

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.: 4176-2002

Motion: To suppress physical
evidence

LEE BROWN

Defendant.

-----X

BRYAN COAKLEY, ESQ.
For the Defendant

RICHARD A. BROWN, D.A.

BY: DONNA MYRILL, A.D.A.
Opposed

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

Kew Gardens, New York
Dated: July 30, 2003

/s/_____
SEYMOUR ROTKER, JSC

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

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

Indictment No. 4176-2002

LEE BROWN

Defendant.

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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 Class E felony of Criminal Possession of Stolen Property in the Fourth Degree. The charge is that on December 15, 2002, defendant Lee Brown knowingly possessed stolen credit cards in a vehicle over which he had control.

Defendant, claiming to be aggrieved by an unlawful search and seizure, has moved to suppress two credit cards, seized from the said automobile, by Officer Joseph A. Durante of the 105th precinct, on December 15, 2002

It was asserted by the People's witness that the seizure of the credit cards from the defendant's vehicle was done pursuant to an "inventory search" in which case the People must go forward to establish the legality of the police conduct by clear and convincing evidence. At the conclusion of the hearing the People argued that, in fact, notwithstanding the characterization of the search as an inventory case, it is the People's position that the credit cards were seized from the automobile because they were in "plain view". The People must establish the legality of the police conduct; the defendant, however, bears the 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 July 14 and 21, 2003

I give full credence to the testimony of the People's witness Police Officer Joseph A. Durante.

I make the following findings of fact:

On December 15, 2002, Police Officer Durante was the recorder in a marked police vehicle being operated by his partner Officer Werber while doing a 3:00P.M. - 11:30P.M. tour of duty in sector Charlie in the 105th precinct.

At approximately 9:00P.M. Officer Durante's vehicle was directed by police radio to go to 148th Drive and Edgewood Avenue in the Rosedale section in Queens to investigate a "suspicious male."

The officers arrived at the location in a few minutes. Officer Durante and his partner saw and spoke to a male black in his early twenties (the male black's home was ultimately identified as 241-42 148th Drive). The male black did not want to give his name. There was second male black standing next to the first male black who also remained unidentified. The first male black stated that on the previous evening he had observed a male in the yard of his home looking into his sister's window. That person did not have permission to be within the yard where the window was located. The "unidentified complainant" told Officer Durante that he had seen that same person shortly before the officers arrival and that he had been sitting in a white van which was parked around the corner.

The officer observed the unoccupied white van blocking a driveway to a house. He knocked on the door of the house to see if the vehicle owner had any relationship to the premises. The occupier of the premises didn't know anything about the van. Officer Durante and his partner went to the van but observed no one in it. The officer ran the plate and found that a woman who lived on Roosevelt Avenue owned it. The car was not stolen.

Officer Durante wrote a ticket for the van which was blocking the driveway and put it on the windshield.

A black woman who also refused to give her name observed the officers in the neighborhood; came over to them and said, although she did not see anyone, on the previous evening a chair had been placed next to a window at her house and the screen had been cut.

Officer Durante went back to the original unidentified complainant and said he would keep the block under surveillance for a while to see if the occupant of the van returned.

Within minutes Officer Durante saw a light flashing from the location where he first interviewed the male black. Durante and his partner went back and saw the original male black and two others surrounding a fourth person. That fourth person, was apparently being detained. He was identified by the unidentified complainant as the person who had trespassed on his property and who he had previously seen in the van earlier that same evening.

Defendant identified himself after being asked and Officer Durante inquired as to what he was doing in the neighborhood. At that point the defendant gave inconsistent responses about looking for his girlfriend and then he was placed under arrest for trespassing and attempted burglary of 241-42 148th Drive (the unidentified complainant's house). The officer tried to put the cuffs on the defendant who started fighting with them. Pepper spray was used on the defendant. An ambulance was called. While waiting for it to arrive, the defendant said he had a water bottle in his car (the white van) and gave the keys to the officer to get the water so the defendant's eyes could be washed out and he could drink some water.

The officer opened the middle part of the van (which had sliding doors). He shined his flashlight into the car looking for the water. Durante observed an old parking summons and two credit cards on the floor on the front passenger's side of the van.

After the defendant was attended to, the van was driven back to the precinct by another officer "to accommodate the defendant". Approximately one half hour later Officer Durante while inventorying the contents of the vehicle and without knowing anything about them seized the two credit cards from the front passenger side of the vehicle.

I make the following conclusions of law:

At a suppression hearing, the People have the burden of going forward in the first instance with evidence of the legality of the police conduct which has been challenged by the defendant, People v. Malinsky, 15 NY2d 86 (1965). This a burden of production and not a burden of proof or persuasion, People v. Sanders, 79 AD2d 5 (1976). Two issues are raised by the facts in this case. First the legality of the defendant's arrest and, second, the seizure of two stolen credit cars from his vehicle.

The Arrest

A police officer's authority to make a warrantless arrest is set forth in CPL 140.10. Under that section a custodial arrest is authorized when the officer has "reasonable cause to believe" that an individual committed a crime, "whether in his presence or not". New York's "reasonable cause" standard is the same as the "probable cause" requirement of the Fourth Amendment, People v. Jenkins, 209 AD2d 164 (1st. Dept., 1994). CPL 70.10(2) states that "reasonable cause" exists "when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgement and experience that it is reasonably likely that an offense was committed and that (the suspect) committed it". When, as here, probable cause is not based solely on the officer's own observations but, in part, on information supplied by another individual it must be determined that the informant is (1) reliable and (2) that he has a sufficient basis for his knowledge of the suspect's criminal activity, Aguilar v. Texas, 278 US 108 (1964), Spinelli v. United States, 393 US 410(1969).

Upon responding to the location to investigate a report of a suspicious male, the officers were advised by a civilian informant who initially declined to identify himself by name that, on the previous evening, he had seen an individual trespassing on his property and looking into his sister's bedroom. According to the informant, the same individual had returned to the area and was sitting in a white van parked around the corner. The officers verified that an unoccupied white van was parked in the location disclosed by the informant. They conducted a further investigation but without concrete results. The informant was advised that the officers would keep an eye on the van and they left the area. Minutes later the officers noticed a blinking light and returned to the area.

On this occasion, they observed the original informant and two other males apparently detaining a fourth individual. At this point the informant identified the defendant as the individual who he had seen trespassing at his back window on the previous evening. Although the officers were probably authorized to make an arrest at this point, they merely questioned the defendant. In response, he identified himself but gave inconsistent answers regarding his reasons for being in the area. Based on all of the above information, the officers decided to effect an arrest. The defendant resisted and had to be subdued by force.

Given these circumstances, the officers had reasonable cause to effect the arrest of the defendant. The informant advised them that he had been the victim of a crime [attempted burglary] and identified the perpetrator. Generally speaking an accusation by a civilian complainant even if anonymous against a specific individual is sufficient, absent materially impeaching circumstances, to establish probable cause to believe that the offense was committed and that the identified suspect committed it, People v. Martin, 221 AD2d 568 (2nd Dept., 1995).

An informant who is an eye witness victim (i.e. a complainant) is deemed reliable because he can be prosecuted if his report is a fabrication, People v. Crespo, 70 AD2d 661 (2nd Dept., 1979). In addition, the basis for his knowledge is obviously his own first hand observations. Where, as here, the informant does not identify himself, it is prudent for the officer to obtain some further indicia of the informant's reliability before effecting the arrest. That was done here in two ways. First the officer had reasonably extensive conversations with the informant during which he learned his address and could assess his credibility based on demeanor, People v. Simpson, 244 AD2d 87 (1st. Dept., 1998). Secondly, he had, had a conversation with another area resident and, most significantly, questioned the suspect.

Based upon the foregoing, the Court finds that the officers had ample reasonable cause to effect an arrest of the defendant.

The Seizure of the Credit Cards

The next question presented is the legality of the seizure of the stolen credit cards from the defendant's vehicle. In the context of an alleged Fourth Amendment violation, the People must produce credible evidence that the challenged search or seizure was either pursuant to a valid warrant or was justified by one of the many exceptions to the warrant requirement. No warrant was obtained in this case.

Under Pennsylvania v. Labron, 518 US 939 (1996) the police may conduct a warrantless search of a vehicle and its contents if they have probable cause to believe that it contains contraband [the automobile exception]. To be justify a search under these circumstances, the People must show that there exists some nexus between the probable cause to search and the crime for which the defendant is being arrested, People v. Bryant, 245 AD2d 1010 (3rd. Dept., 1997). As pointed out by the defendant there is no such nexus here. The only information available to the police indicated that the defendant had, at most, attempted to commit

a burglary. Thus, there was no articulable reason to suspect that the fruits or instrumentalities of crime would be located in the van

Neither can the search be upheld as incident to a lawful arrest. Such a search is justified by the officer's right to protect himself by preventing the arrestee from gaining access to a weapon or to prevent the destruction or concealment of evidence. As a result, the scope of this search is strictly limited to the arrestee's person and to the area from which he might gain possession of a weapon or evidence, People v. Branch, 259 AD2d 556 (2nd Dept., 1999). Since the arrest in this case was effected at some distance from the van, this exception to the warrant requirement does not apply

Since there is no evidence that the van was impounded pursuant to ordinary police regulations and procedures and subsequently inventoried the "inventory search" doctrine does not apply, People v. Galak, 80 NY2d 715 (1993).

The People have, however, presented evidence which purports to establish that the search was justified under the "plain view" doctrine. The leading New York case articulating that doctrine is People v. Diaz, 81 NY2d 106 (1993). Diaz holds that "if the sight of an object gives the police probable cause to believe that it is an instrumentality of a crime, the object may be seized without a warrant if three conditions are met: (1) the police are lawfully in the position from which the object is viewed; (2) the police have lawful access to the object; and (3) the object's incriminating nature is immediately apparent".

In order for the seizure in this case to be justified the People are required to produce credible evidence that the officer was lawfully in the defendant's vehicle at the time of the seizure of the credit cards, that the cards were accessible without a further search and that the incriminating nature of the evidence was immediately apparent.

Was the police officer lawfully inside the defendant's vehicle?

The initial entry into the vehicle was clearly justified. The defendant gave one of the officers on the scene his keys and requested that he retrieved a bottle of water stored therein. This officer observed the credit cards that are the subject of this motion but took no official police action with respect to them. Subsequent to the defendant's arrest which the Court has found was supported by probable cause, a second

officer entered the vehicle and drove it to the police precinct. According to the testimony this was done as an accommodation to the defendant. Assuming the truth of this statement, is this officer's presence in the vehicle lawful?

The People do not argue that the car was being impounded or seized pursuant to some regulation or general policy, Colorado v. Bertine, 479 US 367 (1987). Although they do not explicitly argue that the search and seizure here are justified by consent that is the logic of their position. When the People rely on consent to justify police action, however, they bear a "heavy" burden to establish by "clear and convincing" evidence that the defendant knowingly and voluntarily waived his rights, People v. Whitehurst, 25 NY2d 389 (1969), People v. Zimmerman, 101 Ad2d 294 (2nd Dept., 1984). Assuming that the credible testimony establishes that the officers were acting to accommodate the defendant, this cannot be said to establish to a "clear and convincing" degree that the defendant, in the legal sense of that word, consented to their actions¹.

The case of People v. Hill, 212 AD2d 632 (2nd Dept., 1995) cited by the People in support of the motion is distinguishable. In that case, the Police had credible information that the vehicle being driven by the defendant at the time of his arrest had been used by him in connection with a robbery. There was no doubt that this fact authorized a seizure of the vehicle. More to the point, is People v. Bonneau, 140 Misc. 2d 938 (Co. Ct, Westchester Co., 1988). In Bonneau, the defendant was arrested for theft. The location of the arrest was the Village of Buchanan police station. At the time of the arrest the defendant's car was parked at his place of employment. Subsequent to the arrest the police arranged to have his vehicle towed and impounded. An official police form indicated that the vehicle had been impounded for "felonious use" but there was also testimony that it was removed at the request of the defendant's employer.

The Court ruled that there was no valid reason for the police to impound the vehicle. The Court wrote that "the car was safe where it was" until such time as the defendant or his agent could retrieve it, its "presence caused no risk" to the property owner where it was parked, there was no "danger of its being molested". Had the vehicle been "unregistered, uninsured or uninspected" or had it been parked so as to endanger public safety or interfere with the flow of traffic the seizure would have been authorized, see, People v. Robinson, 36 AD2d 375 (2nd Dept., 1971) and People v. Sullivan, 29 NY2d 69 (1971). Although

¹This argument would be substantially more persuasive if the testimony indicated that it was the defendant who asked the police to drive his vehicle to the police station.

the vehicle in this case was illegally parked in front of a driveway, there was no testimony that it was moved for that reason. Even in that case, however, the Bonneau case suggests that the police would be required to employ the least intrusive alternative to impoundment which, in this case, would be simply to move the vehicle to a legal parking spot².

Did the Police have lawful access to the information on the cards?

Even if the Court assumed that the officer was acting with the defendant's consent or otherwise legally driving the vehicle, it is apparent that he did not learn that the credit cards were stolen until he examined them and saw that they were not in the defendant's name. Examination of the names on the cards is inconsistent with the explanation that the car was being driven to the precinct solely as an "accommodation to the defendant". The evidence establishes that the knowledge that the cards were contraband was the result of a separate investigation which was conducted subsequent to the seizure. It cannot be said that an officer driving a vehicle to the station house to accommodate the defendant had lawful access to the names on the credit cards.

On this issue the case of Hicks v. Arizona, 480 US 321 (1987) is illustrative. In Hicks the police were legally in the defendant's residence pursuant to an exigent circumstances search for a shooter and weapons. In the course of the search, they observed expensive stereo equipment which they suspected was stolen. Acting on this suspicion, they recorded the serial number for various units. In the case of some units the numbers were readily apparent but in the case of others the police were required to move the items to find the identifying numbers. The Court ruled that the apparent numbers were properly recorded because they were in plain view but that the serial numbers recorded from the moved items were the product of an illegal search.

In People v. Solano, 148 AD2d 761 (2nd Dept., 1989), the Appellate Division, Second Department assumed that the police had legally seized the defendant's vehicle following his arrest on a warrant but disallowed any search thereof absent a valid inventory search under Colorado v. Bertine, 479 US 367 (1987)

². The question of issue of the extent to which the police must explore the alternatives to impoundment before taking that action has not been explicitly decided by the New York Courts. The Bonneau case contains a discussion of the law of several other jurisdictions which suggest where there are less intrusive alternatives to impoundment the police must employ them.

or “evidence to support a finding... that there was reason to believe that the defendant’s vehicle actually contained a weapon” so that a “public safety exception” to the warrant requirement might apply.

Was the incriminating nature of the cards clearly apparent?

Finally, in order for a seizure to be justified under the “plain view” doctrine it must be apparent that the item is contraband. Unlike a weapon or narcotics, a credit card is not *per se* contraband. Unless the officer could articulate some specific reason to believe that the cards were the fruits of a crime for which the defendant had been arrested he had no reason to seize them or even to examine them. Based on the information that the officers had in their possession at the time of the seizure there was no reason for them to believe that two credit cards in the defendant’s vehicle were either the fruits of instrumentalities of any crime committed by the defendant.

Again the case cited by the People is distinguishable. In People v. Batista, 261 AD2d 218 (1st Dept, 1989) the Court held that the incriminating nature of a brown lunch bag wrapped with tape which the defendant dropped while entering a narcotics location was “readily apparent” to the arresting officer based the fact that he had made hundreds of narcotics arrests and had frequently seen narcotics packaged in this manner. Millions of law abiding citizens possess credit cards and occasionally leave them in their cars. Unlike the situation in Batista, the officer offered no articulable reason to support the necessary finding that two credit cards left in the vehicle were obvious contraband.

For all of the foregoing reasons, the Court must suppress the recovered evidence. In so doing however, the Court notes that the seizure of the credit cards, although in violation of the defendant’s rights under the Fourth Amendment, was not the result of overreaching or wilful misconduct on the part of the police officers involved. The officers acted in good faith and in a way that to them seemed reasonable. Their actions, however, when viewed in hindsight, were simply not justified by adequate probable cause or by some exception the warrant requirement. As the Court of Appeals wrote in People v. Spinelli, 35 NY2d 77(1974) at page 82.

the failure to secure a warrant was by no means a sinister attempt on the part of the police officers to deprive an individual of his constitutional rights. But in an age of advancing technology the

courts' vigilance in protecting a citizen's right to privacy becomes more necessary than ever before. The goal is not to protect criminals but to protect the standards of decency in our society. The privacy of an innocent citizen, of necessity, must be judged by the same standards as those applied to citizens who are found later to be guilty,

Kew Gardens, New York

Dated: July 30, 2003

/s/

SEYMOUR ROTKER, JSC