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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

THE PEOPLE OF THE STATE OF NEW YORK

DECISION & ORDER

-against-

IND. # 07-4139

ARDIAN HARUSHA,

Defendant

Pursuant to a prior Decision and Order of this Court a hearing was held on the defendant's motions to suppress evidence. The relevant findings of fact and conclusions of law are as follows:

On October 4, 2008, officers from the 49th precinct were conducting a traffic checkpoint in the vicinity of East Fordham Road and Boston Road. The purpose of the checkpoint was to check cars for safety and equipment violations. At approximately 1:45 a.m. the officers heard a large crash in the direction of the cars approaching the checkpoint. Officer Farrell Goldman walked toward the noise to investigate.

As he approached, Officer Goldman was informed by another officer, P.O. Alfaro, that there was an accident and that the driver of the Mercedes involved in the accident was possibly under the influence of alcohol. Officer Goldman approached the Mercedes and observed the defendant in the driver's seat. P.O.

Goldman observed that the defendant had a bloody nose, as well as watery eyes. Additionally, as P.O. Goldman spoke to the defendant, he smelled alcohol coming from the defendant.

Upon being asked if he had been drinking, the defendant stated that he had "a couple of Henneseys." When the defendant exited the car, he appeared to be unsteady on his feet. Officer Goldman handcuffed the defendant and led him to his RMP for transport back to the precinct. Officer Goldman then notified Sgt. Charlie Kim that he was arresting the defendant.

According to departmental policy, vehicles operated by intoxicated motorists are seized for forfeiture. Accordingly, a police tow truck was called in to tow the defendant's vehicle to the 49th pct. Prior to arrival of the tow truck, Sgt. Kim performed what he termed a cursory inventory search of the vehicle. According to Sgt. Kim, he knew a complete inventory would be conducted back at the precinct. However, he conducted a cursory search for what he considered to be "valuables" or "significant items" prior to the towing of the vehicle. What constituted "valuable" or "significant" items was a matter of Sgt. Kim's discretion. Upon looking in the unlocked glove compartment, Sgt. Kim discovered a loaded handgun.

Once the vehicle was back at the precinct, P.O. Goldman performed a

complete inventory search. Officer Goldman prepared property vouchers for all items removed from the car, including the handgun recovered earlier by Sgt. Kim.

The People claim that the search of the vehicle and the seizure of the gun fall within the inventory search exception to the warrant requirement. In such case, the first inquiry is whether the vehicle was properly impounded.

The police had probable cause to arrest the defendant based upon the accident, his admissions and the other indicia of intoxication observed by Officer Goldman. See People v. Mojica, 62 A.D.3d 100 (2nd Dep't 2009); People v. Gagliardi, 144 A.D.2d 882 (3rd Dep't 1988); People v. Farrell, 89 A.D.2d 987 (2nd Dep't 1982). The arrest of the defendant for Driving while Intoxicated provided a valid basis for impounding the vehicle. County of Nassau v. Wildermuth, 295 A.D.2d 553 (2nd Dep't 2002); Grinberg v. Safir, 266 A.D.2d 43 (1st Dep't 1999). Accordingly, it was proper to impound the vehicle and inventory its contents.

However, the method by which the inventory search was conducted invalidates the search. The People have the burden of demonstrating that the search was conducted pursuant to standardized police procedures. People v. Gonzalez, 62 N.Y.2d 386 (1984). See also People v. Miller, 237 A.D.2d 535 (2nd Dep't 1997). A valid inventory search must satisfy two criteria." People v.

Galak, 80 N.Y.2d 715, 719 (1993). First, the procedure must be rationally designed to meet the objectives that justify the search in the first place. Second, the procedure must limit the discretion of the officer in the field.” Id.

“Three specific objectives are advanced by inventory searches: protecting an owner's property while it is in the custody of the police; insuring police against claims of lost, stolen, or vandalized property; and guarding police and others from dangerous instrumentalities that would otherwise go undetected. The New York City Police Department has a uniform procedure for conducting inventory searches contained within the patrol guide. That procedure, if followed, meets the specified objectives of a valid inventory search. See People v. Pompey, 63 A.D.3d 612 (1st Dep’t 2009).

However, to satisfy the second criterion, establishing that a valid, standardized procedure exists, the People must establish that the procedure was in fact followed. People v. Johnson, 1 N.Y.3d 252 (2003); People v. Gomez, 50 A.D.3d 407 (1st Dep’t 2008). Although Sgt. Kim testified that he was familiar with the procedure, he did not follow it. Instead, he conducted a search for valuables and contraband that could be seized at his discretion. Such use of discretion is incompatible with a valid inventory search. People v. Gomez, 13 N.Y.3d 6 (2009); People v. Galak, 80 N.Y.2d 715 (1993). By failing to document

all items in the vehicle, Sgt. Kim failed to conduct a “meaningful inventory.” Id.

The instant case is distinguishable from the facts in People v. Dickens, 218 A.D.2d 584 (1st Dep’t 1995) relied on by the People. While Sgt. Kim said the discovery of explosives or other dangerous instrumentalities was part of his reason for conducting the search, he admittedly did not search all of the areas in which such items could be found. Again, such discretion is incompatible with a valid inventory search. People v. Gomez, 50 A.D.3d 407 (1st Dep’t 2008).

As an alternative, the People advance the theory that the weapon should be admissible under the inevitable discovery doctrine. Under the inevitable discovery doctrine, “evidence obtained as a result of information derived from an unlawful search or other illegal police conduct is not inadmissible under the fruit of the poisonous tree doctrine where the normal course of police investigation would, in any case, even absent the illicit conduct, have inevitably led to such evidence.” People v. Fitzpatrick, 32 N.Y.2d 499 (1973). The People opine that a full inventory search was conducted by Officer Goldman which would necessarily have uncovered the gun.

However, the gun recovered during the illegal inventory search is primary evidence. Primary evidence is “evidence illegally obtained during or as the immediate consequence of the challenged police conduct.” People v. Stith, 69

N.Y.2d 313 (1987). The inevitable discovery doctrine cannot be applied to primary evidence. Id.; People v. Turriago, 90 N.Y.2d 77 (1997); People v. Julio, 245 A.D.2d 158 (1st Dep't 1997)..

The facts in People v. Stith are very similar to those in the instant case. In Stith, the police stopped a truck for speeding. Stith, *supra* at 316. When the driver was unable to produce the registration, the Trooper ordered the defendant out of the truck and entered the truck to conduct his own search for the registration. Id. at 317. During that search, the Trooper discovered a loaded weapon. Id. It was subsequently learned that the truck was stolen. Id.


The troopers search of the truck was clearly illegal. The People claimed that because the truck was stolen, the troopers, had they waited would have discovered that fact, impounded the truck and discovered the weapon during an inventory search. The Court of Appeals held that the inevitable discovery doctrine could not be applied to primary evidence such as the weapon recovered from the truck. Id. at 320.

For the foregoing reasons, the defendant's motion to suppress physical evidence, to wit, the handgun, is granted. The remainder of defendant's motion to suppress evidence is denied.

This Decision shall constitute the Order of the Court.

ENTER

Dated: New City, New York
May 7, 2010



WILLIAM A. KELLY
J.S.C.