IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	NO. 05-34
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
JEVON LEWIS a/k/a	:	
Jason Thompson	:	
	:	
Defendant.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J. MAY 24, 2005

I. INTRODUCTION

The indictment in this case charges the defendant, Jevon Lewis, a/k/a Jason Thompson, with one count of possession of a firearm by a convicted felon. Specifically, the indictment charges that the defendant, having been convicted in a court of New Jersey of a felony, knowingly possessed in and affecting interstate commerce a firearm, that is, a Smith & Wesson, Model 669, 9mm. semi-automatic pistol, serial number TBY5608, in violation of 18 U.S.C. § 922(g)(1). Before the Court is the defendant's motion to suppress physical evidence. For the reasons that follow, the motion will be denied.

II. BACKGROUND

At about 1:30 a.m. on June 24, 2004, Officers Sean Elkins, James Abadie, Michael Repici and Michael Amato were on foot patrol on South Street in Philadelphia, Pennsylvania. Because of the many bars and restaurants on South Street, these officers frequently make arrests for violations of Pennsylvania's open container laws, which make it a summary offense to possess an open container on public streets or while in vehicles.

On the night/early morning in question, Lewis was sitting in the passenger seat of a Ford Taurus that was lawfully parked on the 300 block of South Street. He was alone in the car at that time. Lewis was reclined in the seat and was allegedly holding a half-empty bottle of Armadale[1] vodka in his lap. Officer Elkins allegedly was the first officer to see defendant with the bottle of vodka. After calling for back-up, he and his three fellow officers approached to arrest Lewis for violating the open container laws.

Officer Elkins directed Lewis to exit the car. Upon being directed to exit, Lewis protested at first, but ultimately got out of the car. After Lewis exited the car and was arrested, the Officers Elkins and Repici began to search him. Lewis attempted to thwart the search by shifting and moving his body. The officers believed Lewis was trying to hide something. Lewis

[1] Each officer who testified easily recalled the specific brand of vodka--Armadale--which is sponsored by the famous rap star, Jay-Z.

then attempted to run, but the officers grabbed hold of him. In response, Lewis pulled a loaded gun and pointed it at Officer Elkins's chest, then at Officer James Abadie's stomach. The officers attempted to forcibly remove the gun from Lewis's hand, but Lewis continued to clench the gun. During the struggle, the officers placed Lewis in a headlock and kicked and punched him until he released the gun. Lewis was ultimately subdued and placed in cuffs.

A federal grand jury indicted Lewis for possessing a firearm after conviction for a felony, in violation of 18 U.S.C. § 922(g)(1).[2] Lewis now moves to suppress the firearm, arguing that it is the fruit of an unlawful arrest. In response, the government argues that the officers had probable cause to arrest Lewis for violating two statutes: (1) Section 10-604(2)(b) of the Philadelphia Code, which prohibits possession of an open container of an alcoholic beverage in the public streets, including in a motor vehicle parked in the public streets,[3] and (2) Section 3809 of Title 75 of the Pennsylvania Consolidated

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[2] Lewis was originally charged under Pennsylvania law, but the local charges were ultimately dismissed when federal authorities adopted the matter.

[3] Section 10-604(2)(b) of the Philadelphia Code states, "No person shall consume alcoholic beverages or carry or possess an open container of alcoholic beverages in the public right-of-way . . . ." Phila. Code § 10-604(2)(b). "Public Right of Way" is defined as "all public streets . . . , including motor vehicles parked within such right-of-way." Id. § (1)(b).

Statutes, which prohibits an occupant in a motor vehicle from possessing an open container of an alcoholic beverage.[4] The government contends that the officers validly searched Lewis's person incident to his arrest for a violation of Section 10-604(2)(b) of the Philadelphia Code. Finally, the government argues that even if the initial arrest was unlawful, Lewis's use of the gun to commit a new, distinct crime after the stop provided independent probable cause to arrest him and subjected the gun to a lawful seizure.

The Court held a hearing during which Officers Elkins, Abadie and Repici testified. Thereafter, the parties submitted supplemental briefs on the suppression issue.

III. DISCUSSION

A. Lewis's Arrest

The lawfulness of an arrest is determined by reference to state law insofar as the provisions of state law do not violate the U.S. Constitution. Ker v. California, 374 U.S. 23, 37 (1963). Lewis was arrested for violating Section 10-604(2)(b) of the Philadelphia Code. Lewis's violation constitutes a "summary case." See Commonwealth v. Rose, 755 A.2d 700, 702 (Pa.

[4] Section 3809 provides, "Except [in certain circumstances not applicable here], an individual who is an operator or an occupant in a motor vehicle may not be in possession of an open alcoholic beverage container . . . ."

Super. 2000) ("A criminal proceeding instituted for a violation of [Section 10-604] constitutes a summary case . . . .").

The Pennsylvania Rules of Criminal Procedure allow for a warrantless arrest for a summary case "when arrest is specifically authorized by law." Pa. R. Crim. P. 400; Commonwealth v. Bullers, 637 A.2d 1326, 1328 (Pa. 1994). The Pennsylvania legislature has specifically authorized a police officer who witnesses a violation of a city ordinance to arrest the offending person. See 53 Pa. Cons. Stat. Ann. § 13349; Rose, 755 A.2d at 702. Therefore, Lewis's arrest was valid under state law.

Having established the validity of Lewis's arrest under state law, the officers' arrest of Lewis is valid if it comports with the Fourth Amendment. According to the U.S. Supreme Court, "if an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001). "Probable cause exists whenever reasonably trustworthy information or circumstances within a police officer's knowledge are sufficient to warrant a person of reasonable caution to conclude that an offense has been committed by the person being arrested." United States v. Myers, 308 F.3d 251, 255 (3d Cir. 2002) (citing Beck v. Ohio, 379 U.S. 89, 91 (1964)).

"The determination that probable cause exists for a warrantless arrest is fundamentally a factual analysis that must be performed by the officers at the scene. It is the function of the court to determine whether the objective facts available to the officers at the time of arrest were sufficient to justify a reasonable belief that an offense [had been or was being] committed." United States v. Glasser, 750 F.2d 1197, 1206 (3d Cir. 1984). A court must look at the "totality of the circumstances" and use a "common sense" approach to the issue of probable cause. Id. at 1205 (citing Illinois v. Gates, 462 U.S. 213 (1983)).

In the present case, each of the three officers who testified stated that he observed Lewis holding the half-empty (or half-full) bottle of Armadale vodka in his lap. This set of objective facts witnessed first-hand by the officers established the requisite probable cause to arrest Lewis for violating Section 10-604(2)(b).[5] Accordingly, Lewis's arrest comported with the Fourth Amendment.

B. Lewis's New, Distinct Crime

[5] Although defendant claims that the officers' testimony is untrustworthy, the Court credits the officers' testimony that they observed Lewis with a half-filled bottle of Armadale vodka and that, upon being frisked, Lewis attempted to flee and drew a gun on the officers generally along the lines described in their testimony at the suppression hearing.

In addition to having probable cause to arrest Lewis for violating the open container laws, the officers had probable cause to arrest Lewis for various weapons violations. As the officers began to frisk Lewis for weapons, he drew a gun on them. Lewis's act of drawing the gun provided an independent basis of probable cause to arrest him, regardless of what happened prior to Lewis's act of drawing the gun.

A court must determine the scope of the exclusionary rule by determining "whether, granting [arguendo] establishment of the primary illegality, the evidence to which . . . objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." United States v. Burton, 288 F.3d 91, 99 (3d Cir. 2002) (citing Wong Sun v. United States, 371 U.S. 471, 488 (1963)). Here, irrespective of whether the officers' initial arrest was supported by probable cause, Lewis's new and distinct act of drawing the gun purged any taint and allowed for an arrest for the new act. Moreover, the gun, which Lewis brought into the plain view of the officers, could legitimately be seized.

The Fourth Circuit recognized as much in a factually similar case. See United States v. Sprinkle, 106 F.3d 613, 619 (4th Cir. 1997). In Sprinkle, as an officer began to conduct a Terry frisk on a suspect, a frisk that the Fourth Circuit later concluded was unsupported by reasonable suspicion, the defendant

"pushed away and began to run." Id. at 616. “After running about one-half block with [Officer] Riccio in pursuit, [the defendant] pulled a handgun from the front of his pants” and shortly thereafter fired a shot at the pursuing officer. Id. The defendant was subsequently charged with possessing a firearm after conviction for a felony, in violation of 18 U.S.C. § 922(g)(1). Id.

The Fourth Circuit held that “[i]f a suspect's response to an illegal stop ‘is itself a new, distinct crime, then the police constitutionally may arrest the [suspect] for that crime.’” Id. at 619 (quoting United States v. Bailey, 691 F.2d 1009, 1017 (11th Cir. 1982)). The “new and distinct crime, even if triggered by an illegal stop, is a sufficient intervening event to provide independent grounds for arrest.” Id. “A contrary rule would virtually immunize a defendant from prosecution for all crimes he might commit that have a sufficient causal connection to the police misconduct." Id. (citation and internal quotations omitted). “Because the arrest for the new, distinct crime is lawful, evidence seized in a search incident to that lawful arrest is admissible.” Id. (citation omitted). The reasoning of Sprinkle applies directly to the instant case. Accordingly, Lewis’s new and distinct act of drawing the gun provided an alternative basis to arrest him and validly seize his firearm.

IV. CONCLUSION

Because the officers had probable cause to arrest Lewis for violating Pennsylvania's open container laws, and because the officers had probable cause to arrest Lewis for his new and distinct act of pointing his gun at the officers, Lewis's gun was subject to lawful seizure. Therefore, Lewis's motion to suppress will be denied. An appropriate order follows.

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UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	NO. 05-34
v.	:	
	:	
JEVON LEWIS a/k/a	:	
Jason Thompson	:	

ORDER

AND NOW, this **24th** day of **May, 2005,** upon consideration of defendant's Motion for Leave to File a Post-Hearing Memorandum in Support of his Motion to Suppress Physical Evidence (doc. no. 49), it is hereby **ORDERED** that the Motion is **GRANTED**.

IT IS FURTHER ORDERED that, upon consideration of defendant's Motion to Suppress Physical Evidence (doc. no. 28), and the responses thereto, the Motion is **DENIED**.

An Amended Scheduling Order shall issue.

AND IT IS SO ORDERED.

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EDUARDO C. ROBRENO, J.