

STATE OF NEW YORK COUNTY OF ERIE
ERIE COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

VS.

MEMORANDUM OF LAW

Indictment No.: [REDACTED]

[REDACTED] [REDACTED]
Defendant.

INTRODUCTION

[REDACTED] was indicted on one count of Criminal Possession of a Weapon, under Penal Law §265.03(3) and one count of Criminal Possession of a Controlled Substance under Penal Law §220.02(7). This motion concerns the legality of a seizure of a handgun and drugs recovered during the search of vehicle performed by Buffalo Police during a traffic stop and statements made by [REDACTED] after his arrest.

A two day Ingle/Mapp/Huntley hearing was held on [REDACTED]. The People called three witnesses, Buffalo Police Officers [REDACTED], [REDACTED] and [REDACTED]. [REDACTED] did not call any witnesses.

FACTS OF THE CASE

On [REDACTED], at approximately 11:49 PM Officers [REDACTED] were conducting a traffic stop on a Jeep Grand Cherokee for dark tinted windows at [REDACTED], in City of Buffalo, (April 19, transcript, hereinafter “tr.” at 4-5). Inside the vehicle was the driver— [REDACTED], the front seat passenger— [REDACTED], and back seat passenger— [REDACTED] ([REDACTED]).

Officer Robinson runs the names of the occupants and while he determines that there were no issues with the license of the driver, registration or insurance of the vehicle ([REDACTED]) he learns that [REDACTED] is on parole ([REDACTED]).

After learning that [REDACTED] is on parole, Officer Robinson requests consent to search his person (April 19, tr. at 8). After some discussions between [REDACTED] and the

officers, ██████████ agrees to a search of his person only (April 19, tr. at 36-37). A search is conducted and nothing is found (April 19, tr. at 9) ██████████ is then directed to stand on the sidewalk and Officer Robinson shines his flashlight into the interior of the car and begins searching the front passenger compartment (April 19, tr. at 38-39).

Officer Robinson uses a NIK test wipe to test underneath and on the passenger seat where the defendant had been seated after he had exited the car (April 19, tr. at 8). After the NIK wipe returns a positive result, Officer Robinson removes the other two occupants from the vehicle and directs them to stand on the sidewalk with ██████████ (April 19, tr. at 48). Officer Robinson conducts inventory search of the vehicle (April 19, tr. at 10) searching inside of a black bag in the back seat, where a loaded firearm was recovered. (April 19, tr. at 11).

LEGAL ANALYSIS

Officers Illegally Prolonged the Traffic Stop in Order to Gain Consent to Search the Defendant Without a Founded Suspicion that Criminality was Afoot

A traffic stop constitutes a limited seizure of the person of each occupant (*People v. May*, 81 N.Y.2d 725, 727 [N.Y. 1992]; *People v. Harrison*, 57 N.Y.2d 470, 476 [N.Y. 1982]). For a traffic stop to pass constitutional muster, the officer's action in stopping the vehicle must be justified at its inception and the seizure must be reasonably related in scope, including its length, to the circumstances which justified the detention in the first instance (*United States v. Sharpe*, 470 U.S. 675, 682, [1985]; *see also, Florida v. Royer*, 460 U.S. 491, 500, [1983]).

A police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a ticket for the violation (*see Rodriguez v. United States*, 575 U.S. 348 [2015]).

In this case — even if the initial stop was justified — the length and circumstances of the continued detention were not. Consequently, the evidence ultimately seized must be suppressed.

While not having made any observations that ██████████ was involved in criminality (April 19, tr. at 32; April 26, tr. at 14, 24), Officers Robinson and Zappia became solely focused

on [REDACTED] after learning that he was on parole (April 26, tr. at 24). Officer Zappia was only focused on getting [REDACTED] consent to a search (April 26, tr. at 42).

Officer Zappia agreed [REDACTED] was “completely cooperative” (April 26, tr. at 16) in providing all the information the officer had requested including his name, the spelling of his name, date of birth, and address upon request (April 26, tr. at 15-18).

Despite no issues with the driver’s license, registration of the vehicle, insurance or warrant checks, Officers Robinson and Zappia did not issue a traffic citation to the driver (April 26, tr. at 43). Officer Robinson maintained control of the driver’s license, only returning it after [REDACTED] consented to a search¹. The sole focus of the officer’s was questioning Mr. [REDACTED] regarding his parole curfew and attempting to get him to consent to a search of his person (April 26, tr. at 42).

During this time— the driver asks Officer Zappia 3 times — “Why can’t I just have have my ticket?”. Officer Zappia responds, “We were going to work with you.”—but tickets are not issued, the detention continues while Officer Robinson questions [REDACTED] further about his parole and parole officer until [REDACTED] finally agrees to step out of the car and consent to a search of his person.²

Officer Zappia testified [REDACTED] was asked to consent to a search for 3 reasons. First, because [REDACTED] denied he had a parole curfew (April 26, tr. at 20). This never occurred. Prior to the request to search, Officer Zappia never has a single conversation with Mr. [REDACTED] about curfew. During their very first conversation³, [REDACTED] acknowledges to Officer Robinson he has a 9 o’clock curfew when asked. Officer Robinson was impeached during his testimony —with his own body camera —when he testified that [REDACTED] lied to him about his curfew (April 19, tr. at 29).

Second, because [REDACTED] was going to an address on Crowley when his parole address was off [REDACTED]. Officer Zappia testified extensively how “suspicious” it was that Mr.

¹AXON_Body_2_Video_2021-11-15_2339.mp4 at 2:17 (04:41:45).

²AXON_Body_2_Video_2021-11-15_2328 at 11:15 (04:39:20).

³ AXON_Body_2_Video_2021-11-15_2331.mp4, at 1:47 (04:33:14)

Officer Robinson: “Sazlieo what’s your curfew man?”

[REDACTED] “I live right here”, (while gesturing forward, up the street)

Officer Robinson: “I know, what’s your curfew? 9 o’clock right?”

[REDACTED] -Nods head in agreement-

Officer Robinson: How come you are out?

[REDACTED] “I’m coming home”

██████████ was on his way to his mother's home and staying with her when his parole approved address was on ██████████. (April 26, tr. at 23). Officer Zappia continued to call this activity "suspicious" even after ██████████'s mother walked to the scene after being called by Mr. ██████████. She confirmed to officers that ██████████ was staying with her at the address Mr. ██████████ had already provided officers on ██████████ because of issues with his girlfriend at the ██████████ (April 26, tr. at 24). The driver, also confirmed that she was on the way to drop ██████████ off at his house on ██████████ (April 19, tr. at 24). Officer Zappia never articulated what was suspicious about someone staying with their mother or what criminality Officer Zappia suspected as a result.

Third, because ██████████ was in a car with alcohol. Officer Zappia testified that there was nothing illegal about a case of beer in a car but a "parolee is not supposed to be around alcohol" (April 26, tr. at 20). Officer Zappia also acknowledged that ██████████ told officers that the alcohol belonged to her and she and ██████████ were on their way to a hotel after they dropped off ██████████ at his mother's (April 26, tr. at 20). Officer Zappia never testified that he observed ██████████ drinking alcohol and also testified that other than ██████████ being inside the car, there was no actual connection to ██████████ and the closed cases of alcohol in the back seat (April 26, tr. at 21). Furthermore, Officer Zappia has no actual knowledge of ██████████'s conditions of parole. No evidence of ██████████'s parole conditions exist in the record that he is not allowed to be around alcohol.

Neither Officer Zappia or Robinson are parole officers. They cannot enforce parole conditions. They had no conversations with ██████████'s parole officer. There is no evidence in the record that ██████████ was in violation of any parole conditions or that either Officer had any knowledge of what ██████████ parole conditions were. (April 26, tr. at 21-24).

Officer Robinson testified he asked ██████████ for consent to search because Mr. ██████████ was argumentative and lied about his curfew (April 19, tr. at 28).

When Officer Robinson was confronted with video of his conversation with Mr. ██████████ his request to search, Officer Robinson acknowledged that ██████████ had not been argumentative with him and had not lied about his curfew (April 19, tr. at 29-30). Officer Robinson then decided the reason he asked ██████████ to consent to a search was because ██████████ was out after curfew (April 19, tr. at 30). Officer Robinson testified that being out after curfew is not a crime and never articulated what criminality he suspected as a

result. Even when asked directly: “What about being out after curfew indicated to you that he [REDACTED] was committing a crime?”, Officer Robinson response was “It’s a violation of his curfew” (April 19, tr. at 30- 31).

None of the reasons provided by either officer regarding why [REDACTED] was asked to a consent search were supported by a founded suspicion of criminality. Each reason was related to a perceived violation of a parole condition. Neither officer has any knowledge of any parole condition of [REDACTED]. Also the parole conditions that the officers pointed to: curfew, staying at his mother’s address, which isn’t listed as “parole approved” and being “around alcohol” are not crimes or evidence of criminality.

A consent to search will not be upheld unless the request to search is supported by a founded suspicion of criminality (*see also People v. Tejada*, 217 A.D.2d 932 [4th Dept.1995]; *People v. Hollman*, 79 N.Y.2d 181, 191-192 [1992]; *People v. Garcia*, 20 N.Y.3d 317, 324 [2012]; *People v. De Bour*, 40 N.Y.2d 210, 223, [1976]). [REDACTED] granted the police permission to search his person only after prolonged questioning which was also coercive, that might reasonably have led him to believe that he was suspected of a crime —without a founded suspicion— during an illegal, prolonged traffic stop.

[REDACTED]’s status as a parolee does not mean that he has diminished protections under the constitution. “[W]e immediately agree with defendant that in consequence of his acquiring status as a parolee, he did not surrender his constitutional rights against unreasonable searches and seizures...” *People v. Huntley*, 43 N.Y.2d 175 (N.Y. 1977).

The actions of Buffalo Police in searching [REDACTED] were not undertaken at the request or direction of [REDACTED]’s parole officer, for his perceived violations of parole and therefore were impermissible.

When the prolonging of the stop was for the sole purpose of questioning [REDACTED] about his parole status and attempting to get him to consent to a search —without a founded suspicion —the subsequent detention and searches were illegal (*see People v. Dunbar*, 840 N.E.2d 106 [N.Y. 2005]).

The Court Should Reject the Testimony of Officer Robinson and Officer Zappia as Not Credible. Testimony Regarding Observation of Drugs in Plain View by Officer Robinson is a Recent Fabrication.

After Officer Robinson completes the search of ██████████'s person and finds nothing, he begins a search of the vehicle and locates drugs. The discovery of drugs then leads Officer Robinson to perform an inventory search of the vehicle, where he discovers a gun in a book bag in the back seat.

Officer Robinson has provided testimony in this case on two prior occasions, once during a felony hearing and again in grand jury proceedings. Officer Robinson never testified previously during either proceeding that he observed drugs in plain view (April 19, tr. at 47). During the suppression hearing—for the very first time—Officer Robinson claims to see drugs in plain view on the passenger seat of the vehicle (April 19, tr. at 47). Officer Robinson also did not write in any official papers filed in this case that he observed drugs in plain view (*see attached Felony Complaint, Defendant's A in Evidence; April 19, tr. at 46*).

To the contrary, Officer Robinson testified at the felony hearing on November 19, 2021, that he *searched* the car and found drugs under the seat (April 19, tr. at 47). Officer Robinson also completed a felony complaint in this case where he wrote the following: , “When Officers approached the said vehicle it was found that defendant ██████████ was violating parole curfew and *did give officers permission to search him*. During the *search of the defendant, ██████████'s area*, Officer Brendan Robinson did recover multiple loose crack rocks of cocaine from *under the front passenger's side of the vehicle*” (April 19, tr. at 46, emphasis added). Officer Robinson's paperwork or his prior testimony never consisted of observing drugs on the seat of the vehicle or in plain view.

Officer Zappia did not see anything on the seat of the vehicle (April 26, tr. at 34). Officer Zappia is standing directly behind the open door of the vehicle as Officer Robinson is searching ██████████. Officer Zappia is only a few inches from where Officer Robinson is standing—shining his flashlight onto and staring at the exact area in which Officer Robinson claims to see drugs⁴ (April 26, tr. at 35).

During the felony hearing conducted on November 19, 2021, Officer Zappia testified he *intended* to exceed the scope of the consent given by ██████████. Officer Zappia testified that when he requested consent to search from ██████████, it was his intention to search *him* and *his area within the car*. (April 26, tr. at 32-33). Which is exactly what the partners do.

⁴ AXON_Body_2_Video_2021-11-15_2339.mp4 at 1:25 (04:40:52)

Officers Zappai and Robinson originally justified their search, as consent search—which Officer Robinson wrote in his original paperwork and is demonstrated by the conduct of the officers at the scene.

When Officer Robinson begins searching the car, [REDACTED] objects—telling the officers: “You aren’t allowed to do that shit, you just asked to search me,” Officer Zappia says: “It’s your immediate area.”; “It’s your immediate area where you are sitting.” Officer Robinson responds: “I’m searching your immediate area, that’s included with you.”⁵ (April 19, tr. at 43).

Officer Robinson and Zappia, are now aware they had exceeded the scope of the consent given by [REDACTED] consented to a search of his person—and as a result of that consent—Officer Robinson conducted a search of the car. Surely anticipating suppression would be granted if he testified consistently with his prior testimony, Officer Robinson decided instead to fabricate another reason why he searched the car. Despite all of his prior testimony and sworn statements to the contrary, Officer Robinson testifies for the first time, in front of this Court, that he observed drugs in plain view. A recent fabrication of the facts of this case—unworthy of belief by this Court.

The Court should refuse to credit testimony which has all appearances of having been patently tailored to nullify constitutional objections (*People v Harris*, 192 A.D.3d 151, 163, [2020], *People v Lebron*, 184 A.D.2d 784, 784 [2d Dept. 1992]).

On a motion to suppress physical evidence, the People bear the burden of going forward to establish the legality of police conduct in the first instance" (*People v. Hernandez*, 40 A.D.3d 777, 778 [N.Y. App. Div. 2007]; see *People v. Berrios*, 28 N.Y.2d 361 [N.Y. 1971]; *People v. Moses*, 32 A.D.3d 866 [N.Y. App. Div. 2006]). "Implicit in this concept is that the testimony offered by the People in first presenting their case must be credible" (*People v. Quinones*, 61 A.D.2d 765 [N.Y. App. Div. 1978] ; see *People v. Berrios*, 28 N.Y. 2d at 367-368; *People v. Fletcher*, 130 A.D.3d 1063 [N.Y. App. Div. 2015]).

When the testimony of the police officer is unworthy of belief, the court should conclude that the People have not met their burden of coming forward with sufficient evidence and grant the motion to suppress (*People v. Berrios*, 28 N.Y.2d at 369). "[If] the People establish the legality of the police conduct by credible evidence, the defendant bears the burden of

⁵ AXON_Body_2_Video_2021-11-15_2339.mp4 at 2:30 (04:41:58)

establishing that the arrest was not based on probable cause or that the police conduct was otherwise illegal" (*People v. Fletcher*, 130 A.D.3d at 1064).

Therefore, the People have not met their burden of coming forward with sufficient evidence and motion to suppress should be granted.

The Incriminating Character of the Substance on the Seat was Not Readily Apparent and Officers were Not in a Lawful Position to Observe the Item

"[L]aw enforcement officers may properly seize an item in 'plain view' without a warrant if (i) they are lawfully in a position to observe the item; (ii) they have lawful access to the item itself when they seize it; and (iii) the incriminating character of the item is immediately apparent" (*People v. Brown*, 96 N.Y.2d 80, 89 [2001]; *People v. Bishop*, 161 A.D.3d 1547 (4th Dept., 2018)).

Video of the seat, where Officer Robinson claims to have observed drugs in plain view is in evidence and a screen shot of the time stamp at 04:41:36 is attached as Exhibit 2. Officer Robinson testified he is outside the car at this time and observed suspected crack cocaine on the seat (April 19, tr. at 15).

Nothing in this video or in the attached screenshot on the seat of the vehicle is immediately apparent as crack cocaine.

In viewing Officer Robinson's body camera, there is no indication that he initially saw anything, on the seat, let alone a substance he recognized as crack. Again, his testimony is a recent fabrication in order to justify the search, after the fact.

Officer Robinson has no outward reaction upon shining his flashlight onto the seat. He instead engages the driver in a conversation about her tinted windows and order of protection as he begins searching the interior of the car. He doesn't remove any occupants from the car or ask any questions about the substance. He then engages in a full search of the front passenger side of the vehicle including under the seat, feeling with his hands around the plastic components of the car and looking in the glove box. It is only after this complete search is finished, does he take out a NIK test and wipe the seat and floor.⁶

⁶ AXON_Body_2_Video_2021-11-15_2339.mp4 at 2:09 through 4:55 (04:41:36)

Officer Robinson was not consistent when describing what he saw on the seat. In his direct testimony, he referred to it as, “ a white rock like substance” (April 19, tr. at 9). On cross, the substance became a “white flake (April 19, tr. at 40),” “powderish”, “white powderish flake”(April 19, tr. at 40) and “white powder (April 19, tr. at 45)”; “loose, white flake” (April 19, tr. at 41). On the body camera, Officer Robinson refers to the substance as “white powder”⁷ not a “white rock like substance” as he had testified to on direct.

Also the substance Officer Robinson claimed to have observed is loose and unpackaged. Robinson is a patrol officer. He testified that his duties as a patrol officer are “ to patrol the area and answer 911 calls” (April 19, tr. at 4). The record does not contain any testimony regarding Officer Robinson’s specialized training or experience detection of controlled substances *by sight*. Officer Robinson’s incredible abilities only stem from making traffic stops and drug related arrests (April 19, tr. at 42, 56). Officer Robinson then needs to test the substance in order to determine whether the substance is drugs (April 19, tr. at 41). Offer Zappia also testified that he and his partner use the NIK test wipes because they are unable to tell all the time if the item to be tested is drugs by looking at them. (April 26, tr. at 53).

No evidence of drugs on the seat actually exists in this case. Officer Robinson used the same wipe to test both the seat and the carpet under the seat before he looks at the wipe and observes a positive test result. (April 19, tr. at 43). There is also no evidence in the record that the positive result was from any substance on the seat.

At 04:41:36, Officer Robinson claims to be outside the car. Prior to this time stamp, at 04:31:34, the exterior of the vehicle and threshold of the vehicle is visible on screen. At 04:41:36, only the interior of the vehicle is now visible. Officer Robinson’s hand is also extended forward with his flashlight in hand and the dashboard on the right hand side is now only partly visible as he has moved further into the interior of the car.⁸ Officer Zappia observed Officer Robinson inside the car immediately after the search of [REDACTED] (April 26, tr. at 46).

Officer Zappia and Robinson are both visible on body camera extended their flashlights and hands into the interior of the vehicle⁹ Officer Zappia admitted that he had (April 26, tr. at 47-

⁷ *Id.* at 4:54 (04:44:23).

⁸ AXON_Body_2_Video_2021-11-15_2339.mp4 at 2:07 (04:41:34).

⁹ AXON_Body_2_Video_2021-11-15_2328.mp4 at 1:02 (04:19:10-Zappia), 5:34 (04:33:40-Zappia) and 5:40 (04:43:47-Robinson)

48) explaining on re-direct it was because the windows were too dark to see through (April 26, tr. at 56).

Obviously Officer Robinson was aware or made aware that testimony that he was outside the vehicle when he claims to have observed drugs on the seat was necessary for a legal plain view search to have occurred. However, both Officers had already placed their flashlight-laden hands into the interior of the car prior to this moment in the stop. ("[W]e find that the officer's action of placing his flashlight-laden hand inside the vehicle in order to better observe the floor of the car constituted a search." *People v. Young*, 615 N.Y.S.2d 767 [N.Y. App. Div. 1994]).

This Court should reject the testimony of Officer Robinson that he was maintaining a position outside of the vehicle when he and Officer Zappia had already entered the interior of the vehicle their flashlights and Officer Robinson's body camera also depicts his hand within the interior of the car.

For all of the foregoing reasons, the evidence recovered as a result of the search, i.e. the firearm, drugs and statements should be suppressed as fruit of the poisonous tree (*see generally Wong Sun, supra*); and [REDACTED]'s motion requesting suppression of should be granted in its entirety.

