

People v Riley

2022 NY Slip Op 34726(U)

April 15, 2022

County Court, Westchester County

Docket Number: Indictment No. 21-0181

Judge: Anne E. Minihan

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**FILED
AND
ENTERED**
ON April 15 2022
**WESTCHESTER
COUNTY CLERK**

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
THE PEOPLE OF THE STATE OF NEW YORK

- against -

QUAME RILEY,

FILED

APR 15 2022

Defendant **TIMOTHY C. IDONI**
COUNTY CLERK
COUNTY OF WESTCHESTER

DECISION AND ORDER
Indictment No. 21-0181

Minihan, J.,

An indictment has been filed against the defendant charging him with Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[3]). The allegations are that on or about December 10, 2020, at approximately 10:50 p.m. in the area of South Broadway in the City of Yonkers, that the defendant possessed a loaded and operable 9-millimeter Kel Tec P-11 handgun and that this possession did not take place in his home or place of business. The People contend that the defendant was the front seat passenger in a vehicle stopped for violating the provision of the Vehicle and Traffic Law that prohibits excessive window tint.

The People filed timely notice of their intent to introduce two oral statements they attribute to the defendant, one of which they allege to have been made at the scene on South Broadway in Yonkers and the other at the Yonkers Police Department on December 10, 2020. By omnibus motion, the defendant sought suppression of the physical evidence recovered in this case as well as his noticed statements. Pursuant to the decision of this court (Zuckerman, J.), dated December 21, 2021, the defendant's omnibus motion was granted to the extent that the court directed that *Huntley* and *Mapp/Dunaway* hearings be held prior to the trial of this matter.

On March 30, 2022, immediately prior to commencement of pre-trial hearings, the need for a *Huntley* hearing was obviated when the defendant withdrew this aspect of his request for omnibus relief, conceding that there was no valid basis upon which his noticed statements would be subject to suppression. A pre-trial hearing thereafter commenced and testimony concluded on March 30, 2022 after which the parties were permitted the opportunity to submit post-hearing memoranda.

Pursuant to the *Mapp/Dunaway* hearings that were held on March 30, 2022, I give credence to the testimony of the People's witnesses, Yonkers Police Officer Matthew Berni and Yonkers Police Officer Marc Caro whose testimony I found to be generally plausible and partially credible. The People's exhibit in evidence was comprised of a flash drive which contained (1) still photographs of the car that the defendant was a passenger in when stopped by police, (2) photographs of the firearm and magazine allegedly recovered from the defendant, as well as (3) video footage from a body camera worn by Officer Berni. The defendant testified on

his own behalf at the hearing and the defense also called the defendant's brother-in-law, Theophile Kerolle, the driver of the vehicle stopped that evening. Their testimony I also found to be generally plausible and partially credible.

I make the following findings of fact and conclusions of law.

FINDINGS of FACT

On December 10, 2020, Yonkers Police Officers Matthew Berni and Marc Caro, both officers without significant law enforcement experience,¹ were on duty and working together on a uniformed patrol assignment. At approximately 10:50 p.m., the officers found themselves in the vicinity of South Broadway when they observed a white Mercedes with very heavily tinted side and rear windows enter the roadway from a parking space on the street. Officer Caro, the driver, activated the marked patrol vehicle's emergency lights and effected a traffic stop. The officers got out of their vehicle and approached the white Mercedes, confirming as they did that the vehicle, which they noted was extremely clean, had windows that were tinted to the point of opacity. By the time that Officer Caro had approached the driver's side of the car and Officer Berni had walked over to the passenger side, all four of the vehicle's windows were rolled down. As they approached the Mercedes, each officer detected the strong odor of burnt marijuana emanating from the passenger compartment of the vehicle and Officer Berni observed a green leafy substance he believed to be marijuana on the floorboard of the passenger side of the car.

When Officer Caro reached the driver, he asked for, and the man provided, a driver's license, which identified the driver as Theophile Kerolle. The officer also inquired about the smell of marijuana that he had detected upon his approach to the vehicle and he was told by the driver that he and the passenger had just finished smoking. Further inquiry as to whether there was any additional marijuana in the car prompted an affirmative response by Mr. Kerolle who stated that there was about 2 grams of marijuana in the backseat in a black bag. Officer Caro asked the driver to step out of the vehicle, told him that he was going to be placed under arrest for possession of marijuana, and conducted a pat down search of Mr. Kerolle before placing him in handcuffs.

On the passenger side, Officer Berni asked the man, whom at the hearing he identified as the defendant, where he was coming from, where he was going, as well as his name and some other information. It was the officer's impression that the defendant appeared nervous and avoided eye contact during their interaction and, that instead of answering his questions, looked down and scrolled on his phone to try and find photographic or video evidence to demonstrate to

¹At the time of the incident, Officer Berni had approximately two and a half years' experience as a police officer and Officer Caro had been a police officer for less than two years. Neither officer had previous direct personal experience detecting or recovering a firearm in a patrol situation.

the officer that he was a rap artist. Eventually, Officer Berni testified, the defendant responded with his name and date of birth in a stuttering voice. At the hearing, the video from Officer Berni's body camera was played and in it, the defendant is observed scrolling on his phone at times but generally making eye contact and calmly telling the officer his name and date of birth in a clear, stutter-free response.

Suspecting that the defendant might be in possession of a weapon, Officer Berni directed the defendant out of the vehicle.² The defendant complied and the officer initiated a protective pat search, starting at the waistband of the defendant's pants. Finding nothing, the officer moved to the torso area at which time he felt the outline of a pistol in the defendant's left jacket pocket. Recognizing the feel of the object in the defendant's pocket, he directed the defendant to place his hands behind his back while he kept both of his hands on the firearm and called his partner over in a worried voice to assist. The defendant calmly complied, as conceded by Officer Berni and as evidenced in the body camera footage, and was handcuffed with the assistance of Officer Caro. Officer Berni could tell that the firearm was in an interior pocket of the defendant's jacket so he asked the defendant how he should do that so that he could remove it safely without accidentally pulling the trigger. The defendant described how to access the left interior pocket of his jacket and the officer retrieved the firearm without further incident.

Once recovered, Officer Berni pulled the magazine out of the firearm and observed that it was loaded with live ammunition. The defendant was placed inside the officers' patrol vehicle. When additional officers arrived on the scene, an inventory search was conducted during which Officer Berni recovered a black plastic bag containing marihuana in the backseat of the Mercedes.

Theophile Kerolle testified for the defense at the hearing that he was the defendant's brother-in-law and had been the driver that evening. He recalled that he had driven the defendant from Queens where they lived to Ruff Ryders, a recording studio in Yonkers, for a podcast interview. After the interview, Mr. Kerolle and the defendant then drove to a liquor store on South Broadway in Yonkers where Mr. Kerolle purchased two bottles of champagne which were packaged in a black plastic bag. Asked to describe his car, Mr. Kerolle stated that it is a white Mercedes Benz, AMG GT 63S, four-door, with a panoramic black glass top and factory-installed heavily tinted windows.

Mr. Kerolle recalled that two officers pulled the car over just as they left the liquor store and that one officer went to his window and the other to the defendant's side. Although he was not given the reason why police had stopped the car, when asked for his identification, he provided it to the officer who then asked him about the smell of marihuana. Mr. Kerolle replied that he had two grams of medical marihuana in a plastic bag in the backseat of the car at which time he was then asked to exit the vehicle and go to the area near the back bumper where he was searched.

²During cross examination, Officer Berni testified that his intention in removing the defendant from the vehicle was both to perform a protective pat down *and* to find the "extra marihuana" that the driver had admitted was in the vehicle. Notable here is that Officer Berni did not claim to have searched the defendant for marihuana *on his person*.

As the result of a vehicular accident some years before where he had been seriously injured, Mr. Kerolle was under a doctor's care for, among other things, persistent pain. To control his nausea and as part of his pain management plan he had prescription for a number of medications as well as a medical marijuana card, which he testified having had in his wallet that evening. Mr. Kerolle smoked marijuana recreationally prior to obtaining a prescription for medical marijuana. The black plastic bag that was ultimately recovered in the backseat of his car contained not only the 2 grams of marijuana about which he told police but also other medications.

Once the black bag was recovered from the vehicle, Mr. Kerolle was brought to the precinct, his arrest for unlawful possession of marijuana and summons for excessive tint on his vehicle were processed, and both he and his car were released. Ultimately, these matters were resolved with an Adjournment in Contemplation of Dismissal (marijuana) and a fine for the tinted windows.

The defendant testified at the hearing on his own behalf. He stated that he was a reggae musician who had, since the age of 13 when he was signed to Sony Music, success in the industry. He conceded that on December 10, 2020, when he was stopped by police, that he was in possession of a firearm that had been given to him by a family friend. Although he believed that his friend was licensed to possess the weapon, he admitted that he did not have a permit to carry the gun that was in his jacket pocket that evening.

On December 10, 2020, the defendant recalled that his brother-in-law was driving a brand new car that cost a half a million dollars to take him to a rough neighborhood in Yonkers for a podcast interview and that, between the two of them, they were wearing jewelry worth approximately \$250,000³ and for these reasons, was carrying a loaded firearm that evening. It was the defendant's testimony that when his friend gave it to him, he said that it was loaded but that he had not checked to confirm this. He stated that he had never held a gun before, that he did not know how to use it, and that he did not try and unload it but that he had it to protect himself in a "very rough neighborhood."

The defendant testified that he had just released a new single and that he was in Yonkers to promote that new single by giving a live interview. At the conclusion of the podcast interview, the defendant was asked if he wanted to do a song with one of the other artists at the studio and, when the defendant agreed, the decision was made for him and his brother-in-law to go out to a nearby liquor store to buy some champagne before they would return for the recording of the song. With his brother-in-law driving and he in the passenger seat, the two men went out, purchased champagne, and were stopped by police shortly after leaving the liquor store.

Consistent with the testimony of the People's witnesses and Mr. Kerolle, the defendant recalled that one officer approached the driver's side of the vehicle while the other came up to the passenger window. When asked for his identification, the defendant testified that he

³ The defendant testified that if he was going to do a video or an interview or if he had a performance, he would typically wear expensive jewelry.

responded that he did not have a physical identification but had a photograph of it on his phone and that was why he was scrolling through his phone. He told the officer his name, date of birth, and address when he was asked and he testified that the officer never asked that he not look through his phone or to make eye contact with the officer while they were speaking to each other. He also noted that he was not nervous, that he was not acting nervously, that he did not avoid eye contact, and that he did not stutter. The defendant heard the other officer ask his brother-in-law if he had marihuana and heard Mr. Kerolle respond that he had a medical marihuana card and said that he had marihuana in a black plastic bag behind his seat. The defendant testified that while his brother-in-law smoked marihuana and smelled of marihuana (as did his car) that he, on the other hand, did not smoke marihuana and that there was none on the floorboard or seat of the car.

When asked to get out of the car, the defendant testified that he complied and that, in response to being asked whether he had anything on him that the officer needed to worry about, he responded that he did not. In describing the pat down search that followed, the defendant testified, as had Officer Berni, that it began at his waist band. The officer put his hand around the defendant's waist and slid it under his belt with his thumbs above the belt. Afterwards, he searched the top of the defendant's chest. The defendant characterized his demeanor as calm and cooperative and he noted that at one point, the officer thanked him for being so calm and asked him how he should get the gun out of his (the defendant's) pocket without accidentally shooting the defendant.

.CONCLUSIONS of LAW

The defendant seeks suppression of physical evidence, particularly the loaded 9-millimeter Kel Tec P-11 handgun which the People maintain, and the defendant concede, was seized from his jacket pocket in the course of a pat down search that followed a traffic stop. On a motion to suppress evidence, the defendant bears the ultimate burden of proof, by a preponderance of the evidence, when challenging the legality of a search and seizure, but the People bear the initial burden to show the legality of the police conduct in the first instance (*People v Ramirez-Portoreal*, 88 NY2d 99 [1996]; *People v Wise*, 46 NY2d 321 [1978]; *People v Whitehurst*, 25 NY2d 389, 391 [1969]; *People v Berrios*, 28 NY2d 361, 367 [1971]; *People v Spann*, 82 AD3d 1013, 1014 [2d Dept 2011]; *People v Hernandez*, 40 AD3d 777, 778 [2d Dept 2007]; *People v Moses*, 32 AD3d 866 [2d Dept 2006]). In evaluating the police action, the court must determine whether it was justified at its inception and whether it was reasonably related in scope to the circumstances present at the time (*People v DeBour*, 40 NY2d 210, 215 [1976]). To that end, the credibility determinations of the hearing court will be entitled to great deference on appeal and will not be disturbed unless clearly unsupported by the record (*People v Watson*, 163 AD3d 855, 856-857 [2d Dept 2018]).

In evaluating police conduct, the court must determine whether the actions taken were justified at every stage of the encounter (*see People v DeBour*, 40 NY2d 210, 223 [1976]; *People v Finlayson*, 76 AD2d 670, 678 [2d Dept 1980]). A forcible stop and seizure by police requires

reasonable suspicion of criminal activity (see *People v Spencer*, 84 NY2d 749, 753 [1995]; *People v Sobotker*, 43 NY2d 559, 563 [1978]). Reasonable suspicion is “the quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe that criminal activity is at hand” (*People v Sobotker*, 43 NY2d at 564). “To achieve a level of reasonability, the police officer’s suspicion must be ‘based upon specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion’” (*People v Riggio*, 202 AD2d 609, 610 [2d Dept 1994], quoting *Terry v Ohio*, 392 US 1, 21 [1968]; see *People v Hicks*, 68 NY2d 234, 238 [1986]). “Resolution of the issue of whether [an officer] possessed reasonable suspicion requires evaluation of the totality of the circumstances” (*People v Loper*, 115 AD3d 875, 879 [2d Dept 2014]; *People v Williams*, 69 AD3d 663-664 [2d Dept 2010]).

On this record that the officers had probable cause to effect a traffic stop of the Mercedes in which the defendant was a passenger based upon their confirmed observation of window tint so excessive they were unable to see through them to the interior of the vehicle even with the patrol vehicle’s headlights engaged (VTL § 375[12-a][b]). Indeed the defendant concedes that the stop for the purposes of issuing the driver a traffic summons was entirely lawful. Moreover, upon making a valid traffic stop, the officers had the discretionary authority to order the occupants to exit the vehicle (*People v Garcia*, 20 NY3d 317, 321 [2012]; *People v Robinson*, 74 NY2d 773, 774-775 [1989]; *People v Grant*, 83 AD3d 862, 863 [2d Dept 2011]). Further, the warrantless search of the Mercedes was also permissible under the automobile exception since police had reasonable cause to believe that the vehicle contained contraband inasmuch as both officers detected the odor of burnt marijuana as they approached the car (a fact which defendant concedes) and the driver of the vehicle admitted having marijuana in a bag in the backseat (see *People v Blasich*, 73 NY2d 673, 678-679 [1989]; *People v Thomas*, 181 AD3d 831, 833 [2d Dept 2020])⁴.

To conduct a protective pat-down search as Officer Berni did in this case, the officer must “harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous” (*Arizona v Johnson*, 555 US 323, 327 [2009]; *People v Batista*, 88 NY2d 650, 653-654 [1996]; *People v Robinson*, 74 NY2d 773, 774 [1989]). There is no indication here that Officer Berni’s

⁴ In this regard, the court is mindful of the enactment of the Marijuana Regulation and Tax Act, which became effective in 2021, subsequent to this incident, and which amended the Penal Law, inter alia, with the addition of an article legalizing the possession by persons over the age of 21 with a specified amount of cannabis (Penal Law § 222.05[1], as added by L 2021, Chapter 92, § 16). This provides that “no finding or determination of reasonable cause to believe that a crime has been committed,” can be founded “solely on evidence” of “the odor of Cannabis” or, with limited exception, “the odor of burnt cannabis” or the possession of marijuana in an authorized amount (Penal Law § 222.05[3][a],[b],[c],[e]). Such does not invalidate a search that, when conducted, was lawfully supported by probable cause to believe that a substance then contraband in any amount would be found in the car (*People v Babadzhanov*, 22 NY Slip Op 02273 [2d Dept, April 6, 2022]; PL § 221.05).

suspicion was more than a hunch, certainly there was no record evidence that would justify a pat-down for officer safety inasmuch as neither the body camera video footage nor the testimony of the officers gives rise to a reasonable suspicion that the defendant was armed. Officer Berni testified that he conducted the pat-down for his own safety because he suspected that the defendant might be in possession of a weapon. He testified that his suspicion was founded in his observation of the defendant engaging in certain nervous behavior such as failing to make and maintain eye contact and stuttering speech, however neither behavior may properly be characterized as furtive or particularly suggestive of dangerousness and, in any event, his observations are not supported by the body-worn camera footage entered into evidence which confirms that the defendant was calm and cooperative.

In the body-worn camera video, the defendant can be observed not only making eye contact with the officer but giving calm, responsive answers in unaffected speech. Further, in getting out of the car, the defendant did not engage in aggressive, suspicious, evasive, or furtive behavior that would justify a protective pat-down. Such evidence, or lack of evidence, negates a finding of reasonable suspicion that the defendant was armed or posed a threat to the officer. As the officer offered a reason for a pat-down that the record facts do not support, the court cannot find that the People have met their burden of going forward to establish the legality of police conduct in the first instance. Without reasonable suspicion that Officer Berni or his partner were in danger of physical injury or that the defendant was armed, or probable cause to believe that contraband would be discovered on the defendant's person, the protective pat-down was unlawful and requires suppression of the handgun that was discovered and recovered as a direct consequence of that search (*see Terry v Ohio*, 392 US 1 [1968]; CPL 140.50[3]; *People v Reid*, 24 NY3d 615 [2015]).

In a suppression hearing, the court must evaluate the reason that the officer proffers for the pat-down search of a motorist, rather than the powers that the officer possessed but elected not to exercise (*see People v Reid*, 24 NY3d 615 [2015]). In this regard, it is important to take particular note that the pat-down of the defendant that resulted in the recovery of the firearm cannot be justified as a search for marihuana. In the first instance, while there is testimony that one of the reasons the defendant was directed to get out of the car was so that police could search for the "extra marihuana," the context of the record supports that the so-called "extra marihuana" the officer intended to search for was Mr. Kerolle's marihuana which he admitted was in the backseat of the vehicle. There is insufficient credible evidence on this record that Officer Berni initiated the pat-down search of the defendant for the purposes of recovering marihuana *on the defendant's person* or that he had any present intention to arrest the defendant at the time of the search. The court does not credit, and the body camera video does not corroborate, testimony suggesting that a minuscule amount of green leafy vegetation was visible to the officer on the bucket seat upon which the defendant sat *prior* to exiting the vehicle nor testimony that marihuana was visible on the floorboard of the vehicle *prior* to the defendant getting out of the car.


Not only did Officer Berni himself testify that he expected to find a weapon on the defendant based on his so-called nervous behavior, he consistently characterized the purpose of his search as having been motivated by officer safety. Moreover, the officer initiated the search not in the defendant's pockets where presumably marihuana would most reasonably be found, but rather at the defendant's waistband which is entirely consistent with a safety pat-down search for a weapon.

Finally, the pat-down search cannot be justified as having been incident to arrest since this doctrine requires proof that, at the time of the search, an arrest has either already occurred or is about to occur. Where, as here, no arrest had taken place at the time of the search, the officer must have intended to make one if the search incident to arrest exception is to be properly applied and here, there is no evidence that such was the case and, in fact, the defendant was never charged with unlawful possession of marihuana (*see People v Reid*, 24 NY3d 615, 620 [2014]).

Accordingly, for the reasons stated herein, the defendant's motion to suppress the loaded 9-millimeter Kel Tec P-11 handgun that was recovered from his interior jacket pocket is granted.

This constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
April 15, 2022



ANNE E. MINIHAN
Acting Justice of the Supreme Court

TO:

HON. MIRIAM E. ROCAH
District Attorney, Westchester County
111 Dr. Martin Luther King, Jr. Boulevard
White Plains, NY 10601
By: Christopher Clark, Esq.
Assistant District Attorney

PORTALE RANDAZZO, LLP
Counsel to Defendant Quame Riley
245 Main Street, Suite 340
White Plains, NY 10601
By: Richard Portale, Esq.
Chad Mair, Esq.