

**People v Ingram**

2012 NY Slip Op 33843(U)

November 30, 2012

Supreme Court, Erie County

Docket Number: 00668-2012

Judge: Russell P. Buscaglia

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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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The People of the State of New York

vs

INDICTMENT NO.  
00668-2012

Robert L. Ingram,

Defendant.

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Frank A. Sedita, III, Esq.  
Erie County District Attorney  
BY: Seth T. Molisani, Esq.  
Assistant District Attorney  
Attorney for the People

Michael J. Stachowski, Esq.  
Attorney for the Defendant

**DECISION AND ORDER**

**RUSSELL P. BUSCAGLIA, J.S.C.**

The defendant is charged by this Indictment with Criminal Possession of a Weapon in the Second Degree, Penal Law § 265.03. The defendant moves to suppress the physical evidence seized and the statements allegedly made by him pursuant to Section 710.20 of the Criminal Procedure Law. A hearing was conducted pursuant to Mapp v. Ohio, 367 U.S. 643 (1961), Dunaway v. New York, 442 U.S. 200 (1979) and People v. Huntley, 15 NY2d 72 (1965). Lt. Bryan Strobele, Officers Robert Salamone, John Beyer and Kelvin Sharpe of the City of Buffalo, New York Police Department testified at the hearing.

The credible testimony at the hearing revealed that on March 25, 2012 at approximately 4:30 p.m., Officers Beyer and Sharpe were on routine patrol, in uniform, driving a marked police car. They were assigned to the Buffalo Police Department Housing Unit, which was headquartered at 312 Perry Street in the City of Buffalo. Their shift started at 3:30 p.m. and ended at 1:30 a.m. Earlier that day, Officer Sharpe arrested someone who advised him that guns were located in a shed behind 118 Montana Street in the City of Buffalo. The nature of the charge for which the arrest was made was not provided, but the arrestee was unknown to Officer Sharpe and the information was not a declaration against his penal interest. Officers Sharpe and Beyer drove to Montana Street to investigate the gun information and as they turned the corner from Ferry Street, they observed two (2) individuals standing in the curb area in front of 116 Montana Street. The two (2) individuals were not engaged in any suspicious activity. The location was a high crime area in which the officers had made prior arrests for drugs and guns. As they got closer, the two (2) individuals started to walk across the street and Officer Sharpe recognized one of the men as Christopher Pratt, the victim in a recent shooting which was under investigation. Officer Sharpe, the driver, stopped the police car and asked Pratt what he was doing. Meanwhile, Officer Beyer focused on the defendant, the other individual, who continued to cross the street and walk away. Officer Beyer asked him his name but the defendant did not answer. Instead, his eyes got big as he grabbed toward his right jacket pocket and walked swiftly away. Officer Beyer, believing the defendant had a gun, yelled to him not to do it and pursued him. The defendant was not observed committing any crime and was not engaged in any suspicious activity. The defendant then

vigorously grabbed at his right pocket as he ran away from Officer Beyer, who drew his gun and ordered him to stop. The defendant continued running and dove over a concrete block wall landing on the other side on his stomach. Officer Beyer ordered him to stop. The defendant rolled onto his back and still grabbed at his right pocket as Officer Sharpe caught up with him and both officers subdued him. Officer Sharpe then recovered a loaded handgun from the defendant's right pocket and the defendant then made the first statement contained in the Notice served upon him pursuant to § 710.30 of the Criminal Procedure Law without being asked any questions. Other officers arrived to assist. The defendant was handcuffed and placed in the rear seat of Officers Sharpe and Beyer's police car. Officer Sharpe advised the defendant of the appropriate Miranda warnings from memory and the defendant said he understood them before making the further statements contained in the Notice. He was transported to the Buffalo Police Department's Housing Unit Headquarters for processing. While handcuffed to a bench in the hallway, Lt. Strobele approached the defendant who was visibly upset and agitated. Without re-administering Miranda warnings, he told the defendant he was glad he was okay and that the officers were also unharmed. The defendant then made the statement he was just trying to get rid of it. Shortly afterward, while officers were completing paperwork in connection with the defendant's arrest and while in his presence, Officer Salamone asked Officers Sharpe and Beyer if they were requesting DNA testing for the gun. Without being asked any questions the defendant spontaneously said they did not need to test the gun. It was his. No promises or threats were made and no coercion was used. The defendant never invoked his right to remain silent or his right to counsel.

A person must allege standing to suppress evidence by establishing a reasonable expectation of privacy in the place or items searched, People v. Ramirez-Portoreal, 88 NY2d 99 (1996). The defendant has an expectation of privacy in his person and the clothes he wears that society deems reasonable. Therefore he has standing to challenge the search of his person and the seizure of the gun it yielded.

The events leading up to the street encounter with the defendant and Christopher Pratt were innocuous. There were no reports of any criminal activity in progress and the defendant was not engaged in any criminal activity. The neighborhood's reputation as a high crime area by itself does not justify police interference with a person's privacy or liberty interests, People v. Johnson, 64 NY2d 617 (1984), People v. Ferry, 152 AD2nd 952 (4<sup>th</sup> Dept. 1989) and People v. Cornelius, 113 AD2d 666 (1<sup>st</sup> Dept. 1986). The information provided by an unnamed person arrested earlier that day to Officer Sharpe concerning guns located in a shed behind 118 Montana Street was not sufficiently reliable to create exigent circumstances or a public safety emergency warranting police interference with the defendant and Pratt. There was no information about the types of guns, whether they were loaded and operable or the circumstances surrounding their possession. Furthermore, the informant was arrested for criminal activity and, therefore, his credibility was suspect since his information was not a declaration against his penal interest. Therefore, the officers' initial approach of the defendant should have been limited to a request for information, Level 1 under People v. Debour, (40 NY2d 210 (1976)).

In order for a police officer to pursue a person who ignores a request for information and flees, he needs at least a founded suspicion that criminal activity is afoot, coupled with

the flight, Level 2 under DeBour, supra. Without that quantum of suspicion, any coercive interference with a citizen's liberty, either physical or verbal, could be an unlawful and unreasonable violation of constitutional proportions, People v. Holmes, 81 NY2d 1056 (1993), People v. Sierra, 83 NY2d 928 (1994) and People v. Bora, 83 NY2d 531 (1994).

The police may not pursue a defendant if he flees when an officer merely approaches to request information, Sierra, supra. The defendant's flight in response to an approach by the police, combined with other specific circumstances indicating that he may be engaged in criminal activity, may give rise to reasonable suspicion, the necessary predicate for police pursuit. Conversely, flight following a request for information, which is not predicated on any evidence of criminal activity, will not give rise to reasonable suspicion, People v. Robbins, 196 AD2d 699 (1<sup>st</sup> Dept. 1993), *revd*, People v. Robbins, 83 NY2d 928 (1994), People v. Grant, 164 AD2d 170 (1<sup>st</sup> Dept. 1990) and People v. Patterson, 156 AD2d 723 (2<sup>nd</sup> Dept. 1989).

The defendant exercised his right to walk away and refuse to answer the officers' questions and absent suspicion of any criminal conduct, was authorized to do so. Furthermore, he wore a thin jacket that did not conceal much and Officer Beyer saw no tell-tale sign of a gun or dangerous contraband prior to taking coercive measures and pursuing the defendant. Neither Officer Beyer or Sharpe saw a bulge, the outline of a gun or any other indicia of criminal activity on the part of the defendant before they ordered him to stop and yelled not to do it. Under the circumstances, their pursuit and eventual forcible seizure of him was unlawful. Therefore, under the totality of the circumstances, the search and

seizure of the gun from his person was similarly unlawful, Wong Sun v. United States, 371 US 471 (1963) and People v. Oramus, 25 NY2d 825 (1969).

This Court is mindful of the dangers faced by police officers as they attempt to detect and prevent crimes, especially in neighborhoods known for criminal activity. When tell-tale signs of weapon possession are observed, officers need not await the glint of steel before they take reasonable measures to protect themselves as they conduct their inquiry, People v. Benjamin, 51 NY2d 267 (1980). However, absent at least a founded suspicion that criminal activity was afoot, officers are not authorized to pursue a defendant upon his flight. The coercive measures taken by Officer Beyer, both verbal and physical in chasing the defendant and drawing his gun constituted a seizure of the defendant, People v. Johnson, 167 AD2d 880 (4<sup>th</sup> Dept. 1990) and People v. McFadden, 136 AD2d 934.

The facts and circumstances surrounding the defendant's arrest are similar to those in the companion case to Sierra, supra, People v. Robbins. In Robbins, supra, the arresting officers knew only that after exiting from the back seat of a livery cab that had been stopped for an equipment violation, the defendant grabbed his waistband and then fled, facts which provided them with no information regarding criminal activity. The court held that the police had an insufficient basis upon which to pursue the defendant and, therefore, suppression should have been granted. This defendant's conduct provided even less of a reasonable suspicion he had been or was about to engage in criminal activity. The fact that his eyes got big is of no moment, People v. Pines, 99 NY2d 525 (2002) and there were no tell-tale signs of weapons possession that accompanied his flight.

Therefore, the police pursuit that led to the seizure of the gun was unlawful from its inception, Robbins, supra at 930.

The People's argument that People v. Bachiller, 93 AD3d 1194 (2012) requires this Court to deny the defendant's motion is unavailing. The facts in Bachiller, supra, are distinguishable because the arresting police officers there were responding to a call of a possible stabbing at a specific location and actually observed the defendant and another unidentified male engaged in a heated argument along with a large crowd of 100 people on the street leaving a house party. Based on the officers' initial observations and the defendant chasing the other unidentified male, the officers had Level 2 under DeBour, supra, a founded suspicion that criminal activity was afoot. That, coupled with the defendant's flight rose to Level 3 under DeBour, supra, a reasonable suspicion that he had committed a crime, the necessary predicate to pursue him. The defendant then further acted suspiciously in changing direction multiple times while grabbing and holding onto an object in his waistband area with his left hand as the police approached him. The nature of the call, the defendant's conduct, the surrounding circumstances and the defendant's flight gave rise to reasonable suspicion that the defendant was in possession of a weapon justifying their pursuit and eventual arrest of him. These facts are distinguishable in that the circumstances underlying Officers Beyer's and Sharpe's actions did not give rise to this required level of reasonable suspicion before their actions in pursuing this defendant upon his flight resulted in his arrest.

The People have the burden of establishing the voluntariness of a person's statement beyond a reasonable doubt, People v. Witherspoon, 66 NY2d 973 (1985).

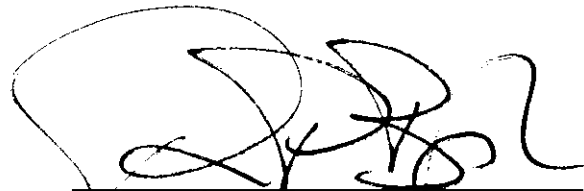
Miranda warnings are an absolute prerequisite to custodial interrogation, Miranda v. Arizona, 384 U.S. 436 (1966). The test to determine custody is what a reasonable person innocent of any crime would have thought had he been in the defendant's position, People v. Yuki, 25 NY2d 585 (1969). The statements allegedly made by the defendant followed his unlawful arrest, flowed from his unlawful arrest and are the fruit of the poisonous tree. Therefore, the traditional voluntariness analysis need not be addressed by this Court.

Accordingly, the defendant's motion to suppress the physical evidence seized and the statements allegedly made by him is **GRANTED**.

This decision constitutes the Order of this Court.

DATED: Buffalo, New York

November 30, 2012



RUSSELL P. BUSCAGLIA  
Supreme Court Justice

GRANTED:

**GRANTED**  
*November 30, 2012*  
*Maureen Smith*

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