

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : CRIMINAL TERM : JHO

THE PEOPLE OF THE STATE OF NEW YORK : REPORT
: BY: JOAN O'DWYER, JHO
: DATE: October 30, 2003
-against- :
JOSE TORRES : INDICTMENT NO.: 3727-02
Defendant :

MOTION: TO SUPPRESS PHYSICAL EVIDENCE AND STATEMENTS
(MAPP/HUNTLEY/DUNAWAY)

FOR THE MOTION: ELIZABETH PRUSER, ESQ.

OPPOSED: ALLISON WRIGHT, ESQ., ADA

The defendant is charged with, inter alia, Criminal Possession of a Weapon in the Second Degree. He has moved for an order suppressing physical evidence and statements, contending that he was subjected to an unlawful search and seizure and that his statements were taken in derogation of his constitutional rights. A hearing to report on the admissibility of this evidence was held before me on August 18, August 22, and October 14, 2003. At this hearing, the People called Sergeant John Hart and the defendant called Juana Lopez. The court credits the testimony of both witnesses.

Sergeant hart testified that on November 11, 2002 at approximately 12:27 AM, while on plainclothes patrol in an unmarked

car, he responded to a radio run that three individuals, two male blacks and a female, were in a black Cadillac and were in possession of guns. He said that he responded to the location at 108-32 Union Hall Street and saw three people; one male black on the sidewalk and one male black and a female sitting in a red Toyota which was parked on Union Hall Street behind a black Cadillac, about fifty to sixty feet north of 109th Avenue. The sergeant stated that his attention was drawn to an unrelated matter occurring up the street and that when he returned to the scene he saw the red Toyota being driven northbound on Union Hall Street. He testified that the vehicle then came to a stop on its own just south of 109th Avenue, about one-half block away from where he had first seen it. Sergeant Hart said that he observed the driver of the Toyota, identified at the hearing to be the defendant, exit the vehicle and cross the street. At this time, while the defendant was out of the vehicle, he walked up to the driver's side window of the Toyota and asked the female sitting in the passenger seat if she was all right. The female responded that "it was no big deal" (suppression hearing minutes p 12). The sergeant then asked the female, who appeared nervous, if there was a gun in the vehicle. The woman did not respond, but looked toward the defendant. Sergeant Hart stated that he then noticed a "white towel protruding [about four inches] from the bottom of the driver's seat" (id. p 13). He also noticed that the towel was folded and

that the floor of the vehicle around the towel was dirty. According to the sergeant, the towel "just seemed odd" and "suspicious" "like maybe they could be hiding something" (id. p 14). He said that he "pulled the towel out from beneath the seat" (id.), at which time he recovered a loaded handgun which had been on the towel.

Sergeant Hart further testified that the defendant was placed under arrest after the gun was recovered. He said that the defendant asked why he was being arrested, in response to which he told the defendant that "he was being arrested for a loaded handgun" (id. p 16-17). The defendant replied that the gun "was his brother's and that he didn't know it was there" (id. p 17). He also told Sergeant Hart that the female in the Toyota had nothing to do with the gun.

According to Sergeant Hart, the license plate of the Toyota was "run" and it was learned that the vehicle did not belong to the defendant but to someone named Juana Lopez.

On cross-examination, Sergeant Hart testified that he arrived at the location less than five minutes after receiving the radio run. He said that the red Toyota had not been reported stolen.

Juana Lopez testified that on November 10, 2002 she was the registered owner of a red Toyota bearing license plate #BDW2169 and that on that day she gave the defendant permission to use her

vehicle.

On cross-examination, Ms. Lopez testified that she often lent the vehicle to the defendant, who was her daughter's boyfriend, and did not expect it to be returned at any set time. She said that she had known the defendant for over ten years and that he called her "aunt", although they were not actually related. Ms. Lopez stated that she did not tell the defendant who could or could not be in her car. She testified that she did not know who had been invited into the car after it was lent to the defendant.

According to Ms. Lopez, on the occasions when she would lend her car to the defendant, he sometimes returned it the same day and sometimes returned it the next day, "depending on what he had to do" (suppression hearing minutes p.51).

The defendant now moves for the suppression of the gun.

CONCLUSIONS OF LAW

At issue initially is whether the defendant had standing to object to the search of the red Toyota and the resultant recovery of the weapon from its interior. The People's position is that the defendant lacks standing to contest the search, notwithstanding the fact that the Grand Jury was charged under the presumption of possession statute, claiming that where the People rely on the statutory presumption as well as upon the theory of constructive

possession, the defendant has no automatic standing. They also assert that the defendant lacked a legitimate expectation of privacy in the Toyota, so that he has failed to meet his burden of demonstrating standing. The defendant's position is that once a Mapp hearing has been ordered, the question of standing need not be addressed. He further contends that he has automatic standing to contest the search of the vehicle by virtue of the presumption of possession charge presented to the Grand Jury.

At the outset, the court notes that it disagrees with the premise that the granting of a Mapp hearing obviates the need for the defendant to establish standing. The issues surrounding standing, abandonment, and the propriety of police conduct are all to be considered by the court in assessing the admissibility of evidence at a Mapp hearing. Therefore, the fact that a Mapp hearing was granted does not mean that the court which ordered the hearing found standing to have been established. Accordingly, the question of standing is one which must be addressed by the court.

Standing is a threshold determination as to "who is, or should be, entitled to enforce the prohibition against unreasonable searches" (People v Wesley, 73 NY2d 351, 355 [1989]). Generally, "standing is available only if [a] defendant demonstrates a personal legitimate expectation of privacy in the searched premises" (People v Tejada, 81 NY2d 861 [1993]). However, in People v Millan, 69 NY2d

514 [1969], the Court Of Appeals "carved out a narrow exception in one particular class of constructive possession cases" (People v Wesley, supra), holding that where a defendant is charged with possession upon a statutory presumption, he has the right to challenge the legality of the search, "regardless of whether he is otherwise able to assert a cognizable Fourth Amendment interest" (id). The Court reasoned that "fundamental tenets of fairness require that a defendant charged with possession under the statutory presumption be given an opportunity to contest the search" (id). Under Millan, then, the defendant would have automatic standing to contest the search of the Toyota, for the People utilized the statutory presumption in obtaining the indictment against him. However, the People claim that where they intend to rely on both constructive possession and the statutory presumption, as they claim they intend to do in the present case, Millan is inapplicable.

In making the determination as to whether the People's assertion is correct, the court must examine the facts and holdings in People v Tejada, supra, which revisited the principal of "automatic standing".

In Tejada, the defendant was arrested and charged in connection with an apartment search in which the police seized drugs, drug paraphernalia, and a gun in plain view. The hearing court found insufficient exigency to support the warrantless entry

into the apartment, and, finding that the defendant had automatic standing to challenge the admissibility of drugs which he was charged with possessing under the "room presumption" statute, therefore suppressed the drugs. However, with respect to the drug paraphernalia and the gun, which were not covered by the presumptive possession statute, the court denied suppression, ruling that the defendant "was relegated to the general principle that only a legitimate expectation of privacy in the premises could confer standing to challenge the warrantless search and seizure" (see, People v Tejada, 183 AD2d 500 [1st Dept 1992]). The defendant appealed this ruling and argued in the appellate courts that "where a statutorily presumptive possessory count is included among other criminal charges emanating from ordinary constructive possession", the automatic standing exception should be extended to all charges, so that he should have automatic standing as to the drug paraphernalia and weapon. This position was rejected by the Appellate Division and Court of Appeals, which recognized the "need for a limited form of automatic standing where the criminal possessory charge is rooted solely in a statutory presumption attributing possession to a defendant", but found that "the unfairness perceived in Millan is not present in cases where a defendant is charged with constructive possession on the basis of evidence other than the statutory presumption". It appears clear

to the court that the gravamen of the Tejada ruling is that where there are multiple charges, yet only one is impacted by the statutory presumption of possession, only that charge is subject to automatic standing, while the others remain subject to the general rule requiring the establishment of a legitimate expectation of privacy in the area searched. The Court did not specifically address the question posed in the case at bar, whether reliance upon constructive possession in addition to the statutory presumption would negate automatic standing. However, because of the wording in the case - that automatic standing is to be granted where the possessory charge is "rooted solely" in the statutory presumption - a number of appellate courts have relied on Tejada to deny a defendant automatic standing in situations in which the People have given notice of their intent to charge both constructive possession and the statutory presumption.

In People v Nunez, 234 AD2d 569 [2d Dept 1996], appeal denied 89 NY2d 1039 [1997], the Second Department, relying on Tejada, held that the defendant did not have automatic standing to challenge the search of the automobile in which drugs were recovered "because the People did not rely solely on the statutory presumption of possession, but also on a theory of constructive possession".

In People v Paulino, 216 AD2d 238 [1st Dept 1995], appeal denied 87 NY2d 849, the First Department, citing Tejada, held that

the defendant "did not have automatic standing to challenge the search and seizure, as the People relied on not only the "room presumption" of Penal Law § 220.25 (2) but also constructive possession".

In People v Ayers, 214 AD2d 459 [1st Dept 1995], appeal denied 86 NY2d 732 [1995], the Appellate Division held that there was no evidence that the defendant had a reasonable expectation of privacy in the apartment and further noted, citing Tejada, that the doctrine of "automatic standing" "was inapplicable because the People adequately, although inartfully, apprised the hearing court of their intention to rely on ordinary constructive possession in addition to the "room presumption" of Penal Law § 220.25 (2)".

In the opinion of the court, the reliance of the Nunez, Paulino, and Ayers courts on the language of the Tejada decision instead of on the actual facts and holdings of the Court in reaching that decision has resulted in the misapplication of the case. The appellate courts, citing the wording in Tejada, held that because the People gave notice of their intent to rely on both the statutory presumption and constructive possession, the possessory charge was not "rooted solely in a statutory presumption", thereby vitiating the defendant's automatic standing. However, an examination of the facts of Tejada make it clear that this was not what the case stood for. In fact, the record indicates that the defendant in Tejada was

in constructive possession of all of the property recovered by the police, including the drugs for which there was a statutory presumption, so that if the Tejada court had followed the reasoning of the appellate courts which ostensibly relied on its holding, it would have negated the defendant's automatic standing with respect to the drugs found in the apartment on the ground that the defendant's possession was not rooted solely in the statutory presumption, but upon constructive possession as well. This, however, was not their holding. They did not negate the defendant's automatic standing in connection with the charge which was subject to the statutory presumption, notwithstanding the fact that it was clearly subject to constructive possession as well. They upheld the defendant's automatic standing with respect to the drug charge, which, it bears noting, was not even an issue in the case. It was a given that the drug charge would be subject to automatic standing. All the Tejada court did was refuse to extend automatic standing to charges which were solely rooted in constructive possession. Accordingly, under the Tejada ruling and rationale, where the People rely on both the statutory presumption and the general constructive possession charge, automatic standing is to be conferred, but only with respect to the possessory count premised upon the statutory presumption. Therefore, on the basis of the Tejada decision, the defendant in the present case has automatic standing to challenge

the recovery of drugs which he is statutorily presumed to possess, but would have no automatic standing to challenge the admissibility of any other contraband found in the vehicle for which no statutory presumption was applicable. To the extent that the holdings in Nunez, Paulino, and Ayers reflect the opposite legal conclusion, this court rejects them and relies instead on the legal underpinnings of both Tejada and Millan.

The court notes that support for the rejection of the holdings in Nunez, Paulino, and Ayers may be found in People v King, 242 AD2d 736 [2d Dept 1997], the most recent Second Department decision involving the application of Tejada to possessory charges for which the People intend to rely on both constructive possession and the statutory presumption. In King, the majority suppressed evidence recovered pursuant to a car search, finding the search to be unlawful. The position of the dissent, however, was that the defendant lacked standing to search the vehicle, citing People v Tejada to support their view that the defendant did not have automatic standing to contest the search because the People "did not rely solely on the statutory presumption of possession...but also relied on the theory of constructive possession". The majority held that they "disagree[d] with the conclusion that the defendant did not have automatic standing", although they offered no case law or discussion in support of this

position and despite the fact that the relevant facts of its case were virtually indistinguishable from those in Nunez, Paulino, and Ayers. It appears to the Court that this is clear evidence that the Second Department itself has rejected the holdings in these cases.

Additional evidence that Tejada has not been properly applied by the courts in Nunez, Paulino, and Ayers may be found in the Court of Appeals' discussion of fairness with respect to the issue of automatic standing over the years. In People v Millan, the Court held that it "offends fundamental tenets of fairness inherent in New York criminal jurisprudence" to permit the government "to use the legal fiction of constructive possession to prosecute all passengers [in a vehicle in which a gun is found], conscious or not of the gun's existence, and yet deny those it accuses a right to question the actions of its agents in conducting the search", finding that this is "repugnant to the requirements of fair play which have evolved through centuries of Anglo-American constitutional history". Thereafter, in People v Wesley, the Court of Appeals refused to extend automatic standing to constructive possession cases, emphasizing that "no presumption [would be] used to secure a conviction" but rather, the People would "bear the substantial burden of establishing defendant's ability and intent to exercise dominion or control over the contraband". In other words, where the presumption is used to obtain a conviction for

possession, an obviously easy burden to meet, fairness dictates that the defendant be given automatic standing, but where the possession is based upon constructive possession, so that the People must prove dominion and control, a "substantial burden", automatic standing is not required. However, in Nunez, Paulino, and Ayers, the courts apparently found the scenario in which the People relied on both theories to prove possession to be the equivalent of relying upon only the constructive possession theory, for they denied the defendant automatic standing. In the opinion of the court, this would only make sense, in relation to the Court's fairness argument, if the People in those cases were unable to "secure a conviction" on the presumption alone, but were required to meet the "substantial burden" of proving dominion and control in order to obtain a conviction. However, this is not the case. In order to get an indictment or a conviction, the People need only prove one theory or the other, and although there is no way of knowing which of the two was or would actually be relied upon by the jury in making its determination, it appears clear to the court that in view of the relative ease of conviction when the presumption is used as compared to the more onerous burden of proving constructive possession, the strong likelihood is that there will be many occasions where a defendant would be convicted on the strength of the presumption alone, a circumstance which the Court of Appeals has held would be

patently unfair unless the defendant had the opportunity to challenge the search. Accordingly, it appears to the court that where both theories are relied upon by the People, allowing for the strong possibility that only the presumption will be used to support a conviction, automatic standing should be granted. Accordingly, the holdings in Nunez, Paulino, and Ayers should be rejected on this ground as well.

The court notes that the situation would be different if the People were required to elect¹ which of the two theories they would rely upon to establish possession, so that in order to deny a defendant automatic standing, they would have to stipulate that the presumption would not be used in order to obtain a conviction. This way, the court could assure that the "fundamental tenets of fairness" and the "requirements of fair play" that the Court of Appeals sought to protect in Millan would be satisfied. However, in the present case, there has been no election, only the People's assertion that they intend to rely on both the statutory presumption and the general constructive possession charge. In the opinion of the court, to permit the People not to elect which theory they intend to rely upon and to vitiate the defendant's automatic

¹The concept of electing theories was addressed in People v Galak, 80 NY2d 715 (1993) and People v Hvi Jin An, 253 AD2d 657 [1st Dept 1998], appeal denied 92 NY2d 949 (1998).

standing by virtue of their purported reliance on both, despite the fact that the use of the presumption would require automatic standing and would be by far the easier burden to meet, is simply not fair and would effectively set the stage for the eradication of the doctrine of "automatic standing" altogether, for all a prosecutor would have to do to eliminate the defendant's automatic standing would be to charge constructive possession in addition to the statutory presumption, which in the context of a vehicle search would be relatively easy to justify, if not to prove.

Accordingly, the court finds that the defendant in the case at bar has automatic standing to challenge the recovery of the drugs from the Toyota.

Even assuming, arguendo, that the defendant did not have automatic standing to contest the vehicle search in this case, the court finds that in any event, he has standing to object to the search of the Toyota by virtue of the fact that he was its driver.

As the court has already noted, the general rule is that a defendant seeking suppression of evidence has the burden of establishing standing by demonstrating a legitimate expectation of privacy in the premises or object searched (People v Ramirez-Portoreal, 88 NY2d 99 [1996]). In the opinion of the court, the defendant in the case at bar, who offered testimony to indicate that he had borrowed the Toyota from a friend, met this burden.

In People v Gonzalez, 68 NY2d 950 [1986], the Court of Appeals held that the defendant's statement that he had borrowed the car in which he was arrested from a friend was sufficient to establish that he had a legitimate expectation of privacy so as to confer standing.

In People v Lewis, 217 AD2d 591 [2d Dept 1995], the Second Department held that the defendant, "as the driver of a vehicle borrowed with the owner's permission, had a privacy interest in the vehicle sufficient to support standing to challenge [its] search".

In People v Wright, 140 AD2d 656 [2nd Dept 1988], the Second Department held that a defendant had standing to challenge the search of a vehicle which he had borrowed from a friend.

In US v Pena, 961 F2d 333 [2d Cir 1992], the United States Court of Appeals for the Second Circuit held that it "is not the law that only the owner of a vehicle may have a Fourth Amendment privacy interest therein that is protected against governmental invasion, finding that "the borrower of an automobile can possess such an interest" and that where a defendant "offers sufficient evidence indicating that he had permission of the owner to use the vehicle, [he] plainly had a reasonable expectation of privacy in the vehicle" and therefore had standing to challenge its search.

In US v Miller (821 F2d 546 [11th Cir 1987]), the United States Court of Appeals for the Eleventh Circuit held that a

defendant has standing to challenge the search of a car borrowed from a friend.

In US v Rusher, 966 F2d 868 [4th Cir 1992], the United States Court of Appeals held that the defendant had a reasonable expectation of privacy in a truck, finding that although he was not the owner of the truck, he was its driver and there was no evidence in the record tending to show that he was illegitimately in possession of it.

In US v Portillo, 633 F2d 1313 [9th Cir 1980], writ of cert denied 450 US 1043 [1981], the Ninth Circuit of the United States Court of Appeals held that the defendant had a legitimate expectation of privacy in a car he did not own because he was in possession of the car with the permission of the owner and had a key to it, "thus having the required level of control over the car".

In US v Arce, 633 F2d 689 [5th Cir 1980], cert denied 451 US 972 [1981], the Government conceded that a defendant had standing to challenge the search of a car he did not own because he was driving it.

In US v Santiago, 174 FSupp2d 16 [SDNY 2001], the United States District Court for the Southern District held that the defendant had a legitimate expectation of privacy in a car which he did not own but which he "was driving at the time of his apprehension and from which the challenged evidence was seized" by

virtue of the fact that he demonstrated "a legitimate basis for being in the vehicle. The court found that "under Second Circuit precedent, permission from the owner of a car to use it and possession of the car keys have been held to establish an adequate privacy interest" in the vehicle to establish standing to challenge its search.

It appears clear to the court that as the driver of a vehicle which he had been given permission to drive by the owner, the defendant had standing to object to the vehicle's search by the police. In reaching this conclusion, the court notes that the holding in People v DeLucchio, 115 AD2d 555 [2d Dept 1985], a case cited by the People in support of its position that the defendant did not have standing, does not require a different result. In DeLucchio, the defendant had driven the vehicle owned by another on February 21st, but the vehicle was not searched until February 23rd, after it had been returned to the owner. This scenario is easily distinguishable from the one at bar so that its holding that the defendant did not have an expectation of privacy in the vehicle is not dispositive of the issue at bar.

Accordingly, pursuant to either the doctrine of automatic standing or under the general rule of standing, the defendant may rightfully challenge the search of the Toyota.

The first question before the court in assessing the

propriety of the police conduct in this case is whether or not the initial approach of the Toyota by Sergeant Hart was lawful. At the outset the court notes that it agrees with the defendant that the anonymous tip of three people with guns in a Cadillac did not give Sergeant Hart reasonable suspicion with respect to the people in the Toyota (see, Florida v J.L., 529 US 266 [2000], in which the United States Supreme Court held that "[a]n anonymous tip that a person is carrying a gun is not, without more, sufficient to justify a police's officer's stop and frisk of that person"; see also, People v. William "II", 98 NY2d 93 [2002], in which the New York Court of Appeals, citing the decision in Florida v J.L., held that a tip must be "reliable in its assertion of illegality, not just in its tendency to identify a determinate person"; and People v Ballard, 279 AD2d 529 [2d Dept 2001]). Nevertheless, the evidence adduced at the hearing indicates that the defendant's car was not stopped by the police, but merely approached, and as the Court of Appeals held in People v Spencer (84 NY2d 749 [1995]), "the right to stop a moving vehicle is distinct from the right to approach the occupants of a parked vehicle" and it is only when a car is stopped or pulled over that there is a seizure which requires reasonable suspicion. It appears to the court that in the present case, the sergeant had a right to approach the Toyota on the basis of the radio run of people in possession of guns in the area, which

transmission provided at least "an articulable basis for requesting information", which is the level of information required when a car has been "approached but not seized" (see, People v Ocasio, 85 NY2d 982 [1995]). Accordingly, the approach of the defendant's vehicle was proper.

The next issue before the court is whether the facts presented to Sergeant Hart upon his approach of the Toyota justified his intrusion into the vehicle. In making this determination, the court must review the different scenarios which would support the police entry into a vehicle.

One justification for the search of a vehicle is the arrest of an occupant of that vehicle and the search incident thereto. In these situations, "where police have validly arrested an occupant of an automobile and they have reason to believe that the car may contain evidence relating to the crime for which the occupant was arrested**they may contemporaneously search the passenger compartment, including any containers found therein" (People v Belton, 55 NY2d 49 [1982]; see, People v Galak, 81 NY2d 463 [1993]; People v Langen, 60 NY2d 170 [1983]; see also, People v Rives, 237 AD2d 312 [2d Dept 1997], appeal denied 90 NY2d 1013 [1997] in which the Second Department again upheld a car search by an officer "if he has reason to believe that the vehicle or its visible contents may be related to the crime for which the arrest

is being made").

Another situation in which a search may be permitted is when the search is undertaken pursuant to an accident investigation or where the driver is suspected of driving while intoxicated. In such situations, the recovery of alcohol from a vehicle would be warranted. For example, in People v Ellis (169 AD2d 838 [2d Dept 1991], appeal denied 77 NY2d 960 [1991]), the police saw the defendant's car weaving on the highway for 3/4 mile. When the car was stopped, the officer saw an open beer container which the court held to have been properly seized.

A third scenario justifying police entry into a vehicle occurs when a car is lawfully stopped and the police observe contraband in plain view. For example, the observation of a gun protruding from under a car seat would supply independent probable cause for a search of the vehicle, even if the stop was based solely upon a traffic violation. The same has been held to be true for the observation of marihuana (People v Laccone, 164 AD2d 897 [2d Dept 1988]), or fireworks (People v Miller, 177 AD2d 989 [4th Dept 1991]), or a glass pipe with cocaine residue (People v Rives, supra). The search under these circumstances is justified by the plain view observation of property which is unlawful to possess.

Finally, the police may enter a vehicle when it is lawfully stopped and the police reasonably believe "that a weapon

located within the vehicle presents an actual and specific danger to the officer's safety" (see, People v O'Neal, 248 AD2d 561 [2d Dept 1998], appeal denied 92 NY2d 858). For example, in People v Carvey, 89 NY2d 707 [1997], the Court of Appeals upheld the police intrusion of reaching into the area of a vehicle where one of the occupants had been sitting on the basis of the fact that this occupant was wearing a bulletproof vest, which the court noted provided an "enhanced ability to safely use a deadly weapon" (see also, People v Torres, 74 NY2d 224 [1989]).

It appears to the court that there is no debate that Sergeant Hart did not enter the Toyota incident to the arrest of an occupant of the vehicle, pursuant to an accident investigation, or because he saw contraband in plain view. All he saw protruding from the seat was a folded towel, which is clearly not contraband. The fact that the towel was in plain view cannot support its recovery, for "[t]o justify a warrantless seizure of an item in plain view, its incriminatory character must be immediately apparent" (Horton v California, 496 US 128 [1990]; see, People v Carbone, 184 AD2d 648 [2d Dept 1992]). Accordingly, the question is whether Sergeant Hart had a reasonable belief that there was a weapon in the car which created an "actual and specific danger".

In the opinion of the court, the facts and circumstances presented to the sergeant did not support such a belief. In cases

in which the courts have permitted the police to enter a vehicle for safety purposes, there has had to be some objective criteria to indicate that the likelihood of a weapon being in the car was substantial. For example, In People v Worthy, 261 AD2d 277 (1st Dept 1998), appeal denied 93 NY2d 1029 (1999), the police approached a vehicle pursuant to a routine traffic stop. As they did so, the defendant made a "dipping" motion toward the floor. On these facts, the Appellate Division held that the "likelihood of weapon in the car [was] substantial and the danger to the officer's safety actual and specific", thereby justifying the search of the vehicle's front passenger area. In People v Cisnero, 226 AD2d 279 (1st Dept 1996), appeal denied 88 NY2d 1020 {1996), the defendant, a passenger in a vehicle stopped for a traffic infraction, bent down in what the court characterized to be "an apparent attempt to conceal something". On these facts, the Appellate Division upheld the police entry into the vehicle and their retrieval of a gun from therein. In People v Rodriguez, 160 AD2d 960 (2d Dept 1990), a passenger's "sudden hand motion" toward the floor during a routine car stop was held to provide a "reasonable basis to believe that the passenger might be in possession of a weapon". In all of these cases, the occupants of the vehicle engaged in conduct which led the police to believe that a gun was being concealed. However, in the case at bar, there is no evidence of this nature. Instead, Sergeant

Hart entered the car on the basis of the passenger's silence when he asked if there was a gun in the car, her glancing over at the defendant at this time, and his belief that the towel looked "suspicious". The court finds that this is an insufficient predicate for entering the car, so that the gun recovered incident to this unlawful entry must be suppressed.

The last issue before the court is the admissibility of the defendant's statement. In the opinion of the court, this evidence must be suppressed as "fruit of the poisonous tree" (Wong Sun v US, 371 US 471).

Based upon the foregoing, the defendant's motion to suppress physical evidence and statements should be granted.

.....
JOAN O'DWYER, J.H.O.