

60 Misc.3d 1220(A)
Unreported Disposition

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WILL APPEAR IN THE REPORTER.
Supreme Court, Kings County, New York.

The PEOPLE of the State of New York, Plaintiff,
v.
John PALLIS, Defendant.

6350-2017

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Decided on August 1, 2018

Attorneys and Law Firms

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For the Defendant: Dana Cohen, The Legal Aid Society,
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Opinion

Jane C. Tully, J.

*1 The defendant is charged with criminal possession of a weapon in the second degree, and other related charges. On June 19, 2018, the Court conducted a combined *Payton/Dunaway/Mapp/Huntley* hearing. The People called New York City Police Officer John Triano and Detective Akiya David as witnesses. The defendant, John Pallis, testified on his own behalf. The defendant has moved to **suppress** a firearm and statements made to the police.

The Court does not find that the testimony of the People's witnesses was "tailored to nullify constitutional objections" (*People v. Garafolo*, 44 AD2d 86, 88 [2d Dept 1974]) or "so improbable as to be inherently unworthy of belief" (*People v. Lebron*, 184 AD2d 784, 785 [2d Dept 1992]). However, based upon the credible testimony, the written submissions of the parties, and the applicable law, the defendant's motion to **suppress** the firearm is GRANTED. The defendant's motion to **suppress** the statements made to the police is DENIED. In doing so, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Police Officer John Triano

Police Officer John Triano has been with the New York City Police Department for six years and is currently assigned to the anti-crime unit at the 63rd Precinct. He has received training in the identification of firearms and has participated in approximately ten arrests involving firearms. On August 10, 2017, at approximately 2:00 a.m., Officer Triano and his partners, Lieutenant Ardito and Officer Voso, were in plain clothes, on patrol, in an unmarked police vehicle, in the vicinity of 2255 Coleman Street. Officer Triano testified that the officers were investigating a claim of theft of services based on prior complaints of a "wire running from a telephone pole into an RV." Officer Triano testified that he had not received any complaints regarding the RV on that specific night. After arriving at 2255 Coleman Street, Officer Triano observed "a wire coming from a telephone pole into the top of an RV." Officer Triano described the area as quiet and residential and testified that he had observed the motorhome prior to August 10, 2017.

Officer Triano testified that when he approached the motorhome he observed, through the window, the defendant sitting on a couch inside, alone, watching television. Although Officer Triano testified that he knocked on the passenger side door to the motorhome, he later admitted that he could not recall which of the three officers knocked on the door. Officer Triano testified that he asked the defendant to step outside, and the defendant complied. Officer Triano explained to the defendant that he was there because the defendant was using a wire connected to a telephone pole. Officer Triano testified he did not threaten or make any promises to the defendant, and the officers' guns were not drawn. Officer Triano testified that the defendant apologized and explained that he was going to leave soon and was going upstate. Officer Triano placed the defendant in handcuffs outside of the motorhome. Officer Triano testified that as he walked the defendant towards the police vehicle, the defendant "stated that there was a gun in there." Officer Triano testified that he understood the defendant's statement to mean that there was a firearm in the motorhome. Officer Triano testified that at that time, the door to the motorhome was open, and the defendant gestured and motioned towards the motorhome, and responded "in the

cabinet,” when Officer Triano asked where the firearm was located.

*2 Officer Triano testified that he entered the motorhome while the defendant was standing on the street, in handcuffs. Officer Triano went towards the cabinet and observed the firearm. Officer Triano could not recall whether the cabinet was opened or closed. He observed that the firearm was loaded and recovered the firearm. Officer Triano testified that he then conducted a cursory check of the motorhome. Officer Triano could not recall whether the motorhome had a separated bedroom or a dining area, but he testified that he observed a living area, with couch and television, and a kitchen with a kitchen sink. Officer Triano testified that he did not observe the motorhome on leveling jacks. Officer Triano did not know whether there was only one entrance to the motorhome, but he identified a photograph, introduced as People's exhibit 1C, as showing the passenger side door, the entrance which he had used to enter the motorhome.

Detective Akiya David

Detective Akiya David has been with the New York City Police Department for seven years and is currently assigned to the 63rd Precinct detective squad. She testified that on August 10, 2017, she became involved with an ongoing investigation of an alleged firearm possession occurring at 2255 Coleman Street. Detective David testified that she participated in the debriefing of the defendant at the 63rd Precinct. Detective David and her partner, Detective Kontrovich, read the defendant *Miranda* warnings and interviewed the defendant. The interview was memorialized on video and introduced into evidence as People's exhibit 2.

The defendant, John Pallis

The defendant, John Pallis, testified that he is a resident of Sullivan County, but at the time of his arrest, he was employed by Advanced Mechanical to install and repair oil burners around the Brooklyn area. He testified that he commuted from Sullivan County to Brooklyn in a minivan and that he lived in his motorhome in Brooklyn for the duration of his employment. He testified that he leaves his motorhome in Brooklyn and that the motorhome had been parked on Coleman Street for approximately ten days before his arrest. The defendant described his motorhome as having a bedroom, full bathroom, kitchen and living area, and testified that on

August 10, 2017, the motorhome was on scissor jacks to stabilize it. He testified that he connected the motorhome to a telephone pole to receive electricity. He also testified that the passenger side door is the only entrance to the motorhome.

The defendant testified that on August 10, 2017, at 2:00 a.m., he awoke to banging on the window of his motorhome, and learned it was the police. An officer asked him to step outside and he closed the door behind him when he did so. He testified that the door automatically locks and he had the only key on his person. The defendant testified that he observed five police officers when he stepped outside. He testified that one of the officers told him there was a “problem with the electric” to which the defendant responded, “yeah I know.” The defendant indicated that he was placed in handcuffs. He testified that Officer Triano walked him across the street, then asked him if he had “any drugs or anything you want to get rid of before we go in and search the motorhome?” The defendant testified that he told Officer Triano, “you can't search my motorhome,” to which another officer responded, “watch me.” The defendant indicated that two other officers went inside the motorhome. The defendant testified that he remembered he had a firearm inside one of the cabinets and told Officer Triano about the firearm. The defendant testified that after his release from custody, he returned to his motorhome and observed the lock on the door was broken and the door was left unlocked. The defendant stated that he later moved the motorhome from the location.

***3 CONCLUSIONS OF LAW**

Probable Cause to Arrest

The People bear the initial burden of going forward to show that the police acted lawfully in their arrest of the defendant (*People v. Baldwin*, 25 NY2d 66, 70 [1969]; *People v. Malinsky*, 15 NY2d 86, 91 [1965]). Probable cause only requires a reasonable belief that a crime has been or is being committed or that evidence of a crime may be found in a certain place (*People v. Bigelow*, 66 NY2d 417, 423 [1985]; *People v. McRay*, 51 NY2d 594, 602 [1980]). Here, the People met their burden of establishing that the police had probable cause to arrest the defendant. Officer Triano testified that there had been complaints about a wire running from the telephone pole into the motorhome. Officer Triano observed the defendant's motorhome with a wire

extending from a telephone pole into the top of the motorhome. Officer Triano also observed the defendant inside watching television, indicating that electricity was being used. Furthermore, the defendant acknowledged in his testimony that he was using electricity from the telephone pole for his motorhome. Therefore, there was probable cause to arrest the defendant for theft of services.

Suppression of the Firearm

The People have the initial burden at a **suppression** hearing of providing evidence of the legality of police conduct in the first instance (*People v. Di Stefano*, 38 NY2d 640, 652 [1976]). It is the People's burden in the first instance to establish justification for a warrantless search (*People v. Pettinato*, 69 NY2d 653, 654 [1986]). “All warrantless searches presumptively are unreasonable per se, and, thus, where a warrant has not been obtained, it is the People who have the burden of overcoming this presumption of unreasonableness” (*People v. Jimenez*, 22 NY3d 717, 721 [2014]).

The United States Supreme Court held in *Payton v. New York*, that “the Fourth Amendment... prohibits the police from making a warrantless and nonconsensual entry into a suspect's home” (445 US 573, 590 [1980]). The “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed” (*id.* at 586). The mere fact that officers may have probable cause to search a home does not allow them to conduct such a search without a warrant, unless the search falls within one of “a number of ‘carefully delineated’ exceptions to the Fourth Amendments Warrant Clause in that context” (*People v. Garvin*, 30 NY3d 174, 181 [2017], quoting *People v. Molnar*, 98 NY2d 328, 331 [2002]; see also *Welsh v. Wisconsin*, 66 US 740, 753 [1984]; *People v. Avinger*, 140 AD3d 895 [2d Dept 2016]). One of those exceptions is consent to entry (see *People v. Levan*, 62 NY2d 139, 142 [1984]). Under the “automobile” exception however, the police may search a vehicle without a warrant when they have probable cause to believe that evidence or contraband will be found there (see *People v. Belton* 55 NY2d 49, 55 [1982]). Elimination of the warrant requirement for automobiles has been justified both by the mobility of vehicles and by the diminished expectation of privacy (*People v. Galak*, 81 NY2d 463, 467 [1993]).

*4 “The hybrid character of the motor home places it at the crossroads between the privacy interests that

generally forbid warrantless invasions of the home and the law enforcement interests that support the exception for warrantless searches of automobiles based on probable cause” (*California v. Carney*, 471 US 386, 395 [1985, Stevens, J., dissenting] [citations omitted]). In *Carney*, the United States Supreme Court held that, under certain circumstances, a motorhome may fall within the automobile exception because it involves concerns similar to those surrounding automobiles and other readily mobile vehicles. The Court emphasized that, “[w]hen a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes — temporary or otherwise,” the justifications for the automobile exception comes into play (*id.* at 392-3). However, the automobile exception should not be extended to a motorhome which is objectively indicated by the circumstances as being used as a residence (see *id.* at 392-4; see also *United States v. Gooch*, 6 F3d 673, 677 [9th Cir 1993]). *Carney* put forth several factors that might be relevant in determining whether a motorhome is being used as a residence, including whether it was licensed, elevated on blocks, connected to utilities and whether it had convenient access to a public road (471 US at 395, n 3). Motorhomes may be more like residences than automobiles where they provide increase privacy and residential necessities (see e.g. *United States v. Williams*, 630 F2d 1322, 1326 [9th Cir 1980]). Therefore, to justify a warrantless search of the defendant's motorhome under the automobile exception, the People must establish that (1) the motorhome was readily mobile and (2) it was located in a setting that objectively indicated it was being used for transportation (see *Carney* 471 US at 394-395).

Officer's Triano's testimony supports the inference that the defendant's motorhome was being used as a residence rather than a vehicle. Although Officer Triano testified that the motorhome did not have leveling jacks, he testified that the motorhome was parked in a quiet and residential area. Officer Triano also testified he had seen the motorhome prior to August 10, 2017, indicating that it had been stationary before that date. The officer testified that there had been complaints of a “wire running from a telephone pole into an RV,” and Officer Triano observed the defendant at 2:00 a.m. in the early morning, on the couch in the motorhome watching television. Officer Triano did not recall whether the motorhome had a separated bedroom or a dining area, but he testified that the motorhome had a kitchen and a living area with a couch and a television. Here, there was

no evidence that the motorhome was being used as a means of transportation, in that it was used daily or for commercial purposes. Nor did the People present any evidence that the defendant had any other residence than the motorhome. Although the motorhome was mobile because of its inherent ability, Officer Triano's testimony suggested that the motorhome was situated in such a way that an objective observer could have concluded that it was being as a residence based on the amenities in the motorhome, and the fact that the wire running from the telephone pole would have to be disassembled before the motorhome could be driven away (*see e.g. United States v. Adams*, 845 F Supp. 1531,1537 [D Fl 1994] [motorhome was being used for residence where it was located on a private rural wooded lot, electric generator was operating at time of arrest, and it contained a kitchenette, sink, bed, sofa and a dining room table]). Probable cause did exist that the motorhome contained evidence of a crime, however, the automobile exception does not apply to the warrantless search of the defendant's motorhome. Therefore, the People must establish that the police searched the defendant's residence pursuant to one of the delineated exceptions to the warrant requirement (*Payton v. New York*; *see People v. Garvin*, 30 NY3d 174 [2017]).

To justify the warrantless entry into the defendant's motorhome, the People argue that the defendant gave implied consent to the search by voluntarily exiting the motor home, voluntarily disclosing the location of the firearm, and gesturing towards the motorhome, while the door was open.

Courts have consistently held that consent may be established by conduct as well as words (*People v. Davis*, 120 AD2d 606, 607 [2d Dept 1986]). A consent to search must be, “an unequivocal product of an essentially free and unconstrained choice” (*People v. Gonzalez*, 39 NY2d 122, 128 [1976]). The People bear a heavy burden of establishing that the search was based on consent (*id.*). “The determination whether the People met their burden is a question of fact based on the totality of the circumstances” (*People v. Poinvil*, 47 Misc 3d 79 [App Term 2, 11 & 13 Jud Dists, 2d Dept 2015]). When the circumstances supporting consent are no greater than the circumstances negating consent, the People have not met their burden of production (*People v. M.R.*, 26 Misc 3d 1213[A] [Sup Ct, Bronx County 2009]).

*5 The Court finds that the People have not met their heavy burden of establishing that the defendant gave implied consent to search his motorhome based on Officer Triano's testimony that the defendant gestured towards the motorhome, the door to which had been left open, and stated there was a gun in a cabinet in his motorhome, while in handcuffs, and being escorted to the police vehicle. The cases cited by the People are distinguishable. In *People v. Taylor*, 7 Misc 3d 126(A) (App Term 2d & 11th Jud Dists 2d Dept 2005), consent was established when the defendant opened the door to her apartment, allowed officers inside, and directed one of them to the firearm. Similarly, in *People v. Brown*, 234 AD2d 211 (1st Dept 1996), consent was established after officers asked another resident of the defendant's apartment if they could speak to the defendant, at which point the resident walked over to the defendant, leaving the door wide open and walking away. In neither of the above-mentioned cases were the defendants in custody, in handcuffs, or on the sidewalk outside of their residences while the police conducted a search of their home. Moreover, here, the defendant did not voluntarily leave his door open, or voluntarily walk away from his motorhome. Officer Triano testified that the defendant was placed in handcuffs and was being escorted to the police vehicle, away from his motorhome. The mere fact that the defendant gestured towards the motorhome, while he was in handcuffs, and advised the police that there was a firearm, while walking to the police vehicle, did not amount to implied consent for the police to enter the defendant's motorhome and conduct a search.

Furthermore, there was no evidence that the motorhome would disappear in the amount of time it would have taken the police to obtain a warrant, as they were in complete control of it and the sole occupant was in custody (*see e.g. United States v. Williams*, 630 F2d 1322). The People offered no evidence of any imminent departure of the motorhome. It is inexplicable why, here, the police chose to eschew the safe harbor of a search warrant and conduct a warrantless search. There was “no excuse for proceeding without a warrant, unless it was the personal impatience or inconvenience of the police, considerations which never may be permitted to outweigh the constitutional interests at stake” (*People v. Knapp*, 52 NY2d 689, 697 [1981]).

Accordingly, the defendant's motion to **suppress** the firearm recovered from his motorhome without a search warrant is granted, as a violation of *Payton v. New York*.

Suppression of the Statements

A defendant who is in custody may not be interrogated by law enforcement without being advised of his constitutional rights (*Miranda v. Arizona*, 384 US 436 [1966]). “Both the elements of police ‘custody’ and police ‘interrogation’ must be present before law enforcement officials constitutionally are obligated to provide the procedural safeguards imposed upon them by *Miranda*” (*People v. Huffman*, 41 NY2d 29, 33 [1976]). It is the Peoples burden to prove that the statements of a defendant they intend to rely upon at trial are voluntary, and not the product of unlawful interrogation or that they were genuinely spontaneous (*People v. Jin Cheng Lin*, 26 NY3d 701, 719 [2016]).

The defendant's statement that occurred at the outset of Officer Triano's investigation did not require *Miranda*. The defendant was not handcuffed or restrained, the officers' firearms were not drawn, and the defendant was not threatened or promised anything. The defendant's statement that he was going upstate, was made in response to an investigation regarding the defendant's use of a telephone pole to provide electricity into his motorhome. Therefore, the statement did not violate *Miranda*.

Although the defendant was in custody when he stated that there was a firearm inside the motorhome, the statement was not made in response to any custodial interrogation and, therefore, did not violate *Miranda*.

The defendant's motion to **suppress** the statement memorialized on video after the defendant had been given *Miranda* warnings is denied. The police had probable cause to arrest the defendant, irrespective of the *Payton* violation, and the statement was taken at the precinct after *Miranda* warnings were properly administered to the defendant (*New York v. Harris*, 495 US 14 [1990]; *People v. Ayala*, 165 AD2d 878 [2d Dept 1990]; *People v. Thomas*, 164 AD2d 874 [2d Dept 1990]).

In sum, there was no evidence presented that any of the statements were made in violation of the defendant's rights or that they were coerced in any way. As a matter of law, the Court finds that the statements were knowingly, intelligently, and voluntarily made.

***6 CONCLUSION**

This Courts finds that there was probable cause to arrest the defendant. The defendant's motion to **suppress** the firearm recovered as a result of the warrantless search of his motorhome is granted. The defendant's motion to **suppress** the statements made to the police is denied.

This constitutes the Decision and Order of the Court.

All Citations

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