

SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM: PART K-23

P R E S E N T: HON. GREGORY L. LASAK,
Justice.

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THE PEOPLE OF THE STATE OF NEW YORK

- against-

Indictment No.: 2/07

Motion: To suppress identification
and physical evidence.

JOEL BELTRAN, DAVID BERNARD,
JONATHAN CUEVAS, AND JAHFAAR LAMMY,

Defendants.

-----X

EDWARD J. MUCCINI, ESQ.

For the Defendant Lammy

MICHAEL ANASTASIOU, ESQ.

For Defendant Beltran

MICHAEL HORN, ESQ.

For Defendant Bernard

PETER ANTIOCO, ESQ.

For Defendant Cuevas

RICHARD A. BROWN, D.A.

BY: PATRCIA THEODOROU, A.D.A.

Opposed

Upon the foregoing papers, and due deliberation had, the motion is denied. See accompanying memorandum this date.

Kew Gardens. New York

Dated: July 29, 2008



GREGORY L. LASAK
JUSTICE SUPREME COURT

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-23

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THE PEOPLE OF THE STATE OF NEW YORK

BY: GREGORY L. LASAK, J.S.C.

- against -

Indictment No. 2/07

JOEL BELTRAN, DAVID BERNARD,
JONATHAN CUEVAS, AND JAHFAAR LAMMY,

Defendants.

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The following constitutes the opinion, decision and order of the court.

An indictment has been filed against the defendants accusing them *inter alia* of the crime of Robbery in the First Degree (PL §160.15-2). The charge is that on September 19, 2006, the defendants, while armed with a deadly weapon, robbed the complainants.

Defendants, claiming that the People have failed to show that probable cause existed and have moved to exclude the pretrial identification, as well as, the prospective identification testimony upon the ground that they are inadmissible because the prior identification of the three defendants by the prospective witness was improper. Defendants further claim that the seizure of any property from the defendants should also be suppressed.

The People have the burden of going forward to show that probable cause for the arrest did exist, that the pretrial identification procedure was not constitutionally impermissible and the property was properly seized. The defendant, however, bears the burden of establishing, by a preponderance of the evidence, that the procedure was impermissible. If the procedure is shown to be improper, the People then have the burden of proving by clear and convincing evidence that the prospective in-court identification testimony, rather than stemming from the unfair pretrial confrontation, has an independent source.

The People assert that the seizure of the aforesaid property from the defendants was incident to a lawful arrest. The People have the burden, in the first instance, of going forward to

show the legality of police conduct. Defendant, however, bears the ultimate burden of proving by a preponderance of the evidence that the physical evidence should be suppressed.

A pretrial Mapp/Dunaway/Wade hearing was conducted before me on October 11, 2007, January 16, 2008 and March 10, 2008.

Testifying at this hearing were P.O. Kevin Warmhold, P.O. Anthony Scapicchio and P.O. John Dombrowski. I find their testimony to be credible.

I make the following findings of fact:

P.O. John Dombrowski testified that on September 19, 2006, he was working in the confines of the 106 precinct and responded to Maliki Grocery Store, 110-19 Liberty Avenue, Queens County. At approximately 12:10am., Officer Dombrowski meet and spoke to Saheh El Maliki. Approximately forty-five minutes to one hour later, Officer Dombrowski received a communication from a patrol supervisor instructing him to bring the complainant to the vicinity of 85th Street and 88th Avenue. Officer Dombrowski along with P.O. Fryfeld drove the complainant, Saleh El Maliki in a marked radio patrol car to the location where the defendants were being held. The complainant was seated in the back seat of the marked radio patrol car and did not exit the vehicle. Officer Dombrowski stated that he turned the takedown lights on and illuminated the area where the four defendants were being held.

Police Officer Kevin Warmhold testified that on September 18, 2006 he was working in the confines of the 102 precinct. Officer Warmhold was the driver of a marked radio patrol car and at approximately 11:50 pm he received a radio run of a Robbery of a commercial business at 110-19 Liberty Avenue. The information received was for three males, black or Hispanic, all wearing dark clothing armed with a gun. Officer Warmhold was working with his partner Police Officer Anthony Scapicchio. Officer Warmhold testified that they conducted a brief canvas for approximately ten (10) minutes and then continued with their patrol.

At approximately 1:05 am on September 19, 2006, while still on patrol, Officer Warmhold observed a vehicle with dark tinted windows pulling out from in front of a fire hydrant. Officer Scapicchio testified that when he observed the vehicle at the hydrant he believed that the vehicle may have been in the process of being stripped. Due to that fact and the darkness of the tint, the

car was pulled over and the driver was asked to roll down the windows. Four individuals were seated in the vehicle. The driver, David Bernard, was asked to produce his drivers license, insurance and registration. Officer Warmhold testified that as he proceeded to go back to his vehicle he observed a large sum of cash held together by a rubber band (approximately three inches thick) in the magazine holder behind the driver's seat. Officer Warmhold asked defendant Lammy Jahfaar, in the back seat facing the money, who the money belonged to and he responded that it was his mother's laundry money. Defendant Jahfaar was removed from the vehicle and a cell phone was observed on the seat. When asked if it was his cell phone, defendant Jahfaar said it was not. The car contained four male individuals and they were all removed from the vehicle. Seated in the driver's seat was defendant David Bernard, in the front passenger seat was defendant Joel Beltran, in the rear seat behind the driver was defendant Lammy Jahfaar, and the defendant Jonathan Cuevas was in the rear seat behind the passenger. Officer Warmhold then picked up the cell phone which was on the rear seat of the vehicle and asked who it belonged to. Defendant Cuevas stated he purchased it from a friend. Officer Warmhold opened the phone and observed arabic writing on the cell phone. Approximately, eleven cigars were recovered from under the driver's seat of the vehicle defendants were in. Defendant Joel Beltran was searched and a large sum of cash rolled and held together with a rubber band, approximately nine cigars and three rolls of quarters were found in his pockets. Also, under the seat where defendant Beltran was seated, was a large sum of cash rolled and held together with a ruber band. A second cell phone was found stuffed in the rear seat. In the front passenger seat area of the vehicle was one of the victim's, Mohammad Himood's, identification card and part of a wallet. The driver was asked if there was anything dangerous in the vehicle the Officer should know about. The driver, defendant David Beltran, stated Officer Warmhold could look in the car and in the trunk and defendant Beltran popped the trunk open. Officer Warmhold testified that he quickly looked in the trunk and then walked to the front of the car when he was called back to the trunk by his partner Officer Seapicchio. Officer Seapicchio pointed to an open toolbox in the trunk with a firearm partially visible. The firearm was wrapped in a camouflauge rag with the handle of the gun exposed. The camouflauge rag was later examined and observed to be a face mask. After the firearm was found in the trunk a further search of the entire vehicle was performed. Inside the

vehicle was a black hooded sweatshirt, batting gloves, black Nike batting gloves, and a green hat.

Officer Warmhold testified that he contacted and spoke to a TS operator, of the Police Department, and requested information on the earlier Robbery. Officer Warmhold was informed in part that the victims were of arabic decent. Officer Warmhold requested that the victim be brought to the location where the defendants had been stopped. Upon arrival Officer Warmhold spoke briefly with the complainant, El Maliki, regarding what had happened and asked if he could identify the people who robbed him. Complainant El Maliki stated he could and he was brought by police car to the location, the vicinity of 85-10 88th Avenue, where the defendants were being held. The complainant informed the officer that a large sum of cash, cigars and lottery tickets had been taken during the robbery. Officer Warmhold remained with the complainant who was seated in the back seat of a police car while another officer displayed the defendants, one by one. The first individual displayed was defendant Joel Beltran, then Lammy Jahfaar, and then Jonathan Cuevas, all of whom were identified by the complainant as the individuals who had robbed him. The complainant was not able to identify defendant David Bernard.¹ All four individuals were placed under arrest.

Specifically, subsequent to the arrest, Officer Warmhold recovered the following property: from defendant Beltran, six hundred thirty-nine dollars (\$639) in United States Currency and nine Dutch Master cigars, from defendant Jahfaar, eight hundred twenty-four (\$824) in United States Currency, and from defendant Cuevas, six hundred thirty-nine (\$639) in United States Currency.

I make the following conclusions of law:

Probable cause to arrest is present when the facts and circumstances known to the arresting officer, warrant a reasonable person with the same expertise to conclude that a crime is being, or was, committed, and that the defendant is the perpetrator. See, People v. Maldonado, 86 N.Y.2d 631, 635 N.Y.S.2d 155 (1995); People v. Carrasquillo, 54 N.Y.2d 248, 455 N.Y.S.2d 97 (1981); People v. McCray, 51 N.Y.2d 594; 435 N.Y.S.2d 679 (1980); see also C.P.L. § 70.10(2). The totality of circumstances gives rise to a finding of probable cause

Defendant David Bernard is not subject to the Wade portion of this hearing, as no identification procedure pursuant to CPL §710.30(1)(b) was served for him.

when it is more probable than not that the person to be arrested committed a crime. See, People v. Carrasquillo, *supra* at 254; People v. Surico, 265 A.D.2d 596, 697 N.Y.S.2d 356 (3d Dept. 1999). This legal conclusion is made after all the facts and circumstances are considered together. See, People v. Bigelow, 66 N.Y.2d 417, 423; 497 N.Y.S.2d 630 (1985). Although the facts and circumstances viewed separately may be insufficient to establish probable cause, when these factors are viewed in totality, probable cause may be found. Id.

In the present case, probable cause has been established. The police possessed probable cause to stop the vehicle based on their belief that the vehicle may have been in the process of being stripped and excessive tint on the windows. See, People v. Robinson, 97 NY2d 341, 741 NYS2d 147 (2001). The officer then observed a large roll of United States Currency (approximately three inches thick) bound by a rubber band in the magazine holder behind the driver's seat. Defendant Jahfaar said was his mother's laundry money. He was then removed from the car. Defendant Jahfaar stated that the cell phone on the back seat, with the arabic writing, was not his. Defendant Cuevas stated he had gotten it from a friend. When asked his friend's name Cuevas gave a Hispanic name. Both these items and the defendants responses to the questions raised the officers suspicions. The other three defendants were removed from the car and frisked for safety reasons. See, People v. Rivera, 159 AD2d 281, 552 NYS 2d 284 (1990); People v. Lambert, 84 AD2d849, 444NYS2d 168. The police then executed a search of the vehicle and trunk with defendant Bernard's (the driver) consent. The Court finds defendant Bernard's consent was voluntary. See, People v. Gonzalez, 39 NY2d 122, 347NE2d 575, 383NYS2d 215 (1976).

In this case, the officers frisked the defendants for safety reasons and then executed a search of the vehicle both with defendant Bernard's (the driver) consent and a later search incident to the arrest of the defendants. Defendants claims that the police did not possess sufficient probable cause to stop the vehicle is without merit. While a passenger of an automobile possesses standing to challenge the stop of a car as unlawful (see, People v. Dawson, 115 AD2d 611, 496NYS2d 273), the Court finds probable cause for the stop did exist.

Defendant further moves to suppress the show up by the witness. The New York State

Constitution prohibits the introduction at trial of identification evidence obtained by the government or its agents, if the identification was secured through unduly suggestive means. An identification procedure is “unduly suggestive” if it “creates a substantial likelihood that the defendant would be singled out for identification.” People v. Chipp, 75 N.Y.2d 327, 335, 553 N.Y.S.2d 72 (1990) *cert. denied*, 498 U.S. 833 (1990).

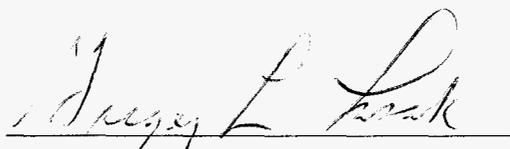
At the hearing, which was conducted before this Court, on the issue of undue suggestibility, the People had the burden to go forward with credible evidence to establish that the noticed pre-trial identification procedure was legally conducted and not unduly suggestive. People v. Chipp, *supra*. Here, the identification took place within two hours of the robbery and the stop of the vehicle did not involve any suggestive conduct.² Thus, suppression is not warranted.

Accordingly, defendants application to suppress the property and identification is denied.

The foregoing constitutes the opinion, decision and order of the court.

Kew Gardens, New York

Dated: July 29, 2008


GREGORY L. LASAK
JUSTICE SUPREME COURT

²In People v. Duuvon, 77 N.Y.2d 541, 569 N.Y.S.2d 346 (1991), a case decided by the Court of Appeals which addressed the propriety of a show up identification, the factors considered by this Court in determining whether the identification procedure was unduly suggestive included the proximity of the defendant’s arrest to the scene of the crime and how close in time to the crime the defendant was apprehended.