58 Misc.3d 171
County Court, Monroe County, New York.

The PEOPLE of the State of New York, Plaintiff,
v.
Joshua PERKINS, Defendant.

Aug. 21, 2017.

Synopsis

Background: Defendant charged with firearm and drug offenses moved to dismiss or reduce the charges, for release of grand jury minutes, and to suppress evidence.

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

[1] it could not review evidence not presented to grand jury;

[2] absence of definition of detachable magazine in assault weapon provision of firearms statute did not render the statute unconstitutionally vague;

[3] any inconsistencies between firearm examiner's report and grand jury testimony did not have material influence upon grand jury;

[4] occupant did not voluntarily consent to search of shared residence; and

[5] officer's unsupported conclusory statement that subject of arrest warrant resided at residence was insufficient to support officers' request that occupant consent to search of residence.

Motion granted in part and denied in part.

West Headnotes (34)

[1] Indictment and Information
Degree of proof

A grand jury may issue an indictment only where there is legally sufficient evidence before it that provides reasonable cause to believe that a person has committed an offense.

Cases that cite this headnote

[2] Indictment and Information
Incompetent or insufficient evidence

Indictment and Information
Hearing and determination

To dismiss or reduce an indictment based on insufficient evidence, a reviewing court must consider whether the evidence produced at the grand jury, viewed in the light most favorable to the People, would, if unexplained and uncontradicted, warrant conviction by a petit jury.

Cases that cite this headnote

[3] Indictment and Information
Degree of proof

In the context of a grand jury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt; thus, a reviewing court must determine whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes, and whether the grand jury could rationally have drawn the guilty inference.

Cases that cite this headnote

[4] Indictment and Information
Grand or petit jury irregularities

A grand jury proceeding is defective when the integrity of the proceeding is impaired, and prejudice to the defendant may result; a defective grand jury proceeding warrants dismissal of an indictment.

Cases that cite this headnote

[5] Indictment and Information
Grand or petit jury irregularities

Although failure to furnish adequate or complete instructions is not one of the statutory grounds listed as authorizing dismissal of the indictment, it may, in a given case, render the grand jury proceedings defective, thus mandating dismissal of the indictment. McKinney's CPL § 210.35(5).

Cases that cite this headnote

[6] Grand Jury
Charge

A grand jury need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law.

Cases that cite this headnote

[7] Grand Jury
Charge

As the grand jury is not charged with the ultimate responsibility of determining the guilt or innocence, it is unsound to measure the adequacy of the legal instructions given to the grand jury by the same standards that are utilized in assessing a trial court's instructions to a petit jury; rather, it is sufficient if the district attorney provides the grand jury with enough information to enable it intelligently to decide whether a crime has been committed and to determine whether there exists legally sufficient evidence to establish the material elements of the crime.

Cases that cite this headnote

[8] Grand Jury
Charge

The test for evaluating the adequacy of instructions to a grand jury is whether they were so deficient as to impair the integrity of the grand jury's deliberations.

Cases that cite this headnote

[9] Indictment and Information
Limitations on judicial review of evidence

Indictment and Information
Hearing and determination

Trial court's authority to review grand jury's proceedings, on defendant's motion to dismiss or reduce firearm charges alleging insufficient evidence was presented to grand jury, did not extend to reviewing evidence not presented to grand jury. McKinney's CPL § 210.20.

Cases that cite this headnote

[10] Constitutional Law
Weapons and explosives

Weapons
Violation of other rights or provisions

Absence of definition of detachable magazine in firearms statute outlining criteria for semi-automatic rifle to qualify as assault weapon, which requires at a minimum that rifle have the ability to accept a detachable magazine, did not render the statute unconstitutionally vague, since plain reading of "detachable," without further modifiers or instruction, was absolute in its meaning. McKinney's Penal Law § 265.00(22)(a).

Cases that cite this headnote

[11] Constitutional Law
Statutes

In assessing vagueness challenges, courts have developed a two-part test: first, to ensure that no person is punished for conduct not reasonably understood to be prohibited, the court must determine whether the statute in question is sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute; second, the court must determine whether the enactment provides officials with clear standards for enforcement.

Cases that cite this headnote

[12] Statutes
Will of legislature

Statutes
Natural, obvious, or accepted meaning

Courts are constitutionally bound to give effect to the expressed will of the legislature and the plain and obvious meaning of a statute is always preferred to any curious, narrow or hidden sense that nothing but a strained interpretation of legislative intent would discern.

Cases that cite this headnote

[13] Indictment and Information

Incompetent or insufficient evidence

Dismissal of grand jury charge of criminal sale of a firearm in the first degree was not warranted, even if evidence presented to grand jury was insufficient to establish that one weapon qualified as assault weapon, since remaining evidence presented to grand jury satisfied required minimum number of unlawful transactions to constitute the charge. McKinney's Penal Law § 265.13(2).

Cases that cite this headnote

[14] Indictment and Information

Incompetent or insufficient evidence

Any inconsistencies between firearm examiner's report and grand jury testimony did not have material influence upon grand jury, which charged defendant with criminal sale of a firearm in the first and second degree, since credibility factors should be more appropriately reserved for presentation to the petit jury.

Cases that cite this headnote

[15] Indictment and Information

Grand or petit jury irregularities

People's failure to provide specific definition for detachable magazine to grand jury, which charged defendant with criminal sale of a firearm in the first and second degree, did not impair the integrity of the proceeding, even though firearms statute outlining criteria for semi-automatic rifle to qualify as assault weapon required at a minimum that rifle have the ability to accept a detachable magazine. McKinney's Penal Law § 265.00(22)(a).

Cases that cite this headnote

[16] Criminal Law

In general; discretion

Defendant failed to establish compelling and particularized need for disclosure of grand jury minutes, as required to support his request for disclosure. McKinney's CPL § 190.25(4)(a).

Cases that cite this headnote

[17] Criminal Law

In general; discretion

A party seeking disclosure of the grand jury minutes must establish a compelling and particularized need for them.

Cases that cite this headnote

[18] Criminal Law

In general; discretion

If a party successfully establishes a compelling and particularized need for disclosure of the grand jury minutes, then the court must properly balance the public interest for disclosure against the public interest favoring secrecy.

Cases that cite this headnote

[19] Searches and Seizures

Expectation of privacy

The motive force for the constitutional safeguards precluding unreasonable searches and seizures is protection against arbitrary governmental invasion of privacy. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[20] Searches and Seizures

Necessity of and preference for warrant, and exceptions in general

Subject only to a few specifically established and well-delineated exceptions, warrantless searches and seizures are per se unreasonable. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[21] **Searches and Seizures**
Warrants

The purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search; placement of this checkpoint between the government and citizens implicitly acknowledges that an officer engaged in the often competitive enterprise of ferreting out crime may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty and the privacy of his home. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[22] **Searches and Seizures**
Consent, and validity thereof

Searches and Seizures
Validity of consent

When consent is the justification for a warrantless search, the People bear a heavy burden of proving, by clear and convincing evidence, the consent was voluntarily obtained and courts should indulge every reasonable presumption against waiver. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[23] **Searches and Seizures**
Voluntary nature in general

Consent to warrantless search is voluntary only when it is a true act of the will, and an unequivocal product of an essentially free and unconstrained choice. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[24] **Searches and Seizures**
Voluntary nature in general

Voluntariness is incompatible with official coercion, whether actual or implicit, overt or subtle and no one circumstance is determinative of the voluntariness of consent to warrantless search. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[25] **Searches and Seizures**
Voluntary nature in general

Whether consent to warrantless search has been voluntarily given or is only a yielding to overbearing pressure must be determined from the circumstances. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[26] **Searches and Seizures**
Voluntary nature in general

Submission to lawful authority is not the equivalent to voluntary consent to warrantless search. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[27] **Searches and Seizures**
Knowledge of rights;warnings and advice

Searches and Seizures
Custody, restraint, or detention issues

Occupant did not voluntarily consent to search of residence, requiring suppression of fruits of search; consent was given after investigator made explicit assertion regarding existence of warrant for co-occupant, occupant's response of "I don't have a choice" demonstrated compulsory effect of investigator's warrant announcement, and arrival of four armed officers and canine unit at 7 a.m. was sudden, intense, and

supported inference of coercion. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[28] Arrest

Entry with warrant

An arrest warrant, without more, may not be utilized as a basis to enter one's residence. U.S.C.A. Const.Amend. 4; McKinney's CPL § 120.80(4).

Cases that cite this headnote

[29] Searches and Seizures

Persons, Places and Things Protected

Physical entry into one's home is the chief evil against which the wording of the Fourth Amendment is directed. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[30] Searches and Seizures

Persons, Places and Things Protected

At the Fourth Amendment's very core stands the right of a person to retreat inside the home and there be free from unreasonable governmental intrusion. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[31] Searches and Seizures

Persons, Places and Things Protected

Searches and Seizures

Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant

Searches and Seizures

Voluntary nature in general

The Fourth Amendment draws a firm line at the entrance to a home; without a warrant, that threshold may not be reasonably crossed absent exigent circumstances or voluntary consent. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[32] Searches and Seizures

Waiver and Consent

Police do not have unlimited authority to seek consent to search; rather, a police officer's request to search must be justified by a founded suspicion that criminal activity is afoot.

Cases that cite this headnote

[33] Arrest

Tests for determining propriety

Even the most limited intrusion by the police of a person walking on the street must be predicated on more than a hunch, whim, caprice or idle curiosity. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[34] Searches and Seizures

Prior official misconduct; misrepresentation, trick, or deceit

Police officer's unsupported conclusory statement that subject of arrest warrant resided at residence was insufficient to support officers' request that occupant consent to search of that residence, where there was no other evidence that warrant execution team possessed even a scintilla of information, either from personal observations, fellow officers, or from some other independent source, that subject was inside the residence at time permission to enter was sought. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

Attorneys and Law Firms

****458** Eric Schneiderman, Esq., New York State Attorney General, by James Mindell, Esq., Assistant Attorney General, Syracuse, For the People.

Matthew Lembke, Esq., Cerulli Massare & Lembke, Rochester, For the Defendant.

Opinion

JOHN L. DeMARCO, J.

***173** The defendant, Joshua Perkins, is charged by way of the above-referenced indictment with two counts of criminal sale of a firearm in the first and second degree respectively (Penal Law [PL] §§ 265.13[2]; 265.12 [2]) and one count of second-degree forgery (PL § 170.10[3]), all in conjunction with events occurring at or near Jackson's Guns & Ammo on East Henrietta Road in the County of Monroe on or about and in between January 24, 2013 and July 10, 2014. He is further charged with criminal possession of a controlled substance in the seventh degree (PL § 220.03), criminal possession of a weapon in the third degree (PL § 265.02[7]), 11 counts of criminal possession of a weapon in the third degree (PL § 265.02[8]), and possession of untaxed tobacco products (Tax Law § 1814[a][I]), all stemming from a search of defendant's residence at or near Auramar Drive in the City of Rochester occurring on or about June 15, 2016.

GRAND JURY MINUTES

Defendant has requested that the Court inspect the grand jury minutes, and has also moved on various grounds to dismiss or reduce the charges in the indictment. He has further requested that the Court release the grand jury minutes for inspection.

[1] **[2]** **[3]** The law provides that a grand jury may issue an indictment only where there is legally sufficient evidence before it that provides reasonable cause to believe that a person has committed an offense (*People v. Huston,* 88 N.Y.2d 400, 407, 646 N.Y.S.2d 69, 668 N.E.2d 1362 [1996]). To dismiss or reduce an indictment based on insufficient evidence, a reviewing court must consider whether the evidence produced at the grand jury, viewed in the light most favorable to the ***174** People, would, if unexplained and uncontradicted, warrant conviction by a petit jury (*People v. Grant,* 17 N.Y.3d 613, 616, 935 N.Y.S.2d 542, 959 N.E.2d 479 [2011]). "Legally sufficient evidence" is defined by statute as "competent evidence, which, if accepted as true, would establish every element of an offense charged" (Criminal Procedure Law [CPL] § 70.10[1]). "In the context of a grand jury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt" (*People v. Bello,* 92 N.Y.2d 523, 526, 683 N.Y.S.2d 168, 705 N.E.2d 1209 [1998]). "Thus, a reviewing court must determine whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes, and whether the grand jury could rationally have drawn the guilty inference" (*Grant,* 17 N.Y.3d at 616, 935 N.Y.S.2d 542, 959 N.E.2d 479).

[4] **[5]** **[6]** **[7]** **[8]** The law also provides that a grand jury proceeding is defective when the integrity of the proceeding is impaired, and prejudice to the defendant may result. A defective grand jury proceeding warrants dismissal of an indictment. (*Huston,* 88 N.Y.2d at 409, 646 N.Y.S.2d 69, 668 N.E.2d 1362.) Although failure to furnish adequate or complete instructions is not one of the grounds listed as authorizing ****459** dismissal of the indictment (*see* CPL § 210.35[5]),[1] it may, in a given case, render the grand jury proceedings defective, thus mandating dismissal of the indictment (*People v. Valles,* 62 N.Y.2d 36, 476 N.Y.S.2d 50, 464 N.E.2d 418 [1984] [citations omitted]). It is well settled that a grand jury need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law (*People v. Darby,* 75 N.Y.2d 449, 554 N.Y.S.2d 426, 553 N.E.2d 974 [1990] [citations omitted]). As the grand jury is not charged with the ultimate responsibility of determining the guilt or innocence, it is "unsound to measure the adequacy of the legal instructions given to the Grand Jury by the same standards that are utilized in assessing a trial court's instructions to a petit jury" (*People v. Calbud, Inc.,* 49 N.Y.2d 389, 394, 426 N.Y.S.2d 238, 402 N.E.2d 1140 [1980]). Rather, it is "sufficient if the District Attorney provides the Grand Jury with enough information to enable it intelligently to decide whether a crime has been committed and to determine whether there exists legally sufficient evidence to establish the material elements of the crime" (*Calbud, Inc.,* 49 N.Y.2d at 394–395, 426 N.Y.S.2d 238, 402 N.E.2d 1140). The test for evaluating the adequacy of instructions is "whether [they] were so deficient as to impair the integrity of the Grand Jury's deliberations" (*People v. Cannon,* 210 A.D.2d 764, 620 N.Y.S.2d 539 [3d Dept.1994] [citations omitted]).

***175** To meet the statutory criteria of an assault weapon, a semi-automatic rifle (rifle) must, at a minimum, have the "ability to accept a *detachable magazine* " (PL § 265.00[22][a] [emphasis added]); however, the Legislature has not further defined this term. Defendant's paramount contention concerns the absence of a definition for "detachable magazine" as it applies to 9 of the 18 rifles

at issue in this case that he alleges have been modified by an MR2 Kit (MR2).[2] In sum, defendant asserts that without statutory clarification, the ambiguity permits an interpretation that the installation of an MR2 converts a *detachable* magazine to a *fixed* magazine, thereby disqualifying MR2–modified rifles from classification as assault weapons.[3] Accordingly, defendant seeks a decrease in the total number of rifles which currently constitute the bases of counts 6, 7 and 27, which would result in dismissal or reduction thereof.

[9] [10] [11] [12] In support of his position, defendant implores the Court to seek guidance from the Legislatures of other states that have further defined "detachable magazine" as an ammunition feeding device that cannot be removed without disassembly of the weapon (*see* Conn. Gen. Stat. Ann. § 53–202a[2][F] [4];[4] ****460** Cal. Penal Code § 30515[b]; Md. Code Crim. Law § 4–301 [f]). He further ***176** relies upon a firearms examiner's report—not presented to the grand jury—finding an MR2–modified Bushmaster rifle to have a *fixed* magazine as authoritative in establishing that such a modification transforms an assault weapon into a lawful rifle. The Court disagrees. Defendant's contentions fall outside the scope of the Court's authority to review grand jury proceedings as he requests that the Court consider evidence not presented therein (*see* CPL §§ 210.20; 210.25; 210.30; 210.35; *see also People v. Jennings,* 69 N.Y.2d 103, 115, 512 N.Y.S.2d 652, 504 N.E.2d 1079 [1986] ["the inquiry of the reviewing court is limited to the legal sufficiency of the evidence since that inquiry is *exclusively the province of the Grand Jury* "] [emphasis added]).[5]

****461 [13] *177** Here, as part of their grand jury presentation, the People called a firearms examiner who testified—after establishing his credentials—that he inspected all of the weapons at issue in this case, including the Bushmaster, and concluded that each was capable of accepting a detachable magazine (*see* PL § 265.00[22]). Significantly, there was no testimony whatsoever as to the modification of any rifle by means of an MR2.

Even if the Court were to consider the firearm examiner's report relied upon by defendant and conclude that the Bushmaster was not an assault rifle, thereby excluding it from consideration in count 6, the integrity of the indictment would not be impaired as the remaining evidence presented to the grand jury still satisfies the required minimum number of unlawful transactions to constitute the charge.[6] Additionally, defendant's tenuous extrapolation of the conclusion from the firearm examiner's report that the affixing of an MR2 converts a detachable magazine to a fixed magazine is unsupported by the document itself; the report merely indicates that the magazine is fixed but does not set forth a basis for that conclusion. Rather, it is defendant's unsupported and self-interested assertion that the Bushmaster was modified by an MR2.

[14] To the extent any inconsistencies exist between the firearm examiner's report and grand jury testimony, the Court concludes it would not have a material influence upon the grand jury, as credibility factors should be more appropriately reserved for presentation to the petit jury (*see People v. Suarez,* 122 A.D.2d 861, 505 N.Y.S.2d 728 [2d Dept.1986], *appeal denied* 68 N.Y.2d 817, 507 N.Y.S.2d 1036, 499 N.E.2d 885 [1986]; *see generally People v. Davis,* 48 A.D.3d 1255, 850 N.Y.S.2d 821 [4th Dept.2008], *lv. denied* 10 N.Y.3d 839, 859 N.Y.S.2d 398, 889 N.E.2d 85 [2008], *denying error coram nobis* 64 A.D.3d 1200, 881 N.Y.S.2d 360 [2009]).

[15] Accordingly, based upon an examination of the grand jury minutes, the Court concludes that the offenses charged in the indictment are supported by legally sufficient evidence, and the evidence provides reasonable cause to believe that defendant committed the offenses charged. Furthermore, the proceedings were not defective. Viewing the People's instructions in totality, this Court finds no deficiency that would have impaired ***178** the integrity of the grand jury's deliberations. Contrary to defendant's contention, that the People did not provide a specific definition for "detachable magazine" to the grand jury did not impair the integrity of the proceeding (*see generally Calbud, Inc.,* 49 N.Y.2d 389, 426 N.Y.S.2d 238, 402 N.E.2d 1140; *People v. Douglas,* 288 A.D.2d 859, 732 N.Y.S.2d 781 [4th Dept.2001], *lv. denied* 97 N.Y.2d 681, 738 N.Y.S.2d 296, 764 N.E.2d 400 [2001]; *People v. Scott,* 175 A.D.2d 625, 572 N.Y.S.2d 562 [4th Dept.1991], *lv. denied* 78 N.Y.2d 1130, 578 N.Y.S.2d 888, 586 N.E.2d 71 [1991]).

[16] [17] [18] Defendant also requests that the Court release a portion of the minutes of the grand jury proceeding as specified above. Grand Jury proceedings are secret (CPL § 190.25[4][a]). "[A] party seeking disclosure of the grand jury minutes must establish a compelling

and particularized need for them" (**462 *People v. Robinson,* 98 N.Y.2d 755, 756, 751 N.Y.S.2d 843, 781 N.E.2d 908 [2002]). If a party successfully establishes a compelling and particularized need for disclosure of the grand jury minutes, then the court must properly balance the public interest for disclosure against the public interest favoring secrecy (*see People v. Fetcho,* 91 N.Y.2d 765, 676 N.Y.S.2d 106, 698 N.E.2d 935 [1998]). Defendant has failed to establish a compelling and particularized need for disclosure of the grand jury minutes. Accordingly, his request to release the minutes of the grand jury proceeding is denied.

SEARCH OF AURAMAR DRIVE

As a result of defendant's motion to suppress evidence, the Court conducted a combined *Payton, Mapp* and *Franks*[7] hearing on August 4, 2017. At the conclusion of the proceeding, the parties each offered oral argument in support of their respective positions and the Court reserved decision. The following constitutes the Court's findings of fact and conclusions of law.

A. *Findings of fact*

The People called two witnesses at the hearing: State Police Investigators Jeffrey Ulatowski and Robert Kotin. First, Investigator Ulatowski testified that on June 15, 2016 at approximately 6:54 a.m., he and three other members of the violent felony warrant execution team responded to Auramar Drive in the City of Rochester in an attempt to serve a warrant *179 upon an individual named "Ben P." A copy of the warrant was received into evidence as People's exhibit 2. Significantly, the address for Ben P. indicated on the warrant differed from that of Auramar Drive and the record is wholly devoid of any factual basis which led officers to this particular location in their efforts to execute the warrant. Investigator Ulatowski indicated that each of the team members drove separate vehicles to the residence and arrived simultaneously. He further indicated that they were all equipped with firearms and wore protective vests which clearly identified them as law enforcement. Upon arrival, he approached the residence accompanied by two team members and knocked on the front door. The fourth member of their team remained in the front yard with a canine as he prepared to conduct a perimeter sweep of the residence. Shortly thereafter a woman later identified as "Judy P." opened the front door and spoke with the officers. Investigator Ulatowski informed her that he had a warrant for Ben P. and inquired if he was inside. After Judy P. responded that Ben P. was not home, Investigator Ulatowski sought her consent to enter the residence to search for him, to which she responded, "I guess I don't have a choice, do I." A search of the home ensued during which Investigator Ulatowski indicated he observed what appeared to be an assault rifle and high capacity magazines located in defendant's bedroom and in the basement respectively. Upon observing these items in plain view, he contacted a Senior Investigator to report his findings.

The People next called Investigator Kotin who testified that he responded to Auramar Drive upon the report of what appeared to be an assault rifle and high capacity magazines in plain view inside the **463 residence. Relying upon his observations once inside, Investigator Kotin applied for a search warrant (received in evidence as People's exhibit 1) which was ultimately approved and thereafter executed. The items recovered inside the residence include an assault rifle, several high capacity magazines, suboxone, and approximately 16,000 untaxed cigarettes.

Defendant called one witness, Judy P., who essentially reiterated the testimony of Investigator Ulatowski as it pertained to the events precipitating the initial police entry into Auramar Drive.

B. *Conclusions of law*

[19] [20] [21] Defendant challenges the tangible evidence recovered from his residence as a result of a search pursuant to consent *180 provided by Judy P. and a subsequently obtained warrant, the application for which was based upon the observations of certain prohibited weapons in plain view following the initial police entry. He contends, in the main, that Judy P. did not voluntarily consent to a search of their shared residence. The Court agrees. The motive force for the constitutional safeguards precluding unreasonable searches and seizures is protection against arbitrary governmental invasion of privacy (*People v. Hodge,* 44 N.Y.2d 553, 557, 406 N.Y.S.2d 736, 378 N.E.2d 99 [1978] [citations omitted]). Subject only to a few specifically established and well-delineated exceptions, warrantless searches and seizures are per se unreasonable (*Payton v. New York,* 445 U.S. 573 n. 25, 100 S.Ct. 1371, 63 L.Ed.2d 639 [1980] [citations and quotations omitted]; *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 [1973];

Katz v. United States, 389 U.S. 347, 356, 88 S.Ct. 507, 19 L.Ed.2d 576 [1967]; *Coolidge v. New Hampshire,* 403 U.S. 443, 453, 91 S.Ct. 2022, 29 L.Ed.2d 564 [1971]. "The purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search. "As [the Supreme Court] explained, placement of this checkpoint between the Government and citizens implicitly acknowledges that an officer engaged in the often competitive enterprise of ferreting out crime may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty and the privacy of his home." " (*Steagald v. U.S.,* 451 U.S. 204, 212, 101 S.Ct. 1642, 68 L.Ed.2d 38 [1981].)

[22] **[23]** **[24]** **[25]** **[26]** When consent is the justification for a warrantless search, the People bear a heavy burden of proving, by clear and convincing evidence (*People v. Zimmerman,* 101 A.D.2d 294, 475 N.Y.S.2d 127 [2d Dept.1984]), the consent was voluntarily obtained (*People v. Whitehurst,* 25 N.Y.2d 389, 306 N.Y.S.2d 673, 254 N.E.2d 905 [1969]) and courts should indulge every reasonable presumption against waiver (*People v. Guzman,* 153 A.D.2d 320, 551 N.Y.S.2d 709 [4th Dept.1990] *granting appeal* 75 N.Y.2d 926, 555 N.Y.S.2d 45, 554 N.E.2d 82 [1990] citing *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 [1938]). Consent to search is voluntary only when it is a true act of the will, and an unequivocal product of an essentially free and unconstrained choice (*People v. Kuhn,* 33 N.Y.2d 203, 351 N.Y.S.2d 649, 306 N.E.2d 777 [1973]; *People v. Gonzalez,* 39 N.Y.2d 122, 128, 383 N.Y.S.2d 215, 347 N.E.2d 575 [1976] [citations omitted]; *see People v. Kendrick,* 147 A.D.3d 1419, 47 N.Y.S.3d 550 [4th Dept.2017]; *People v. Rose,* 122 A.D.2d 484, 505 N.Y.S.2d 244 [2d Dept.1986]). "Voluntariness is incompatible with official coercion, whether actual or implicit, overt or subtle. No one circumstance is determinative of the ***181** voluntariness of consent. Whether consent has ****464** been voluntarily given or is only a yielding to overbearing pressure must be determined from the circumstances." (*Gonzalez,* 39 N.Y.2d at 128, 383 N.Y.S.2d 215, 347 N.E.2d 575.) To be certain, submission to lawful authority is not the equivalent to voluntary consent (*Bumper v. North Carolina,* 391 U.S. 543 n. 14, 88 S.Ct. 1788, 20 L.Ed.2d 797 [1968] [citations and quotations omitted]).

[27] **[28]** In considering the voluntariness of Judy P.'s waiver, the most persuasive factor, in the Court's view, is the explicit assertion by Investigator Ulatowski regarding the existence of a warrant for Ben P. made immediately prior to seeking Judy P.'s consent. By conveying this information, he impliedly suggested that the police had a lawful right to enter and search the residence and Judy P. had no right to refuse. Such a situation is "instinct with coercion" (*Bumper,* 391 U.S. at 550, 88 S.Ct. 1788). It is of no moment that the warrant for Ben P. carried with it the limited authority to enter the residence only if Investigator Ulatowski had a reason to believe that Ben P. was inside (*Payton* 445 U.S. at 603, 100 S.Ct. 1371; CPL § 120.80 [4]) as the legal distinctions between arrest and search warrants [8] are not readily apparent to a layperson. Moreover, Judy P.'s response—"I don't have a choice"—empirically demonstrates the compulsory effect of Investigator Ulatowski's warrant announcement. Those words certainly cannot be construed as demonstrative of a free an unconstrained choice, but rather as acquiescence resulting from the belief that protest to the Investigator's request would be futile.

This Court also finds that the suddenness and intensity of the police presence at Auramar Drive further contributed to Judy P.'s inability to voluntarily consent. At nearly 7:00 a.m. while Judy P. was inside of her home alone, four armed officers—including one canine unit—arrived in unison in separate vehicles all dressed in a manner suggestive of their readiness to complete a tactical operation. Though inadvertent, the circumstances reveal domineering official conduct, and compel the Court to conclude that Judy P.'s will was overborne at the time she agreed to the search of the residence. Based upon a totality of the circumstances, the atmosphere as inferred from the testimony could hardly have been less coercive, and where ***182** there is coercion, there cannot be consent (*Bumper,* 391 U.S. at 550, 88 S.Ct. 1788). Thus, the fruits obtained as a result of Judy P.'s involuntary consent to search, which include the tangible items recovered throughout defendant's residence, must be suppressed (*see Wong Sun v. U.S.,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 [1963]).

[29] **[30]** **[31]** Furthermore, the Court would be remiss were it not to express its concern on the seeming encroachments upon the constitutional protections implicated in this matter. Physical entry into one's home is the chief evil against which the wording of the Fourth Amendment is directed (*Payton,* 445 U.S. at 585, 100

S.Ct. 1371 [citations and quotations omitted]). The language therein embodies the centuries-old principle of respect for the privacy of the home (*Wilson v. Layne,* 526 U.S. 603, 610, 119 S.Ct. 1692, 143 L.Ed.2d 818 [1999]). At the Amendment's very core stands the right of a person to retreat ****465** inside and there be free from unreasonable governmental intrusion (*United States v. Allen,* 813 F.3d 76, 80 [2d Cir.2016] [citations and quotations omitted]). Indeed, the Fourth Amendment draws a firm line at the entrance to a home. Without a warrant, that threshold may not be reasonably crossed absent exigent circumstances (*Payton,* 445 U.S. at 590, 100 S.Ct. 1371; *see generally Allen,* 813 F.3d 76) or, as discussed above, voluntary consent (*Gonzalez,* 39 N.Y.2d 122, 383 N.Y.S.2d 215, 347 N.E.2d 575; *Bumper,* 391 U.S. 543, 88 S.Ct. 1788).

[32] **[33]** Yet, police do not have unlimited authority to seek consent (*People v. Hall,* 51 Misc.3d 1203[A], 2016 N.Y. Slip Op. 50364[U], *4, 2016 WL 1173425 [Monroe County Court, 2016]; *People v. Marshall,* 5 A.D.3d 42, 773 N.Y.S.2d 148 [3d Dept.2004], *lv. denied* 2 N.Y.3d 802, 781 N.Y.S.2d 302, 814 N.E.2d 474 [2004]). Rather, a police officer's request to search must be justified by a founded suspicion that criminal activity is afoot (*People v. Dunbar,* 5 N.Y.3d 834, 835, 806 N.Y.S.2d 137, 840 N.E.2d 106 [2005]).[9] A failure to apply this standard would effectively permit police to knock on any door at any time and request ***183** consent to search for any reason or no reason whatsoever (*People v. Madden,* 58 A.D.3d 1023, 1027, 871 N.Y.S.2d 766 [concurring op.] [3d Dept.2009]). Though a hyperbolic illustration, it certainly highlights the absurdity of such a result and demonstrates the incongruence with the tenets of the Fourth Amendment. Even the most limited intrusion by the police of a person walking on the street "must be predicated on more than a hunch, whim, caprice or idle curiosity" (*People v. Ocasio,* 85 N.Y.2d 982, 985, 629 N.Y.S.2d 161, 652 N.E.2d 907 [1995] [citations omitted]). To not extend the same, or greater, level of protection to governmental intrusions occurring at a home is wholly illogical. The very notion that an individual is entitled to lesser protections at their home than on the street erodes Fourth Amendment protections and furthermore, is unsupported by the litany of jurisprudence disallowing unreasonable searches. Accordingly, ****466** the Court finds that the application of *De Bour* to police investigations occurring at a residence consistent with our laws and the integrity of the Fourth Amendment (*see generally Hall,* 51 Misc.3d 1203[A]; *Marshall,* 5 A.D.3d 42, 773 N.Y.S.2d 148).

[34] The imperativeness of the need to review the initial intrusion is especially apparent in this case, as on the record before the Court, there was seemingly no nexus between the subject of the warrant and the residence wherein police sought entry. Aside from Investigator Ulatowski's unsupported conclusory statement that he believed Ben P. resided at Auramar Drive, there is no evidence to suggest that the warrant execution team possessed even a scintilla of information—either from personal observations, fellow officers, or from some other independent source—that Ben P. was inside the residence at the time permission to enter was sought. Not even the data contained within the warrant itself established a connection between Ben P. and Auramar Drive. On this record, the Court must conclude that there was insufficient information to elevate the police-initiated encounter to a common-law inquiry by requesting consent to search defendant's residence.

Assuming arguendo the voluntariness of Judy P.'s consent, inasmuch as it was obtained immediately after the improper ***184** inquiry, the Court cannot conclude that her consent was acquired by means "sufficiently distinguishable from the taint" of the illegal request (*People v. Carr,* 103 A.D.3d 1194, 1196, 962 N.Y.S.2d 520 [4th Dept.2013] citing *People v. Banks,* 85 N.Y.2d 558, 626 N.Y.S.2d 986, 650 N.E.2d 833 [1995], *cert. denied* 516 U.S. 868, 116 S.Ct. 187, 133 L.Ed.2d 124 [1995]; *see generally People v. Hollman,* 79 N.Y.2d 181, 581 N.Y.S.2d 619, 590 N.E.2d 204 [1992]).

CONCLUSION

In light of the foregoing, it is hereby ORDERED that the branch of defendant's omnibus motion seeking dismissal or reduction of the charges in the indictment is denied in its entirety; and it is further

ORDERED that defendant's motion to suppress the tangible evidence recovered from the premises of Auramar Drive is granted.

All Citations

58 Misc.3d 171, 64 N.Y.S.3d 454, 2017 N.Y. Slip Op. 27296

Footnotes

1 CPL § 210.35(5) functions as a catchall permitting dismissal of the indictment when the integrity of the grand jury proceeding is so implicated that a defendant may be prejudiced (*People v. Morales,* 183 A.D.2d 570, 583 N.Y.S.2d 845 [1st Dept.1992], *appeal denied* 80 N.Y.2d 896, 587 N.Y.S.2d 927, 600 N.E.2d 654 [1992]).

2 As the Court understands it, an MR2 Kit is an aftermarket apparatus intended to lock a magazine in place, removable only when a rifle is dissembled. All of the rifles at issue in counts 7 (six rifles) and 27 (one rifle) as well as two of the eleven rifles in count 6 are alleged to have been modified by an MR2.

3 The Court recognizes that the People's interpretation of the impact of an MR2 on the lawfulness of a semi-automatic rifle is opposite to that of defendant, and declines to make a determination as to whether the installation of an MR2 renders a rifle inside or outside the scope of the definition of assault rifle. In this Court's view, such a determination should be left to the trier of fact.

4 In *New York State Rifle and Pistol Ass'n, Inc. v. Cuomo,* 804 F.3d 242 (2d Cir.2015), *denying cert* –— U.S. ——–, 136 S.Ct. 2486, 195 L.Ed.2d 822 (2016), the Second Circuit considered two appeals challenging gun control legislation, arising out of New York and Connecticut respectively, and ultimately concluded that certain portions of both statutes were unconstitutional when analyzed in a Second Amendment context. The court further concluded that no challenged portion of either statute is unconstitutionally vague, however it did not consider specifically the validity of the term “detachable magazine” in its holding. As an aside, the Court notes that despite the Connecticut Legislature's inclusion of a definition for “detachable magazine,” the Second Circuit remained silent as to the New York Legislature's failure to do so, seemingly an implicit acknowledgment of the validity of the statute in the absence of a specific definition for “detachable magazine.”

5 Though CPL § 210.25(3) provides a vehicle for challenging the constitutionality or otherwise validity of a statute, defendant merely alludes to, but has not specifically raised, a constitutional challenge to the statute. Nevertheless, were the Court to render a decision in that vein, it is not persuaded that the statute does not pass constitutional muster.
In assessing vagueness challenges, courts have developed a two-part test: first, to ensure that no person is punished for conduct not reasonably understood to be prohibited, the Court must determine whether the statute in question is sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute; second, the Court must determine whether the enactment provides officials with clear standards for enforcement (*People v. Stuart,* 100 N.Y.2d 412, 420–421, 765 N.Y.S.2d 1, 797 N.E.2d 28 [2003] [citations and quotations omitted]).
With these principles in mind, the Court turns to defendant's attack on the words “detachable magazine.” He suggests that the ambiguity of this phrase does not place a person on notice of proscribed conduct, as detachable magazines can be modified by an MR2 to be fixed magazines, even if that modification is only temporary and reversible by means of disassembly. In essence, defendant's contention attempts to create varying degrees of detachability; however, it does not appear that such a reading was contemplated by the Legislature. Courts are constitutionally bound to give effect to the expressed will of the Legislature and the plain and obvious meaning of a statute is always preferred to any curious, narrow or hidden sense that nothing but a strained interpretation of legislative intent would discern (*Finger Lakes Racing Ass'n v. New York State Racing & Wagering Bd.,* 45 N.Y.2d 471, 410 N.Y.S.2d 268, 382 N.E.2d 1131 [1978] [citations omitted]).
A plain reading of “detachable”—without further modifiers or instruction—is absolute in its meaning. The Court is satisfied that the ordinary understanding of “detachable magazine” furnishes defendant and officials alike with adequate notice. Perhaps further clarification would assist those attempting to navigate their way through the labyrinth of gun regulation; however, the Court cannot conclude, based upon the plain meaning of the statute, that it is unconstitutionally vague.
The Court further notes that, though considered in different contexts, this statute has withstood previous constitutional challenges (*see Schultz v. State of N.Y. Exec.,* 134 A.D.3d 52, 19 N.Y.S.3d 92 [3d Dept.2015], *appeal dismissed* 26 N.Y.3d 1139, 27 N.Y.S.3d 502, 47 N.E.3d 782 [2016], *reconsideration denied* 27 N.Y.3d 1047, 33 N.Y.S.3d 871, 53 N.E.3d 750 [2016]; *New York State Rifle,* 804 F.3d 242). Finally, to the extent defendant relies upon other state Legislatures that have further defined “detachable magazine,” he declined to acknowledge those that have not (*see* Haw. Rev. Stat. Ann. § 134–1[2] [b]; Colo. Rev. Stat. Ann. § 18–1.3–406[7][b]; Minn. Stat. Ann. § 624.712 [7][xii]; Idaho Code Ann. § 18–3302[1][e][3]).

6 A total of 11 transactions, including the Bushmaster, are alleged in count 6, which requires the sale of 10 or more firearms in not more than a year (*see* PL § 265.13[2]).

7 The evidence adduced at the hearing was limited to the circumstances surrounding the consent to the search of Auramar Drive as neither counsel explored the veracity of the search warrant affiant during their examinations. Accordingly, defendant failed to establish by a preponderance of the evidence the falsehood of the statements contained within the search warrant application (*see Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); *People v. Baris,*

116 A.D.2d 174, 500 N.Y.S.2d 572 [4th Dept.1986], *appeal denied* 67 N.Y.2d 1050, 504 N.Y.S.2d 1025, 495 N.E.2d 358 [1986]).

8 The interests protected by an arrest warrant and a search warrant differ in that the former serves to protect an individual from an unreasonable seizure while the latter protects an individual's reasonable expectation of privacy in a particular place or thing. Accordingly, an arrest warrant, without more, may not be utilized as a basis to enter one's residence (*Payton* 445 U.S. at 603, 100 S.Ct. 1371; CPL § 120.80 [4]).

9 In *People v. De Bour,* 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 [1976], the Court of Appeals articulated a cohesive four-tiered framework for evaluating police-initiated street encounters, explaining its purpose was to "provide clear guidance for police officers seeking to act lawfully in what may be fast-moving *street encounters* " (*People v. Moore,* 6 N.Y.3d 496, 499, 814 N.Y.S.2d 567, 847 N.E.2d 1141 [2006] [emphasis added]). Subsequently, the *De Bour* framework has been extended to intrusions occurring in various other contexts (*People v. Garcia,* 20 N.Y.3d 317, 959 N.Y.S.2d 464, 983 N.E.2d 259 [2012] [application of *De Bour* analysis during a traffic stop investigation]; *People v. McIntosh,* 96 N.Y.2d 521, 730 N.Y.S.2d 265, 755 N.E.2d 329 [2001] [search of passengers on a commercial bus]; *People v. May,* 81 N.Y.2d 725, 593 N.Y.S.2d 760, 609 N.E.2d 113 [1992] [approach of passengers in stationary vehicle]; *Marshall,* 5 A.D.3d 42, 773 N.Y.S.2d 148 [search of college dorm room]; *Hall,* 51 Misc.3d 1203[A] [search of residence]); *but see Madden,* 58 A.D.3d 1023, 871 N.Y.S.2d 766 [finding the *De Bour* framework inapplicable to a police investigation occurring at a hotel]; *People v. Ortiz,* 141 A.D.3d 872, 35 N.Y.S.3d 536 [3d Dept.2016] [investigation inside defendant's home]).

To the extent that *Madden* and *Ortiz* decline to apply a *De Bour* framework, the Court, respectfully, is unpersuaded by the reasoning employed therein, finding it contradictory to that of *De Bour* and its progeny. Yet, these holdings which seemingly imply a departure from well-established principles should not be interpreted as vitiating former precedent (*see New Amsterdam Casualty Co. v. National Union Fire Ins. Co. of Pittsburgh, PA.,* 266 N.Y. 254, 261, 194 N.E. 745 [1935] [an opinion intended to overrule former precedents, establishing a new principle, should be expressed in plain and explicit terms]), but rather as limited in application to the unique factual circumstances presented in those respective cases.