43 Misc.3d 827
County Court, Monroe County, New York.

The PEOPLE of the State of New York, Plaintiff,
v.
Christopher Q. WILLIAMS, Defendant.

Oct. 2, 2013.

Synopsis

Background: Defendant was charged by indictment with one count of criminal possession of weapon in second degree. Defendant moved to suppress tangible and statement evidence.

Holdings: The County Court, Monroe County, DeMarco, J., held that:

[1] defendant abandoned pistol;

[2] pursuit of defendant was justified;

[3] investigatory detention was supported by reasonable suspicion;

[4] defendant's statements to arresting officer violated *Miranda*;

[5] defendant's written confession was voluntary; and

[6] confession was not tainted by prior *Miranda* violation.

Motion granted in part and denied in part.

West Headnotes (9)

[1] Searches and Seizures
Abandoned, surrendered, or disclaimed items

Defendant's pistol that he discarded while in flight as police officers merely entered vicinity in two patrol cars was abandoned, without infringement of defendant's Fourth Amendment rights; defendant's flight was not precipitated by any encounter with officers prior to abandoning pistol as independent act not provoked by police illegality, so reasonable inference could be made that defendant consciously intended to relinquish pistol thereby surrendering any privacy interest he had in pistol. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[2] Arrest
Particular cases

Police officer's pursuit of defendant upon exiting her patrol car to investigate dark object that he tossed was supported by adequate justification, under Fourth Amendment, where officer's observation of defendant "blading" his body by quickly turning and walking in side-stepping manner was made from vantage point of her vehicle on public roadway, and defendant then took flight as vehicle approached vicinity. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[3] Arrest
Particular cases

Police officers' investigatory detention of defendant who tossed dark object and fled as officers' patrol cars approached vicinity was supported by reasonable suspicion of criminal activity, based on one officer's observation of defendant "blading" his body by quickly turning and walking in side-stepping manner, and then officer yelling out that she observed defendant go over fence and head in direction of second officer who then temporarily seized defendant with help of first officer handcuffing him before investigating tossed object that turned out to be pistol. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[4] Criminal Law
Necessity of showing voluntary character

Criminal Law
Voluntariness

A confession or admission is admissible at trial only if its voluntariness is established beyond a reasonable doubt. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[5] **Criminal Law**
Custodial interrogation in general

Miranda warnings are required when a person is subjected to custodial interrogation. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[6] **Criminal Law**
Warnings

Whether a suspect is in custody, as would trigger his right to *Miranda* warnings prior to interrogation, is generally a question of fact, and the standard to be applied is whether a reasonable person, innocent of any crime, would have believed he was not free to leave. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[7] **Criminal Law**
Particular cases or issues

Defendant's statements to arresting officer that defendant merely found pistol that he had discarded as patrol car approached vicinity and that pistol did not belong to him, were made while he was in custody, triggering his right to *Miranda* warnings; defendant made statements while in handcuffs and seated inside patrol car with door open and officer standing in between door and defendant, and statements were made in response to questions that officer knew or should have known were likely to elicit incriminating response and were not pedigree in nature. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[8] **Criminal Law**
Particular cases

Criminal Law
Particular cases

Criminal Law
Particular cases

Defendant's written confession to investigator, after custodial interrogation preceded by adequate *Miranda* warnings, was knowing, intelligent, and voluntary; investigator never promised or denied defendant anything to get him to talk, did not threaten him in any way, and confirmed that he could read and write English, did not appear to be under influence of alcohol or narcotics, and was coherent and not lethargic, and defendant reviewed statement for accuracy, made changes before signing and initializing, declined offer to return to hospital after vomiting before signing confession, and never asked for interrogation to stop or for assistance of counsel. U.S.C.A. Const.Amend. 5, 6.

Cases that cite this headnote

[9] **Criminal Law**
Two-step interrogation technique; warnings

Defendant's statements to arresting officer during custodial interrogation in violation of *Miranda*'s warning requirements did not taint defendant's later written confession, on grounds that taint was dissipated by sufficient break in chain of events, where confession was made following valid *Miranda* waiver one and one-half hours after prior un-warned statement, at different location, and to different police officer. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

Attorneys and Law Firms

****805** Sandra Doorley, Esq., Monroe County District Attorney, Michael Bezer, Esq., of counsel, Assistant District Attorney, Rochester, NY, for the People.

Avik K. Ganguly, Esq., Rochester, N.Y., for the Defendant.

DECISION AND ORDER

DeMARCO, J.

***829** Defendant is charged by Indictment No. 2012–0944 with one count of criminal possession of a weapon in the second degree, in violation of Penal Law section 265.03(3), in connection with an incident occurring in the City of Rochester, County of Monroe, on November 28, 2012. The defendant brought a motion to suppress tangible and statement evidence. The tangible evidence at issue is a .45 caliber pistol. The People filed opposition papers. The Court conducted a hearing on these issues on July 2, 2013. At the conclusion of the hearing, the Court placed its findings of fact on the record, and reserved decision. The Court fully adopts and incorporates its findings of fact herein, and credits the testimony of the People's witnesses at the hearing. The parties have filed written memoranda in support of their respective positions. The Court has reviewed the evidence presented at the hearing, including the admitted exhibits, as well as the parties' written memoranda.

Defendant contends that the police had no legal justification to pursue, detain or question him on November 28, 2012. More ***830** specifically, defendant argues that at the time he was observed by police, neither he nor any of the three individuals he was with had committed any observable violation(s) of law, nor were they engaged in any suspicious activity that properly gave rise to reasonable cause to believe that criminality was afoot. Defendant contends that law enforcement had no justification to pursue him when he ran and that, accordingly, the tangible and statement evidence at issue should be suppressed as fruits of an unlawful seizure and arrest. Defendant also contends that his alleged admissions to law enforcement pursuant to his seizure and arrest (if deemed lawful) were the fruit of an unlawful arrest and made in violation of his Miranda rights. The People respond that defendant's action of "blading" his body—i.e., quickly turning and walking in a side-stepping manner as the police cars approached his vacinity—and then, without provocation, suddenly running and discarding a dark object from his waistband, justified the police pursuit. The People argue that defendant's seizure and arrest were warranted, and that defendant's statements pursuant to his arrest were voluntarily made and not in violation of his Miranda rights. The People further contend that defendant abandoned the tangible evidence at issue, and that said abandonment was not precipitated by police illegality.

The Court finds that defendant's seizure and arrest were lawful and that, in any event, defendant abandoned the tangible evidence at issue, and that said abandonment was an independent act not precipitated by police illegality. The Court also finds that defendant's alleged statements to Rochester Police Department officer Jeffrey McEntee ("officer McEntee") were made in violation of his Miranda rights. Defendant's alleged statements to Rochester Police Department investigator Timothy Gourlay ("investigator Gourlay") were not. The Court's conclusions of law follow.

A. Conclusions of Law

As the Court of Appeals has repeatedly explained, the "purpose of [****806** *People v. De Bour,* 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976)] was to provide clear guidance to police officers seeking to act lawfully in what may be *fast-moving street encounters* and a cohesive framework for courts reviewing the propriety of police conduct *in [those] situations* " (*People v. Moore,* 6 N.Y.3d 496, 499, 814 N.Y.S.2d 567, 847 N.E.2d 1141 [2006] [emphasis added]; *see De Bour,* 40 N.Y.2d at 223, 386 N.Y.S.2d 375, 352 N.E.2d 562). In *De Bour,* 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562, for example, the Court of appeals held that *the least intrusive level of inquiry is a request for information* when ***831** there is some objective, non-arbitrary reason *for that interference (see De Bour,* 40 N.Y.2d at 223, 386 N.Y.S.2d 375, 352 N.E.2d 562 [emphasis added]). This connotes that the Court of Appeals' notion of what constitutes a street encounter, in the first instance, requires some level of interference. Moreover, and consistent with this notion, The American Heritage Dictionary defines the term "encounter" as "an unplanned or unexpected meeting" or "a hostile confrontation" (The American

Heritage Dictionary 451 [2nd ed. 1991]). Dictionary.com defines "encounter" as "to come upon or meet with" or "to meet with or contend against" (Dictionary.com, http://dictionary.reference.com/browse/enounter?s=t/ [accessed August 29, 2013]). Here, in contrast to the above notions, there was neither an interference nor an encounter.

Thus, the critical question is *not*, as defendant would have it, whether his act of flight, alone, or even in conjunction with all the surrounding circumstances, provided police reasonable suspicion to pursue him (*cf. People v. Holmes,* 81 N.Y.2d 1056, 1058, 601 N.Y.S.2d 459, 619 N.E.2d 396 [1993] [citations omitted]; *People v. Martinez,* 80 N.Y.2d 444, 446, 591 N.Y.S.2d 823, 606 N.E.2d 951 [1992]; *People v. Sierra,* 83 N.Y.2d 928, 929, 615 N.Y.S.2d 310, 638 N.E.2d 955 [1994]; *People v. Cady,* 103 A.D.3d 1155, 1156, 959 N.Y.S.2d 321 [4th Dept.2013]; *People v. Riddick,* 70 A.D.3d 1421, 1422, 894 N.Y.S.2d 260, *lv. denied* 14 N.Y.3d 844, 901 N.Y.S.2d 150, 927 N.E.2d 571 [2010]; these concepts are not determinative here (*see People v. Edmund,* 169 A.D.2d 195, 199, 572 N.Y.S.2d 982 [4th Dept.1991], *appeal denied* 78 N.Y.2d 1075, 577 N.Y.S.2d 238, 583 N.E.2d 950 [1991] [where the initial encounter does not constitute a "stop", reasonable suspicion is not required] [internal quotations not in original]). Rather, the relevant question to be resolved, as the facts here fall short of illustrating even the lowest level of intrusion contemplated in *De Bour,* much less a "stop", is whether defendant abandoned the tangible evidence at issue, or whether it was revealed as a direct result of police illegality and constitutes fruit of the poisonous tree (*see People v. Ramirez–Portoreal,* 88 N.Y.2d 99, 110, 643 N.Y.S.2d 502, 666 N.E.2d 207 [1996]; *see also Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 [1963]; *People v. Cantor,* 36 N.Y.2d 106, 114, 365 N.Y.S.2d 509, 324 N.E.2d 872 [1975]).

The Court notes at the outset that as defendant may rely on the People's proof to establish standing (see CPL 710.60[1]; *People v. Burton,* 6 N.Y.3d 584, 588–589, 815 N.Y.S.2d 7, 848 N.E.2d 454 [2006]), and as his suppression claims are grounded in essentially the same facts involving at least one of the same police witnesses, considerations of judicial economy militated in favor of conducting the hearing, notwithstanding any pleading deficiencies in defendant's papers (*see People v. Mendoza,* 82 N.Y.2d 415, 429–430, 604 N.Y.S.2d 922, 624 N.E.2d 1017 [1993]; *People v. Otero,* 51 A.D.3d 553, 554, 858 N.Y.S.2d 157 [1st Dept.2008]).

[1] Indispensable to the analysis here is the fact that defendant's flight was not provoked by unlawful police conduct or, for ****807** that ***832** matter, any discernable interaction at all with the police. The record bears out that defendant fled as police merely entered his vicinity in two separate patrol cars. Neither patrol car activated its emergency lights or sirens in approaching defendant's vicinity. Nor did either patrol car approach defendant's vicinity in a rapid or otherwise exigent manner. In addition, neither patrol car impeded defendant's line of travel or freedom of movement. Nor did any police officer in either patrol car make any gestures or explicitly assert anything to defendant or his companions, much less any commands, before defendant fled. Indeed, both police cars were patrolling defendant's vicinity as part of their detail, with no suspicion at all regarding criminality in the area or as to defendant and his companions.

[2] Dispositive of the analysis, in addition to and in view of the above-stated circumstances, is the uncontroverted fact that defendant fled *before* officer McEntee *or* officer Pitts exited their patrol vehicles. It is further uncontroverted that officer Pitts observed defendant "blade" his body, run and then toss a dark object, all within seconds, while still seated in her patrol vehicle (T at 79, lines 5–8). Doubtless, this observation, made from a vantage point where officer Pitts had a legal right to be (inside her police vehicle on a public roadway), coupled with defendant's flight, afforded her adequate justification to exit her vehicle to investigate what defendant tossed or to pursue him (see *Cady,* 103 A.D.3d at 1156, 959 N.Y.S.2d 321). In any event, defendant's act of tossing the dark object was an independent act not precipitated by improper police conduct, and reasonably begets the exclusive inference that he consciously intended to relinquish it, and, in so doing, surrendered any privacy interest in it (*see generally Ramirez–Portoreal,* 88 N.Y.2d 99, 643 N.Y.S.2d 502, 666 N.E.2d 207 [1996]; *see also People v. Howard,* 50 N.Y.2d 583, 593, 430 N.Y.S.2d 578, 408 N.E.2d 908 [1980], *cert. denied* 449 U.S. 1023, 101 S.Ct. 590, 66 L.Ed.2d 484 [1980]); *People v. Boodle,* 47 N.Y.2d 398, 404, 418 N.Y.S.2d 352, 391 N.E.2d 1329 [1979], *cert. denied* 444 U.S. 969, 100 S.Ct. 461, 62 L.Ed.2d 383 (1979). Notably, defendant may not even have been aware when he tossed the dark object that officers McEntee and Pitts actually exited their patrol vehicles.

[3] With respect to defendant's seizure, even assuming *arguendo* that officer McEntee's pursuit of defendant was unlawful, the seizure was nevertheless lawful. The record reflects that officer Pitts, during her pursuit of defendant, called out (yelled) when she observed defendant go over a fence, and officer McEntee then seized him (T at 79, lines 9–15). The record further reflects that officer Pitts was involved with handcuffing defendant before she backtracked and recovered the gun (T at ***833** 104, lines 2–4). Officer Pitts' collective observations of defendant justified the temporary seizure to investigate what, if anything, defendant may have tossed moments after she observed his flight. This is not a case of an improper seizure leading to the recovery of tangible evidence, where the evidence may not have been recovered but for the improper seizure or resulting incriminating statements. The seizure of defendant by officers Pitts and McEntee was reasonably related in scope to the aggregate circumstances leading up to *that* encounter (*see People v. William II,* 98 N.Y.2d 93, 98, 745 N.Y.S.2d 792, 772 N.E.2d 1150 [2002]), notwithstanding that defendant's flight, in the first instance, was not precipitated by any encounter whatsoever with the police.

Furthermore, the seizure is not rendered improper merely because it involved officer McEntee, whom, arguably, was without sufficient indicia of criminality to justify his pursuit of defendant in the first ****808** place. Notably, the temporary seizure of defendant did not occur until *after* officer Pitts' observations and yelling out to officer McEntee that defendant was headed in his direction. To maintain that it was illegal for officer McEntee at that juncture to tackle and seize defendant, based merely on the questionability of his initial pursuit, would yield an absurd result. Clearly, officer McEntee may react to information imparted by a fellow officer, especially one with whom he is interacting in real-time as part of the same detail. To hold otherwise would unfairly strain law enforcement's ability to work together and exchange critical information under rapidly developing circumstances where such real-time communications—oftentimes made under the most stressful of circumstances which, by their very nature, are inconducive to poised reflection—may mark the difference between apprehension of the suspect versus failure to apprehend, or life and death.

Because there was no street encounter here, and because defendant's flight was not provoked by police illegality, the tangible evidence that he discarded while in flight was abandoned and, in this Court's view, not so as a result of any infringement of defendant's Fourth Amendment rights. The cases cited by defendant are inapposite, as the instant facts fall short of a street encounter, triggering analysis under the well settled legal principles set forth in *De Bour,* 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 and its progeny. Defendant does not address the issue of abandonment in his papers. Defendant's motion to suppress tangible evidence is denied.

Defendant also contends that the statements he made to police were involuntarily made within the meaning of CPL 60.45, ***834** or otherwise inadmissible as unlawfully or unconstitutionally obtained.

[4] **[5]** **[6]** The Court begins this part of its analysis by noting that a confession or admission is admissible at trial only if its voluntariness is established beyond a reasonable doubt (*see People v. Yarter,* 41 N.Y.2d 830, 393 N.Y.S.2d 393, 361 N.E.2d 1041 [1977], *cert. denied* 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 [1977]; *People v. Valerius,* 31 N.Y.2d 51, 334 N.Y.S.2d 871, 286 N.E.2d 254 [1972]). *Miranda* warnings are required when a person is subjected to custodial interrogation (*see Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 [1966]; *People v. Berg,* 92 N.Y.2d 701, 685 N.Y.S.2d 906, 708 N.E.2d 979 [1999]). Whether a suspect is in custody is generally a question of fact (*see People v. Centano,* 76 N.Y.2d 837, 560 N.Y.S.2d 121, 559 N.E.2d 1280 [1990]), and the standard to be applied is whether a reasonable person, innocent of any crime, would have believed he was not free to leave (*see People v. Yukl,* 25 N.Y.2d 585, 307 N.Y.S.2d 857, 256 N.E.2d 172 [1969]).

[7] The Court declines to suppress defendant's statements to officer McEntee that he (defendant) just found the gun and that the gun was not his, as the fruit of an unlawful arrest, for the reasons explained above. The Court does find, however, that said statements were made in violation of defendant's Miranda rights. Defendant made said statements while in handcuffs and seated inside a police car with the door open and officer McEntee standing in between the door and the defendant. Defendant was no doubt in custody at that time, and officer McEntee did not read defendant his Miranda rights. Because the above statements were made in response to questions officer McEntee knew or should have known were likely to elicit an incriminating response (*see Rhode Island v. Innis,* 446 U.S. 291, 302, 100 S.Ct. 1682, 64 L.Ed.2d 297 [1980]),

and were not pedigree in nature (*see* ****809** *People v. Alleyne,* 34 A.D.3d 367, 828 N.Y.S.2d 2 [1st Dept.2006], *lv. denied* 8 N.Y.3d 918, 834 N.Y.S.2d 509, 866 N.E.2d 455 [2007], *cert. denied* 552 U.S. 878, 128 S.Ct. 192, 169 L.Ed.2d 130 [2007] [holding that "a question which falls within the scope of interrogation ... does not for that reason fall outside the pedigree exception"] [citation and internal punctuation omitted]), they are inadmissible at trial.

[8] On the other hand, the Court concludes that the custodial interrogation of defendant which yielded his written statement to investigator Gourlay was in all respects proper and lawful. Investigator Gourlay preceded his questioning by an adequate advisement of the *Miranda* rights, after which defendant knowingly, intelligently and voluntarily waived his rights and agreed to be interviewed. At no time did investigator Gourlay promise defendant anything to get him to talk, or threaten him in any way. Nor did investigator Gourlay offer or deny defendant ***835** anything to get him to talk. Investigator Gourlay asked defendant if he could read and write English, to which defendant responded he could. Investigator Gourlay testified that defendant did not appear to be under the influence of alcohol or narcotics, based on his experience interacting with people under the influence of those substances. Investigator Gourlay testified that defendant was coherent and did not at all appear lethargic. While investigator Gourlay drafted defendant's statement, defendant reviewed the statement for accuracy and was given the opportunity to make any changes or additions to it. Investigator Gourlay placed defendant's two-page statement in front of him and asked defendant to read the first sentence aloud to insure that defendant could understand his (investigator Gourlay's) writing and sufficiently read English. Defendant read the first sentence with no problem, and investigator Gourlay stood next to him and read the entire statement aloud. Investigator Gourlay then asked defendant if he wanted to make any changes or add anything, and defendant did not make any changes.

Significantly, before signing and initializing his (defendant's) approval of the statement, defendant stated to investigator Gourlay that he felt sick. As investigator Gourlay escorted defendant to the bathroom, he (defendant) vomited on the floor in the hallway. Defendant did not request medical attention before or after vomiting. After defendant vomited, he proceeded to the restroom, washed his hands, and investigator Gourlay then escorted him back to the interview room. Investigator Gourlay asked defendant if he was okay, to which defendant responded, yes. Investigator Gourlay asked defendant if he needed to go back to the hospital, to which defendant responded, no. Investigator Gourlay again asked defendant if he was medically okay, to which defendant responded that he was sore but okay and did not want to go back to the hospital. Investigator Gourlay re-read defendant's statement to him, while defendant was seated with the statement in front of him. Investigator Gourlay again gave defendant an opportunity to change or add anything before signing the statement. Defendant made one cross out on page one, signed the bottom of page two, and drew a horizontal line on the empty portion on page two that was not written on and initialed at the beginning and end of the line so nothing could be added without his consent. Defendant never asked for the interrogation to stop, or for the assistance of counsel. The People established the voluntariness of defendant's written statement to investigator Gourlay beyond a reasonable doubt.

[9] ***836** The Court further finds that despite the aforesaid *Miranda* violation, there was a sufficient break in the chain of events to allow for the admission of defendant's written statement. The fact that ****810** defendant's written statement was made following a valid *Miranda* waiver at a significantly different time and location and to a different officer indicates a change in the nature of the interrogation to constitute a "sufficiently, definite pronounced break in the interrogation to dissipate the taint from the [earlier] *Miranda* violation" (*see People v. Braswell,* 49 A.D.3d 1190, 856 N.Y.S.2d 366 [4th Dept.2008], *lv. denied* 10 N.Y.3d 860, 860 N.Y.S.2d 486, 890 N.E.2d 249 [200] [citations and internal punctuation omitted]; *see also People v. Smith,* 275 A.D.2d 951, 713 N.Y.S.2d 426 [4th Dept.2000], *lv. denied* 96 N.Y.2d 739, 722 N.Y.S.2d 806, 745 N.E.2d 1029 [2001]; *People v. White,* 10 N.Y.3d 286, 856 N.Y.S.2d 534, 886 N.E.2d 156 [2008]). Defendant's reliance on *People v. Chapple,* 38 N.Y.2d 112, 378 N.Y.S.2d 682, 341 N.E.2d 243 (1975) and *People v. Bethea,* 67 N.Y.2d 364, 502 N.Y.S.2d 713, 493 N.E.2d 937 (1986) contending that his written statement should be suppressed because it was part of one continuous chain of events is misplaced. In both *Chapple* and *Bethea,* defendants were subjected to extensive, un-Mirandized custodial interrogations (*see White,* 10 N.Y.3d at 291–292, 856 N.Y.S.2d 534, 886 N.E.2d 156;

People v. Bolus, 185 A.D.2d 1007, 1008, 587 N.Y.S.2d 446 [3rd Dept.1992], *lv. denied* 81 N.Y.2d 785, 594 N.Y.S.2d 731, 610 N.E.2d 404 [1993]). That was not the case here. Defendant's initial statements to officer McEntee were obtained from defendant while he was seated in a patrol car at the crime scene at approximately 8:22 p.m. Defendant was later informed of his *Miranda* rights by another officer (investigator Gourlay) at the station at approximately 9:52 p.m. After defendant waived those rights—approximately one and one-half hours after his initial un-Mirandized statements—investigator Gourlay elicited defendant's written confession. Under the circumstances, the "earlier, unwarned statement cannot be said to have committed [defendant] to later confessing the crime" (*Smith,* 275 A.D.2d at 951, 713 N.Y.S.2d 426 [citations and internal punctuation omitted]). Defendant's written statement is therefore admissible at trial.

D. Conclusion

Based upon the foregoing, defendant's motion to suppress tangible evidence is DENIED. Defendant's motion to suppress statement evidence is GRANTED in part and DENIED in part. This constitutes the Decision and Order of the Court.

All Citations

43 Misc.3d 827, 984 N.Y.S.2d 803, 2013 N.Y. Slip Op. 23466