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MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS : CRIMINAL TERM : PART-JHO

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X R E P O R T  
THE PEOPLE OF THE STATE OF NEW YORK : BY: JOAN O'DWYER, J.  
: :  
-against- : DATE: MAY 24, 2001  
: :  
ANTHONY PEREZ, : INDICT. NO. 2822/00  
: :  
Defendant. :  
X

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MOTION TO SUPPRESS PHYSICAL EVIDENCE  
AND IDENTIFICATION TESTIMONY (Mapp/Wade/Dunaway)

FOR DEFENDANT: Michael Mays, Esq.  
FOR PEOPLE: Cindy Jo, Esq., ADA

The defendant is charged with Criminal Possession of Stolen Property in the Fourth Degree. He has moved for an order suppressing physical evidence and identification testimony, contending that he was subjected to an unlawful search and seizure and that the pretrial identification procedure was unduly suggestive. A hearing to report on the admissibility of this evidence was held before me on May 9, 2001. At this hearing, the People called Police Officer Lawrence Zackman, whose uncontroverted testimony I find credible.

Officer Zackman testified that on August 23, 2000 at about 10:50 P.M. he responded to Beach 30<sup>th</sup> Street to investigate a possible stolen car at that location. He said that upon arrival at the scene he saw a vehicle parked in a lot next to a church. He also spoke with officers there who advised him that an eyewitness had seen a male Hispanic driving what he believed to be a stolen car and park it in the lot. According to Officer Zackman, he "ran" the Vehicle Identification Number on the vehicle and learned that it had been reported stolen. He thereafter "sat and watched" the location from an unmarked vehicle parked about 50 feet from the entrance of the church parking lot.

Officer Zackman further testified that at approximately 12:40 A.M. he saw a male, identified at the hearing to be the defendant, enter the parking lot. He said that he approached the defendant, who was standing right next to the driver's door of the stolen vehicle, and that as he did so the defendant began to walk toward him. The officer stated that he frisked the defendant for his safety, felt a hard object in the defendant's pocket, then removed a screwdriver from the pocket he had frisked. He testified that he then attempted to start the vehicle with the screwdriver, which he did. At this time, he handcuffed the defendant and asked other officers to bring the eyewitness to the scene. About 50

minutes later, at 1:30 A.M., the eyewitness arrived and from a distance of 15 feet identified the defendant as the individual he had seen driving the car, although he indicated that he had changed his clothing. The defendant was then brought to the 101<sup>st</sup> Precinct, where a search of his person revealed a packet of marijuana which he had in his shoe.

Officer Zackman testified that he later learned from the owner of the vehicle, Jonathan Wade, that his car had been stolen the day before.

On cross-examination, Officer Zackman testified that he was in uniform and that when he first approached the defendant he did not speak to him, but grabbed his hands and put them on the back of the vehicle. He said that he did not observe the defendant inside of the vehicle at any time. He also stated that he handcuffed the defendant for his safety but did not place him under arrest at that time.

According to Officer Zackman, the defendant could have been arrested for trespassing onto the private parking lot. He said that the stolen vehicle was the only vehicle in the lot.

Officer Zackman further testified on cross-examination that the defendant was handcuffed and his hands placed behind him when he was viewed by the eyewitness. He said that the eyewitness

had seen defendant at about 11:00 A.M., then returned to identify him at 1:30 A.M., about 2 ½ hours later. The officer stated that the eyewitness had not provided a description of the individual he had seen driving the stolen vehicle other than to indicate that he was a male Hispanic.

Officer Zackman also stated on cross-examination that he had testified before the Grand Jury that he had handcuffed the defendant "because he was trespassing on the grounds" (suppression hearing minutes, p 25).

The defendant now moves for the suppression of physical evidence and identification testimony.

#### CONCLUSIONS OF LAW

At issue initially is the lawfulness of the defendant's forcible detention by Officer Zackman. In making this assessment, the court must "examine the predicate for the police action and then determine whether or not that predicate justified the extent of the official intrusion on the individual" (People v Stewart, 41 NY2d 65, 66 [1978]).

In the opinion of the court, Officer Zackman's detention of the defendant was supported by reasonable suspicion. As the United States Supreme Court has held, "the essence of all that has

been written [about reasonable suspicion] is that the totality of the circumstances - the whole picture - must be taken into account. Based upon that whole picture, the detaining officer must have a particularized and objective basis for suspecting the particular person stopped of criminal activity" (United States v Cortez, 449 US 411, 417 [1981]). In the case at bar, Officer Zackman was permitted to draw logical deductions from the specific and articulable facts presented to him, specifically, that the defendant had entered a private lot at 12:40 A.M. to approach a stolen vehicle, which was the only car in the lot, and to conclude, on the basis of his observations, that the defendant was involved in criminal activity. Accordingly, the defendant was lawfully seized upon reasonable suspicion pending possible identification by the witness (see, People v Hicks, 68 NY2d 234 [1987]).

The next issue before the court is the admissibility of the screwdriver recovered from the defendant's pocket by Officer Zackman. It is settled law that a defendant stopped upon reasonable suspicion may be frisked for weapons if the officer "reasonably suspects that he is in danger of physical injury" (CPL § 140.50[3]), and in the opinion of the court, effecting a forcible stop upon reasonable suspicion in a deserted lot at 12:40 A.M. creates a reasonable fear of injury justifying a frisk.

Furthermore, the officer stayed within the bounds of a stop and frisk, which "authorizes a limited search of lawfully detained suspects to determine whether a weapon is present and may not exceed what is necessary to ascertain the presence of weapons" (People v Diaz, 81 NY2d 106 [1993]). He patted down the defendant, felt a hard object, and recovered this object, which was proper. He did not thereafter search the defendant until after the defendant had been identified and placed under arrest. Therefore, the screwdriver was lawfully recovered.

The next issue before the court is whether the fact that the defendant was handcuffed at the time he was initially detained on reasonable suspicion undermines the propriety of his detention. In the opinion of the court, it does not.

In People v Thomas (247 AD2d 284 [1st Dept 1998], appeal denied 92 NY2d 906 [1998]), the court held that reasonable suspicion "permits the forcible detention of a defendant through the use of handcuffs".

In People v Persaud (244 AD2d 577 [2d Dept 1997], appeal denied 91 NY2d 976), the Second Department held that where the police had reasonable suspicion that the defendant was selling narcotics, "the use of handcuffs during his detention was appropriate".

In People v Alford (186 AD2d 43 [1st Dept 1992], appeal denied 80 NY2d 973 [1992]), the court held that the "use of handcuffs as a precautionary measure" during the defendant's detention on reasonable suspicion was lawful (see, People v Foster, 985 NY2d 1012 [1995]; People v Allen, 73 NY2d 378 [1989]; People v Smith, 73 NY2d 961 [1989]; People v Tucker, 223 AD2d 424 [1st Dept 1996; People v Carney, 212 AD2d 721 [2d Dept 1995])).

Having found that the forcible detention of the defendant with the use of handcuffs was justified upon reasonable suspicion, the court must grapple with the more difficult question of whether the duration of this seizure was too long to be considered an investigatory stop. The typical scenario in such a stop is one in which the defendant is detained upon reasonable suspicion for a few minutes until the complainant or eyewitness is brought to the scene to confirm or dispel the officer's suspicions. However, the defendant herein was handcuffed for 50 minutes awaiting the arrival of the witness. The issue then becomes whether this length of time alone transformed the investigatory detention into an arrest. A review of the cases which have addressed the issue leads the court to conclude that upon the facts of this case, it did not.

In United States v Sharpe, 470 US 675 [1985], the defendant's 30-40 minute detention upon reasonable suspicion was

found to have been unlawful by the Federal Court of Appeals, which held that it "failed to meet the Fourth Amendment's requirement of brevity" . In reversing this decision, the United States Supreme Court held that there is "no rigid time limitation on Terry stops", finding that "such a limit would undermine the equally important need to allow authorities to graduate their response to the demands of any particular situation" (id., p 685). The Court further held that "[i]f the purpose underlying a Terry stop - investigating possible criminal activity - is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in Terry". It found that to assess whether or not a detention is too long to be justified as an investigative stop, it is "appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant" (id., p 686). The Supreme Court concluded that courts in these situations "should not indulge in unrealistic second-guessing" (id.)

In United States v Tehrani, 49 F.3d 54 [2d Cir 1995], the Second Circuit "decline[d]" to hold that a thirty minute detention based on reasonable suspicion [was], per se, too long", holding

that the stop "lasted no longer than [was] necessary to effectuate its purpose" (id., p 61).

In United States v Davies, 768 F.2d 893 [7<sup>th</sup> Cir 1985], cert denied, 474 US 1008 [1985], the Federal Court of Appeals upheld a 45 minute stop of a defendant upon reasonable suspicion, finding that "there is no talismanic time beyond which any stop initially justified on the basis of Terry becomes an unreasonable seizure under the fourth amendment" (id., 901). It found that the 45 minute detention was temporary and "limited to the purpose of the stop".

In People v Harris, 186 AD2d 148 [2d Dept 1992], the defendant was detained on reasonable suspicion for thirty minutes. The Second Department recognized that this was longer than that "ordinarily encountered", but found that it was reasonable under the circumstances, which included a computer breakdown at the Department of Motor Vehicles which "temporarily thwarted the arresting officer's diligent efforts to ascertain relevant information".

In People v Pinkney, 156 AD2d 182 [1<sup>st</sup> Dept 1989], appeal denied 75 NY2d 870 [1990], the Appellate Division held that the defendant's thirty minute non-arrest detention, including his

transportation to the precinct, was within the bounds of a lawful investigatory stop".

In People v Lyng, 104 AD2d 699 [3d Dept 1984], the Appellate Division held that the detention of a defendant on reasonable suspicion for "less than an hour" constituted a justifiable, brief detention pending investigation to "ascertain whether a crime had been committed".

It appears to the court, on the basis of these cases, that the defendant's 50 minute detention herein did not transform the investigatory stop into an arrest. Officer Zackman reasonably suspected the defendant of criminal activity but did not have enough information to simply place him under arrest. Therefore, he detained him at the scene until other officers could locate and transport the witness, who, in view of the time this occurred, was likely sleeping. In the opinion of the court, the police "diligently pursued" the one avenue "likely to confirm or dispel their suspicions" (United States v Sharpe, supra), and under the circumstances, the fifty minute period of time it took to do so was reasonable.

The last issue before the court is the admissibility of the witness's identification testimony. The difficult question to resolve is whether the 2½ hour hiatus between the witness's initial observation of the defendant in the stolen car at 11 P.M. and his

observation of him at the scene at 1:30 A.M. renders the procedure unduly suggestive. In the opinion of the court, the circumstances presented to the police in this matter rendered the showup reasonable and therefore sufficiently prompt to be sustained pursuant to People v Brnja, 50 NY2d 366 [1980] and People v Ortiz, 90 AD2d 53 [1997], which held that prompt showup identifications conducted in close geographic and temporal proximity to the crime are "not presumptively infirm" and in fact "have generally been allowed".

In People v Rodriguez, 267 AD2d 61 [1<sup>st</sup> Dept 1999], appeal denied 94 NY2d 924 [2000], the Appellate Division found an identification procedure to be reasonable under circumstances in which the complainant identified the defendant two hours after the robbery but shortly after apprehension, in close proximity to the crime scene.

In People v McBride, 242 AD2d 482 (1st Dept 1997), appeal denied 91 NY2d 876 (1997), the showup of the defendant was conducted two hours after the robbery. In upholding the showup procedure, the Appellate Division held that the "time lapse ... does not compel a conclusion that it was improper", particularly in view of the fact that it was "conducted shortly after the defendant's detention and in close proximity to the crime scene".

In People v Wells, 221 AD2d 281 [1st Dept 1995], appeal denied 87 NY2d 978 [1996]), the Appellate Division held that although the investigatory showup "was conducted some two hours after the robbery, this time lapse, by itself, does not compel a conclusion that it was improper".

In People v Maybell, 198 AD2d 108 [1<sup>st</sup> Dept 1993], appeal denied 82 NY2d 927 [1994], an on-the-street showup identification of the defendant conducted approximately three hours after the commission of the crime was found to be proper under the circumstances.

In People v Ortiz, 232 AD2d 180 [1<sup>st</sup> Dept 1996], reversed on other grounds, 90 NY2d 533 [1997], the Appellate Division held that the police had reasonable suspicion to detain the defendant and that the "1 ½ hour delay in conducting the showup was within acceptable boundaries".

In People v Andrews, 255 AD2d 1027 [1998], the Second Department upheld a showup conducted three hours after the commission of a robbery, distinguishing its facts from those in People v Johnson, 81 NY2d 828 [1993], in which the Court of Appeals held a 2½ hour gap between the crime and the showup to be violative of due process.

In the opinion of the court, the present case is distinguishable from Johnson as well. In Johnson, there was no

detention pending identification. The defendant had been arrested by the police upon probable cause and brought back to the scene of the crime, which the court found to have been improper, holding that a lineup should have been conducted instead. By contrast, the defendant herein was being held upon reasonable suspicion pending identification by the witness. In the opinion of the court, the identification under these circumstances, to ascertain if the defendant was the individual who had been driving the stolen car, was reasonable and therefore proper. It appears to the court that the police, who had reasonable cause to suspect and detain the defendant but lacked probable cause to arrest him absent an identification, had no alternative but to conduct an on-the-scene showup (See, People v Boyd, 272 AD2d 898 [4<sup>th</sup> Dept 2000], appeal denied, 95 NY2d 850 [2000], in which a showup held within thirty minutes of the defendant's detention and within two hours of the burglary was upheld for apparently similar reasons).

Accordingly, the identification of the witness need not be suppressed.

Based upon the foregoing, the defendant's motion to suppress physical evidence and identification testimony should be denied.

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JOAN O'DWYER, J.H.O.