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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER
Indictment No.: 17-0750

JONATHAN ROSE,

Defendant.

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FUFIDIO, J.

The following constitutes the opinion, decision and order of the Court.

An indictment has been filed against defendant, Jonathan Rose, accusing him of the class C violent felonies of Criminal Possession of a Weapon in the Second Degree (two counts), Criminal Possession of a Weapon in the Third Degree (three counts), Criminal Possession of a Weapon in the Fourth Degree (four counts) and a violation of New York State Vehicle and Traffic Law Section 402.

It is alleged that the defendant possessed two loaded and operable semi-automatic pistols, three large capacity ammunition feeding devices, and various Kung Fu stars and metal knuckles. These items were found pursuant to a search of the defendant's motor vehicle by the Rye City Police after a traffic stop on May 5, 2017. Mr. Rose has moved to suppress these seized items claiming to be aggrieved by an unlawful search and seizure after having been the subject of a traffic stop.

In the first instance, the People have the burden of going forward to show the legality of the police conduct. However, the defendant bears the ultimate burden of proving by a preponderance of the evidence that the physical evidence should be suppressed.

By Decision and Order dated September 14, 2018 (Minihan, J.) the Court granted the defendant's request that a pretrial Mapp/Dunaway hearing be held to determine the propriety of any search and seizure of physical evidence in this case. On November 28, 2018 this Court conducted a pretrial suppression hearing. The People provided the sworn testimony of Police Officer Randall Kapus and Police Officer Alexander Whalen. In addition, the People provided several evidentiary exhibits, most notably, DASH Cam Video from Police Officer Kapus's patrol car and cell phone video from the defendant's IPhone.

The Court makes the following findings of fact:

On May 5, 2017, Rye City Police Officer Randall Kapus was on routine patrol in a marked patrol car on Milton Road in the City of Rye. At approximately 10:45 in the morning, he noticed that an Audi being driven in the opposite direction from which he was travelling did not have a front license plate displayed on the front of the car. As the car passed him he looked behind and saw from the rear license plate that the car was registered in New York. He then turned his car around to initiate a traffic stop of the Audi. When he turned his patrol car emergency lights on, the dashboard camera installed in Officer Kapus's car began video recording the stop and Officer Kapus's interaction with the Defendant who was ultimately identified as the driver of the Audi. The video shows that the Defendant activated his right directional signal and pulled his car to the side of the road promptly and without incident. After the stop, Officer Kapus remained in his car for a short period of time while activating his case initiation computer program on his onboard computer. He then turned on a portable microphone which is synchronized with the dashboard video camera, in order to audio record his interaction with the Defendant. Once the microphone was turned on, he approached the Audi that he had

just pulled over.[1] The Defendant also recorded the interaction with an iPhone that was in a holder mounted on the dashboard or windshield of the car.[2]

Officer Kapus asked the Defendant for his license and registration. In response the Defendant handed Officer Kapus a valid Colorado driver's license, a valid New York identification card and a valid Grand County Colorado concealed handgun permit. The Court finds that the Defendant likely gave the Officer Kapus the handgun permit inadvertently and his denials to the officer about the permit when first asked about it reveal that he was not aware that he had done so and that his attempted retrieval of the permit was twofold, one, because he did not mean to turn it over and wanted to take it back and two, that he knew he had guns in the car and did not want to draw unneccesary suspicion to them, which no doubt rose Officer Kapus's level of suspicion. He was unable to locate the registration and appeared to have a pile of papers in his lap through which he was looking while trying to produce his registration. Officer Kapus asked some general questions about the Defendant's state of residence and then asked the Defendant if he had a gun in the car. The defendant replied that he did not and looked down towards his lap and the driver's side floor. Officer Kapus asked him again if he had a gun in the car and again the Defendant said that he did not. Finally, Officer Kapus asked where the gun was and the Defendant told him that it was in Colorado. Much of Officer Kapus's testimony about the interaction is belied by the video and audio recordings that were made of the event. For instance, the Officer testified that the Defendant was acting extremely nervously throughout the whole interaction, the Court does not find that he was. Indeed, to the Court he did not appear to be very nervous at all and certainly no more than anyone else who has just been pulled over by the police. Similarly, the Officer described the action of the Defendant reaching his hand out of

[1] Officer Kapus's audio and video recording of the interaction was admitted into evidence as Exhibit 3.
[2] The Defendant's video recording was admitted into evidence as Exhibit 4.

the car window in order to try to retrieve the Colorado gun permit as forceful and very aggressive; again, the Court did not find this to be so after viewing the video and the audio recordings of the exchange. After this initial interaction with the Defendant, the Officer had a hunch that there might have been a gun in the car and interpreted the fact that the Defendant gave him the gun license as a tacit admission that he did. Nevertheless, the Officer turned his back on the Defendant while he was still sitting in the car and returned to his own police car which was two or three car lengths behind the defendant's car and began the process of calling for back up. While in the car he told another officer over the radio that the Defendant had said that he was not answering any questions, another assertion which is belied by the actual audio recordings which demonstrate that the Defendant did respond to the officer's questions up until the officer returned to his police car.

The officer waited in his car for approximately six minutes while he waited for back up to arrive. The only conversation Officer Kapus engaged in while he was waiting was the one just mentioned, and refuted, wherein he told another officer that he was going to take the Defendant out of the car and search it because he had refused to answer questions about guns. Officer Kapus did not verify the licenses that the Defendant handed to him, he did not check the license plates on the car, he did not run the Defendant's name for warrants, nor did he audibly express to anyone any type of urgency regarding this particular stop.

Approximately six minutes later a backup officer, Officer Whalen, arrived and the two Officers approached the car again. The two walked right up to the car, Officer Whalen was touching his sidearm and Officer Kapus was not. Officer Whalen walked to the passenger's side and Officer Kapus again approached the driver's side and stood right next to the driver's side window. At this point, Officer Kapus asked the Defendant to step out of the car and brought him

to the back of the car for a pat down search. Upon exiting the car Officer Kapus said that the Defendant quickly slammed the car door shut, however, the video does not show that the way he shut the car door was anything extraordinary. After patting the Defendant down for weapons and while the Defendant was still at the back of the car with Officer Whalen, Officer Kapus opened the closed driver's side door and began searching in the door map pocket. After about 13 seconds of rummaging around in the pocket he held up a magazine to a semi-automatic pistol and asked the Defendant why he had it and also told the defendant that he now had probable cause to search the car. A search of the car produced two loaded 15 round magazines, one loaded 12 round magazine and one loaded 10 round magazine, two loaded semi-automatic pistols, a package of Quikclot which is a blood clotting agent commonly used to treat gunshot wounds, one set of brass knuckles, three kung fu throwing stars and seven knives. The Defendant was then arrested for the weapons found in his car.

The Court does not find that the Defendant acted aggressively or threatening in any manner, at any point during this encounter, nor does the Court find that the defendant was extraordinarily nervous in either his mannerisms or verbal answers. Furthermore, despite Officer Kapus's characterization of the Defendant's search for his registration as being put on as a show, the video in Exhibit 4 shows the Defendant continually searching for the registration in the car while Officer Kapus is back in his patrol car waiting for backup.

The Court makes the following conclusions of law:

The Court finds that the police were justified in stopping the Defendant's car. Officer Kapus testified that he saw the Defendant's car coming towards him as he was patrolling on Milton Road and that it did not have an observable front license plate in violation of Vehicle and Traffic Law section 402. Accordingly, Officer Kapus was permitted to stop the Defendant for

that violation (*People v Robinson*, 97 NY2d 341 [2001], *People v Lightner*, 56 AD3d 1274 [4th Dept. 2008]). The Court is not persuaded that there may have been a license plate on the front dashboard or that if there was, it was conspicuously displayed.

Nor is the Court persuaded by the Defendant's assertion that Officer Kapus was not justified in asking the Defendant whether he had a gun and where it was. The rule is that the police may only inquire about whether or not there is a weapon when they have a founded suspicion of criminality (*People v Garcia*, 20 NY3d 317 [2012]). The Court finds that underpinning this whole decision is the fact that the Defendant's handgun permit was from Colorado and that New York State does not offer reciprocity for other state's concealed carry permits, accordingly, there is an articulable undercurrent of criminality on that factor alone. The Court has no question that the knowledge of such a permit creates a quantum of suspicion that the licensee may have a gun, the question that this Court is faced with is to what degree.

Offering more insight into the spectrum of suspicion on this issue is *People v Batista*, 88 NY2d 650 [1996]. In *Batista*, the Court of Appeals considered the implications of a defendant wearing a bullet proof vest. They wrote, "A bullet proof vest is properly linked to the inference that the wearer might be carrying a gun, more is usually required to justify a frisk...." (*Batista* at 655, citing *People v DeBour*, 40 NY2d 210, 216 [1976] (Innocuous behavior alone will not generate a founded or reasonable suspicion that crime is at hand)).

Any inquiry into the propriety of police conduct must weigh the degree of intrusion against the prevailing circumstances (*People v Salaman*, 71 NY2d 869 [1988]). In this case the Defendant, either intentionally or inadvertently, handed the police officer a valid concealed carry handgun permit issued by Grand County in the State of Colorado. The degree of intrusion beyond the permitted "basic nonthreatening questions" pertaining to things like "identity, address

or destination" (*Garcia* at 322) by asking if the Defendant had a gun on him is minimal and is a reasonable question when confronted with an out of state concealed carry handgun permit, because, as addressed above, if the Defendant had a gun, which he ultimately did, and was not permitted to carry it, which authorization his Colorado concealed carry permit does not grant for New York, then there is a base suspicion of criminal activity. Further, Officer Kapus was legally in a position where he could question the Defendant because of the traffic stop and the information that he learned from the defendant by way of his concealed carry permit was open for a minimally intrusive limited inquiry by questioning about whether he had a gun on him. The Defendant denied having a gun on him or in his car and the resulting observations made by Officer Kapus in response to the questions about the gun were validly obtained.

In addition, Officer Kapus was justified in asking the Defendant to step out of the car during their interaction (*People v Robinson*, 74 NY2d 773 [1989]). He did not do so initially because, according to him, Rye City Police policy was to have two officers on scene when someone is removed from a car and initially he was the only officer on the scene.

This leads to the thornier question of whether Officer Kapus's pat down search of the Defendant at the rear of the car was justified. *Salaman*, citing *Terry v Ohio*, 392 US 1 [1968] says that a pat down is justified when, "the officer is justified in believing that the suspect is armed" (*Salaman* at 870), but *Terry* phrased this slightly differently emphasizing the narrowness of the rule, permitting a pat down where an officer, "has reason to believe that he is dealing with an armed *and dangerous* individual..." (*Terry* at 27)(emphasis added). The Supreme Court went on to write that the reasonableness is derived not from, "inchoate or unparticularized suspicion or 'hunch,' but to the specific reasonable inferences...draw[n] from the facts in light of his experience." (*Id.*).

The sum of Officer Kapus's testimony demonstrates that he had a hunch that the defendant was lying about the location of his guns, however, there is nothing that he can point to that demonstrably shows that the Defendant was in fact lying about them. Taking the permit by itself, because the Court does not find that the Defendant was acting more nervously than anyone else who has just been stopped by the police, nor does the Court find that he acted aggressively towards Officer Kapus when trying to retrieve his handgun permit, this Court feels that the presence of the permit, more so than the donning of a bullet proof vest as in *Batista*, creates a reasonable and articulable suspicion that the Defendant might have a gun on his person and if he did without permission to have it, there is also a reasonable and articulable suspicion that the Defendant was committing a crime.[3] However, there is nothing from the facts presented at this hearing that would lead this Court to believe that Officer Kapus could have reasonably suspected that the Defendant presented an actual danger. Accordingly, the Officer's pat down search of the Defendant was not justified, however, no evidence was recovered from the Defendant as a result, nor was anything learned that led to an increased degree of suspicion.

Turning now to the search of the Defendant's car. The People suggest that the search was justified because Officer Kapus had probable cause to search the car or, in the alternative, that a justification to search can be found in the line of cases derived from *People v Torres*, 74 NY2d 224 [1989] where the substantial likelihood of a weapon in a car, coupled with an actual and specific danger created by that weapon is enough to warrant a limited search for that weapon to neutralize that threat. The Court finds that neither of these theories can justify the search in this particular case.

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[3] Again, this is where the out of state license comes into play. Had the Defendant presented a New York State full carry permit, the Court would not be indulging the police as far as it is. The fact that the Defendant is licensed in one state does not necessarily give him the permission to carry a handgun in another and the unlicensed possession of a handgun in New York is a crime.

A police officer's intrusion into a citizen's car is a significant intrusion into that citizen's privacy (*Torres* at 229). From this Court's perspective, Officer Kapus's reasonable and articulable suspicion never ripened into anything more that would justify such an intrusion in this case allowing the search of the Defendant's car.[4]

On the continuum of levels of certainty used in criminal jurisprudence, probable cause falls short of proof beyond a reasonable doubt, but requires, "information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place." (*People v Bigelow*, 66 NY2d 417 [1985]). The law does not require that one single piece of evidence supply all the information necessary to justify this belief, rather, the belief may be predicated upon a culmination of facts and circumstances that, when viewed collectively, amount to probable cause (*Id.* at 423). The out of state Colorado concealed carry permit is the foundation around which the Court has analyzed this issue.

Initially, the People suggest that by giving the permit to Officer Kapus the Defendant essentially admitted that he had guns in his car. Such an admission would be *per se* probable cause (*People v Pincus*, 184 AD2d 666 [1992]). The Court is not persuaded that the mere act of presenting a document that permits the concealed carry of a handgun in another state is the same as admitting that he is currently armed and that there are guns in the car. As stated above, the permit certainly creates a link in the inferential chain, but in and of itself does not make such an admission. To find that, the Court would have to also be persuaded that handing over a library card is an admission that there are books in the car or that handing over a credit card is an admission that he had just gone shopping and that the items that he had bought could be found in

[4] Although not dispositive of this motion, it is also worth pointing out that Officer Kapus did not think that he had probable cause either. Once he discovered the magazines within the Defendant's car he told the Defendant, "Now I have probable cause to search your car..."

the car. What the Court will grant the People is that the permit speaks for itself and that certain inferences can be drawn from its mere existence in a case. However, there is just too much ground between the act of handing over a card and the assertion that doing so is the equivalent of the Defendant making an admission that the Court cannot credit that argument.

The People also posit that the presence of a concealed carry permit is the equivalent of the presence of bullets or a bullet case and that, in conjunction with other observations support a finding of probable cause. To support that proposition, the People cite to cases in which the presence of bullets has been a factor in determining probable cause (*People v Ellis*, 62 NY2d 393 [1984]; *People v Shin*, 192 AD2d 684 [1993] and *People v Berroa*, 259 AD2d 624 [1999]). They have also cited to cases in which other paraphernalia associated with guns; targets and empty holsters, was insufficient to amount to probable cause (*People v Elwell*, 50 NY2d 231 [1980](targets) and *People v Drayton*, 172 AD2d 849 [1991](empty holsters)). The Appellate Courts drew the distinction between the presence of actual bullets being "more immediately associated with the presence of a deadly weapon than other incidentally related items such as holsters and practice targets...." (*Ellis* at 397) because, "bullets have no other practical use than as ammunition for a deadly weapon." (*Id.*). So, as the Court discussed above, an out of state concealed carry permit is a proper link in the inference that a person might possess a gun (*Batista* at 655).

Although the Court understands that there is a stronger correlation between a pistol permit and a gun than perhaps a target and a gun, the Court views a permit more along the lines of an empty holster. It is something that is still more incidentally related to a gun and something that has other practical purposes such as an identification card, than it is something that is

indispensable to the *operation* of a gun and thus more likely to indicate the immediate presence of a gun.

Finally, the People rely on Officer Kapus's testimony about the Defendant's demeanor and certain actions he took during the encounter to demonstrate that the totality of the circumstances amounted to probable cause. They rely upon cases that have held that a Defendant's nervousness coupled with other observable actions were enough to establish probable cause (*People v Smalls*, 111 AD3d 582 [1st Dept. 2013] (Observing indicia of a drug sale, followed by suspicious activity and demonstrably false statements by the defendant supported probable cause); *People v Martin*, 156 AD3d 956 [3rd Dept. 2017] (Observing indicia of drug sales in a known drug neighborhood, followed by demonstrably false statements, extreme nervousness and erratic behavior supported probable cause); *People v Armstrong*, 299 AD2d 224 [1st Dept. 2002] (Observing a hand to hand drug transaction in a drug prone location coupled with nervousness and flight from police once spotted supported probable cause); *People v Arnette*, 111 AD2d 861 [2nd Dept. 1985] (Nervousness coupled with spatial and temporal proximity to the crime scene, matching the description of the suspect supported probable cause)).[5]

In addition to Officer Kapus's testimony, the Court considered the video evidence that was admitted during the hearing and found that the video evidence belies most of Officer Kapus's testimony in those regards. The Court found that the Defendant did not appear extremely nervous or very nervous at all, that his attempt to retrieve his pistol permit once he realized that he had given it to Officer Kapus was quick and non-threatening and more aptly

[5] Specifically, Officer Kapus testified that the Defendant's search for his registration appeared to be for show, that he acted aggressively when he tried to retrieve the gun permit that he had given Officer Kapus, that he looked down at his feet (near where one of the guns was discovered) when asked about guns and that he quickly slammed the door once he stepped out of the car at Officer Kapus's request.

described as sticking his hand out the window; that the search for his registration was genuine and continuous even while Officer Kapus was back in his patrol car and the purpose for keeping up a ruse had passed, that his glance downward although possibly a "tell" was also in conjunction with his genuine attempt to locate his registration among a pile of papers in his lap and that he closed the door normally when he was asked to step out of the car. Additionally, his behavior once he was behind the car was non-threatening and in all respects, normal. Accordingly, the Court does not give much credit to those actions towards a determination of probable cause and at best the quantum of proof adduced from the facts found in this case lies somewhere between a reasonable articulable suspicion and a substantial likelihood that there was a gun in the car, neither of which is enough to justify a probable cause search of the car.

The People's second argument for justifying the search of the car is based on a line of cases originating with *People v Torres*, in which Courts will uphold a warrantless search of a car, short of probable cause, when the quantum of proof is such that there is a substantial likelihood that there is a weapon in the car and that weapon poses an actual and specific danger to police officer safety (*People v Torres*, 74 NY2d 224 [1989]; *People v Carvey*, 89 NY2d 707 [1997]). Interestingly, this type of search is not permitted even if there is a substantial likelihood that there is a weapon in the car and the defendant is going to be allowed back into the car unless it can be shown that the particular weapon is an actual and specific threat (*Torres* at 230-31).

Even assuming that the evidence was such that it clearly demonstrated a substantial likelihood that there was a gun in the car, there is nothing that indicates that the gun itself posed an *actual and specific* danger to Officer Kapus and Officer Whalen, nor is there anything that the Court can rely upon that shows that Officer Kapus and Officer Whalen felt that they were in any actual and specific danger.

Cases in the *Torres* line that have upheld these types of searches have all taken into consideration the actions of the Defendant when determining that there was an actual and specific danger to the officers making the search.

In *Carvey*, the defendant was the rear passenger seat of a car that was stopped for not having a rear license plate. The police noticed the defendant bend over and place something under the seat and also saw that he was wearing a bullet proof vest. A search of the car revealed a gun under the seat where the defendant had been. Citing to *Ellis, supra*, the Court reasoned that the presence of the bullet proof vest in and of itself, would not supply probable cause to search nor, likely even supply the quantum of proof required for a frisk, given its other, "practical use[s]" (*Ellis* at 397, *People v Batista*, 88 NY2d 650 [1996]). However, the Court continued that there is an inherent link between a bullet proof vest and a gun (*Batista* at 655) and decided that the act of wearing a bullet proof vest, such as the defendant was, indicated a "readiness and willingness to use a deadly weapon..." such that the officers reasonably concluded that when the defendant secreted something under the seat, coupled with him wearing the bullet proof vest, there was a substantial likelihood that there was weapon in the car and that it could be an actual and specific danger (*Carvey* at 712).

In *People v Mundo*, 99 NY2d 55 [2002], the Court of Appeals upheld the discovery of a kilogram of cocaine under the *Torres* theory. Again, the defendant *Mundo* was the rear passenger, this time in a car that led police on a high speed chase that at one point almost resulted in the car striking a pedestrian. While in pursuit the officers noticed that the defendant turned to face them and then made a movement towards the trunk of the car as if he were hiding something. When the police finally succeeded in stopping the car they searched the rear armrest area where the defendant had made his furtive movements and there they smelled a strong odor

of a chemical agent used to process cocaine emanating from inside the trunk. They then opened the trunk and found a kilogram of cocaine. Relying on *Torres*, the Court decided that the combination of the driver disobeying the officer's authority to pull over, the driver's apparent lack of concern for the safety of pedestrians and the defendant's furtive movements warranted the officers belief that there was a weapon in the car, even though there was none, and that it posed a specific danger to the officer (*Mundo* at 59).

Finally, in *People v Hardee*, 126 AD3d 626 [1st Dept. 2015] *aff'd*, 30 NY3d 991 [2017], the defendant's erratic driving, his continuous glances over his shoulder at something inside his car, his failure to comply with officer's commands and his resistance and fighting when the officers tried to handcuff him justified a search of his car under *Torres* which resulted in the police finding a gun, in a bag, in the back seat area. The Court wrote that, "defendant's actions both inside and outside of the vehicle created a 'perceptible risk' and supported a reasonable conclusion that a weapon that posed an actual and specific danger to their safety..." was located behind the front passenger's seat in the area in which the defendant kept looking during his interaction with the police (*Hardee* at 628).

Here, there is nothing in the Defendant's behavior, before, during or after the interaction with Officer Kapus that would justify the belief that a weapon in the Defendant's car posed an actual and specific danger. This is underscored by the Officer's own actions taken in the course of this stop. Officer Kapus, after receiving the Defendant's conceal carry permit turned his back on the Defendant and walked back to his patrol car. He left the Defendant alone in his car for approximately six minutes while he waited for back up to arrive. While in the patrol car he made no indication that he was in any kind of hurry to get back to the Defendant, nor did he express any kind of urgency or indicate that this stop was an emergency. Finally, once back up did

arrive, the two officers casually approached the car and appeared to take no defensive measures that would serve to mitigate any perceived actual and specific danger had one existed.

The Court does not find that the search of the Defendant's car was justified in any manner and accordingly grants the Defendant's motion and suppresses any evidence obtained from the search of the Defendant's car.

The foregoing constitutes the opinion, decision and order of the Court in this matter.

Dated: December 12, 2018
White Plains, New York

Hon. George E. Fufidio
Judge of the Westchester County Court