

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK,

-VS-

CATHERINE E. BONNER,

Ind. #: 2017/1097

Defendant.

APPEARANCES:

For the People:
Michael Bezer, Esq.
Assistant District Attorney
SANDRA DOORLEY, ESQ.
Monroe County District Attorney
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For the Defendant:
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DECISION AND ORDER

Schiano, Jr., J.

Defendant, Catherine E. Bonner, is charged by the above-referenced Indictment with Criminal Possession of a Weapon in the Second Degree, in violation of Section 265.03(1)(b) of the Penal Law of the State of New York; Menacing a Police Officer or Peace Officer, in violation of Section 120.18 of the Penal Law of the State of New York; and Menacing in the Second Degree, in violation of Section 120.14(1) of the Penal Law of the State of New York. The defendant moved the Court for an order suppressing certain tangible evidence and statements as well as for an order suppressing the arrest of the defendant. The court granted a *Mapp* and *Huntley* hearing. The combined hearing was held on March 28 and April 12 of 2018. The People presented the testimony of Officers Korey McNees, Investigator Kathleen Springer and Evidence Technician Kristin Trewar of

the Rochester Police Department ("RPD"). The defense presented the testimony of Officer Michael Johnson, also of the RPD. The Court made no findings of fact and conclusions of law at the close of the proceedings and accepted post-hearing memoranda from the parties.

The Court has considered the evidence adduced at the hearing, including the testimony of the witnesses and the exhibits in evidence. The bulk of the exhibit evidence consisted of the body worn camera footage ("BWC") of testifying witnesses Officers Korey McNees and Michael Johnson. The exhibit evidence also included the BWC of non-testifying RPD officers: Lieutenant Joseph Graham, Officer Daryl Hoggs and Officer Jason LaRuez. The BWC of Lieutenant Graham and Officers Hoggs and LaRuez were moved into evidence by defendant on the stipulated consent of the People. Finally, the Court considered the post hearing submissions of the parties. After due consideration of the evidence and law, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

On November 11, 2017, sometime after 11:00 a.m., Officer Johnson responded to 1089 Genesee Park Boulevard in the City of Rochester, New York (hereafter "1089"), concerning a domestic related call for assistance retrieving property. He was joined a few minutes later by Officer McNees. The Officers encountered a bearded male, later identified as Jason LaFountain ("LaFountain"). LaFountain essentially informed the officers that he had broken up with his girlfriend, later identified as defendant herein, Catherine E. Bonner, and now wished to retrieve his belongings from her home at 1089.

It appears that LaFountain represented to the officers that he resided with defendant at 1089 until the break-up the previous evening.

For the next 24 minutes the officers attempted to assist LaFountain to gain entry in the residence to retrieve items of his personal property that were inside. Very quickly after he arrived on the scene, Officer McNees advised LaFountain that New York law provided that because LaFountain was a resident at 1089, he was entitled to break in the residence to retrieve his belongings. Officer McNees repeated this advisement several times.

Defendant was at home but did not respond when the officers initially knocked on her door or when Officer McNees attempted to reach her by phone. Finally, at 11:41 a.m., Officer McNees spoke to defendant through a closed side-entrance door. Defendant refused to admit LaFountain and denied that LaFountain lived there, claiming that he had house in Livonia where he lived with his children. Officer McNees informed defendant that LaFountain intended to "kick the door in." Defendant stated that she did not feel safe and protested that the police were not protecting her.

At this point LaFountain evidenced that he was frustrated with the situation and intended to break a window. LaFountain walked around the corner of the house to a side window and shattered a pain of glass as Officer McNees, and LaFountain's daughter, stood by. LaFountain then removed his shoe and began to clear the remaining glass in the window. As he did so, defendant raised the barrel of a firearm briefly through the blinds and broken window. Officer McNees drew his weapon and ordered defendant to put the gun down. Defendant withdrew the gun from the window, taking blinds down as she did so, and Officer Johnson observed her leave the room.

When defendant reappeared, Officer Johnson, with his weapon pointed at defendant through the window from the outside, ordered defendant to lay prone on the floor. Officer Johnson testified that he did not see a gun when defendant reappeared. Officer McNees reported over the radio that a female had just pointed a loaded handgun at him.

By 11:48 a.m., several additional officers arrived on the scene and began the process of breaking through the door of defendant's residence. At 11:49 a.m., Officers breached the door and found defendant prone on the floor being covered by Officer Johnson, who remained at the window pointing his weapon at defendant from outside the house. Handcuffs were placed on defendant and, at 11:49 a.m., Officer McNees announced on his radio that defendant was in custody.

The following description of the search of the upstairs of defendant's home is taken from the BWC of Officer Johnson. The upstairs of the home consists of two bedrooms. One to the right of the top of the stairs and one to the left. Also to the left is a bathroom and short hallway that terminates in a large closet/small room.

At 11:51:30, RPD officers, including Officer Johnson, started up the stairs to the second floor of the residence to "clear" it (BWC of Officer Michael Johnson ["MJ BWC"]). At 11:51:55, while still on the stairs, Officer Johnson called out: "find out exactly where this gun is at" (MJ BWC). While discussing the procedure to clear the rooms, other officers are heard to state that the gun is in a bedroom under a mattress (MJ BWC, 11:52:05-11:52:13). An officer in charge directed Officer Johnson and another officer into the right hand bedroom (11:52:20). Officer Johnson entered the room and five seconds later lifted

the mattress of a bed in the room (11:52:24-11:52:29, MJBWC). Nothing was seen under the mattress. Officer Johnson then checked that the other officer, who has entered a walk in closet, was clear. He then announced that he was going to "lift this" and approached the mattress and lifted it again, but from a different side than the first time he lifted it (11:52:42). Nothing was seen and Officer Johnson is heard to say "nothing" (11:52:44). Officer Johnson then exited the room. He did not look under the bed.

Officer Johnson then assisted another officer to clear a small room or closet at the end of the hallway and announced that room was clear at 11:53:12 (MJ BWC). Officer Johnson reentered the hallway. Another officer is then heard to ask, "can we secure the weapon if we know its up here?" To which Officer Johnson replied, "we gotta find it" (MJ BWC, 11:53:16-11:53:24). Other officers are heard to say, "she said it's under a mattress" (MJ BWC 11:53:25). Officer Johnson, standing in the hallway outside the first room he had entered said, "I just checked this one" indicating the mattress in the right hand bedroom he lifted twice earlier. He continued: "so let's check this one then," indicating a bed in the left hand bedroom (11:53:25-11:53:28). Following that statement, another officer is heard to say "I don't know if they want us . . . you know what I mean?" (MJ BWC 11:53:28). As Officer Johnson approaches a small bed in the bedroom to the left at the top of the stairs, an officer is heard to state: "we'll take a look just to see if it's under there, but . . . (MJ BWC 11:53:35). A police officer then lifted a corner of the mattress and the long gun that is the subject of this Indictment is clearly visible (MJ BWC, 11:53:38).

Officer Johnson testified that he was "absolutely not" searching for the gun (Transcript, April 12, 2018, p. 74, Ins 24-25, p. 75 In. 1) and that he lifted the whole bed to

look underneath it (Transcript, April 12, 2018, p. 74, Ins. 20-21). Further, that he was looking for a possible threat (Transcript, April 12, 2018, p. 75, In. 15).

At no time did police here obtain a warrant to arrest defendant, or a warrant to enter defendant's home and conduct a search for a gun. At 12:30 p.m., defendant signed an RPD Consent to Search card, Form 1353. At 12:55 p.m., RPD Evidence Technician Kristin Trewar recovered the gun that is the subject of the present Indictment.

Conclusions of Law

Here, the People maintain exigent circumstances permitted the warrantless entry, arrest of defendant, and search for the gun while conducting a protective sweep. Further, the People argue that defendant gave her voluntary consent, by signing an RPD consent to search form, for them to search her home and recover the gun.

Defendant maintains that the People may not rely upon the exigent circumstances exception to the warrant requirement because the exigent circumstances here were created by police or such circumstances had abated prior to the police search. Accordingly, defendant argues the warrantless police entry into defendant's home and search minutes thereafter violated defendant's Fourth Amendment rights.

Defendant contends that the Police violated defendant's rights by misstating New York law to the effect that LaFountain was privileged to forcefully enter defendant's home and failing to conduct a proper investigation or perform basic due diligence in the course of encouraging and condoning LaFountain's attempt to forcefully enter defendant's premises. Finally, defendant asserts that her consent to search was involuntary and therefore not valid.

It is well established that a warrantless entry into a home is presumptively unconstitutional (*Payton v New York*, 445 US 573 [1980]; *People v Molnar*, 98 NY2d 328, 331[2002]). “However, where exigent circumstances exist, the failure of the police to procure a warrant is excusable” (*People v Dominquez*, 141 AD2d 833, 834,(2d Dept 1988)[citing *Payton v New York*, 445 US 573, 586; *People v Mealer*, 57 NY2d 214 [1980], *cert denied* 460 U.S. 1024 [1983]). Police officers may also “act without a warrant where they possess probable cause to search but urgent events make it impossible to obtain a warrant in sufficient time to preserve evidence or contraband threatened with removal or destruction. The scope and duration of any search must be limited by, and reasonably related to, the exigencies of the situation” (*People v Williams*, 146 AD3d 906 [2d Dept 2017][citing *Mincey v Arizona*, 437 US 385). It is the People’s burden to justify a warrantless search (*People v Hodge*, 44 NY2d 553).

Here, Officer McNees alleges he observed the barrel of gun pointed in the direction of himself and LaFountain by defendant from inside the residence. This established probable cause for defendant’s arrest. However, “[i]t is well settled that probable cause, by itself, does not justify a warrantless nonconsensual intrusion into a defendant’s home (*Payton v New York*, 445 US 573). Nevertheless, as noted above, where exigent circumstances exist, the failure of the police to procure a warrant is excusable” (*People v Dominquez*, 141 AD2d 833, 834 [2d Dept1988]).

In determining whether exigent circumstances exist so as to justify such an entry the following factors must be considered: (1) the gravity of the offense; (2) whether there is reason to believe that the suspect is armed; (3) whether there is reasonably trustworthy information to believe that the suspect committed the crime involved; (4) whether there is a strong

reason to believe that the suspect is in the premises being entered; and, (5) likelihood that the suspect will escape if not swiftly apprehended

People v Dominquez, 141 AD2d at 833-834.

The first four criteria above are satisfied as the alleged menacing occurred in the presence of Officer McNees by defendant in her residence. A grave offense was committed, the officers reasonably believed defendant was armed, and they knew for certain she was inside the home. It is not likely that defendant would escape, however. Nevertheless, these circumstances were sufficient to justify the officers' warrantless entry into defendant's home. While it is true that Officer Johnson had his weapon pointed at defendant through the window, he could not secure defendant from that position or be sure that no gun was within her reach. Accordingly, the police, LaFountain and his daughter remained in danger.

Defendant argues the police created the exigency. Police may not rely upon the exigency exception to the warrant requirement where the exigency is predicated on the officers engaging in or threatening to engage in conduct that violates the Fourth Amendment (*Kentucky v King*, 563 US 453 [2011]). In this case, Officer McNees repeatedly stated that LaFountain, citing unspecified "New York State law," was authorized to force his way into defendant's home. Such an advisory is contradictory to RPD Rules and Regulations for police officers in civil matters.

According to Rochester Police Department Rules and Regulations, Officers are not to use "the powers of their office to render assistance in the pursuit of matters which are strictly private or civil in nature, except in those matters where they are required by law to

so exercise their powers or where a breach of the peace has occurred or is imminent."

Officer McNees testified that he understood this was a civil matter.

Furthermore, Officer McNees pronouncements as to New York law were, as far as this Court can determine, without actual basis in New York law. The People have been unable to point to any New York Statute, rule, regulation or case law, providing authority for Officer McNees' advisement to LaFountain.

Moreover, this advisement was offered without any investigation into whether LaFountain's claims were true. Worse, the Officers ignored information they learned in the course of the 24 minutes before LaFountain broke the window that was contrary to LaFountain's story or could have led them to exercise an appropriate level of restraint and caution in this situation.

For instance, they ignored defendant's denial that LaFountain did not live there and in fact maintained a residence in Livonia with his children. They gave no significance to LaFountain's statement he never received mail there. The Officers ignored defendant's statement that she was afraid of LaFountain and failed to investigate whether there was any information known to RPD about the domestic incident the night before. This, even after a neighbor stated to them that defendant had been injured by defendant the night before, although the neighbor did not witness it. The neighbor stated that defendant's mother told her the previous night, after returning from taking defendant to the hospital, that LaFountain had run over defendant with his car and left her in the street. The neighbor stated that she was very concerned for defendant's welfare. Officer Johnson's response was that the only reason they were there was to assist LaFountain to get his things from defendant's residence. Officer Johnson stated: "if he's a legitimate resident,

and it sounds like he is, he can actually kick the door in if he wants to, to get his things" (MJ BWC 11:32 a.m.). The neighbor did reply affirmatively to McNees question as to whether defendant lived there more than ten days. Hearing this, McNees stated that was all he needed to know.

LaFountain breaking the window was not a violation of the defendant's Fourth Amendment rights. The police here wrongly informed LaFountain that he was privileged and licensed to forcefully enter defendant's residence. Defendant's act of pointing a gun in the direction of Officer McNees and LaFountain, however, "was an independent act, not the direct result of, and therefore not tainted by," the wrongful conduct by police (*People v Smith*, ___AD3d___ [4th Dept May 4, 2018], 2018 NY App Div LEXIS 3199 *, | 2018 NY Slip Op 03277). In other words, the officer's entry into defendant's home, the prerequisite for a Fourth Amendment violation,¹ was not an exploitation by police of LaFountain's act of breaking the window, even where the police wrongfully encouraged and condoned LaFountain to do so. The police entry into defendant's home was, rather, a reaction to defendant's independent act of pointing what the officer's perceived as loaded firearm at a police officer and LaFountain.

Defendant also argues that she was justified pursuant to Section 35 of the Penal Law to defend her home against police assisted invasion by LaFountain. Justification is a defense that defendant may assert at trial for a jury to decide and is not a grounds for

¹ Not every entry into an individual's home is a violation of the Fourth Amendment, "[t]he Fourth Amendment's warrant requirement was not meant to apply to situations where police reasonably need to enter a premises for a legitimate, benevolent purpose distinct from crime-fighting [T]he Supreme Court has crafted its Fourth Amendment jurisprudence recognizing the varied public service roles of local police officials" (*People v Molnar*, 98 NY2d 328, 333 [2002]).

dismissal of the charges by the court at this stage of the proceedings, or grounds for suppression of tangible evidence (see Penal Law §35, *People v Ellis*, 233 AD2d 692, 693 [3d1996][a justification charge to the jury, if supported by a reasonable view of the evidence, is appropriate where a defendant stands accused of menacing])).

The search and seizure of the assault weapon charged in the Indictment was unlawful and must be suppressed. The long gun found by police was not in plain view and the officers here were not entitled to search for it as part of protective sweep when the exigency permitting their warrantless entry into the home had abated (*People v White*, 259 AD2d 400, 401 [1st Dept 1999][police lawfully conducted a protective sweep of defendant's room and properly seized the rifle discovered in plain view]; *People v Jenkins*, 24 NY3d 62 [2014][continued search for the alleged weapon by police unlawful after suspects handcuffed and under police supervision]). The exigency permitting police entry into defendant's home abated when police secured defendant in handcuffs, prone on the floor at 11:49 a.m. (*People v Jenkins*, 24 NY3d 62, 65 [2014]). "Once defendant had been apprehended, the urgency had dissipated and the police had time to secure a search warrant" (*People v Ciccarelli*, 161 AD2d 952 [3d Dept]).

The People contend that the exigency had not yet abated because the police had not secured the firearm. Secured meaning "making sure that an officer is with it, no other people or civilians are around it, and that weapon is not used against us" (The People's Letter Memorandum, May 11, 2018, p. 4.; citing Hearing testimony of Officer Johnson, April 12, 2018, Transcript, p. 85, Ins. 2-4). The court does not agree.

Although Police may conduct a protective sweep under these circumstances, such procedure "is a quick and limited search of premises . . . conducted to protect the safety

of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding" (*Maryland v Buie*, 494 US 325, 327 [1990]). It is apparent that in the course of clearing the upstairs portion of the house, the police were also, in an obvious fashion, searching for the alleged weapon. "When the police effect an arrest in a suspect's premises under exigent circumstances, the police may not conduct a full-blown search. They can seize evidence only within the immediate area of the defendant or evidence that is in plain view" (1 New York Search & Seizure § 4.03 [citing *People v Ciccarelli*, 161 A2d 952; *People v Alling*, 118 AD2d 960 [3d Dept 1986]]). The long gun found by police on the second floor of the residence was not in the immediate area of the defendant nor in plain view.

Although Officer Johnson testified he was looking for a "threat . . . a person underneath a mattress holding a gun" when he lifted the mattress in the right hand bed room, the words and actions of the Officers themselves, as evident on Officer Johnson's BWC, leave no doubt that the Officers were engaged in a search for the gun.

Finally, the court finds that defendant's consent was not voluntary. "Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle," and "[w]here there is coercion there cannot be consent" " (*People v Gonzalez*, 39 NY2d 122, 128 [1976][quotations omitted]). That a defendant is handcuffed at the time of consent is considered a significant factor in determining whether apparent consent was but a capitulation to authority (*id.*, at 129). Furthermore, at the time defendant was asked for her consent, she was surrounded by several uniformed officers, in addition to Investigator Springer (*id.*, 128 [an atmosphere of authority is contradictory of a capacity to exercise a free and unconstrained will, "This is especially true when the individual in custody or under

arrest is confronted by a large number of police agents”)). Finally, Investigator Springer added to the coercion by repeatedly stating that if defendant did not consent she would obtain a search warrant and “tear the house up” and to avoid that defendant should cooperate and sign the consent form. Moreover, at the time defendant signed the consent to search, the police had already conducted an unlawful search and located the long gun.

Huntley Issue

At a hearing to consider suppression of statements made by a defendant, the People bear the burden of proving beyond a reasonable doubt that the statements were voluntarily made and not the result of coercive police activity (*People v Guilford*, 21 NY3d 205, 208 [2013]).

Miranda warnings are required whenever a person is subjected to custodial interrogation; that is, when a person's freedom of movement is restrained in a manner associated with a formal arrest, and the questioning is intended to elicit incriminating evidence (See *Miranda v Arizona*, 384 US 436 [1966]; *People v Bennett*, 70 NY2d 891, 893-894 [1987]; *People v Shelton*, 111 AD3d 1334 [4th Dept 2013], *lv denied* 23 NY3d 1025 [2014]).

Defendant was not in custody as she spoke to Officer McNees through the closed door from inside her residence. Those statements will not be suppressed. Also, the police officer's questions as they entered the residence and were in the process of securing defendant do not constitute interrogation, but were merely threshold inquiries designed to clarify the nature of the situation. Thus, those statements were admissible without *Miranda* warnings.

After that, defendant was in custody and was never provided *Miranda* rights and warnings. The People have not identified any specific statements by defendant after defendant was handcuffed for which they seek admission at trial i.e., statements by defendant that were not in response to police interrogation for which the court is to analyze. Accordingly, the People have not met their burden as to any statements after defendant was taken into custody. All defendant's statements by defendant after she was placed in custody at 11:49 a.m. are suppressed.

It is hereby,

ORDERED, that the motion to suppress statements is granted for the reasons set forth herein with the exception as to certain statements noted above.

ORDERED, that the motion to suppress the 9mm caliber Hi-Point Assault Weapon is granted for the reasons set forth herein.

ORDERED, that the motion to suppress defendant's arrest is denied.

The above constitutes the Decision and Order of the Court.

Dated: 5-21-18, 2018.

Rochester, New York



HONORABLE CHARLES A. SCHIANO, JR.
Supreme Court Justice