

DISTRICT COURT OF THE COUNTY OF NASSAU
FIRST DISTRICT : CRIMINAL TERM

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

CHRISTOPHER YIM,

Defendant.

HON. ANDREW M. ENGEL

DECISION and ORDER

Docket No. 2008NA004807

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The Defendant is charged with driving while ability impaired by drugs, pursuant to VTL § 1192(4), failing to maintain lane - unsafe lane change, pursuant to VTL § 1128(a), and improperly tinted windows, pursuant to VTL § 375.12-a(b)(2).

Pursuant to the order of this court (Engel, J.) dated October 17, 2008, an *Ingle/Dunaway/Huntley/Mapp*¹ hearing was held on November 12, 2008.

At an *Ingle/Dunaway/Huntley/Mapp* hearing, where a defendant challenges the legality of his stop, the existence of probable cause for his arrest, a search and seizure and the statements allegedly obtained as a result thereof, the People have the burden of going forward, in the first instance, to establish the legality of the police conduct. *People v. Malinsky*, 15 N.Y.2d 86, 262 N.Y.S.2d 65 (1965); *People v. Wise*, 46 N.Y.2d 321, 413 N.Y.S.2d 334 (1978); *People v. Dodt*, 61 N.Y.2d 408, 474 N.Y.S.2d 441 (1984); *People v. Moses*, 32 A.D.3d 866, 823 N.Y.S.2d 409 (2nd Dept. 2006), *lv. den.* 7 N.Y.3d 927, 827 N.Y.S.2d 696 (2006) Once the prosecution has met this burden, the defendant has the ultimate burden to establish the illegality of the police conduct, by a

¹ *People v. Ingle*, 36 N.Y.2d 413, 369 N.Y.S.2d 67 (1975); *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248 (1979); *People v. Huntely*, 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1965); *Mapp v. Ohio*, 367 U.S. 643; 81 S.Ct. 1684 (1961)

fair preponderance of the evidence. *People v. Berrios*, 28 N.Y.2d 361, 321 N.Y.S.2d 884 (1971); *People v. Di Stefano*, 38 N.Y.2d 640, 382 N.Y.S.2d 5 (1976); *People v. Lombardi*, 18 A.D.2d 177, 239 N.Y.S.2d 161 (2nd Dept. 1963) Additionally, the People have the burden of proving the voluntariness of the statements allegedly made beyond a reasonable doubt. *People v. Valeruis*, 31 N.Y.2d 51, 334 N.Y.S.2d 871 (1972); *People v. Anderson*, 42 N.Y.2d 35, 396 N.Y.S.2d 625 (1977).

In an attempt to meet these burdens, the People relied exclusively upon the testimony of Police Officer Jeffrey Toscano. The Defendant did not call any witnesses. After listening to Officer Toscano and observing his demeanor, the court finds his testimony to be credible; and, based thereon, makes the following findings of fact:

On February 21, 2008, at approximately 3:30 a.m. Officer Toscano observed the Defendant operating his vehicle, with tinted front side windows, heading westbound on Hempstead Turnpike in Uniondale, straddling the line between the center and left lanes and weaving back and forth for one-eighth ($\frac{1}{8}$) to one-quarter ($\frac{1}{4}$) of a mile. Upon making this observation, Officer Toscano signaled for the Defendant to pull his vehicle over, which the Defendant did, without a problem. After pulling his vehicle behind and slightly to the left of the Defendant's vehicle Officer Toscano approached the driver's side of the Defendant's vehicle.

Standing at the driver's window, a little towards the rear, Officer Toscano observed the Defendant to have red, glassy eyes and smelled the strong odor of marijuana. Officer Toscano then asked the Defendant if he had been smoking marijuana, to which the Defendant responded that he had not been smoking that night. Officer Toscano then scanned the interior of the Defendant's vehicle with his flashlight and observed three (3) small plastic bags on the floor of the passenger's side with what he believed to be marijuana residue in them, and further observed what he believed to be a "very tiny" marijuana cigarette in a plastic cup in the center console. Officer Toscano then

asked the Defendant to whom these items belonged, to which the Defendant responded, “that stuff is my friends’, they were smoking earlier.” Despite the observations of what he believed to be marijuana, Officer Toscano did not seize these items. Officer Toscano did testify that marijuana was recovered from the vehicle sometime later pursuant to an inventory search.

Officer Toscano then asked the Defendant to exit his vehicle and come onto the bicycle/walking path at that location. Officer Toscano again observed the Defendant’s eyes to be red. Officer Toscano then performed ,and/or attempted to perform, Standardized Field Sobriety Tests (“SFSTs”). In performing the horizontal gaze nystagmus, nine step walk and turn and one leg stand tests, the Defendant either could not, or would not perform, parts of the tests and showed positive clues of impairment. These latter signs included the inability to follow the officer’s pen with his eyes without moving his head, missing a heel to toe step, walking on the wrong line, and putting his foot down, raising his arms to a height greater than six (6") inches, and/or hopping for balance. Officer Toscano did not recall if he performed a portable breath test.

Based upon all of the observations he made of the Defendant, including the operation of his vehicle, his appearance and his performance on the SFSTs, Officer Toscano believed the Defendant to be impaired and placed him under arrest.

Following this testimony, the Defendant conceded the voluntariness of the statements attributed to him, but challenged their admissibility, along with the marijuana allegedly recovered, as being the fruits of an improper stop and illegal arrest. The People argue that the stop and arrest were proper and that the marijuana should not be suppressed, as it was observed in plain view and/or recovered pursuant to an inventory search.

“A police officer is authorized to stop a motor vehicle on a public highway when the officer observes or reasonably suspects a violation of the Vehicle and Traffic Law (citations

(2) locations in the Defendant's vehicle, for reasons which he did not explain, he did not seize these items. Similarly, while Officer Toscano testified that marijuana was later recovered as part of an inventory search, there was no way to know if what was recovered during this purported inventory search were the same items observed by Officer Toscano.

Moreover, relying on the alleged inventory search, the People have failed to present any evidence whatsoever that the search was conducted pursuant to "an established procedure clearly limiting the conduct of individual officers that assures that the searches are carried out consistently and reasonably" *People v. Galack*, 80 N.Y.2d 715, 594 N.Y.S.2d 689 (1993); *See also: People v. Johnson*, 1 N.Y.3d 252, 771 N.Y.S.2d 64 (2003) In the absence of such testimony the marijuana allegedly recovered pursuant to such a search must be suppressed.

Accordingly, that branch of the Defendant's motion which seeks to suppress the marijuana recovered from the Defendant's vehicle is granted. Similarly, there being no testimony whatsoever regarding the chemical breath test conducted in this matter, that branch of the Defendant's motion which seeks to suppress the results of such test is granted. That branch of the Defendant's motion which seeks to suppress the two (2) statement attributed to him is denied. The court however, at this time, makes no determination as to the relevance of the statements. Such a determination shall be made, if necessary, at the time of trial.

This constitutes the decision and order of the court.

Dated: Hempstead, New York
December 4, 2008



ANDREW M. ENGEL
J.D.C.