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STATE OF NEW YORK
COUNTY COURT :: BROOME COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

ERIC HARDING,

Defendant.

DECISION AND ORDER

Ind. No. 10-595

MARTIN E. SMITH, J.

The defendant is charged by indictment with the crime of Driving While Intoxicated in violation of § 1192[3] of the Vehicle and Traffic Law. He moves to dismiss the indictment pursuant to CPL § 210.20[1][e] on the grounds that prosecution is barred by double jeopardy pursuant to Article 40 of the CPL. The People oppose the defendant's motion.

The Court conducted *Huntley* and *Dunaway* hearings on June 31, 2011, where the pertinent facts related to this motion were fully explored. The defendant submitted a letter memorandum on this issue on July 18, 2011, and the People submitted their letter memorandum on July 19, 2011. The Court makes the following findings of fact:

At approximately 2:45 AM on June 30, 2010, the defendant was operating a pick-up truck in the Village of Johnson City on State Route 17 eastbound, a public highway. Another motorist, Donald Humphries, traveling near the defendant observed him strike the guardrail and continue without stopping. Mr. Humphries called 911 and continued to follow the defendant. Eventually both vehicles stopped in the Town of Kirkwood, and Deputy Julie Fleming of the Broome County Sheriff's Office responded to the location. Deputy Fleming found the defendant in the driver's seat of the pickup, which had come to rest slightly down an embankment. Deputy Fleming observed that the defendant exhibited various physical indicia consistent with intoxication, and thereafter had the defendant perform field sobriety tests. Based upon her observations, Deputy Fleming charged the defendant with a violation of Vehicle and Traffic Law § 1192[3] by a simplified traffic information made returnable in the Town of Kirkwood. In addition, the defendant was issued other simplified traffic informations returnable in the Village of Johnson City charging him with, *inter alia*, Leaving the Scene of a Property Damage Accident (Vehicle and Traffic Law § 600[1][a]) and Unsafe Lane Change (Vehicle and Traffic Law § 1128[a]).

The defendant was indicted by the Grand Jury on one count of Driving while Intoxicated and was arraigned on the indictment on December 1, 2010. On May 6, 2011, in the Village of Johnson City, the defendant pleaded guilty to Leaving the Scene of a Property Damage Accident and Unsafe Lane Change.

An analysis of double jeopardy is generally a three-part process. The first step involves a traditional federal constitutional analysis under *Blockburger v United States* (284 US 299 [1932]) and its progeny. Since a constitutional analysis is limited to separate prosecutions for the same offense, the Court need not conduct such analysis given the facts here. The second step involves the application of the broader New York statutory protections provided by CPL § 40.20[2]. Finally, even if a prosecution is not barred by constitutional or statutory double jeopardy, a court must consider whether the rule of compulsory joinder equitably bars further prosecution (*See*, CPL § 40.40).

The Court first reviews statutory double jeopardy. The defendant argues that the traffic infractions in the Village of Johnson City and the Driving while Intoxicated in the Town of Kirkwood comprise the same criminal transaction[1], an argument the People do not dispute. Where two or more acts are part of the same criminal transaction a person may not be separately prosecuted

[1]As defined by CPL § 40.10.

unless one of the enumerated exceptions under CPL § 40.20[2] applies. The Court need only consider the first two exceptions.

CPL § 40.20[2][a] permits a subsequent prosecution when: "The offenses as defined have substantially different elements and the acts establishing one offense are in the main clearly distinguishable from those establishing the other." Similarly, CPL § 40.20[2][b] permits a subsequent prosecution when: "Each of the offenses as defined contains an element which is not an element of the other, and the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil." These exceptions are closely related and are typically considered together.

Both exceptions consist of two prongs, the first prong concerns the elements of the charged offenses. A simple reading of the relevant statutory language shows that Driving while Intoxicated has "substantially different elements" compared to Leaving the Scene of a Property Damage Accident or Unsafe Lane Change, and "contains an element which is not an element" of those offenses. Therefore, the first prong of both exceptions is satisfied.

The second prong of each exception requires further discussion. The Court considers the second exception first. In *People v Lindsly*, the court concluded that the legislative purposes behind Driving while Intoxicated and Leaving the Scene of an Accident were "[q]uite plainly. . . directed at different targets" (99 AD2d 99, 101 [2d Dept 1984]). Given the absence of a contrary rule by the Court of Appeals or the Third Department, this Court is bound to follow the authority of *Lindsly* (*See, Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663 [2nd Dept 1984]). Applying *Lindsly* to the facts here, the exception in CPL § 40.20[2][b] is applicable in part and the subsequent prosecution for Driving while Intoxicated would not be prohibited by the defendant's guilty plea to Leaving the Scene of a Property Damage accident if it were the only offense to which the defendant had pleaded guilty.

However, whether Driving while Intoxicated and Unsafe Lane Change "are designed to prevent very different kinds of harm or evil" is a different question. The answer seems to be that each offense is *not* designed to prevent very different harm. Both offenses are contained in Title VII of the Vehicle and Traffic Law and regulate the operation of motor vehicles on public highways and mandate that such operation be done safely.[1] The defendant cites to *People v Montone*, a district court decision which held that Speeding (V&T Law 1180) and Driving while Impaired by Alcohol (V&T Law 1192[1]) "were *not* designed to prevent substantially different kinds of evil or harm" (82 Misc 2d 234 [Dist Ct Nassau Co 1975]). However, *Lindsly* disapproved of *Montone*'s analysis, and the majority of courts have done likewise (*See, People v Roopnarine*, 11 Misc 3d 416 [Dist Ct 2006]; *See also, People v Foster*, 133 Misc 2d 427 (Dist Ct 1986); *and see, People v Green*, 89 Misc 2d 639 [Dist Ct 1977]). These decisions suggest then that CPL § 40.20[2][b] is applicable to the Unsafe Lane Change charge just as it is to Leaving the Scene of a Property Damage Accident. However, a case not addressed by either party suggests that the cited authority has been abrogated.

In *People v Claud* (151 AD2d 594 [2nd Dept 1989]), the defendant was charged by indictment with the crime of Assault by Operating a Vessel in the Second Degree in violation of then Navigation Law § 49[4][b][2].[2] The defendant was also charged in town court with a separate

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[1]That both offenses are directed at the safe and prudent operation of motor vehicles is readily discernable from their statutory language or interpretation of such. Vehicle and Traffic Law § 1128 requires that a motor vehicle "be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement *can be made with safety*" [emphasis added]. Driving while Intoxicated has been defined as operating a motor vehicle when having "voluntarily consumed alcohol to the extent that [one] is incapable of employing the physical and mental abilities which [one] is expected to possess in order to *operate a vehicle as a reasonable and prudent driver*" [emphasis added](*People v Cruz*, 48 NY2d 419 [1979]).

[2]Prior to its repeal in 1992, the statute read: "a person is guilty of assault by operating a vessel in the second degree when with criminal negligence he causes serious physical injury to another person, and causes such serious physical injury by operation of a vessel in violation of paragraph a of this subdivision." Paragraph [a] read: "(1) No person shall operate a vessel on the waters of the state while his ability to operate such a vessel is impaired by the consumption of alcohol or the use of a drug. (2) No person shall operate a vessel on the waters of the state while he is in an intoxicated condition."

information alleging the offense of failing to operate his boat in a careful and prudent manner in violation of the town code (*Id.*). The defendant, without knowledge of the District Attorney, pleaded guilty in the town court and then moved to dismiss the indictment on double jeopardy grounds (*Id.*). County Court granted the motion to dismiss finding that the exception under CPL § 40.20[2][b] was not applicable, holding that both offenses were designed to protect human life and avoid injury (*Id.* at 595). On appeal, the Second Department reversed, holding that while the Navigation Law seeks to "reduce human suffering and carnage caused by impaired or intoxicated vessel operators on 'all waters of the state,'" the town code was much more limited and applied only to the waters of the town (*Id.*). The language used by the Second Department in discussing the purpose of the Navigation Law is nearly identical to that used by *Lindsly* in addressing the Vehicle and Traffic Law (*Lindsly*, at 101).

The Court of Appeals rejected the reasoning of the Appellate Division, holding that:

> Although [the] Navigation Law requires a finding of intoxication – a finding unnecessary under the Babylon Town Code's "careful operation" subdivision – the two statutory provisions were not designed to prevent "very different kinds of harm or evil." Notwithstanding that the Navigation Law refers to the prevention of serious physical injury and the Town Code commands the operation of a boat in a careful and prudent manner, both provisions are designed to assure the safe operation of boats so as to protect human life and avoid injury.
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> *People v Claud*, 76 NY2d 951, 953 [1990].

There is no logical basis not to extend the Court of Appeals' interpretation of the legislative intent underlying the regulation of boats to that of the regulation of motor vehicles. This Court holds that Unsafe Lane Change and Driving while Intoxicated are both designed to assure the safe operation of motor vehicles and protect human life and avoid injury. Accordingly, the People may not rely on the exception in CPL § 40.20[2][b].

The Court turns back to second prong of CPL § 40.20[2][a]: "the acts establishing one offense are in the main clearly distinguishable from those establishing the other." The People in *Claud* relied on this exception as well. The Court of Appeals held that since "the defendant's careless operation of the boat constitute[d] the same act giving rise to both offenses," CPL § 40.20[2][a] was inapplicable (*Claud*, at 953). However, in the instant case it was not the defendant's unsafe lane change that gave rise to the intoxicated operation of his motor vehicle, and it remains to be proven if intoxicated operation gave rise to an unsafe lane change. While the unsafe lane change is a distinct act which might tend to establish intoxicated operation, it is insufficient proof of guilt in and of itself. The unsafe lane change is "in the main" clearly distinguishable from the act of intoxicated driving. The same analysis is applicable to the leaving the scene charge.

The People having satisfied both prongs of CPL § 40.20[2][a], are thus entitled to rely on it and there is no bar on the subsequent prosecution of the Driving while Intoxicated charge. Having found that one of the exceptions in CPL § 40.20 applies, the Court must finally consider whether the compulsory joinder rules in CPL § 40.40 nonetheless bar further prosecution.

CPL § 40.40[1] provides:

> Where two or more offenses are joinable in a single accusatory instrument against a person by reason of being based upon the same criminal transaction, pursuant to paragraph (a) of subdivision two of section 200.20, such person may not, under circumstances prescribed in this section, be separately prosecuted for such offenses even though such separate prosecutions are not otherwise barred by any other section of this article.

Under the facts here, the People may well have joined all the aforementioned offenses in the current indictment pursuant to CPL § 200.20[2][a]. However, neither of the situations prescribed in CPL § 40.40 are applicable here. A further prosecution is only barred:

> [W]hen the People possess sufficient evidence to pursue simultaneous prosecutions but fail to do so, allowing one prosecution to conclude before a second is initiated (see, CPL 40.40 [2]), or when two or more joinable offenses are charged separately and defendant's motion to consolidate the charges is erroneously denied (see, CPL 40.40 [3])
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> *People v Lanahan*, 276 AD2d 906 [3d Dept 2000].

In this case, the accusatory instruments that resulted in the entry of a guilty plea were simplified traffic informations filed in the Village of Johnson City Court. The felony charge of Driving while Intoxicated could not be joined with those simplified traffic informations because it was charged by felony complaint filed contemporaneously in another court with appropriate geographical jurisdiction. Since the defendant never sought joinder of the offenses, and pleaded guilty in the Village of Johnson City Court knowing full well of the pending indictment, the separate prosecutions are not barred by CPL § 40.40 (*See, Lanahan* at 909; *and see, Lindsly* at 102-103).

Accordingly, the defendant's motion to dismiss for a violation of CPL § 40.10 *et. seq.* is denied.

It is so ordered.

DATED: September 13, 2011
Binghamton, NY

Martin E. Smith
MARTIN E. SMITH
Broome County Court Judge

Appearances: Kevin F. Guyette, Esq.
Attorney for Defendant

Christopher D. Grace, Esq.
Senior Assistant District Attorney