People v Vukel
2017 NY Slip Op 32994(U)
May 26, 2017
County Court, Westchester County
Docket Number: 16-1053
Judge: Larry J. Schwartz

[* 1]

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

TOME VUKEL,

Defendant.

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FILED
MAY 26 2017
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

FILED
AND
ENTERED
ON MAY 26, 2017
WESTCHESTER COUNTY CLERK

DECISION & ORDER

Indict. No. 16-1053

SCHWARTZ, J.,

The defendant has been indicted and is accused of driving while intoxicated as a felony (VTL §1192[3]), moving from lane unsafely (VTL §1128[a]), and failing to yield the right of way (VTL §1143) on or about April 16, 2016. The indictment alleges the defendant operated a motor vehicle while in an intoxicated condition. It is further alleged the defendant, while driving a vehicle upon a roadway divided into two or more clearly marked lanes for traffic, failed to drive as nearly as practicable entirely within a single lane and did move from such lane without first ascertaining such movement could be made with safety. It is also alleged that the defendant's vehicle entered and crossed a roadway from a place other than another roadway and failed to yield the right of way to all vehicles approaching on the roadway.

The defendant moved for omnibus relief and this Court (Zambelli, J.), by Decision and Order dated February 28, 2017, directed a hearing be conducted prior to trial to determine the legality of the stop of defendant's vehicle and defendant's arrest (*People v Ingle*, 36 NY2d 413, *People v May*, 81 NY2d 725), whether his statements were the product of an illegal stop or arrest, whether *Miranda* warnings were necessary and, if so, whether the defendant was so advised and made a knowing, intelligent and voluntary waiver thereof, and whether the statements were otherwise involuntarily made with the meaning of CPL §60.45. This Court further directed a hearing to be held to determine whether observations made or any property seized, should there be any, pursuant to the stop and arrest were lawfully obtained or were collected in violation of the defendant's rights. It also directed a hearing be held to determine whether defendant was given sufficient warning, in clear and unequivocal language, of the effect of a refusal to take a chemical test as provided by VTL §1194(f) and persisted in such refusal.

On May 17, 2017, a combined *Ingle, Mapp, Dunaway, Huntley,* and VTL §1194(2)(f) refusal hearing was conducted before this Court at which the People called New York State Police Troopers Darren Nesbitt and Peter Zerrle. Received into evidence was Trooper Zerrle's *Miranda*/DWI Refusal Card (People's Exhibit 8). The defense called no witnesses and offered no evidence.

I find the testimony offered by the People's witnesses to be plausible, candid, and fully credible. I make the following findings of fact:

FINDINGS OF FACT

On April 16, 2016 at or about 11:00 pm, Trooper Nesbitt was on patrol traveling eastbound on East Main Street in the Town of Cortlandt, County of Westchester, when he saw a vehicle exit the parking lot of Brodie's Pub directly in front of the trooper's marked patrol vehicle. This caused the trooper to stop short and apply his brakes. There were no other vehicles near the trooper's vehicle. He observed the Defendant's vehicle continue eastbound on East Main Street and the trooper followed the vehicle as it stopped a red light at the next intersection. When the light turned green, the Defendant's vehicle turned left at the intersection onto Lexington Avenue. Trooper Nesbitt continued to follow the vehicle travelling northbound on Lexington Avenue without activating his emergency lights. While the vehicle was traveling on Lexington Avenue, the trooper observed the vehicle travel over the double-yellow line separating both lanes of travel on Lexington Avenue numerous times.

After about a third of a mile, the trooper activated his emergency lights and pulled the vehicle over. Trooper Nesbitt exited his patrol vehicle and approached the driver-side of the stopped vehicle. He observed only one occupant, the driver, who he identified in court as the defendant. The defendant rolled his window down and the trooper observed the defendant's eyes were droopy and bloodshot and the trooper detected the odor of alcohol on the defendant's breath. The defendant produced his license and registration and the trooper walked back to his vehicle. As Trooper Nesbitt was checking the defendant's license and registration on his computer, Trooper Zerrle arrived on the scene.

Together, the troopers walked back to the defendant's vehicle. Trooper Zerrle observed the defendant's eyes were bloodshot and watery, that his speech was slurred, and the odor of alcohol on the defendant's breath. Trooper Zerrle asked the defendant where he was coming from and if he had anything to drink that evening. The defendant stated that he had come from Brodie's, that he had "only 4 beers" and that he was headed home. Trooper Zerrle then asked the defendant to step out of his vehicle so he could administer field sobriety tests. The Trooper administered a horizontal gaze nystagmus test, a walk and turn test, and a one leg stand test. Based upon the number of clues the Defendant exhibited on each test, Trooper Zerrle determined that the defendant failed each of the field sobriety tests. Trooper Zerrle concluded the Defendant was intoxicated and arrested the Defendant for driving while intoxicated.

Trooper Zerrle transported the defendant back to the State Police Barracks where at 12:10 A.M. on April 17, 2016 he advised the defendant of the DWI chemical test refusal warnings required by VTL §1194(2)(f) as printed on the card admitted as evidence (People's Exhibit 8). After the defendant indicated he understood the warnings, he refused to submit to a chemical test unless he was permitted to use the bathroom. Trooper Zerrle stated he would permit the Defendant to use the bathroom as soon as he took the test. The defendant refused to submit to a chemical test again at 12:15 a.m. after being given the warnings and added he wanted to use the bathroom. A third time at 12:21 a.m. after the trooper gave the warnings, he simply refused the test again. After the third refusal, the defendant was given *Miranda* warnings and indicated he understood them. The defendant did not answer any questions. Subsequently, after speaking to his lawyer, the defendant indicated to Trooper Zerrle that he wanted to take the chemical test but the trooper declined to administer the test. The defendant was processed and thereafter released.

Pursuant to these findings of fact, I make the following conclusions of law:

CONCLUSIONS OF LAW

STOP OF THE VEHICLE:

The stop of the defendant's vehicle was lawful and proper.

Pursuant to the standard set forth in *People v Ingle*, 36 NY2d 413 (1975) and its progeny, police officers may stop a motor vehicle on a public highway if they have a reasonable, individualized suspicion that its occupants have committed or are about to commit a violation of law, including traffic infractions (see *People v Sobotker*, 43 NY2d 559, [1978]). The reasonable suspicion must be based on specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant the intrusion (*see id.*).

Based on the evidence adduced at this hearing that Trooper Nesbitt observed the defendant-operator fail to yield the right away and travel across the double-yellow line numerous times, the Court concludes the trooper had a reasonable suspicion that traffic infractions were committed and the stop of the defendant's vehicle was lawful and proper Accordingly, the noticed statements consisting of the first statement contained in the People's notice given pursuant to CPL Section 710.30 ("710.30 Notice") alleged to have been made roadside on April 16, 2016 at approximately 11:26 p.m. (the "First Noticed Statement") and the second statement contained in the 710.30 Notice alleged to have been made at the State Police Barracks on April 17, 2016 at 12:10 a.m. (the "Second Noticed Statement") were not the result of an illegal stop.

STATEMENT MADE AT ROADSIDE:

The First Noticed Statement made by defendant at roadside was not the product of custodial interrogation and therefore *Miranda* warnings were not a necessary condition precedent to their introduction at trial. Nor was there any indication the statement was involuntarily made.

"It is well settled that the applicable standard for determining whether interrogation is or is not custodial is what 'a reasonable man, innocent of any crime would have thought had he been in the defendant's position... [R]oadside detentions have been held to be noncustodial and reasonable initial interrogation attendant thereto has been held to be merely investigatory" (*see People v Mason*, 157 AD2d 859 [2d Dep't 1990] *quoting People v Yukl*, 25 NY2d 585 [1969]).

Based upon the evidence adduced at this hearing, the Court concludes that at the time the Defendant made the First Noticed Statement he was not in custody and therefore *Miranda* warnings were not required.

PROBABLE CAUSE FOR ARREST:

The troopers had probable cause to arrest the defendant after observing him commit multiple traffic infractions while operating a motor vehicle, observing his appearance, detecting alcohol on his breath, and noticing his slurred speech, as well as the Defendant admitting to

having 4 beers at a bar and failing the three (3) field sobriety tests performed by defendant. Therefore, based on the totality of the circumstances, the arrest was lawful (*see People v Kucmierowski*, 103 AD3d 755 [2d Dep't 2013]). The Second Noticed Statement (alleged to have been made after the arrest) was not the result of an illegal arrest.

CUSTODIAL INTERROGATION/*MIRANDA* WARNINGS

Although the 710.30 Notice contained the Second Noticed Statement, no evidence was adduced at the hearing that the Defendant made that statement. In fact, after Trooper Zeerle advised the Defendant of the *Miranda* warnings, he testified the Defendant did not make any further statements. As there was no testimony at the hearing that the Defendant actually made the Second Noticed Statement, this Court cannot permit introduction of same at trial and therefore suppresses that alleged statement.

ADMISSIBILITY OF ALLEGED STATEMENTS:

Having found (1) the stop of the Defendant's vehicle was lawful and proper, (2) there was probable cause for the Defendant's arrest, and (3) that the roadside statement was not the product of a custodial interrogation requiring *Miranda* warnings, the Defendant's application to suppress the First Noticed Statement is denied. The Second Noticed Statement is suppressed for the reasons set forth above.

CHEMICAL TEST REFUSAL:

The defendant persisted in his refusal to submit to a chemical test after being given the statutorily-mandated warning.

VTL § 1194(2)(f) provides that evidence of a refusal to submit to a chemical test shall be admissible upon a showing beyond a preponderance of the evidence that the person was given sufficient warning in clear and unequivocal language of the effect of such refusal and the person persisted in the refusal (*see People v Burnet*, 24 Misc3d 292, 302). Where a DWI suspect persistently refuses to submit to a properly requested chemical test, but subsequently changes his or her mind and consents to the test, the subsequent consent does not void the prior refusal (*see Viger v Passidomo*, 65 NY2d 705, 707 [1985]).

Based on the evidence adduced at the hearing, the Court concludes that sufficient and clear warnings were given and that the Defendant knowingly, voluntarily and unequivocally persisted in his refusal to submit to a chemical test. The People will be permitted to use evidence of the defendant's refusal at trial.

PROPERTY AND OBSERVATIONS:

As there was no property seized, any application to suppress physical evidence is moot. Regarding the troopers' observations, the Court has found reasonable suspicion to justify the traffic stop and probable cause for the arrest. Therefore, the troopers' observations may be used by the People as evidence on their direct case.

***SANDOVAL* HEARING**

On May 18, 2017, a hearing pursuant to *People v Sandoval*, 34 NY2d 371 (1974) was held to determine the permissible scope of cross-examination concerning the defendant's prior criminal acts should the defendant testify in his own defense. The defendant has the burden of showing that the prejudicial effect of defendant's prior convictions outweighs the probative value (*see People v Sierra*, 167 AD2d 765 [3d Dep't 1990]).

After due consideration, the People's application to introduce evidence of two of Defendant's prior convictions and the underlying facts of one of those convictions, as well as the underlying facts of three further incidents is denied in its entirety except, if the defendant testifies, the People may elicit testimony from the Defendant that he has two prior misdemeanor convictions. However, the People may not elicit testimony or mention the specific crimes for which the Defendant was convicted, or their underlying facts. If the People believe during trial the defense has opened the door to the introduction of prior convictions and underlying facts precluded by this decision, they may seek the Court's permission to introduce them.

This Decision constitutes the Order of the Court.

Dated: White Plains, New York
May 26, 2017

HON. LARRY J. SCHWARTZ
COUNTY COURT JUDGE

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