

People v Newson
2017 NY Slip Op 07752
Decided on November 8, 2017
Appellate Division, Second Department
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Decided on November 8, 2017 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department

L. PRISCILLA HALL, J.P.
SANDRA L. SGROI
JOSEPH J. MALTESE
COLLEEN D. DUFFY, JJ.

2013-09493
(Ind. No. 2308/11)

[*1] The People of the State of New York, respondent,

v

Takim Newson, appellant.

Paul Skip Laisure, New York, NY (Jenin Younes of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, NY (John M. Castellano, Johnnette Traill, Joseph Ferdenzi, and Heather H. Marshall of counsel), for respondent.

DECISION & ORDER

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Latella, J.), rendered September 26, 2013, convicting him of robbery in the first degree (two counts), robbery in the second degree (three counts), criminal possession of a weapon in the second degree (two counts), criminal possession of a weapon in the third degree, criminal possession of stolen property in the fifth degree, failing to stop at a steady red signal, and making an unlawful turn, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing (Paynter, J.), of those branches of the defendant's omnibus motion which were to suppress physical evidence and his statements to law enforcement officials.

ORDERED that the judgment is modified, on the law and the facts, by vacating the convictions of robbery in the first degree (two counts), robbery in the second degree (three counts), criminal possession of a weapon in the second degree (two counts), criminal possession of a weapon in the third degree, and criminal possession of stolen property in the fifth degree, vacating the sentences imposed thereon, and dismissing those counts of the indictment; as so modified, the judgment is affirmed, and those branches of the defendant's omnibus motion which were to suppress physical evidence and his statements to law enforcement officials are granted.

3-to-1

8TS - Founded Suspicion

After stopping
A's car for
a traffic violation,
police lacked a
founded suspicion
of criminality and
thus lacked the
authority

to ask whether there
was anything illegal in
the vehicle. Subsequent
consent was thus unlawfully

obtained and
all

facts -- physical
evidence + statements --
suppress ✓.

At a suppression hearing, the People elicited testimony from the arresting officer, the detective who interviewed the defendant at the police station, and the officer who assisted the arresting officer in conducting an inventory search of the defendant's vehicle.

The arresting officer testified that at approximately 3:30 a.m. on the night at issue, a red Mitsubishi traveling at a high rate of speed cut off the unmarked police vehicle that he had been driving, made a left turn from the far right lane of traffic, and then made another left turn through a red light. The officer testified that, as a result, he directed the vehicle, which was driven by the defendant, to stop. The officer also testified that, at the time he stopped the vehicle, he had no suspicion that the vehicle or its occupants were connected in any way to a radio run he had received approximately 20 minutes earlier describing a black man wearing a "blue shirt and blue pants" and carrying a firearm in his waistband who had fled on foot from the area of "70-20 Grand Avenue."

The arresting officer further testified that after the vehicle stopped, he approached the driver's side, where the defendant was sitting in the driver's seat, and his partner approached the passenger's side, where a male passenger was sitting in the front seat. The officer testified that he observed a Coach handbag in the back seat of the vehicle, but he also testified that, at that point, he had no knowledge that the handbag may have been the subject matter of a potential robbery.

The arresting officer testified that as he approached the vehicle, he thought the front seat passenger could "possibly fit[]" the description from the radio run because he was a black male wearing all dark clothing. The officer admitted that the passenger had been wearing grey jeans and a black jacket, not blue pants or a blue shirt, but indicated that in his experience, witnesses easily confuse blue and black.

The officer did not immediately ask the passenger to get out of the vehicle; instead, he asked the defendant, who was still seated in the vehicle, if there was "anything illegal" on him or in the vehicle. According to the officer, the defendant replied, "No, officer. You can check." The officer did not testify that at that time of his inquiry he was in fear for his safety. Although the officer testified that at the time the defendant responded to his inquiry, the officer smelled a strong odor of alcohol coming from the defendant, his question about "anything illegal" was not based on the smell of alcohol or his belief that the passenger looked like the reported gunman, and he never performed a breathalyzer or other sobriety test on the defendant. The officer also testified that neither he nor his partner drew a gun even though he thought the passenger might have matched the description of a man in dark clothing with a gun.

The officer testified that he directed the defendant to step out of the vehicle and move to the rear of the vehicle, where he frisked the defendant but did not recover a weapon. The officer and his partner then switched places, and the officer removed the passenger from the vehicle and moved the passenger to the rear of the vehicle. The officer frisked the passenger but did not recover a weapon.

The officer testified that he asked the defendant where he was coming from, and the defendant answered that he was coming from a strip club and admitted that he had been drinking. The officer testified that this discussion occurred after the defendant had been removed from the vehicle and after the officer had asked the defendant if there was anything illegal on him or in the vehicle. According to the officer, at the time he entered and looked inside the vehicle, the defendant and the passenger were standing at the rear of the vehicle, and he knew that they were unarmed. The defendant and the passenger were not free to go at that point.

The officer testified that although he had no knowledge that the Coach handbag may have been involved in a robbery, the handbag "grabbed [his] attention," and he had a hunch or suspicion that there might be something wrong with two men driving with a handbag in the backseat. Next to the handbag, he saw a camera and a cell phone. The officer looked inside the handbag to see if there were any markings that would identify the owner and then turned on the camera and saw that all the photographs were of Asian people. The officer testified that he asked the defendant who the camera belonged to, and the defendant replied that it belonged to his girlfriend, who he described, upon further questioning, as "Dominican." The officer further testified that when he asked the defendant why all the photographs in the camera were of Asian people, the defendant explained that "he [had] bought it off of a crack head in the Rockaways."

According to the officer, he then retrieved the cell phone and dialed the most recent number on the phone. The officer testified that a young woman answered and informed him that the handbag, camera, and cell phone belonged to an Asian exchange student then living in Flushing. The woman reported that she had seen the owner of the property earlier in the evening and that she could not explain how the items came into the defendant's possession. The officer arrested the defendant and the passenger and called for another police vehicle.

According to the arresting officer, when the next police vehicle arrived, the officers used its computer data system to search then-recent police reports, one of which showed that a Coach [*2]handbag, a cell phone, and a camera matching the description of the items in the defendant's vehicle had been stolen earlier that evening. The officer testified that at that point he knew a crime had been committed, and the officers then transported the defendant, the passenger, and the Mitsubishi back to the police station.

The arresting officer and an officer who assisted him with an inventory search of the vehicle both testified about the inventory search, and about the handgun that the assisting officer found behind the radio face bracket that held the center console radio, which seemed to be "unclicked."

The detective who interviewed the defendant testified that the defendant initially declined to speak with him when he encountered the defendant at around 5:30 a.m. at the police station. The detective did not advise the defendant of his *Miranda* rights (see *Miranda v Arizona*, 384 US 436) at this first meeting, and he and his partner returned the defendant to a holding cell after the defendant declined to speak with them. The detective further testified that he had no further contact with the defendant until approximately seven hours later. At that time, the detective again was in the interview room with the defendant and asked him if he would like to speak about the incident. When the defendant asserted that he would, the detective advised the defendant of his *Miranda* rights by reading a preprinted card to the defendant. The defendant signed a written waiver of his *Miranda* rights.

The defendant spoke to the detective approximately nine hours after he was arrested and made several inculpatory statements regarding where he got the gun, how close he had been to the person he robbed, and what he was planning to do with the camera. The interview lasted approximately one hour but was not videotaped, and the defendant did not sign a statement. Thereafter, the defendant was charged in a 13-count indictment with, inter alia, robbery in the first degree (two counts), robbery in the second degree (three counts), criminal possession of a weapon in the second degree (two counts), criminal possession of a weapon in the third degree, criminal possession of stolen property in the fifth degree, failing to stop at a steady red signal, and making an unlawful turn.

The suppression court denied those branches of the defendant's omnibus motion which were to suppress the physical evidence found in the backseat of the Mitsubishi, the gun, and the defendant's statements to the police. The court, crediting the testimony of the arresting officer and the other prosecution witnesses, concluded that the initial traffic stop was justified and that the defendant consented to the search of the vehicle. The court also determined that the inventory search was valid and that, in any event, the police were authorized to search the entire vehicle. Finally, the court concluded that the defendant's statements at the police station were admissible because they were made after a voluntary waiver of his *Miranda* rights.

After a jury trial, the defendant was convicted of all counts submitted to the jury. The defendant appeals.

Contrary to the People's contentions, the defendant properly preserved the issues raised herein for appellate review (see CPL 470.05[2]).

"At a suppression hearing, the prosecution has the initial burden of going forward with evidence to demonstrate the legality of the police conduct in the first instance" (*People v Moses*, 32 AD3d 866, 868). Accepting the testimony of the arresting officer as true (see *People v Condon*, 100 AD3d 920, 920), we nevertheless find that the branch of the defendant's omnibus motion which was to suppress the physical evidence should have been granted. The evidence established that the officer did not have a "founded suspicion that criminality [was] afoot" that would justify his question as to whether the defendant had anything illegal in the vehicle (*People v Garcia*, 20 NY3d 317, 324; see *People v De Bour*, 40 NY2d 210, 215). Although the stop was justified by the traffic violations, the intrusiveness of the officer's conduct exceeded that which is permissible during a normal traffic stop (see *People v Woods*, 189 AD2d 838, 842; *People v Mikel*, 152 AD2d 603, 605). The officer did not testify to any suspicious actions

by the defendant, nor did he testify that he felt threatened [*3] in any way or offer any other justification for asking the defendant if there was anything illegal in the vehicle or for frisking the defendant (see *People v Woods*, 189 AD2d at 842; *People v Mikel*, 152 AD2d at 605).

Any subsequently acquired suspicion that the officer formed when he searched the Coach handbag, the cell phone, and the camera did not justify the officer's question that preceded the search as to whether there was anything illegal in the vehicle (see *People v Milaski*, 62 NY2d 147, 155-156; *People v De Bour*, 40 NY2d at 215-216). "[A] request for information involves basic, nonthreatening questions regarding, for instance, identity, address or destination. . . . Once [an] officer asks more pointed questions . . . the officer is no longer merely seeking information . . . [and the inquiry] must be supported by a founded suspicion that criminality is afoot" (*People v Hollman*, 79 NY2d 181, 185). Here, the officer's testimony demonstrated that his question to the defendant as to whether there was anything illegal in the vehicle was based on his observations of the traffic violations and on his speculation that the passenger, not the defendant, possibly matched the description of the man in the radio run. Those facts are insufficient to constitute founded suspicion that criminality was afoot (see *People v Garcia*, 20 NY3d at 324; *People v De Bour*, 40 NY2d at 225-226; *People v Turriago*, 219 AD2d 383, 387-388, *mod* 90 NY2d 77; *People v Woods*, 189 AD2d at 842). As the officer's question was not supported by the requisite founded suspicion that criminality was afoot, the fruit of that unlawful inquiry must be suppressed (see *People v Milaski*, 62 NY2d at 155-156; *People v De Bour*, 40 NY2d at 217).

Thus, the Coach handbag, the cell phone, and the camera should have been suppressed as fruit of an illegal search, as well as the gun that was subsequently found upon an inventory of the vehicle (see *People v Garcia*, 20 NY3d at 324; *People v Rossi*, 80 NY2d 952, 954; *People v Smith*, 98 AD3d 590, 592-593; *People v Woods*, 189 AD2d at 842; see also *People v Turriago*, 219 AD2d at 391).

Contrary to the People's contention, the suppression record did not demonstrate that the causal connection between the illegal search and the defendant's statements was sufficiently attenuated to purge the taint of the illegal search (see *People v Harris*, 77 NY2d 434, 441; *People v Woods*, 189 AD2d at 842; see also *People v Bradford*, 15 NY3d 329, 333; *People v Conyers*, 68 NY2d 982, 983; *People v Rogers*, 52 NY2d 527). Accordingly, the physical evidence, as well as the statements that the defendant made to law enforcement officials, must be suppressed (see *Taylor v Alabama*, 457 US 687, 694, *Wong Sun v United States*, 371 US 471, 485; *People v Harris*, 77 NY2d at 441).

Without the statements and physical evidence that should have been suppressed, there could not be sufficient evidence to prove the defendant's guilt of the robbery or the related charges. Thus, all counts of the indictment other than those for traffic violations must be dismissed (see *People v Rossi*, 80 NY2d at 954; *People v Smith*, 98 AD3d at 592-593; *People v Woods*, 189 AD2d at 842; see also *Wong Sun v United States*, 371 US at 485).

In light of our determination, we need not reach the defendant's remaining contention.

HALL, J.P., SGROI, and DUFFY, JJ., concur.

MALTESE, J., dissents, and votes to affirm the judgment, with the following memorandum:

Contrary to the view of my colleagues in the majority, I agree with the suppression court that the arresting officer's efficient and reasonable inquiry at the scene was justified under the totality of the circumstances and that the police conduct in this case was lawful.

I do not explicitly disagree with my colleagues' recitation of the arresting officer's testimony at the suppression hearing. However, I do believe that this evidence, when viewed as a whole and in light of the reasonable inferences that may be drawn therefrom, paints a picture that is different from the one presented by my colleagues. I believe, as did the suppression court, that the [*4] evidence sets a scene wherein the arresting officer was reasonably suspicious of some manner of criminal activity afoot (see *People v De Bour*, 40 NY2d 210) and the defendant volunteered his consent to "check" his car for contraband.

At 3:10 a.m. on a Saturday morning, the arresting officer was in uniform and on patrol duty in an unmarked police vehicle when he received a radio run describing an armed man fleeing the front of a deli in Queens. The officer and his partner drove to

the specified location and canvassed the area, but they did not locate the suspect described in the radio run. Twenty minutes later, at approximately 3:30 a.m., the defendant drove a red Mitsubishi at a high rate of speed and cut off the unmarked police vehicle. The defendant made a left turn from the far right lane of traffic, and then made another left turn through a red light. Due to these traffic infractions, the officer turned on his emergency lights, and the defendant slammed on the brakes and came to a sudden stop in the middle of the road. Using his loudspeaker, the officer directed the defendant driver to pull over.

The officer then approached the driver's side of the vehicle, and his partner approached the passenger side, where a passenger was sitting in the front passenger seat. Neither officer removed their weapons from their holsters. While the officer was approaching the vehicle, he observed a Coach brand woman's handbag in the backseat. At first, as aptly noted by the majority, he thought that the front-seat passenger "possibly fit[]" the description from the radio run (both the defendant and the passenger were young black males). The officer smelled a strong odor of alcohol coming from the defendant. When the officer asked the defendant if there was anything illegal on him or in the vehicle, the defendant immediately replied, "No, officer. You can check." The officer directed the defendant and his passenger to step out of the vehicle. Both men were frisked and no weapons were found. When the officer asked the defendant where he was coming from, the defendant said that he was coming from a strip club, and he confirmed that he had been drinking alcohol.

While the defendant and the passenger were standing outside the car, the officer looked into the backseat. There were several items in the backseat, including the Coach handbag. The officer stated that the handbag "grabbed [his] attention" because something seemed strange about two men driving a vehicle with a handbag in the backseat. Next to the handbag, the officer saw a camera and a white cell phone. Acting upon the defendant's unsolicited consent to "check" the vehicle for illegal items, the officer looked inside the handbag to see if any markings identified its owner. The officer also turned on the camera and saw that all the photographs were of people who appeared to be Asian. When the officer asked "who the camera belonged to," the defendant stated that it belonged to his girlfriend, who he described as "Dominican," and said that he "bought [the camera] off of a crack head in the Rockaways." Then, the officer picked up the cell phone and dialed the most recent number. A young woman answered and informed the officer that the handbag, camera, and cell phone belonged to an Asian exchange student who lived in Flushing. The woman on the phone had seen the owner of the property earlier that evening, and she could not explain why the items were in the defendant's possession. At this point, the officer arrested the defendant and the passenger and called for another police vehicle.

When the next police vehicle arrived, the officers used its computer to search recent police reports. A robbery complaint report showed that a matching Coach handbag, cell phone, and camera had been taken during a robbery earlier that evening. Thereafter, the officers transported the defendant, the passenger, and the vehicle back to the police station.

During an inventory search of the vehicle, conducted pursuant to procedures set forth in the New York City Patrol Guide, a police officer visually inspected the center console radio and noticed that the radio face bracket appeared to be "unclicked" or "unsnapped." Further inspection led to the discovery of a handgun behind the face bracket.

At the police station, the defendant signed a written waiver of his *Miranda* rights (see *Miranda v Arizona*, 384 US 436) and made several inculpatory statements. Among other things, he explained how he obtained the handgun, his proximity to the robbery victim, and his plan to sell the camera. The interview lasted approximately one hour.

The defendant did not present any evidence at the suppression hearing.

After the hearing, the suppression court, crediting the People's witnesses, concluded that the traffic stop was justified, the defendant voluntarily consented to a search of the vehicle, the subsequent inventory search was valid, and the defendant's statements at the police station were voluntarily made after he waived his *Miranda* rights. I agree.

On these facts, the prosecution met its initial burden of going forward with evidence demonstrating the "legality of the police conduct in the first instance" (*People v Moses*, 32 AD3d 866, 868).

In New York, the propriety of an encounter between a police officer and a person is generally measured by the graduated four-level test set forth in *People v De Bour* (40 NY2d 210; see *People v Garcia*, 20 NY3d 317). The relevant inquiry is whether

the encounter was justified at its inception and whether the police action was "reasonably related in scope to the circumstances which rendered its initiation permissible" (*People v De Bour*, 40 NY2d at 222; see *People v Moore*, 6 NY3d 496, 498).

Here, we all agree that there was a valid vehicle stop, justified by the arresting officer's observation of multiple traffic offenses. In my view, the timing and nature of the several traffic offenses did more than justify the stop. These high-speed traffic violations, committed with abandon in the wee hours of the morning on a Saturday, would provide a reasonable officer with grounds not only to make a traffic stop, but also to develop reasonable suspicion that something more sinister may be afoot (cf. *People v Graves*, 142 AD3d 559, 560; *People v Jackson*, 158 AD2d 545, 545). Although the arresting officer may have better articulated his thought process as to why he proceeded the way he did, the suppression court considered all the evidence adduced by the People and made logical inferences in reaching a determination as to whether the police conduct was lawful. In addition to the time of night and the defendant's high rate of speed and erratic driving, the officer testified that the passenger might have fit a description of a gun-toting suspect from a recent radio run. More importantly, the officer's suspicion was further aroused when he saw a Coach handbag in plain view before he reached the driver's side window. He thought it unusual that two men out for a late night, high-speed ride had a handbag in the backseat. Under these circumstances, the suppression court properly concluded that the traffic stop was valid and that the arresting officer's conduct, including ascertaining where the driver and occupant were coming from—a strip club where they acknowledged that they were drinking—and asking whether the defendant had anything illegal in the vehicle, was a justified level-two inquiry (see *People v De Bour*, 40 NY2d at 215-222; *People v Graves*, 142 AD3d at 560; *People v Brito*, 244 AD2d 631; cf. *People v Garcia*, 20 NY3d at 324; *People v Battaglia*, 86 NY2d 755, 756; *People v Stevenson*, 7 AD3d 820, 821; *People v Williams*, 300 AD2d 684, 685).

Further, the suppression court properly concluded that the defendant volunteered his consent to search the vehicle. "Consent to search, a relinquishment of constitutional protection under both the Federal and State Constitutions against unjustified official intrusion, must be a free and unconstrained choice. Official coercion, even if deviously subtle, nullifies apparent consent. Whether consent has been voluntarily given or is only a yielding to overbearing official pressure must be determined from the circumstances" (*People v Gonzalez*, 39 NY2d 122, 124; see *People v Turriago*, 219 AD2d 383, 389, *mod* 90 NY2d 77). The People have a heavy burden of proving the voluntariness of a defendant's consent to a search, "which is a question of fact that must be determined from the totality of the circumstances" (*People v Quagliata*, 53 AD3d 670, 671; see *People v Concepcion*, 69 AD3d 956, 956, *mod* 17 NY3d 192). Here, considering the totality of the circumstances, the People met their burden of demonstrating that the defendant's consent was voluntarily given and was not the product of coercion (see generally *People v Xochimiltl*, 147 AD3d 793, 794).

Significantly, the arresting officer never asked the defendant for his consent to search the vehicle (cf. *People v Irizarry*, 79 NY2d 890, 892; *Matter of Antoine W.*, 79 NY2d 888, 890). Instead, the defendant immediately responded to the officer's question about whether he had [*5] anything illegal on his person or in the vehicle, "No, officer. You can check." Moreover, there was little or no indicia of coercion prior to the defendant volunteering his consent to "check" the vehicle (cf. *People v Gonzalez*, 39 NY2d 122). The record demonstrates that the arresting officer and his partner never laid hands upon their firearms, let alone removed them from their holsters (cf. *People v Quagliata*, 53 AD3d at 672). Instead, the officer asked a simple question, which promptly yielded the defendant's voluntary consent to go ahead and "check" the vehicle. There was not a prolonged period of questioning or detainment, and there was no indicia of harassment (see *People v Leiva*, 33 AD3d 1021, 1023; cf. *People v Woods*, 189 AD2d 838, 839-843; *People v Mikel*, 152 AD2d 603, 605).

Accordingly, because the police conduct was lawful and the proceeds of the robbery were obtained after the defendant volunteered his consent to search the vehicle, the suppression court properly denied those branches of his omnibus motion which were to suppress the handbag, the cell phone, and the camera (see *People v Abraham*, 111 AD3d 756, 757; cf. *People v Turriago*, 219 AD2d at 387).

Further, the suppression court properly declined to suppress the handgun discovered during the inventory search of the defendant's vehicle. Inventory searches of an automobile after the lawful arrest of the driver are permissible as an exception to the warrant requirement (see *People v Padilla*, 21 NY3d 268, 272; *People v Morman*, 145 AD3d 1435, 1436). Here, the evidence at the suppression hearing demonstrated that the inventory search was valid because it was conducted pursuant to established police

procedures and the items removed from the vehicle were each assigned a voucher number (see People v Taylor, 92 AD3d 961, 962; cf. People v Gomez, 13 NY3d 6, 11), which created a "usable inventory" of the vehicle's contents (People v Ewart, 130 AD3d 1062, 1062 [internal quotation marks omitted]; see People v Cochran, 22 AD3d 677, 677-678).

At trial, the robbery victims identified the Coach handbag, the camera, and the cell phone as the items forcibly taken from them.

In sum, it is my view that, under the totality of the circumstances in this case, the police officers used their training and experience to ask simple and reasonable questions, when they possessed reasonable suspicion that criminality may be afoot, to resolve the situation peacefully rather than drawing their guns or otherwise threatening or using unnecessary force. Consequently, the suppression court properly denied suppression of the Coach handbag, the cell phone, the camera, the gun, and the defendant's statements to police.

Accordingly, I would affirm the judgment of conviction.

ENTER:

Aprilanne Agostino

Clerk of the Court

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