

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 26

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THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND
ORDER
INDICTMENT NO.

- against -

5518/09
May 6, 2010

ALI ABDUL-AKIM and MARCUS AYALA,

DEFENDANTS.

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DWYER, J.:

Defendants are charged under Indictment 5518/09 with Criminal Possession of a Weapon in the Second Degree [PL § 265.03 (3)] and in the Fourth Degree [PL § 265.01 (1)]. Defendant Abdul-Akim is also charged with Unlawful Wearing of a Body Vest [PL § 270.20]. Both defendants seek to suppress a firearm recovered from an automobile during an inventory search and defendant Abdul-Akim seeks to suppress the vest. A Dunaway/Mapp hearing was held before me on March 5, 2010, and March 8, 2010. Concluding arguments were heard on April 14, 2010. The court reserved decision and all parties submitted memoranda of law. After having observed and evaluated the credibility of the witnesses, examined the exhibits presented, read the legal memoranda submitted and reviewed

the applicable law, the court resolves defendants' motions as follows.

THE EVIDENCE AT THE HEARING

A. The Prosecution Case

The people called one witness, Police Officer Joseph Armenio. According to Officer Armenio, on June 16, 2009, at the morning roll call at the 75th Precinct, he received information that there might be retaliation for a recent murder that had occurred in front of 330 Hinsdale Avenue. He was shown a photograph of Ali Abdul-Akim ["Akim"], the brother of the murder victim.

Officer Armenio and his partner Officer Noeldechen then conducted foot patrol on New Lots Avenue. At approximately 1:50 p.m. the officers were reassigned to a post in front of 330 Hinsdale Avenue. On the way to 330 Hinsdale, the officers walked down Sutter Avenue. Officer Armenio observed a Mercedes slowly moving eastbound on Sutter Avenue. The driver was holding a cell phone with both hands. When asked on cross-examination whether he was saying there were no hands on the wheel, Officer Armenio replied "Correct." Officer Armenio was approximately 15 feet away and on the opposite side of the street.

Officer Armenio directed the driver to pull over. The Mercedes pulled

over to the curb at the corner of Sutter and Williams Avenues. The driver was defendant Ayala. There were two other individuals in the car, one in the front passenger seat and one in the back seat. The front seat passenger was defendant Akim. The passenger in the back seat was Jeffrey Brown. Officer Armenio walked to the driver's side of the car and asked defendant Ayala to produce a license, registration and insurance.

Officer Armenio testified that defendant Ayala handed him a Virginia "permit", along with a valid Virginia registration in Mr. Ayala's name and valid insurance. Officer Armenio did not recall whether Mr. Ayala showed him a New York State learner's permit, although a New York learner's permit issued to Mr. Ayala was later vouchered at the precinct.

Officer Armenio believed that Mr. Ayala's Virginia "permit" did not authorize him to drive in New York. Officer Armenio testified that he determined at the scene that the document was not a driver's license and arrested defendant Ayala for unlicensed driving, as well as for operating a motor vehicle while unlawfully using a cell phone. He did not recall what, if any, result he obtained from a later computer check with the Virginia Department of Motor Vehicles as to Mr. Ayala's driving status.

While Officer Armenio had been speaking to Mr. Ayala, he had

observed that his partner was interacting with the front seat passenger, defendant Akim. He observed Mr. Akim exit the vehicle and approach a corner store. Officer Armenio recognized Mr. Akim as the individual whose photograph he had viewed at the roll call before his tour. Officer Armenio could tell that defendant Akim was wearing a body vest. Shortly thereafter, two other officers arrived on foot, Police Officer Demonda and Police Officer Schwartz. Officer Schwartz stopped defendant Akim, searched his person, and confirmed that Mr. Akim was wearing a bulletproof vest under his hooded sweatshirt. A pair of gloves was recovered from the pocket of the sweatshirt.

Defendant Akim was arrested for Unlawful Wearing of a Body Vest (see PL § 270.20). Jeffrey Brown was not arrested and was told that he was free to leave. During the stop, both Mr. Brown and Mr. Akim produced identification for the police. A valid New York State driver's license was vouchered for Mr. Brown. Officer Armenio brought defendant Ayala's car back to the precinct for inventory and safekeeping. There the officer conducted an inventory search with the assistance of Sergeant Downs and Police Officer Guzman in accordance with the procedure set forth in the

Patrol Guide, with which he was familiar.¹ Officer Armenio looked in the driver's side of the car and found nothing of importance. He then went around to the front passenger side and opened the glove box. Inside he discovered a loaded nine millimeter firearm and one loose nine millimeter round. He called the Evidence Collection Unit to come and remove the firearm. He subsequently resumed the search. He observed assorted personal items on the back seat of the car. Officer Armenio also opened the trunk and found three black duffle bags filled with clothing and sneakers. Everything found in the trunk and the back seat of the car during the inventory search was vouchered for safekeeping.

B. The Defense Case

In June, 2009, defendant Ayala was on active duty in the Coast Guard and was stationed in Virginia. On June 15, 2009, defendant Ayala obtained a temporary driver's license from the Department of Motor Vehicles in Virginia. He was told that his photo ID license would follow in the mail within seven business days. He was directed by the Virginia Department of Motor Vehicles to carry other photo identification with the temporary license as proof of his licensed driving status. On the same day, he purchased a 2005

¹A copy of the relevant Patrol Guide provisions was entered into evidence as People's

Mercedes X240.

Defendant Ayala left Virginia about midnight, arriving in Brooklyn about nine to ten hours later, on June 16, 2009. In the afternoon of June 16, he was on his way to visit family when he saw his friend, Ali Abdul-Akim, exiting the building at 330 Hinsdale Avenue, about two blocks away from where Mr. Ayala's son and fianc_e live. He stopped his car and Mr. Akim got in the front passenger side. Mr. Brown came out of the building about thirty seconds later and got in the back seat of the car. Mr. Ayala drove the car to Sutter Avenue between Williams Avenue and Hinsdale Avenue at the request of Mr. Akim and Mr. Brown. Mr. Brown went inside a store and Mr. Akim went across the street and into a barber shop to talk to someone about his brother.

Mr. Ayala crossed the street as well, but did not enter the barber shop. While outside the car, he saw Officer Armenio, who greeted him, saying "How are you doing?" Mr. Ayala replied "How are you doing?" On the way back to his car Mr. Ayala called his fianc_e and had a conversation lasting forty-five seconds to one minute. He ended the call before his got back into his car. Mr. Akim and Mr. Brown got back in the car just after

Exhibit 1.

defendant Ayala. Mr. Ayala started the ignition and, as he was about to pull away, Officer Armenio walked up to the driver's side of the car. Officer Armenio asked for his license, registration and insurance.

Mr. Ayala gave Officer Armenio his temporary Virginia driver's license, his military identification, his registration and his insurance. Officer Armenio told Mr. Ayala that his driver's license was not a valid license. Mr. Ayala then gave Officer Armenio his New York State learner's permit and told Officer Armenio that Mr. Brown was a licensed driver in the state of New York. He also told Officer Armenio that it was "okay" for Jeffrey Brown to drive the vehicle. Officer Armenio did not respond.

When a sergeant arrived shortly thereafter, defendant Ayala was handcuffed and placed in the back of the police car. He asked the sergeant to check the validity of his Virginia license and the sergeant replied that he had checked and could not find anything. Mr. Ayala received a photo license in the mail seven business days after being issued the temporary license on June 15, 2009.

Defendant Ayala offered a document into evidence, Defense Exhibit A. It is a Commonwealth of Virginia "Temporary Driving Permit" bearing an issue date of February 10, 2010. Defendant testified that he had lost his

photo driver's license and went to the Virginia Department of Motor Vehicles in February, 2010, for a replacement. He was issued the temporary license and told to use it as a driver's license and to carry photo ID along with it. Mr. Ayala received a photo license in the mail in seven business days. Mr. Ayala testified that the document he gave Officer Armenio on June 16, 2009, was identical to Defendant's Exhibit A, with the exception of the issue date, which was June 15, 2009.

The document letterhead on Defendant's Exhibit A reads "Virginia Department of Motor Vehicles." There is a document number on the top right, and below the number, in the center, the documents states: "COMMONWEALTH OF VIRGINIA TEMPORARY DRIVING PERMIT." The first line contains an issue date of 2/5/2010 and an expiration date of 11/29/2016. The third line reads: "LICENSE TYPE: DRIVER'S LICENSE."

On June 21, 2009, Mr. Ayala went to the 75th Precinct to pick up items that were taken from him at the arrest, as well as the items that were on the back seat of the car and in the trunk. A property clerk index sheet given to defense counsel as part of Open File Discovery indicated that items vouchered under the voucher number ending in 186 were returned to Mr. Ayala on June 21. One of the items listed on the voucher was a New York

State ID, No 931387778, Mr. Ayala's New York State learner's permit. The Virginia document was not listed on the voucher. Mr. Ayala testified that he never received the Virginia document back from the police.

Received into evidence as Defense Exhibit C was a certified document² from the Virginia Department of Motor Vehicles entitled, "Transcript of Driver History Record as of 03/06/2010", "REQUESTED FOR: AYALA, MARCUS JONATHAN." The document indicates "DRIVER LICENSE STATUS: LICENSED." The document shows that a license was issued on June 15, 2009, reading "DATE ISSUED: 06/15/09", " EXPIRES: 11/29/2016," "LICENSE TYPE: DRIVERS LICENSE," "ISSUE TYPE: ORIGINAL."

FINDINGS OF FACT

At a Mapp/Dunaway hearing, the People have the initial burden of going forward to establish facts which demonstrate that the arrest of the defendant was supported by probable cause and that the contested evidence was legally obtained. In effect, the People's proof must make out a prima facie case: the People's evidence must, if fully credited, provide a

² At the hearing the document was marked only for identification pending any issues as to admissibility that might subsequently be raised. No such issues were raised in the parties' papers, and the document accordingly is admitted in evidence.

legal basis for the police action (see People v. Wise, 46 NY2d 321, 329 [1978]; People v. Calder, 44 AD2d 683 [2d Dep't, 1974]). The burden then shifts to the defendant to persuade the court, by a preponderance of the evidence, that the seizure was in reality unlawful (see People v. Berrios, 28 NY2d 361, 367 [1971]; People v. Merola, 30 AD2d 963, 964 [2d Dep't, 1968]).

In this case the People's evidence and the defense evidence contain discrepancies on a number of points. The court considers two of them to be critical, and concludes that they should be resolved in this way:

1. There was no factual basis for an arrest of defendant Ayala for the unlicensed operation of a motor vehicle.

Defendant Ayala testified that in June, 2009, he was stationed at a Coast Guard facility in Virginia. On June 15, 2009, just after purchasing a car in that state, he procured a Virginia driver's license. The license was "temporary," in that it was to be replaced in a week by a wallet-sized license bearing his photograph. It was a valid driver's license nonetheless, and it was this document that he handed to Officer Armenio when the officer spoke with him the next day, in Brooklyn.

The court credits that testimony because it was overwhelmingly corroborated. In the first place, the court takes notice of relevant provisions in the Virginia Code Annotated. Section 46.2-344 provides for the issuance of temporary driver's permits, upon a determination that an applicant is qualified to receive a license. A temporary permit is valid until receipt of the driver's license in the mail but in no case shall be valid for more than 90 days from the date of issuance. Section 46.2-335 provides for issuance of learner's permits which are valid until the holder is issued a driver's license. Temporary driving permits are also issued to learner's permit applicants and are valid until they receive their learner's permits in the mail. A

document of either type will be labeled a “Temporary Driving Permit” but will specify whether it is a license or a learner’s permit.³

Defendant Ayala introduced into evidence a “Temporary Driving Permit” issued to him by the Commonwealth of Virginia on February 5, 2010. He testified that, with the exception of this 2010 issue date, the document is identical to the one he obtained in Virginia on June 15, 2009, and gave to Officer Armenio on June 16, 2009. Line 3 of the document plainly states “Type of License: Driver’s License.” Perhaps most critically, defendant Ayala introduced into evidence his “Transcript of Driver History Record,” obtained from the Virginia Department of Motor Vehicles. That transcript indicated that a driver’s license was issued to defendant Ayala on June 15, 2009. The transcript provides no indication that Virginia ever issued defendant Ayala a learner’s permit. There thus is every reason to believe that what Officer Armenio saw on June 16, 2009, was a driver’s license.

No other circumstance provides a reasonable basis for concluding that Officer Armenio was instead shown a “learner’s permit.” Of course,

³This is based on an examination of the Virginia Department of Motor Vehicles website. See http://www.dmv.state.va.us/webdoc/general/news/temp_permits.asp

Officer Armenio's testimony was that on June 16, 2009, defendant Ayala gave him a Virginia learner's permit. However, he conceded that, except for the issue date, the 2010 temporary driver's license placed in evidence by the defense looked like the document that he had been shown. As noted, while the word "permit" appears in the heading of the 2010 document, the third line of the document plainly identifies it by stating "Type of License: Driver's License."

In addition, the People and the defense attribute to each other the responsibility for the failure to produce the 2009 document at the hearing, and ask that the court draw a negative inference. However, the document, whether a driver's license or a learner's permit, was taken from defendant Ayala when he was arrested. The People suggest that the document was given back to Mr. Ayala after the arrest, but he denies that it was among the papers returned to him by the police. On this front, the evidence reveals that unspecified items were vouchered as "personal papers" on June 16, 2009, and returned to defendant Ayala on June 21, 2009. Officer Armenio could not state that the 2009 Virginia document was among these personal papers, and there is no other indicator that it was. The People simply offer

speculation to that end.⁴ The court concludes that neither side can fairly be charged with responsibility for the failure to produce the Virginia document displayed to Officer Armenio on June 16, 2009.

Given the conclusion that defendant Ayala displayed a valid Virginia driver's license, the court need not resolve a separate factual dispute as to whether defendant Ayala also showed Officer Armenio his valid New York learner's permit, which would itself have authorized defendant Ayala to operate the vehicle while Brown, a licensed driver, was present in it.⁵

2. There was no factual basis for an arrest of defendant Ayala for illegally using a cell phone.

⁴ The New York State learner's permit taken from defendant Ayala was specifically identified on a voucher. No reason appears why that document should have been specifically listed, if the Virginia document was included only among miscellaneous "personal papers."

⁵ Contrary to the People's argument, VTL § 501-b (1) (a) does not require that a licensed driver be in the front seat unless the learner is under 18 years old [see VTL § 501 (2) (vi), (vii)].

The court finds that the People have failed to meet their burden of going forward with proof that defendant Ayala illegally used his cell phone, and in the alternative concludes that defendant Ayala proved the contrary by a preponderance of the evidence. As to the People's showing, Officer Armenio testified that defendant Ayala was holding a cell phone in "both hands" while driving his Mercedes on June 16, 2009. Section 1225-c (2) of the Vehicle and Traffic Law prohibits a driver's use of a cell phone while his car is in motion, but only if the cell phone is near the driver's ear. There was no testimony that while the Mercedes was in motion defendant Ayala was using his cell phone as a phone, with the instrument near his ear.⁶ The fact that he was holding the phone in both hands would suggest that he was using the cell phone to "text." But a driver's use of a phone to "text" was not made illegal until the enactment of VTL § 1225-d, effective on November 1, 2009, well after the arrests in this case.⁷

The People's proof, even if fully credited, thus does not make out a VTL violation. Beyond that, defendant Ayala himself offered testimony that he did not use his cell phone while driving. His testimony was that he

⁶ Indeed, at one point the officer seemed to agree that when he saw defendant with the cell phone the Mercedes was stopped at a red light, rather than in motion.

⁷ The defense has argued in post-hearing submissions that Officer Armenio and Officer Noeldechen testified in the grand jury that defendant Ayala was indeed "texting." However, no evidence of this grand jury testimony was presented during the hearing and the court will therefore not consider this argument.

parked his Mercedes, exited it, encountered Officer Armenio while on the sidewalk, and thereafter made a call with his cell phone before re-entering his car. In the Grand Jury defendant Ayala said he concluded his call only after returning to the driver's seat of his parked car. But even that testimony does not suggest that defendant was speaking on his cell phone while his car was in motion. In short, the court concludes that defendant Ayala did not use his cell phone in violation of VTL § 1225-c.⁸

CONCLUSIONS OF LAW

To resolve the motion to suppress, the court must assess the legality of (1) the arrest of defendant Ayala; (2) the seizure and search of his

⁸ The hearing evidence made plain that defendant Ayala was arrested for unlicensed driving and for the illegal use of a cell phone. The People have nonetheless argued in their post-hearing submissions that an arrest was also justified under VTL § 1212 , Reckless Driving, and VTL § 1226, Control of Steering Mechanism. The People's belated theory is that these provisions were violated because defendant held his cell phone in both hands while his vehicle was in motion, and thus must have been driving with both hands off the steering wheel. Even overlooking that this theory is both technical and late, the court concludes, essentially for the reasons noted in text, that neither the People's evidence nor the evidence as a whole is sufficiently clear to support a conclusion that either traffic violation was committed.

automobile; and (3) the arrest of defendant Abdul-Akim that occasioned the recovery of his body vest. 1. The Arrest of Defendant Ayala

Based on the testimony of Officer Armenio, the People argue that he made a traffic stop of defendant Ayala's Mercedes that was properly based on defendant Ayala's cell phone use. A police officer may lawfully stop a car where the officer has probable cause to believe to believe the driver violated the Vehicle and Traffic Law (see Pennsylvania v. Mimms, 434 US 106 [1977]; People v. Robinson, 97 NY2d 341, 349 [2001]). The court, for the reasons noted above, concludes that defendant Ayala's cell phone use provided no justification for a stop, in that there was no evidence that defendant Ayala was using his cell phone illegally.

The People argue that an arrest was proper because Officer Armenio also had probable cause to believe that defendant Ayala was an unlicensed driver. But even if the court ignores that there was no reason to ask defendant Ayala for his license, still the People's theory fails. The unlicensed operation theory is based on the determination by Officer Armenio and his supervisor that the Virginia license shown to the police was not a valid driver's license, but was a learner's permit issued by the Virginia Department of Motor Vehicles. As already noted, however, the

court has determined that this theory is incorrect.

But that does not end the inquiry. While the People's cell phone theory is simply defeated by the evidence, the analysis must continue as to the theory that defendant Ayala was not a licensed driver. Officer Armenio's testimony is that he and his supervisor looked at defendant's valid Virginia license and mistook it for an invalid out-of-state learner's permit. Under controlling precedent, should an officer make an illegal arrest based on a mistake of law and as a result recover evidence, the evidence must be suppressed. But generally, if the reason for an illegal arrest is a mistake about the facts supporting the officer's belief that probable cause exists, the arrest is not unlawful. "The constitutional validity of a stop is not undermined simply because the officers who made the stop were mistaken about relevant facts" (United States v. Jenkins, 452 F3d 207, 212 [2006]; see Saucier v. Katz, 533 US 194, 206 [2001]); People v. Gonzalez, 88 NY2d 289, 295 [1996]; People v. Smith, 1 AD3d 965 [4th Dep't 2003]). For example, an "officer's mistaken, but reasonable belief" that an object is an unlawful weapon "will not invalidate an otherwise lawful arrest" (People v. David, 223 AD2d 551 [2d Dep't, 1996] [glove doctored to increase the power of a punch]) . And an officer's recognition that an

individual matches the description of a wanted criminal can justify intrusive police action, even if it later becomes clear that the individual in question is not the person who was wanted (Colon v. City of New York, 60 NY2d 78, 82 [1983]).

This law/fact distinction is not always satisfactory. For example, the Fourth Department ignored it while refusing to order suppression when the police made a good faith mistake about foreign law – in particular, a mistake as to whether the tinting of a car’s windows was illegal in Georgia (People v. Estrella, 48 AD3d 1283 [4th Dep’t, 2008] aff’d 10 NY3d 945 [2008]). Moreover, it will not always be easy to classify a particular mistake as one of law or fact. In People v. Jean-Pierre (47 AD3d 445 [1st Dep’t, 2008]), officers saw that the defendant’s New Jersey license plate bore a sticker with the number “03”, assumed that the car’s registration was from 2003, and concluded that the registration was out-of-date. In fact the sticker indicated that the car registration had been renewed in March. The Court concluded that the officers had made a reasonable mistake of fact, but the misunderstanding of New Jersey’s registration display regulations could as readily be viewed as an error of law. And in the David case noted above, the Court opined that the officer made a mistake of fact when he concluded that a doctored glove was an illegal weapon. But one could as

easily say that the officer made a mistake about the reach of the law.

The error in this case likewise straddles the line. Officer Armenio's mistake could be classified as one of law, and thus to require suppression: in thinking that defendant Ayala was not licensed, he did not recognize the legal significance of a Virginia "Temporary Driver's Permit" which announced itself as a "driver's license." Alternatively, the mistake could be classified as one of fact: defendant Ayala displayed a license, and Officer Armenio mistook it for a permit.

In any event, this court is of course bound by the test set out in People v. Gonzalez (88 NY2d at 295). It will therefore accept the law/fact dichotomy specified in that case and others, and will assume, in the People's favor, that in examining defendant's license Officer Armenio made a mistake of fact.

But that still does not end the inquiry. As noted, in cases like David it has been held that intrusive action may be justified by a "reasonable" mistake of fact. For example, when a police officer concludes, based on a name or a description, that an individual is "wanted," his ensuing action may be valid even though the person arrested is not in fact the wanted man (see e.g. People v. Roberts, 196 AD2d 665 [2d Dep't 1993]). What is demanded is not that agents of the government "always be correct but that

they always be reasonable” (Illinois v. Rodriguez, 497 US 177, 185-86 [1990]; see also People v. Colon, 60 NY2d 78, 82 [1983][“A party may act with probable cause even though mistaken . . . if the party acted reasonably under the circumstances in good faith.”]; People v. Gonzalez, 88 NY2d at 294-95). Courts must examine police conduct and attendant circumstances under this reasonableness standard (People v. Cantor, 36 NY2d 106, 111 [1975]; People v. Chestnut, 51 NY2d 14, 23 [1980][“Of course, the key principle of the Fourth Amendment and the constitutional analogue of New York State is reasonableness” (Chestnut, fn 7 at 23).]; People v. Carrasquillo, 54 NY2d 248, 254 [1981]). The question, therefore, is whether the mistaken determination by Officer Armenio and his supervisor that defendant Ayala was not a licensed driver was reasonable under the circumstances.

Applying that principle, in People v. Jennings (54 NY2d 518 [1981]), the Court of Appeals held that notwithstanding the reasonableness of the arresting officer’s reliance upon a mistaken communication that there was a valid parole warrant outstanding for the driver, the arrest and subsequent seizure of items from the defendant’s person and the trunk of his car was invalid. The court noted that good faith cannot validate an arrest based upon the purported authority of a document which objectively furnished no

justification for the intrusion. In a 1990 Bronx County case, the court reached a similar result where an arrest was based upon inaccurate information in the police computer database that a car had been stolen. The court held that although the police officer acted rightfully, the apprehension and search nonetheless must fall (People v. McElhaney, 146 Misc.2d 748 [Sup. Ct, Bx Co., 1990]).

This court concludes that the mistake that led Officer Armenio to arrest defendant Ayala was simply not reasonable. First and foremost, the document proffered by defendant Ayala indicated on its face that it was a “driver’s license.” Apparently both a Virginia temporary license and a Virginia temporary learner’s permit are headed “Temporary Driving Permit.” But the “type” of authorization granted – for example, driver’s license or learner’s permit – is plainly specified. Here defendant Ayala’s document announced itself as a “license,” and the court cannot ratify as “reasonable” police conduct based on obliviousness to the plain facial contents of a license. To be mistaken about the windshield “tinting” laws of Georgia, or to misunderstand the registration stickers of New Jersey, is one thing. To ignore documentation overtly bearing the term “driver’s license” is another matter entirely.

Beyond that, defendant Ayala indisputably produced Virginia

registration and insurance papers for his vehicle, a circumstance clearly at odds with any thought that he had only a learner's permit. In addition, as indicated by the 2010 Virginia documents in evidence, the document which defendant Ayala produced on June 16, 2009, bore a number which, when checked, should have readily revealed that defendant Ayala was licensed. A check on that number was either done and the results ignored, as indicated by defendant Ayala's testimony, or not done in time to avoid an inappropriate arrest.

Finally, the People's evidence showed that the police had been alerted at roll call to the possibility that defendant Akim might seek retribution for the murder of his brother. While hardly conclusive of any other fact, this circumstance provided a motive for the police speedily to jump to the unreasonable conclusion that defendant Ayala, who was chauffeuring Mr. Akim, should be detained. The police must be alert to possible violence and must safeguard the community from criminal activity.

But crime prevention may not be effected at the expense of disregarding the constitutional requirement that citizens be free of unreasonable searches and seizures. While we will never know whether the police action in this case promoted community safety, the method utilized here - a custodial arrest of defendant Ayala based on the indefensible determination

that his Virginia license was a learner's permit - cannot be said to be reasonable.

In short, in view of the "driver's license" notation on the Virginia document, it was unreasonable for the police to conclude that defendant Ayala was not a licensed driver. All the evidence corroborated the conclusion that the document was a license, not a learner's permit. Moreover, the resources available to the police to determine the status of a driver should have enabled the police to confirm the validity of defendant Ayala's driver's license at the scene, obviating any need to transport defendant and his vehicle to the station house. The court earlier concluded that defendant Ayala was not properly arrested for the unlawful use of a cell phone. The arrest was simply illegal, and it follows that the seizure of defendant Ayala's car and the recovery of the firearm from the glove box were actions taken in violation of defendant Ayala's state and federal constitutional rights.

2. The seizure of the Mercedes based on a traffic infraction.

As noted above, the record does not permit the court to conclude that defendant Ayala could be arrested for unlawfully using a cell phone while driving. But if that conclusion is wrong, even a legal arrest for the cell phone offense would not have made the recovery of the firearm from the

glove box of defendant Ayala's Mercedes proper.

Unlawfully using a cell phone while driving is a traffic infraction (VTL § 1800 [a]). One who is guilty of this infraction is punishable by a fine of not more than one hundred dollars (VTL § 1225-c [4]). A jail term is not authorized. The Vehicle and Traffic Law and the Criminal Procedure Law provide that a warrantless arrest may be made for this offense.⁹

Unsurprisingly, however, an officer may issue an appearance ticket in lieu of making a warrantless arrest (CPL 150.20 [1]).

Thus, had Officer Armenio seen defendant Ayala unlawfully using a cell phone while driving, under New York's governing statutes he could either have issued a summons, or made an arrest. But that does not end the inquiry. As noted above, the reasonableness of police conduct is the key consideration in analyzing that conduct under the Fourth Amendment and its New York counterpart, Article I § 12 of the state constitution. And in this case an arrest of defendant Ayala for unlawful cell phone use, with the

⁹ Vehicle and Traffic Law § 155 reads: "For purposes of arrest without a warrant, pursuant to article one hundred forty of the criminal procedure law, a traffic infraction shall be deemed an offense." Criminal Procedure Law Section 140.10 (1) (a) provides: "a police officer may arrest a person for: (a) any offense when he has reasonable cause to believe that such a

ensuing seizure of his automobile and the inventory of its contents, would simply not have been reasonable.

The New York Court of Appeals has on several occasions addressed the question of custodial arrests for minor traffic infractions in the context of examining the legality of searches incident to such arrests, and has expressed a preference for the issuance of an appearance ticket in lieu of arrest. In People v. Marsh (20 NY2d 98, 100-101 [1967]), the Court held that the police are not authorized to conduct a search incident to an arrest for a traffic infraction unless the officer has reason to fear an assault or has probable cause for believing that the driver committed a crime. In the Court's view, the Legislature did not intend traffic offenders to be regarded as and treated like criminals. Thus, the Vehicle and Traffic Law expressly provides that a traffic infraction is not a crime, and our statutes authorize issuance of a summons in lieu of arrest.

In People v. Troiano (35 NY2d 476, 478 [1974]), the police placed the defendant under arrest pursuant to a warrant issued six days earlier on a misdemeanor charge of driving with a suspended license. The Court

person has committed such offense in his presence”

upheld a frisk following the arrest, noting that “[S]o long as an arrest is lawful, the consequent exposure to search is inevitable” (Troiano at 478). The Court again acknowledged, however, that there might be an area of traffic violation “arrest” where a full-blown search would not be justified because the alternative of issuing a summons was available or because the arrest was a suspect pretext (id.).

The Court of Appeals decided in People v. Howell (49 NY2d 778 [1980]) that the circumstances fell within the traffic infraction exception articulated in Troiano (see Howell at 780). The defendant was pulled over for erratic driving, and the trial court concluded that a frisk of the defendant was inevitable and proper because reckless driving was a misdemeanor. The Court of Appeals held that this conclusion was error: “An arrest in a situation such as was presented in this case was neither called for nor the preferred procedure (citation omitted)” (People v. Howell at 779; see also People v. Adams, 32 NY2d 451, 454-55 [1973]).

Lower courts have continued to look carefully at the circumstances underlying custodial arrests for traffic infractions, holding that the proper law enforcement procedure is for the officer to issue a summons rather than place the person under arrest, unless that procedure cannot be followed.

“An ever-growing body of persuasive commentary . . .” suggests “. . . that police officers do not, absent some aggravating circumstance, have an unfettered discretion to make a full custodial arrest for a traffic offense and must instead merely issue the traffic summons and allow the motorist to leave” (see Santiago v. City of New York, 2002 NY Slip Op. 40036[U], *18 [Sup. Ct, Bx Co., 2002]). The ready examples of aggravating circumstances include a driver’s lack of identification, which would make it impossible for the police to issue a citation, and his lack of a valid license, which would make it impossible for him legally to drive away (see e.g. People v. Cooper, 38 AD3d 678, 680 [2d Dep’t, 2007][driver refused to identify himself]; People v. Reynolds, 21 Misc.3d 1110(A), *4 [Sup. Ct, Bx Co., 2008][license suspended]; People v. Brito, 4 Misc.3d 1004 (A)*2 [Sup. Ct, NY Co., 2004] [defendant refused to identify herself]).

Given that backdrop, the court concludes that the police conduct here constituted an unreasonable intrusion on privacy, even on the assumption that defendant Ayala committed the cell phone infraction. There was no need to arrest defendant Ayala. Issuance of a citation was eminently practicable, for defendant Ayala had numerous items of identification - - and, of course, a valid license. Beyond that, the back seat passenger, Brown, was licensed, and could have driven the car had defendant Ayala

not been able to. Moreover, the choice to arrest defendant Ayala was accompanied by a decision to seize his automobile, and ultimately to inventory all its contents. Even though the arrest was authorized by statute, the disproportionate nature of the police response to a supposed cell phone violation is apparent. That police response was unreasonable.

A custodial arrest may not be employed as a pretext to conduct a search. True, an objectively reasonable traffic stop is not invalidated because the primary motivation of the police was to investigate some other matter (see Whren v United States, 517 US 806 [1996]; People v. Robinson, 97 NY2d 341[2001]). However, the scope, duration and intensity of a seizure, and any subsequent search, “remain subject to the strictures of article I, §12, and judicial review” (People v Troiano, 35 NY2d 476 [1974]; People v Marsh, 20 NY2d 98 [1967]). A custodial arrest and impoundment for using the cell phone was not called for under the circumstances in this case. When the Legislature enacted cell phone legislation and authorized a fine of not more than \$150 for an infraction, it could not have thought it was giving police officers the right arbitrarily to arrest drivers for such a violation, to seize their vehicles, and to conduct intrusive searches (People v. Marsh, 20 NY2d 98, 101 [1967]).

The United States Supreme Court visited the area in Atwater v. City of

Lago Vista (532 US 318 [2001]). There the petitioner drove without a seatbelt, a misdemeanor under Texas law that was punishable only by a fine. The police arrested her even though the law permitted a citation in lieu of arrest, and the petitioner later sued for what she termed a violation of her Fourth Amendment rights. The Supreme Court held that the Fourth Amendment authorizes the police to arrest for offenses punishable only by fines, and that the suit was properly dismissed.

For a number of reasons, this court does not find Atwater to be controlling or even persuasive authority. First, the Supreme Court was addressing a civil cause of action, in a case with procedural rules different from those which govern here. Second, in Atwater the Court addressed only the legality of the arrest itself, and not of an arrest coupled with an intrusive and unnecessary search; this court is not holding that a simple arrest for illegal cell phone use violates a constitutional provision. Perhaps most importantly, New York State courts are bound to exercise independent judgment in determining the scope and effect of the rights guaranteed by the New York State Constitution. Decisions of the Supreme Court limiting similar guarantees in the Constitution of the United States do not bind New York courts (see People v. Alvarez, 70 NY2d 375, 378 [1987]).

In short, the court concludes that even if Officer Armenio had probable cause to believe that defendant Ayala drove his car while unlawfully using a cell phone, that was not a valid predicate for the resultant arrest, search of the car, and recovery of the firearm.¹⁰

Defendant Ayala of course has standing to contest the seizure of and search of his car. The People have indicated that they are relying on the statutory presumption set forth in PL § 265.15 (3) to establish Mr. Akim's possession of the firearm. Where the People are relying on the statutory presumption to establish possession of contraband by all the occupants of

¹⁰ Defendants Ayala and Akim argue that the People have not shown that the search of the car was done pursuant to proper inventory procedures. Given the disposition of the motion, it is unnecessary to speak of this argument at any length. The court will note only that it disagrees with defendants' argument. The People introduced ample proof of the authorized inventory procedure. Both the manner of the search, and the procedure through which a record of the seized property was made, fully comply with the governing authority (see South Dakota v. Operman, 428 US 364 [1976]; People v. Johnson, 1 NY3d 252, 256 [2003]).

an automobile, a passenger in the car has standing to contest the legality of the search of the car (see People v. Millan, 69 NY2d 514 [1987]; People v. Wesley, 73 NY2d 351 [1989]). Defendant Akim therefore has a right to challenge the legality of the impoundment of the vehicle and the search pursuant to which the firearm was recovered (see People v. Delvas, 164 AD2d 940 [2d Dep't, 1990]). 3. The Seizure of the Body Vest from Defendant Akim

When the Mercedes was pulled over defendant Akim was sitting in the front passenger seat. While Officer Armenio was on the driver's side of the car talking to defendant Ayala, his partner Officer Noeldechen was on the passenger side talking to defendant Akim. Officer Armenio observed defendant Akim exit the car and walk towards a store. Officer Schwartz and Officer Demonda approached defendant Akim. Officer Schwartz stopped defendant Akim, searched his person, and discovered he was wearing a bulletproof vest under his hooded sweatshirt. Defendant Akim was arrested for Unlawful Wearing of a Body Vest, a Class E felony, in violation of Penal Law § 270.20:

1. A person is guilty of the unlawful wearing of a body vest when acting either alone or with one or more other persons he commits any violent felony offense defined in section 70.02 while possessing a

firearm, rifle or shotgun and in the course of and in furtherance of such crime he wears a body vest.

Subsection two of PL § 270.20 sets forth the definition and specifications for the term “body vest”.

Defendant Akim argues that wearing a body vest is not a crime unless the person wearing it commits a violent felony offense while possessing a firearm, and wears the body vest in furtherance of such crime. The court agrees; the officers who arrested defendant Akim acted illegally because they were mistaken about the law. “A mistake of fact, but not a mistake of law, may be used to justify a search and seizure” (People v. Smith, 1 AD3d 965 [4th Dep’t, 2003]; see People v. Gonzalez, 88 NY2d 289, 295 [1996]). “Where the officer's belief is based on an erroneous interpretation of law, the stop is illegal at the outset and any further actions by the police as a direct result of the stop are illegal” (Matter of Byer v. Jackson, 241 AD2d 943, 944-945 [1997]; see People v. Rose, 67 AD3d 1447 [4th Dep’t, 2009]).

CONCLUSION

Having found that the determination by the police that probable cause existed under the circumstances herein was not reasonable, the Court concludes that the arrests of the defendants and the inventory search of

defendant Ayala's Mercedes were not legal. Accordingly, the motion to suppress the firearm recovered pursuant to the inventory search is granted as to both defendants. Defendant Akim's motion to suppress the body vest is granted as well.

E N T E R:

Dwyer
Justice of the Supreme Court

MARK

DATED: May 6, 2010