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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

NO. 9

TYRONE D. GORDON,

Respondent.

20 Eagle Street
Albany, New York
January 7, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 9, The People of the
3 State of New York v. Tyrone Gordon.

4 (Pause)

5 CHIEF JUDGE DIFIORE: Good afternoon, counsel.
6 This is appeal number 9, The People of the State of New
7 York v. Tyrone Gordon.

8 Counsel?

9 MR. ARCIDIACONO: Good afternoon. May it please
10 the court, my name is Guy Arcidiacono. I'm appearing of
11 counsel to Timothy B. Sini, the District Attorney of
12 Suffolk County.

13 At the outset, Your Honor, with your permission,
14 I'd like to reserve two minutes of time for rebuttal.

15 CHIEF JUDGE DIFIORE: You have two minutes, sir.

16 MR. ARCIDIACONO: Thank you.

17 The hearing court's order grants a greater
18 expectation of privacy in a search of the curtilage outside
19 the residence - - -

20 JUDGE FEINMAN: Chief, can we ask - - - can we
21 ask - - -

22 MR. ARCIDIACONO: - - - than a search of - - -

23 JUDGE FEINMAN: - - - counsel to just either
24 speak up or somehow adjust the - - - I'm having difficulty
25 hearing.



1 CHIEF JUDGE DIFIORE: Yes, of course. Counsel,
2 maybe - - - perhaps a little closer to the microphone.

3 MR. ARCIDIACONO: Oh, okay.

4 CHIEF JUDGE DIFIORE: I hear you fine, actually.

5 MR. ARCIDIACONO: Is - - - is that better?

6 JUDGE FEINMAN: Yes, thank you.

7 MR. ARCIDIACONO: The issue before this court is
8 a narrow one. Does the phrase "entire premises" in a
9 search warrant designate all searchable areas within the
10 curtilage, or is it the equivalent of residence, house,
11 dwelling, or some other limiting designation?

12 We're asking this court to hold that the use of
13 that term "entire premises" permits a search of the house,
14 the curtilage, and containers located both inside and
15 outside the residence. And - - -

16 JUDGE FEINMAN: But that would be permitted under
17 People - - - under the Ross case out of the Supreme Court
18 of the United States?

19 MR. ARCIDIACONO: Yes.

20 JUDGE FEINMAN: Correct.

21 MR. ARCIDIACONO: Yes.

22 JUDGE FEINMAN: So now the question becomes is
23 there some different rule under Article 1 Section 12 of the
24 State Constitution, and if so, how has that argument been
25 or not been properly developed both at the Supreme Court



1 and the Appellate Division?

2 MR. ARCIDIACONO: Well, I would say, first of
3 all, under Article 1 Section 12 of the New York
4 Constitution, this would be permissible, because the
5 limiting factor here is probable cause. That's the
6 safeguard.

7 And so we're not asking the court to create a - -
8 - a search where one wouldn't be permitted now; what we are
9 saying is that that - - - that term, "entire premises",
10 should permit a search outside the home that's equivalent
11 to the one that's permitted inside the home. And again,
12 the safeguarding factor is probable cause.

13 In the case here - - -

14 JUDGE STEIN: Counselor, do you agree that Ross
15 didn't directly address the issue presented here, although
16 it has been interpreted that way by the federal courts that
17 - - - the United States Supreme Court hasn't actually
18 addressed the vehicle issue in the context of Ross?

19 MR. ARCIDIACONO: Well, I guess we would say it
20 sufficiently did and that has been developed in federal
21 cases across the country, in - - - including the Second
22 Circuit. So - - -

23 JUDGE STEIN: And how - - - would you agree that
24 the issue that was argued below was exactly the issue of
25 whether New York law - - - and - - - and citing several



1 cases provided otherwise. And those cases themselves refer
2 to the state constitution. Do you - - -

3 MR. ARCIDIACONO: Well - - -

4 JUDGE STEIN: - - - agree with that?

5 MR. ARCIDIACONO: Well, I would say that those
6 other cases were distinguishable for a variety of reasons.

7 JUDGE STEIN: Well, that may be the case. I - -
8 - I'm just trying to get to Judge Feinman's question about
9 whether - - - and it seems to me also, the cases below
10 decided this case based on New York law - - - but whether
11 the issue of New York law being different, based on our
12 constitution was raised and - - - and argued and - - - and
13 addressed?

14 MR. ARCIDIACONO: Well, by - - - by the hearing
15 court here, yes, it was addressed.

16 JUDGE STEIN: Yes. Okay.

17 MR. ARCIDIACONO: Yes, it was. And I think what
18 Judge Cohen determined was that the - - - or he felt, in
19 his opinion, that the - - - the Court of Appeals had to - -
20 - until they re-addressed Sciacca, that his ruling was
21 compelled by New York law.

22 Our position is that those cases are really not
23 strictly on point. Sciacca involved a tax case where the
24 officers had a warrant to search a van. They broke into a
25 garage to search that van. Clearly that's not the



1 situation we have here.

2 And in Dumper, you had a search warrant. And
3 after the police started to exercise that warrant, a car
4 drove up into the property, and the court said that car
5 wasn't here at the start of the warrant, it wasn't
6 mentioned in - - - for probable cause, and so that search
7 was not proper. It wasn't - - -

8 JUDGE WILSON: Chief - - - Chief, may I ask a
9 question or two?

10 CHIEF JUDGE DIFIORE: Judge Wilson.

11 JUDGE WILSON: So it - - - are you making a
12 distinction between, then, a case of cars or vehicles that
13 arrive at a - - - at a property while the search is going
14 on and ones that arrive a minute before or five minutes
15 before or ten minutes before?

16 MR. ARCIDIACONO: Well, if you read Dumper
17 strictly, I think - - - I think that's the conclusion that
18 - - - that you might reach. But we're not asking - - -

19 JUDGE WILSON: Well, I guess let me ask you a
20 different way, then. What is - - - if you have a premises
21 warrant, and let's assume the premises warrant is valid, is
22 it your view that you're allowed to sue any vehicle that
23 happens to be on the premises at the time the warrant
24 execution starts?

25 MR. ARCIDIACONO: Well, under the facts in this



1 case, yes.

2 JUDGE WILSON: No, I - - - I'm asking about a
3 general rule. Not the facts of this case.

4 MR. ARCIDIACONO: Just a car appears - - -

5 JUDGE WILSON: I'll get to the facts of this case
6 in a minute.

7 MR. ARCIDIACONO: It - - - it might depend on who
8 the car was registered to, when it got there.

9 JUDGE WILSON: So if it's a FedEx vehicle, maybe
10 not?

11 MR. ARCIDIACONO: If the warrant - - - I'm sorry,
12 Judge, I couldn't hear.

13 JUDGE WILSON: So if - - - if it's a FedEx
14 vehicle parked on the driveway when the officers showed up,
15 maybe not?

16 MR. ARCIDIACONO: Possibly not. That's right.
17 So - - -

18 JUDGE WILSON: So why - - - why would
19 registration matter?

20 MR. ARCIDIACONO: Well, in this case you have - -
21 - well, really there are two cars. And they obviously have
22 different circumstances. Starting with the car in the
23 backyard, that car was the functional equivalent of a
24 container, no matter how you look at it. And it also
25 raises the question: when is a vehicle no longer a



1 vehicle? Because it didn't have a registration, didn't
2 have license plates. It was described by defense counsel
3 as inoperable. But - - -

4 JUDGE STEIN: But - - - but did they know that
5 before they brought the search warrant application to the
6 magistrate?

7 MR. ARCIDIACONO: You know, it's not specifically
8 mentioned in the warrant, so I don't believe the record
9 really establishes - - -

10 JUDGE STEIN: So - - - so - - -

11 MR. ARCIDIACONO: - - - whether they did or did
12 not.

13 JUDGE STEIN: So doesn't your rule leave that up
14 to the discretion of the officers that are searching rather
15 than establishing probable cause before they go there?

16 If there - - - if you're making a distinction,
17 then don't they have to show that the vehicles that they
18 searched meet - - - you know, fall within that category?

19 MR. ARCIDIACONO: Well, I - - - you know, again,
20 in this case, you have this car. It's seated on the
21 property. The house itself, in the warrant application, is
22 described as being occupied by Mr. Gordon. And so
23 certainly there's nothing to suggest that that car was not
24 his.

25 JUDGE STEIN: But unlike - - -



1 MR. ARCIDIACONO: Meaning behind to - - -

2 JUDGE STEIN: - - - unlike containers, you know,
3 that are somewhere, vehicles are just - - - it seems to me
4 to be inherently more transportable. It's so much more
5 likely that it could be the vehicle of a visitor or it
6 could be a relative or it could - - - you know, it could be
7 a friend. There are just so many possibilities, because
8 vehicles come and go all the time.

9 Closets don't come and go, and contain - - - I
10 mean, you know, and containers certainly can. But vehicles
11 just seem like an inherently different object, to me.

12 MR. ARCIDIACONO: Well, I - - -

13 JUDGE GARCIA: What if it was - - - I'm sorry,
14 Chief.

15 What if it was a wheelie bag, you know? What if
16 it was a bag that had wheels on it? Would that make it a
17 different kind of container, because it can be taken in and
18 out of the premises?

19 MR. ARCIDIACONO: Well, and I guess that's really
20 what the federal courts have said, that really any vehicle
21 on the property - - - on the curtilage is - - - is the
22 equivalent of - - - of a container. And - - -

23 JUDGE GARCIA: Yeah, and I'd like to go back,
24 though, to this issue of the state constitution, because it
25 seems to me, the citations in the suppression motion were



1 dual citations, and in our cases as well: that here's the
2 rule; see, you know, Fourth Amendment and see, you know,
3 the relative article under the state court - - - state
4 constitution.

5 But I'm looking for an independent state
6 constitutional argument in this record based on the factors
7 we've laid out many times in P.J. Video and other cases,
8 that makes the argument at some level below this court,
9 that there's an independent state constitutional basis for
10 suppressing this evidence.

11 MR. ARCIDIACONO: I'm sorry, for suppressing the
12 evidence. Well, from - - - from our standpoint - - -

13 JUDGE GARCIA: Where is that in the record?

14 MR. ARCIDIACONO: Well, this record establishes
15 that the officers had provided an application - - -

16 JUDGE GARCIA: No, counsel, I think you're
17 misunderstanding my question.

18 MR. ARCIDIACONO: I'm sorry.

19 JUDGE GARCIA: The question I have is where was
20 the legal argument made and preserved for this Court that
21 there is an independent state constitutional basis for
22 suppression?

23 MR. ARCIDIACONO: I can't point you to it, Judge.
24 I can't point you to it. Other than - - -

25 JUDGE FEINMAN: And would that be because it



1 wasn't there?

2 MR. ARCIDIACONO: Yes.

3 JUDGE FAHEY: Judge, can I ask a question?

4 CHIEF JUDGE DIFIORE: Yes, Judge Fahey.

5 JUDGE FAHEY: Thank you.

6 Counselor, to buttress the state constitutional
7 argument and the New York Rule that applies, how do you
8 view 690.15 and specifically the distinguishment that
9 690.15 of the CPL draws between a premises and a motor
10 vehicle?

11 MR. ARCIDIACONO: Well, I'm not sure it draws a
12 distinction. It lists different places where a search may
13 be held.

14 JUDGE FAHEY: Well, it has separate categories.
15 Let me stop you there. It does have separate categories?

16 MR. ARCIDIACONO: Yes, it does.

17 JUDGE FAHEY: And there's a separate category for
18 motor vehicles. Was that complied with here?

19 MR. ARCIDIACONO: In this case? Well, I think
20 arguably the warrant application did, based on the
21 observations - - -

22 JUDGE FAHEY: Well, it never mentioned - - -

23 MR. ARCIDIACONO: - - - made by the officers - -

24 -

25 JUDGE FAHEY: - - - motor vehicles, did it?



1 MR. ARCIDIACONO: I'm - - - it did not mention
2 specifically - - -

3 JUDGE FAHEY: Okay.

4 MR. ARCIDIACONO: - - - motor vehicles. However,
5 when it addressed the behavior, which included sales that
6 extended out of the house and across the street, when it -
7 - -

8 JUDGE FAHEY: I - - - I understand that. But I -
9 - - my question to you is that you know, the logic of your
10 argument is that it's a container, they had probable cause,
11 therefore were able to go in and do this in the context of
12 curtilage.

13 There's a number of steps that you're going
14 through, when really, all you've got to do is cite the
15 right section of the CPL and you wouldn't be in this
16 position.

17 MR. ARCIDIACONO: Well, that would be another way
18 to do it, Judge. What we're arguing here - - -

19 JUDGE FAHEY: It would be a lot easier.

20 MR. ARCIDIACONO: - - - no, no. What we're - - -

21 JUDGE FAHEY: Let me stop you one second. It
22 would be a lot easier way to do it than what we're going
23 through right now; wouldn't it?

24 MR. ARCIDIACONO: Well, not necessarily. Because
25 if a magistrate looks at an application for a warrant and



1 sees that there is probable cause to search not just the
2 house, but to search the curtilage, to search containers,
3 why can't that court use the phrase "entire premises"?

4 Now, I understand what you're getting at. There
5 are other categories. There's "vehicle" and there's
6 "person". But our position would be that a vehicle could
7 be encompassed within "entire premises", as cases show.

8 JUDGE FAHEY: Well, here's my point. Usually,
9 when the legislature writes something like this, they're
10 very careful with the - - - the criminal procedure law.
11 And they seem to have drawn a distinction between premises
12 and motor vehicles; and it's set out there.

13 And it doesn't resolve the constitutional
14 question, but it seems to buttress the constitutional
15 question.

16 JUDGE RIVERA: If I - - - if I may ask a question
17 - - -

18 CHIEF JUDGE DIFIORE: Yes, Judge Rivera.

19 JUDGE RIVERA: - - - of counsel? Thank you very
20 much.

21 So counsel, with respect to this last point, or
22 this point that you're making, so if I follow it to its
23 logical conclusion, your position is based on your view
24 that a property owner considers all motor vehicles on their
25 property to be their property - - -



1 MR. ARCIDIACONO: No.

2 JUDGE RIVERA: - - - or did I misunderstand you?

3 MR. ARCIDIACONO: No. Yes, you did misunderstand
4 me, Judge. I - - -

5 JUDGE RIVERA: If you would clarify, then?

6 MR. ARCIDIACONO: I'm sorry. Well, in this case,
7 there is no argument that the car in the back that really
8 wasn't functioning at all was owned by the defendant, and
9 that the car in the front, on the driveway, was his
10 cousin's car, that he had permission to have.

11 So certainly, while he had to have permission - -
12 -

13 JUDGE RIVERA: And - - - and when was that - - -
14 when was that presented to - - - during the warrant
15 application?

16 MR. ARCIDIACONO: It was - - - it's not
17 specifically in the warrant application. So we can't know
18 - - -

19 JUDGE RIVERA: So again - - - so again - - -

20 MR. ARCIDIACONO: - - - whether it was or not.

21 JUDGE RIVERA: - - - excuse me. So if an owner
22 doesn't - - - doesn't believe that a car that's on their
23 property is part of the property, and they own it, why
24 would the magistrate or judge deciding the warrant
25 application jump to such a conclusion?



1 MR. ARCIDIACONO: Well, it certainly shouldn't be
2 what's in the subjective mind of the defendant whether the
3 car is his or not. In this case, it clearly was controlled
4 by him, and so the warrant was - - - was proper.

5 Clearly the car in the back - - -

6 JUDGE RIVERA: Who knew that - - - but I'm saying
7 - - - perhaps I'm not being clear now. But when was that
8 presented in the warrant application?

9 MR. ARCIDIACONO: Yes, and it doesn't say whether
10 it was presented. It's silent. So we don't know.

11 CHIEF JUDGE DIFIORE: Thank you, counsel.

12 MR. ARCIDIACONO: I would - - -

13 CHIEF JUDGE DIFIORE: Thank you, counsel.

14 MR. ARCIDIACONO: Thank you.

15 THE COURT: Counsel?

16 MR. MANLEY: Good afternoon, Your Honor. May it
17 please the court, Jonathan Manley, for respondent, Tyrone
18 Gordon.

19 In this case, Your Honor, the People are asking
20 this court to overturn almost fifty years of New York
21 jurisprudence that requires law enforcement to particularly
22 describe the place to be searched in a search warrant.

23 The People have taken the position that because
24 they included the language "entire premises" within the
25 search warrant, that they were entitled to search any



1 portion of the property, including any vehicles, buildings,
2 sheds, or containers thereon.

3 JUDGE FEINMAN: Well, how would you interpret
4 "entire premises"?

5 CHIEF JUDGE DIFIORE: So counsel, if there is a
6 warrant to search for illegal drugs in a house and the
7 surrounding property, what, if any limitations - - - we're
8 talking about in a narcotics trafficking case - - - what if
9 any limitations are there to search the outside property,
10 in your mind?

11 MR. MANLEY: Judge, I believe that the initial
12 limitation is that they have to provide probable cause to
13 search the entire property. In this particular - - -

14 CHIEF JUDGE DIFIORE: Assuming that - - -
15 assuming that the magistrate received the proper
16 information from the affirming officer that there was
17 narcotics activity going on in the house and outside the
18 house. What limitations are there - - -

19 MR. MANLEY: So Judge, in the - - -

20 CHIEF JUDGE DIFIORE: - - - in your mind?

21 MR. MANLEY: - - - in this - - -

22 CHIEF JUDGE DIFIORE: There's a car there,
23 there's a shed there, there's a trunk out - - - you know,
24 next door to the garage.

25 MR. MANLEY: Yeah, Judge, I - - - I believe, in



1 that - - - in that type of a situation, where they have
2 established probable cause that narcotics activity is
3 taking place throughout a premises, I believe they do still
4 have to particularly describe vehicles, buildings, sheds,
5 and things of that nature.

6 But in this particular case, there is absolutely
7 no facts that support probable cause that there was any
8 elicit activity going on but for at the actual building and
9 the residence.

10 JUDGE FEINMAN: So Chief, if I may?

11 CHIEF JUDGE DIFIORE: Yes, Judge Feinman.

12 JUDGE FEINMAN: Before you get back to the
13 particulars of this case, as a general principle, how do
14 you square what you just said with United States v. Ross -
15 - -

16 MR. MANLEY: Well - - -

17 JUDGE FEINMAN: - - - the Ross case?

18 MR. MANLEY: Well, I believe that the - - - that
19 the case law that has been established in New York State is
20 narrower than that. I believe that the case law that's
21 been established in New York State - - -

22 JUDGE FEINMAN: So the Court of Appeals' cases
23 all pre-date Ross, and to Judge Garcia's point, I'm not
24 sure that there's any discussion in those cases of why the
25 New York Constitution is affording greater protection. To



1 me, the way I read those cases, Dumper and Sciacca and - -
2 - and the others, it seems to me that they're just saying
3 this is what the feds have said, and that applies here.

4 I mean, obviously those cases aren't captioned
5 United States v. Dumper, or United States v. Sciacca,
6 because they're New York cases. But I - - - I don't see
7 where those cases are applying a different rule than the
8 federal rule.

9 MR. MANLEY: Well, the rule that they're applying
10 is that when you have a search warrant and you are making a
11 request for the search warrant, you must particularly
12 describe each area that you intend to search. And each
13 area that is intended to be searched must be supported by
14 independent probable cause.

15 The cases that you cited, Your Honor, I think - -
16 - I think really we should be focusing on the Hansen case,
17 because the facts couldn't be any more similar to the facts
18 that we have in this case.

19 There was a vehicle on the property, in Hansen,
20 that was searched. That vehicle was actually particularly
21 described in the warrant, and the warrant indicated that
22 they could search that vehicle. But the Court of Appeals
23 made a determination that they did not have sufficient
24 probable cause with respect to the vehicle to search it.

25 JUDGE FEINMAN: Right, but so - - - so that's not



1 really a disagreement about the controlling principle.
2 That becomes a disagreement about what the record is in a
3 particular case that was developed before the magistrate
4 and/or the scope of the warrant that's issued.

5 What I'm trying to get at is the controlling
6 principles.

7 MR. MANLEY: I think the controlling principle is
8 just that: that each portion - - - each place that has to
9 be searched, whether it be a building, whether it be a
10 vehicle, whether it be a shed, has to - - -

11 JUDGE FEINMAN: All right, so let me ask you
12 this. You know, you have probable cause to believe that
13 there's drug dealing going on in a particular apartment or
14 a particular house, and so you have to send in an officer
15 to do a controlled buy or some sort of, you know,
16 cooperating witness, to go do a whole survey of a property?

17 MR. MANLEY: Well, Judge, I wouldn't - - -

18 JUDGE FEINMAN: And find out if there's a shed
19 and if there's a this and a that?

20 MR. MANLEY: Well, Judge, during - - -

21 JUDGE FEINMAN: Is that what you're advocating?

22 MR. MANLEY: No, Judge, during the - - - I do
23 believe that the police need to provide facts to allege
24 that there are other portions of the property that are
25 being used in any type of illicit activity and not just a



1 drug transaction, in order to get a search warrant.

2 In this case, the facts were clear and alleged in
3 the warrant application. The individual exited the home,
4 walked out to an awaiting vehicle in the street, conducted
5 a hand-to-hand transaction, immediately went back to the
6 home. There is - - -

7 JUDGE FEINMAN: So what does "entire premises"
8 mean, when the judge issues the warrant?

9 MR. MANLEY: I believe that the warrant issued
10 for under a theory of "entire premises" was incorrect in
11 this case, and it's overbroad just as the Rainey warrant
12 was.

13 The facts in this case do not support a warrant
14 to search the entire premises. The facts in this case
15 support a warrant to search the building, the home only.
16 And nothing else was described, nothing else was alleged.

17 JUDGE FEINMAN: Well, what about the conduct that
18 I think the Chief Judge referred to earlier, about drug
19 dealing, that's going outside on the street?

20 MR. MANLEY: Well, again, the - - - the facts
21 that were alleged was the individual left the home, went to
22 a - - - went to the vehicle that was another individual's
23 vehicle, and went immediately back to the home, on four
24 separate occasions; if I remember correctly.

25 There was no indication that any other portion of



1 the property was being used for any illicit activity, other
2 than the building and the residence itself. The term
3 "entire premises" cannot just be generally thrown around,
4 and the Rainey court established that.

5 The Rainey court established that to protect
6 innocent individuals, just as the - - - as Your Honor had
7 described earlier. What if a FedEx vehicle was on the
8 property? What if - - -

9 JUDGE FEINMAN: That was actually Judge Wilson.

10 MR. MANLEY: What if there was another innocent
11 party's vehicle on the property? The position of the
12 District Attorney's Office in this case would state that
13 they can search anything that happens to be there, whether
14 it was there the day that a narcotics transaction occurred,
15 or whether it's there at the time the search occurred.

16 JUDGE RIVERA: If I - - - if I may ask a
17 question?

18 So counsel, as I'm listening to you, as I recall
19 your briefing on this, I understand your point to be - - -
20 now that you're saying the warrant itself was fully
21 overbroad by the use of this term - - - is that because the
22 entire premises here included the residence, and - - - and
23 the home holds a particular position in - - -

24 MR. MANLEY: Well - - -

25 JUDGE RIVERA: - - - not only federal



1 jurisprudence, but state jurisprudence, and under our
2 respective constitutions?

3 MR. MANLEY: Well, my position with that is in
4 response to the District Attorney's position, which was
5 since the warrant states they can search the entire
6 premises, they can search every vehicle, structure,
7 building, or any other object thereon.

8 I believe that before we can even get to their
9 position about whether that is correct or incorrect, we
10 have to look at whether the underlying facts in this case
11 support a search warrant to search such a broad area,
12 meaning the entire premises, the entire property, the
13 entire yard, any structures or vehicles thereon.

14 I don't believe that the facts that were alleged
15 in this application support that.

16 Putting that to the side, it is clear from New
17 York jurisprudence from Rainey to Dumper to Hansen to
18 Sciacca, that they cannot just search any vehicle on a
19 property. The law enforcement cannot search any shed,
20 building, or structure on a property. They are not allowed
21 to do it unless it is particularly described in the
22 application and supported by independent probable cause.

23 Their other option here always could have been,
24 when they got to the property and they made a determination
25 that these vehicles were there, they could have simply



1 requested a piggyback warrant.

2 They are asking for forgiveness now, after the
3 fact, when they find out, after they searched these
4 vehicles, that they belonged to Mr. Gordon. They didn't -
5 - - law enforcement did not know at the time of the search
6 that these vehicles belonged to Mr. Gordon. They didn't
7 learn that they were his until they questioned him at the
8 precinct, hours after the search.

9 So what the District Attorney's Office is asking
10 is they're asking just to allow blanket, broad searches of
11 entire pieces of property if they establish - - -

12 JUDGE STEIN: If I - - - is this a common
13 occurrence, or is this - - - is this a very rare thing? Do
14 you know what the regular general practice is here as to
15 these premises warrants and the search of vehicles?

16 MR. MANLEY: Generally speaking, out here in
17 Suffolk County, Your Honor, it is regular - - - that term
18 "entire premises" is regularly used in this - - - in this
19 particular jurisdiction. I don't know if it is since Judge
20 Cohen's decision. But prior to Judge Cohen's decision, it
21 was regularly used.

22 The issue that - - -

23 JUDGE GARCIA: Judge, may I ask a question?

24 CHIEF JUDGE DIFIORE: Judge Garcia.

25 JUDGE GARCIA: It seems to me, looking back at



1 these cases and Sciacca, this - - - this particular issue -
2 - - Sciacca is the closest but has never been here. I
3 think Rainey is a much different case in the sense that
4 there were two separate residences, raising very different
5 issues, it seems to me. But Sciacca gets close, at least
6 in dicta.

7 They're all, I think, as Judge Feinman pointed
8 out, pre-Ross cases. And it seems, in looking at that New
9 York case law, what we were doing, as we do often, is
10 saying here's the constitutional floor, and here's - - -
11 you know, this is - - - this is what's required. See
12 Fourth Amendment and the equivalent under the state
13 constitution, I think saying that there's this kind of two-
14 part support for this finding, but not really analyzing it
15 separately, at all. It's a parenthetical cite.

16 If - - - assuming for purposes of this question,
17 if Ross changed the constitutional analysis there, saying
18 that Fourth Amendment cite is no longer valid, that the
19 Fourth Amendment permits this - - - and I think many
20 federal courts - - - and the Supreme Court, again, hasn't
21 hit this particular issue yet - - - what is the argument
22 based on our constitution that we should continue or find
23 now as a - - - as an extension or an application of that
24 rule that this search was unreasonable? What is the
25 independent state constitutional basis, and where can I



1 find that argument in the record?

2 MR. MANLEY: Well, Judge, I think that we should
3 start with CPL 690.15, which specifically delineates
4 vehicles from premises from person. And if you look at the
5 particular warrant in this case, the warrant specifically
6 delineated the search of Mr. Gordon's person; it also
7 specifically delineated the search of the premises. It
8 didn't mention the vehicle.

9 And that is something unique to New York State,
10 Your Honor. New York State CPL 690.15 requires at each - -
11 -

12 JUDGE GARCIA: Was that argument made below?

13 MR. MANLEY: I - - - I believe it was. I believe
14 that 690.15 was a part of the motion papers, Judge. I
15 don't believe that it was specifically referenced in the
16 judge's decision, but it was certainly referenced within
17 the papers for the initial motion and for the briefs in the
18 Second Department.

19 JUDGE GARCIA: What I remember seeing, and I
20 could be wrong, is in the memorandum of law in support
21 there's a parallel citation, again, along the lines of what
22 our case law does. But I don't remember seeing any
23 independent argument that either New York statutes or the
24 history of the Fourth Amendment equivalent, as incorporated
25 into our constitution in 1938, somehow provides for a



1 greater level of what might otherwise apply under the
2 federal Constitution.

3 MR. MANLEY: I think that the reference to CPL
4 690.15 would satisfy that, Your Honor. New York State
5 specifically delineates vehicles from premises. And going
6 forward, with the natural flow and progression from that,
7 each specific individual entity has to be supported by
8 probable cause. If 690 - - -

9 JUDGE FEINMAN: So - - - so let me just
10 understand what you're saying. So every time, you know,
11 defense counsel writes a motion and says the drugs should
12 be suppressed, I have standing, you know, nexus, factual
13 allegations, they have standing, and the search here
14 violated, you know, the federal and state constitutions,
15 and cites the two sections, if that's all they say, is that
16 enough to later argue an independent state constitutional
17 ground as the federal law develops?

18 MR. MANLEY: I believe it does, you know,
19 establish at least a position that it had been raised
20 earlier under the trial court.

21 Our position here is, and has always been, that
22 each vehicle, each building, each structure, has to be
23 supported by independent probable cause in order for law
24 enforcement to search them.

25 JUDGE FEINMAN: Okay.



1 CHIEF JUDGE DIFIORE: Thank you, counsel.

2 MR. MANLEY: Thank you.

3 CHIEF JUDGE DIFIORE: Counsel?

4 MR. ARCIDIACONO: Thank you, Your Honor.

5 Your Honor, we're not asking that - - - or
6 suggesting that the State should provide less protection to
7 its citizens. What we're saying is that in a situation
8 like this, that if there's enough probable cause to search
9 not just the house but the surrounding curtilage, which is
10 part of the house, then it should be sufficient to search
11 containers in that area.

12 And certainly that first car - - -

13 JUDGE RIVERA: Counsel - - - Judge, if I may ask?

14 CHIEF JUDGE DIFIORE: Yes.

15 JUDGE RIVERA: Counsel, but doesn't that rule
16 lead to the situation where an innocent person's car is on
17 the property, and at the time of the execution of the
18 warrant it gets searched? And I'm not talking about
19 someone who drove up to buy drugs. This is an innocent - -
20 - you know, the cousin - - - not the cousin - - - the - - -
21 the aunt is visiting and not into drugs at all. In fact,
22 the defendant is hiding the drugs from the aunt. Doesn't -
23 - - is that where your rule leads to?

24 MR. ARCIDIACONO: No, actually it - - -

25 JUDGE RIVERA: Without - - - without the probable



1 cause regarding, you know, cars that are coming and going,
2 that any car at the time, on the property, should be
3 searched; and here's the probable cause for that?

4 MR. ARCIDIACONO: I guess, Judge, I'm thinking
5 more in terms of what Judge Feinman mentioned that - - -
6 that the probable cause in each case is a factual matter.
7 That would be a factual matter.

8 But here - - - and again, I think there is a
9 distinction in this case between the two cars - - - the car
10 in the back - - -

11 JUDGE RIVERA: I'm sorry, so then - - - I'm
12 sorry. So then is your rule that - - - and I'm going back
13 now to something I think Judge Wilson was inquiring of - -
14 - is your rule, then, if it's clearly the defendant's
15 automobile, that's not a problem. If it's on the property,
16 that gets searched.

17 But if it's someone else's vehicle, that's a fact
18 question. Yeah, perhaps law enforcement should have
19 presented in the application probable cause for searching a
20 non-defendant vehicle - - - the non-defendant - - - someone
21 who's not the target of the search warrant, to search their
22 vehicle?

23 MR. ARCIDIACONO: Well, certainly in - - - in
24 this case, there was a sufficient probable cause to search
25 the vehicles. That may not be the case - - -



1 JUDGE RIVERA: I'm sorry, what's the - - - I
2 understand your argument - - -

3 MR. ARCIDIACONO: - - - in other cases.

4 JUDGE RIVERA: - - - about the vehicle that's in
5 the backyard, doesn't have a registration, appears not to
6 be functioning - - - excuse me for one moment - - - on
7 that.

8 But what about the other vehicle. Where - - -
9 what's the probable cause on that? Perhaps I just missed
10 that in the record.

11 MR. ARCIDIACONO: Well, the probable cause for
12 that is that this drug activity extends beyond the front
13 door. It goes all the way out into the street. In fact,
14 it goes across the street. And the - - - the materials
15 that the police officers were looking for and that they got
16 the warrant for, were the kinds of things, all of which,
17 could be secreted in small containers, including that car,
18 both in the back and in the front.

19 Things like the drugs, computers, records, drug
20 paraphernalia, all those were small items and could be
21 secreted in small containers.

22 And so in - - - in this case, certainly either
23 car would - - - would qualify. And as the police laid out
24 in their warrant, the house was occupied by Mr. Gordon.
25 There was no reason for them to think that the car in the

1 front driveway and the car in the - - -

2 JUDGE RIVERA: Then is there something unique - -
3 -

4 MR. ARCIDIACONO: - - - back were not his.

5 JUDGE RIVERA: - - - is there something unique to
6 drug activity that lends itself to the way you're
7 interpreting what might be the recognition of probable
8 cause of the search warrant?

9 MR. ARCIDIACONO: I think that there's - - -

10 JUDGE RIVERA: What if it's another kind of
11 activity that is not about secreting small items?

12 MR. ARCIDIACONO: Well, then I think it would get
13 back to Judge Feinman's point that it's, you know, a
14 question of fact in that particular case.

15 The last point I - - - I just wanted to point out
16 was nobody's mentioned *People v. Powers*. That's the Third
17 Department case where the - - - the police had a warrant
18 for a garage and were allowed to search the car, and the
19 court termed that to be a container. That is very similar
20 to the situation we have here.

21 So we're not asking that a defendant's rights in
22 New York be lessened in any way; we're simply suggesting
23 that when a court reviews probable cause and finds that
24 there's a sufficient probable cause for a search of the
25 house and the curtilage, that should include containers



1 outside the house, and that those containers should include
2 cars.

3 CHIEF JUDGE DIFIORE: Thank you, sir.

4 MR. ARCIDIACONO: Thank you.

5 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Tyrone D. Gordon, No. 9, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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