

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

The People of the State of New York

vs.

Indictment No. 70234-19-001

~~XXXXXXXXXX~~

Defendant

Appearances:

John J. Flynn, Esq.
Erie County District Attorney
BY: David M. Zak, Esq.
Assistant District Attorney
Attorney for the People

Paul G. Dell, Esq.,
Attorney for the Defendant

DECISION AND ORDER

GIVENS, J.

The defendant is charged by this indictment with Criminal Possession of a Weapon in the Second Degree, PL 265.03(3), Criminal Possession of a Controlled Substance in the Fourth Degree, PL 220.09(1), Criminally Using Drug Paraphernalia in the Second Degree, PL 220.50(3), Improper Turning or Stopping, VTL 1163(a) and Possession of Alcohol in Vehicle, VTL 1227(1). The defendant moves to suppress the physical evidence seized pursuant to Section 710.20 of the Criminal Procedure Law.

The Court finds that the People have not met their burden of establishing credible facts to support a finding that there was probable cause to effectuate the subject traffic stop, and therefore evidence seized cannot form the basis for this prosecution.

FACTS

A suppression hearing was previously conducted in 2019 before Hon. Russell P. Buscaglia who retired prior to rendering a decision during a period when Court was not in session except for essential business due to COVID, and during the pendency of a disputed request to review police disciplinary records of the witnesses pursuant to the newly enacted Section 245 of the Criminal Procedure Law, effective January 1, 2020. This Court conducted a new suppression hearing on September 16, 2021. Officers Mitchell J. Thomas and Mitchell R. Thomas (hereinafter referred to as Officers J. Thomas and R. Thomas) of the City of Buffalo Police Department, testified at the hearing.

The testimony at the hearing revealed that on June 27, 2019, while on routine patrol in a marked patrol vehicle at 2:35 a.m., with Officer J. Thomas at the wheel, the patrol vehicle was traveling south on Fillmore Avenue approaching Dewey Avenue where the defendant's vehicle was first observed facing east on Dewey, stopped near the intersection. Defendant's vehicle on Dewey was at a perpendicular angle to the approaching patrol vehicle on Fillmore. Defendant's vehicle was the sole vehicle on the road and was properly situated behind a cross walk. There was a traffic light which the officers testified was red facing the defendant's car.

Initially the car was described by Officer J. Thomas as “a car at the light”. Officer R. Thomas later testified that the defendant was “not hugged up” on the corner but was “a little further back from the intersection. He’s not right at the intersection”. Officer J. Thomas testified that he thought defendant’s car would have gone straight because it did not have a blinker on. After the patrol car turned right at the intersection, Officer J. Thomas testified that he saw the defendant’s vehicle also beginning to turn right while simultaneously signaling its turn with its right turn blinker. He testified he observed the defendant’s vehicle’s turn through his side view mirror. Officer J. Thomas then made a U-turn, activated his lights and sirens and pulled the defendant over because Defendant had not signaled his turn for the requisite 100 feet prior to its turn, required by VTL 1163(b).¹ Officer J. Thomas testified that when he asked the defendant to get out of the vehicle the defendant “reached toward the bottom of his seat near his feet area”. Drugs, drug paraphernalia, along with a loaded and operable handgun were found in defendant’s vehicle.

When asked on cross examination why he was observing defendant’s vehicle’s turn behind him, Officer J. Thomas testified that he was on routine patrol in a high crime area and that he liked to stay alert. He also stated that as no other cars were on the road his sole focus was on defendant’s vehicle.

When questioned as to why he never mentioned to the grand jury the fact that his observation of the defendant’s turn made behind him was viewed through his side view mirror, Officer J. Thomas stated that he *had* testified to that. However, when confronted with his grand jury testimony he admitted that he did not mention that fact to the grand jury.

¹ VTL 1163 (a) gives the parameters to apply to turning movements at intersections and into driveways and requires that a vehicle be in a proper position upon the roadway before turning and that its movement may only be made when it can be “made with reasonable” safety. VTL 1163 (b) speaks to vehicles moving in traffic and VTL 1163 (d) proscribes the signals to be used when turning, changing lanes or starting from a stopped position.

Initially on direct examination Officer R. Thomas testified that “we seen that vehicle make a right-hand turn”. After being asked by the prosecutor “when you say we, were you the one watching the vehicle or was that your brother”, a few answers later, the witness stated “my brother actually notified me of the traffic infraction”. On cross examination, he stated that he did not actually observe the defendant’s turn. When asked about signing a felony complaint under oath to the contrary, he admitted that he did in fact sign the felony complaint in the case, under oath, indicating that he had observed the turning infraction when he had not. Defense counsel also cross-examined both witnesses about the histories of various disciplinary complaints lodged against them.

The defense argues that the officers’ testimony reveals that they are not being truthful about the reasons for the stop; that the officers were targeting Defendant and that they used the VTL 1163 allegation in an attempt to try to legalize a stop for which there was no lawful basis. The defense further argues that the defendant’s right-hand turn from a stopped position does not fall within the purview of VTL 1163(b), but rather that of VTL 1163(d) pertaining to the turns made by vehicles starting from a parked position which, by definition, does not require the 100 feet of continuous signaling prior to turning.

LAW & ANALYSIS

The Court of Appeals has recently clarified that the standard to be applied to determine the legality of a traffic stop is whether or not the police had probable cause to believe that a traffic infraction had been committed. (*People v Hinshaw*, 35 NY 3d 427 [2020]).

On a motion to suppress physical evidence yielded from a traffic stop the People bear the initial burden of establishing the legality of the police conduct in the first instance. “Implicit in this concept is that the testimony offered by the People ...must be

credible. (*People v Berrios*, 28 NY2d 361, 368 [1971]). The burden then shifts to the defense to establish by a preponderance of the credible evidence that the police conduct was illegal. *Id.*

Vehicle and Traffic Law Section 1163(b) states that “a signal of intention to turn right or left when required shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning”. By its own wording the “100 feet in advance” element applies where at least 100 feet have been traveled with the requisite intent to turn. Here, there was no testimony that the officer had observed defendant’s vehicle traveling or operating on the roadway at all beyond seeing it stopped near the corner. In fact, Officer R. Thomas’ testimony that upon approaching the intersection “we noticed a vehicle sitting at a red light going -- facing eastbound on Dewey” verifies that at no point was the vehicle observed to be in motion. Furthermore, there is no testimony that the car was even running prior to its turn and no testimony tending to indicate that it was running (such as that its lights were on while stopped near the corner at 2:35 a.m.). The only testimony is that the car was stopped near an intersection at which there was a traffic light. Of note is that the Officers’ observations of defendant’s vehicle prior to its turn were limited to what they could see by approaching the corner from a perpendicular angle. Also of note is that there was no testimony of any allegation that the turn was otherwise not “made with reasonable safety”, the statutory premise set forth in Vehicle and Traffic Law Section 1163(a). Last, that the turn was made simultaneously with the signal does not indicate any illegality where the record indicates no more than that the vehicle turned from a stopped position.

Accordingly, the elements of the alleged infraction upon which this traffic stop was testified to have been made are not present in the suppression hearing record. The officers’ conclusions that the defendant violated Section 1163(a) of the Vehicle and Traffic Law were not supported by an adequate demonstration of facts, which renders

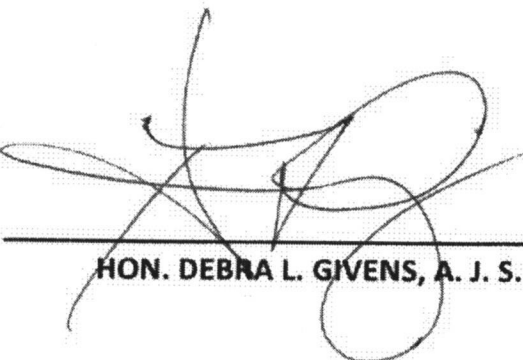
this Court unable to determine what actually occurred leading up to the stop of defendant's vehicle. The Court finds that the People have not met their burden of establishing credible facts sufficient to support a finding that there was probable cause to effectuate the subject traffic stop. Thus, the People have failed to meet their initial burden supporting the legality of this traffic stop, and under these circumstances any evidence seized was illegally obtained and cannot be the basis for prosecution. (See, *People v Knupp*, 159 Ad 3d 510 [1st. Dept., 2018]); (*People v Anonymous*, 60 Misc. 3d 405 [Bronx Co. 2018]).

Even had the People met their burden of setting forth facts sufficient to support their conclusions, the record demonstrates questionable credibility given the inconsistencies, contradictions and admissions in the testimony. The search of defendant's vehicle was predicated on an unlawful stop. Therefore, the search and seizure of the subject vehicle and all evidence flowing from it are fruit of the poisonous tree, (*Wong Sun v United States*, 371 U.S. 471 [1963]) and *People v Oramus*, 66 NY2d 825 [1969]) and must be suppressed.

Accordingly, the defendant's motion to suppress physical evidence seized is **GRANTED**.

This decision constitutes the Order of this Court.

DATED: Buffalo, New York
February 2, 2022



HON. DEBRA L. GIVENS, A. J. S. C.