STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

The People of the State of New York

vs INDICTMENT NO. 01681-2019

Demario Robbins,

Defendant.

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Erie County District Attorney
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DECISION AND ORDER

PAUL B. WOJTASZEK, J.S.C.

The defendant is charged by this Indictment with Criminal Possession of a Weapon in the Second Degree, Penal Law § 265.03 (3). He moves pursuant to CPL § 710.20 to suppress physical evidence and statements allegedly made by him.

A hearing was conducted pursuant to People v. Ingle, 36, NY2d 413 (1975), 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). On consent of the People and the defendant the hearing was reopened to admit the glass jar seized from the vehicle after the defendant's arrest. At that time, the People disclosed to the defendant arresting Officer

Ronald Ammerman's Departmental file prepared in connection with an ongoing investigation into his conduct during a recent publicized arrest in May 2020. The defendant contends that the court should consider this information in assessing the officer's credibility, Giglio v. United States, 405 U.S. 150 (1972).

Officers Ronald Ammerman, Jake Giarrano and Majed Ottman as well as Detective Joseph Acquino testified.

The credible evidence at the hearing revealed that Officers Ammerman and Giarrano were in uniform driving a marked patrol car on August 5, 2019 at 6:30 p.m. when they observed a Lincoln Sedan with excessive window tint driving eastbound on Adam Street near Sycamore Street in the City of Buffalo. They activated their lights and initiated a vehicle stop. Officers Ammerman and Giarrano approached the passenger side and immediately asked the occupants for identification and if they had any pot. The officers did not tell the occupants they smelled marijuana. The front seat passenger, Daquan Marshall, was removed first and searched before being placed in a patrol car. The defendant, seated in the rear driver's side seat, was removed and in the process a handgun was observed in his waistband. In a frenetic flurry of activity, Officers Ammerman and Giaranno forcibly subdued and restrained the defendant. Officer Giarrano removed the gun and threw it several feet away to prevent the defendant's access to it. It was made safe and confiscated. Officer Ammerman drew his gun during the struggle and threatened to "blow the defendant's brains out" if he did not comply with his orders to get on the ground and put his hands behind his back.

Several police cars and officers responded to the scene to assist the arresting officers. Among them was Majed Ottman who advised the defendant of the appropriate

Miranda Warnings from a card. The defendant was handcuffed and seated in the rear of a patrol car. The defendant indicated he understood his rights but no questions were asked of him at the scene or during the transport to C District and then Buffalo Police Department Headquarters.

The driver of the Lincoln, Michael Crockett, who was known to Officer Ammerman, was cited for excessive window tint despite no official measurement of light transmittance. The basis for the determination was a comparison between the patrol car's windows, which have the maximum legal tint limit, and the Lincoln's windows. Officer Ammerman testified a tint meter was available to him, while Officer Giarrano testified he did not have one and the Buffalo Police Department did not issue tint meters to its officers.

It should be noted that Officer Giarrano testified that scraps of marijuana were observed near the shifter but none were recovered, photographed or referenced in any police reports or arrest data reports. Officer Ammerman testified he smelled a strong odor of marijuana coming from the car but did not specify if it was burning or raw. He also testified he has made hundreds of marijuana arrests prior to August 5, 2019 despite being a patrol officer for less than three years. Both officers testified they had training relative to the detection of marijuana at the Police Academy. No marijuana was recovered, nor any paraphernalia, such as roaches or blunts, lighters or related items. The occupants denied having any marijuana. The Lincoln was searched at the scene following the defendant's arrest. Officer Giaranno recovered a closed covered glass jar from the closed center console which he claimed contained green-brown wax material consistent with THC oil. Officer Ammerman testified the jar contained green vegetable

matter and was recovered from the passenger door. Nowhere in the video was the observation of the smell of marijuana mentioned or conveyed to the occupants. Officer Ammerman asked the occupants if they had anything other than pot in the car without making an observation of any criminal activity. There was no proof that any crime had been reported or that the location was a high crime area. At no time did any police officer ask for consent to search the vehicle or the occupants.

The defendant was ultimately taken to Buffalo Police Department Headquarters and turned over to Detective Acquino, who was assigned to investigate gun violence cases. Detective Acquino immediately readvised the defendant of the appropriate Miranda warnings and the defendant said he understood them. The defendant did not appear to be under the influence of drugs or alcohol. The defendant did not invoke his rights to counsel or to remain silent. No promises or threats were made to the defendant and no coercion was used.

The defendant then made the statement contained in the 710.30 Notice that he had the gun for protection because he was shot at a couple times recently. The defendant did not make any other statements relative to any other crimes under investigation.

A person must allege standing to suppress physical tangible 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 clothing he wears that society deems reasonable. Further, a passenger in a car has standing to challenge the lawfulness of a vehicle stop. People v. Gonzalez, 68 NY2d 950 (1986).

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).

The stop of the Lincoln was lawful based on the officers' observation of excessive tint. People v. Estrella, 10 NY3d 945 (2008), People v. Collins, 105 AD3rd 1378 (4th Dept. 2013), People v. Fagan, 98 AD3d 1270 (4th Dept. 2012). The lack of a tint meter device to support the ticket issued does not vitiate the reasonable cause determination. At an Ingle hearing, proof beyond a reasonable doubt is not required. People v. Rose, 67 AD3d 1447 (4th Dept. 2009), People v. Saylor, 166 AD2d 899 (4th Dept. 1990). The inconsistent testimony of the two arresting officers relative to having a tint meter goes to their credibility nonetheless.

What occurred pursuant to and after the traffic stop is what is at issue here. People v. Garcia, 20 NY3d (2012) requires courts to apply a People v. DeBour, 40 NY2d 210 (1976) analysis to traffic stops. Accusatory questions or requests for consent to search one's vehicle cannot be made unless police have a Level 2 founded suspicion that criminal activity is afoot.

A police officer is permitted to order the occupants of a stopped vehicle to either exit or remain inside to enable the officer 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.

This Court has the benefit of the officers' body camera footage in addition to their testimony and other proof adduced at the hearing in making its determination. Upon their approach, Officer Ammerman immediately asked all the occupants for identification, not just the driver. Also, without telling the occupants he smelled marijuana, Officer Ammerman asked if they had anything other than "Pot" in the car. No furtive or threatening movements or gestures were observed and the occupants appeared to be cooperative. Any threat from the allegedly excessively tinted windows was eliminated once all the windows were rolled down. The officers then removed the front seat passenger, Daquan Marshall, to search him and then did the same to the defendant, which precipitated the events that led to the seizure of the gun. The officers later said they smelled a strong odor of marijuana. They also said on the video they saw crumbs on the shifter, but took no photos nor referenced it in reports. The officers did not recover any marijuana. They only recovered a small closed covered glass jar that appears to contain virtually nothing inside a closed center console. The jar and its contents were not tested by the lab. There was no marijuana, raw or burnt, nor any paraphernalia recovered from the vehicle or its occupants. Both Officers Ammerman and Giarrano testified that the sole basis for their decision to remove the occupants from the Lincoln was the smell of marijuana. The defendant contends that without a credible basis to conduct the search and seizure that yielded the loaded handgun, his motion must be granted.

The Court is cognizant that it is well settled that an experienced, trained officer's observation of the smell of marijuana is sufficient to constitute probable cause to search a vehicle and its occupants People v. Chestnut, 36 NY2d 971 (1975), People v. Cuffie,

109 AD3rd 1200 (4th Dept 2013), People v. Chestnut, 43 AD2d 260 (3rd Dept. 1974). A brief review of some caselaw precedent is necessary to elucidate the dispositive issue in this hearing. The Court of Appeals decision in People v. Chestnut, supra, the seminal case on this issue, allows police officers with the proper training and experience to do what Officers Ammerman and Giarrano did here if they smell burning marijuana. Its progeny goes further to permit searches of cars and their occupants upon a credible showing that police officers smelled raw or burnt marijuana. People v. Wideman, 121 AD 3d 1514 (4th Dept. 2014), People v. Sykes, 110 AD3d 1437 (4th Dept. 2013), People v. Howington, 96 AD3d 1440 (4th Dept. 2012), People v. Williams, 144 AD3d 1204 (3rd Dept. 2016) *cf.* People v. Virges, 118 AD3d 1445 (4th Dept. 2014), People v. Black, 59 AD3d 1050 (4th Dept. 2009).

The People submit that the facts in People v. Green, 173 AD3d 1690 (4th Dept. 2019) after remittal People v. Green, 66 Misc 3d 1205 (A) (Supreme Court Erie County 2019), People v. Green, 2014 MISC Lexis 6523 Supreme Court Erie County closely parallel the facts here: a traffic stop for a Vehicle & Traffic Law equipment violation, and a loaded gun recovered after a rear seat passenger was removed after the experienced arresting officer smelled marijuana. At first blush the facts appear to match up, however, a closer look proves otherwise. In Green, the arresting officers recovered two small baggies of fresh marijuana pursuant to a search of defendant's person at the scene. Officers also later recovered two additional marijuana cigarettes at the station house during booking. The arresting officer's testimony was further corroborated by the defendant being charged with Unlawful Possession of Marijuana in the lower court.

Hence, the Court's credibility assessment was affirmed by the Appellate Division. The testimony and observations of Officers Ammerman and Giarrano is at best inconsistent on many important details and at worst apparently tailored to overcome constitutional objections. Neither officer differentiated between raw or burning marijuana. Each gave different descriptions of the contents of the glass jar. Although each made reference to "crumbs or scraps" of marijuana through testimony or on the video, none was photographed, recovered, included in reports or tested. The jar, which was closed, virtually empty and recovered from inside a closed center console, hardly lends the ring of credibility to the officers testimony that they smelled a strong odor of marijuana. To analogize the lawfulness of the vehicle stop being supported by the issuance of a summons for excessive tint, the converse applies here for the failure to charge unlawful possession of marijuana. The failure to test the jar's contents for marijuana further militates against crediting the officer's testimony.

Considering the totality of the evidence and the facts and circumstances surrounding the defendant's arrest, the arresting officers' testimony does not strike this Court as credible. Without a valid basis for the accusatory questions under DeBour and its progeny or the removal and search of the occupants from the lawfully stopped vehicle, the People have not met their burden. People v. Smith, 2015 NY Misc Lexis 4719 (County Court Monroe County 2015). Since all warrantless searches presumptively are unreasonable per se, it is the People who have the burden of overcoming this presumption of unreasonableness where a warrant has not been obtained. Absent some exception to the Fourth Amendment and its New York Constitution Counterpart (Article 1 § 12) suppression is required here. People v.

Jimenez, 22 NY3d 717 (2014), People v. Wilcox, 134 AD3d 1397 (4th Dept. 2015).

In People v. Anderson, 65 Misc3d 1201 (A) (Supreme Court Queens County 2019), a recently decided search and seizure case, the Court ruled that the arresting officer's testimony regarding his alleged observation of twelve (12) marijuana crumbs with a flashlight near the driver's feet on the black mat at 1:30 a.m. strains credulity, is contrary to common experience and appears to be tailored to overcome constitutional objections. The Court further opined that the failure to photograph, secure, voucher or test the crumbs or "shake" was crucial to its determination. The Court did not find the testimony regarding the crumbs to be credible. "To put it another way, what crumbles is the officer's credibility as to the central issue." *See also* People v. Maiwandi, 170 AD3d 750 (2nd Dept. 2015), People v. Rutledge, 21 AD3d 1125 (2nd Dept. 2005), People v. Lewis, 600 NYS2d 272 (2nd Dept. 1993), People v. Lebron, 585 NYS2d 498 (2nd Dept. 1992), People v. Miret-Gonzalez, 552 NYS2d 958 (2nd Dept. 1990), People v. Garafolo, NYS2d 500 (2nd Dept. 1974).

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. Yukl, 25 NY2d 585 (1969).

With respect to the statement allegedly made by the defendant to Detective Acquino, this Court has sufficient evidence upon which to make a voluntariness determination. However, in light of the suppression ruling set forth above, no such

analysis need be undertaken. Because the statement flowed directly from the unlawful search and seizure, it is fruit of the poisonous tree and must therefore similarly be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963), People v. Oramus, 25 NY2d 825 (1969).

The attenuation doctrine is not applicable to the facts and circumstances presented here as no intervening circumstances or gaps in temporal proximity between the defendant's arrest and statement were shown, People v. Harris, 77 NY2d 434 (1991).

Accordingly, the defendant's motion is granted in all respects.

This decision constitutes the Order of this Court and no further order is necessary.

DATED: Buffalo, New York

August 4, 2020

PAUL B. WOJTASZEK
Supreme Court Justice