

SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM PART K-12 QUEENS COUNTY
125-01 QUEENS BOULEVARD
KEW GARDENS, NY 11415

P R E S E N T :

HONORABLE JOSEPH ANTHONY GROSSO
ACTING JUSTICE

THE PEOPLE OF THE STATE OF NEW YORK

Ind. No. 2781/03
2835/03

- against -

Motion To Suppress
Physical Evidence

KIRBIN FERMIN AND JOSEPH FERMIN,

Defendants

Submitted

On the papers submitted

John Cobb, Esq.
For the Motion

Hon. Richard A. Brown
District Attorney, Queens
County, by:

Eugene Guarino, Esq.
Opposed

The defendants, two brothers, are charged, inter alia, with Criminal Possession of a Controlled Substance in the Third Degree. They move for orders suppressing physical evidence and a hearing was conducted before me on June 25, 2004. Five witnesses testified. Detectives Daniel Altieri and Gerald Farrel were called by the People. The defendants testified on their own behalf and called Ms. Ebony Smith.

On December 1, 2003, Detectives Altieri and Farrell were on duty as investigators in a "buy and bust" team which was operating in the vicinity of 154th Street and 118th Avenue. They

each described the area as a known drug prone location. At about 6:15, Detective Altieri and his partner Detective O'Hara were driving their unmarked vehicle in the subject location. They observed a group of 10-12 individuals gathered across the street from an older Cadillac, the defendants' vehicle. They observed two individuals walk toward this car, remain there briefly and then return to the group. The defense witnesses indicated that only one person approached their car at this time to say hello. All witnesses agreed that none of the tell tale signs of a narcotics transaction occurred. As detective Altieri drove closer to the defendants' vehicle, he observed smoke coming from the partially opened driver's side window. He indicated that he recognized the distinctive smell of burning marijuana. The detective flashed his light into the Cadillac and saw four occupants. The defendants were in the front seat. Two females, one of whom was Ebony Smith, were in the rear seat. Detective Altieri indicated that he observed a smoldering marijuana "blunt" in the front seat ash tray. The defendants admitted smoking marijuana earlier in the day. All defense witnesses deny smoking marijuana at the time the police approached their vehicle. Rather, they contend that a regular tobacco cigarette was being smoked. Detective Altieri asked all occupants out of the vehicle and called back up team members to his location. When the back up team arrived, the vehicle was completely searched. The defense witnesses indicated that it was during the automobile search that the police recovered the small unsmoked portion of a marijuana cigarette from the floor of the rear of the vehicle. The defendants were arrested for Criminal Possession of Marijuana in the fifth degree, a class "B" misdemeanor, and taken to the police precinct.

At the precinct, the defendants were placed in separate holding cells and were directed to remove all their clothing. It is undisputed that defendant Joseph Fermin was visibly upset at this point. Detective Farrell indicated that when he conducted a visual examination of each defendant that he observed a plastic bag protruding from each defendant's rectum. He indicated that he directed each defendant to remove the respective bags and each defendant complied. Each defendant testified that due to the way each had inserted the bags into their rectums that the bags were not visible. Each defendant stated that they were held by several police officers and subjected to a body cavity search.

Under the best case scenario for the People, the defendants were subject to a strip search and visual observation following a

lawful arrest for a Class "B" misdemeanor. Under the worst case scenario for the People, the defendants were subjected to a body cavity search following an unlawful arrest. Clearly under the latter scenario, the physical evidence recovered must be suppressed.

As a condition precedent for a valid strip search there must be a valid arrest. However, since a strip search, is more intrusive than a search incident to arrest, the police must demonstrate a reasonable suspicion to believe that the arrestee is concealing contraband in or near an intimate body part in addition to establishing probable cause. (See, e.g. People v. Kelley, 306 AD2d 699 [3rd Dept. 2003]. The crucial focus then becomes the nature of the crime itself (see, People v. Stevens, ___ Misc 3rd ___ NYLJ 11/14/03) or the reputation and conduct of the arrestee (Kelley, supra; People v. Martinez, 268 AD2d 266 [1st Dept. 2000). See also, Patrol Guide Procedure 208-05).

A clear and definite reason to believe that contraband will be found in a particular area of the body to be searched must be established in order to justify a full body cavity search (see, People v. Materon, 107 AD2d 408 [2nd Dept. 1985]).

Applying these principles to this case, I conclude that the People have failed to sustain their burden of proof to establish a reasonable suspicion to justify a strip search or the more intrusive body cavity search.

The arrest in this case was for a minuscule amount of marijuana. There was nothing in the testimony to suggest anything more. While one of the defendants was visibly upset when ordered to disrobe, under the circumstances presented in this case, I conclude that this was a natural and equivocal response to the police order which did not give rise to a "reasonable suspicion".

Accordingly, the motion to suppress physical evidence is granted.

Dated: August 16, 2004

JOSEPH ANTHONY GROSSO