

**People v Fennell**

2007 NY Slip Op 31273(U)

May 9, 2007

Supreme Court, New York County

Docket Number: 0000374/1999

Judge: Gregory L. Lasak

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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.

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

- against-

Indictment No.: 374/99

Motion: To suppress identification  
and physical evidence.

NEVILLE FENNELL,

Defendant.

-----X

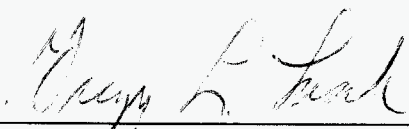
ANTHONY BATISTI, ESQ.  
For the Defendant

RICHARD A. BROWN, D.A.

BY: DANIEL NOVAK, 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: May 9, 2007

  
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GREGORY L. LASAK  
JUSTICE SUPREME COURT

SUPREME COURT, QUEENS COUNTY  
CRIMINAL TERM, PART K-23

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

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

- against -

Indictment No. 374/99

NEVILLE FENNELL,

Defendant.

-----X

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 crime of Attempted Robbery in the First Degree (PL §110/160.15-2). The charge is that on January 29, 1999, defendant, while acting in concert with another, attempted a Robbery while armed with a deadly weapon.

Defendant, claiming that improper identification testimony may be offered against him, has moved to exclude the pretrial identification, as well as, the prospective identification testimony of Lorenzo Thompson upon the ground that they are inadmissible because the prior identification of the defendant by the prospective witness was improper.

The People have the burden of going forward to show that the pretrial identification procedure was not constitutionally impermissible. The defendant, however, bears the burden of establishing, by a preponderance of the evidence, that the procedure was impermissible. If the procedure is shown to be improper, the People then have the burden of proving by clear and convincing evidence that the prospective in-court identification testimony, rather than stemming from the unfair pretrial confrontation, has an independent source.

Defendant, also claiming to be aggrieved by an unlawful search and seizure, has moved to suppress the loaded firearm recovered from the vehicle in which the defendant was a passenger.

In this case, the People assert that the seizure of the aforesaid property from the defendant's person was incident to a lawful arrest. The People have the burden, in the first instance, of going

forward to show the legality of police conduct. Defendant, however, bears the ultimate burden of proving by a preponderance of the evidence that the physical evidence should be suppressed.

A pretrial Wade/Dunaway/Gittens hearing was conducted before me on April 30, 2007.

Testifying at this hearing was Firefighter Brian Glenn. I find his testimony to be credible.

**I make the following findings of fact:**

On January 29, 1999, Firefighter Brian Glenn was employed by the New York City Police Department as a Police Officer. Firefighter Glenn was the operator of a radio motor patrol car and driving the patrol supervisor/Sergeant.

At approximately 5:00 P.M., Officer Glenn received a radio run, a report of a robbery, and the perpetrators were described as two male Blacks, wearing a black clothing, armed with a gun driving a black Cherokee with gold stripes. Approximately ten minutes later while traveling northbound on 165<sup>th</sup> Street, Queens County, he observed a black Jeep Cherokee with gold stripes occupied by two male blacks, driving southbound..

Officer Glenn followed the vehicle and made a car stop. Upon stopping the vehicle Officer Glenn observed the apprehended other in the drivers seat and the defendant, Neville Fennell, seated in the passengers side of the vehicle.

Officer Glenn notified the 113<sup>th</sup> pct. Tracer unit that they had stopped the vehicle. The complainant was brought to the location of the vehicle stop. The complainant identified the defendant as the man that placed a gun to his face and robbed him. Defendant was then searched, handcuffed, and placed in the radio patrol car.

Officer Glenn searched the black Jeep Cherokee and recovered a loaded 9mm handgun directly behind the passenger seat of the vehicle, stuffed into the seat cushion.

**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.Y.2d 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. The police possessed probable cause to stop the black Jeep Cherokee in the vicinity of the attempted robbery, close in time to its occurrence. The vehicle with the two individuals, including the defendant, fit the description provided over the radio and defendant was identified by the complainant as the individual responsible for the attempted robbery. No evidence was presented that would lead this Court to believe that there was any suggestive conduct on the part of law enforcement when the witness stated that the defendant was the individual who pointed the gun at him.

In any event, defendant moves to suppress the show up by the witness. The New York State Constitution prohibits the introduction at trial of identification evidence obtained by the government or its agents, if the identification was secured through unduly suggestive means. An identification procedure is “unduly suggestive” if it “creates a substantial likelihood that the defendant would be singled out for identification.” People v. Chipp, 75 N.Y.2d 327, 335, 553 N.Y.S.2d 72 (1990) *cert. denied*, 498 U.S. 833 (1990).

At the hearing, which was conducted before this Court, on the issue of undue suggestibility, the People had the burden to go forward with credible evidence to establish

that the noticed pre-trial identification procedure was legally conducted and not unduly suggestive, People v. Chipp, *supra*. Here, the identification took place within minutes of the radio run and the stop of the described vehicle and did not involve any suggestive conduct.<sup>1</sup> Thus, suppression is not warranted.

Next, addressing defendant's claim that property recovered from the vehicle should be suppressed, the Court finds that the property is 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." U.S. 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 (1<sup>st</sup> 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 of the vehicle incident to the arrest of defendant. Defendant claims that the police did not possess sufficient probable cause to stop the vehicle which was a popular vehicle at the time. Defendant's argument is without merit. While a passenger of an automobile possesses standing to challenge the stop of a car as unlawful (see, People v. Dawson, 115 AD2d 611, 496 NYS2d 273), the Court finds probable cause for the stop did exist. The Gethers aspect of the hearing allows defendant to challenge the unlawful interference with his person and challenge the search of the vehicle as the fruit of an illegal arrest. Given the proximity of the location and time of occurrence, description of the

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<sup>1</sup>In People v. Duuvon, 77 N.Y.2d 541, 569 N.Y.S.2d 346 (1991), a case decided by the Court of Appeals which addressed the propriety of a show up identification, the factors considered by this Court in determining whether the identification procedure was unduly suggestive included the proximity of the defendant's arrest to the scene of the crime and how close in time to the crime the defendant was apprehended.

vehicle and the defendant given by the complainant. probable cause for the stop was established.

Accordingly, defendant's application to suppress the property and identification is denied.

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

Kew Gardens, New York  
Dated: May 9, 2007



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GREGORY L. LASAK  
JUSTICE SUPREME COURT