People v Diaz
2012 NY Slip Op 33557(U)
April 26, 2012
Sup Ct, New York County
Docket Number: 1819/2011
Judge: Juan M. Merchan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

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PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER
Ind. No. 1819/2011

-against-

JASON DIAZ,

Defendant.

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JUSTICE JUAN M. MERCHAN;

On September 29, 2011, this Court presided over a *Dunaway/Mapp* hearing. By Decision and Order dated October 25, 2011, Defendant's motion to suppress physical evidence was denied. (*See,* October 25, 2011 Decision and Order annexed hereto and incorporated herein).

On February 29, 2012, Defendant filed and served a Motion to Reargue and Renew. On April 9, 2012, the People filed a Response opposing the Defendant's motion.

For the reasons set forth herein, defendant's motion for leave to reargue is denied. Defendant's motion for leave to renew is granted and upon renewal, the court adheres to its October 25, 2011 decision denying suppression.

Motion to Reargue Pursuant to CPLR §2221(d)

CPLR §2221(d) states that a motion for leave to reargue: "(1) shall be identified specifically as such; (2) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and (3) shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry."

Defendant's motions to reargue is premised upon a decision issued by the First Department of the Appellate Division on November 1, 2011, *People v. Crawford,* 89 AD3d 422 (1st Dept 2011). Defendant argues that the facts of *Crawford, supra,* are "strikingly similar" to the facts herein, and thus reargument should be granted.

The defendant's moving papers fail to meet the requirements for a motion to reargue as set forth in CPLR 2221(d). The Defendant's papers do not allege that this court overlooked or misapprehended matters of fact or law which predate its decision. Instead, Defendant maintains that: "New case law, published since the Court made its decision, shows that the defendant's motion should not have been denied. Thus, the defendant moves the Court for leave to reargue." (Defendant's Affirmation in Support, p. 6, Point II, ¶1).

Defendant's argument is not a valid basis to entertain a motion to reargue. Defendant's moving papers set forth no binding legal precedent predating this court's decision alleged to have been "overlooked or misapprehended," as required by the statute.

A motion to reargue does not permit an unsuccessful party to reargue the very questions previously decided, nor does it serve to provide that party an opportunity to advance arguments different from those tendered on the original application.

Accordingly, Defendant's motion for leave to reargue is denied.

Motion to Renew Pursuant to CPL §710.40(4)

CPL §710.40(4) provides that: "[i]f after a pre-trial determination and denial of the motion the court is satisfied, upon a showing by the defendant, that additional pertinent

facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion, it may permit him to renew the motion before trial or, if such was not possible owing to the time of the discovery of the alleged new facts, during trial."

Defendant does not allege that any new facts have been discovered since the court's determination of the motion, and thus, Defendant's motion to renew pursuant to CPL §710.40(4) is denied.

Motion to Renew Pursuant to CPLR §2221(e)

CPLR §2221(e) states that a motion for leave to renew: "(1) shall be identified specifically as such; (2) shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and (3) shall contain reasonable justification for the failure to present such facts on the prior motion."

Defendant argues that *People v. Crawford,* 89 AD3d 422, *supra,* constitutes a change in law requiring this court to grant Defendant's motion to suppress pursuant to CPLR §2221(e). Defendant asserts that the facts in *Crawford* are "strikingly similar" to the facts underlying this court's suppression ruling, and therefore, this court must grant renewal, and upon renewal, must suppress the physical evidence in this case.

Because Defendant has submitted appellate case law post-dating this court's decision, Defendant's motion for leave to renew is granted to the extent that this court will analyze what, if any, effect the decision in *Crawford* has upon its prior ruling.

In *Crawford, supra,* police officers traveling in an unmarked car, observed Mr.

Crawford walking down a street at night, repeatedly adjusting an object in his pants pocket by cupping his hand over the outside of his pocket and pulling upwards. When the police pulled their vehicle alongside Mr. Crawford and asked to speak to him, the defendant complied. He obeyed a direction to remove his hands from his pockets as well as a request to produce identification. At that point, an officer observed a five to six inch bulge in one of the defendant's pants pockets. As one of the officers opened his car door and stepped outside, the defendant fled. The police pursued and observed the defendant throw a gun to the ground. The Appellate Division concluded that: "Defendant's flight, when accompanied by nothing more than the presence of an object in his pocket that was unidentifiable even at close range, did not raise a reasonable suspicion that he had a gun or otherwise was involved in a crime." *Id.* at 423.

Contrary to Defendant's assertion, the facts in *Crawford* are markedly different from the facts in the current matter. Initially, this case does not involve a pocket bulge. Instead, this case involves repeated hand movements toward the waistband area of the Defendant's pants. This is a significant distinction because it is common for people to carry various innocuous items in their pockets. However, it is not normal practice for people to carry innocent, non-contraband items inside the waistbands of their pants. In *People v. DeBour,* 40 NY2d 210, 221 (1976), in upholding the seizure of a gun from the defendant's waistband, the Court noted that: "The location of the bulge is noteworthy because unlike a pocket bulge which could be caused by any number of innocuous objects, a waistband bulge is telltale of a weapon." Since *DeBour,* appellate cases have repeatedly distinguished fact pattens which involved waistband bulges or hand

movements toward the waistband area, from cases involving pocket bulges. *See, People v. Holmes,* 81 NY2d 1056, 1058 (1993) (bulging jacket pocket distinguished from a waistband bulge); *People v. Moore,* 6 NY3d 496, 501 (2006) (police officers, having a right to make a common law inquiry, would have possessed reasonable suspicion to support a frisk when the defendant reached for his waistband, however, because the defendant was stopped at gunpoint prior to reaching for his waistband, the pat-down was improper); *see also, People v. Chin,* 25 AD3d 461 (1st Dept), *lv* denied 6 NY3d 846 (2006); *People v. Thomas,* 258 AD2d 413 (1st Dept), *lv denied* 93 NY2d 980 (1999); *People v. Giles,* 223 AD2d 39, 42 (1st Dept), *app denied,* 89 NY2d 864 (1996); *cf, In re Felix R.,* 265 AD2d 277, 277-228 (1st Dept 1999).

In the current case, the testifying officer, Stephen Hillman, had extensive training and experience in the area of firearms, including participation in prior arrests in which defendants had secreted guns in their waistbands. Based upon his training and experience, Officer Hillman believed the manner in which Mr. Diaz was adjusting his waistband while walking down the street at night, in a high crime area known for gun violence, was indicative of the presence of an unholstered firearm. Additionally, Defendant's furtive hand movement toward his waistband occurred immediately following his startled reaction upon making eye contact with the plainclothes officers. It was not until after making these observations that Officer Hillman opened his car door and began to approach the Defendant. However, as the officer exited his vehicle, Mr. Diaz stepped behind a companion thereby blocking the officer's ability to fully observe the front of Defendant's body. Despite this furtive movement, the officer could see that the

Defendant was again moving his hand toward the front area of his waistband. At this point, Officer Hillman, now less than five feet from the Defendant, ordered the Defendant to raise his hands and attempted to frisk Defendant's waistband area. This court found, based upon the totality of the circumstances, that Officer Hillman had reasonable suspicion to believe that the Defendant posed a threat to his safety and acted properly in initiating a frisk.

The facts of this case are far more similar to those in *People v. Stephens,* 47 AD3d 586 (1st Dept), *lv denied* 10 NY3d 940 (2008), than to those in *Crawford, supra.* In *Stephens,* the defendant was observed at night walking in an area known for recent gunpoint robberies. As he walked behind another man, Stephens clutched his waistband and kept his right arm tightly against his body. When the defendant observed police officers in an unmarked police car, he looked startled. The officers stopped their car and began to approach the defendant, however he ran away before the police could ask him any questions. As he ran, officers pursued and observed the defendant discard a gun. The *Stephens*' court found these observations justified the officers' pursuit of the defendant and the recovery of the firearm. Based upon the totality of the circumstances, the police had reasonable suspicion to support the actions taken.

Likewise, in *People v. Montague,* 175 AD2d 54 (1st Dept 1991), the Appellate Division was presented with a factual scenario very similar to the facts before this court. In *Montague,* when police approached a group of men standing near a drug prone location, the defendant quickly moved away from the group while nervously looking back toward the officers. As the officers exited their vehicle and approached the defendant,

he reached into the front of his waistband. At that point, one of the officers grabbed the defendant's arm and removed a revolver from inside his waistband. The *Montague* court concluded that "...where defendant manifested his awareness of the police, made an initial attempt to evade them, and, when directly confronted, placed his hand in his waistband, a telltale hiding place for a gun * * * it would be unreasonable to require the officers to assume the risk that defendant's conduct was not innocuous." *Id.* at 56. *See also, People v. Pines,* 281 AD2d 311 (1st Dept 2001), *aff'd* 99 NY2d 525 (2002).

Subsequent to this court's receipt of the current motion to renew, the First Department decided *People v. Gerard,* __ AD3d __, 2012 NY Slip Op 02957 (1st Dept), on April 19, 2012, where the question presented was whether the defendant's actions upon the approach of the police supported a stop and frisk. Although Defendant has not relied upon *People v. Gerard,* an analysis of that case is appropriate at this time. In *Gerard,* a police officer approached the defendant after he observed him walking in a drug and gun prone location in the early morning hours. The defendant was wearing an unzipped jacket which was weighted down on the left side. When the defendant saw the officers approaching, he changed direction, quickened his pace, and hugged the building line, positioning his body toward the building wall in such a way as to shield his weighted-down jacket pocket from view. The First Department found these facts provided the officers with a founded suspicion that criminality was afoot. However, the court concluded that when officers approached, the defendant's further act of turning his left shoulder toward the officers, refusal to respond to a question, and his attempt to block the officer's hand from feeling the pocket bulge, did not support a stop and frisk.

While the facts in *Gerard* are indeed strikingly similar to the case at bar, the obvious and significant distinction, as in *Crawford,* is that both cases involved a pocket bulge as opposed to a waistband adjustment. Neither *Gerard* nor *Crawford* involved a hand movement underneath clothing toward a waistband. Here, as Officer Hillman left his vehicle, the defendant immediately positioned himself behind his companion and moved his hand to his waistband, thus escalating the threat level. The officer, almost face-to-face with the defendant at that instant, had reasonable cause to believe the defendant was reaching for a weapon. Accordingly, his attempt to frisk the defendant was a reasonable response to protect his own safety.

Therefore, this court concludes that *People v. Crawford, supra,* nor does not constitute a change in law. *Crawford* does not alter any established principles of search and seizure law, nor does it overrule or modify any prior appellate law relating to the right to stop, frisk or pursue an individual. Rather, it applied the same four level analysis set forth in *People v. DeBour,* 40 NY2d 210, *supra*, utilized by this court in its October 25, 2011 Decision and Order.[1] Likewise, *People v. Gerard, supra,* does not alter any established principles of law. Therefore, upon consideration of Defendant's motion for

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1. Defense counsel contends this court failed to apply the four-level test set forth in *People v. DeBour,* 40 NY2d 210, *supra*, in analyzing this encounter. (*See,* Affirmation in Support of Motion for Leave to Renew and Reopen, p. 5, no. 3). To the contrary, this court employed a *DeBour* analysis throughout it decision. This court found that Officer Hillman's initial observations, including Defendant's startled expression upon seeing the plainclothes officers' vehicle turning the corner directly in front of him, followed by Defendant's quick hand movement toward his waistband and his act of pulling up his pants, supported a common law right of inquiry, the second level of *DeBour, supra.* Immediately thereafter, as the officer approached to within feet of the Defendant, he made a second hand movement toward his waistband, while attempting to shield his actions from the officer's view by moving behind his walking companion. These further actions provided reasonable suspicion, the third level of *DeBour.* (*See,* October 25, 2011 Decision and Order, pp. 7-8). Moreover, as a corollary of the right to temporarily detain for questioning, a police officer may frisk a person when he reasonably suspects he is in danger of physical injury by virtue of the detainee being armed. *DeBour,* 40 NY2d at 223.

renewal, this court adhere's to it prior Decision and Order dated October 25, 2011.

Conclusion

Defendant's motion for leave to reargue is denied. Defendant's motion for leave to renew his previous motion is granted, and upon renewal, Defendant's motion to suppress is denied.

This constitutes the decision and order of the court.

Dated: April 26, 2012
New York, New York

Juan M. Merchan
Judge of the Court of Claims
Acting Justice - Supreme Court