

People v Kevin Thompson

2016 NY Slip Op 30879(U)

May 16, 2016

City Court of Peekskill

Docket Number: 2015-0506

Judge: Reginald J. Johnson

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CITY COURT: CITY OF PEEKSKILL
COUNTY OF WESTCHESTER: STATE OF NEW YORK
-----X
PEOPLE OF THE STATE OF NEW YORK,

-against-

DECISION &
ORDER
Docket No. 2015-0506

KEVIN THOMPSON,

Defendant.

-----X

HON. REGINALD J. JOHNSON

The Defendant moves to dismiss the pending Driving While Intoxicated (DWI) charges (Vehicle and Traffic Law [V&T] §§1192.2 and 1192.3) on the ground that the State Police lacked probable cause to arrest him [See, Dunaway v. State of New York, 99 S. Ct. 2248 (1979)] and that therefore any evidence obtained therefrom—in particular, the results of the Standardized Field Sobriety Test and Blood Alcohol Content test, should be suppressed as poisonous fruit. [See, People v. Concepcion, 216 A.D.2d 141 (1995)]. The People oppose the motion.

A Dunaway hearing was conducted before me on April 12, 2016. The People produced Trooper Vincent Mederos as its witness. The Defendant did not testify. Based on the evidence and testimony produced at the hearing, the Court makes the following Findings of Facts and Conclusions of Law.

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The facts are undisputed and brief. State Trooper Vincent Mederos testified that on April 26, 2015 at approximately 2:40 a.m., he and his partner Trooper Andrew Kasin were on patrol in the City of Peekskill in or about Main Street and North Water Street when they observed a parked Gray 1995 Dodge Intrepid with its engine running and lights on in the municipal parking lot on Water Street. Trooper Mederos testified that they decided to conduct a welfare check so they entered the parking lot and approached the vehicle.

Trooper Mederos approached the driver's side of the vehicle, while Trooper Kasin was standing at the rear passenger side of the vehicle. Trooper Mederos noticed that the vehicle's headlights, taillights and dashboard lights were illuminated with the keys in the ignition. When he used his flashlight to illuminate the interior of the vehicle, Trooper Mederos noticed the Defendant seated in the driver's seat with his seatbelt on. He knocked on the window and asked the Defendant to lower it. Trooper Mederos asked the Defendant if he was ok and he replied that he was fine but that he was trying to determine if he was ok to drive because he had just come from the bar across the street where he had consumed several drinks.

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Trooper Mederos then detected an odor of alcohol emanating from the Defendant's breath and car, and that he had glassy blood shot eyes and delayed speech. He then asked the Defendant for his license and registration to check their validity. Thereafter, Trooper Mederos asked the Defendant to exit his car; as Defendant was exiting his vehicle, he needed to lean against the vehicle in order to maintain his balance.

Trooper Kasin requested that the Defendant submit to a Standardized Field Sobriety Test (S.F.S.T.) which consisted of the Horizontal Gaze Nystagmus test, Walk and Turn test, and One Leg Stand test. The Defendant took these tests and failed them all.

Trooper Mederos testified that the usual practice is to check vehicles at night to determine if operators are in them; he said that he checks parking lots for suspicious activity, broken glass under vehicles which may be a sign of vehicle larceny, and disabled vehicles-particularly if there are signs that the driver left the vehicle in order to seek help. In particular, Trooper Mederos said that approaching a vehicle in the parking lot at that location at that hour of the night was not unusual to investigate whether a vehicle has been abandoned or whether a motor vehicle operator was safe and secure or needed assistance.

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On cross examination, Trooper Mederos said that he was aware that a bar was located in the area of the parking lot. He further stated that the Defendant's vehicle was lawfully parked, that nothing appeared wrong with the vehicle, and that he did not commit any traffic offense. Trooper Mederos stated that he did not receive a call that a driver was in need of assistance at the subject location, and that he did not contact Headquarters that he was approaching Defendant's vehicle to make a welfare check.

Trooper Mederos stated that he has conducted motor vehicle welfare checks in the past and that said welfare checks do not always involve vehicles in parking lots. According to Trooper Mederos, welfare checks are discretionary; he said that his experience informs him that vehicles are not present in the subject parking lot at that time of the morning. Trooper Mederos said that he did not approach the Defendant because he thought he was intoxicated, but rather to determine if he needed assistance and, if so, to provide it.

Lastly, Trooper Mederos conceded that but for his approaching the Defendant's vehicle for the purpose of conducting a welfare check, he had no further lawful basis for approaching said vehicle. Trooper Mederos said that he believes that he could conduct a welfare check on an operator of a motor vehicle if the facts and circumstances warrant said check. Specifically, Trooper Mederos

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believed that the presence of the Defendant's vehicle in the subject parking lot at 2:40 a.m. with its lights on was a sufficient basis to conduct a welfare check.

Conclusions of Law

It has been held that "Reasonableness' is the touchstone of any inquiry into the propriety of police conduct in a police-citizen encounter." People v. Herold, 282 A.D.2d 1, 4, 726 N.Y.S.2d 65 (1st Dept. 2001) citing People v. Batista, 88 N.Y.2d 650, 653, 649 N.Y.S.2d 356, 672 N.E.2d 581 (1996). Of critical importance is whether the police conduct "was reasonably related in scope and intensity to the level of information available to the officers at the time they took action." Herold, 282 A.D.2d at 4, citing People v. Cantor, 36 N.Y.2d 106, 111, 365 N.Y.S.2d 509, 324 N.E.2d 872 (1975).

In the seminal case of People v De Bour, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976), the Court of Appeals set forth a graduated four level test by which police-citizen encounters-that is, when the police are acting in their law enforcement capacity, must be analyzed. Specifically, a Level I encounter permits the police to approach a citizen to request information if the police have an objective, credible reason not necessarily indicative of criminal activity; a Level II encounter permits the police to conduct a Common law right of inquiry (a more intrusive inquiry than permitted under Level I) where the police have a founded

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suspicion that criminal activity is afoot; a Level III encounter permits the police to detain and even conduct a frisk for weapons where the police have a reasonable suspicion that a crime has been or will be committed; and a Level IV encounter permits the police to arrest a person where the police have probable cause to believe that the person committed a crime. See also, People v. Moore, 6 N.Y.3d 496, 814 N.Y.S.2d 567, 847 N.E.2d 1141 (2006); People v. McIntosh, 96 N.Y.2d 521, 730 N.Y.S.2d 265, 755 N.E.2d 329 (2001).

In People v. Holloman, 79 N.Y.2d 181, 191 590 N.E.2d 204, 581 N.Y.S.2d 619 (1992), the Court of Appeals stated that a Level I encounter [or Request for Information] by a police officer may include questions about a person's "identity, destination, or reason for being in the area," provided the officer has an articulable reason for approaching the person, not necessarily indicative of criminality.

Although it is generally recognized that the police have broad authority to approach and pose questions to citizens, they may not do so on a mere whim or caprice, but must base the request for information on an articulable reason. See, People v. McIntosh, 96 N.Y.2d 521, 730 N.Y.S.2d 265, 755 N.E.2d 329 (2001). Further, when only a request for information or Level I encounter is justified, the individual remains free to continue on his or her way and to walk away from the

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scene without risk of forcible detention. See, People v. Moore, 6 N.Y.3d 496, 814 N.Y.S.2d 567, 847 N.E.2d 1141 (2006).

It is well settled that a request for information or Level I encounter can never be lawfully made by the police pulling over a moving vehicle, because at the moment the vehicle is pulled over (it is considered a limited seizure for Fourth Amendment purposes), the encounter is said to lose its consensual characteristics transforming it into, at a minimum, a Level III encounter, which requires “reasonable suspicion” that the individual has committed, is committing, or is about to commit a crime. See, People v. Spencer, 84 N.Y.2d 749, 752-753, 622 N.Y.S.2d 483, 646 N.E.2d 785 (1995).

It has been held that the actual motivations or subjective intentions of a police officer who approaches an individual will be irrelevant when the officer has an objective, credible reason for making the approach. See, People v. Wallgren, 94 A.D.3d 1339, 943 N.Y.S.2d 639 (3rd Dept. 2012). In Wallgren, two police officers approached defendant’s vehicle to conduct a welfare check after it had stopped and started and jolted several times before pulling over to the side of the road. After the two police officers interacted with the defendant, they detected an odor of alcohol on his breath; thereafter, they requested that he perform a S.F.S.T. which he

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failed. The defendant was then arrested and charged with D.W.I. among other charges. The defendant moved to suppress the evidence and dismiss the indictment. The trial court granted the motion finding that the police officers' testimony regarding the approach of the motorist was not credible in that they did not have an "objective credible reason to so, not necessarily indicative of criminality." See, People v. Story, 81 A.D.3d 1168, 1168, 917 N.Y.S.2d 403 (2011).

The Wallgren Court reversed the trial court finding that the police, after having observed the defendant's vehicle stop and start and jolt several times before coming to a stop, did have an objective, credible reason to approach him.

In Story, 81 A.D.3d 1168, *supra*, state troopers observed the defendant's truck parked on the side of a rural highway at night with someone hunched over outside the passenger side of the truck. The troopers approached the defendant's truck to conduct a welfare check, after which they determined that the defendant was intoxicated. The defendant was arrested and charged with D.W.I. The defendant was convicted after trial and appealed.

The Story Court affirmed the conviction finding that the troopers' observation of the defendant hunched over outside the passenger side of his parked

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truck at night on the side of the road on a rural highway provided a justifiable reason to approach and request information. Id. at 1168.

In People v. Robinson, 309 A.D.2d 1228, 1228, 764 N.Y.S.2d 757, 2003 N.Y. Slip Op. 17138 (4th Dept. 2003), the Court affirmed the D.W.I. conviction of the defendant after a deputy sheriff observed his vehicle, at 2:50 a.m., drive onto a road which was accessible to only three businesses which were closed, park, and turn of its lights. In affirming the conviction, the Court rejected the defendant's contention that the deputy sheriff had to have had a "reasonable suspicion" to approach the defendant's vehicle since the defendant's vehicle had already stopped. The Court reasoned that given the early morning hours and the fact that the businesses were closed, the deputy sheriff had an objective, credible reasonable to approach the defendant's parked vehicle, irrespective of whether any criminality was afoot.

In People v. Evans, 175 A.D.2d 456, 572 N.Y.S.2d 508 (3rd Dept. 1991), the Court affirmed the conviction of the defendant after his vehicle was observed parked in deserted "overlook area" of the Taconic State Parkway in the Town of Gallatin, Columbia County. The troopers noticed that there were two individuals in the vehicle, that the vehicle did not have a front license plate affixed to it, that

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there were no stickers on the windshield, and that the vehicle's rear window had been broken out. The troopers approached the parked vehicle and determined that the defendant was in possession of drugs. The defendant was arrested and later pled guilty to criminal possession of a controlled substance.

The defendant appealed his conviction contending that the troopers had to have had a "reasonable suspicion" that criminal activity was or was about to be committed in order to justify their approach to his vehicle. The Court rejected this contention reasoning that since the defendant's vehicle was parked, the troopers only needed to have an objective, credible reason, irrespective of whether they had any indication of criminal activity, to approach the defendant to ask for information and, upon doing so, then they acquired probable cause to arrest the defendant after observing drug paraphernalia in the vehicle. *Id.* at 457-458.; See also, People v. Omowale, 83 A.D.3d 614, 923 N.Y.S.2d 442 (1st Dept. 2011) (a traffic infraction can provide the police with a basis for approaching and requesting information).

On the other hand, in People v. Laviscount, 116 A.D.3d 976, 978-979, 984 N.Y.S.2d 394, 2014 N.Y. Slip Op. 02798 (2nd Dept. 2014), which the Defendant cites in his Memorandum of Law at p. 2, the Court reversed the trial court's denial

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of the defendant's motion to suppress the evidence, reasoning that simply because the defendant's vehicle was parked early morning in an area where cars are not usually parked and that the defendant may have moved an object from his dashboard and threw it on the floor of his car was an insufficient basis to justify approaching his vehicle and requesting information.

In People v. Miles, 82 A.D.3d 1010, 918 N.Y.S.2d 594, 2011 N.Y. Slip. Op. 02035 (2nd Dept. 2011), the Court affirmed the trial court's decision which granted the defendant's motion to suppress reasoning that the police lacked an objective, credible reason for approaching defendant's vehicle simply because it was parked outside a bar in an area where there had been 'community complaints' of gang and drug activity.

The People cite People v. Blajeski, 125 A.D.2d 582, 509 N.Y.S.2d 648 (2nd Dept. 1986) for the proposition that if the police in that case were permitted to approach a parked, but running vehicle, and request that the driver identify himself, then the approach of the troopers in the case at bar should pass constitutional muster particularly because the "trooper's actions demonstrated good policing and a desire to make sure nothing was wrong at 2:40 a.m. in a fairly deserted parking lot (See People's Reply Affirm. at p. 8).

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In this Court's view, and contrary to the People's contention, the Blajeski case is distinguishable from the facts in the case at bar because there was no testimony in this case that the subject parking lot was in a 'drug-prone location,' as was the case in Blajeski. Further and, most importantly and curiously, the Blajeski Court does not state what other facts it may have considered that would have justified the police officer in approaching the defendant to request information, because the defendant and his passengers were lawfully parked with the engine running for approximately 10 minutes. There was no claim that the defendant committed a traffic infraction or posed a danger to the police officer or others at that location. It is well settled that a defendant's mere presence in a 'drug-prone area' is insufficient to provide a police officer with an objective, credible reason for him to conduct a level one request for information. See, People v. Johnson, 109 A.D.3d 449, 970 N.Y.S.2d 550 (1st Dept. 2013). This Court considers the Blajeski decision unavailing in light of People v. Laviscount, 116 A.D.3d 976, 978-979, 984 N.Y.S.2d 394, 2014 N.Y. Slip Op. 02798 (2nd Dept. 2014) and People v. Miles, 82 A.D.3d 1010, 918 N.Y.S.2d 594, 2011 N.Y. Slip. Op. 02035 (2nd Dept. 2011).

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Now turning to the question presented: did the troopers have an objective, credible reason to approach the defendant's vehicle for the purpose of conducting a welfare check? The Court is of the opinion that they did not. Initially, the Court notes that since the defendant was seated in his parked vehicle when the troopers approached him for a "welfare check," they only needed an objective, credible reason for their approach. See, People v. Harrison, 57 N.Y.2d 470, 475, 457 N.Y.S.2d 199, 443 N.E.2d 447 (1995); People v Witt, 129 A.D.3d 1449, 11 N.Y.S.3d 767, 2015 N.Y. Slip Op. 04955 (4th Dept. 2015). Here, Trooper Mederos conceded that the defendant did not commit a traffic violation (See, People v. Omowale, 83 A.D.3d 614, 923 N.Y.S.2d 442 (1st Dept. 2011) (a traffic infraction can provide the police with a basis for approaching and requesting information)).

Further, Trooper Mederos testified that the defendant's vehicle was lawfully parked at the time he and his partner approached the vehicle (See, People v. Barrientos, 84 A.D.3d 549, 923 N.Y.S.2d 95 (1st Dept. 2011)). In addition, Trooper Mederos stated that he did not receive a call that a driver was in need of assistance at the subject location (See, People v. Whalen, 101 A.D.3d 1167, 956 N.Y.S.2d 598, 2012 N.Y. Slip. Op. 08358 (3rd Dept. 2012)). The gravitas of Trooper Mederos' testimony is that he and his partner approached the defendant's parked car for the

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sole purpose conducting a welfare check.¹ The problem with Trooper Mederos' reason for approaching the defendant's vehicle to do a "welfare check" is that neither he nor his partner observed any outward indicia or signs that the defendant was disabled or in need of medical assistance (See, People v. Story, 81 A.D.3d 1168, 1168, 917 N.Y.S.2d 403 (2011). Lastly, there was no testimony that the defendant resembled an individual portrayed in a police department wanted poster. See, People v. Wilson, 5 A.D.3d 408, 773 N.Y.S.2d 95 (2nd Dept. 2004).

While the Court recognizes the importance of police vigilance during their patrol of the streets, the highways and the byways for crime detection, for crime prevention and for the detection of those in need of assistance-be it medical or otherwise, the Courts are tasked with the duty to examine the police action/encounter to "consider whether or not it was justified in its inception and whether or not it was reasonably related in scope to the circumstances which rendered its initiation permissible." People v. De Bour, 40 N.Y.2d at 223, citing People v. Cantor, 36 N.Y.2d 106, 111, 365 N.Y.S.2d 509, 324 N.E.2d 872 (1975).

¹ The Defendant contends that Trooper Mederos' claim that he approached the defendant's parked vehicle to conduct a "welfare check" was pre-textual in that the real reason for the approach was that he thought the defendant was intoxicated, as he was aware that a bar was across the street from the parking lot. See, Defendant's Reply Memorandum of Law/Post Hearing, Argument, Point I, pp. 2-3.

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At a suppression hearing, the Defendant bears the ultimate burden of proving, by a preponderance of the credible evidence, that the challenged evidence should not be used against him. See, People v. Berrios, 28 N.Y.2d 361, 321 N.Y.S.2d 884, 270 N.E.2d 709 (1971); People v. Thomas, 291 A.D.2d 462, 738 N.Y.S.2d 357 (2nd Dept. 2002). However, the People bear the burden of going forward to establish the legality of the police conduct in the first instance. See, People v. Hernandez, 40 A.D.3d 777, 836 N.Y.S.2d 219 (2nd Dept. 2007).

Based on the aforesaid and the totality of the circumstances in this case, including the testimony, the exhibits and the post hearing submissions,² the Court finds that Trooper Mederos' approach to the defendant's parked vehicle in the subject parking lot on April 26, 2015 was unlawful inasmuch as he failed to articulate an object, credible reason for the approach warranting a suppression of the evidence and a dismissal of the charges. See, People v. Laviscount, 116 A.D.3d 976, 978-979, 984 N.Y.S.2d 394, 2014 N.Y. Slip Op. 02798 (2nd Dept. 2014);

² Pursuant to CPLR 2219(a), the Court considered the testimony at the hearing and all exhibits received into evidence thereat, Defendant's Memorandum of Law, People's Post-Hearing Memorandum of Law: Affirmation In Opposition, and Defendant's Reply Memorandum of Law/Post Hearing.

People v. Miles, 82 A.D.3d 1010, 918 N.Y.S.2d 594, 2011 N.Y. Slip. Op. 02035
(2nd Dept. 2011).

Based on the forgoing, it is

ORDERED, that the Defendant's motion to suppress the evidence and
dismiss the charges is granted.

This constitutes the Decision and Order of the Court.

Enter,

/s/

Honorable Reginald J. Johnson
City Court Judge
Peekskill, New York

Dated: May 16, 2016

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