

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

The People of the State of New York,

vs

SAMUEL TILLMAN,

Defendant.

INDICTMENT NO.
704447-20/001
LEGACY: #01254/2020

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

Paul Gordon Dell, Esq.
Attorney for the Defendant

DECISION AND ORDER

PAUL B. WOJTASZEK, J.S.C.

The defendant is charged by this Indictment with Criminal Possession of a Weapon in the Second Degree, Penal Law § 265.03(3). The defendant moves to suppress the physical evidence seized pursuant to Section 710.20 of the Criminal Procedure Law. A hearing was conducted pursuant to *Mapp v Ohio* (367 US 643 [1961]) and *Dunaway v New York* (442 US 200 [1979]). The hearing was conducted on January 3, 2023. Detective Brian Walsh and Officer Bradley Canzoneri with the Amherst Police Department testified. The defendant also testified. Both parties

submitted post-hearing briefs which this court has reviewed in full.¹ The defendant argues the police did not have reasonable suspicion to justify the seizure, therefore the recovered firearm should be suppressed. In response the People argue that the detectives had reasonable suspicion that the defendant was involved in prostitution activity in Room 148 at the Red Roof Inn, thereby providing the requisite authority to approach him to further their investigation.

Findings of Fact and Conclusions of Law:

The credible evidence at the hearing revealed that on August 5, 2020 Detective Brian Walsh of the Amherst Police Department was conducting an investigation at the Red Roof Inn on Flint Road in Amherst, New York from a vantage point across the street in the parking lot of the Triad Apartment Building. The investigation began with a 911 call from a motel guest about possible prostitution activity. Dispatch relayed the call to Detective Walsh's boss and the matter was referred to the Narcotics Unit. Detective Walsh was conducting surveillance related to this allegation of possible prostitution at the motel in Room 148. When he initially arrived at the parking lot he observed the area of Room 148 to monitor what was happening. Over the course of 90-120 minutes he observed one white female and two black males "coming and going" from Room 148. The detective did not observe any of the three individuals using drugs or exchanging money.

When the three persons left the motel in a vehicle together, Detective Walsh also left. His partner Detective Dailey then began researching on-line to see if there was prostitution taking place at Room 148. Detective Dailey started texting with a female that was purportedly available at the

¹ The court reviewed the defendant's Memorandum of Law dated February 28, 2023, various written communications from the defendant himself including a "Memorandum of Law" dated February 8, 2023, the People's Memorandum of Law dated March 15, 2023, and the defendant's March 17, 2023 reply letter.

motel. Detective Walsh read the texts at the hearing (Exhibit 2) and “bbbj” was discussed (this is oral sex without a condom). The texts reveal an exchange about meeting time, place, cost, and the usage of condoms. The text messages did not come from the woman that was in Room 148. While the texts did indicate the Red Roof Inn, Room 148 was never mentioned specifically. Even when the detective texted “Room?” the response was “Ok are u close?” as opposed to identifying a specific room.

Later, Detective Walsh went back to the Red Roof Inn with Detective Homberger and they took various positions to watch the area and “make sure everything was safe.” Detective Walsh admitted his Lieutenant directed him ahead of time to detain the two black males. They observed the same two black males, but Detective Walsh did not personally observe the men leave Room 148. They approached the two men sitting on the stairwell. When he initially encountered the defendant, Detective Walsh did not feel he was in danger and his intention was to detain the defendant to “look further into their involvement with what was happening in that [Room 148] room.” The defendant had a Coors Light in his hand and did not make any furtive gestures or have any visible bulge in his clothing.

The police approached and identified themselves at which point one individual (the defendant) stood up. When he approached the defendant Detective Walsh did not think he was a “John” or a pimp. He did not know what his relationship to the female was.

Detective Walsh said, “come on over here.” When he directed the defendant to walk with him the defendant was not under arrest. No handcuffs were used, no firearms were displayed, and there were no threats or promises made. In response Detective Walsh recalled the defendant “immediately put his hands up against the wall.” The defendant made some type of motion that was not normal, like he was ready to be frisked. Detective Walsh interpreted this to mean the

defendant had something on him or that he was a danger. The Detective said “no,” because he wanted to move down the hallway a bit to see if the defendant had involvement with the suspected prostitution. As they were walking the detective asked the defendant if he had anything dangerous on him. The defendant responded he had a gun in his front pocket. According to Detective Walsh, he did not lay a hand on the defendant until the defendant said he had a gun on him. He testified he did not pat the defendant down until after he said he had a gun. He further testified he was not able to ask about the prostitution situation before the defendant said he had a gun.

The defendant’s testimony was inconsistent with that of Detective Walsh. The defendant testified that when the detectives approached him he was going to try and move out of their way to let them pass, but when they took their badges out he put his hands in the air. He was never told to raise his hands. The police never drew their weapons. They never said freeze or do not move. The defendant recalled the detective saying “I’m gonna talk to you,” and his partner took the other male with the defendant off to the side. The officers were both armed. The detective said the defendant was not under arrest, but he had some questions for him and the detective displayed his hands in a manner that indicated the defendant could not “just walk away.” There were questions about what he knew about prostitution going on, and the girl he was in the room with (it is not clear which room is being discussed). According to the defendant the officer said he had to pat the defendant down for his safety so he was directed to get against the wall. During the pat down the defendant felt the officer touch the butt of a gun, so he told him had had a gun. The defendant was then arrested for possession of the gun.

Officer Bradley Canzoneri with the Town of Amherst Police Department was working on August 5, 2020 at 12:30pm when he was called to the Red Roof Inn to transport a suspect in custody. When he arrived he took the defendant into custody and put him in his patrol car. Without

being asked a question the defendant made statements. No Miranda warnings were given. Exhibit 1 in evidence is the body camera footage from Officer Canzoneri which recorded the defendant's statements.

Lawfulness of police activity:

Initially, the People have the burden at a suppression hearing of showing the legality of the police conduct in the first instance (see *People v Baldwin*, 25 NY2d 66, 70 [1969]; *People v Ponce*, 203 AD3d 1628 [4th Dept 2022]). Once the People have met this burden, it is the defendant that bears the burden of proving any illegality of the police conduct (see *People v Berrios*, 28 NY2d 361 [1971]; *People v Baldwin*, 25 NY2d at 66).

To meet their burden the People must demonstrate the officers' intrusion was justified pursuant to *DeBour's* four level of intrusion analysis (see *People v DeBour*, 40 NY2d 210, 223 [1976]).

The court in *People v Bruce* (78 AD2d 169, 171 [1st Dept 1980]) presents this issue succinctly:

Reasonableness is the touchstone by which police conduct is measured under the Fourth Amendment. (*Cady v Dombrowski*, 413 U.S. 433, 439 *People v Prochilo*, 41 NY2d 759, 761.) "[Whether] * * * a particular search or seizure is to be considered reasonable requires a weighing of the government's interest against the encroachment involved with respect to an individual's right to privacy and personal security * * * Thus, we must consider first whether * * * the police action was justified in its inception and secondly whether * * * that action was reasonably related in scope to the circumstances which rendered its initiation permissible." (*People v De Bour*, 40 NY2d 210, 215.) What is required is a balancing of two societal interests, law enforcement on the one hand and individual privacy and personal inviolability on the other. (See *Brinegar v United States*, 338 U.S.160,176.)

The issue in this case is what if any authority law enforcement officers had to interfere with the liberty and privacy interests of the defendant. The defendant argues that at most there was a

founded suspicion that criminal activity was afoot which permits the right to a common law inquiry, and anything beyond that including the seizure of the gun was unlawful. In response, the People argue that a citizen informant made several 911 calls providing updates on suspicious activity, and that combined with the observations and communications with the subject female provided a founded suspicion to ask the defendant an accusatory question. Further, the defendant's actions in immediately placing his hands on the wall provided a further basis for asking pointed accusatory questions.

In *People v Mobley* (120 AD3d 916 [4th Dept 2014]) the court held that a police officer may stop a person to search for weapons where the officer reasonably suspects the person is committing, has committed or is about to commit a crime and the officer reasonably suspects he is in danger of physical injury (internal citations omitted). Moreover, a stop based on reasonable suspicion will be upheld if the officer can point to specific and articulable facts which, along with logical deductions, reasonably prompted the intrusion (*People v Mobley*, 120 AD3d at 917).

The defendant in this case cited *People v Martinez-Gonzalez* (188 AD3d 1593 [4th Dept 2020]) for the proposition that proximity to suspected criminal activity and otherwise innocuous behavior does not provide reasonable suspicion. More specifically in *People v Martinez-Gonzalez* the police were conducting surveillance of a residence for drug sales when the defendant was observed moving from the front to the back of the house on two occasions to smoke a cigarette. He left the house as a passenger in a vehicle and a patrol car followed him intending to stop the car. As the car slowed down the defendant jumped out and ran to his own house where he was arrested (and found to be in possession of cocaine and heroin). The court held that defendant's proximity to a suspected drug house and his otherwise innocuous behavior gave the officer at most founded suspicion of criminal activity permitting a common law inquiry that did not rise to the

level of reasonable suspicion in the absence of other indicia of criminality (*see People v Martinez-Gonzalez*, 188 AD3d at 1594) (*c.f. People v Moore*, 32 NY2d 67, 70 [1973]) (holding there was reasonable suspicion that the defendant was carrying a concealed weapon and there were reliable facts linking the individual to a weapon, therefore the belief of danger is real and reasonable and an immediate search is justified).

The People here did not meet their burden of showing the legality of the police conduct in the first instance. There was a call made into dispatch from a citizen observing certain conduct at the Red Roof Inn, and Detective Walsh was told to “detain” the defendant. This was seemingly before he made any observations of the defendant, and even when he did see the defendant there was nothing more than innocuous behavior observed. While the defendant and Detective Walsh differ on some elements of the encounter, it is uncontested that the defendant was not observed exchanging money with a woman and he was not observed exiting Room 148 when Detective Walsh returned the second time. The texts offered by the People between Detective Dailey and a woman never specified Room 148. Where the record is devoid of evidence that the officer was aware of or observed conduct providing a particularized reason to question the defendant, the police action is not justified at its inception (*see People v King*, 199 AD3d 1454 [4th Dept 2021]) (holding while it is lawful to approach a parked car if the police have an articulable, credible reason to approach, in the absence of a particularized reason to request information from the occupant, the intrusion is no longer justified).

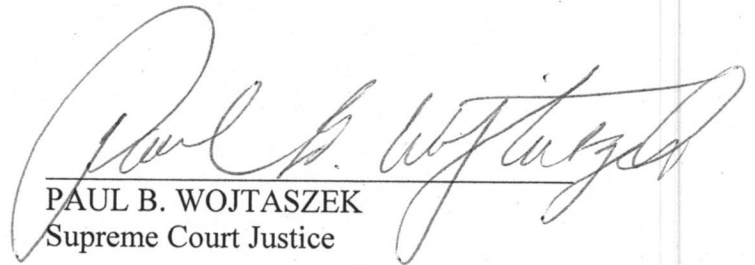
Notwithstanding the citizen’s call(s) and the observations of the police, the defendant’s actions here were innocuous and readily susceptible of an innocent interpretation that did not generate a founded suspicion of criminality (*see People v Williams*, 191 AD3d 1495, 1497 [4th Dept 2021]). And even if they did have a founded suspicion of criminality, the additional specific

circumstances in this case, including any “furtive and suspicious activity,” of which there really was none, did not rise to the level of reasonable suspicion of criminal activity justifying the detention and accusatory questions of the defendant that led to the discovery of the gun (*People v Williams*, 191 AD3d at 1497) (*see also People v Riddick*, 70 AD3d 1421, 1423 [4th Dept 2010]) (holding the mere fact the defendant was located in an alleged high crime area does not supply reasonable suspicion without other objective indicia of criminality) (internal citations omitted).

Accordingly, the defendant’s motion to suppress the physical evidence seized is **GRANTED**. In light of the court’s ruling, the defendant’s statements memorialized on the body camera footage are similarly suppressed as fruit of the poisonous tree (*see Wong Sun v United States*, 371 US 471 [1963]; *People v Oramus*, 25 NY2d 825 [1969]).

This decision constitutes the Order of this Court.

DATED: Buffalo, New York
March 24, 2023



PAUL B. WOJTASZEK
Supreme Court Justice