60 Misc.3d 405
Criminal Court,
City of New York.

The PEOPLE of the State of New York
v.
ANONYMOUS, Defendant.

XXXXX
|
Decided May 2, 2018

Synopsis

Background: Defendant was charged with operating a motor vehicle while under the influence of alcohol. Defendant filed motion to suppress.

[Holding:] The Criminal Court of the City of New York, Bronx County, Steven Hornstein, J., held that officer did not establish reasonable basis to effectuate traffic stop for tinted windows.

Motion granted.

West Headnotes (3)

[1] Criminal Law
Evidence on Motions
Criminal Law
Presumptions and burden of proof

On a motion to suppress physical evidence, the People have the burden of going forward to show the legality of the police conduct in the first instance; implicit in this concept is that the testimony offered by the People in first presenting their case must be credible. U.S. Const. Amend. 4.

Cases that cite this headnote

[2] Arrest
Motor Vehicle Stops

An officer who can articulate credible facts establishing reasonable cause to believe that someone has violated a law has established a reasonable basis to effectuate an automobile stop. U.S. Const. Amend. 4.

Cases that cite this headnote

[3] Automobiles
Equipment or inspection offenses, in general

Police officer did not establish reasonable basis to effectuate traffic stop of defendant's vehicle based on observation that vehicle had tinted windows, where officer did not provide any testimony as to degree to which windows were tinted, that he had training or experience gauging lawfulness of tinted windows, or that he used a tintometer. U.S. Const. Amend. 4; N.Y. Vehicle and Traffic Law § 375(12-a) (b) (1-3).

Cases that cite this headnote

Opinion

Steven Hornstein, J.

***1** Defendant is charged with one count of operating a motor vehicle while under the influence of alcohol (VTL § 1192 [1]). Based on the credible evidence adduced at a suppression hearing held on May 1, 2018 the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

During his twelve plus year employment with the New York City Police Department, Lieutenant Kaiser has made approximately seventy arrests, ten or so of which involved operating a motor vehicle while under the **influence** of alcohol. He has also participated in another one hundred arrests involving **driving** under the **influence**. He has specialized training in the recognition of symptoms related to alcohol consumption and in the administration of portable breath tests and he has witnessed, in social settings, the effects of alcohol consumption on individuals.

On August 26, 2017, Lieutenant Kaiser was in plainclothes, in an unmarked car, with Captain Scheublin. At approximately 4:15 a.m., he "observed a gray 2000 Nissan with tinted windows traveling westbound on East Gun Hill Road." Based solely on his observation of "tinted windows," Lieutenant Kaiser, activated his vehicle's turret lights and pulled the Nissan over.

The defendant was driving the vehicle. Through the open driver's side window, Lieutenant Kaiser smelled the strong odor of an alcoholic beverage on the defendant and noticed his eyes were "bloodshot and watery." The defendant was asked to step out of the vehicle. Lieutenant Kaiser, believing the defendant was intoxicated, called for an additional unit to respond to the scene.

Police Officer Josue Batista, in uniform, and in a marked patrol car, received a call from Lieutenant Kaiser related to an intoxicated motorist. Officer Batista has been with the New York City Police Department for approximately fifteen months and he has made approximately thirteen to fifteen arrests. Two to three of those arrests were for **driving** under the **influence** and he has assisted in two other such arrests. He received training at the Police Academy in the recognition of individuals under the **influence** of alcohol and he, like Lieutenant Kaiser, has observed intoxicated persons in social settings.

Officer Batista arrived with his partner, Officer Maddolini, and they spoke with Lieutenant Kaiser. Officer Batista noted that the defendant's eyes were bloodshot and glassy, his speech was slurred and mumbled, and his breath and body bore the strong odor of alcohol. At 4:23 a.m., believing that the defendant was intoxicated, and upon receiving his lieutenant's authorization, Officer Batista placed the defendant under arrest. Neither he nor Lieutenant Kaiser issued the defendant a summons for excessive tints (*see* VTL § 375 [12] [b]).

Officer Batista transported the defendant to the 45th Precinct's Intoxicated Driver Testing Unit ("IDTU") for further processing. While at the precinct, Officer Batista noted in his police reports that the defendant was steady. He stated, however, that while he had stated the defendant was "steady" in his paperwork, there were also points when he was somewhat "wobbly." He further stated that the defendant was polite and cooperative, that his clothing was orderly and that he was a "gentleman."

***2** At 6:26 a.m. the defendant was offered a breath test by a Highway One officer and, in the presence of Officer Batista, the defendant consented to the test. The test resulted in a breath alcohol content of .11 of one percentum by weight. Shortly thereafter, the defendant consented to a coordination test that consisted of the horizontal gaze nystagmus test, the walk and turn test and the one-legged stand test. The breath test and coordination tests were recorded on a DVD. The DVD was entered into evidence, without objection, as People's Exhibit Number two and the court has reviewed that exhibit.

FINDINGS OF LAW

[1] On a motion to suppress physical evidence, the People have the burden of going forward to show the legality of the police conduct in the first instance (*see People v. Berrios*, 28 N.Y.2d 361, 321 N.Y.S.2d 884, 270 N.E.2d 709 [1971]). "Implicit in this concept is that the testimony offered by the People in first presenting their case must be credible" (*People v. Quinones*, 61 A.D.2d 765, 766, 402 N.Y.S.2d 196 [1st Dept. 1978], *citing People v. Berrios*, 28 N.Y.2d at 367–368, 321 N.Y.S.2d 884, 270 N.E.2d 709). Here, contrary to the defendant's contention, Lieutenant Kaiser and Officer Batista were credible (*see,* generally, *People v. Garafolo*, 44 A.D.2d 86, 88, 353 N.Y.S.2d 500 [2d Dept. 1974]).

[2] Nonetheless, suppression is required. As stated in *People v. Robinson*, 97 N.Y.2d 341, 741 N.Y.S.2d 147, 767 N.E.2d 638 [2001], an "officer who can articulate credible facts establishing reasonable cause to believe that someone has violated a law has established a reasonable basis to effectuate a [traffic] stop" (*see also People v. Guthrie*, 25 N.Y.3d 130, 133, 8 N.Y.S.3d 237, 30 N.E.3d 880 [2015]).

[3] Here, the sole predicate for the traffic stop was Lieutenant Kaiser's observation of a "gray 2000 Nissan with tinted windows traveling westbound on East Gun Hill Road." The defendant correctly points out that the People failed to develop any testimony as to the degree to which the Nissan's windows were tinted.

Vehicle and Traffic Law § 375 (12–a) (b) (1–3) provides:

No person shall operate any motor vehicle upon a public highway, road or street: (1) the front windshield of which

is composed of, covered by or treated with any material which has a light transmittance of less than seventy percent unless such materials are limited to the uppermost six inches of the windshield; or (2) the sidewings or side windows of which on either side forward of or adjacent to the operator's seat are composed of, covered by or treated with any material which has a light transmittance of less than seventy percent; or (3) if it is classified as a station wagon, sedan, hardtop, coupe, hatchback or convertible and any rear side window has a light transmittance of less than seventy percent....

Operating a motor vehicle with excessively tinted windows on a public roadway is a violation of VTL § 375 (12–a) (b) (1–3) and justifies the stop of that vehicle by the police (*see People v. Cuevas*, 203 A.D.2d 88, 610 N.Y.S.2d 41 [1st Dept. 1994], *lv denied* 83 N.Y.2d 909, 614 N.Y.S.2d 391, 637 N.E.2d 282 [1994]; *see also People v. Bacquie*, 154 A.D.3d 648, 649, 62 N.Y.S.3d 425 [2d Dept. 2017], *lv denied* 30 N.Y.3d 1113, —— N.Y.S.3d ——, —— N.E.3d —— [2018] ["A police officer's observation of what are suspected to be excessively tinted vehicle windows may justify a stop of that vehicle."]; *People v. Banks*, 148 A.D.3d 1359, 1360, 50 N.Y.S.3d 583 [3rd Dept. 2017] ["The traffic stop was made after troopers observed the excessively tinted windows on defendant's vehicle and, as such, was justified."]; *People v. Roberson*, 155 A.D.3d 1683, 64 N.Y.S.3d 835 [4th Dept. 2017] ["The evidence at the suppression hearing established that the police lawfully stopped the vehicle in which defendant was a passenger because it had excessively tinted windows."]).

In this case, Lieutenant Kaiser testified that the windows on the Nissan the defendant was driving were tinted. He did not, however, provide any testimony or evidence that he made a reasonable mistake of fact in believing the windows were excessively tinted (see *People v. Jean–Pierre*, 47 A.D.3d 445, 851 N.Y.S.2d 4 [1st Dept. 2008]), that he has training and/or experience in gauging the lawfulness of tinted windows, that he used a tintometer to gauge the "light transmittance" of the tinted windows, or that his observations reasonably indicated that the Nissan's tinted windows violated VTL § 375 (12–a) (b) (1–3) or some other provision of the Vehicle and Traffic Law (*compare People v. Bacquie, supra* at 649, 62 N.Y.S.3d 425 [Officer had difficulty seeing inside car on well-lit street from couple of feet away and, "although he did not recall receiving training regarding tinted windows, he had experience in this area, having made thousands of stops and written hundreds of summonses for illegally tinted windows."]).

***3** Accordingly, contrary to the People's contention, the stop of the defendant's car was unlawful and the defendant's motion to suppress observational evidence, chemical test evidence, videotape evidence and statement evidence is granted (*see Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 [1963]; *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 [1979]). In view of the foregoing, it is unnecessary to reach defendant's remaining contentions.

This constitutes the decision and order of the Court.

All Citations

--- N.Y.S.3d ----, 60 Misc.3d 405, 2018 WL 2348520, 2018 N.Y. Slip Op. 28155