

APL-2024-00129

Court of Appeals
State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-v-

SAMUEL SHAW,

Appellant.

APPELLANT'S REPLY BRIEF

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Reply Argument

In their Respondent’s Brief, the People contend that there are a bevy of procedural infirmities that each bar consideration of the merits of Mr. Shaw’s suppression claim. Contrary to the People’s arguments, the only relevant procedural bar in this appeal is the People’s failure to argue before the trial court that the fruit of the search—the firearm—was discovered in manner that was attenuated from the *Payton* violation that preceded it (*see generally Payton v New York*, 445 US 573 [1980]).

Point I: This Court may review the *Payton* issue.

The People argue that Mr. Shaw’s contentions that his *Payton* rights were violated is not preserved because he did not specifically argue that he was “constructively” arrested inside the home (Respondent’s Brief at 16–17). Initially, the People get an important fact wrong. They write that the section of Mr. Shaw’s motion papers arguing that there was a *Payton* violation claimed “he was arrested inside of his residence” (Respondent’s Brief at 16). Contrary to that assertion, Mr. Shaw’s motion papers state, “Upon information and belief, on July 21st, 2018, officers from the Rochester Police Department ordered the defendant to exit his temporary domicile and arrested him” (A: 144 at ¶43). At no point was

Mr. Shaw arguing that a garden-variety *Payton* violation had occurred. His theory of the Fourth Amendment violation in this case has always been that the SWAT team illegally forced him to exit his house. Mr. Shaw's further statement that he was arrested "within his home" (A: 145 at ¶49), accords with the Second Circuit's view in *United States v Allen* (813 F3d 76 [2d Cir 2016]), that a suspect is seized at the moment their freedom of movement is constrained. Here, the seizure occurred by virtue of the officers' gun-point orders, which took place while Mr. Shaw was still within the home.

Defense counsel's argument after the hearing further explained his theory of the *Payton* violation. He stated, "It wasn't optional that Mr. Shaw leave that residence. RPD didn't go there and ask politely. They ordered him out of the residence, and that is an arrest. It's even an arrest under *Payton*" (A: 711–712). At the hearing, the People understood exactly what Mr. Shaw was arguing. They responded to his argument on the merits:

"As I have submitted in my papers, as the Court's largely familiar with, probably better than I, when you voluntarily walk outside of a home and you are taken into custody there, there is no *Payton* issue. The police go into a home, there may be an issue. They did not go into this residence. He came out. Whether that was a good choice or a bad choice is irrelevant

to your analysis of whether there is a *Payton* issue. I submit to you there is not. The testimony that you have got that is credible is, he voluntarily walked out. Was it in response to being ordered out? Perhaps. Was it bad a choice, particularly for him? Perhaps. Does that mean there is a *Payton* issue? No, there is not.”

(A: 718). The issue that Mr. Shaw (and the People) put directly before the trial court was whether Mr. Shaw voluntarily exited his house or whether he was forced out by the SWAT team’s conduct and orders.

This Court should reject the People’s argument that Mr. Shaw had to preserve his current claim with a term of art like “constructive arrest.” As Mr. Shaw pointed out in his initial brief, while there are some courts which use the term “constructive entry” to examine circumstances similar to Mr. Shaw’s arrest, other courts, like the Second Circuit, reject that doctrine and simply analyze whether law enforcement take control of a suspect’s movements while the suspect is inside the home (*Allen*, 813 F3d at 86) (Appellant’s Brief at 18–26). Defense counsel’s argument that, “They ordered him out of the residence, and that is an arrest” accords perfectly with the Second Circuit’s holding in *Allen*. Defense counsel made his theory of the *Payton* violation known to the trial court. The preservation rule requires no more.

The People next argue that “it is clear” that the Appellate Division reached the merits of the *Payton* issue in the interest of justice (Respondent’s Brief at 18). But, in examining the Appellate Division’s memorandum—where the court expressly declined to address an unpreserved contention about curtilage (A: 6)—it would be unsound to assume that the Appellate Division used its interest of justice jurisdiction *sub silentio* to address the *Payton* issue. Nonetheless, this Court is never “bound by an intermediate appellate court’s characterization of its own order, and it must determine for” itself whether a question of law is presented for review (*People v Epakchi*, 37 NY3d 39, 44 [2021]). It is noted that if this Court does conclude that the Appellate Division addressed this issue in the interest of justice, such a conclusion does not help the People. Instead, it would render the Appellate Division’s determination that there was a Fourth Amendment violation unreviewable by this Court (*see People v Riley*, 19 NY3d 944, 945 [2012]; *People v Caban*, 14 NY3d 369, 373 [2010]).

Relatedly, the People argue that County Court did not decide the *Payton* issue because it “did not grant a hearing on the *Payton* claim and, instead, summarily denied it on the motion papers” (Respondent’s Brief

at 18). While it is true that the hearing was not technically called a “*Payton* hearing,” County Court’s written decision expressly references the hearing testimony to conclude that Mr. Shaw’s *Payton* rights were not violated. The whole of County Court’s decision on this issue is the following:

“Defendant also alleged a violation of his *Payton* rights in his moving papers. Those allegations were insufficient to merit a hearing on the issue. At the hearings, it was clearly established that Defendant's arrest occurred eight to ten feet in front of McCoy’s apartment, and thus Defendant’s *Payton* rights were not implicated (*People v. Evans*, 132 AD3d 1398, 1399 [4th Dept 2015]; *see also People v. Reynoso*, 309 AD2d 769, 770 [2d Dept 2003], *affd* 2 NY3d 820 [2004]; *see People v. Correa*, 55 AD3d 1380, 1380 [4th Dept 2008], *lv denied* 11 NY3d 924 [2009]).”

(A: 209.)

By considering the evidence at the hearings to deny Mr. Shaw’s claim, County Court rendered a reviewable decision on this issue. And County Court was correct to render a decision on the merits of Mr. Shaw’s *Payton* claim. After all, the parties both argued the *Payton* issue in their oral argument following the hearing (A: 711–712, 718), showing that they understood the hearing to have encompassed that claim. The People did not object to defense counsel’s argument regarding the *Payton* violation on the ground that the trial court did not order a *Payton* hearing. Instead,

they simply argued that there was no *Payton* violation (*cf. People v Frederick*, 46 Misc 3d 33, 35 [App Term 2014] [where People responded to a suppression issue on the merits, “the prosecutor’s conduct at the hearing waived any claim that *Mapp/Dunaway* issues were not before the court because defendant had failed to properly seek those hearings”]).

Furthermore, the proof at the hearing encompassed everything County Court needed to render a decision. Salvatore Amato testified about the SWAT team raid and how he gave verbal commands to Mr. Shaw to exit the home (A: 532–535). Domenic Borrelli testified about how he actually took Mr. Shaw into custody after Mr. Shaw exited the home (A: 555–558). And Mr. Shaw and Ms. McCoy each testified about what happened (A: 613–651, 701–710). In conclusion, County Court’s decision is a reviewable decision that expressly relied upon the hearing testimony. Nothing in CPL 470.15 (1) requires a formalistic view of the proceedings. Instead, this Court can consider the record and the parties post-hearing *Payton* arguments “to understand the context of the trial court’s ultimate determination” (*People v Nicholson*, 26 NY3d 813, 825 [2016]).

This Court should review the *Payton* issue in this case. The SWAT team’s conduct was blatantly unconstitutional and a clear holding from

this Court regarding the necessity of a warrant for this type of SWAT team raid would create state-wide precedent that guides law enforcement on how to conduct arrests without violating the constitutional rights of citizens.

Point II: The People have not preserved the argument that the theory of attenuation should be considered if a Fourth Amendment violation was found to have occurred.

In his initial brief, Mr. Shaw argued that the People failed to preserve an argument regarding attenuation and thus the Appellate Division had erred in entertaining it (Appellant’s Brief, at 42–45). In response, the People now argue that “[a]ssuming *arguendo* that a *Payton* violation occurred, it does not necessarily follow that the People were required to demonstrate that the consent was attenuated from the Defendant’s illegal arrest” (Respondent’s Brief at 27). The People then argue that Mr. Shaw had a burden of demonstrating that the discovery of the firearm was come at by exploitation of the initial illegality (Respondent’s Brief at 27–28).

The People’s attempt to shift the burden should be rejected. First, this Court clearly laid out the parties’ applicable burdens in *People v Borges* (69 NY2d 1031 [1987]):

“When a defendant challenges the admission of evidence obtained by a consensual search, claiming the consent was the product of an illegal arrest, the burden rests on the People to demonstrate that the consent was acquired by means sufficiently distinguishable from the arrest to be purged of the illegality.”

(69 NY2d at 1033.) In a more recent case, this Court has adhered to this burden-shifting scheme, stating,

“Defendant claims that the lineup identification must be suppressed because it was the product of an illegal arrest. In order to counter that challenge, the People were required to demonstrate that the identification was ‘acquired by means sufficiently distinguishable from the arrest to be purged of the illegality.’”

(*People v Jones*, 21 NY3d 449, 454–455 [2013], quoting *People v Conyers*, 68 NY2d 982, 983 [1986].)

Here, in the *Payton* section of his motion, Mr. Shaw specifically argued that “as a direct and unattenuated result of the defendant’s unlawful arrest, the police obtained certain evidence in the form of statements and a firearm” (A: 145). Mr. Shaw’s motion practice was sufficient, under this Court’s precedent, to shift the burden to the People to show attenuation.

But, the People never argued attenuation in the trial court. Nor, did they argue it before the Appellate Division. Instead, in those courts, they

rested upon their argument that Mr. Shaw lacked standing for his challenge and that there had been no *Payton* violation.

The People also argue that because the police obtained Ms. McCoy's consent to search, not Mr. Shaw's consent, "it cannot be said that there was a connection between the illegality (i.e. the Defendant's arrest) and the derivative evidence obtained as a result of the consent to search given by Ms. McCoy" (Respondent's Brief at 28). But, as Mr. Shaw demonstrated in his initial brief, this Court has held that a defendant may challenge the consent given by a third-party when that party is subject to the same illegal police conduct as the defendant (*People v Banks*, 85 NY2d 558, 561–563 [1995]). And many jurisdictions have found that a defendant may challenge the consent given by a third-party when that consent is the fruit of a constitutional violation committed against the defendant alone (*see United States v Valentine*, 539 F3d 88, 91, 96 [2d Cir 2008]; *State v Lane*, 726 NW2d 371, 378 [Iowa 2007]; *United States v Vega*, 221 F3d 789, 801 [5th Cir 2000], *abrogated on other grounds by Kentucky v King*, 563 US 452 [2011]; *United States v Maez*, 872 F2d 1444, 1453–1456, 1453 n 11 [10th Cir 1989]).

Here, law enforcement benefited from and exploited the initial illegal raid on Ms. McCoy's house. They chose to target Mr. Shaw there in order to arrest him without a warrant. And then, strategically, chose to "ask" (or pressure) Ms. McCoy for her consent to search as the most convenient method to search the home out of which they had just forced her and Mr. Shaw. The nexus between the illegal arrest and the fruits of the consent search was properly alleged in the motion papers and is clear from evidence adduced at the hearing.

Point III: Mr. Shaw has standing to challenge the search because he was an overnight guest at Ms. McCoy's home.

Lastly, the People argue that the Appellate Division erred in finding that Mr. Shaw had standing—a reasonable expectation of privacy—in Ms. McCoy's home (Respondent's Brief at 20–24). The People are wrong, and because this is a mixed question of law and fact, the Appellate Division's determination cannot be disturbed unless it is without any record support (*People v Leach*, 21 NY3d 969, 971 [2013]).

None of the cases relied upon by the People in their brief support making an exception to the per se rule created by the United States Supreme Court in *Minnesota v Olson* (495 US 91 [1990]). Mr. Shaw's

standing is established by *Minnesota v Olson* for three reasons: 1) he was a current overnight guest who was present at the apartment when the arrest and search occurred; 2) his status as an overnight guest had not been revoked; and 3) his reasonable expectation of privacy in Ms. McCoy's apartment extended to the one bathroom which was shared by all in the apartment.

The Supreme Court's decision in *Minnesota v Olson* created a bright-line rule that eliminated the need for the kind of multifactor analyses that the People promote in their brief (Respondent's Brief at 23).

As Professor Wayne R. LaFave wrote in his Search and Seizure treatise,

“[I]t is quite clear *Olson* amounts to a per se rule that one's status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable. That is, there is no occasion now for lower courts to assess, as to overnight guests, additional factors of the kind that the Court in *Olson* said would produce a needlessly complex rule—e.g., whether the visitor is related by blood or marriage to the owner or lessor, whether the visitor stores his clothes or other possessions in the dwelling, or whether the visitor has taken precautions to develop and maintain his privacy in the dwelling.”

(6 Wayne R. LaFave, Search & Seizure § 11.3 [b] [6th ed Oct 2022 update]

[internal quotation marks and citations omitted].)

The People argue that this Court should look to *People v Rodriguez* (69 NY2d 159 [1987]), which lays out certain factors for courts to consider in evaluating a defendant’s privacy interest in an apartment not his own. But, *Rodriguez* predated the Supreme Court’s decision in *Olson* by three years, and was supplanted by the per se rule in *Olson*. Indeed, *Olson* referred to multifactor tests as “needlessly complex” and rejected them in favor of a per se rule for overnight guests (495 US at 96).

The multifactor test in *Rodriguez* is no longer applicable to defendants who have stayed overnight in an apartment and claim a reasonable expectation of privacy there. The factors in *Rodriguez* only retain vitality for defendants who have not been overnight guests (*see People v Ortiz*, 83 NY2d 840, 842 [1994] [noting that standing confers to an overnight guest, citing *Olson*, or to those with familial or other socially recognized relationships, citing *Rodriguez*]). The People’s citation to *People v Ponder* (54 NY2d 160 [1981]), suffers from the same infirmity. This was another pre-*Olson* case that analyzed a privacy interest prior to the Supreme Court’s creation of a per se rule for overnight guests.

The People also cite two cases from the Fourth Department, *People v Conway* (277 AD2d 1020 [4th Dept 2000]) and *People v Smith* (155

AD3d 1674 [4th Dept 2017]) which, at first blush, appear to support their position (Respondent's Brief at 23). In *Conway*, this Fourth Department wrote,

“defendant did not live with [the victim], but merely stayed overnight occasionally and kept a few personal items at the victim's residence, to which he did not have a key. Thus, the court properly determined that defendant lacked standing to contest the warrantless search of the victim's apartment and garage.”

(277 AD2d at 1020.)

A reading of the briefs filed in *Conway*, under docket KA 98-05158, show why this case is inapposite to the instant facts.¹ Both the defendant's brief and the People's brief reveal that the defendant was *not* arrested at the victim's home, in which he claimed an expectation of privacy, nor was the search of the residence initiated while the defendant was present. Thus, the question in *Conway* was whether the defendant had enough connection to the victim's apartment to have standing as a *prior* overnight guest. The frequency of his overnight stays at her house was relevant to that inquiry. In comparison, here, because Mr. Shaw was arrested at Ms. McCoy's apartment and the search was initiated upon his

¹ Briefs filed in the Appellate Division, Fourth Department are available by emailing AD4ref@nycourts.gov.

arrest, the question is not whether he had standing as a *prior* overnight guest, but whether he standing as a *current* overnight guest present at the apartment at the time of the arrest and search (see *State v Guy*, 679 SW3d 632, 673 [Tenn Crim App 2023] [“A defendant’s status as an overnight guest ‘must exist at the time of the search’”]; *State v Francisco*, 107 Wash App 247, 255, 26 P3d 1008, 1012 [Wash Ct App 2001] [“*Olson* and the other guest cases cited by Francisco differ from the case at hand in that, in each case, the defendant was a current guest and was physically present at the time of the search”]; *State v Cortis*, 237 Neb 97, 104 [1991] [“In significant contrast to *Olson, supra*, Cortis was not a current overnight guest at the time of the police intrusion”]). Because Mr. Shaw was a current overnight guest at Ms. McCoy’s home, he falls into *Olson*’s per se rule.

Next, *Smith* was a case about the sufficiency of the allegations in a motion seeking a *Mapp* hearing (155 AD3d at 1675). A review of the decision and the oral argument (specifically, ADA David A. Heraty’s oral argument for the People on October 24, 2017 under docket KA 16-

00367),² shows that the defendant did not allege that he was an overnight guest, thus *Olson* was inapplicable.

The People also argue that Ms. Shaw had lost his expectation of privacy at Ms. McCoy's home because he overstayed his welcome, citing *People v Kobza* (66 AD3d 1387 [4th Dept 2009]) and *People v D'Antuono* (306 AD2d 890 [4th Dept 2003]). These two cases, however, involved hotel rooms, not a private residence, and held that once the defendant's rental period for the hotel room had ended, so ended his expectation of privacy in the room. Here, the record does not support a finding that Mr. Shaw overstayed his welcome at Ms. McCoy's house.

Ms. McCoy testified that after she and Mr. Shaw both went to sleep around five or six in the morning (A: 634), they woke up later in the day and Mr. Shaw remained at her house until the police arrived around 8:45 p.m. (A: 634–635). On cross-examination she testified:

“Q You guys hang out for the day, right?

A I don't know if you want to call it hanging out but –

Q You didn't kick him out, right?

² Available to view at <https://www.youtube.com/live/fyqxWjJ7qW4?si=aQPMO2o83MnbjC2i&t=3616>

A Well, I was telling him that I had things that I had to do, and that, what was he about to get into because I had things that I had to do.

Q But he remained there until approximately 8:45, right?

A Okay, yes. But I think he said he was looking for somebody to come get him. I don't really know what happened. I had things that I had to do, and I kept stressing that to him."

(A: 635.) Ms. McCoy's statements to Mr. Shaw stressing to him that she had things to do is a far cry from "overstaying a welcome" or expressly asking a guest to leave. And it is a far cry from the cases cited by the People, where a rental agreement for a hotel room expires. Ms. McCoy's testimony that she told Mr. Shaw that she had "things that I had to do" did not strip him of his reasonable expectation of privacy in the apartment in which he had just spent the night. If Ms. McCoy meant to express that she had kicked Mr. Shaw out or was trying to kick him out, she would have done so in her testimony. She did not.

Lastly, the fact that the arrest occurred at 8:45 p.m. following the night that Mr. Shaw had been an overnight guest does not mean that he lost standing. In *Olson*, the Supreme Court addressed an arrest that occurred at 3 p.m. following the defendant's overnight stay at his host's

home (495 US at 101). *Olson* indicates that an overnight guest retains their privacy interest so long as they remain at their host's home.

Next, the People attempt to enlarge the scope of Mr. Shaw's burden of proving standing by arguing that he had to show not only a reasonable expectation of privacy in Ms. McCoy's apartment, but in the bathroom specifically, and even going so far as to posit that Mr. Shaw had to show a subjective expectation of privacy in the *toilet tank* (Respondent's Brief at 24). This must be rejected, also on the basis of the Supreme Court's plain language in *Olson*, which spoke of a defendant's privacy interest in the whole home or premises in which he stays. The Supreme Court never held that a defendant's privacy interest is only in the room in which he sleeps. The Court also wrote, "It is unlikely that the guest will be confined to a restricted area of the house; and when the host is away or asleep, the guest will have a measure of control over the premises" (495 US at 99).

While the Supreme Court viewed it as unlikely, this Court did, in *People v Leach* (21 NY3d at 971) affirm an Appellate Division finding that a defendant did not have a privacy interest in a guest bedroom in his grandmother's house, though he was living with his grandmother. Specifically, in *Leach*, the grandmother testified that the guest bedroom

in her apartment was not intended for her grandson to use. Because this Court was reviewing a mixed question of law and fact in *Leach*, it wrote that although “a contrary finding might also have been reasonable under these circumstances,” it affirmed on the basis of the grandmother’s testimony (21 NY3d at 972).

Here, in contrast, there was no testimony that Mr. Shaw was excluded from the bathroom in Ms. McCoy’s apartment. And, it cannot be the case that Mr. Shaw was excluded from the bathroom in this apartment, because *it was the only bathroom* in the apartment (A: 619). It should go without saying that an overnight guest in an apartment presumptively has permission to use the bathroom. Lastly, Mr. Shaw testified that he had access to the entirety of the apartment throughout his stay, and that he had taken a shower in the bathroom (A: 703, 710).

This Court should reject the People’s argument that Mr. Shaw demonstrate his privacy interest with a greater specificity than the apartment as a whole. Such a heightened burden is inconsistent with the Supreme Court’s decision in *Olson*. Mr. Shaw was not excluded from the bathroom, and his reasonable expectation of privacy in Ms. McCoy’s apartment extended to the bathroom.

* * *

Mr. Shaw was an overnight guest in Christina McCoy's apartment. And not only an overnight guest, but one who was engaged in an intimate relationship (if not a committed, long-term relationship) with Ms. McCoy. Because Mr. Shaw had a reasonable expectation of privacy in the apartment, he has standing to contest his warrantless arrest and the search of the apartment (*see United States v Osorio*, 949 F2d 38, 41–42 [2d Cir 1991]).

Conclusion

Where there is a Fourth Amendment violation followed by a consent search and the defendant alleges the evidence recovered in the search is the fruit of the Fourth Amendment violation, the People are required to prove two things to show that the evidence was legally obtained: that the consent was voluntary and that the consent was attenuated from the Fourth Amendment violation that preceded it (*see* 4 Wayne R. LaFare, Search & Seizure § 8.2 [d] [6th ed Oct 2022 update]). Because the People did not argue before the trial court that the consent was attenuated, “the Appellate Division erred in entertaining” that theory on appeal (*People v Hunter*, 17 NY3d 725, 728 [2011]), and the People have waived that

argument (see *People v Hurdle*, 106 AD3d 1100, 1104 [2d Dept 2013]; *People v Phillips*, 225 AD2d 1043, 1043 [4th Dept 1996]; *People v Clark*, 149 AD2d 720, 721 [2d Dept 1989]; *United States v Hernandez*, 847 F3d 1257, 1262 [10th Cir 2017]). Mr. Shaw contends that the fruit of the search, the firearm, must be suppressed because the People have not met their burden of showing that the firearm was legally obtained.

Application of the exclusionary rule is appropriate in this case. The rule was “originally created to deter police unlawfulness by removing the incentive” for police to violate citizens’ constitutional rights (*People v Payton*, 51 NY2d 169, 175 [1980]; see also *United States v Leon*, 468 US 897, 909 [1984]). This case presents a flagrant and intentional violation of Mr. Shaw’s constitutional rights (and those of Ms. McCoy and the other residents of the Atkinson Court apartments). The violation did not end when Mr. Shaw was taken into custody. It continued through law enforcement pressuring Ms. McCoy into permitting a search of her home while she was still handcuffed in the back of a police vehicle. Suppression of the firearm and a clear statement that this kind of law enforcement conduct is not acceptable in New York is the only way to deter future violations. And because the failure to suppress the firearm is not a

harmless error on the facts of this case, Mr. Shaw asks this Court to reverse the judgment, dismiss count 9, and remit for a new trial on the remaining counts.

In the initial brief, Mr. Shaw also addressed alternative requests for relief. If this Court did not grant suppression itself, it should either remit to County Court to determine voluntariness and attenuation pursuant to CPL 470.15 (1), or remit to the Appellate Division for a determination of both voluntariness and attenuation, using the correct standards.

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**Printing Specifications Statement
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This Reply Brief was prepared on a computer using Microsoft Word. The typeface is 14-point Century Schoolbook, double-spaced (except for headings, footnotes, and block quotations). According to the Microsoft Word application, the total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities is 4,590.