federal and state judicial interpretations of civil rights protections.

In *Florida v. Bostick*, the U.S. Supreme Court in 1991 held that armed narcotics officers had legal authority to question a bus passenger without any articulable suspicion, so long as “a reasonable passenger would feel free to decline the officers’ requests or otherwise terminate the encounter.” Ten years later, in *People v. McIntosh*, the New York Court of Appeals applied precedent grounded in state common law and Article I, Section 12 of the state

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7 See *id*.
9 *Id.* at 847.
12 *Id.* at 429.
constitution in concluding that the police could not request that a bus passenger produce a ticket and identification without an objective, credible reason based on the conduct of the passenger. Consequently, New Yorkers enjoy greater protection from arbitrary police questioning in this context than residents of states that adhere to the federal rule.

I. **BOSTICK AND THE FEDERAL JUDICIARY’S APPROACH TO BUS SWEEPS**

The facts of *Florida v. Bostick* arose from a drug interdiction program conducted by the Broward County Sheriff’s Department in Florida. As part of this initiative, officers would “routinely board buses at scheduled stops and ask passengers for permission to search their luggage.” On one occasion, two officers, one of whom carried a pistol in a zippered pouch, boarded a bus in Fort Lauderdale and asked Terrance Bostick, “admittedly without articulable suspicion,” to produce his ticket and identification. After reviewing the documents and finding no apparent problem, the officers asked Bostick to consent to a search of his luggage. After he apparently consented to the search, the officers found cocaine in one of his bags and arrested him on drug trafficking charges. The trial court denied Bostick’s motion to suppress the cocaine on Fourth Amendment grounds and the Florida District Court of Appeal affirmed but certified a question to the state’s highest court. The Florida Supreme Court reversed, determining that “a reasonable passenger would not have felt free to leave the bus to avoid questioning,” and that the Sheriff’s Department’s practice of boarding buses to seek permission to search passengers’

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14 N.Y. CONST. art. I, § 12. The first paragraph of Article I, Section 12 is identical in substance to the Fourth Amendment, providing: “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” *Id.*

15 McIntosh, 755 N.E.2d at 333.


17 *Id.*

18 *Id.* at 431 (quoting Bostick v. State, 554 So. 2d 1153, 1154 (1989)).

19 Bostick, 501 U.S. at 431–32.

20 There was some disagreement on this point, but the trial court determined as a matter of fact that Bostick had given consent; the appellate courts, including the U.S. Supreme Court, deferred to that finding. *Id.* at 432.

21 *Id.* at 429.

22 *Id.*
bags was per se unconstitutional.23

The U.S. Supreme Court granted review to consider whether this sort of police encounter on a bus constitutes a seizure for Fourth Amendment purposes.24 In his argument, Bostick relied on the test enunciated in Michigan v. Chesternut25 for deciding whether a Fourth Amendment seizure occurred, urging that the appropriate standard was whether “a reasonable person would have believed that he was not free to leave.”26 Bostick asserted that he did not feel free to leave the bus since he was seated with a police officer standing over him, he had nowhere else to go while inside the bus, and if he exited the bus, he would have been stranded in Fort Lauderdale without his luggage.27 Writing for the majority, Justice Sandra Day O’Connor ruled: “In such a situation, the appropriate inquiry is whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.”28 The Court did not determine whether a seizure had occurred, but remanded the case so the Florida courts could “evaluate the seizure question under the correct legal standard.”29 The majority opinion hinted, however, that a seizure had not occurred by noting “that the officers did not point guns at Bostick or otherwise threaten him and that they specifically advised Bostick that he could refuse consent.”30

Bostick remains a key case in Fourth Amendment jurisprudence. In the 2007 case, Brendlin v. California,31 the U.S. Supreme Court relied upon Bostick in concluding that a passenger in an automobile pulled over by the police had been seized for Fourth Amendment purposes.32 And in 2015, the Second Circuit Court of Appeals considered Bostick in commenting that “the ‘free to leave’ test may not be the best measure of a seizure where a person has no desire to leave the location of a challenged police encounter,”33 and concluded that a seizure occurs where an official uses physical force to eject someone from a public area and intentionally restrains the person

23 Id.
24 Id. at 433.
26 Id. at 573 (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)).
27 Bostick, 501 U.S. at 435.
28 Id. at 436.
29 Id. at 437.
30 Id.
32 Id. at 256–57.
33 Salmon v. Blesser, 802 F.3d 249, 253 (2d Cir. 2015) (quoting Bostick, 501 U.S. at 435).
and controls his movements. Bostick was certainly the foremost federal authority on the Fourth Amendment’s application to bus sweeps when People v. McIntosh was heard by the New York Court of Appeals in 2001.

II. McIntosh, De Bour, and New York’s Recognition of Rights More Expansive Than Those Guaranteed by the Federal Constitution

The facts of People v. McIntosh were strikingly similar to those of Bostick. An Albany County Sheriff’s Department investigator and two other officers from his department boarded a bus that had stopped in the city of Albany on a trip that originated in New York City. As part of a drug interdiction effort, the investigator asked all passengers to produce bus tickets and identification. The investigator saw Rawle McIntosh and his female companion push a black object between them. After obtaining consent to search McIntosh’s suitcase, the investigator discovered a digital scale. When McIntosh and his companion stood up, the investigator noticed a black jacket on McIntosh’s seat. In the jacket’s pocket was more than two ounces of cocaine.

Under Bostick, the only relevant inquiry for Fourth Amendment purposes would have been whether McIntosh felt free to refuse the officers’ requests and terminate the encounter. But, under New York law, the validity of a police encounter had since 1971 been evaluated using the four-level framework established by the Court of Appeals in People v. De Bour.

The first two De Bour levels regulate police conduct that falls short of a Fourth Amendment seizure. Level I concerns a police officer’s approach of a citizen to request basic information, such as identification or destination. Such a request “is permissible when there is some objective credible reason for that interference not

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54 Salmon, 802 F.3d at 255.
56 Id.
57 Id.
58 Id.
61 See id. at 572. Level II, the “common-law right to inquire, is activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion in that a policeman is entitled to interfere with a citizen to the extent necessary to gain explanatory information.” Id. Levels III and IV involve, respectively, a forcible stop and detention based on reasonable suspicion and an arrest based on probable cause. Id.
62 Id. at 571–72.
necessarily indicative of criminality.” In *De Bour*, the Court of Appeals held that the police had an objective, credible reason for making a Level I inquiry because the street encounter “occurred after midnight in an area known for its high incidence of drug activity,” and only after Louis De Bour “conspicuously crossed the street to avoid walking past the uniformed officers.”

Based on *De Bour*, it was unnecessary for the Court of Appeals to reach the issue of whether McIntosh had been seized or felt free to refuse the officers’ requests. Because the investigator engaged in a Level I *De Bour* inquiry when he asked all the bus passengers to produce their tickets and identification, he needed an objective, credible reason for posing that question. The only explanation offered by the People was that the bus trip originated in New York, which is “known as a source city for narcotic drugs.” The unanimous Court of Appeals concluded: “In the absence of any conduct by a passenger or other basis giving rise to a particularized reason for the encounter, the request of [fifteen] passengers to produce documentation did not meet the *De Bour* standard.” Therefore, the ensuing search of McIntosh’s bag and jacket was also unlawful.

In comparing the analysis of the two opinions under the New York standard established in *De Bour* and applied to bus sweeps in *McIntosh*, the Broward County Sheriff’s Department’s questioning of Terrance Bostick undoubtedly would have been found improper. The officers admitted they had no articulable suspicion for approaching Bostick. A system that permits the police to question bus riders for no good reason would also lead to allowing the police to question citizens in other contexts. Justice Thurgood Marshall made this point in his *Bostick* dissent, noting that one officer involved in another case had openly admitted that he considered race when deciding which travelers to approach. As Justice

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43 Id.
44 Id. at 570.
46 See id. at 331 (“It is well settled that when an officer asks an individual to provide identification or destination information during a police-initiated encounter, the request for information implicates the initial tier of *De Bour* analysis.”).
47 Id. at 332.
48 Id.
49 Id. at 333.
50 See id. at 331 (citing the criteria for bus sweeps set out in *De Bour*). See also *Bostick*, 501 U.S. at 431–32 (explaining the bus sweep that occurred prior to Bostick's arrest).
51 *Bostick*, 501 U.S. at 441 (Marshall, J., dissenting).
52 Id. at 441 n.1.
Marshall aptly characterized the potential consequences, “the basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be inarticulable than unspeakable.”

Today, sixteen years after the decision in McIntosh, De Bour and McIntosh remain vital guideposts when New York courts rule on the legality of police conduct. In October 2015, the New York Court of Appeals decided a case involving a Level I De Bour inquiry, and the standard was reaffirmed—the officer’s request must “be supported by an objective, credible reason, not necessarily indicative of criminality.”

McIntosh has been extended well beyond its original application to bus sweeps. One particularly salient aspect of McIntosh was its observation that “[t]he fact that an encounter occurred in a high crime vicinity, without more,” was insufficient to justify even a Level I De Bour inquiry. In People v. Johnson, the Appellate Division, First Department, relied on this statement in holding that the police could not question a defendant just because they found him in a drug-prone New York City Housing Authority building. In another case, the First Department found that there was no objective, credible reason for police officers to approach a defendant and his female passenger in a legally parked car, even though the area was “known for narcotics activity and prostitution.”

Even arguably suspicious behavior may not be sufficient to justify a Level I inquiry if the behavior is subject to an innocuous explanation. For instance, the Appellate Division, Second Department, determined that officers lacked an adequate basis to approach defendant’s car even though they observed him remove something from the dashboard and throw it onto the floor of the

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53 Id.
54 People v. Barksdale, 41 N.E.3d 1111, 1113 (N.Y. 2015) (quoting People v. Moore, 847 N.E.2d 1141, 1142 (N.Y. 2006)). Under the particular circumstances of this case, the Court ruled the police had an objective, credible reason to approach the defendant. The officers spotted the defendant standing in the lobby of an apartment building, an area that was “restricted by signage and a lock.” Id. The building was also enrolled in the trespass affidavit program (TAP), which allows the police to patrol buildings in the program, searching for trespassers and others committing crimes. Id. at 1112.
55 In 2012, the Court of Appeals extended the De Bour framework to traffic-stop cases. See People v. Garcia, 983 N.E.2d 259, 259 (N.Y. 2012).
56 People v. McIntosh, 775 N.E.2d 329, 332 (N.Y. 2001).
58 Id. at 551.
vehicle. Likewise, an officer was found to lack justification to approach a defendant’s automobile where the officer watched the defendant, from a distance of about fifty yards, sitting in a parked car and smoking something. From that distance, the officer was not able to determine if the defendant was smoking tobacco or marijuana.

CONCLUSION

The De Bour/McIntosh precedent illustrates how state courts can interpret state common law and state constitutional provisions to extend civil rights protections that rise above the minimum floor established by the federal Constitution and the U.S. Supreme Court. Bostick and other Fourth Amendment cases in New York provide significant protection for citizens once they have been subjected to a search or seizure, but there is a wide range of police conduct that may infringe on a citizen’s liberty without rising to the level of a Fourth Amendment seizure. In that realm, state courts can use their common law and state constitutional protections to regulate law enforcement to ensure that people are not questioned or detained for arbitrary reasons.

61 Id.
63 Id.