

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

UNITED STATES OF AMERICA

v.

BRIAN McNEAL,

Defendant.

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CRIMINAL ACTION

NO. 13-16-1

**MOTION TO SUPPRESS PHYSICAL EVIDENCE
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

RUFE, J.

MARCH 21, 2012

The United States charges Defendant Brian McNeal with possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g). Defendant has filed a Motion to Suppress (Doc. No. 18) all physical evidence arising from what he claims was an illegal stop, search, and seizure which occurred on April 2, 2011. The Court has considered Defendant's motion to suppress, the Government's response thereto, Defendant's supplemental letter memorandum and the testimony and oral argument presented at an evidentiary hearing in Criminal Action Number 11-639. At a hearing held on March 14, 2013 at which Defendant acknowledged his right to re-litigate the motion on the instant charge, Defendant testified that he seeks a ruling from the Court on the record established at an earlier suppression hearing held in the related criminal proceeding. The Court now enters its findings of fact and conclusions of law.¹

¹ Defendant has not presented the Court with any evidence in this case to support his motion to suppress. Rather, Defendant relies exclusively on the record presented in support of his motion to suppress in Criminal Action Number 11-639. See March 14, 2013 Hr'g Tr. ---. The record before the Court is therefore identical to that which was before it when the undersigned ruled on Defendant's motion to suppress in his prior criminal proceeding. Consequently, the Court has no evidence upon which it could rely to vary from its prior recorded findings of fact. At the March 14 hearing in this case, both the Government and Defendant agreed to have the Court rely exclusively on the evidentiary record presented in the prior proceeding, and acknowledged the absence of an evidentiary basis to vary from the prior factual findings. See March 14, 2013 Hr'g Tr. ---.

Defendant does, however, ask the Court to consider an additional legal basis to support his motion. Specifically, Defendant argues that in the event the Court's credibility determinations should change or be overruled

I. FINDINGS OF FACT

1. On April 2, 2011, at approximately 2:40 a.m., Philadelphia Police Officers Michael Sidebotham and Joseph Caplan were on the outskirts of the Olney section of Northwest Philadelphia, a high-crime area, where they were responding to a radio “flash” report of a shooting at Charley B’s Bar (“the Bar”), located on the corner of Broad and Ruscomb Streets, that included a brief description of the suspect.²

2. As the Officers, who were in full uniform and in a marked police car, traveled southbound on Broad Street toward the Bar, they noticed a blue Plymouth Sundance traveling at a high rate of speed in the opposite direction, but continued to the scene of the reported shooting, the investigation of which was their top priority.³

3. The Officers arrived at the Bar to survey the scene and investigate the alleged shooting.⁴ After doing so, they returned to the police vehicle, which Officer Sidebotham parked facing northbound on Broad Street near the intersection of Broad and Windrim Streets, to continue their surveillance of the scene and ensure that patrons of the Bar left without incident.⁵

4. While parked, the Officers noticed the same blue Plymouth Sundance again traveling northbound on Broad Street.⁶ When the Sundance came to a stop at a red light at the

as an abuse of discretion, the holding in United States v. Gant, 556 U.S. 332 (2009) requires that Defendant’s motion to suppress be granted. As Defendant concedes, this legal precedent only provides a basis for granting the motion if the Court finds grounds to alter its factual findings with regard to the credibility of law enforcement officers. Without an evidentiary basis for the Court to do so, Gant does not require a different outcome here.

² Suppression Hr’g Tr. (“Hr’g Tr.”) 5-6, 60-62, June 13, 2012 [Crim. A. No. 11-639, Doc. No.25]. The individual involved in the shooting was described as a black male wearing jeans and either a white shirt or without a shirt at all. See Def.’s Ex. 6.

³ Hr’g Tr. 5, 11, 60-62.

⁴ Hr’g Tr. 9, 63-64.

⁵ Hr’g Tr. 9, 64.

⁶ Hr’g Tr. 10, 12, 64.

intersection of Broad and Windrim Streets, the Officers observed that its brake lights were not working.⁷

5. Upon noticing this traffic violation, Officer Sidebotham, who was driving the police vehicle, followed the Sundance for about two blocks; as it began to turn left onto Duncannon Street, Officer Sidebotham engaged his emergency lights and siren and the Sundance pulled over to the side of the road.⁸

6. The Officers exited their vehicle and approached the Sundance— Officer Sidebotham on the driver’s side and Officer Caplan on the passenger’s side.⁹

7. At about the same time, a second police vehicle arrived on the scene and Officers David Tamamoto and Eric Ruch began to approach the car a few seconds behind the other officers—Officer Ruch on the driver’s side and Officer Tamamoto on the passenger’s side.¹⁰

8. As Officer Sidebotham approached the driver of the Sundance, he was able to see, through the use of a flashlight that he carried, a handgun on top of a shoe box located behind the rear passenger seats.¹¹ The two-door Plymouth Sundance that Defendant was driving is a coupe-style car; it has two-doors and a liftback rear opening (as opposed to a hatchback).¹² The car has a “back or rear deck” which can be placed behind the two rear seats, below the rear windshield to cover the portion of the trunk area that would otherwise be visible from the interior or the

⁷ Hr’g Tr. 12, 64.

⁸ Hr’g Tr. 12, 19, 65.

⁹ Hr’g Tr. 14, 65-66.

¹⁰ Hr’g Tr. 20, 65, 74-75, 83-84.

¹¹ Hr’g Tr. 14.

¹² See Gov’t Ex. 4; Hr’g Tr. 19, 50, 101-05.

exterior of the car without opening the trunk.¹³ Officer Sidebotham was able to see behind the rear seats into the trunk area because the rear deck was not in place.¹⁴

9. Officer Ruch, who approached on the driver's side of the car just behind Officer Sidebotham, also noticed the handgun behind the left rear seat on top of a shoebox.¹⁵

10. Officer Sidebotham signaled to the other officers that there was a gun in the car.¹⁶ Officer Ruch noticed Officer Sidebotham's non-verbal signal.¹⁷

11. After noticing the gun, Officer Sidebotham asked the driver of the vehicle, Defendant Brian McNeal, who was the car's sole occupant, if he had a permit to carry the gun; Defendant responded that he did not.¹⁸

12. Because Officer Sidebotham believed that Defendant could reach the gun from where he sat in the driver's seat, he ordered Defendant out of the car.¹⁹ Defendant complied with this command with the assistance of the officers, exiting by the passenger's side door because the driver's side door would not open.²⁰

13. Officer Caplan walked Defendant to one of the police vehicles and placed Defendant in its backseat without handcuffs.²¹ Officer Sidebotham then returned to the

¹³ See Gov't Ex. 4; Hr'g Tr. 19, 50, 101-05.

¹⁴ Hr'g Tr. 14, 19.

¹⁵ Hr'g Tr. 84.

¹⁶ Hr'g Tr. 16.

¹⁷ Hr'g Tr. 89-90.

¹⁸ Hr'g Tr. 20.

¹⁹ Hr'g Tr. 20.

²⁰ Hr'g Tr. 19-20, 66.

²¹ Hr'g Tr. 24-25, 67-68.

Sundance to retrieve the keys from the ignition and then the gun from the rear interior of the car.²²

14. After recovering the gun, Officer Sidebotham placed Defendant under arrest. A pat-down of Defendant's person revealed six percocet pills. The Officers handcuffed Defendant and placed him in the back of a police vehicle.²³

15. Officer Sidebotham used his police radio to report that he had an individual in custody who he believed matched the flash description describing the suspect involved in the shooting.²⁴

16. Upon returning to the police station, Officers Sidebotham wrote Defendant a ticket for a traffic violation involving the rear brake light; Defendant was not present when the ticket was written.²⁵ Officer Sidebotham explained that he waited until he returned to the station to write the ticket because he wished to leave this high-crime area and write the ticket along with all other paperwork concerning the incident.²⁶

II. DISCUSSION

Defendant moves to suppress all evidence arising from what he maintains was the illegal stop, search, and seizure, which occurred on April 2, 2011. According to Defendant, Officers Sidebotham and Caplan did not have reasonable suspicion for the stop because they did not

²² Hr'g Tr. 24-25.

²³ Hr'g Tr. 25.

²⁴ Hr'g Tr. 49; Def.'s Ex. 6, Track 19. Defendant is a black male who was wearing jeans and a black hooded sweatshirt at the time of his arrest. See Def.'s Ex. 1.

²⁵ Hr'g Tr. 28, 30; see also Gov't Ex. 8.

²⁶ Hr'g Tr. 48. The Government presented the testimony of Philadelphia Police Officer William Vandegrift, who stated that on February 5, 2011, less than two months before the incident, he had issued a citation to Defendant because the rear brake lights of the Plymouth Sundance were not working. Hr'g Tr. 118; Gov't Ex. 8. The Court considers this evidence only in assessing the credibility of the arresting officers' testimony; this citation for the same violation occurring two months prior to the incident does not alone impute credibility.

observe the alleged traffic violation. Defendant maintains that the officers stopped his car because he was a black male driving in the area of a reported shooting, and that a stop on this basis was not supported by reasonable suspicion because Defendant did not match the flash description.

Additionally, Defendant argues that even if the Court finds that the stop was supported by reasonable suspicion, the search of the vehicle, which led to the recovery of the gun, was impermissible because the gun was not in plain view at the time of the search. Defendant moves to suppress all physical evidence, including the percocet, as “fruit of the poisonous tree.”²⁷

A. Officers Sidebotham And Caplan Had Reasonable Suspicion To Stop The Car Because They Observed Defendant Commit A Traffic Violation

A traffic stop is a seizure within the meaning of the Fourth Amendment to the United States Constitution.²⁸ A traffic stop is therefore “subject to the constitutional imperative” that the stop be reasonable under the circumstances.²⁹ A traffic stop is generally reasonable under the circumstances where an officer has reasonable suspicion to believe that a traffic violation occurred.³⁰

Here, Officers Sidebotham and Caplan testified that Defendant’s rear brake light was not working as 75 Pa. C.S. § 4303(b) requires, and that it was for this reason that they stopped Defendant’s car. The Court finds this testimony credible and sufficient to support the conclusion

²⁷ Wong Sun v. United States, 371 U.S. 471, 487 (1963).

²⁸ Whren v. United States, 517 U.S. 806, 809-10 (1996). The Fourth Amendment to the United States Constitution provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV.

²⁹ Id. at 810.

³⁰ United States v. Delfin-Colina, 464 F.3d 392, 396-98 (3d Cir. 2006); see also Whren, 517 U.S. at 810.

that the traffic stop was reasonable.³¹ As Defendant concedes, even if the Officers' subjective intent was to investigate Defendant for the reported shooting, they were justified in making the stop if they had reasonable suspicion to believe Defendant committed a traffic violation.³² Thus, Defendant's argument that the Officers' true intent in stopping his car was to determine if he was involved in the shooting, is not material to the analysis because the Court finds credible the Officer's testimony that a traffic violation occurred.

B. Officer Sidebotham Had Reasonable Suspicion To Search The Car Because The Gun Was In Plain View

Defendant submits that even if the Court concludes that the Officers lawfully stopped the car, the search of the interior of the car was unreasonable because the gun was not in plain view. Defendant does not dispute the Officers' authority to order Defendant out of the car if the car was lawfully stopped in the first instance, and Defendant does not argue that the Officers were not justified in searching the car if the gun were visible from the car's exterior, which Defendant claims it was not.³³ Thus, whether the search of the car was lawful depends on whether the Court finds credible the Officers' testimony that the gun was in plain view.

Once an officer is lawfully in an area, any incriminating evidence in plain view may be seized; this rule requires both that the incriminating nature of the evidence be readily apparent

³¹ Defendant rests great significance on Officer Sidebotham's alleged failure to report by radio that he was initiating a vehicle stop for a traffic violation before actually stopping the car. Defendant asserts that this failure and Officer's Sidebotham's failure to write the ticket immediately, demonstrate that the alleged traffic violation was fabricated as a pretext for the stop. However, Officer Sidebotham also testified that it is not his practice to radio when he stops a car for a traffic violation and explained his reasons for waiting until he returned to the police station to write the ticket. Hr'g Tr. 22, 48. The Court finds his explanation credible as it does his testimony that he observed that the brake light was not working. See note 30 supra.

³² Doc. No. 27 at 1; see United States v. Johnson, 434 F. App'x 159, 163 n.2 (3d Cir. 2011) (citing Whren, 517 U.S. at 811-13).

³³ See Mot. to Suppress (Doc. No. 18) at 6-7 (arguing that the search of the vehicle was unlawful even if the stop was lawful because absent additional incriminating evidence, the traffic stop alone did not provide a basis to search the car).

and that the evidence be in a place that could be plainly viewed.³⁴ Whether the incriminating nature of the evidence is readily apparent depends on the totality of the circumstances.³⁵ Here, the incriminating nature of the firearm was readily apparent given that Defendant was driving through a high-crime area where a shooting had been reported mere minutes before Defendant was stopped and in light of Defendant's own statement in response to police questioning that he did not have a permit to carry the gun.³⁶

An object is in plain view when it is observed in "that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers."³⁷ "[U]se of artificial means to illuminate a darkened area" or an officer's change of position so as to see the interior of a car from different angles does not constitute a search triggering Fourth Amendment protection.³⁸ Here, Officer Sidebotham testified that as he approached the driver's side door of the car he noticed a handgun behind the left rear seat on top of a shoe box; Officer Ruch, who walked just behind Officer Sidebotham, also noticed the gun. The Court finds their testimony credible and sufficient to establish that the gun was in plain view.

Officer Sidebotham's use of a flashlight to illuminate the interior of the car and whether either officer changed their position to better see the interior of the car, does not change this

³⁴ Horton v. California, 496 U.S. 128, 136-37 (1990).

³⁵ United States v. Law, 384 F. App'x 121, 123 (3d Cir. 2010).

³⁶ See, e.g., United States v. Bond, 173 F. App'x 144 (3d Cir. 2006) (finding that the officers had probable cause to arrest the defendant for violation of 18 Pa. C. S. § 6108 based solely on the officer's observation that the individual possessed a firearm on the streets of Philadelphia). Defendant does not dispute the fact that the incriminating nature of the gun was readily apparent. See generally Mot. to Suppress at 6-7.

³⁷ Texas v. Brown, 460 U.S. 730, 740 (1983).

³⁸ Id.

conclusion. The officers did not first search the car to discover contraband. They did not open the trunk or remove the rear deck to search for weapons or contraband. Rather, they shone their flashlight onto the car's interior open space through the vehicle's window. Such conduct cannot be described as a search.³⁹

III. CONCLUSIONS OF LAW

1. Philadelphia Police Officers Michael Sidebotham and Joseph Caplan had reasonable suspicion to stop Defendant's vehicle based on their observations that Defendant's rear brake light was not functioning.

2. Officer Sidebotham lawfully seized the handgun from the rear area of the car because the gun was in plain view from his position outside the car. The gun is therefore admissible at trial.

3. Derivative evidence seized incident to Defendant's arrest is not "fruit of the poisonous tree," and will not be excluded on this basis.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Suppress will be denied. An appropriate Order follows.

³⁹ Id.

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ORDER

AND NOW, this 21st day of March 2013, upon consideration of Defendant’s Motion to Suppress (Doc. No. 18), and all responses and replies thereto, and for the reasons set forth in the accompanying Findings of Fact, Conclusions of Law, and Memorandum Opinion, it is hereby **ORDERED** that the Motion is **DENIED**.

It is so **ORDERED**.

BY THE COURT:

CYNTHIA M. RUFÉ, J.