

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY—CRIMINAL TERM—PART K-11

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

ORDER OF THE COURT

JAIQUANE EDMOND,

INDICTMENT NUMBER:
327/2007

Defendant.

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JOEL L. BLUMENFELD, JSC

APPEARANCES OF COUNSEL

For the People: Richard A. Brown, District Attorney, Kew Gardens (by
Brian Kohm, Assistant District Attorney)

For the Defendant: Stephen Banks, Esq., New York (by Germaine Auguste,
Esq. and Pamela Peters, Esq.)

OPINION OF THE COURT

The defendant is charged with two counts of criminal possession of a weapon in the second degree¹ and disorderly conduct.^{2, 3} On July 26, 2007, a *Mapp-Huntley* was held before this court. At this hearing Sergeant Kevin Komorsky and the defendant, Jaiquane Edmond, testified. Their testimony differed a great deal and the court finds neither wholly credible. At the end of the hearing, both parties requested additional time to submit post-hearing memoranda of law, which they both did.

FINDINGS OF FACT

On December 21, 2006, at around 8:00 to 8:20pm, a group of five or six individuals, including the defendant, were congregating in front of 85-02 Rockaway Beach Boulevard, which is part of a public housing complex referred to as the Hamel Houses. They were “blocking the pedestrian walkway going into the

¹ Penal Law §§ 265.03 (1) (b) and (3).

² Penal Law § 240.20 (6)

³ This type of disorderly conduct occurs when, in addition to the prescribed mens rea, the defendant congregates with other persons in a public place and refuses to comply with a lawful order to disperse (Penal Law § 240.20 [6]).

building” (Transcript at 5-6).⁴ The Sergeant, in an unmarked car with two other officers, pulled over, turned on the red bubble lights, and the Sergeant, with his shield out, told them to leave the area. They nodded and started to walk away in apparent compliance with the Sergeant’s directive. Upon seeing this group walk away, the police left the scene.⁵

The Sergeant, in the same car, came back to the same building two or three minutes later. Although the defendant was there again, it is unclear whether the others were with him were a part of the same group the Sergeant asked to leave earlier (Transcript at 12). Again, he asked them to leave. Once again, they appeared to leave in compliance with the directive and the Sergeant left.

About two minutes later the Sergeant once again returned and the same group was there (Transcript at 7). This time, however, the three police officers, for the first time, exited the unmarked police vehicle. The Sergeant believed the group was impeding the pedestrian walkway and having been given two prior

⁴ There is no evidence that while this group was present that anyone else was around or tried to enter or exit the building and could not.

⁵ The court does not credit the defendant’s testimony that he was not present when the police came around two times before they exited the car the third time. The court accepts the Sergeant’s specific recollection of seeing the defendant in his red hooded sweatshirt each of these three times.

opportunities to leave,⁶ now the officers “were going to stop, question and frisk, possible [sic] summons all the individuals in front of the building” (Transcript at 18).

The officers told all of them to put their hands on the wall. The defendant, along with the others, complied and put their hands up (Transcript at 20, 21). “He reached, he checked me. He reached in my pants pocket and he found a gun” (Transcript at 21-22).⁷ The defendant told the Sergeant: “You know what’s going on here. I need it for protection” (Transcript at 9).⁸

ARGUMENT AND CONCLUSIONS OF LAW

The People argue that the seizure of the weapon was justified as the product of a search incident to a lawful arrest in that the police had probable cause to arrest the defendant for disorderly conduct (Penal Law § 240.20, either as an obstruction of pedestrian traffic [subdivision 5] or as a refusal to comply with a lawful order

⁶ There is no evidence as to how they impeded the walkway, only the conclusory statement that they were impeding. The testimony was that only these five or six people were present.

⁷ The Sergeant, when recalled after the defendant testified at the hearing, appeared to corroborate the defendant’s testimony that everyone with the defendant was at least stopped and possibly frisked: “But we did fill out UF 250’s. I had my officer fill them out for the people they had stopped so we could have those on the record” (Transcript at 35) [The court notes that UF 250’s is the old form for the Stop and Frisk Report.]; he also testified that the other officers “froze up” the other individuals (Transcript at 12).

⁸ The court does not credit the defendant’s testimony that he never said anything when the gun was seized.

of the police to disperse where the defendant was congregating with others in a public place [subdivision 6]) or resisting arrest (Penal Law § 205.30).⁹ In the alternative, the People argue that the seizure of the weapon was justified as the product of a level three intrusion under *People v De Bour*, 40 NY2d 240 (1980) (either as the police having reasonable suspicion and thereby allowing the search or as level two intrusion elevated to a level three intrusion due to the flight of the defendant, under *People v Sierra*, 83 NY2d 928, 929 [1994] and *People v Martinez*, 80 NY2d 444 [1992]¹⁰).¹¹

⁹ The resisting arrest argument can be dismissed out of hand since there is no evidence that the defendant had any knowledge that he was going to be placed under arrest at the time the officer claims that the defendant ran to the door of the building. The Sergeant's testimony was that he was going to stop, frisk and possibly summons the five individuals and never told anyone to stop.

¹⁰ In these cases, the court held that where the police have a a founded suspicion that the suspect may be engaged in criminal activity, the suspect's fleeing or running away in apparent response to the officer's approach, may give rise to reasonable suspicion (level three of De Bour), the necessary predicate for police pursuit. For example, in *People v Gonzalez*, NYLJ, at 18, col 1, the defendant was observed in the daytime, talking with a group of men on West 125th Street in New York County. "Given the unfortunate reality of crime in today's society, many areas of New York City, at one time or another, have probably been described by the police as 'high crime neighborhoods' or 'narcotics-prone locations.'"

"If these circumstances could combine with flight to justify pursuit, then in essence the right to inquire would be tantamount to the right to seize, and there would, in fact, be no right 'to be let alone.' That is not, nor should it be, the law."

" [*People v Holmes*, 81 NY2d 1056,] 1058 [(1993)]."

¹¹ The People in their argument rely on the Sergeant's version of the event when the police came upon the defendant and others the third time. However, this court does not credit his version because it rises to the level of tailored testimony to meet constitutional scrutiny (*People v Garofolo*, 44 AD2d 86, 88 [2d Dept 1974]).

According to the testimony of the Sergeant, as he exited his unmarked car, the defendant said "oh, shit" and started to leave and run about 30 feet to the entrance of the building. The Sergeant testified that he saw the defendant pull on the door a couple of times and then put his left hand in his left pocket of

(continued...)

In *De Bour*¹², the Court of Appeals set forth a graduated four-level test for evaluating street encounters initiated by the police. As each level increases, the amount of permitted police intrusion increases, from the simple request of information to the loss of liberty and a full-blown search.

- **Level one** permits a police officer to approach a person and request information and requires that the request be supported by merely an objective, credible reason, not necessarily indicative of criminality;

¹¹(...continued)

his sweatshirt jacket. The defendant's testimony was that he never put his hand in his pocket. Interestingly, when the Sergeant testified before the Grand Jury in March 2007, he did not state that the defendant was reaching in his pocket (Transcript at 16-17).

The Sergeant testified that he then grabbed the defendant, put him up against the wall, placed his hand in the defendant's pocket and removed the defendant's hand from the jacket pocket. There is no evidence that while his hand was in the defendant's pocket he ever felt any object in there. The Sergeant then told him to stay there, which he did, and — without patting him down or feeling the pocket and feeling anything at all, and without seeing a bulge — reached in the pocket and pulled out a loaded .25 caliber handgun (Transcript at 8). The Sergeant yelled out "gun" to his partners. The defendant then told the Sergeant: "You know what's going on here. I need it for protection." At that point, the defendant was placed under arrest.

The court finds that when the police arrived on the scene all of the people, including the defendant, were told to go up against the wall and were frisked, or as the defendant put it, checked. As stated before, this is corroborated by the Sergeant in that he did acknowledge during cross-examination during his recall that the others were "froze" and that stop and frisk reports were filled out. Further, the inconsistency in the Sergeant's testimony with his Grand Jury testimony as well as his claim that when he placed his hand into the defendant's jacket pocket and removed the defendant's hand yet never felt anything in that same pocket from where he seized the gun raises questions as to the credibility of this part of the story. It was after putting all the people against the wall and then recovering the gun that the need for this tailored testimony arose in an attempt to justify the search. Accordingly, the court credits the defendant's testimony that he did not say "oh, shit", run 30 feet to the building door, and put his hand in his pocket.

¹² *People v De Bour*, 40 NY2d 240 (1980).

- **Level two**, the common-law right of inquiry, a somewhat greater intrusion, requires a founded suspicion that criminal activity is afoot;
- **Level three** allows an officer to forcibly stop and detain an individual, and requires a reasonable suspicion that the particular individual committed or is about to commit a crime and once a person is lawfully stopped, under level three, the officer is authorized to frisk the person if the officer reasonably believes that he or she is in danger of physical injury (*see* CPL 140.50 [1], [3]; *People v Carney*, 58 NY2d 51,54-55 [1982]; *People v Cantor*, 36 NY2d 106, 112 [1975]);
- **Level four**, arrest, requires reasonable cause to believe that the person to be arrested has committed a crime

(*People v De Bour*, 40 NY2d at 223; *People v Hollman*, 79 NY2d 181, 184-185 [1992]; *People v Moore*, 6 NY3d 496, 498-499 [2006]).

The problem with the People's argument is that level three of *DeBour* does not apply in this case. First, level three does not apply to petty offenses. Second, level three only allows for a frisk in limited circumstances and does not allow a full-blown search which, if this court were to follow the People's version of the

facts, the officer conducted by reaching into the defendant's pocket. Third, it is highly questionable that what the defendant did allowed the officer to conduct a frisk. And, fourth, there is no evidence that there was reasonable suspicion that the defendant had or was about to commit a crime.

Level Three of De Bour Does Not Apply to Petty Offenses

In 1976, the Court of Appeals established the four levels of DeBour. As the court wrote the third level is:

“Where a police officer entertains a reasonable suspicion that a particular person has committed, is committing or is about to commit a *felony or misdemeanor*, the CPL authorizes a forcible stop and detention of that person (CPL 140.50, subd. 1; *see Terry v Ohio*, 392 US 1, 88 S.Ct. 1868, 20 L.Ed.2d 889; *People v Cantor*, *supra*). A corollary of the statutory right to temporarily detain for questioning is the authority to frisk if the officer reasonably suspects that he is in danger of physical injury by virtue of the detainee being armed (CPL 140.50, subd. 3).” [emphasis supplied]

People v De Bour, 40 NY2d 210, 223 (1976). *De Bour* recognized that the authority for the level three intrusion comes from statute (i.e., “statutory right”), in particular, subdivision one of CPL 140.50. CPL 140.50 (1) states:

In addition to the authority provided by this article for making an arrest without a warrant, a police officer may stop a person in a public place located within the geographical area of such officer’s employment when he reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor defined in the penal law, and may demand of him his name, address and an explanation of his conduct.¹³ [emphasis added]

In 1992, the court revisited *DeBour* in *People v Hollman, infra*, and once again defined level three and limited it to felonies and misdemeanors:

“Where a police officer has reasonable suspicion that a particular person was involved in a *felony or misdemeanor*, the

¹³ Article 140 of the Criminal Procedure Law consistently makes these distinctions.

officer is authorized to forcibly stop and detain that person.”

[emphasis added]

People v Hollman, 79 NY2d 181, 185 (1992).

Last year, the Court of Appeals once again stated the level three standard and limited it to felonies and misdemeanors:

“level three authorizes an officer to forcibly stop and detain an individual, and requires a reasonable suspicion that the particular individual was involved in a *felony or misdemeanor*.” [emphasis added]

People v More, 6 NY3d 496, 498-499 (2006).

And just last month the Court of Appeals held:

“Temporary detentions are authorized by statute only for *felonies and misdemeanors*, not violations (CPL 140.50 [1]).”

[emphasis added]

(*In the Matter of Victor M*, ___ NY2d ____, 2007 Slip Op 07742, *3 [Oct. 16, 2007], 2007 WL 2988758).

Therefore, petty offenses, such as disorderly conduct, are excluded from level three intrusions.

Level Three of De Bour Does Not Allow a Full-blown Search

Level three of *De Bour* only allows for a frisk (in limited circumstances) and does not allow a full-blown search. Even if this court were to accept the People's version of the facts by crediting the Sergeant's testimony as to the seizure of the gun, there is no evidence that the officer saw a bulge or felt a gun by frisking before he reached into the defendant's pocket for the gun. Even if this court were to credit the Sergeant's testimony that the defendant ran, tried to enter the building, reached into his pocket and then the Sergeant grabbed the defendant's hand from inside his jacket pocket, told him to put his hands up and again reached into the defendant's pocket and pulled out a gun, this would not justify his actions under level three. Reaching into a person's pocket does not constitute a frisk, but rather a full-blown search that requires probable cause (*People v Hill*, 171 AD2d 1017 [4th Dept 1991] citing *People v Bernard*, 41 NY2d 759, 763; *People v Peters*, 18 NY2d 238, 245; *affd.* 392 US 40; *People v Joslin*, 32 AD2d 859). Courts have consistently held that under level three, when there is

a fear for the officer's or the public's safety, a "limited" pat-down or frisk is permitted (*People v Benjamin* , 51 NY2d 267 [1980])¹⁴. In *People v Rodriguez*, 177 AD2d 521 (2d Dept 1999), the officers observed the defendant and others standing behind a car and a person, other than the defendant, with a license plate and a screwdriver. When the police approached they saw "the defendant furtively turn his back and suddenly reach towards his waistband" (*id.* 522). The court found that the officer was

"justified in taking the reasonable precautionary measure of restraining the defendant's arms in order to ensure his safety...and upon feeling the hard object in the defendant's waistband, the officer acted properly in conducting a frisk of the defendant's person and securing the loaded handgun which that search produced" (*id.*).

In the instant case, if the court were to credit the Sergeant's testimony that he feared for his safety, when he put his hand into the defendant's pocket and pulled the defendant's hand out of that pocket, there is no evidence that he felt the

¹⁴ See e.g., *People v Salaman*, 71 NY2d 869 (1988); *People v Bannister*, 220 AD2d 520 (2d Dept 1995); *In re Antonio A.*, 249 AD2d 202 (1st Dept 1998); *People v Rodriguez*, 177 AD2d 521 (2d Dept 1991); *People v Batash*, 163 AD2d 399 (2d Dept 1990).

weapon or an object consistent with a weapon when he pulled the hand out, or that he saw a bulge, or that after he pulled the hand out he felt the pocket to see if there was a weapon. While the People are correct that the police do not have to wait until they see the “glint of steel” before they can act to preserve their safety (*People v Benjamin*, 51 NY2d 267, 271 [1980]), they are incorrect in how it would apply to the instant case. The act to preserve the officer’s safety was a frisk (*id.*), not a full-blown search by reaching into the pocket without first frisking. If one were to credit the Sergeant’s testimony, once he put his hand into the defendant’s pocket to remove the defendant’s hand, since he did not simultaneously feel a weapon, or see a bulge, *Benjamin* does not allow the officer to conduct a subsequent full-blown search into that pocket.

Accordingly, even if level three applied to the instant situation, it would have allowed the officer to conduct a limited frisk and not a full-blown search.

It Is Highly Questionable That What the Defendant Did Allowed the Officer to Conduct a Frisk

Even if the reaching into the pocket of the defendant constituted a frisk, it is highly questionable that the Sergeant could, under the standards of the applicable law, frisk the defendant. If this court were to accept the testimony from the

Sergeant relevant to this issue, this court would find that the defendant upon seeing the Sergeant leave the police car, went to the front door of the apartment building and tried to open the door by tugging on the door and when he could not open the door, the defendant reached into his pocket.

There is not evidence that, on its face, constitutes a dangerous situation that the police encountered on December 21st. While the Sergeant testified that since that summer there were numerous gang-related shootings in the area and that a couple of months prior to December he was caught in a cross-fire in the same area, this does not, in and of itself, mean that the officers were in a dangerous situation. There is no evidence that there were reports of a person with a gun in that area.¹⁵ What the officer saw was a person who was standing in front of a building not — on the face of it — doing anything other than standing around, and upon seeing the police approach, left, tried to open a door and upon not being able to, reached into his pocket.

“Behavior which is susceptible of innocent as well as guilty interpretation cannot constitute probable cause and ‘innocuous

¹⁵ Even a report of a man with a gun in the area alone would have not been enough to allow a frisk of the defendant (*People v Marine*, 142 AD2d 368 [1st Dept 1989]; citing *People v Benjamin*, 51 NY2d 267)

behavior alone will not generate a founded or reasonable suspicion that a crime is at hand [citations omitted].’ *People v De Bour*, 40 NY2d 210, 216; *see also, People v Farrell*, 90 AD2d 396; *affd* 59 NY2d 686; *People v Allen*, 109 AD2d 24, 32).”

People v Miller, 121 AD2d 335 (1st Dept 1986). In the instant case, why wouldn’t the officer think that the defendant was reaching into his pocket to get his key (*see id.*; *People v Marine*, 142 AD2d 368 [1st Dept 1989]). While the People argue that the defendant does not live in that building, there is no evidence that he knew that at the time he entered the instant situation.

Second, there was no testimony that the officer observed a bulge in the pocket, although that too would have had limited import in this case (“[U]nlike a pocket bulge which could be caused by any number of innocuous objects, a waistband bulge is telltale of a weapon” [*People v DeBour*, 50 NY2d at 221]).

The fact that the Sergeant’s suspicion regarding the defendant turned out to be correct cannot serve to establish the necessary, probable cause (*People v De Bour*, 40 NY2d 210, 216; *People v Scott D.*, 34 NY2d 483, 490 [1974]).

There Is No Evidence That There Was Reasonable Suspicion That the Defendant Had or Was about to Commit a Crime

What crime — that is felony or misdemeanor¹⁶ — did the defendant commit or was about to commit by standing around in front of a building? The People do not argue that it was a crime, but rather the violation of disorderly conduct.¹⁷

Reasonable suspicion is defined as “the quantum of knowledge sufficient to induce an ordinary prudent and cautious man under the circumstances to believe criminal activity is at hand” (*People v Cantor*, 36 NY2d 106, 112-113 [1975]).

There is no testimony that the defendant committed a crime or was about to commit a crime by standing in front of the apartment building.

Therefore, level three does not apply to the instant situation. Accordingly, the only rationale to allow this search would be if the search had been incident to a lawful arrest.¹⁸ Therefore, the issue is whether the police had probable cause to arrest the defendant for a criminal offense.¹⁹

¹⁶ Penal Law § 10.00 (6)

¹⁷ Penal Law § 240.20

¹⁸ See, e.g. *United States v Robinson*, 414 US 218, 234 (1973).

¹⁹ In this level (four), probable cause is to a criminal offense, which includes a violation, as opposed to level three which requires a crime.

Level Four and Probable Cause

The People argue that the police had probable cause to arrest the defendant for disorderly conduct (Penal Law § 240.20, either as an obstruction of pedestrian traffic [subdivision 5] or as a refusal to comply with a lawful order of the police to disperse where the defendant was congregating with others in a public place [subdivision 6]) or resisting arrest (Penal Law § 205.30).

The arrest of an individual, and any search made incident to the arrest, are unlawful unless supported by probable cause (*see People v Hicks*, 68 NY2d 234). While probable cause does not require as much proof as is necessary to sustain a conviction, it does require more than mere suspicion (*People v Wharton*, 60 AD2d 291, 292; *affd* 46 NY2d 924; *cert denied* 444 US 880). Conduct which is equally susceptible to innocent or culpable interpretation cannot give rise to probable cause (*People v Carrasquillo*, 54 NY2d 248, 254; *People v De Bour*, 40 NY2d 210).

Probable Cause and Disorderly Conduct Through the Obstruction of Pedestrian Traffic

The People argue the Sergeant saw the defendant and others “blocking the pedestrian walkway going into the building” (Transcript at 5-6). Obstructing

pedestrian traffic, is only an element of disorderly conduct. As disorderly conduct is not a strict liability offense, the act of obstruction is simply not enough, it must be done “with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof” (Penal Law § 240.20).

The disorderly conduct statute was “designed to proscribe only that type of conduct which has a real tendency to provoke public disorder” (Commission Staff Notes, reprinted in Proposed N.Y. Penal Law [Study Bill, 1964 Senate Int. 3918, Assembly 5376] § 250.05, at 388, *as quoted in People v Benjamin*, 185 Misc 2d 466, 468 [Crim Ct NY County 2000]). This conduct must be “of public rather than individual dimension” (*People v Munafò*, 50 NY2d 326, 331 [1980]). This conduct is evaluated by considering “the nature and number of those attracted, taking into account the surrounding circumstances, including, of course, the time and the place of the episode under scrutiny” (*id.*; *see also People v MR*, 12 Misc3d 671 [Crim Ct, NY County 2006]; *People v Millhollen*, 5 Misc3d 810 [City Ct, City of Ithaca 2004]; *People v Griswold*, 170 Misc2d 38 [County Ct, Yates County 1996]). Accordingly, a defendant cannot be guilty of breach of the peace if he

“annoyed no one, disturbed no one, interfered with no one” (*People v Perry*, 265 NY 362, 365 [1934]).

Further, disorderly conduct exists only where the offending conduct is “reinforced by a culpable mental state to create a public disturbance” (*People v Tichenor*, 89 NY2d 769, 775 [1997]; *see also People v Munafo*, 50 NY2d at 331; *People v MR*, 12 Misc3d 671).

As stated before, there is no testimony whatsoever as to whether anyone tried to pass the group and were unable to do so or even whether anyone else was around. Again, the only evidence is that the defendant and the others were just congregating in front of a building and no evidence other than a conclusory statement that they were blocking the pedestrian walkway, but no evidence as to whether anyone tried to pass or whether anyone else was around.

Accordingly, there was no probable cause to arrest the defendant for disorderly conduct under this subdivision.

Probable Cause and Disorderly Conduct: Refusing to Comply with a Lawful Order of the Police to Disperse

This type of disorderly conduct requires the defendant, “with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof” to

congregate with other persons in a public place and refuse to comply with a lawful order of the police to disperse (Penal Law § 240.20 [6]). However, just refusing to comply with an order is insufficient proof of a violation of this statute:

At times even a mere refusal to comply with the directions of a policeman, who may act in an arbitrary and unjustifiable way, does not constitute ‘disorderly conduct.’ Mere disobedience of an officer is not always an offense punishable by law, any more than his command is not always the law.

(People v Arko, 199 NYS 402 [App Term, 2d Dept 1922]). In the instant case, the defendant and others were congregating in front of the subject building. When the police came by and told them to disperse, the Sergeant saw them complying with the order by walking away. The defendant and others appeared to go and when, a few minutes later, the defendant and either the same group or possibly others went back to the subject building were told again to leave and the Sergeant once again saw them comply by walking away. The Sergeant a few minutes later came back to the building, saw the same group and this time exited the car. What is totally

absent from the testimony is the explanation as to what the legal foundation for the order to disperse.

The People argue in their memoranda of law — for the first time and without ever questioning the Sergeant about what order he was thinking about when he told them to disperse — that the lawful order to disperse comes from subdivision five of section 402 of the Public Housing Law. In this section, the police assigned to patrol public housing

“shall have the power and it shall be their duty, in and about housing facilities, to preserve the public peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insurrections, *disperse unlawful or dangerous assemblages and assemblages which obstruct free passage*; protect the rights of persons and property; guard the public health; remove all nuisances; enforce and prevent violation of all laws and ordinances; and for these purposes to arrest all persons guilty of violating any law or ordinance and shall provide for the performance, without unnecessary delay, of all recording,

fingerprinting, photographing and other preliminary police duties.” [emphasis added]

The People argue that this was an assemblage which obstructed free passage. But again, there is not testimony that if someone tried to pass that they would not be able to do so or that anyone tried to pass and that it was blocked. Without such testimony, there is no evidence that the assemblage was unlawful, dangerous or obstructing free passage.

Accordingly, there is a lack of probable cause based on this coupled with the arguments in the previous section as to the element of intent.

Probable Cause and Resisting Arrest

The People argue that the defendant by running away from the Sergeant created probable cause to arrest for resisting arrest. It should be noted that this court did not credit the testimony of the Sergeant that the defendant, upon seeing the police officers exit the car said “oh, shit,” turned around and ran 30 feet to the building door and tried to get in without using a key which lead to the defendant putting he hand in his pocket.²⁰ However, even if this court were to credit such

²⁰ This court has previously stated that reaching into the pocket after trying to get into a locked door would be consistent with the innocuous act of getting a key to open the door.

testimony, the running away would not rise to the level of probable cause. A key element of resisting arrest is the requirement that the arrest be authorized — in other words that the arrest was premised on probable cause.²¹ Additionally, the officer never testified to telling the defendant to halt, or that he was being arrested when the defendant allegedly ran. As stated above, there was no probable cause for arresting the defendant for disorderly conduct, so there can be no resisting arrest.

Probable Cause

Once the police encountered the defendant for a third time, they exited the vehicle for the first time. The purpose, as stated by the Sergeant, was to stop, question, frisk, and possibly summons all the individuals in front of the building. However, the police never testified as to whether he or any other officer inquired as to whether the defendant, or anyone with the defendant, lived in the subject building or was visiting someone in the building (*see e.g. People v Hendricks*, 43 AD3d 361 [1st Dept 2007]). Nor was there any testimony that the defendant was congregating in front of this building for any reason other than to exercise his right

²¹ *People v Jensen*, 86 NY2d 248, 253 (1995); *People v Alejandro*, 70 NY2d 133 (1987); *People v Peacock*, 68 NY2d 675, 676-677 (1986); *People v Parker*, 33 NY2d 669 (1973).

of freedom of assembly, as recognized in the first amendment of the United States Constitution (made applicable to the states through the 14th amendment) and Section 9 of Article I of the New York State Constitution. Nor was there any testimony as to whether anyone tried to walk by or enter the building and they were unable to do so because of the group's blocking of the entrance. Since there is no probable cause, the Sergeants act of reaching into the defendant's pocket was improper under Article 1, Section 12 of the New York State Constitution. There is no reasonable analysis that would allow this court to find this search proper.

Accordingly, the handgun is suppressed. The statement is also suppressed as a fruit of a poisonous tree since it flowed from the unlawful stop, search and seizure of the defendant (*Wong Sun v United States*, 371 US 471).²²

²² In the interest of thoroughness, the court notes that there are other arguments that have no foundation in the record which the court will now address.

In the People's statement of facts, the People state that the defendant

"ran for the door of the building. The defendant does not live in that N.Y.C.H.A. building or that development. He then unsuccessfully tried to gain illegal entry into the building to escape arrest by the Police."

At the time the Sergeant exited the vehicle, he had no knowledge whatsoever that the defendant did not live in the building or in that complex. This is an improper use of the facts that came to light only after the defendant was arrested.

Under the arguments section of the People's memorandum it is argued that the Sergeant and his officers were on patrol because of numerous gang-related shootings and that the Sergeant had been caught in a cross-fire in the same area a couple of months prior:

"Here, we have a defendant wearing red hanging out in front of a N.Y.C.H.A. building that he does not live in (he gave NYPD an address in another area of

(continued...)

This opinion constitutes the decision and order of the court. IT IS SO ORDERED.

DATE: November 7, 2007
Kew Gardens, NY

JOEL L. BLUMENFELD,
Acting Justice of the Supreme Court

²²(...continued)

Rockaway and CJA an address in Manhattan and yet a third address at 7400 Shore parkway to this court under oath).”

Again, the fact that the defendant does not live there was not known to the Sergeant at the time of the incident. Nor was it known at the time the Sergeant acted whether anyone in that group either did or did not live there. The People are clearly implying that the defendant was a part of a gang because he was wearing red and since the Sergeant was investigating gang-related activities. However, there is no testimony whatsoever that the Sergeant knew the defendant prior to the action and therefore suspected him of being in a gang, or that the Sergeant thought that the red sweatshirt was a part of something a gang would wear. Nor was there any testimony that the defendant was wearing anything that would indicate that he was a gang member. In fact, the Sergeant testified that three or four of the others were wearing white shirts (Transcript at 11). The first time the connection between the defendant and a gang was raised was by the People in the defendant’s cross where the defendant denied being a part of a gang called GIB or the Bloods, even though he did acknowledge having heard of them (Transcript at 26-27). Even when the People recalled the Sergeant, the People never asked the Sergeant whether he knew the defendant before hand or whether the Sergeant had any knowledge as to what gang members wear and if so, whether the defendant was wearing anything indicating that he was a gang member.