SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM: PART K-23

P R E S E N T: HON. GREGORY L. LASAK,
Justice.

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THE PEOPLE OF THE STATE OF NEW YORK

- against-

Indictment No.: 10211/06

JAYSON BEMUS,

Motion: To suppress
physical evidence and statement.

Defendant.

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DERON CASTRO, ESQ.
For the Defendant

RICHARD A. BROWN, D.A.

BY: HARRIS LIOLIS, A.D.A.
Opposed

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

Kew Gardens, New York
Dated: March 20, 2007

GREGORY L. LASAK
JUSTICE SUPREME COURT

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-23
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THE PEOPLE OF THE STATE OF NEW YORK

BY: GREGORY L. LASAK, J.S.C.

- against - Indictment No. 10211/06

JAYSON BEMUS,

Defendant.
----------X

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

An indictment has been filed against the defendant accusing him of the crimes of Criminal Sale of a Controlled Substance in the Third Degree (PL §220.39-1), Criminal Possession of a Controlled Substance in the Third Degree (PL § 220.16-1). The charge is that on December 7, 2005, defendant sold cocaine to another individual.

Defendant moves to suppress physical evidence and statement evidence.

A pretrial suppression hearing was conducted before me on March 7, 2007.

I give full credence to the testimony of the People's witnesses Detective Brian Smith, and Police Officer Forgione.

I make the following findings of fact:

Detective Brian Smith, an eleven year veteran of the New York City Police Department, testified that on December 7, 2005, he was assigned to the Queens Narcotics Division of the New York City Police Department. He was trained as an undercover but was presently working as a detective investigator.

Detective Smith testified that he observed a female, who he called JD Black. Detective

Smith followed her for a period of time while observing her from across the street. He then observed a maroon four-door Jeep Cherokee pull up to the location. Detective Smith testified that the defendant was the driver of the Jeep Cherokee and he observed the defendant exit the vehicle and approach the female, JD Black. He observed defendant and the female engage in a conversation and defendant handed her two ziplocs of cocaine and the female handed him an undetermined amount of United States Currency. The female walked away and the defendant entered the Jeep Cherokee. Detective Smith radioed the field team with the defendant's description, vehicle and vehicle plate number. The field team then appeared with red lights on and defendant stopped and exited the vehicle. Defendant fled from the vehicle and Detective Smith chased and tackled the defendant. As the defendant was subdued and handcuffed, Police Officer Forgione approached them with the female, JD Black, and the defendant stated "you got me; I fucked up". No Miranda rights had been read to the defendant nor was he asked any questions.

Police Officer Jason Forgione, a member of the NYPD Queens Narcotics Bureau, testified that he was working on December 7, 2005 as part of a field team. He received a radio transmission and responded to the vicinity of 189th Street and 120th Avenue. PO Forgione testified that he observed the defendant in handcuffs, he obtained his pedigree information and searched the defendant. PO Forgione recovered two cell phones and one hundred ninety four dollars in United States Currency from the defendant's pants pocket. PO Forgione then went to move the defendant's vehicle which was in the middle of the street with the drivers side door open. As PO Forgione got in the vehicle, he observed a ziploc of crack cocaine on the passenger side floor of the vehicle.

I make the following conclusions of law:

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.Y2d 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 exists. PO Smith observed the defendant engage in a hand to hand drug transaction. Thus, Detective Smith and PO Forgione possessed probable cause to detain and arrest the defendant.

The defendant claims that the property recovered from his person and the vehicle should be suppressed. The Court finds that the property is properly admissible and not subject to suppression. The 4th Amendment of the United States Constitution and Article I, § 12 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 officer executed a search incident to a lawful arrest. 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, which is what occurred in the circumstances presented in this case. See Wylie, *supra* at 249, citing Belton, *supra* at 52. The officer properly recovered the cell phones and the sum of United States Currency.

Furthermore, another exception to a warrantless seizure exists here, the plain view doctrine. See Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022 (1971). This doctrine states that the police should be able to seize evidence which is in plain view if they had a right to be where they were when they observed it. See People v. Brown, 96 N.Y.2d 80, 88-89, 725 N.Y.S.2d 601

(2001) citing other cases. Thus, under this doctrine, PO Forgione properly seized the ziploc of cocaine when he entered the defendants vehicle and observed it on the floor.

Defendant also seeks suppression of an oral statement he made. The admissibility of defendant's statement depends on whether it was made as a result of express questioning or its functional equivalent. People v. Huffman, 61 N.Y.2d 795, 473 N.Y.S.2d 495 (1984), citing People v. Bryant, 59 N.Y.2d 786, 464 N.Y.S.2d 729 (1983).

The defendant in this case was never asked any questions but blurted out the statement when he observed the female, JD Black, also under arrest. Defendant's statement was therefore voluntary and spontaneous, not the result of any custodial interrogation or questioning.

Accordingly, defendant's motion to suppress the property, and the statement is denied.

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

Kew Gardens, New York
Dated: March 20, 2007

GREGORY L. LASAK
JUSTICE SUPREME COURT