

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
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HIKENEE KELLEY : NO. 06-271

MEMORANDUM AND ORDER

McLaughlin, J.

November 9, 2006

Two Philadelphia police officers stopped a car for making a left turn against a red light. After brief questioning, one of the officers reached into the car and removed the bag of the defendant, the car's rear passenger, and conducted a brief tactile examination of the bag, which revealed a gun. The defendant has moved to suppress the gun and the defendant's statement that he had no permit for the weapon. The Court will grant the motion.

I. Findings of Fact

The Court held an evidentiary hearing on the defendant's motion to suppress on November 3, 2006, during which Officer Marshmond testified. Based on the testimony and evidence presented at the hearing, the Court makes the following findings of fact.

On December 8, 2004, at approximately 7 p.m., Philadelphia Police Officers Robert Richie and Hamilton Marshmond observed a 1995 Chevrolet Caprice turn left against a red light and noted that the car's center brake light was inoperative.

The officers stopped the vehicle, which pulled into a nearby gas station after clearing the busy intersection. Two males were sitting in the car's front seat, and a third, the defendant, was seated in the rear.

As he approached the car, Officer Marshmond saw the defendant's hand resting on a black backpack. The defendant was semi-reclined, sitting in back of the driver's seat but with his right leg resting across the rear cushion and extending diagonally toward the front passenger. The defendant's position was typical of the way a tall man would sit. The defendant is 6'4", 240 lbs.

The backpack was on the back seat on the passenger side of the car by the defendant's leg. As Officer Marshmond approached the car, the defendant, with his right hand, nudged the bag away from himself.

While Officer Richie questioned the driver, Officer Marshmond began questioning the defendant through the rear passenger door's open window. The defendant put his hands in his lap at Officer Marshmond's request. He was neither aggressive nor agitated, and answered the officer's questions. Officer

Marshmond asked the defendant if the bag was his. The defendant said yes.¹ The officer then opened the car door and removed the bag, holding it at the top. Feeling that the bag was heavy and suspecting that it might contain a weapon, the officer felt the bottom of the bag with his five fingers and felt what he believed to be a gun. The officer asked the defendant if he had a permit. The defendant responded that he did not, and was then arrested.

In the meantime, Officer Richie discovered that the driver of the car did not have a driver's license. Pursuant to a city regulation, when an officer finds that a motorist is driving without a valid license, the car is towed. After Officer Marshmond arrested the defendant, he called for a tow truck. The driver of the car was frisked, but the front passenger was not.

The tow truck never came. Eventually, the officers returned the car keys to the car's front passengers who then drove away.

II. Analysis

The stop of the vehicle was lawful. A traffic stop is permitted where an officer observes a violation of a state

¹ The Court does not accept the testimony that the defendant hesitated before answering the question. This does not appear in the police memorandum, the police report, the preliminary hearing transcript, or the government's opposition to the motion.

traffic regulation. Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977); United States v. Moorefield, 111 F.3d 10, 12 (3d Cir. 1997).

Following a lawful stop, a police officer may conduct "a reasonable search for weapons" where the sum of all circumstances gives him "reason to believe that he is dealing with an armed and dangerous individual." Terry, 392 U.S. 1, 27 (1968); Moorefield, 111 F.3d at 13. The search is circumscribed by the exigencies which justify the intrusion. Terry, 392 U.S. at 25-26. The scope of the search is limited to places where a weapon could be placed or hidden. Michigan v. Long, 463 U.S. 1032, 1049 (1983). Because a weapon could have been placed in the defendant's backpack, the search is constitutional if Officer Marshmond had reason to believe that the defendant was armed and dangerous.

In their opposition, the government argues that a reasonable officer would believe the defendant was dangerous because of (1) the defendant's behavior (he was allegedly "uncooperative, nervous, and agitated") and (2) the defendant's attempt to conceal the bag as the officer approached the car. (Br. in Opp. at 2.)

These characterizations of the defendant's behavior were contradicted in the hearing by Officer Marshmond's description of the defendant as neither agitated nor aggressive

and answering questions as they were asked. Similarly, there was no testimony in the hearing that the defendant attempted to hide the black bag.

In the hearing, the government did not reassert the justifications offered in its brief. Instead, the government argued for the first time that the search was reasonable because the defendant hesitated when asked if the bag was his and because he pushed the bag away from himself and toward the officer as the officer approached the car.

The Court concludes that the government has not demonstrated that a reasonable person would believe that the defendant was armed and dangerous. Nothing in the defendant's behavior -- his relaxed position and demeanor, his hand resting on his bag, his cooperativeness -- supported a suspicion that he was armed and dangerous. A man reclining in an unthreatening pose, nudging a backpack, and placing his hand in his lap when asked to do so does not give rise to a reasonable inference of dangerousness, even if the car in which he was traveling committed a traffic offense.

Cases where courts have found a reasonable suspicion of dangerousness involve stronger suggestions that the suspect could be armed. See, e.g., Michigan v. Long, 463 U.S. at 1050-51 (reasonable suspicion of dangerousness where a car was pulled over in a dark, rural area, the suspect appeared drunk, and there

was a knife on the floor of the car); Mimms, 434 U.S. at 111-12 (reasonable suspicion where the officer noticed a bulge in the suspect's jacket); Moorefield (reasonable suspicion where the suspect attempted to exit the vehicle, disobeying police orders, raised and lowered his hands several times, and reached for his waist). This case, where the defendant was in a car that violated traffic regulations, is more akin to Leveto v. Lapina, 258 F.3d 156 (3d Cir. 2001), where a search warrant to investigate tax-related crimes did not give reasonable suspicion to think the alleged criminals were armed and dangerous.

Officer Marshmond stated in his testimony that it makes him uneasy when a suspect does not answer questions honestly or hesitates before answering, but the Court does not accept Officer Marshmond's account of the hesitation, and there is no allegation that the defendant was dishonest.²

Officer Marshmond also testified that he frisked the bag in part because the car was going to be towed, and occupants are often "irate" when they exit vehicles. But there was no

² Even if the Court were to accept Officer Marshmond's assertion that the defendant slightly hesitated before claiming ownership of the bag, the Court's conclusion would not change. That slight hesitation is not an adequate basis for a conclusion that the defendant was armed and dangerous.

The Court also notes that according to the police memorandum, Officer Marshmond's question about the ownership of the bag was posed to all three men in the car, and Officer Marshmond admitted during the motion hearing that the car might have contained more than one bag. (Def. Ex. 1.)

reason to think that the defendant, "cooperative," "compliant," and "not agitated," would be irate. Additionally, police officers can always demand that occupants exit a vehicle during a routine traffic stop. Maryland v. Wilson, 519 U.S. 408, 415 (1997). The fact that occupants might be forced to exit a vehicle does not make it reasonable to conclude that they might be armed and dangerous.

The Court likewise does not find that the defendant's nudging of the bag, a one-handed movement by a man in a half-prostrate, casual position, supports the conclusion that he was armed and dangerous. The gesture seemed, if anything, a signal to the officer that the defendant would not attempt to open the bag. Indeed, Officer Marshmond did not attach any particular significance to the movement of the bag.

The Court is also concerned that the officer's justification for the search has shifted. In the preliminary hearing, Officer Marshmond asserted that he seized the bag from the car and frisked it because the car was supposed to be towed due to the driver's lack of a license. (Gov. Ex. 3 at 6.) The fact that Officer Marshmond justified the search on administrative grounds alone weighs against a finding that the sum of the circumstances gave him "reason to believe that he was

dealing with an armed and dangerous individual." Terry, 392 U.S. at 27.³

Because the officer lacked a reasonable belief that the defendant was armed and dangerous, the search was unconstitutional and the weapon must be suppressed. As the Government admits, under the fruit of the poisonous tree doctrine, the fate of the defendant's statement that he did not have a license for the gun is tied to the fate of the weapon itself. Accordingly, the defendant's motion is granted.

An appropriate order follows.

³ The Government has not argued that the search of the bag was justified as an inventory search. During oral argument, the Government argued for the validity of the search only on the ground that it was reasonable for an officer to think that the defendant was armed and dangerous. (Tr. at 47-51.)

