§ 3.03 Custodial Arrests for Minor Offenses That Carry No Jail Penalty

In *Atwater v. City of Lago Vista*,[1] the United States Supreme Court addressed the issue of a police officer's authority to place an individual in custody after making an arrest for a minor offense, including a traffic offense, that carries no jail penalty. In *Atwater*, the defendant was driving her young children (ages four and six) home from soccer practice when her son's toy fell out of her pickup truck. She permitted the children to remove their seat belts so they could peer out the window to look for the toy as she drove slowly. She also removed her seat belt. A police officer stopped the vehicle and placed her under arrest for driving without a seat belt. In Texas, this offense is a misdemeanor, but is punishable only by a $50 fine and does not carry a jail penalty. The defendant was placed in custody, removed to a precinct, placed in a holding cell for an hour, and then released on bond. Ultimately, the defendant pled guilty to the offense and paid a $50.00 fine. She then filed an action alleging that her Fourth Amendment rights had been violated.

The Supreme Court upheld the custodial arrest and adopted a bright-line rule--if a police officer has probable cause to believe that an individual has committed even a minor offense that carries no jail time, the officer may still make a custodial arrest. The *Atwater* Court made it clear that it wanted to utilize standards that are clear and simple. To hold otherwise, it opined, would lead to an unacceptable situation in which each discretionary judgment by a police officer in the heat of the moment of an arrest would be subject to constitutional review by a court.

The *Atwater* Court refused to adopt the defendant's argument that there should be a compelling need for a custodial arrest in cases where there is no jail penalty. The *Atwater* Court also found that it would be too difficult for a police officer, in the heat of the moment, to distinguish offenses that carry a jail penalty from those that do not. It was not convinced that the country was facing an epidemic of unnecessary arrests for minor offenses. Thus, the *Atwater* Court concluded that, despite the "gratuitous humiliations imposed by a police officer who was (at best) exercising, extremely poor judgment,"[2] there was no violation of the Fourth Amendment.

Those who have criticized *Atwater* note that in dealing with offenses that carry no jail penalty,[3] the government is placing an individual in jail *prior* to a conviction, even though the individual cannot be incarcerated *after* the conviction. In addition, when a police officer issues a traffic summons to a motorist, the law in New York has been clear that neither the motorist nor the car can be searched.[4] Whether that will change is unclear.

As discussed in Chapter 5 below, the New York Court of Appeals has held that custodial arrests for traffic misdemeanors should not be made where an alternative summons is available and can be issued. In *People v. Howell*,[5] a motorist was stopped for reckless driving, a misdemeanor under the Vehicle and Traffic Law, and searched pursuant to a custodial arrest. In suppressing the handgun which was recovered, the Court of Appeals held that because a summons could have been issued, the custodial arrest was unlawful. The Court, on other occasions, explained its reason for precluding custodial arrests where a summons could be issued. The Court reasoned that a search incident to a lawful arrest has two objectives--the seizure of evidence of a crime and the removal of any weapons from the arrestee. Thus, the Court concluded that when a motorist is stopped for a traffic misdemeanor, "it is unlikely and certainly unreasonable to assume that ... a search of the defendant's person [is] properly an incident to the arrest."[6] However, when a defendant cannot supply appropriate identification to a police officer, courts will routinely approve of a custodial arrest in lieu of a summons.[7] It should be noted that in New York, an officer can make a custodial arrest for a violation under the Penal Law or a local ordinance committed in the officer's presence, even though the officer would be authorized to forgo a custodial arrest and issue a summons or desk appearance ticket.[8]

It remains to be seen whether the decision in *Atwater* will be muted by the prior holdings of the Court of Appeals. This will depend on whether the Court seeks to offer greater protection to New York citizens under the New York Constitution. Ultimately, if it is determined by New York courts that a custodial arrest is permissible solely within the discretion of a police officer, then a motorist could be *searched* incident to the arrest. In addition, if there is no one who can safeguard the automobile, the car can be impounded, and an inventory search can be conducted. Other critics suggest that, as a result of *Atwater*, more consent searches of automobiles will be conducted. If a police officer explains to a motorist that he or she can be taken into custody, the motorist may consent to a search in lieu of a custodial arrest. Whether that type of consent is truly voluntary would also need to be resolved by the courts.

Finally, it can be argued that *Atwater's* effect may be magnified by the New York Court of Appeals' decision dealing with pretext stops.[9] If a police officer has probable cause to stop a vehicle for a traffic offense, the stop is permissible even though the reason he stopped the car was to investigate unrelated criminal activity and even though there was no reasonable suspicion to believe there was criminal activity. Pursuant to *Atwater*, the officer can take the motorist into custody and, under certain circumstances, conduct an inventory search of the vehicle.

The United States Supreme Court more recently held that, in another category of minor offenses, a custodial arrest is valid. In *Virginia v. Moore*,[10] the Court held that a custodial arrest for a traffic offense based upon probable cause was lawful even though it may violate a state's search and seizure policy or a state law requiring the issuance of a summons. The potential impact of this decision in New York may depend upon a triology of cases decided by the New York Court of Appeals forty years ago, that left open a window of opportunity for greater protection against this type of arrest under the New York State Constitution.

In *Virginia v. Moore*,[11] Virginia police officers arrested the defendant for driving with a suspended license, a misdemeanor punishable by a year in jail and a $2,500.00 fine. However, under Virginia law, an officer is required to issue a summons, in lieu of an

arrest, for this crime. Pursuant to the arrest, the police officers searched the defendant and recovered sixteen grams of crack cocaine. In moving to suppress the cocaine, the defendant argued that the arrest was unlawful under state law and, as a consequence, the search incident to the arrest was also illegal.

The Supreme Court held the arrest to be valid because it satisfied the Fourth Amendment requirement that it be based upon probable cause. The fact that the arrest violated Virginia law did not invalidate the arrest, nor did it invoke the Fourth Amendment exclusionary rule. The Court refused to link the analysis of the arrest to state law because that would have made the result unpredictable and dependent upon a case-by-case analysis of individual state search and seizure policies. Underlying the Court's adherence to a probable cause standard was its preference for predictability and bright-line rules for law enforcement officers.

As noted above, the Court also expressed its preference for bright-line rules in *Atwater v. City of Lago Vista*,[12] a case which served as the precedential underpinning for *Moore*. While the arrest in *Atwater* was lawful under state law, the Court did not decide whether the result would have been the same had the arrest violated a state statute. *Moore* has now held that the result would be the same, provided of course that the arrest was based upon probable cause.

Once the Court held that *Moore's* arrest was valid, the issue of the search incident to the arrest was disposed of easily. The Court noted that officers may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence. The Court relied upon *U.S. v. Robinson*,[13] in which the Court upheld a search of a suspect who had been lawfully arrested for certain traffic offenses, even though the officer had no basis for believing either that the suspect was armed or that evidence might be found. The Court found that the intrusive nature of a lawful custodial arrest includes and permits the lesser intrusion of the arrestee's search. The search is justified by a need to ensure the officer's safety while the suspect is taken into custody and brought to the precinct. The Court noted, however, that an officer who issues a summons, does not face the same danger and, therefore, does not have the same authority to search.

While the Court refused to apply state search and seizure jurisprudence to its analysis in *Moore*, it did acknowledge that state courts are free to protect the privacy interests of their citizens by imposing higher standards on searches and seizures than required by the Federal Constitution. Thus, states may choose to regulate arrests in a manner more restrictive than the Fourth Amendment requires. They may do so pursuant to statute, as did the Virginia state legislature, or by reliance upon their state constitution.[14]

What impact will *Moore* have in New York on the ability of police officers to make routine custodial arrests of traffic offenders followed by searches incident to those arrests? New York is one of twenty-eight states that have no limitation on police discretion to arrest for a traffic offense.[15] While police officers have the discretion to make arrests now, which is infrequently exercised, will *Moore* embolden officers to begin making routine custodial arrests as a matter of policy?

Any discussion in this area begins with a trilogy of cases decided forty years ago by the New York Court of Appeals. In *People v. Marsh*,[16] the Court held that a custodial arrest for a traffic infraction, followed by a search, was only reasonable if the individual posed a danger to the officer. The decision was based on both the Federal

and State Constitutions, as well as a determination by the Court that there was no legislative authority for searches incident to these types of arrests. The Court also noted that, when a police officer stops a motorist for a traffic infraction, there can be no "fruits" or "implements" of such an infraction; this factor militated against the necessity for an arrest.

Seven years later, the Court of Appeals expanded the rule in *Marsh* to searches incident to a misdemeanor traffic arrest. In *People v. Adams*,[17] the Court based its holding solely on federal constitutional grounds; the decision's viability however, was short-lived when *U.S. v. Robinson, supra ,* was decided six months later. As noted above, *Robinson* held that searches incident to an arrest for a traffic infraction were not violative of the Fourth Amendment.

The final case in the trilogy, *People v. Troiano*,[18] essentially overruled *Adams* by relying on *Robinson* to uphold a search incident to a misdemeanor traffic arrest. *Troiano* relied upon *Robinson's* pronouncement that once a person is lawfully taken into custody a search may be conducted incident to the arrest.

Thus, *Robinson* served to eliminate the *federal* constitutional underpinnings of both *Marsh* and *Adams*. Nonetheless, the *Troiano* majority held open the possibility that, in the future, there could be greater protection for New York citizens under a *state* constitutional doctrine. It held that "[t]here is, perhaps, an area of traffic violation 'arrest' where a full-blown search is not justified, but it might seem to be confined to a situation where an arrest was not necessary because an alternative summons was available or because the arrest was a suspect pretext." The three concurring judges also held that the *state* constitutional underpinning of *Marsh* was still viable. The Court of Appeals later underscored its preference for a summons in lieu of an arrest for a traffic stop,[19] but on other occasions it has acknowledged that an arrest is mandatory under circumstances which preclude the issuance of a summons.[20]

Thus, the *Marsh-Adams-Troiano* trilogy offered the promise of greater protection for New York motorists who are subject to arrests for traffic infractions. Will that promise be realized? The need to answer that question seems more urgent in the wake of *Atwater* and *Moore* which have provided police officers with the federal constitutional basis to take motorists into custody for minor traffic offenses and to search them incident to the arrest.

The Court of Appeals has clearly demonstrated a willingness in the past to adopt more protective standards under the New York State Constitution when doing so promotes the individual rights of citizens. Thus, the Court may interpret the state constitution, as it has in the past, as an independent source of protection for its citizens. In the area of searches and seizures, the Court has turned to the State Constitution to afford citizens greater protection than that provided by the Fourth Amendment.[21]

In the past, the Court has signaled a particular concern for the manner in which motorists are treated by law enforcement officers. In *In re Muhammad F.*,[22] the Court rejected a roving patrol stop that had been created to protect victim-prone taxicab drivers. The Court expressed a particular dissatisfaction with the manner in which motorists were taken by surprise and stopped by police officers while driving their cars. The Court noted that such stops, without warning, can generate anxiety or even fear on the part of lawful travelers. Similarly, in *People v. Spencer*,[23] the Court expressed its dissatisfaction with the indiscriminate stopping of automobiles to

determine whether an occupant may have information regarding the commission of a crime.

This concern for motorists, and the manner in which they are treated by law enforcement officials, may reflect a continued willingness by the current Court to provide greater protection for New York citizens who are arrested for traffic infractions. In the past, the Court has observed the impact of certain police practices on the citizens of this State and the unique needs of our citizens for greater state constitutional protection. As a result the Court has interpreted Article I §12 of the New York State Constitution to reflect a policy of heightened protection of personal privacy in various settings.[24]

In assessing custodial arrests for traffic offenses, the Court once again would be in the best position to address the interests of its citizens and balance those interests against the interests of the State. In making a determination, the Court would undoubtedly take note of the intrusive nature of a custodial arrest and its serious impingement upon an individual's freedom and privacy interests. As part of the arrest process an individual is searched, booked, fingerprinted and held in custody until he or she appears before a judge for arraignment.

In balancing that intrusion against any state's interest, the Court would assess whether the state has a special interest that justifies this type of arrest. It can be argued that there is no such state interest. First, the state's interest in arresting a motorist for a traffic offense could not be justified by a desire to insure that the motorist will be present to answer the allegations against him or her; it is presumed that currently the overwhelming majority of individuals appear and either contest the ticket or pay a fine. Second, there is no state interest in obtaining evidence as a result of this type of arrest. Finally, there is no state interest that a custodial arrest will insure that the traffic offender will not commit future traffic offenses.

On balance, it can be argued that an individual's privacy interests outweigh the state's interest in custodial arrests for traffic offenders. In the wake of *Atwater* and *Moore,* the Court of Appeals may seize the opportunity, left open in *Troiano*, to prohibit these arrests pursuant to the State Constitution.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure > Arrests > General Overview

Criminal Law & Procedure > Arrests > Probable Cause

Criminal Law & Procedure > Search & Seizure > General Overview

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Search Incident to Lawful Arrest > General Overview

FOOTNOTES:

Footnote 1. Atwater v. City of Lago Vista, 532 U.S. 318, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001) .

Footnote 2. Atwater v. City of Lago Vista, 532 U.S. 318, 346-47, 121 S. Ct. 1536, 1553, 149 L. Ed. 2d 549, 572 (2001) .

Footnote 3. In New York a seat belt violation carries only a *civil* penalty. N.Y. Veh. & Traf. Law § 1229-c(5).

Footnote 4. People v. Marsh, 20 N.Y.2d 98, 281 N.Y.S.2d 789, 228 N.E.2d 783 (1967) .

Footnote 5. People v. Howell, 49 N.Y.2d 778, 426 N.Y.S.2d 477, 403 N.E.2d 182 (1980) .

Footnote 6. People v. Adams, 32 N.Y.2d 451, 346 N.Y.S.2d 229, 299 N.E 2d 653 (1973) ; *see also* Santiago v. City of N.Y., 2002 N.Y. Misc. LEXIS 188 (Sup. Ct. Bronx Co. 2002).

Footnote 7. People v. Rodriguez, ___ Misc.2d ___, N.Y.L.J. 6/21/02 (N.Y. Crim. Ct. 2002).

Footnote 8. People v. Lewis, 50 A.D.3d 595, 857 N.Y.S.2d 88 (1st Dept. 2008); People ex rel. Johnson v. N.Y. State Div. of Parole, 299 A.D.2d 832, 750 N.Y.S.2d 696 (4th Dept. 2002); People v. Barclay, 201 A.D.2d 952, 607 N.Y.S.2d 531 (4th Dept. 1994) ; People v. Brewer, 200 A.D.2d 579, 606 N.Y.S.2d 292 (2d Dept. 1994) ; People v. Anderson, 111 A.D.2d 109, 489 N.Y.S.2d 486 (1st Dept. 1985) ; People v. Houston, 19 Misc.3d 1124(A), 862 N.Y.S.2d 816 (Sup. Ct. Kings Co. 2008); People v. Grant, 126 Misc.2d 18, 480 N.Y.S.2d 1010 (N.Y. Crim. Ct. 1984) ; People v. Hazelwood, 104 Misc.2d 1121, 429 N.Y.S.2d 1012 (N.Y. Crim. Ct. 1980) .

Footnote 9. People v. Robinson, 97 N.Y.2d 341, 741 N.Y.S.2d 147, 767 N.E.2d 638 (2001) ; *see also infra* Chapter 5.

Footnote 10. Virginia v. Moore, ___ U.S. ___ 128 C. Ct. 1598, 170 L. Ed. 2d 559 (2008) .

Footnote 11. *Virginia v. Moore*, 128 S. Ct. 1598 (2008) .

Footnote 12. *Atwater v. City of Lago Vista*, 532 U.S. 318, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001) .

Footnote 13. *U.S. v. Robinson*, 414 U.S. 218 (1973) .

Footnote 14. Certain courts have rejected *Atwater* under a state constitutional theory. See *State v. Askerooth*, 681 N.W.2d 353 (Minn. 2004) ; *State v. Brown*, 792 N.E.2d 175 (Ohio. 2003) ; *State v. Bauer*, 36 P.3d 892 (Mont. 2001) ; *State v.*

Bayard, 71 P.3d 498 (Nev. 2003) (cases collected in 55 Syracuse L. Rev. 889, F.N.18).

Footnote 15. The American Bar Association has criticized this type of unlimited discretion. *See American Bar Association Standards Relating to Pretrial Release*, §2.1

Footnote 16. *People v. Marsh*, 20 N.Y.2d 98 (1967) .

Footnote 17. *People v. Adams*, 32 N.Y.2d 451 (1973) .

Footnote 18. *People v. Troiano*, 35 N.Y.2d 476 (1974) .

Footnote 19. *People v. Howell*, 48 N.Y.2d 778 (1980).

Footnote 20. *See e.g. People v. Ellis*, 62 N.Y.2d 393 (1984) (defendant could not produce identification); *People v. Copeland*, 39 N.Y.2d 986 (1976) (same).

Footnote 21. See *Pitler, "Independent State Search and Seizure Constitutionalism: The New York Court of Appeals Quest for Principled Decision Making"*, 62 Brook. L. Rev. 1, 9, 14, 17 (1996).

Footnote 22. *In Re Muhammad F.*, 94 N.Y.2d 136 (1999) .

Footnote 23. *People v. Spencer*, 84 N.Y.2d 749 (1995) .

Footnote 24. See, *e.g. People v. Dunn*, 77 N.Y.2d 19 (1990) (home); *People v. Scott* 79 N.Y.2d 474 (1992) (open field); *People v. Mercado*, 68 N.Y.2d 874 (1986) (public bathroom stall).