People v Rasul
2011 NY Slip Op 34270(U)
October 13, 2011
Supreme Court, Albany County
Docket Number: DA 146-11
Judge: Dan Lamont

ORIGINAL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

–against–

FAQUIR RASUL

Defendant

DECISION/ORDER

Indictment # 20-3573
Index # DA 146-11

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 charges the defendant with committing the crime of Criminal Possession of a Controlled Substance in the First Degree, in violation of Penal Law § 220.21(1), a class A-I felony. The charge is that on or about February 10, 2011 at approximately 10:00 p.m., on the New York State Thruway, in the Town of Bethlehem, County of Albany, the defendant Faquir Rasul did knowingly and unlawfully possess one or more preparations, compounds, mixtures, or substances of an aggregate weight of eight ounces or more containing the narcotic drug cocaine.

REMEDY SOUGHT BY DEFENDANT

(a) Tangible evidence:

Defendant claiming to be aggrieved by an unlawful stop of a motor vehicle in which he was a passenger and by an unlawful search and seizure has made a motion for an Order suppressing drug/contraband evidence seized from his person.

(b) Statements:

Defendant moves this Court for an order suppressing oral and written 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 that such statements were involuntarily made within the meaning and intent of CPL § 60.45.

BURDEN OF PROOF

(a) Tangible evidence:

Where a defendant challenges the admissibility of tangible physical evidence and makes a motion to suppress, the People bear the burden of going forward to show the legality of the police conduct in the first instance. However, the defendant bears the ultimate burden of proving by a preponderance of the evidence that the tangible evidence seized constitutes the product of an unlawful search and seizure by the police and should not be used against him.

(b) Statements:

[1] 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 in the first instance; 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.

[2] 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.

PREPONDERANCE OF THE EVIDENCE STANDARD OF PROOF

The function of a standard of proof as that concept is employed in the due process clause of the United States Constitution and in the realm of fact-finding is to instruct the fact-finder concerning the degree of subjective confidence that our society believes that he or she should have in the correctness of his or her factual determinations and conclusions for a particular type of adjudication (see, Addington v. Texas, 441 US 418, at pp 423-424 [1979]). The application of a preponderance of the evidence standard of proof indicates both society's minimal concern with the outcome and a conclusion that the litigants should share the risk of error in roughly equal fashion (*id.* at p 423).

Preponderance of the evidence means the greater part of such evidence. The phrase refers to the quality of the evidence, that is, its convincing quality, and the weight and effect that it has on the fact-finder's mind (NY Pattern Jury Instructions (Civil) § 1:23).

PRE-TRIAL HEARING: CREDIBILITY HEARINGS

A pre-trial suppression hearing was conducted before the undersigned on June 17, 2011 and July 27, 2011. Trooper Gary Denise, Jr. ("Trooper Denise"); Trooper Howard Jones ("Trooper Jones"); Trooper John Knoetgen ("Trooper Knoetgen") and Investigator Omar Snow ("Inv. Snow") from the New York State Police testified for the People. Trooper Denise, Trooper Howard, Trooper Knoetgen and Inv. Snow each

appeared frank and forthright, although Trooper Denise and Trooper Howard demonstrated significant inability to properly assess distances and the sizes of objects. Although this Court is troubled by the substantial inability of Trooper Denise to correctly estimate distances–testifying at the hearing that Attorney Castillo was 200-300 feet from the witness stand when Attorney Castillo was standing approximately 10 feet from back of the approximately 65 feet deep Courtroom, this Court, gauged upon a preponderance of the evidence standard finds Trooper Denise credible, and specifically finds that Trooper Denise did observe the subject motor vehicle change lanes on the Thruway without signaling and thereafter did smell the odor of burnt marihuana emanating from the stopped vehicle and the defendant. The People's Exhibits received in evidence are found authentic, reliable and worthy of consideration by the Court.

The defendant did not testify at the hearing or call any witnesses at the hearing; however, the defendant introduced into evidence several exhibits. The defendant's exhibits received in evidence are found authentic, reliable, and worthy of consideration by the Court.

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

FINDINGS OF FACT

Trooper Denise and Trooper Knoetgen have been specifically trained on the recognition of various drugs and controlled substances–including both the odor of fresh marihuana and the odor of burnt marihuana.

At the beginning of Trooper Denise's shift on February 10, 2011, Trooper Denise received a criminal intelligence e-mail regarding a 2008 white Lincoln MKX, bearing

plate number FFR 5259, heading from New York City to Albany, and containing two black males with handguns and drugs–hereinafter referred to as the "BOLO" (People's Exhibit #1). The information contained within the BOLO was from an anonymous tip. At approximately 7:30 p.m., the information contained within the BOLO was also broadcast over the police radio. Trooper Denise parked his marked NYS Police vehicle near mile marker 136 or 137 on the New York State Thruway in the Town of Bethlehem, Albany County, to observe traffic traveling northbound. At approximately 9:30 p.m., Trooper Denise observed a white SUV similar to the description provided by the BOLO pass his position traveling northbound. In his rear view mirror, Trooper Denise observed the vehicle change lanes without signaling into the passing lane to pass another vehicle. Trooper Denise pulled out, caught up to the vehicle, and observed that the white SUV had the same license plate number as the BOLO information. Trooper Denise notified dispatch that he was following the vehicle from the BOLO and requested back-up before pulling the vehicle over due to the possibility that the occupants may be carrying guns.

Once Trooper Knoetgen arrived as back-up, Trooper Denise initiated a vehicle and traffic stop. Trooper Denise approached the passenger side while Trooper Knoetgen approached the driver's side of the vehicle. When the defendant rolled down the passenger side window, Trooper Denise detected the odor of burnt marihuana. Trooper Denise asked the defendant some cursory questions and then asked the defendant to step out of the vehicle and go to the front of the vehicle. Trooper Denise did not observe anything about the defendant's appearance to make him believe the defendant had a gun. However, Trooper Denise also detected the odor of burnt marihuana

emanating from the defendant's clothing. Defendant admitted that he and the driver had smoked marihuana before being pulled over.

Trooper Knoetgen asked the driver to roll down the window and also immediately noticed the odor of burnt marihuana. Trooper Knoetgen asked the driver to exit the vehicle and asked him some cursory questions regarding where he was coming from and going to. Trooper Knoetgen also noticed the odor of burnt marihuana on the driver's clothing. The driver of the vehicle also told Trooper Knoetgen that he and the passenger had smoked marihuana before being pulled over.

Trooper Denise asked the defendant if he could check for weapons and the defendant indicated that he didn't mind. Trooper Denise did a pat down search of the defendant, while Trooper Knoetgen did a pat down search of the driver. Neither trooper found any weapons or contraband. Trooper Knoetgen and Trooper Denise then searched the vehicle and did not find any marihuana, guns or cocaine. While they were searching the vehicle, Trooper Jones engaged the defendant in some small talk. After the unsuccessful search of the vehicle, Trooper Knoetgen reasonably believed that the driver and/or the defendant herein could be secreting marihuana or other contraband on their persons.

Trooper Denise ran the driver's information and learned that the driver had a suspended license. Trooper Denise told Trooper Knoetgen that he was going to write the driver some tickets. At some point the troopers learned that the defendant had a valid driver's license. Trooper Knoetgen asked Trooper Denise if the defendant had been searched for marihuana yet, and Trooper Denise said that he had only done a pat down search of the defendant. Trooper Knoetgen then approached the defendant to do another

pat down search for weapons immediately before he planned to do a thorough search for marihuana.

When Trooper Knoetgen patted down the inside of defendant's leg, he felt a hard object that he thought could be the wooden butt of a gun. Trooper Knoetgen motioned for Trooper Jones to come over and mouthed the word "gun" to Trooper Jones. Trooper Knoetgen asked the defendant three times: "What is this, is this a gun?" The defendant did not respond to Trooper Knoetgen's questions, so Trooper Knoetgen assumed that the object was a gun. Trooper Knoetgen then reached inside the defendant's pants and pulled out a package of drugs wrapped inside a black bodega bag (see, defendant's Exhibit #B). The package was approximately 5 inches long; 2-3 inches wide, and 1 ½ inches thick. The defendant was placed in custody and transported to the New York State Police Barracks.

On February 10, 2011, after 10:00 p.m., Inv. Snow met the defendant at the New York State Police Barracks. Inv. Snow advised the defendant of his Miranda rights from a pre-printed card. When asked if he understood his rights, the defendant stated: "Yes." When asked if he wished to talk to the police now, the defendant stated: "Yes." The defendant then proceeded to answer Inv. Snow's questions. When Inv. Snow asked the defendant to give a written statement, the defendant declined to do so and requested an attorney. Inv. Snow then ended the interview.

CONCLUSIONS OF LAW

(a) Tangible evidence:

"The degree of suspicion required to stop a car is minimal. Nothing like probable cause is required." (see, People v. Ingle, 36 NY2ed 413, 415 [1975]). Interfering

with a moving vehicle requires reasonable suspicion (see, People v. Ocasio, 85 NY2d 982 [1995]; People v. May, 81 NY2d 725 [1992]). The stop of an automobile constitutes a seizure, and an officer may stop a vehicle to investigate criminal activity when he has reasonable suspicion that it's occupants have been engaged, are presently engaged, or about to engage in conduct in violation of the law (see, People v. Sobotker, 43 NY2d 559 [1978]). The police may stop a vehicle for a traffic violation when they have a reasonable suspicion based upon articuable facts that the driver has violated the Vehicle and Traffic Law (see, Delaware v. Prouse, 99 S.Ct. 1391 [1979]; People v. Ingle, *supra*). In the instant case, Trooper Denise observed the subject Lincoln MKX change lanes on the New York State Thruway without signaling. This Court holds and determines that Trooper Denise's observation provided him with both reasonable suspicion and probable cause and justified the stop of the vehicle for a traffic infraction.

Trooper Denise approached the passenger side of the vehicle, while Trooper Knoetgen approached the driver's side of the vehicle. Both troopers noticed the smell of burnt marihuana emanating from the vehicle, and both troopers noticed the smell of burnt marihuana on the clothing of the occupants when the occupants exited the vehicle. The defendant and the driver of the vehicle also admitted to smoking marihuana before being pulled over by the police. Pat downs of both the defendant and the driver were negative for weapons. Trooper Denise and Trooper Knoetgen's search of the vehicle was also negative for any weapons, marihuana or drugs. Trooper Knoetgen then did another pat down of the defendant for weapons before proceeding with a search of the defendant's person for marihuana. Based upon the troopers: (1) immediately smelling the odor of burnt marihuana upon approaching the vehicle; (2) smelling the odor of marihuana upon the

clothes of both occupants; (3) both occupants admitting to smoking marihuana before being pulled over by the troopers; and (4) searching the subject vehicle for marihuana with negative results; and also based upon the Trooper Denise and Trooper Knoetgen's training in the recognition of the odor of burnt marihuana and their experience with prior arrests, this Court holds and determines under the totality of the circumstances that Trooper Knoetgen had probable cause to believe that the defendant had marihuana secreted on his person which provided Trooper Knoetgen with sufficient probable cause to search the defendant (see, People v. Pierre, 8 AD3d 904 [3rd Dept. 2004], lv. den. 3 NY3d 710 [2004]; see also, People v. Black, 59 AD3d 1050 [4th Dept. 2009]; People v. Feili, 27 AD3d 318 [1st Dept. 2006]; People v. Turchio, 244 AD2d 366 [2nd Dept. 1997]).

Each of the above-cited cases stand for the proposition that the detection of the odor of marihuana emanating from a lawfully stopped vehicle provides the police with probable cause to search the vehicle and the occupants. Trooper Knoetgen's decision to do another pat down search of the defendant before proceeding to a full search of the defendant's person for marihuana does not eliminate Trooper Knoetgen's probable cause to conduct a full search of the defendant's person. Accordingly, this Court holds and determines that defendant's motion to suppress the tangible evidence seized from his person as the fruit of an allegedly unlawful vehicle and traffic stop and/or as improperly seized pursuant to an allegedly unlawful search of the defendant should be and the same is hereby denied in its entirety.

(b) Statements:

[1] This Court holds and determines that on February 10, 2011, when Trooper Knoetgen seized a quantity of cocaine from the defendant's person, Trooper

Knoetgen had probable cause to arrest the defendant for the possession of such illegal substances (see, People v. Beriquette, 84 NY2d 978 [1994]). Accordingly, this Court holds and determines that defendant's motion to suppress any and all of his oral statements to the police as the fruits of an allegedly unlawful traffic stop and/or allegedly unlawful arrest should be and the same is hereby denied.

[2] When defendant was initially questioned by Trooper Denise, Trooper Knoetgen and Trooper Jones during the traffic stop, he was not in police custody nor the subject of custodial interrogation; therefore, this Court holds and determines that there was no requirement that Miranda rights be given to the defendant. Clearly, threshold or investigative questioning by an investigating police officer does not constitute custodial interrogation, and there is no requirement whatsoever that Miranda warnings be given (People v. Tankleff, 84 NY2d 992 [1994]; People v. Aia, 105 AD2d 592 [3rd Dept. 1984]; People v. Brown, 104 AD2d 696 [3rd Dept. 1984]). Accordingly, the defendant's motion for an order suppressing any and all statements made by him to the troopers on the New York State Thruway–prior to defendant being arrested–should be and the same is hereby denied in all respects.

Inv. Snow met the defendant at the New York State Police Barracks and advised the defendant of his Miranda rights from a pre-printed card. When asked if he understood his rights, the defendant stated: "Yes." When asked if he wished to talk to the police now, the defendant stated: "Yes." The defendant then proceeded to answer Inv. Snow's questions. This Court holds and determines that the defendant knowingly and voluntarily waived his Miranda rights.

This Court based upon proof beyond a reasonable doubt further holds and determines that the defendant's oral statements to Inv. Snow were knowingly freely and voluntarily made within the meaning and intent of CPL § 60.45. This finding is buttressed by the fact that the defendant declined to give Inv. Snow a written statement and then asserted his right to counsel. Accordingly, defendant's motion to suppress his oral statements should be and the same is hereby denied.

CONCLUSION

(a) Tangible evidence:

This Court holds and determines that the defendant's motion to suppress tangible property seized from his person should be and the same is hereby denied.

(b) Statements:

This Court holds and determines that the defendant's motion for an order suppressing oral statements allegedly made by him at the scene of the traffic stop and at the New York State Police Barracks on February 10, 2011 should be and the same is hereby denied.

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

Dated: Albany, New York
October 13, 2011

DAN LAMONT, Acting J.S.C.

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

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