People v Parker
2017 NY Slip Op 33286(U)
November 13, 2017
County Court, Dutchess County
Docket Number: 77/2017
Judge: Peter M. Forman

[* 1]

STATE OF NEW YORK: COUNTY OF DUTCHESS
COUNTY COURT

INDX 1257-2017

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

- against -

SHAMAR A. PARKER,

Defendant.

DECISION AND ORDER
Ind. No. 77/2017

William V. Grady,
District Attorney
By: Frank R. Petramale, Esq.

Cynthia G. Kasnia, Esq.
Counsel for Defendant

HON. PETER M. FORMAN, County Court Judge

Defendant stands accused by the Grand Jury of the County of Dutchess of the following crimes: Criminal Possession of a Weapon in the Second Degree, a Class C Armed Violent Felony, in violation of §265.03(3) of the Penal Law; Criminal Possession of a Weapon in the Third Degree, a Class D Felony, in violation of §265.02(1) of the Penal Law; and Criminal Possession of a Controlled Substance in the Seventh Degree, a Class A Misdemeanor, in violation of §220.03 of the Penal Law. These charges arise from the Defendant's arrest during a traffic stop in the City of Poughkeepsie on May 6, 2017.

Defendant has moved to suppress all physical evidence obtained as the result of an alleged unlawful search and seizure, including a loaded firearm, to wit: a Ruger .40 caliber semi-automatic pistol that was recovered from the Defendant's waistband on the night of his arrest. Defendant has also moved to suppress any statements made by the Defendant while he was being processed by the arresting agency.

By Decision and Order dated August 24, 2017, this Court ordered a pre-trial hearing to

consider Defendant's respective motions and a combined Dunaway/Huntley hearing was held on October 27, 2017. At the conclusion of the hearing, the Court provided counsel with the opportunity to submit written arguments and case law in support of their respective positions by November 9, 2017. The Court has reviewed the additional written materials submitted by counsel in rendering its determination of the pending suppression motions.

DUNAWAY

The People have the burden in the first instance of going forward to show the legality of the police conduct People v. Baldwin, 25 NY2d 66, 770 (1969); People v. Green, 100 AD3d 654 (2d Dept 2012); People v. Leach, 90 AD3d 1073 (2d Dept 2011). Defendant, however, bears the ultimate burden of proving, by a preponderance of the evidence, that this evidence should be suppressed. People v. Berrios, 28 NY2d 361 (1971); People v. Cole, 85 AD3d 1198 (2d Dept 2011); People v. Grant, 83 AD3d 862 (2d Dept 2011).

City of Poughkeepsie Police Officer John Simons was the sole witness who testified at the hearing regarding the stop of the vehicle.

I find Officer Simons' testimony to be reliable and credible in all respects. Based on the credible and reliable evidence introduced during the hearing, I make the following findings of fact and conclusions of law:

Officer Simons and his partner were working the 12 midnight to 7 a.m. tour on May 6, 2017. They were in uniform in a marked patrol vehicle in a high crime area near the intersection of Smith Street and Harrison Street in the City of Poughkeepsie at approximately 12:15 a.m. As they turned onto Harrison Street, they observed a vehicle leave a parked position into the roadway without signaling. As the police officers got closer to the vehicle in question, P.O. Simons noticed the plate number and the fact that the vehicle had extremely dark window tints.

He also recognized the vehicle from several previous encounters in the past few weeks, including a stop on May 2, 2017 when it was determined that the operator of the vehicle was charging passengers for rides into the City of Poughkeepsie without having a taxi license issued by the City of Poughkeepsie.

Upon approaching the subject vehicle, the operator rolled down his window and extended both of his hands out of the driver's side window, which raised Officer Simons' suspicions. In his opinion, this was not a typical response by a driver who has just been pulled over by the police. The driver of the vehicle, Lucius Jones, handed his license to P.O. Simons and it was determined to be suspended. There were three passengers in the vehicle including the Defendant who was seated in the rear of the subject vehicle.

While his partner was interviewing the driver, P.O. Simons walked around the rear of the vehicle and approached the rear window on the passenger side of the vehicle. Simons asked the Defendant to exit the vehicle and the Defendant appeared to be nervous. He was speaking to someone on a cell phone and he began repeating everything that P.O. Simons was saying to whoever he was on the call with. For example, the Defendant told his conversant that he was being asked to step out of the vehicle and he asked the conversant whether, in fact, he had to comply with the officer's request.

Before asking the Defendant to exit the vehicle, Simons and his partner ran the names of the passengers and determined that none possessed a valid driver's license. Therefore, when P.O. Simons asked the Defendant to exit the vehicle, he knew that the vehicle was going to be impounded since none of the occupants could drive it from the scene.

The Defendant asked Simons why he was being asked to exit the vehicle and the officer responded that he needed to ask him a couple of questions outside of the vehicle. When asked a

third time to exit the vehicle, the Defendant began looking around over his shoulders, back and forth, left to right, which indicated to P.O. Simons that he was nervous about something. Simons then asked the front seat passenger to unlock the rear door, which she did.

As P.O. Simons opened the rear passenger door, the Defendant asked Simons if he was going to search him and whether he was allowed to search him. Simons responded that he did not presently intend to search the Defendant, but he asked the Defendant whether there was a reason that he was asking that question. Simons also asked the Defendant whether he had something that he should not have on his person. During this conversation, the Defendant was still on the phone and he finally complied with the officer's request to exit the vehicle.

When the Defendant exited the vehicle, he did so in a peculiar manner. After planting his right foot on the ground, he pivoted backwards with his left foot in a way that obscured his left side and his front from the officer. Essentially, he backed out of he vehicle, not facing the officer. This further heightened P.O. Simons' suspicions, and caused him to become concerned that the Defendant might be trying to conceal a weapon. P.O. Simons' testified that his training and experience taught him that individuals trying to "blade" themselves from an officer are often attempting to conceal a weapon.

Simons then asked the Defendant to place both of his hands on the vehicle. As the Defendant complied, he pressed his pelvis firmly against the trunk of the vehicle, further raising the officer's suspicions that the Defendant might have a weapon. Simons then placed his hand on the Defendant's left shoulder and said in his ear that if he had something the he shouldn't have, he needed to tell the officer at that time. The Defendant did not respond, but the officer felt the Defendant's shoulder trembling and shaking. P.O. Simons then repeated the same question in the Defendant's ear and again, the Defendant did not respond.

The officer then asked the Defendant to keep his hands on the vehicle, but to step back from the vehicle, which the Defendant did. The officer then reached his left hand around the front of the Defendant's waistband around his belt line. As he did so, the officer felt what he believed to be the butt of a gun, a metal object. This object was near the Defendant's pelvis, in the same area that he had been pressing against the vehicle. Simons then called his partner to come over. When Simons lifted up the Defendant's wind breaker, the two officers observed the weapon in the Defendant's waistband, left of center. At that point, the weapon was recovered, and the Defendant was placed under arrest and handcuffed by the officers.

When Simons asked the Defendant if he had anything else in his possession, the Defendant stated that he had a magazine in his left jacket pocket. Simons searched the pocket, and recovered a magazine loaded with 15 rounds of ammunition.

The Court finds that the police officers had an articulable reason to stop the vehicle in the first instance after the observation of one or more apparent violations of the Vehicle and Traffic Law. People v. Ingle, 36 NY2d 413 (1975); People v. Grimes, 133 AD3d 124 (4th Dept 2015) (pulling away from the curb without signaling); People v. McKane, 267 AD2d 253 (2d Dept 1993) lv. denied 94 NY2d 922 (2000) (excessively tinted windows on car).

Once the vehicle is validly stopped, the police are authorized to order the driver and all passengers out of the vehicle until the stop is concluded. People v. Forbes, 283 AD2d 92 (2d Dept 2001). See also, Maryland v. Wilson, 519 U.S. 408, 413 (1997) (describing the potentially dangerous situations police officers encounter in conducting traffic stops, especially when there are more then one occupant in the vehicle).

In this case, the Defendant appeared to be nervous and "fidgety" during his conversation with P.O. Simons. Based on the totality of the circumstances elicited by Simons, the officer's

questions regarding the possible possession of "something he shouldn't have" was reasonable. See, People v. Smith, 280 AD2d 340 (1st Dept 2001); People v. Eure, 46 AD3d 386 (1st Dept 2007).

In this case, the Court finds that the Defendant's furtive conduct gave rise to a reasonable belief in the mind of P.O. Simons that he was armed and that a pat frisk was appropriate and lawful. See, People v. Patron, 141 AD3d 545 (2d Dept 2016). Specifically, the Defendant's conduct, both inside and outside the vehicle, caused Simons to suspect that the Defendant was attempting to conceal something. P.O. Simons has reason to suspect that the Defendant was armed and posed a threat to his safety since his actions were directed to the area of his waistband which was concealed from Simons' view. Thus, the pat frisk in this case complies with the requirements of the Fourth Amendment. See, People v. Grant, 83 AD3d 862 (2d Dept 2011), lv denied 17 NY3d 795 (2017); People v. Fagen, 98 AD3d 1270 (4th Dept 2012); People v. Batista, 88 NY2d 650 (1996).

In making this determination, the Court has considered the totality of the circumstances leading up to the search in question, including the Defendant's demeanor and actions both inside and outside of the vehicle and the Defendant's statements (or lack thereof) both inside and outside of the vehicle throughout the encounter with P.O. Simons. P.O. Simons had reasonable suspicion to be concerned for his safety thoroughly justifying his conducting a pat frisk of the Defendant which resulted in the recovery of a loaded illegal weapon from the Defendant's waistband. See, People v. Grant, supra.

Therefore, the Defendant's motion to suppress is denied.

HUNTLEY

Pursuant to CPL §710.30, the People have served the Defendant with a written notice of

their intent to offer evidence at trial of statements that the Defendant made to public servants which would be subject to suppression if involuntarily made. Specifically, this notice identified certain statements that the Defendant allegedly made on May 6, 2017 to P.O. John Simons of the City of Poughkeepsie Police Department. Defendant has moved to suppress these statements on the grounds, *inter alia*, that they were involuntarily made within the meaning of CPL §60.45.

The Huntley hearing was conducted before me on October 27, 2017. I give full credence to the testimony of P.O. John Simons, the only witness who testified at that hearing.

The findings of fact set forth in the Dunaway section of this decision are incorporated into this part of the Court's determination as well. The statements made by the Defendant while he was in the vehicle and prior to being placed under arrest are admissible since they are not the subject of custodial interrogation. See, People v. Naradzay, 11 NY3d 460 (2008); People v. Rapley, 292 AD2d 469 (2d Dept 2002); People v. Williams, 97 AD3d 769 (2d Dept 2012).

After the Defendant was placed under arrest at the scene by P.O. Simons and his partner, he was transported to the City of Poughkeepsie Police Department Headquarters for processing. He was not read his Miranda rights by either officer. While being processed, the Defendant asked P.O. Simons what he was being charged with. Simons informed the Defendant that one of the changes was Criminal Possession of Stolen Property relating to the weapon that was seized at the scene being reported stolen from the state of North Carolina. The Defendant then stated that he did not know anything about that and that he had found the gun in North Carolina.

I find that the Defendant was in custody at the time that he made the statement to P.O. Simons during processing. I also find that no evidence was presented demonstrating that the Defendant knowingly and intelligently waived his Miranda rights after receiving the requisite warnings. Accordingly, under Miranda v. Arizona, 384 U.S. 436 (1966), the admissibility of

these statements attributed to the Defendant will turn on the issue of whether the statement was the product of an interrogation environment, or the result of express questioning or its functional equivalent. People v. Stoesser, 53 NY2d 648 (1981).

The Court further finds that the Defendant's statements made during processing were spontaneous. P.O. Simons simply answered his question and the Defendant volunteered an inculpatory statement. See, People v. Davis, 32 AD3d 445, (2d Dep 2006); People v. McClough, 135 AD3d 880 (2d Dept 2016); People v. Williams, 97 AD3d 769 (2d Dept 2012). I, therefore, find that these statements made by the Defendant during processing were spontaneous statements and not the product of interrogation. Defendant's motion to suppress these statements is denied.

There are additional statements attributed to the Defendant that were not set forth in the CPL §710.30 notice, but were related during the Huntley hearing by P.O. Simons. After the weapon was discovered by P.O. Simons and the Defendant was placed under arrest, Simons asked the Defendant if he had any other firearms on his person. The Defendant replied that he had a magazine in his left jacket pocket that was subsequently recovered by P.O. Simons. That magazine was loaded with 15 rounds of ammunition.

The People did not include these statements in the CPL §710.30 notice that was served on Defendant. The People also never provided Defendant with notice of these statements in any supplemental CPL §710.30 notice.

CPL §710.30 compels the People to provide Defendant with notice of prior statements made by Defendant when: (1) the People intend to offer those statements at trial; and (2) those statements were made to a public servant; and (3) if made involuntarily, those statements would be suppressible upon motion pursuant to CPL §710.20(3). This notice must be served within fifteen (15) days of arraignment [CPL §710.30(2)].

It is undisputed that the People failed to serve timely notice of these statements on Defendant. Therefore, the People are precluded from using these statements during their case-in-chief at trial, regardless of whether Defendant has been prejudiced by the failure to give timely notice of these statements. [People v. Lopez, 84 NY2d 425, 428 (1994)]. However, because I find that these statements were made voluntarily, this preclusion order does not bar the People from using Defendant's statements solely for purposes of impeachment or rebuttal. [People v. Wilson, 28 NY3d 67 (2016); People v. Rigo, 273 AD2d 258 (2d Dept 2000); People v. Ashley, 15 Misc3d 80, 82 (App Term, 9th and 10th Jud. Dist., 2007)].

So ordered.

Dated: Poughkeepsie, NY
November 13, 2017

PETER M. FORMAN
COUNTY COURT JUDGE

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