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SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY—CRIMINAL TERM—PART L-4

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

ORDER OF THE COURT

DEBORAH HARVEY AND
GREGORY HARVEY,

INDICTMENT NO: N10208-00

Defendants.

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JOEL L. BLUMENFELD, JSC

APPEARANCE OF COUNSEL

For the People: Richard A. Brown, District Attorney, Kew Gardens, New York (Matthew Schechter, of counsel);

For defendant Deborah Harvey: Paul Franzese, Forest Hills, New York

For defendant Gregory Harvey: Allan Lawrence Brenner, Long Beach, New York

OPINION OF THE COURT

On December 2, 1999, Detective Salvatore Salerno of the Southeast Queens Initiative appeared before a judge of the Criminal Court seeking permission to search the first floor apartment at 119-04 Sutphin Boulevard for marihuana and related items.

In support of his application, Detective Salerno submitted what purported to be an affidavit based on information he received from a confidential informant. This document, prepared by an Assistant District Attorney in the Narcotics Investigation Bureau, states in part:

A. I am currently assigned to an investigation regarding marihuana possession at 119-04 Sutphin Boulevard, the first floor apartment and basement, Jamaica, County of Queens, New York, more particularly, a first floor apartment and basement of a two-story red-brick building; the apartment is located behind a restaurant which is named "Bingy Gene's Kitchen" and the location is marked with the number "119-04" on the awning of the building (hereinafter the "subject location").

B. The affiant is relying on a confidential informant (hereinafter "CI") who is registered with the New York City Police Department under confidential informant number 18918. The CI's information is based upon CI's personal knowledge. CI has agreed to cooperate in this investigation and has informed me of observations made by CI at the subject location, as described below. CI has proven reliable in the past leading to the recovery of over 60 bags of marihuana , a sum of United States Currency, two firearms and the arrest of 3 people. Specifically, in November of 1998, the CI who was not under arrest, acting as a good Samaritan, provided the Court with information leading to the recovery of some of the above-mentioned marihuana and currency. More recently, in October of 1999, CI provided me with information which led to the recovery of two firearms.

C. CI informs me that on Wednesday, December 1, 1999 at approximately 9:00PM CI went to the subject location and made the following observations:

CI went to the subject location and was greeted by a male black, approximately 28 years of age, 6' 0" in height, approximately 180 pounds in weight, known to the CI as "Greg." CI observed Greg have a conversation with an unknown male and then enter the first floor of the subject location and return a few moments later and hand a sandwich-sized bag of marihuana to the unknown individual and observed the unknown individual hand Greg a sum of United States Currency. CI then left the subject location.

D. CI informs me that on Tuesday, November 30, 1999 at approximately 7:30 PM CI went to the subject location and made the following observations:

CI went to the subject location and was greeted by Greg. CI observed Greg engage in a conversation with an unknown male and then enter the first floor of the subject location and return a few moments later and hand a small blue bag of marihuana to the unknown individual and observed the unknown individual hand Greg a sum of United States Currency. CI then left the subject location.

E. CI informs me that on Sunday November 28, 1999 at approximately 7:00 PM CI went to the subject location and made the following observations:

CI went to the basement and observed a male black approximately 28 years of age, 5' 11" in height, approximately 250 pounds in weight (hereinafter "JD Basement") hand a small blue bag marihuana to another individual and observed the other individual hand JD Basement a sum of United States Currency. CI then left the basement.

The full transcript of Detective Salvatore Salerno's appearance before the judge in part AR-3, reads as follows:

THE COURT: This is an application for a warrant authorizing the search of premises described as follows:

119-04 Sutphin Boulevard, first floor apartment and basement, Jamaica, County of Queens, New York. More particularly, a first floor apartment and basement of a two-story red-brick building.

The apartment is located behind a restaurant which is named "Bingy Jeans [sic] Kitchen." And this location is marked with the number 119-04 on the awning of the building.

Present before me is?

DETECTIVE SALERNO: Detective Salvatore Salerno.

(Whereupon the officer was sworn.)

THE COURT: Please state your name, shield and command for the record.

DETECTIVE SALERNO: Detective Salvatore Salerno, Shield Number 5886, Southeast Queens Initiative.¹

THE COURT: Based upon reading over the affidavit, I do find that probable cause does exist for the issuance of the Search Warrant, which I am now signing at 6:55p.m., on the Second day of December, 1999.²

¹ Notably absent is any statement under oath by the detective that he read the affidavit and swears to the truth of its contents. However, since the affidavit states it is sworn before the issuing judge this court presumes the regularity of that process despite the lack of it being reflected in the minutes.

² The hearsay information provided by the confidential informant satisfied the *Aguilar/Spinelli* test. "[I]t is settled law in New York that probable cause may be based on unsworn hearsay only when the two-prong test of *Aguilar v Texas*, 378 US 108, and *Spinelli v United States*, 393 US 410, is satisfied, that is, if there is a reasonable showing that the informant is reliable and had a basis of knowledge for the statement." *People v Hetrick*, 80 NY2d 344, 348 (1992) [citations omitted]. "[A]n identified citizen-informant

Four days later, on December 6, 1999, Detective Salvatore Salerno along with other police officers went to the first floor apartment at 119-04 Sutphin Boulevard to execute the search warrant. In order to enter the first floor apartment, they broke the door down. When they entered the apartment, they screamed a few times "Police, search warrant." Deborah Harvey along with an unidentified male and two children were the only ones in the apartment. Gregory Harvey was not present on that day. Deborah Harvey was placed in handcuffs. The officer seized two plastic bags containing marijuana that was compacted. They also seized 53 bags containing marijuana from a bag inside a jacket and some paraphernalia. When the seized items were taken past her in the apartment, she stated something like: "That's not mine. It must be my husband's."

Also seized was a pay stub and a Social Security card in Gregory Harvey's name and a Con Ed bill in Deborah Harvey's name.

On December 15, 1999, he returned to the subject apartment to arrest Gregory Harvey. Detective Salvatore Salerno knocked on the door and asked if they could come in. She allowed them to come in. When Detective Salvatore Salerno entered into the apartment he heard scurrying in the back room. When he went there, he shined his flashlight and found Gregory Harvey in the back hiding in a closet. Gregory Harvey was arrested and taken to the 115th precinct. He was given his *Miranda* warnings (*Miranda v Arizona*, 384 US 436) and made an oral statement after waiving them. The sum and substance was that the marijuana recovered the night the search warrant was executed was his and that his wife had no knowledge of it being in the house.

is presumed to be reliable" (see, *People v Rivera*, 210 AD2d 895, 895-896 [4th Dept 1994] citing *People v Hetrick*, supra at 349). As to the second prong of the *Aguilar/Spinelli* test, it is apparent from their description of events as related in the affidavit that the confidential informant's basis of knowledge was their direct observations (*People v. Rivera*, supra, at 896).

Both defendants move to controvert the search warrant issued on December 2, 1999 and executed on December 6, 1999. Further each defendant moves to suppress statements made as fruits of the poisonous tree. A hearing was held on December 12, 13, and 15th before this court. At this hearing the People presented one witness, Detective Salvatore Salerno. This court finds his testimony credible. At that hearing he acknowledged that one can enter both the restaurant and the apartment from the hallway on the first floor. He also testified that he knew this at the time he sought the warrant. He does not claim, nor does the record reveal, that he ever told this to the issuing judge or to the assistant district attorney who drafted the affidavit.

At issue, as it pertains to the search warrant, is not whether there was probable cause to search some part of the first floor at 119-04 Sutphin Boulevard — there clearly was — but rather whether there was probable cause to search the first floor apartment as opposed to the restaurant on the first floor at that location. In other words, did the affidavit contain sufficient information pertaining to the first floor apartment to support the issuance of a search warrant?

Both the fourth amendment to the United States Constitution and article 1, section 12 of the New York State Constitution state:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Search warrants are “strongly preferred” over warrantless searches (*People v Hanlon*, 36 NY2d 549, 558). It is well-settled that “applications for search warrants should not be read in a hypertechnical fashion, but rather given a common sense review” (*People v Tambe*, 71 NY2d 492,

501; *People v Hanlon, supra*, 559). Even though a reviewing court should give deference to a judicial determination of probable cause, the court must still insist that the magistrate perform his neutral and detached function (*People v Hanlon, id.*).

The reason why reviewing courts should not view applications in a “hypertechnical fashion” is explained in *Hanlon*: “[I]n the real world, we are confronted with search warrant applications which are generally not composed by lawyers in the quiet of a law library but rather by law enforcement officers who are acting under stress and often within the context of a volatile situation” (*id*; see also, *People v Paccione*, 259 AD2d 563 [2d Dept 1999], *lv den* 93 NY2d 975). However, in the instant case, it is not the detective, but rather the assistant district attorney in the Narcotics Investigation Bureau who drafted the affidavit. Second, it is clear that the situation was not at all volatile. Here, the warrant was not sought until the day after the last observation by the confidential informant and was not executed until four days later.

“Where it appears that the Magistrate has conducted such a measured and comprehensive examination into the basis for the warrant, the factual determination as to probable cause will, of itself, constitute a suitable makeweight when the warrant is challenged” (*Hanlon, id.*). From the record presented before, it appears that since he did not ask any questions of the detective before him, the issuing judge simply found enough of what he was looking for in the affidavit. “[W]here the Magistrate merely acts as a rubber stamp the validity of the warrant will be suspect” (*People v Hanlon, id.*).

Since a neutral magistrate issued the warrant, a presumption of validity attaches to that warrant since it is deemed that there has already been a judicial review as to its justification (*People*

v Castillo, 80 NY2d 578, 585, *cert denied* 507 US 1033; *People v Hanlon*, *supra*, 558-559; *People v Ortiz*, 234 AD2d 74, 75 [1st Dept 1996] , *lv denied sub nom People v Cortijo*, 89 NY2d 941). All that this court has to do is determine “whether the issuing Judge could reasonably have concluded that probable cause existed” (*People v Ortiz*, *supra*, at 75-76; *see also, People v Cabreja*, 243 AD2d 387 [1st Dept 1997]).

“Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a *certain place*” [emphasis supplied] (*People v Bigelow*, 66 NY2d 417, 423; *People v McCulloch*, 226 AD2d 848, 849 [3d Dept 1996], *lv denied* 88 NY2d 1070; *see also, People v McRay*, 51 NY2d 594, 602). The determination of whether there is probable cause “is to be made after considering all of the facts and circumstances together. Viewed singly, these may not be persuasive, yet when viewed together the puzzle may fit and probable cause found” (*People v Bigelow*, *supra*, 423; *see also, Illinois v Gates*, 462 US 213, 231-235).

The facts known to the judge at the time of the issuance of the warrant were that:

(1) on Wednesday, December 1, 1999, Greg had a conversation with an unknown male and Greg then entered the *first floor of the subject location* and returned a few moments later and handed a sandwich-sized bag of marihuana to the unknown individual and observed the unknown individual hand Greg a sum of United States Currency [Affidavit, paragraph C];

(2) on Tuesday, November 30, 1999, Greg engaged in a conversation with an unknown male and Greg then entered the *first floor of the subject location* and return a few moments later and

handed a small blue bag of marihuana to the unknown individual and observed the unknown individual hand Greg a sum of United States Currency [Affidavit, paragraph D].

(3) on Sunday November 28, 1999, the confidential informant went to the *basement* and observed an individual hand a small blue bag marihuana to another individual and observed the other individual hand that individual a sum of United States Currency [Affidavit, paragraph E].

In these facts containing the alleged crime, there are no references whatsoever as to the first floor apartment — that is, there are no facts that the confidential informant ever either went into the apartment or saw the person Greg go into the apartment. Had the first floor only contained an apartment, there would be no problem and probable cause would be present. However, on the first floor of the building are entrances to the subject apartment and the restaurant. In the hearing, the detective was asked about the first floor apartment:

THE COURT: Did you have to leave the apartment to leave the building to get from the restaurant to the apartment?

THE WITNESS: No. Within the same building.

Q: You can get from the restaurant to the apartment,

A: Yes.

Q: And within the building from the apartment to the restaurant?

A: Yes

Q: All within the confines of those premises?

A: Yes.

Q: All within the confines of the first floor of the premises at that address, yes?

A: Yes.

[Transcript, Pages 72-73]. The entrance is down the first floor hallway from the subject apartment.

Clearly there was probable cause to search the basement as the confidential informant personally observed JD Basement exchange marihuana for United States currency in the basement. However, as the confidential informant made no observation of where “Greg” obtained the marihuana from after Greg entered the first floor of 119-04 Sutphin Boulevard there is no way of knowing whether it was stored in the hallway, the restaurant or the apartment. Accordingly, there was no way probable cause to search the apartment.

Since these defendants who reside in this first floor apartment have the state and federal constitutional right to be secure in their apartment against unreasonable searches and seizures and to be free from search warrants issued by less than probable cause, the items seized from their apartment are suppressed.

Ms. Harvey’s statement made during that search is suppressed as fruit of the illegal search, seizure and arrest as there is no evidence of attenuation (*see, United States v Crews*, 445 US 463; *Brown v Illinois*, 422 US 590; *Wong Sun v United States*, 371 US 471; *People v Conyers*, 68 NY2d 982; *People v Rogers*, 52 NY2d 527, *cert denied* 454 US 898).

Mr. Harvey’s statement was obtained after *Miranda* warnings were given and after a week after the search. He was arrested in his apartment after his wife gave permission to the police to enter. Whether that permission violated any of her rights to counsel need not be addressed as defendant has made no showing how he has standing to make that claim (*see, e.g., People v Mantilla*,

220 AD2d 691 [2d Dept 1995], *app den* 88 NY2d 850). Since there is no *Payton* violation (*Payton v New York*, 445 US 573), his statement is not suppressed.

This opinion constitutes the findings of facts and conclusions of law, decision and order of the court. IT IS SO ORDERED.

DATE: January 26, 2001
Long Island City, NY

JOEL L. BLUMENFELD,
Acting Justice of the Supreme Court