

People v Morrow

2011 NY Slip Op 34269(U)

October 20, 2011

Supreme Court, Albany County

Docket Number: DA 113-11

Judge: Dan Lamont

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

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JAMES MORROW

Defendant

DECISION/ORDER

Indictment # 20-3559
Index # DA 113-11

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APPEARANCES:

For the People:

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

JASPER MILLS, ESQ.
Assistant District Attorney, of Counsel

For the Defendant:

PARKER & CASTILLO
817 Madison Avenue
Albany, New York 12208

GASPAR M. CASTILLO, ESQ.

DAN LAMONT, J.

The Indictment accuses the defendant of committing the crimes of Criminal Possession of a Controlled Substance in the Third Degree in violation of Penal Law § 220.16(1), a class B felony; Criminal Possession of a Controlled Substance in the Fourth Degree in violation of Penal Law § 220.09(1), a class C felony; and Unlawful Possession of Marihuana in violation of Penal Law § 221.05, a violation. The charges are that on or about December 22, 2010 at approximately 10:58 p.m., while in the area of Lark Street and State Street, in the City of Albany, County of Albany, the defendant James Morrow did knowingly and unlawfully possess one or more preparations, compounds, mixtures or

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substances of an aggregate weight of one-eighth ounce or more containing the narcotic drug cocaine; that the defendant possessed such cocaine with the intent to sell it; and that the defendant did knowingly and unlawfully possess a quantity of marihuana.

REMEDY SOUGHT BY DEFENDANT

(1) Tangible Evidence:

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

(2) Statements:

Defendant moves this Court for an order suppressing oral statements allegedly made by him to the police upon the ground that such statements were the product of an unlawful seizure and arrest of the defendant and/or were involuntarily made within the meaning and intent of CPL § 60.45 .

BURDEN OF PROOF

(1) Tangible Evidence:

The People bear the burden of going forward to show the legality and reasonableness of the police conduct in the first instance; that is, the People must initially show that the forcible detention and arrest of the defendant were lawful, and that the seizure of tangible evidence from the defendant was lawful; however, a defendant who challenges the legality of a search and seizure bears the ultimate burden of proving by a preponderance of the evidence that the tangible evidence was illegally seized and should not be used against him.

(2) Statements:

An admission or confession will not be received in evidence at trial unless the People prove beyond a reasonable doubt that such statement was knowingly, freely, and voluntarily made by the defendant. Where the defendant contends that his statements are the product of an illegal and unauthorized seizure of the defendant's person, the People have the burden of going forward to show the legality of the police conduct; however, a defendant who challenges the legality of the seizure of his person bears the ultimate burden of proving by a preponderance of the evidence that the seizure of his person was unauthorized and illegal.

CREDIBILITY FINDINGS

A pre-trial suppression hearing was conducted before the undersigned on June 2, 2011 and June 8, 2011.

Police Officer Kevin Meehan ("Officer Meehan") and Sergeant Edward Donohue ("Sergeant Donohue") from the City of Albany Police Department testified for the People. Officer Meehan and Sergeant Donohue each appeared frank, candid, and trustworthy, and their testimony had the general force and flavor of credibility.

The defendant did not testify or offer any evidence at the hearing.

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

FINDINGS OF FACT

On December 22, 2010 at approximately 11:00 p.m., Officer Meehan and Officer Condon were working in the area of 246 Lark Street as a result of community complaints regarding drug activity out of that address. Officer Meehan had personally

arrested a number of people from that address for drug possession. From those arrested individuals, Officer Meehan received information that a black male in his early to mid-thirties with short hair would sell drugs from 246 Lark Street, Apartment #1. The drug dealer would sit in a lawn chair in the late afternoon hours and retrieve drugs from his buttocks area. Officer Meehan was also aware that 246 Lark Street was part of the Trespass Affidavit Program ("TAP") and knew the identity of the resident of 246 Lark Street, Apartment #1.

On December 22, 2011, at approximately 10:30 p.m., Officer Meehan observed the defendant walk by his location and enter 246 Lark Street, Apt. #1. Officer Meehan observed that the defendant was a black male with short hair. The defendant was in 246 Lark Street, Apt. #1 for approximately 30 minutes before leaving. Officer Meehan had no idea whether the defendant was a guest of the resident of 246 Lark Street, Apartment #1. According to the Albany County District Attorney's Office's website, the TAP program "is designed to fight against individuals loitering on posted property" and allows police officers to make basic inquiries of any persons loitering on or around that premises, including the stoop or stairs attached thereto". Officer Meehan and Officer Condon followed the defendant for approximately two blocks in their marked police vehicle. Officer Meehan observed the defendant turn his head and shoulders and look back towards the police.

Officer Meehan stopped the police vehicle ahead of the defendant, and got out and approached the defendant on the sidewalk. Officer Meehan observed the defendant momentarily turn his body to the left away from the police; saw defendant adjust his pant leg in mid-stride; and observed that the defendant's zipper was down. Officer

Meehan became concerned that the defendant might be armed, so he asked the defendant to turn towards him and show his hands. The defendant complied and provided Officer Meehan with his name, but said he was coming from somewhere besides 246 Lark Street, Apt. #1 and denied coming from 246 Lark Street, Apt. #1—where Officer Meehan had observed the defendant leave from. Officer Meehan believed the defendant grew nervous and agitated, and he worried that the defendant may have a weapon.

Officer Meehan then did a pat down weapons search of the defendant. Defendant placed his hands on his head and spread his legs out. When Officer Meehan grabbed the defendant's waist band, a bag of marihuana fell out of his pant leg. Officer Meehan placed the defendant in custody and finished his weapons pat down with negative results. The defendant was transported to the Albany City Police Station where a strip search resulted in the discovery of 23 small pieces of crack cocaine in a sandwich bag.

CONCLUSIONS OF LAW

The propriety of street encounters initiated by police officers in their criminal law enforcement capacity is measured using a graduated four-tiered test or method of evaluation as set forth by the Court of Appeals in People v. DeBour, 40 NY2d 210 [1976].

In People v. Moore (6 NY3d 496 [2006]), Chief Judge Kaye delivered the Opinion of the Court and wrote the following:

"In *DeBour*, we set forth a graduated four-level test for evaluating street encounters initiated by the police: level one permits a police officer to request information from an individual and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality; level two, the common-law right of inquiry, permits a somewhat greater intrusion and requires a founded suspicion that criminal activity is afoot; level three authorizes an officer to forcibly stop and detain an individual, and requires a

reasonable suspicion that the particular individual was involved in a felony or misdemeanor; level four, arrest, requires probable cause to believe that the person to be arrested has committed a crime (*De Bour*, 40 NY2d at 223; see also *People v Hollman*, 79 NY2d 181, 184-185 [1992]). The Court's purpose in *De Bour* was to provide clear guidance for police officers seeking to act lawfully in what may be fast-moving street encounters and a cohesive framework for courts reviewing the propriety of police conduct in these situations. Having been the basis for decisions in likely thousands of cases over the past 30 years, *De Bour* has become an integral part of our jurisprudence." (at pp 498-499) (emphasis supplied)

On December 22, 2010 at approximately 11:00 p.m., Officer Meehan was aware that a black male in his early to mid-thirties with short hair would sell drugs from 246 Lark Street, Apartment #1. Officer Meehan was also aware that 246 Lark Street was part of the Trespass Affidavit Program ("TAP") and knew the resident of 246 Lark Street, Apartment #1. Officer Meehan observed the defendant, a black male with short hair, walk by his location and enter 246 Lark Street, Apt. #1. The defendant was in 246 Lark Street, Apartment #1 for approximately 30 minutes before leaving and immediately walked down the street. This Court holds and determines that the police officer's observations of the defendant entering 246 Lark Street, Apartment #1, staying for approximately 30 minutes before exiting the building, and immediately walking down the street provided the police with no basis to approach the defendant based upon the TAP program. According to the police officer's testimony, there was no basis for any reason to believe the defendant was loitering at 246 Lark Street, Apartment #1.

Officer Meehan and Officer Condon in their marked police vehicle followed the defendant for approximately two blocks. Officer Meehan observed the defendant turn his head and shoulders to see the police following him. Officer Meehan stopped the police vehicle ahead of the defendant, got out, and approached the defendant on the sidewalk.

Officer Meehan observed the defendant momentarily turn his body to the left away from the police ; observed defendant adjust his pant leg in mid-stride, and observed that the defendant's zipper was down. Officer Meehan became concerned that the defendant might be armed, so he asked the defendant to turn towards him and show his hands. The defendant complied and provided Officer Meehan with his name, but said he was coming from somewhere besides 246 Lark Street, Apt. #1 and denied coming from 246 Lark Street, Apt. #1—where Officer Meehan had observed the defendant leave from. Officer Meehan believed the defendant grew nervous and agitated, and he became worried that the defendant may have a weapon. Officer Meehan then did a "pat down" weapons search of the defendant. Defendant placed his hands on his head and spread his legs out. When Officer Meehan grabbed the defendant's waist band, a bag of marihuana fell out of his pant leg. This Court holds and determines that based upon the defendant matching the generic description of a black male with short hair exiting 246 Lark Street, Apt. #1—from where such an individual was allegedly selling drugs, Officer Meehan at most had a founded suspicion that criminal activity is afoot, justifying only a level two, common-law right of inquiry (see, People v. Moore, *supra* and People v. Du Bour *supra*).

"A forcible investigatory stop and detention, falling short of an arrest, is justified where there is reasonable suspicion—defined as 'the quantum of knowledge sufficient to induce an ordinary prudent and cautious man under the circumstances to believe criminal activity is at hand'—that a person has committed or is about to commit a crime" (People v. Watts, 43 AD3d 256 [1st Dept. 2007], citing People v. Cantor, 36 NY2d 106, 112-113 [1975]). The Court of Appeals on May 7, 2011 in People v. Brannan (16 NY3d 596, at pp 601-602) stated the following in an opinion by Judge Piggott:

"Reasonable Suspicion Standard"

"These cases are governed by our holding in *People v. De Bour*, 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976), requiring that before a police officer may stop and frisk a person in a public place, he must have 'reasonable suspicion' that such person is committing, has committed a crime or is about to commit a crime (*id.* at 223, 386 N.Y.S.2d 375, 352, N.E. 2d 562). We have defined reasonable suspicion as 'the quantum of knowledge to induce an ordinarily prudent and cautious man under the circumstances to believe criminal activity is at hand' (*People v. Cantor*, 36 N.Y.2d 106, 112-113, 365 N.Y.S.2d 509, 324 N.E.2d 872 [1975]). It may not rest on equivocal or 'innocuous behavior' that is susceptible of an innocent as well as a culpable interpretation (*People v. Carrasquillo*, 54 N.Y.2d 248, 252, 445 N.Y.S.2d 97, 429 N.E.2d 775 [1981]). A stop based on reasonable suspicion will be upheld so long as the intruding officer can point to 'specific and articulable facts which, along with any logical deductions, reasonably prompted th[e] intrusion' (*Cantor*, 36 N.Y.2d at 113, 365 N.Y.S.2d 509, 324 N.E.2d 872)."

Although defendant was a black male with short hair; lied about where he was coming from; momentarily turned his body to the left away from the police; adjusted his pant leg in mid-stride and had his zipper down, this Court must hold and determine that such information is not sufficient to provide the police with a reasonable suspicion that the defendant was involved in a felony or misdemeanor, to wit: was in possession of drugs. Officer Meehan testified that the defendant was wearing bulky clothes and had his hands in his jacket when the police approached. Defendant removed his hands at the request of the officers and appeared to be nervous and agitated. The testimony at the hearing also failed to provide sufficient articulable facts to provide a basis for Officer Meehan to believe that the defendant possessed a weapon; therefore, this Court further holds and determines that Officer Meehan was not justified in conducting a pat down search of the defendant (see, *People v. Hill*, 262 AD2d 870 [3rd Dept. 1999]). Accordingly, this Court holds and

determines that the marihuana that fell from the defendant's pants should be and the same is hereby suppressed.

In the absence of the suppressed marihuana (regardless of the issue raised by the defendant regarding CPL § 150.75), this Court holds and determines that the police had no basis to place the defendant under arrest or transport the defendant to the police station. Accordingly, any and all tangible property seized or recovered from the defendant at the police station—including any tangible property recovered during a strip search and any and all statements made by the defendant at the police station—must be and the same are hereby suppressed as the fruit of the poisonous tree.

CONCLUSIONS

(1) Tangible Evidence:

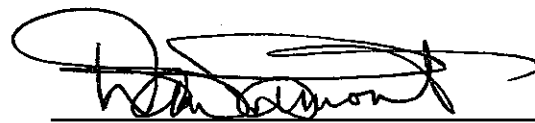
This Court holds and determines that the defendant's motion to suppress tangible evidence seized from his person consisting of marihuana and crack cocaine should be and the same is hereby granted.

(2) Statements:

This Court further holds and determines that defendant's motion for an order suppressing oral statements allegedly made by him at the Albany City Police Station should be and the same is hereby granted.

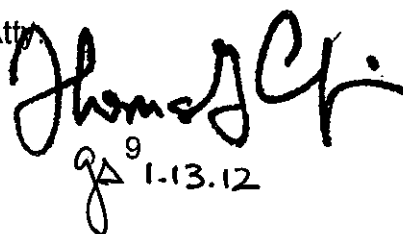
The foregoing constitutes the Opinion, Decision, and Order of this Court.

Dated: Albany, New York
October 20, 2011



DAN LAMONT, Acting J.S.C.

cc: Jasper Mills, Esq., Asst. Dist. Att.
Gaspar M. Castillo, Esq.



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