

**SUPREME COURT
CRIMINAL TERM - PART K-20 - QUEENS COUNTY
125-01 QUEENS BLVD., KEW GARDENS, NY 11415**

P R E S E N T:

**HON. RONALD D. HOLLIE,
JUSTICE**

THE PEOPLE OF THE STATE OF NEW YORK:

Ind. No.: 2518/05

-against-

Motion: MAPP/HUNTLEY

KEVIN OLIVER,

Defendant. :

X

Frank Kelly, Esq.
42-40 Bell Boulevard, Suite 302
Bayside, New York, NY 11361
For the Motion

Richard A. Brown, D.A.
By: A.D.A. Mahmoud Rabah
Opposed

In the opinion of the Court herein, the defendant's motion is granted. See the accompanying decision and order.

GLORIA D'AMICO
Clerk

Date: June 9, 2006

RONALD D. HOLLIE, J.S.C.

The defendant was indicted on October 14, 2005 and charged with Criminal Possession of a Weapon in the Third Degree, Criminal Possession of a Weapon in the Fourth Degree, Unlawful Possession of Marijuana, Unlawful Possession of Handcuffs, Thumb-Cuffs or Leg Irons, and Unlawful Possession of a Radio Device. The defendant now moves to suppress the use of the physical evidence recovered from him and his oral statement, and argues that probable cause did not exist for the arrest, and that the arrest was unlawful.

On March 6, 2006 and March 21, 2006 a hearing pursuant to *Mapp v. Ohio*, 367 U.S. 643 and *People v. Huntley*, 15 NY2d 72 was held before this court, at which testimony was taken from New York City Police Department Officer Jared Tepperman, Shield No. 31035, 105th Precinct, and the defendant, Kevin Oliver.

Based upon the credible evidence adduced at the hearing, the court makes the following findings of fact, and conclusion of law.

Findings of Fact

On September 28, 2005, the arresting officer, P.O. Tepperman of the 105th Precinct, was in uniform and on patrol in a marked patrol car, in his assigned precinct, with his sergeant and another police officer. At approximately 11:05 PM, in the vicinity of Jamaica Avenue and 212th Street in the County of Queens, the arresting officer observed the defendant, Kevin Oliver, riding a bicycle on the sidewalk. The officers stopped, exited their patrol car, stopped the defendant and informed him that he was not permitted to ride his bicycle on the sidewalk. The arresting officer observed the defendant with a cell phone earpiece in his ear, and noticed that he was carrying a knapsack on his back. In response to the officer's inquiry, the defendant informed the arresting officer that he was returning from work and he was about to buy dinner from the Chinese restaurant very near that location. The arresting officer observed the Chinese restaurant to be open for business. The arresting officer requested identification from the defendant and the defendant complied by producing a New York State identification card bearing his name, address and date of birth. The defendant requested permission to enter the restaurant to order his food and the officer agreed to permit the defendant to do so. The arresting officer then observed the defendant leave his bicycle on the sidewalk and enter the restaurant with his knapsack. The arresting officer further observed the defendant approach the counter, place the knapsack on the floor and order his food. During this time, the officers ran the defendant's name and other information through their police computer system as well as through their police radio. The arresting officer was informed over the radio that there was an active warrant for the defendant. No other information was transmitted at that time. At that point, the defendant had voluntarily returned to the patrol car as he waited for his food order to be processed. The defendant's knapsack remained in the Chinese restaurant on the floor where the defendant originally placed it. With the defendant now at the patrol car, the arresting officer informed the defendant that he was being placed under arrest for an active warrant. The arresting officer testified that, at the time of the arrest, the defendant stated "it must be a beer warrant."

The arresting officer searched the defendant's person and recovered a cell phone. The sergeant entered the Chinese restaurant, retrieved the defendant's knapsack, and brought it to the

trunk of their patrol car. The knapsack was closed and it appeared filled and heavy. The sergeant opened the knapsack and the arresting officer observed a radio scanner at the top. The arresting officer believed the possession of the scanner to be a crime. The scanner was not removed from knapsack at the patrol car. No further search was made of the knapsack at the patrol car.

The defendant, now handcuffed and under arrest, requested permission to telephone a friend to ask that friend to retrieve his bicycle, cell phone, and knapsack. The arresting officer permitted and assisted the defendant in placing that phone call, using the defendant's cell phone, and allowed the defendant's friend to pick up the defendant's bicycle and cell phone. The officers refused to release the knapsack and its contents to the friend. The knapsack was taken to the precinct with the defendant.

After taking the defendant to the 105th Precinct, the arresting officer searched the defendant's knapsack and recovered, in addition to the scanner, an unloaded .25 caliber semi-automatic pistol, an unloaded .22 caliber revolver, a bag of marijuana, handcuffs, a drill, drill bits, hammer, chisel, tape, latex and work gloves, garbage bags, tape measure and other tools. The arresting officer did not arrest the defendant for riding his bicycle on the sidewalk and chose instead to issue a summons in lieu of arrest in violation of Administrative Code §19-176(b). In addition, the defendant was charged with crimes related to the contraband seized from the knapsack.

At the conclusion of the hearing the People conceded that the arrest warrant, acted upon by the arresting officer, was not active at the time of the defendant's arrest.

Discussion

An arrest is constitutionally valid when, at the moment the arrest was made, the officer had probable cause to make it (*People v. Feingold* 106 AD2d 583, 585; *People v. Hoffman*, 135 AD2d 299, 301).

In this case, the arresting officer made the decision to arrest the defendant on the warrant and issue to the defendant a summons in lieu of arrest for riding his bicycle on the sidewalk. In determining whether probable cause to arrest exists and what prohibitions against unreasonable search and seizure may apply under our Federal and New York State Constitutions "an objective judicial determination of the facts in existence and known to the officer prevails over the officer's 'subjective evaluation' "*(People v. Jones*, 219 AD2d 417, 421; *People v. Bandera*, 204 AD2d 340, 341). In this Court's view, after a review of the facts in existence and known to the officers, there are two points at which the arresting officer may have had probable cause to arrest. One was the communication of an active warrant and the second was the observation of the defendant riding his bicycle on the sidewalk. Each of those points require a separate probable cause-Fourth Amendment analysis, as well as an analysis under the New York State Constitution. It should be noted that the search and seizure language of the Fourth Amendment of the United States Constitution and the language of Article 1, Section 12 of the New York State

437).

Arrest on Nonexistent Warrant

In this hearing on the defendant's motion to suppress, the burden is on the People to come forward with evidence establishing probable cause for the arrest (*People v. Ramirez-Portoreal*, 88 NY2d 99, 113).

The People attempted to meet its burden by having the arresting officer testify regarding attempts made to verify the defendant's identity, ostensibly so they could issue a summons, and the result of those efforts. The arresting officer and his sergeant communicated via computer and hand held radio with their department. It was at the time of this communication that the arresting officer was told that there was an active warrant.

There exists in our law a definitively established doctrine called the "Fellow Officer Rule" (*People v. Jennings*, 54 NY2d 518, 522 quoting *Whitley v. Warden* 401 US 560). Under the "fellow officer rule", a police officer is entitled to act on the strength of a radio bulletin or a telephone or computer alert from a fellow officer or department and assume its reliability. Officers making arrests based on the transmitted information are justified in doing so because the officer or department furnishing the information presumptively possesses the requisite probable cause which justifies the warrantless arrest. (*People v. Rosario*, 78 NY2d 583, 588). In making an arrest an arresting officer may rely upon information communicated by a *fellow officer* that an individual is the subject of an outstanding warrant (*People v. Watson*, 100 AD2d 452, 460; *People v. Lent*, 92 AD2d 941).

In all cases in which 'fellow officer rule' has been employed, the nature and reliability of the information is an important issue. (*Rosario*, 78 NY2d at 588-589).

The defendant challenges the reliability of the information received by the arresting officer and the validity of the warrant. It was determined, after the arrest, that the warrant was not valid at the time of the defendant's arrest.

Where a warrant is determined to be invalid, vacated or nonexistent, an arrest based on that warrant would be without probable cause and unlawful under the laws of New York State and any evidence seized as a result of the arrest will be suppressed (*Jennings*, 54 NY2d at 523).

The Court of Appeals has held in *Jennings*, that where an arrest is based upon a vacated or nonexistent warrant, the fruits of that arrest must be excluded. There, the court vacated the judgments of conviction and granted the motion to suppress evidence which was seized from a defendant who was stopped for a traffic violation and arrested on an invalid warrant. The People in this case argue that the evidence should not be excluded because the officers acted reasonably and in good faith based upon the information received from a *fellow officer*. They further argued a statement by the defendant admitting the existence of a warrant should be considered as evidence of the arresting officers "good faith," and therefore should shield the evidence seized from exclusion.

Although the federal court in *United States v. Santa*, 180 F3rd 20 (2d. Cir. 1999) held that drug evidence seized from a defendant, in Spring Valley, New York, who was arrested

based upon a warrant vacated months earlier, was admissible as an extension of the “good faith” exception to the exclusionary rule, the law as stated in *Jennings* is controlling in this matter. In New York, “good faith” is not recognized as an exception to the exclusionary rule (*see, People v. P.J. Video, 68 NY2d 296, 305*).

The prosecution in this case has failed to establish the existence of a validly issued arrest warrant, for the defendant, which was active at the time the defendant was arrested on this case. The defendant’s arrest would therefore be unlawful. It should be noted that the statement made by the defendant, and the items recovered from his knapsack, occurred after his unlawful arrest, and as such would be the fruit of that poisonous tree (*see, People v. Randall, 85 AD2d 754, 755*).

Arrest on Traffic Infraction

A police officer may arrest a person for any offense if he has reasonable cause to believe that person committed the offense in his presence (C.P.L. §140.10(1)(a)). If the offense is a ‘petty offense’, as defined in C.P.L. §1.20 (39), a police officer may make an arrest “...only when such offense was committed within the geographical area of the police officer’s employment...and such arrest is made in the county in which the offense was committed” (C.P.L. §140.10(2)).

Reasonable cause, as used in C.P.L. §140.10, is the equivalent of probable cause (*People v. Bothwell, 261 AD2d 232, 234*). A ‘violation’ or ‘traffic infraction’ are each defined as petty offenses. The defendant was issued a summons for a ‘violation’. Riding a bicycle on a sidewalk may also be considered a ‘traffic infraction’ under New York’s Vehicle and Traffic Law (*People v. Little, 309 AD2d 767*).

In the case at bar, the arresting officer observed the defendant riding his bicycle on the sidewalk and in the confines of the precinct in which the officer worked. With that observation, the arresting officer had probable cause warranting a stop of the defendant for a traffic infraction or violation. That stop does not violate the defendant’s Fourth Amendment rights or his rights under Article 1§12 of the New York State Constitution (*see, People v. Robinson, 97 NY2d 341, 349*).

Now stopped, the testimony adduced at the suppression hearing demonstrates that the defendant was advised of the violation, was responsive to questions asked, and was cooperative in supplying reasonably requested information and documentation. There was nothing observed by the arresting officer to suggest that the defendant was committing a crime, and no indication that the arresting officer had reason to fear for his safety, or for the safety of the public. Until the results of the officers’ attempts to verify the defendant’s identity were received, indicating an active warrant, the only charge for which the defendant could have been arrested was a traffic infraction or violation.

The scope, duration, and intensity of the seizure as well as any search made by the police subsequent to that stop remain subject to the strictures of Article 1§12 of the New York Constitution (*Robinson, 97 NY2d at 353*). The Court of Appeals has indicated that upon an arrest for a traffic offense, a full blown search is not justified where the arrest was unnecessary

because an alternative summons was available (*see, People v. Howell, 49 NY2d 778, 779*).

This traffic infraction or violation, without more, did not warrant a full blown search of the defendant's person or possessions (*People v. Carvajales, 152 AD2d 675*). A full blown search is one commonly referred to as incident to a lawful arrest (*see, People v. Marsh, 20 NY2d 98, 101; People v. Lent, 92 AD2d 941*).

On the facts relative to the traffic infraction observed, an arrest of the defendant would be unnecessary because the arresting officer had an alternative summons available. If there had been an arrest, a full blown search would not have been justified, and, if performed, any item recovered would be subject to exclusion (*Howell, 49 NY2d at 778*).

Having determined that probable cause did not exist for the arrest of the defendant based upon the invalid warrant, the court now seeks to determine whether another lawful basis exists for the arrest of the defendant and the seizure of the physical evidence.

The People's contention that the discovery of the contraband was inevitable is without merit. It is clear that the initial stop of the defendant was warranted and justified in view of the fact that the defendant was observed riding his bicycle on a sidewalk, an offense in violation of the Administrative Code. However, a full blown arrest and search was not warranted in view of the fact that a summons in lieu of arrest was available. Therefore, the defendant's arrest was not inevitable (*People v. Howell, 49 NY2d 778, supra*). The People further argue that the officers actions were warranted to protect public safety. In the matter at hand, the record does not indicate that the observations made by Police Officer Tepperman of the defendant and the knapsack in his possession gave the officer reasonable suspicion that there was criminal activity afoot, or that the police needed to take action to protect themselves or ensure the safety of the public. Additionally, the record is devoid of testimony that the gun and the contraband seized, or any of the contents of the knapsack were observed by the police prior to taking possession of the knapsack. In fact, Police Officer Tepperman testified that at the time of his stop of the defendant, he did not pay any extra attention to the knapsack. Therefore the stop of the defendant was based solely on the fact that he was operating his bicycle on the sidewalk in violation of an Administrative Code.

The alternate theory of abandonment advanced by the People is not supported by the testimony. Where a defendant denies ownership by manifesting a clear intention to abandon property, the defendant may not challenge the constitutionality of the search of said item (*see, People v. Martinez, 80 NY2d 444*). The defendant's actions while awaiting the identification check indicated his clear intention to return to the restaurant to retrieve his knapsack, as well as the food that he ordered (*see, People v. Pacheco, 107 AD2d 473*). Moreover, Police Officer Tepperman testified that the defendant clearly manifested ownership of the bag by his inquiry, upon arrest, as to whether his friend could be called to retrieve his knapsack as well as his bicycle and his cell phone. The defendant's action did not manifest an intent to abandon the property seized and searched.

Conclusion of Law

The People have not met their burden of establishing probable cause for the arrest. The defendant, though stopped for a minor violation, was arrested as a result of the officer's mistaken

belief that there was an active warrant in effect pertaining to the defendant. Accordingly, the search of the defendant's knapsack and the seizure of the contraband found therein failed to comport with the reasonableness requirements of the Fourth Amendment. The police lacked probable cause for the arrest, and the contraband seized and the statement attributed to the defendant which flowed from the arrest is hereby excluded.

Order entered accordingly.

The Clerk of the Court is directed to forward copies of the decision to the office of the District Attorney, and to the attorney representing the defendant.

RONALD D. HOLLIE, J.S.C.