

**People v Dawson**

2009 NY Slip Op 33431(U)

August 28, 2009

Supreme Court, Albany County

Docket Number: DA 202-09

Judge: Dan Lamont

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**ORIGINAL**



**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY**

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**THE PEOPLE OF THE STATE OF NEW YORK**

**DECISION/ORDER**

-against-

Indictment # 7-2401  
Index # DA 202-09

**TITUS DAWSON**

Defendant  
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**APPEARANCES:**

For the People:

HONORABLE P. DAVID SOARES  
Albany County District Attorney  
Albany County Judicial Center  
Albany, New York 12207

DAVID A. GONZALEZ, ESQ.  
Assistant District Attorney, of Counsel

For the Defendant:

KINDLON SHANKS & ASSOCIATES  
74 Chapel Street  
Albany, New York 12207

TODD G. MONAHAN, ESQ., of Counsel

DAN LAMONT, J.

The Indictment accuses the defendant of committing the crime of Criminal Possession of a Weapon in the Third Degree in violation of Penal Law § 265.02(1), a class D felony. The charge is that on or about March 6, 2009 at approximately 3:00 p.m., at 521 Lark Drive, City of Albany, County of Albany, the defendant Titus Dawson, having been previously convicted of the crime of Criminal Sale of a Controlled Substance in the Third Degree, did knowingly possess a .380 caliber Davis Industries pistol.

*RP*

## **REMEDY SOUGHT BY DEFENDANT**

### **1) Tangible Property:**

Defendant, claiming to be aggrieved by an unlawful search and seizure, has made a motion to suppress tangible property seized by the police from his residence.

### **2) Preclusion:**

Based upon a lack of CPL § 710.30 notice, defendant seeks preclusion of certain statements made to the police over the telephone.

## **BURDEN OF PROOF**

### **1) Tangible Property:**

The People bear the burden of going forward to show the legality and reasonableness of the police conduct; however, a defendant who challenges the legality of a search and seizure bears the ultimate burden of proving by a preponderance of the credible evidence that the tangible evidence was illegally seized and should not be used against him. With respect to the Franks hearing, the defendant must show by a preponderance of the credible evidence that false statements were contained in the search warrant application and that such false statements were made knowingly and intentionally, or with reckless disregard for the truth, and that without such false statements, the remaining allegations would have been insufficient to establish probable cause for the granting of the search warrant.

### **2) Preclusion:**

When a defendant moves for preclusion of statements based upon lack of CPL § 710.30 notice, the People must establish that no CPL § 710.30 notice was required.

### CREDIBILITY FINDINGS

A pre-trial suppression hearing was conducted before the undersigned on July 23, 2009 and July 24, 2009.

Police Officer Joel Caldwell ("Officer Caldwell"); Police Officer Karen Mink ("Officer Mink"); Detective Scott Gavigan ("Det. Gavigan"); and Detective Scott Gottesman ("Det. Gottesman") from the Albany City Police Department testified for the People. Each police officer appeared frank, candid, and trustworthy, and each officer's testimony had the general force and flavor of credibility.

Officer Caldwell was not subjected to cross examination regarding the field test conducted on the marihuana prior to the issuance of the search warrant (versus his testimony at the hearing that he did not touch anything before the search warrant was issued). The Court views this discrepancy as a mere oversight which could have been explained away upon any cross examination by the defendant. The Court further specifically credits Det. Gavigan's and Officer Caldwell's testimony that the drawer in defendant's bedroom was open when they entered the bedroom. The police were responding to a burglar alarm and had observed evidence of a forcible entry. Furthermore, the police would not have had any reason to open the defendant's dresser drawers with the rather large bag of marihuana in plain view within the bedroom (see Exhibits 5, 6 & 7). The People's Exhibits received in evidence are found authentic, reliable and worthy of consideration by the Court.

The defendant, Titus Dawson testified in his own behalf. The People did not cross examine defendant on his prior convictions. The defendant is clearly an interested witness—interested in the outcome of this proceeding. Defendant's testimony was

generally credible and his demeanor appeared frank and candid. This credibility finding is buttressed by the fact that defendant refrained from testifying about the marihuana found in the bedroom. However, gauged upon a preponderance of the evidence standard and the fact that defendant's residence had clearly been broken into, this Court credits the police officers' testimony that the night stand drawer was open when they swept the residence for intruders or victims.

Based upon the evidence adduced at the suppression hearing, the undersigned makes the following findings of fact:

#### **FINDINGS OF FACT**

On March 6, 2009 at approximately 12:30 p.m., the Albany Police Department dispatch put out a call for officers to respond to a burglar alarm at 521 Lark Drive in the City of Albany. Officer Caldwell arrived on the scene first and observed that the rear door to 521 Lark Drive had been busted in. The door appeared to have been kicked in (see Exhibits 2, 3 & 4). Upon Det. Gavigan's arrival on the scene as back-up, Officer Caldwell and Det. Gavigan entered the residence to clear the house to make sure there were no intruders or injured parties. Although Det. Gavigan knew the defendant from interactions with him in the neighborhood, neither Det. Gavigan nor Officer Caldwell knew that 521 Lark Drive was defendant's residence at the time they entered.

Det. Gavigan and Officer Caldwell cleared the first floor of the residence and did not find anyone present. Upon clearing the second floor, Det. Gavigan and Officer Caldwell observed a bag of marihuana on a night stand, a bag of marihuana on the floor, and a handgun inside an open drawer in the night stand (see Exhibits 5, 6 & 7). At approximately 1:02 p.m., Officer Caldwell performed a field test on the marihuana with a

positive result. Det. Gavigan and Officer Caldwell secured the house and waited for a search warrant to be prepared by Det. Gottesman. While the police were waiting for the search warrant, the audible alarm system went off several times.

Officer Mink had also responded to the burglar alarm call and was assigned to guard the perimeter of the residence at the front door while a search warrant was obtained. A young woman (the woman was defendant's sister) approached Officer Mink and stated that she was a resident of 521 Lark Drive. Officer Mink told her that she could not enter the residence. The woman left and came back several times to see if she could get in the residence. The woman approached Officer Mink with a cell phone and told Officer Mink that her brother was on the phone and wished to speak to the officer. Defendant told Officer Mink that he had been through this before and gave Officer Mink the alarm code "puppy" to shut the alarm off. Officer Mink told the defendant that the police were in the process of getting a search warrant, and the defendant stated that if anything is there, the burglars put it there. The defendant stated that he would be calling his attorney. Officer Mink's supplemental investigation report indicates that the defendant told her that he was calling a lawyer before he made the statement about the burglars.

Det. Gottesman prepared a search warrant application (Exhibit #9) for defendant's residence located at 521 Lark Drive based upon the information conveyed to him by Det. Gavigan and Officer Caldwell. The search warrant application consisted of Det. Gottesman's affidavit with attached field test report from Officer Caldwell; an investigation report for the police response to 521 Lark Drive; and documents showing that defendant had given 521 Lark Drive as his address during previous police contacts.

Det. Gottesman presented the search warrant application to Albany City Court Judge Keefe in the Albany City Court building. Judge Keefe had Det. Gottesman swear to the truth of the application; reviewed the application; and then signed the prepared search warrant (Exhibit # 10). Det. Gottesman was not asked any questions by Judge Keefe. Det. Gottesman drove the search warrant up to 521 Lark Drive. The police executed the warrant and collected various pieces of tangible evidence. On March 13, 2009, Det. Gottesman filed a "Search Warrant Receipt and Inventory" with Albany City Court Judge Carter (Exhibit # 11).

## DISCUSSION

### 1) Tangible Property:

A presumption of validity attaches to a search warrant, which has already been tested by the issuing judge, thus simplifying the suppression court's task in determining whether the issuing judge could reasonably have concluded that probable cause existed, i.e. the sufficiency of the information provided to support a reasonable belief that contraband and/or evidence of criminal activity would be found in the subject residence upon execution of the warrant (see, People v. Ortiz, 234 AD2d 74 [1st Dept. 1996]).

Probable cause requires not proof beyond a reasonable doubt or evidence sufficient to warrant a conviction (see, e.g., People v. Miner, 42 NY2d 937, 938 [1977]; People v. White, 16 NY2d 270, 273 [1965]), but merely information which would lead a reasonable person to conclude, under the circumstances, that contraband and/or evidence of criminal activity may be found at the specific time and place of the search (see, People v. McRay, 51 NY2d 594, 602 [1980]; People v. Bigelow, 66 NY2d 417 [1985]).

The search warrant application revealed that: (1) the police were lawfully

inside 521 Lark Drive performing a security sweep, after responding to a burglar alarm at the residence; (2) a quantity of what appeared to be marihuana was observed in plain view; (3) an unknown black colored pistol in a partially open night stand drawer was observed in plain view; (4) a field test of the marihuana resulted in a positive result; (5) a New York driver's license and a Polaroid picture of defendant were also observed; and (6) Albany Police Department records indicated that defendant's residence was 521 Lark Drive.

Based upon the four corners of the search warrant application (Exhibit # 9), this Court holds and determines that the issuing Court possessed sufficient probable cause to believe that evidence relating to the possession or sale of marihuana and the criminal possession of a handgun could be found in defendant's residence located at 521 Lark Drive (see, People v. McRay, *supra*).

Defendant also contends that the evidence obtained from the search warrant should be excluded because the police officers lied about the night stand drawer being open when they entered his bedroom. "Where an affidavit submitted on a warrant application contains a false statement which was made knowingly or with reckless disregard for the truth and which is necessary to the finding of probable cause, the warrant will be voided and the fruits of the search suppressed if the remainder of the affidavit is insufficient to establish probable cause" (People v. Griffin, 234 AD2d 718 [3rd Dept. 1996], citing People v. Ronning, 137 AD2d 43 [3rd Dept. 1988]; see also, Franks v. Delaware, 438 US 154 [1978]).

As this Court's credibility determination and factual findings demonstrate, this Court credited Det. Gavigan's and Officer Caldwell's testimony that the night stand drawer was open when they entered the defendant's bedroom. Therefore, the defendant has failed to meet his burden of showing that the officers' statements were knowingly false or made

with reckless disregard for the truth (see, People v. Crockett, 30 AD3d 768 [3rd Dept. 2006]). Furthermore, Det. Gavigan's and Officer Caldwell's testimony that the marijuana was in plain view within the bedroom stands uncontradicted at the hearing, and the issuing Court would have had probable cause to issue a search warrant based upon the observations of the marijuana in plain view in the bedroom standing alone. Accordingly, defendant's motion to suppress tangible evidence seized from his residence should be and the same is hereby denied in its entirety

## 2) Preclusion:

While the police were waiting for a search warrant to be issued and not allowing anyone to enter the residence at 521 Lark Drive, defendant's sister approached Officer Mink with a cell phone and told Officer Mink that her brother (the defendant) wished to speak to the officer. Defendant told Officer Mink that he had been through this before and gave her the alarm code "puppy" to shut the alarm off. Officer Mink told the defendant that the police were in the process of getting a search warrant, and the defendant stated that if anything is there, the burglars put it there. The defendant stated that he would be calling his attorney. Officer Mink's supplemental investigation report indicates that the defendant told her that he was calling a lawyer before he made the statement about the burglars.

Defendant seeks preclusion of the statements made to Officer Mink over the cellular telephone based upon a lack of CPL § 710.30 notice. The People concede that no CPL § 710.30 notice was given regarding the defendant's alleged oral statements, but contend that no CPL § 710.30 notice is necessary for such statements. CPL § 710.30(1) states, in pertinent part:

“Whenever the people intend to offer at a trial (a) evidence of a statement made by a defendant to a public servant, which statement if involuntarily made would render the evidence thereof suppressible upon motion \*\*\* they must serve upon the defendant a notice of such intention, specifying the evidence intended to be offered.” (emphasis added)

“It is for the court and not the parties to determine whether a statement is truly voluntary or is one in which the actions of the police are the functional equivalent of interrogation causing the statement to be made” (see, People v. Chase, 85 NY2d 493, 500 [1995], citing People v. Ferro, 63 NY2d 316 [1984]). The People essentially request that this Court create an exception to the CPL § 710.30(1) notice requirement for telephone calls made to the police by a defendant. Such an exception is appealing in this case, since the defendant’s statements appear to have been voluntarily made. The defendant was clearly not in police custody, and the defendant initiated the telephone contact with the police. This Court finds that Officer Mink’s comments did not rise to the functional equivalent of interrogation. However, the defendant came close to asserting his right to counsel during the conversation and was responding to comments made by Officer Mink.

The evidence presented by the People on the issue of preclusion was virtually the same evidence that would have been presented during a Huntley hearing. The Legislature did not envision conducting hearings on voluntariness to determine whether a defendant’s statement is subject to the CPL § 710.30 notice requirements. While defendant’s statements to Officer Mink certainly appear to be voluntarily made, the defendant did assert his right to counsel.

This Court is very much inclined to hold and determine that a defendant initiated telephone call to the police prior to commencement of formal proceedings should

be exempt from the notice provisions of CPL § 710.30(1). However, based upon the particular facts and circumstances in this case wherein defendant stated during the telephone conversation that he would call his lawyer, only a Court can determine whether or not subsequent statements are suppressible upon motion. Therefore, based upon the particular facts and circumstances of this case, this Court holds and determines that the defendant's alleged oral statements to police wherein he may have asserted his right to counsel are subject to the notice requirements of CPL § 710.30 (see, People v. Greer, 42 NY2d 170 [1977]). Accordingly, this Court holds and determines that defendant's alleged oral statements to Officer Mink over the telephone should be and the same are hereby precluded.

**CONCLUSION**

**1) Tangible evidence:**

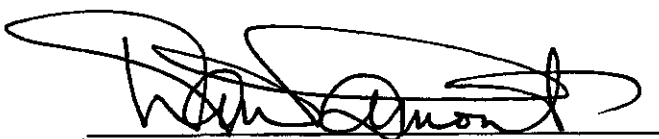
This Court holds and determines that the defendant's motion to suppress the tangible evidence seized from his residence should be and the same is hereby denied in all respects.

**2) Preclusion:**

This Court holds and determines that the defendant's motion to preclude his alleged oral statements to Officer Mink over the telephone should be and the same is hereby granted.

The foregoing constitutes the Opinion, Decision, and Order of this Court.

Dated: Albany, New York  
August 28, 2009

  
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DAN LAMONT, Acting J.S.C.

cc: ✓ David A. Gonzalez, Esq., Asst. Dist. Atty.  
✓ Todd G. Monahan, Esq.

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