| **People v Trotter** |
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| 2017 NY Slip Op 32169(U) |
| October 16, 2017 |
| City Court of Peekskill, Westchester County |
| Docket Number: 2016-1558 |
| Judge: Reginald J. Johnson |
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Docket No. 16-1558

CITY COURT: CITY OF PEEKSKILL
COUNTY OF WESTCHESTER: STATE OF NEW YORK
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PEOPLE OF THE STATE OF NEW YORK,

-against-

DECISION & ORDER
**Docket No. 2016-1558**

LADORIAN D. TROTTER,

Defendant.
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Appearances:

Anthony A. Scarpino
Westchester County District Attorney
1940 Commerce Street, #204
Yorktown Heights, New York 10598
By: Arthur Bernardon, Asst. Dist. Atty.

Jared Altman, Esq.
2125 Albany Post Road
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Atty for Defendant

HON. REGINALD J. JOHNSON

The Defendant in this matter has been charged with Driving While Intoxicated (DWI) (Vehicle and Traffic Law [VTL] §1192.3), [an unclassified Misdemeanor]; Driving While Ability Impaired by Drugs and Alcohol (DWAI) (VTL §1192.4A) [an unclassified Misdemeanor]; Aggravated Unlicensed Operation of a Motor Vehicle-3rd Degree (AUO 3rd) (VTL §511.1A) [an

unclassified Misdemeanor]; Suspended Registration (VTL §512) [an unclassified Misdemeanor]; Refusal To Take Breath Test (VTL §1194.1B) [a traffic infraction]; Improper/No Signal (VTL §1163[d]) [a traffic infraction]; Speed not Reasonable & Prudent (VTL §1180.A) [a traffic infraction]; Failed To Stop At Stop Sign (VTL §1172.A) [a traffic infraction]; Unsafe Lane Change (VTL §1128.A) [a traffic infraction]; and Consumption/Alcohol in Motor Vehicle (VTL §1227.1) [a traffic infraction] and seeks to dismiss these charges on the ground that Peekskill Police lacked probable cause to arrest her [See, Dunaway v. State of New York, 99 S. Ct. 2248 (1979)] and that therefore any evidence obtained therefrom—in particular, the results of the Standardized Field Sobriety Tests (SFSTs) and any statements attributed to her [See, People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1965)] should be suppressed as poisonous fruit [See, People v. Concepcion, 216 A.D.2d 141 (1995)]. The People oppose this request for relief.

A combined Dunaway/Mapp/Huntley hearing was conducted before me on August 16, 2017. The People produced Peekskill Police Officer Michael Lawrence as its witness. The Defendant did not testify. Based on the evidence and testimony produced at the hearing, the Court makes the following Findings of Facts and Conclusions of Law.

Findings of Fact

The People produced P.O. Michael Lawrence Shield #24 as its witness. The Court finds the testimony P.O. Lawrence to be credible. P.O. Lawrence joined the Peekskill Police Department in 2006. Prior to his employment with the Peekskill Police Department, he served two years as a Police Officer for the Towns of Chester and Lloyd respectively in Ulster County. P.O. Lawrence received academy training which consisted of detecting impaired drivers and administering and assessing SFSTs. P.O. Lawrence conducted approximately 200 DWI stops and arrests and assisted in approximately 100 DWI stops and arrests.

On November 30, 2016, P.O. Lawrence was working as a patrolman in Unit 253 during the 4:00pm to 12:00 midnight shift. As he was traveling north on North Division Street, a 2012 Red Hyundai [Hyundai] passed him going southbound on North Division Street when the license plate reader in his unit alerted him that the registration for the Hyundai was suspended. P.O. Lawrence made a U-turn and followed the Hyundai when he observed the car make a right on a red light at the intersection of North Division and Main Street, which is prohibited by posted signage at that location. The Hyundai proceeded down Main Street where P.O. Lawrence observed the Hyundai accelerate at an excessive and unsafe speed for that location because the roadway was slippery and wet and because pedestrians were present in the area. The Hyundai then made a left onto Nelson Ave where the

car failed to come to a complete stop at the stop sign located thereat, and then proceeded onto Union Ave where it drove over the double yellow lines and around a vehicle in front of it and continued onto Union Ave where P.O. Lawrence effected a vehicle traffic stop of the Hyundai on Union Ave.

P.O. Lawrence approached the Hyundai and asked the driver for her license and registration which she provided; he immediately recognized the driver from previous interactions. The Defendant stated that she knew her registration was suspended. P.O. Lawrence smelled the odor of alcohol emanating from the Defendant and her vehicle and he observed that she had glassy eyes and slurred speech, so he requested that she exit the vehicle and walk to the rear of it. After exiting the vehicle, the Defendant leaned on the vehicle to maintain her balance and then stumbled a few times as she walked to the rear of her vehicle. P.O. Lawrence then requested that the Defendant perform SFSTs—to wit, the Horizontal Gaze Nystagmus [HGN] test, the Walk-and-Turn test, and the One Leg Stand test.[1] The Defendant performed the HGN test [or the involuntary eye movement test] and her eyes indicated lack of smooth pursuit at 45° and at maximum deviation. The Defendant declined to perform the Walk-and-Turn and One Leg Stand tests because she said she was taking steroids for a heart condition.

[1] The HGN test, the Walk-and-Turn test and the One Leg Stand test are the only three SFSTs validated by government studies as highly reliable indicators of impairment by intoxication. See, "DWI Detection and Standardized Field Sobriety Testing" training manual at VIII-11 from the National Technical Information Services at 5285 Port Royal Road, Springfield, VA 22161.

P.O. Lawrence then asked the Defendant to submit to a Portable Breath Test (PBT) to check for the presence of alcohol in her mouth. The Defendant refused to blow into the PBT device. P.O. Lawrence believed that the Defendant was under the influence of alcohol and drugs because she seemed to lack situational awareness. Specifically, the Defendant was only concerned with going home and seeing her children even after P.O. Lawrence informed her that she going to be arrested and that her car was going to be impounded. P.O. Lawrence did arrest the Defendant for DWI, DWAI, among other charges, and placed her in his unit. He then conducted a roadside inventory of the Defendant's vehicle when he discovered an opened, cold pineapple alcoholic drink in the vehicle. The plates were removed from the vehicle and it was towed to the tow yard.

After the Defendant was transported to the Peekskill Police Department, P.O. Lawrence read the Defendant DWI/Miranda Warnings. He then asked that Defendant to submit to a chemical test of her blood and she initially consented to said request at 11:40 p.m. After a 20-minute observation period before administering the DataMaster Test, the Defendant then refused to submit to a chemical test of her blood on the ground that she was taking steroids. P.O. Lawrence then repeated the DWI Warnings to the Defendant again but she persisted in her refusal. He then prepared a report of refusal. She then started to complain about arm pain [due to a fracture] because she said her Percocet was

starting to wear off. In response, P.O. Lawrence called EMS who responded to the police station and transported the Defendant to Hudson Valley Hospital under the supervision of P.O. Alex DeMundo.

On cross examination, P.O. Lawrence was asked if he had prepared a case report, if had taken any statements from the Defendant and if he had prepared DWI Bill of Particulars; he answered in the affirmative. P.O. Lawrence was asked if the license plate reader in his unit indicated that the Defendant's license was suspended. He responded that it alerted him that the vehicle's registration was suspended. P.O. Lawrence was asked in what manner did the license plate reader alert him and he stated that as he passed her car the reader sounded a tone and then stated the words "suspended or revoked registration." P.O. Lawrence further stated that the license plate reader takes a snap shot of the license plate that it hits as suspended or revoked. He then was asked in what direction he was traveling when the license plate reader registered a hit on Defendant's vehicle and he said he was traveling north on North Division Street at 10 mph when the license plate reader alerted him. P.O. Lawrence said he was 3 to 4 feet from the Defendant's vehicle as she passed his unit traveling southbound on North Division Street.

P.O. Lawrence stated that when the license plate reader registers a hit, he looks back to observe the vehicle and the license plate and then he follows the vehicle to confirm a match. After he confirms a match, he effects a traffic stop.

P.O. Lawrence said that the Defendant was traveling too fast on Main Street in the vicinity of pedestrians but that he chose to effect a traffic stop of the Defendant's vehicle in or about the 100 block of Union Ave because it was safer to do so in that area. He stated that he usually uses radar but that on the date in question he observed Defendant's vehicle traveling on Main Street at approximately 30 mph in a 25 mph zone which he determined to be an unreasonable speed given the conditions of the roadway and the presence of pedestrians and cars in the area. He issued Defendant a ticket for unsafe speed.

P.O. Lawrence said that he asked the Defendant to exit her vehicle not only because he smelled the odor of alcohol emanating from her vehicle but also because she had glassy eyes and slurred speech. He stopped the Defendant in an area illuminated by street lights. He said that he could see that the Defendant's eyes were glazed over and watery. He said he doesn't recall if the Defendant was wearing a hat. P.O. Lawrence stated that he stopped Defendant's vehicle on a paved roadway and that she was wearing sneakers.

P.O. Lawrence said he used a stream LED light with one beam to conduct the HGN; he instructed the Defendant to keep her head still, to follow the stimulus with her eyes only without moving her head, to keep her feet together and her hand at her sides. The Defendant was not wearing glasses while doing the HGN. He said that he used a pen as a stimulus and that it was less than 12 inches from the

Defendant's face. He asked the Defendant if she had any injuries to her eyes or eye conditions and she said "no", and he did not observe any injuries or conditions to her eyes. He observed that the Defendant's pupils were of equal size. He also did not notice any resting Nystagmus in Defendant's eyes.

P.O. Lawrence said that his unit did not have a dashcam; he said that he administered Defendant's Miranda Warnings in the Booking Room. He did not ask the Defendant about her height or weight during processing. He said he understood that being overweight could affect the accuracy of the One Leg Stand test. The Defendant signed the DWI Warning Form but refused to sign the DWAI Drug Warning Form. P.O. Lawrence said Defendant refused to give a urine or blood sample. He said he does not recall if there is body cam video at the station house. Lastly, he said Defendant was taken to the hospital by EMS under the supervision of Alex DeMundo.

Conclusions of Law

At a suppression hearing, the Defendant generally bears the burden of proof. See, People v. Perez, 149 A.D.2d 344, 539 N.Y.S.2d 750 (1st Dept. 1989). However, the People's burden at a probable cause hearing is less onerous than their burden at trial. See, People v. Saylor, 166 A.D.2d 899, 560 N.Y.2d 560 (4th Dept. 1990).

In the seminal case of People v De Bour, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976), the Court of Appeals set forth a graduated four level test by which police/citizen encounters must be analyzed. Specifically, a level one encounter permits the police to approach a citizen to request information if the police have an objective, credible reason not necessarily indicative of criminal activity; a level 2 encounter permits the police to conduct a common law right of inquiry (a more intrusive inquiry than permitted under level one) where the police have a founded suspicion that criminal activity is afoot; a level 3 encounter permits the police to detain and even conduct a frisk for weapons where the police have a reasonable suspicion that a crime has been or will be committed; and a level 4 encounter permits the police to arrest a person where the police have probable cause to believe that the person committed a crime. See also, People v.Hollman, 79 N.Y.2d 181, 581 N.Y.S.2d 619, 590 N.E.2d 204 (1992); People v. McIntosh, 96 N.Y.2d 521, 730 N.Y.S.2d 265, 755 N.E.2d 329 (2001); People v. Moore, 6 N.Y.3d 496, 814 N.Y.S.2d 567, 847 N.E.2d 1141 (2006). In short, the greater the intrusion, the greater the corresponding justification must be (N.Y. Const. Art. I, §12)—that is, the more information the police must have to justify their conduct.

It is well settled that "the decision to stop a vehicle is reasonable where the police have probable cause to believe that a traffic infraction has occurred." See, People v . Robinson, 97 N.Y.2d 341, 354, 741 N.Y.S.2d 147, 155, 767 N.E.2d 638

(2001); People v. Guthrie, 25 N.Y.3d 130, 133, 8 N.Y.S.3d 237, 240, 30 N.E.3d 880 (2015). A vehicular traffic stop may not be based merely on a hunch. See, People v. Stock, 57 A.D.3d 1424, 871 N.Y.S.2d 545 (4th Dept. 2008). Further, the four levels of police/citizen encounter analysis under De Bour-Hollman apply to traffic stops. See, People v. Garcia, 20 N.Y.3d 317, 959 N.Y.S.2d 464, 983 N.E.2d 259 (2012). A vehicle stop by police is a DeBour level 3 seizure. See, People v. Ocasio, 85 N.Y.2d 982, 984, 629 N.Y.S.2d 161, 162, 652 N.E.2d 907 (1995).

In the case at bar, P.O. Lawrence was on patrol when the license plate reader in his unit alerted him that Defendant's vehicle registration was suspended. To operate a motor vehicle with a suspended registration is a violation of VTL §512—an unclassified misdemeanor [this charge is not disputed by the Defendant]. Since P.O. Lawrence had reasonable suspicion to believe that the Defendant was committing a crime, he was authorized to stop her vehicle. See, People v. Martinez, 80 N.Y.2d 444, 591 N.Y.S.2d 823, 606 N.E.2d 951 (1992). However, prior to stopping the Defendant's vehicle, P.O. Lawrence then personally observed the Defendant commit the following traffic infractions: making an improper turn at a red light at the intersection of Main Street and North Division Street in violation of VTL §1160-D; traveling at a speed not reasonable on Main Street in violation of VTL §1180-A; failing to stop at a stop sign on Nelson Ave in violation of VTL §1172-A; operating her vehicle with a suspended New York State driver's license

in violation of VTL §511.1A [this charge is not disputed by the Defendant]; moving from lane unsafely/crossing double yellow line on Union Ave in violation of VTL §1128.A; consuming alcohol in a motor vehicle in violation of VTL §1227.1; and refusing to take a portable breath test in violation of VTL §1194.1B. That all of the aforementioned VTL violations were personally observed by P.O. Lawrence makes compelling and indisputable the conclusion that he had a reasonable suspicion or probable cause to effect a lawful traffic stop of the Defendant's vehicle on the night in question. See, People v. Sobotker, 43 N.Y.2d 559, 563-564, 402 N.Y.S.2d 993, 996, 373 N.E.2d 1218 (1978); People v. Ingle, 36 N.Y.2d 413, 414, 369 N.Y.S.2d 67, 69, 330 N.E.2d 39 (1975).

Regarding the DWI [VTL §1192.3] charge against the Defendant, the Court finds that the People have presented sufficient credible evidence to prove that the Defendant was operating her motor vehicle while under the influence of alcohol [the Defendant does not dispute the presence of an open can of alcohol in her car at the time of the stop] on the night in question. In People v. Cruz, 48 N.Y.2d 419, 428, 423 N.Y.S.2d 625, 629, 399 N.E.2d 513 (1979), the Court of Appeals held that a driver is intoxicated "when the driver has voluntarily consumed alcohol to the extent that he is incapable of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver." The Second Department interpreted the Cruz case as requiring a "total

incapacity test" so that in order to prove a defendant was intoxicated there must be proof "that the accused's voluntary consumption of alcohol must have rendered him incapable of performing the physical or mental acts required to operate a motor vehicle as a reasonable and prudent driver." People v. Ottomanelli, 107 A.D.2d 212__, 486 N.Y.S.2d 748, 752 (2d Dept. 1985).

Based on the Cruz-Ottomanelli standard for intoxication, this Court finds that the People presented sufficient credible proof of Defendant's intoxication by presenting the following unrebutted facts: the Defendant made an illegal right turn onto Main Street; traveled at an unsafe speed on Main Street given the roadway conditions and pedestrians in the area; made a left turn onto Nelson Ave and failed to stop at the stop sign; proceeded onto Union Ave where she drove over a double yellow line and around a car in front of her before she was pulled over by P.O. Lawrence. P.O. Lawrence detected an odor of alcohol emanating from the Defendant and her vehicle, that her eyes were watery and glazed over, that her speech was slurred, and that after she exited her vehicle she leaned against the vehicle as she walked to the rear of her vehicle and she stumbled a few times. Most importantly, the Defendant failed the HGN test and refused to take the Walk-and-Turn and One Leg Stand tests because she claimed she had a heart condition and was taking steroids for her condition. Based on the aforesaid, the Court finds that P.O. Lawrence had sufficient probable cause to arrest the Defendant for DWI and

DWAI. Further, the aforementioned is credible proof that "the accused's voluntary consumption of alcohol must have rendered [her] incapable of performing the physical or mental acts required to operate a motor vehicle as a reasonable and prudent driver." Id.

Assuming *arguendo* that the Defendant's condition prevented her from performing the roadside SFSTs, the Court is not persuaded that her condition prevented her from submitting to a chemical breath test at the police station. She initially agreed to submit to the chemical test and then she refused, perhaps because she knew that the test results would not have been favorable to her. Since the Defendant persistently refused to submit to a chemical test after P.O. Lawrence administered two DWI refusal warnings to her, he did not administer the test but properly prepared a report of her refusal. See, VTL §1194(3); People v. Smith, 18 N.Y.3d 544, 549 n. 2, 942 N.Y.S.2d 426, 429 n. 2, 965 N.Y.S.2d 928 (2012) ("If the motorist declines to consent, the police may not administer the test unless authorized to do so by court order (see Vehicle and Traffic Law §1194[3]."); See also, Mackey v. Montrym, 443 U.S. 1, 5, 99 S. Ct. 2612, 2614, 61 L. Ed.2d 321 (1979)["The statute leaves an officer no discretion once a breath-analysis test has been refused: 'If the person arrested refuses to submit to such test or analysis, …the police officer before whom such refusal was made shall immediately prepare a report of such refusal'"].

Regarding the DWAI [§1192.4A] charge against the Defendant, the Court finds that there was sufficient credible proof that the Defendant was operating her motor vehicle while her ability to drive was impaired by drugs and alcohol. The Defendant's statement that she took Percocet earlier to relief the pain she was experiencing from her fractured arm was sufficient to sustain the People's burden of proof by a preponderance of the evidence on this charge. Whether the Defendant's ability to operate her motor vehicle was impaired by drugs and alcohol is ultimately a question of fact for the jury.

The People have the initial burden of going forward to establish the legality of the police conduct, while the Defendant has the burden of proving the illegality of the search and seizure. See, Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed.2d 1081, (1961); People v. Malinsky, 15 N.Y.2d 86, 255 N.Y.S.2d 850, 204 N.E.2d 188 (1965) *amended on other grounds* 15 N.Y.2d 86, 262 N.Y.S.2d 65, 209 N.E.2d 694 (1965). Having already found that the vehicular traffic stop of Defendant's vehicle on the night in question and her subsequent arrest were lawful, the Court now finds that the People have met their burden of establishing that the initial police conduct was legal (Defendant having failed to rebut this proof) and therefore any evidence obtained therefrom was lawful and need not be suppressed—to wit, the alcoholic beverage found in her vehicle, the results of the SFSTs, video, booking camera, photos, 911 calls, etc.

However, the VTL §1194.1B charge against the Defendant for refusing to take the portable breath test is dismissed, as this charge is not a legally cognizable offense. See, People v. Sorhaindo, 42 Misc.3d 140(A), 986 N.Y.S.2d 867 (App. Term, 9th & 10th Jud. Dist. 2014).

The Court finds that statements made by the Defendant roadside prior to her arrest were not the product of a custodial interrogation, but the product of a noncustodial investigatory inquiry which does not implicate Miranda v. Arizona, 384 U.S. 436 (1966); See, People v. Mason, 157 A.D.2d 859, 550 N.Y.S.2d 432 (2d Dept. 1990); People v. Brown, 104 A.D.2d 696, 480 N.Y.S.2d 578 (3d Dept. 1984 [Court held that Miranda warnings are not necessary in a DWI traffic stop].

The Court also finds that any statements made by the Defendant after she received his Miranda warnings occurred after she knowingly and intelligently waived her Miranda rights beyond a reasonable doubt. See, People v. Huntly, 15 N.Y.2d 72 (1965); People v. Rosa, 65 N.Y.2d 380 (1985); see also Criminal Procedure Law §710.20.

Any other issues or arguments raised by the parties not specifically addressed in this Decision and Order have been considered and either rejected or deemed moot in light of the Court's ruling.

Based on the forgoing, it is

Ordered, that the Defendant's application to dismiss the charges and to suppress the Defendant's statements is denied.

Ordered, that the parties are directed to appear in Court on October 16, 2017 at 9:30 am for all purposes.

This constitutes the Decision and Order of the Court.

Enter,

_____
Honorable Reginald J. Johnson
City Court Judge
Peekskill, New York

Dated: October 16, 2017