SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM : PART 14
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THE PEOPLE OF THE STATE OF NEW YORK

-against- Ind. No. 9290/2013

Richard Wellington
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Hon. Dineen A. Riviezzo, J.:

A Mapp/Huntley/Dunaway hearing was conducted before this court on July 2, 2013 at which time one witness, Police officer Andreas Sargent, was called by the People. The court finds Police Officer Sargent credible and makes the following findings of fact:

Findings of Fact

On October 18, 2012, Officer Sargent and his partner Officer Fragedis were working in plainclothes on anticrime patrol in an unmarked vehicle in the confines of the 67 Precinct. At approximately 2 o'clock am, he observed three vehicles double parked in front of a lounge called Footprints, located at East 57th Street and Clarendon Road, in Kings County. This area was a high crime neighborhood with many reports of shots fired, burglaries, home invasions and robberies. (P. 11.)

All three vehicles pulled away without turning on their headlights, making a right turn on Ralph Avenue, and then a left onto East 80th Street. (P. 6.) When the vehicles, still without headlights, reached 565 East 80th street, all three made an illegal U-turn, ending up in front of a private house located at that address. (P. 7.) The police vehicle pulled up in front of the first

vehicle, facing it hood -to-hood. At some point during the trip, the officer called from his cellphone to the rest of his team, consisting of Sgt. Rich, Officers Bonanno and Morales, to notify them that he had left the confines of the 67 Precinct, and that he was following the three vehicles.

Once the vehicles were parked, the officer and his partner got out of their vehicle with their shields displayed, identified themselves as police officers, and ordered the occupants to remain inside their vehicle. (P. 11, 26.) At that point the defendant, seated in the first vehicle, which was closest to the officers, exited the vehicle from the front passenger side door, closest to the curb, and walked to the driveway through an open gate and towards a parked silver vehicle. (P. 12-14.) The officer told the defendant to "hold up, hold up." (P. 12.) There was little lighting here and the officers were using flashlights which they had pointed at the defendant. (P. 13.) Defendant walked to the vehicle at a "fast, very fast pace" (p. 37), made a motion like he "pulled something out . . . of his pocket or out of his waist," opened the car door with his left hand and threw a "silver object" with his right hand. (P. 13, 30.)

The car "looked at if it was derelict," in that the tires were flat, there were no plates and garbage was inside. (P. 14.) After defendant threw the silver object inside of the vehicle, he closed the door, walked back toward the road, in the officers' direction. The officer held up his hand and instructed the defendant to stop. (P. 15.) His partner detained the defendant while the officer went over to the vehicle, opened the door, shone the light inside and observed a silver handgun. (P. 14.)

By this time the officer became aware that Sgt Rich had arrived on the scene. Sgt Rich was called over to observe the firearm on the floor near the gas petal. (P. 17-18.) Defendant was placed under arrest. As he was being place inside of the prisoner van he said in the direction of the other occupants of the three vehicles who were now standing on the curb "get the gun, get the gun." (P.

20.)

Later at the precinct, during the arrest processing, the defendant did tell the officer that he lived at 565 East 80th Street. (P. 18-19.)

Arguments of Counsel

Defendant argues that he has standing to contest the recovery of the gun because the gun was discarded as a spontaneous reaction to illegal police conduct in unlawfully seizing the defendant; that defendant was unlawfully seized; that the order that the defendant remain in the car was a Level 3 seizure under DeBour; that the defendant was seized when the officer directed him to "hold on;" and that defendant's statement "get the gun" was not spontaneous.

The People argue that defendant does not have standing to contest the search of the car, as he has not demonstrated any ownership or legitimate expectation of privacy in the vehicle parked in the driveway. Alternatively, the People argue that under the graduated framework set forth in People v De Bour (40 NY2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 [1976]) and People v Hollman (79 NY2d 181, 590 N.E.2d 204, 581 N.Y.S.2d 619 [1992]), at the point that the three vehicles driving in a caravan without headlights made an illegal U-turn, under the officers had at least a Level 2 founded suspicion of criminal activity, allowing the officers to order the occupants to remain inside the vehicles. Defendant's subsequent conduct, they argue – disobeying the order to remain in the vehicle, and throwing a silver object into a parked vehicle – raised that Level 2 suspicion to Level 3, giving the officers reasonable suspicion that criminality was afoot. Lastly, the People maintain that defendant's statement was voluntary and spontaneous, and not the result of custodial interrogation.

Conclusions of Law

"A defendant seeking suppression of evidence has the burden of establishing standing by demonstrating a legitimate expectation of privacy in the premises or object searched" (People v Ramirez-Portoreal, 88 NY2d 99, 108, 666 N.E.2d 207, 643 N.Y.S.2d 502 [1996]). Recently, in People v. Leach (2013 N.Y. LEXIS 1631, 2013 NY Slip Op 4724 [June 25, 2013]), the defendant failed to establish standing to contest a search of the "guest bedroom" in his grandmother's apartment. It was not disputed that the defendant resided in his grandmother's apartment. However, there was testimony by the defendant's grandmother that she did not give the defendant unfettered access to all areas of the apartment, that he had his own bedroom, and that she reserved the "guest bedroom" solely for use by other grandchildren when they came to visit. The record was silent as to whether defendant had ever used that bedroom for any purpose. On these facts, defendant's lack of standing was affirmed.

The evidence introduced by the People (defendant here did not introduce any evidence) did not establish that the defendant had any ownership interest in the car – only that he lived at the location where the car was parked. The car, given its "derelict" condition, may well have been abandoned in a driveway used by numerous individuals. There was no evidence that the defendant had ownership or control over the car or the place where it was parked. People v. Sanchez, 64 A.D.3d 618, 882 N.Y.S.2d 29 (2d Dep't 2009) (hearing court properly determined that he lacked standing to challenge the search of the sports utility vehicle in which the police had observed him place two packages of bundled glassine envelopes; defendant did not sustain his burden of showing that he had a reasonable expectation of privacy in the vehicle, which was registered to another individual; defendant neither produced the vehicle registration, nor claimed that he was entitled to use the

vehicle); People v. Miller, 298 A.D.2d 467, 748 N.Y.S.2d 768 (2d Dep't 2002) (defendant did not establish standing in parked rental car rented by another person; the fact that the defendant possessed keys that fit the rental car did not establish his right to drive or possess the vehicle, that he had a legitimate expectation of privacy in it, or that he had standing to dispute the validity of its search).

Defendant's only argument as to standing is that the gun was not abandoned, but was discarded in response to unlawful police conduct. But as is explained below, as the police conduct was not lawful.

The officers were entitled to follow the vehicles before effectuating a traffic stop, in view of the somewhat suspicious movements of the vehicles – albeit subject to innocent interpretations. Having followed the vehicles, and observed them stop, they were authorized to order the occupants to remain in their cars. A police officer may, as a precautionary measure and without particularized suspicion, direct the occupants of a lawfully stopped vehicle to step out of the car (*see People v Robinson*, 74 NY2d 773, 775, 543 N.E.2d 733, 545 N.Y.S.2d 90 [1989].) The police officer may equally believe, depending on the circumstances, that it is safer to order the occupants to remain in the vehicle. "[I]t is within the discretion of the police officers on the scene to decide whether it is safer to have the driver and passengers exit the vehicle or whether it is safer to maintain the status quo by requiring the driver and passengers to remain in the vehicle until the traffic stop is over." People v. Forbes, 283 A.D.2d 92, 728 N.Y.S.2d 64 (2d Dep't 2001); People v. Packer, 49 A.D.3d 184, 851 N.Y.S.2d 40 (1st Dep't 2008) (whether the police asked defendant, as the passenger, to step out of the vehicle or directed him to remain inside the car, such requests are de minimis intrusions on the privacy interests protected by the Fourth Amendment.)

Once the defendant left his vehicle, in contravention of a lawful order not to do so, and

deposited a shiny object in the parked car, before returning to the vehicle, a reasonable suspicion existed that the defendant was involved in a felony or misdemeanor (level 3 under DeBour). Clearly the Officer had a legitimate basis to determine the nature of the object, and then to arrest the defendant after it was established that the object was a gun.

The Court of Appeals considered whether a police officer may prohibit passengers from leaving a car in People v Harrison, (57 NY2d 470, 475 [1982]), a case relied upon by defendant. "[B]efore the police can forcibly or constructively stop an individual... by the order to remain in the car there must be some articulable facts, which initially or during the course of the encounter, establish reasonable suspicion that the person is involved in criminal acts or poses some danger to the officers" (People v Harrison, 57 NY2d 470, 476, 443 NE2d 447, 457 NYS2d 199 [1982].) The officer in that case approached a parked car and detained the passenger by ordering the occupants not to exit the vehicle, while "approach[ing] an individual for information." Unlike the instant case, there was no initial legal traffic stop. The Court of Appeals in Harrison explicitly relied on the absence of a lawful stop to distinguish the United States Supreme Court's decision in Pennsylvania v Mimms, (434 US 106 [1977]) (police officer who has lawfully stopped a vehicle for a traffic infraction may, as a safety precaution, order the driver to exit the vehicle). "The key fact in the Mimms decision is that the driver had been lawfully stopped for a traffic offense ... The court did not hold that the police could take similar action when, as in the case now before us, the driver had not been lawfully stopped for a violation of the law." ( People v Harrison, supra, at 477.) Because the officer's stop of the defendant in the instant case did, in fact, occur pursuant to a lawful stop for a traffic violation, Harrison is inapplicable.

Although defendant disputes that the stop was based on traffic infractions, arguing that a u-

turn is lawful in a residential area, the vehicle here made turns without signaling and drove without headlights, which clearly justified a traffic stop. In addition, despite defendant's argument, the traffic stop was no less valid merely because the officers failed to issue a summons for the violations of the Vehicle and Traffic Law. (See People v Miller, 216 AD2d 421, 628 N.Y.S.2d 339, appeal denied 86 N.Y.2d 874, 659 N.E.2d 778, 635 N.Y.S.2d 955; People v Garcia, 179 AD2d 1047, 579 N.Y.S.2d 518, appeal denied 82 N.Y.2d 895, 632 N.E.2d 472, 610 N.Y.S.2d 162).

The court credits the police officer's testimony that defendant's statement was spontaneous, and that he was not constructively questioned in any way. "[S]pontaneous statements made while in custody which are not the product of questioning or its functional equivalent clearly are admissible regardless of whether *Miranda* warnings were given" (People v Starks, 37 AD3d 863, 864, 828 N.Y.S.2d 700 [2007]).

The motion is denied.

This constitutes the order of the Court.

8-12-2013

Date

J. S. C.

HON. DINEEN ANN RIVIEZZO