

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX        PART 33

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THE PEOPLE OF THE STATE OF NEW YORK

DECISION

-against-

IND. NO. 853-2017

Jesse Hill & Nicholas Willis,

Defendants.

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**April A. Newbauer, J.:**

Defendants Jesse Hill and Nicholas Willis are charged with criminal possession of a weapon in the second degree and other charges stemming from a car stop on the night of March 24, 2017. Defendants filed omnibus motions to suppress physical evidence—a revolver and ammunition-- on the grounds that the evidence was the subject of an illegal search and seizure. Defendant Willis also moved to suppress his videotaped statement to the police. On November 27, 2017, the court (Michels, J.) granted each defendant a *Huntley/Mapp/Dunaway* hearing. The hearings were conducted on June 27-28, 2019. The defendants' motions to suppress the physical evidence and statements are granted because the prosecution's sole witness was not credible.

## **FINDINGS OF FACT**

The People chose to call as their sole witness Police Officer Daniel Nunez. A thirteen year veteran of the New York City Police Department (NYPD), Officer Nunez has participated in over 100 arrests for firearms. He reviewed the arrest paperwork from the incident and photographs before testifying. According to his testimony, however, Officer Nunez forgot and by mistake did not make entries of the defendants' arrests or the incident itself in his memo book.

Officer Nunez stated that on March 24, 2017 at approximately 1:45 a.m., he was at the corner of East 233<sup>rd</sup> Street and Dyer Avenue, riding in an unmarked vehicle with two fellow members of an NYPD anti-crime team. Officer Nunez was sitting in the front passenger seat. From that vantage point, he said he could see the defendants' car parked, but running, on the opposite side of East 233<sup>rd</sup> Street. He noticed the car because it was a model the NYPD used for anti-crime work and he initially thought the occupants--two young white males--might be fellow plainclothes police officers. Officer Nunez testified that he believed the defendants were committing a traffic violation because their car was in an area with diagonal white lines, although he did not remember a "no standing" zone sign being posted.<sup>1</sup> Once Nunez and his partners could see the defendants were not

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<sup>1</sup>On cross examination, Officer Nunez was asked whether the car was standing or parked, given that he had said it was running:

Q: And the car, the car had its engine on, right?

A: The lights were on, yes.

Q: The car was on. It was idling, right?

A: Yes.

Q: Okay. And you had said that the car was illegally parked, right?

A: Yes.

Q: Okay. But the car was actually standing, it wasn't parked, right, because the car was on?

[THE COURT: Do you understand the question?

A: Yeah.]

A: When you're parked, that is when the car is next to the curb. The car is in park. They

NYPD officers, they drove past the parked car, made a U-turn and pulled up behind the parked car. The defendants' car then began to roll forward and turned the corner onto Dyer Avenue. The officers put on their lights and the car pulled over and stopped in front of a church. Officer Nunez stated that the reason that they stopped this vehicle was because of the traffic violation (illegal parking) and that they intended to issue the driver a summons.<sup>2</sup> The officers parked right behind the defendants' car. Officer Nunez testified that it took approximately fifteen seconds to drive around the corner and park. Officer Nunez got out of the police vehicle and headed to the passenger side of the defendants' car while the driver, Officer Vasquez, exited and proceeded to the driver's side of the car. The sergeant stayed somewhere near the rear of the defendants' car.

Officer Nunez testified that when he exited his vehicle he noticed a strong odor of burning marijuana. He denied seeing either of the defendants smoking, and no lighter, rolling papers or contraband were found. Officer Nunez did not recall whether the defendant's car windows were rolling down or fully down when he approached.<sup>3</sup> Officer Nunez also testified that he observed three small bags of marijuana on the center console of the defendants' car. A photograph of three bags each containing a green leafy substance was introduced into evidence as People's #1. The photograph shows three small ziplock bags perched on the gear shaft in between the driver's seat and the passenger side. The console itself is shown as containing two cans.

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shift the gear it's a P at the top, it was in that. It was in park, so it was parked.

Q: You couldn't see if it was in the P when you were driving your car?

A: No, but I learn that when I walked up to the car. The shift of the gear was in park.

<sup>2</sup>No ticket or summons was ever issued. Defendant Hill testified that the spot where they parked their rental car for three to four hours was a legal parking spot, not a 'no standing' zone.

<sup>3</sup>The defendants introduced evidence that the outside temperature on March 24, 2017 was 37 degrees Fahrenheit.

The officers asked the defendants to step out of the car and they were frisked. The officers then searched the interior of the car and eventually, the trunk. Inside the trunk Officer Nunez testified he observed a box of ammunition and felt what he believed to be a firearm covered and wrapped in a shirt. Once he felt the gun, Officer Nunez said he did not lift up the shirt or search for any other items in the trunk of the car. Instead, he contacted the Evidence Collection Team (ECT). The defendants were placed under arrest. The front passenger was identified as defendant Willis, and the driver was identified as defendant Hill.<sup>4</sup>

As to what occurred next until the officers, the defendants and the car were at the 47<sup>th</sup> precinct, the record is murky. Officer Nunez did not remember how the defendants or the car arrived at the 47<sup>th</sup> precinct, whether he drove the defendants' car to the precinct or not. He testified that at the precinct, ECT unwrapped the firearm in his presence, and that he took photographs of the gun and ammunition, the car and the contents of the trunk. (Ex. 2, A, F) At the precinct, both defendants were read *Miranda* warnings and made statements. These statements were recorded on video and introduced into evidence. (P's Ex. 3, 4)

Defendant Hill testified at the hearing. Hill stated that when the police showed up, Willis was driving the car. The police pulled them over. The police ordered them out of the care and found the packets of marijuana inside a Newport cigarette box in Willis's pants pocket. Defendant Hill said he got into the passenger seat and the defendants begin to drive away before the police car was behind them. They stopped around the corner by a church. Two officers approached their car. Defendant Hill testified that the windows were up and the bags of marijuana were still inside the

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<sup>4</sup>The record also contains lengthy but largely irrelevant testimony from both the People's witness and the defense witness Hill about where the defendants said they were going, why they were in NYC, their routes and activities during the evening.

Newport box in defendant Willis's pocket. According to Hill, Officer Nunez approached him and asked him to exit the car while Officer Vasquez ordered defendant Willis to get out of the car. The defendants were told to stand facing each other on either side of the car approximately four feet apart. Defendant Hill saw Officer Vasquez recover the three bags of marijuana from defendant Willis's pocket. He testified that the photograph introduced as People's Exhibit #1 was not how the bags appeared at the time the police pulled them over. According to Hill, at no time were the bags of marijuana arranged in that fashion and neither were they in plain view. While the defendants stood outside of the car, the two officers searched the interior of the car and then searched the trunk.

### **CONCLUSIONS OF LAW**

In seeking to introduce the physical evidence attributed to the defendant on their direct case at trial, the People bear the burden of providing evidence of the legality of the police conduct which led to the seizure of evidence. *People v. Whitehurst*, 25 N.Y.2d 389, 291 (1969); *People v. Malinsky*, 15 N.Y.2d 86, 91, n.2(1965). Once the People have met their burden, the defendant has the ultimate burden of establishing the illegality of the police conduct by a fair preponderance of the evidence. *People v. Berrios*, 28 N.Y.2d 361 (1971). The People have failed to meet their burden. The defendants' motion to suppress their statements and the physical evidence is granted.

Any inquiry into the propriety of police conduct must weigh the degree of intrusion entailed against the precipitating and attending circumstances out of which the encounter arose. *People v. Salaman*, 71 N.Y.2d 869, 870 (1988); *People v. DeBour*, 40 N.Y.2d 210, 223 (1976). The court must determine whether the police conduct was reasonable considering the totality of the circumstances. *People v. Batista*, 88 N.Y.2d 650, 653 (1996).

Criminal Procedure Law section 140.50 provides, in part, that “a police officer may stop a person in a public place . . . when he reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor . . . and may demand his name, address, and an explanation of his conduct.” Reasonable suspicion is the quantum of knowledge sufficient to induce an ordinarily prudent and cautious person under the circumstances to believe criminal activity is at hand. To justify such an intrusion, the police officer must indicate specific and articulable facts which, along with any logical deductions, reasonably prompted that intrusion. Vague or unparticularized hunches will not suffice. *See People v. Cantor*, 36 N.Y.2d 106, 112-113.

A violation of the Vehicle and Traffic Law will justify a police stop of a vehicle. *People v. Robinson*, 97 NY2d 341 (2001). *See also People v. Thomas*, 19 A.D.3d 32 (1<sup>st</sup> Dept. 2005), *lv. denied* 5 N.Y.3d 795 (2005). An officer’s good faith belief that a traffic infraction is being committed is sufficient, even if that belief later proves to be incorrect. *See People v. Guthrie*, 25 NY3d 130 (2015).<sup>5</sup> In this case, the officers may have had reasonable suspicion to stop the defendants’ car.<sup>6</sup> Officer Nunez testified that he observed a car illegally parked in a ‘no standing’ zone on East 233<sup>rd</sup> Street. It is not clear that the defendants were actually parked or just not moving. The defendants suggested that they were parked in a legal space in front of the no standing area

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<sup>5</sup>But see *People v. Smith*, 1 AD3d 965 (4<sup>th</sup> Dept. 2003)(trial court properly granted suppression where the officer realized his mistake in stopping the car for a traffic infraction before approaching the defendant).

<sup>6</sup> In *DeBour*, the Court of Appeals established a graduated four level test for evaluating the propriety of police conduct in encounters while acting in a law enforcement capacity. The first level allows an officer to request information and such request must be supported by an objective credible reason. The second level requires a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion. *See People v. Moore*, 6 N.Y.3d 496, 499 (2006). The third level permits an officer to stop and detain a person if the requirements of CPL § 140.50 are met.

during the evening. Officer Nunez claimed to have seen the car's gear in "P", but that observation had to have been made after he left his own vehicle, after the defendants had moved their car around the corner to Dyre Avenue.

Fortunately, the outcome of the hearing need not rest on what gear the defendants were in or a parsing of the officers' good faith understanding of the rules in a no standing zone. This case illustrates why the time has come to reject the canard of marijuana emanating from nearly every vehicle subject to a traffic stop. So ubiquitous has police testimony about odors from cars become that it should be subject to a heightened level of scrutiny if it is to supply the grounds for a search. *Cf. People v. Ramos*, 122 AD3d 462 (1<sup>st</sup> Dept 2014). *But cf. People v Mena*, 87 AD3d 946 (1<sup>st</sup> Dept 2011); *see also United States v Gaskins*, 364 F3d 438, 456 (2d Cir 2004)(automobile exception to warrant requirement permits officers to conduct contemporaneous search of car "if probable cause exists to believe the vehicle contains contraband or other evidence of a crime.")). In this instance, while the defendants had a small sealed quantity of marijuana *somewhere* in their possession inside the car, there was no indicia of it being smoked, recently smoked or burning. There were no ashes, cigarettes, rolling papers, clips or lighters, and no testimony that anything had been thrown out of the vehicle during its fifteen second turn around the corner of Dyre Avenue. Officer Nunez noted the defendants' condition was 'apparently normal.' Moreover, according to the officer, defendant Hill appeared very nervous and was breathing rapidly, not exactly the hallmarks of marijuana ingestion. Officer's Nunez's testimony concerning the odor of marijuana is contradicted by evidence in the record. *Cf. People v. Stanley Pena*, Indictment No. 2027-2017 (Sup.Ct Bx Co.) (Marcus, J.)

In addition, his testimony that packets of marijuana were lying in plain view is so incredulous as to cast doubt on his entire narrative. Officer Nunez testified that he observed three small sealed

bags of marijuana lined up neatly in a row near the base of the gear shaft. (See P's Ex. 1) This would mean that the defendants arranged the bags in a straight line, and that the bags stayed poised as the defendant drove the car around the corner, shifting gears at least once. Finally, it would mean that the defendants made no effort to conceal the marijuana when the police pulled up behind them, even knowing, according to defendant Hill, that they also had a firearm in the trunk. If that were not enough, it also defies common sense that the officer would take a photograph at the scene just of the marijuana bags and but then put his camera away and return to the precinct only to photograph the trunk. More likely, the photograph taken by Officer Nunez depicts strategically placed or staged bags of marijuana at the precinct. A determination of Officer Nunez's credibility is informed by two earlier findings against him,<sup>7</sup> but it is the improbability of his narrative that dictates the conclusion that he simply arranged his facts to avoid constitutional infirmity.

Since the People failed to meet their burden of establishing the legality of the police conduct because the testimony of the officer cannot be credited, the marijuana, revolver, ammunition and statements must be suppressed as fruits of an unlawful search and seizure. See *People v Berrios*, 38 NY2d 361 (1971); *People v Carmona*, 233 AD2d 142, 1444 (1<sup>st</sup> Dept 1996).<sup>8</sup>

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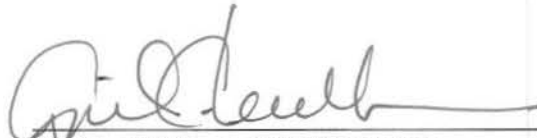
<sup>7</sup>Officer's Nunez was cited for misconduct by the Civilian Complaint Review Board (CCRB) and he was subject to discipline by the NYPD for two prior stops, in 2006 and 2012.

<sup>8</sup>The motions by defendant Willis to preclude the unnoticed statement he allegedly made at the scene of the arrest and the videotaped statement are denied as moot as all statements are 'fruits of the poisonous tree.' If the court were to consider the merits, defendant Willis's motion to preclude the unnoticed statement made at the scene would be granted as the People failed to provide CPL § 710.30(1)(a) notice within fifteen days of arraignment. In contrast, were Willis's arguments for preclusion of the video statement to be considered, the motion to preclude all or part of the video statement would be denied, as the notice was timely and was a summary which provided defendant with enough information to timely move to suppress. The videotaped statement was available for viewing within fifteen days of the defendant's arraignment and the statement was made voluntarily and in accordance with *Miranda*.

The defendants' motions to suppress the statements and physical property are granted in their entirety. This constitutes the decision and order of the court.

ENTER,

Dated: July 25, 2019  
Bronx, New York



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HON. APRIL A. NEWBAUER  
Acting Supreme Court Justice