

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32699
O/prt

_____AD3d_____

Submitted - October 7, 2011

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
THOMAS A. DICKERSON
PLUMMER E. LOTT, JJ.

2009-09982

DECISION & ORDER

The People, etc., respondent,
v Cristobal Perez, appellant.

(Ind. No. 206/07)

Richard L. Herzfeld, P.C., New York, N.Y., for appellant.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Sandra Courbois of counsel),
for respondent.

Appeal by the defendant from a judgment of the County Court, Suffolk County (Hinrichs, J.), rendered August 20, 2009, convicting him of criminal possession of a controlled substance in the first degree, false personation, operating a motor vehicle while using a mobile telephone under Vehicle and Traffic Law § 1225-c(2)(a), operating a motor vehicle without using a safety belt under Vehicle and Traffic Law § 1229-c(3), and failing to stay in a designated lane under Vehicle and Traffic Law § 1128(a), upon his plea of guilty, and imposing sentence. The appeal brings up for review the denial, after a hearing (Hudson, J.), of those branches of the defendant's omnibus motion which were to suppress physical evidence and his statements to law enforcement officials.

ORDERED that the judgment is reversed, on the law, the plea is vacated, that branch of the defendant's omnibus motion which was to suppress physical evidence is granted, that branch of his omnibus motion which was to suppress his statements to law enforcement officials is granted to the extent indicated herein, and the matter is remitted to the County Court, Suffolk County, for further proceedings on the indictment.

After a traffic stop, the defendant was arrested for, inter alia, driving with a suspended

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license and his car was impounded by the Suffolk County Police Department. While the vehicle was impounded in a secure location at the police station, the police conducted several warrantless searches of it. The defendant moved to suppress evidence seized during those searches on the grounds that the police lacked a warrant and that the searches did not satisfy the requirements for an inventory search. He also moved to suppress his subsequent statements to law enforcement officials as the fruits of the alleged unconstitutional searches. The defendant's motion was denied, after which he entered a plea of guilty. This appeal ensued.

As the People correctly concede on appeal, the evidence was not lawfully seized pursuant to an inventory search (*see People v Galak*, 80 NY2d 715, 718-718; *see also People v Gomez*, 13 NY3d 6).

“Where the special mobility of automobiles is no longer a factor because the vehicle itself has been seized and impounded by the police, a warrantless search of the vehicle or of a closed container in the passenger compartment made after impoundment of the vehicle has been held justified only when the contents were by their nature sufficiently discernible to be said to be openly visible or some special exigency existed” (*People v Belton*, 55 NY2d 49, 54; *see People v Quackenbush*, 88 NY2d 534, 541). Here, the police officer's initial entry of the defendant's impounded car to leaf through notebooks located in the back seat was an unjustified unconstitutional search, and the notebooks and any information gleaned therein by the officer must be suppressed. Further, the plain view doctrine does not apply, because the incriminating character of the notebooks was not immediately apparent (*see People v Carbone*, 184 AD2d 648, 650; *see also People v Mais*, 71 AD3d 1163, 1166).

After the officer searched the notebooks, the police returned with a canine, which signaled that the car contained narcotics. Regardless of whether the police were justified in conducting a canine sniff of the air immediately outside the vehicle (*see People v Devone*, 15 NY3d 106, 113), the subsequent warrantless entry of the car by two police officers, during which they pried open a compartment under the rear dashboard speaker and observed what appeared to be United States currency and wrapped bundles, was an unjustified violation of the defendant's constitutional rights. Although a canine sniff indicating the presence of narcotics may be used to establish probable cause for the issuance of a warrant (*see People v Estrella*, 48 AD3d 1283, *affd* 10 NY3d 945, *cert denied* _____ US _____, 129 S Ct 608), or to permit the immediate search of a readily mobile vehicle (*see People v Devone*, 57 AD3d 1240, 1243, *affd* 15 NY3d 106; *People v Gathogo*, 276 AD2d 925, 927; *see also Pennsylvania v Labron*, 518 US 938, 940), here, the defendant's car was impounded in a secure location and there was “ample time for the law enforcement officials to secure a warrant in order to make this significant intrusion” (*People v Spinelli*, 35 NY2d 77, 81). Accordingly, the fruits of this unconstitutional search, including the contents of the compartment, must be suppressed.

The People note that the police obtained a search warrant before removing anything from the vehicle. To the extent the People argue that suppression is not warranted because the evidence would inevitably have been discovered, the doctrine of inevitable discovery may not be used to rehabilitate “primary evidence,” such as the evidence sought to be suppressed in this case, the very evidence obtained during an unconstitutional search (*see People v Stith*, 69 NY2d 313, 318;

see also People v Lindsey, 13 AD3d 651, 652). Thus, obtaining a warrant to search a vehicle that had already been searched could not cure the violation of the defendant's constitutional rights.

Under the circumstances of this case, the defendant's subsequent statements to law enforcement officials, made after these unconstitutional searches, must be suppressed as the fruits of the poisonous tree (*see People v Pearson*, 59 AD3d 743, 744; *see also Wong Sun v United States*, 371 US 471, 485). However, any statements made by the defendant prior to the searches need not be suppressed.

RIVERA, J.P., FLORIO, DICKERSON and LOTT, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan
Clerk of the Court