SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

728

KA 22-01545

PRESENT: WHALEN, P.J., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENTRELL L. BARNER, DEFENDANT-APPELLANT.

BANASIAK LAW OFFICE, PLLC, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (MORGAN R. MAYER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (David A. Renzi, J.), rendered May 25, 2022. The judgment convicted defendant upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the omnibus motion seeking to suppress physical evidence and statements is granted, the indictment is dismissed, and the matter is remitted to Jefferson County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon his guilty plea of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]), defendant contends that his statements and all physical evidence should have been suppressed because law enforcement officers unlawfully stopped his vehicle and detained him without the requisite level of suspicion and, further, because his consent to the search of his vehicle was not voluntarily given. In the alternative, he contends that the matter should be remitted for a *Darden* hearing inasmuch as the evidence at the suppression hearing established that the officers relied, in part, on information obtained from a confidential informant (informant). We agree with defendant that, even if the evidence at the suppression hearing regarding the information relayed by the informant is considered and further assuming, arguendo, that the requisite level of suspicion existed to stop defendant's vehicle, the subsequent vehicular search was unlawful.

At the suppression hearing, the People called only one witness, a detective with the Jefferson County Sheriff's Department who was working as part of the Metro-Jefferson Drug Task Force (Task Force). According to the detective, the Task Force had "received information

that [defendant] was delivering narcotics to customers in the Watertown area from Syracuse." The detective did not indicate who provided that information or when it was received. The detective "believe[d]" that Task Force members had received a description of the vehicle defendant would be driving, but he did not "recall how detailed that description was." According to the detective, other officers in the Task Force located defendant's vehicle at a motel in Watertown and followed it to a residence in Watertown that was owned by someone who "was periodically under investigation by the task force for narcotics activity."

The driver of the vehicle, later identified as defendant, parked the car in the driveway next to the house in question and remained there for approximately 90 minutes. Although the detective observed a number of people enter the house and leave shortly thereafter, which, according to the detective, was indicative of drug activity, he did not see defendant or anyone else exit defendant's vehicle, nor did he see anyone approach defendant's vehicle in the driveway. When defendant eventually drove away, the detective requested that a Watertown police officer stop the vehicle. Following the stop, the detective approached defendant and explained that he suspected that defendant was delivering drugs from Syracuse to customers in Watertown. The detective further stated that he intended to obtain a warrant to search the vehicle but, if defendant consented to a warrantless search, the detective would allow him to leave regardless of whether contraband was found, with the understanding that charges could be lodged later if contraband was discovered. The detective testified that he told defendant that his "intention was to search [defendant's] vehicle, that [he] did not have a search warrant yet, [and that he] would be glad to apply for a search warrant, but if [defendant] wanted to speed up the process, [defendant] could give [him] consent." The detective made clear to defendant that the vehicle would be detained until the warrant was obtained.

Defendant agreed to a warrantless search and signed a written consent form. As the detective began searching the vehicle, defendant said that "[t]he stuff" was in the back seat, where the detective later found a backpack containing heroin and cocaine. Consistent with his promise, the detective did not arrest defendant that day. An indictment was later handed down charging defendant with, inter alia, two counts of criminal possession of a controlled substance in the third degree.

In the absence of exigent circumstances, which did not exist here, " 'all warrantless searches presumptively are unreasonable per se,' and the People have the burden of overcoming the presumption" (*People v Wideman*, 121 AD3d 1514, 1516 [4th Dept 2014]; *see People v Hodge*, 44 NY2d 553, 557 [1978]). Although consent to search is a recognized exception to the warrant requirement, "it is well settled that the People have the heavy burden of establishing voluntary consent" (*People v McCray*, 96 AD3d 1480, 1481 [4th Dept 2012], *lv denied* 19 NY3d 1104 [2012]; *see People v Gonzalez*, 39 NY2d 122, 127-128 [1976]). The People's burden to establish voluntariness is not easily carried inasmuch as a consent to search is voluntary only "when

it is a true act of the will, an unequivocal product of an essentially free and unconstrained choice. Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle" (*Gonzalez*, 39 NY2d at 128).

Here, the record establishes that defendant consented to the search of his vehicle with the understanding that, if he refused, the detective would obtain a warrant and search the vehicle anyway, and that in the meantime the vehicle would be detained at the scene. We note that a suspect's consent to search that is based on threatened action by the police is deemed voluntary only where there are valid legal grounds for the threatened action (*see People v Storelli*, 216 AD2d 891, 891 [4th Dept 1995], *lv denied* 86 NY2d 803 [1995]; *People v LaDuke*, 206 AD2d 859, 860 [4th Dept 1994]; *see also People v Rodriguez*, 189 AD3d 2122, 2123 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]). Further, we agree with defendant that the voluntariness of his consent therefore turns on whether the detective could lawfully have obtained a search warrant, which may be issued "only upon a showing of probable cause to believe that a crime has occurred, is occurring, or is about to occur" (*People v Moxley*, 137 AD3d 1655, 1656 [4th Dept 2016]; *see generally People v Mercado*, 68 NY2d 874, 875-876 [1986], *cert denied* 479 US 1095 [1987]).

In our view, the detective did not have probable cause to believe that defendant had committed a crime or that the vehicle contained contraband when defendant consented to the warrantless search, and, thus, the detective's threat to obtain a search warrant was hollow and misleading. All the detective knew at that point was that a confidential informant had said that defendant had been transporting narcotics from Syracuse to Watertown on some unidentified date and that someone operating a vehicle that may have matched the description of defendant's vehicle had driven from a motel in Watertown to the driveway of a suspected drug house in Watertown. Such information does not rise to the level of probable cause as required for issuance of a search warrant. Indeed, the People do not contend otherwise. Instead, the People merely contend that probable cause will be established if, as defendant requests in the alternative, we remit the matter for a *Darden* hearing, which the People concede County Court erred in refusing to conduct upon defendant's timely request. The purpose of a *Darden* hearing, however, is "to protect against the contingency, of legitimate concern to a defendant, that the informer might have been wholly imaginary and the communication from him entirely fabricated" (*People v Darden*, 34 NY2d 177, 182 [1974]; *see People v Serrano*, 93 NY2d 73, 77 [1999]). Although testimony at a *Darden* hearing can also establish whether the informant had a sufficient basis of knowledge to satisfy the *Aguilar-Spinelli* test (*see People v Hightower*, 207 AD3d 1199, 1201 [4th Dept 2022], *lv denied* 38 NY3d 1188 [2022]; *People v Steinmetz*, 177 AD3d 1292, 1293 [4th Dept 2019], *lv denied* 34 NY3d 1133 [2020]), we agree with defendant that *Darden* hearing testimony cannot be used by the People to supplement the evidence adduced at the suppression hearing to establish probable cause. In other words, where the evidence at a suppression hearing fails to establish probable cause to arrest or search a defendant, the People cannot fill in the gaps with additional

evidence adduced at a subsequent *Darden* hearing.

We conclude that, inasmuch as the People failed to meet their burden of proof at the suppression hearing, the court erred in refusing to suppress the drugs found in defendant's vehicle and his statements to the detective. We therefore reverse the judgment, vacate the plea, grant that part of defendant's omnibus motion seeking to suppress physical evidence and statements, and dismiss the indictment.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court