

People v Green

2014 NY Slip Op 34017(U)

November 6, 2014

Supreme Court, Erie County

Docket Number: 00528-2014

Judge: Russell P. Buscaglia

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

The People of the State of New York

vs

INDICTMENT NO.
00528-2014

Robert Green,

Defendant.

Frank A. Sedita, III, Esq.
Erie County District Attorney
BY: Paul J. Williams, III, Esq.
Assistant District Attorney
Attorney for the People

Thomas J. Eoannou, 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 pursuant to Section 710.20 of the Criminal Procedure Law. A hearing was conducted pursuant to Mapp v. Ohio, 367 U.S. 643 (1961) and Dunaway v. New York, 442 U.S. 200 (1979). Officer Kevin Matusiak of the Town of Cheektowaga, New York Police Department testified at the hearing.

The credible testimony at the hearing revealed that on March 3, 2014 at approximately 2:23 a.m., Officer Matusiak was on duty, in uniform, in a marked police car parked in a stationary position observing traffic on Maryvale Drive near Cedar Grove in the

Town of Cheektowaga. He saw a taxicab approaching him with its driver's side headlight not lit. He followed the taxicab intending to make a traffic stop but before he activated his lights, the taxicab pulled over and stopped on its own. As Officer Matusiak approached the taxicab, he observed the defendant, who was seated in the rear passenger seat, moving his hands in and out of his pockets. As he arrived at the driver's side of the taxicab, he observed both driver's side windows were down. Officer Matusiak asked the occupants for identification. The driver produced a license that was later determined to be suspended and the defendant also produced identification. Officer Matusiak smelled fresh marijuana emanating from inside the taxicab. The defendant asked him if he could leave to go visit his girlfriend. Officer Matusiak told him he could not leave. Officer Matusiak returned to his police car to call for back-up due to the defendant moving his hands.

Officer Christopher Wierzbowski arrived on the scene almost immediately and was apprised of the situation by Officer Matusiak. They approached the taxicab together. Officer Matusiak went to the passenger side and Officer Wierzbowski went to the driver's side. Officer Matusiak told the defendant to exit the taxicab and proceed toward his police car so he could pat him down and conduct his investigation. He told the defendant to put his hands on the police car. The defendant asked him several times where on the police car before he spun around and ran. Officer Matusiak pursued him. During the chase, the defendant dropped three (3) separate components of a 9mm Glock semiautomatic handgun, namely, the barrel, the frame and the magazine, which were recovered after the defendant was arrested. The defendant was ultimately apprehended in a nearby yard, subdued and handcuffed. The defendant was arrested and searched at the scene by

Officer Leising, who also responded to Officer Matusiak's call for back-up. He recovered two (2) small baggies containing fresh marijuana from the defendant's pants pocket. The defendant was transported to Cheektowaga Police Department Headquarters for booking.

The defendant was put in a holding cell at Cheektowaga Police Headquarters where Officer Ken Kishbaugh conducted an administrative search. He recovered additional components of the Glock handgun, namely, two (2) springs and a firing pin, from the defendant's shoes and pants respectively. When reassembled, the components constituted a loaded and operable firearm. Officer Kishbaugh also recovered two (2) marijuana cigarettes containing fresh marijuana from the defendant's pants pocket.

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). As a passenger in a taxicab, the defendant has standing to challenge the basis for the stop, People v. Millan, 69 NY2d 514 (1987) and People v. Rivers, 129 AD2d 983 (4th Dept. 1987). The defendant has a reasonable expectation of privacy in his person, the clothing and footwear he wears that society deems reasonable. Therefore, he has standing to challenge the search and seizure that yielded the contraband.

In order to stop a moving vehicle, a police officer must have reasonable suspicion that its occupants have committed a crime or observe a Vehicle and Traffic Law violation, People v. May, 81 NY2d 725 (1992) and People v. Ingle, 36 NY2d 413 (1975). Since the taxicab stopped on its own prior to Officer Matusiak activating his lights, he needed only an articulable basis to approach a parked car, People v. Ocasio, 85 NY2d 982 (1995). In any event, an equipment violation, such as inadequate headlights one-half hour after

sunset to one-half hour after sunrise, as is March 3, 2014 at 2:23 a.m., is a sufficient basis for an officer to effectuate a traffic stop, see, New York State Vehicle and Traffic Law § 375 2a1 and People v. Saylor, 166 AD2d 899 (4th Dept. 1990).

Upon his approach, Officer Matusiak's observation of the defendant moving his hands in and out of his pockets in the rear seat of the taxicab itself did not rise to the level of founded suspicion that criminal activity was afoot, People v. Debour, 40 NY2d 210 (1976). Other than a minor Vehicle and Traffic Law violation, Officer Matusiak had no suspicion of any criminal activity as he was not in a high crime area and no reports of any crime had been received.

A police officer is permitted to order the occupants of a stopped vehicle to either exit or remain inside to enable him or her to conduct the applicable appropriate investigation or inquiry with safety, People v. Robinson, 74 NY2d 773 (1989) and People v. Forbes, 283 AD2d 92 (2nd Dept. 2001). Such authority must be exercised while simultaneously respecting the occupants constitutional rights against unreasonable searches and seizures. In People v. Campbell, 245 AD2d 191 (1st Dept. 1997), the police stopped a taxicab for passing a red light. The defendant was a passenger in the taxicab. Before the police issued any commands to the occupants, the defendant exited and fled but was pursued, detained and searched after a bag of cocaine was discarded by him. The court held such pursuit and detention based on flight alone, was unlawful and granted suppression of the recovered contraband. Similarly, this defendant cites People v. Howington, 96 AD3d 1440 (4th Dept. 2014) in support of his contention that it is incredible testimony that Officer Matusiak smelled such a small quantity of marijuana sealed in a plastic bag, concealed in

the defendant's pocket, five (5) feet away, with the windows of the taxicab open on a cold winter's morning. While the court deferred to the credibility determinations of the suppression court in affirming its grant of suppression, the facts and circumstances of the defendant's case are distinguishable. The defendant also had two (2) marijuana cigarettes in his pocket that were not sealed in plastic and the officer was experienced in detecting raw or fresh marijuana, People v. Chestnut, 36 NY2d 971 (1975), People v. Virges, 118 AD3d 1445 (4th Dept. 2014), People v. Wideman, 889 KA 13-01956 (4th Dept. 2014) and People v. Black, 59 AD3d 1050 (4th Dept. 2009).

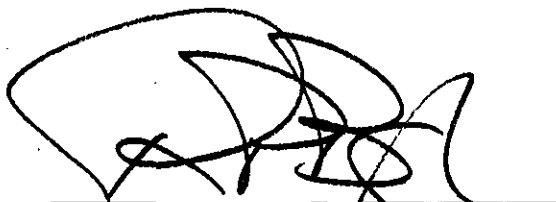
Therefore, the arresting officer had a founded suspicion that criminal activity was afoot, the defendant's flight after he was instructed to put his hands on the police car gave Officer Matusiak authority to pursue the defendant. Since the pursuit was lawful, the defendant's abandonment of the handgun components was an intentional and deliberate independent act designed to divest himself of contraband and not a spontaneous act in response to unlawful police conduct, People v. Howard, 50 NY2d 583 (1980), People v. Boodle, 47 NY2d 398 (1979) and People v. Fussello, 265 AD2d 838 (4th Dept. 1999).

Accordingly, the defendant's motion to suppress the physical evidence seized is **DENIED.**

This decision constitutes the Order of this Court.

DATED: Buffalo, New York
November 6, 2014

GRANTED



RUSSELL P. BUSCAGLIA
Supreme Court Justice

NOV 06 2014
BY *Diane M. Smith*
DIANE M. SMITH
COURT CLERK