

SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM: PART K-19

P R E S E N T: HON. SEYMOUR ROTKER,
Justice.

-----X
THE PEOPLE OF THE STATE OF NEW YORK

- against-

Indictment No.: N10560 - 04

Motion: To suppress physical evidence

NATHANIEL ISSAC

Defendant.

-----X

RUSSELL ROTHBERG, ESQ.
For the Defendant

RICHARD A. BROWN, D.A.

BY: FAISAL KHAN, A.D.A.
Opposed

Upon the foregoing papers, and due deliberation had, the motion is granted. See accompanying memorandum this date.

Kew Gardens, New York
Dated: April 4, 2005

SEYMOUR ROTKER
JUSTICE SUPREME COURT

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-19

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THE PEOPLE OF THE STATE OF NEW YORK

BY: SEYMOUR ROTKER, J.S.C.

- against -

Indictment No. N10560 -04

NATHANIEL ISSAC

Defendant.

-----X

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

An indictment has been filed against the defendant accusing him *inter alia* of the crimes of criminal possession of a controlled substance in the third degree and criminal possession of a weapon in the fourth degree. The charge is that on June 15, 2004, defendant knowingly possessed a quantity of cocaine and a dagger.

Defendant, claiming to be aggrieved by an unlawful search and seizure, has moved to suppress cocaine, seized from his person by Sergeant O'Hagan on June 15, 2004, and a dagger recovered from a shopping bag possessed by defendant, by Police Officer Gabriel Diaz.

In this case, the People assert that the seizure of the cocaine from the defendant's person and the dagger in his possession was incident to a lawful arrest. The People have the burden, in the first instance, of going forward to show the legality of police conduct. Defendant, however, bears the ultimate burden of proving by a preponderance of the evidence that the physical evidence should be suppressed.

A pretrial suppression hearing was conducted before me on March 8, 2005.

Testifying at this hearing was Police Officer Gabriel Diaz.

I find his testimony incredible.

I make the following findings of fact:

On June 15, 2004, Police Officer Gabriel Diaz was working in an anti crime unit with Sergeant O'Hagan doing patrol duty in the 114th Precinct. He was working in civilian clothes in an unmarked vehicle. Officer Diaz, a police officer for five years, claimed that he received narcotics training in identifying and packaging of cocaine and claimed he had arrested fifty persons for possession of controlled substances, especially cocaine.

On June 15, 2004, at approximately 6:50P.M., Officer Diaz and Sergeant O'Hagan arrested Sharnice Nelson and Nathaniel Issac in the vicinity of 41st Avenue and Vernon Boulevard, Queens, New York. Diaz testified at the hearing conducted before this Court that he observed a transaction take place in the vicinity of Vernon Boulevard and 41st Avenue, Queens, New York, between Nelson and Issac. He claimed that while trying to restrain Nelson, she dropped a "crack pipe" which she stepped on and smashed and threw a "rock" of crack into the grass. In his testimony he further stated that Sergeant O'Hagan recovered twenty-one "rocks" of crack from defendant Issac's pant's pocket.

During cross-examination, it was established that in his testimony before the Grand Jury, Diaz never mentioned that Nelson dropped a crack pipe which was smashed by her. The alleged "rock" that she allegedly threw away was never recovered. In fact, the Court takes judicial notice of the following Criminal Court Complaint, to wit: docket 2004QN028538, where, in a sworn affirmation, Diaz charged Sharnice Nelson with attempted tampering with physical evidence in which he stated "at the above-mentioned date, time and place of occurrence, (June 15, 2004 at about 6:50P.M. in front of 40-13 Vernon Boulevard) he observed the defendant, Sharnice Nelson, with a quantity of cocaine which she threw onto the grass and stomped at."

The Court also takes judicial notice of felony complaint herein where Diaz, in his sworn affidavit, stated that "he recovered a quantity of cocaine (to wit: twenty-one(21) rocks of cocaine) from the defendant's pants pocket." See Criminal Court Docket No. 2004QN028509 (People v.

Issac). His in court testimony unequivocally stated that Sergeant O'Hagan recovered the cocaine from defendant's pant's pocket.

Furthermore, in the People's response to an omnibus motion by the defense requesting suppression of physical evidence, the District Attorney in the affirmation stated "the arresting officer, Police Officer Gabriel A. Diaz, with probable cause, placed the defendant under arrest. Subsequent to a lawful arrest, Police Officer Gabriel A. Diaz conducted a search and recovered 21 rocks of cocaine, a dagger with sheath and \$172.00 of united states currency from the defendant's person."

Based upon the myriad of sworn contradictory testimony by Officer Diaz, this Court finds it incredible to believe that the events of which he testified about observing and which allegedly took place between Nelson and Isaac were worthy of belief. Therefore, this Court finds that Issac was unlawfully stopped, detained and searched and any physical evidence recovered from his person or in his actual or constructive possession must be suppressed, to wit: crack cocaine and a dagger.

I make the following conclusions of law:

Initially, as a general rule, a court may take judicial notice of its own records in the case before it. See People v. Perez, 195 Misc. 2d 171, 757 N.Y.S.2d 711 (Crim Ct, New York County 2003) citing Casson v. Casson, 107 A.D.2d 342, 486 N.Y.S.2d 191 (1st Dept. 1985); Weinberg v. Hillbrae Builders, 58 A.D.2d 546, 396 N.Y.S.2d 9 (1st Dept. 1977); see also Prince, Richardson on Evidence § 9-301 (Farrell 11th ed). Moreover, a court may also take judicial notice of the records of another action in the same court. See id., citing Matter of Ordway, 196 N.Y. 95 (1909); People v. Dritz, 259 A.D. 210, 18 N.Y.S.2d 455 (2d Dept. 1940).¹ This Court has taken judicial notice

¹In New York, courts may take judicial notice of a record in the same court of either the pending matter or of some other action (Rosbach v Rosenblum, 260 A.D. 206, 20 N.Y.S.2d 725 (1st Dept. 1940); Matter of Ordway, 196 N.Y. 95 (1909); see also Richardson, *supra*. Judicial notice may also be taken of all prior proceedings of a case although held in another court of the State (Kane v Walsh, 295 N.Y. 198 [1946]). Furthermore, depending upon the equities and justice of the situation, a court may take judicial notice of its own records where the cases are closely connected (Maggio v. State, 88 A.D.2d 1087, 452 N.Y.S.2d 719 (3d Dept. 1982).

of the criminal court complaint for docket 2004QN028538 against Sharnice Nelson, as well as the felony complaint herein. These court files, in conjunction with the hearing testimony, were considered by the Court in rendering its decision.

As the fact finder, this Court found the officer's testimony contradictory. Thus, these contradictory assertions by him are not reliable and are not credible.² As a result, the Court finds, that the officer intentionally misrepresented material facts to the Court, i.e., the circumstances regarding the recovery of the property which was the subject of the suppression hearing, and therefore, it disregards his testimony.³ Therefore, probable cause cannot be established.

Probable cause to arrest is present when the facts and circumstances known to the arresting officer, warrant a reasonable person with the same expertise to conclude that a crime is being, or was, committed, and that the defendant is the perpetrator. See People v. Maldonado, 86 N.Y.2d 631, 635 N.Y.S.2d 155 (1995); People v. Carrasquillo, 54 N.Y.2d 248, 455 N.Y.S.2d 97 (1981); People v. McCray, 51 N.Y.2d 594; 435 N.Y.S.2d 679 (1980); see also C.P.L § 70.10(2). The totality of circumstances gives rise to a finding of probable cause when it is more probable than not that the person to be arrested committed a crime. See People v. Carrasquillo, *supra* at 254; People v. Surico, 265 A.D.2d 596, 697 N.Y.S.2d 356 (3d Dept. 1999). This legal conclusion is made after all the facts and circumstances are considered together. See People v. Bigelow, 66 N.Y.2d 417, 423; 497 N.Y.S.2d 630 (1985). Although the facts and circumstances viewed separately may be insufficient to establish probable cause, when these factors are viewed in totality, probable cause may be found. Id.

In the present case, probable cause cannot be established because the officer's claimed observations are suspect. The 4th Amendment of the United States Constitution and article I, § 12

²Significantly, the officer did not vouch for the remainder of the crack pipe that he claims he observed Sharnice Nelson attempt to destroy. The crack cocaine was not recovered from where Nelson was allegedly observed throwing it. This was also a factor the Court considered in assessing the witness' credibility.

³Under these circumstances, the Court, as fact finder, may disregard the witness' entire testimony. While not all of the testimony by the officer is deemed by the Court to be a misrepresentation, that portion which is necessary for a finding of probable cause, because of its contradictory nature, is rejected.

of our State Constitution protect individuals "from unreasonable government intrusions into their legitimate expectations of privacy." US Const, 4th Amend; NY Const, art I, § 12; People v. Quackenbush, 88 N.Y.2d 534, 647 N.Y.S.2d 150 (1996), citing People v. Class, 63 N.Y.2d 491, 483 N.Y.S.2d 181 (1984), quoting U.S. v. Chadwick, 433 US 1, 7, 97 S. Ct. 2476 (1977). However, the Court of Appeals has justified a warrantless search incident to an arrest in two circumstances: to protect the public's safety and safety of the officer, and to prevent evidence from being destroyed or concealed. See People v. Wylie, 244 A.D.2d 247, 666 N.Y.S.2d 1 (1st Dept. 1997), citing People v. Smith, 59 N.Y.2d 454, 465 N.Y.S.2d 896 (1983); People v. Belton, 55 N.Y.2d 49, 447 N.Y.S.2d 873 (1982); People v. Gokey, 60 N.Y.2d 309, 469 N.Y.S.2d 618 (1983).

In this case, the People argue that the officer executed a search incident to a lawful arrest.⁴ However, because probable cause for defendant's arrest cannot be established because the officer's testimony was not credible and is rejected by the Court, the property, allegedly recovered from defendant's person or an area within his control, is hereby suppressed. The People have not met their burden of going forward to show the legality of police conduct and the seizure was unlawful.

Accordingly, defendant's motion to suppress the evidence is granted.

Kew Gardens, New York
Dated: April 4, 2005

SEYMOUR ROTKER
JUSTICE SUPREME COURT

⁴ Under this exception, police are permitted to search a person who is lawfully arrested, or the area in a suspects immediate control if the search closely follows the arrest. See Wylie, *supra* at 249, citing Belton, *supra* at 52.