

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

D36248
C/kmb

_____AD3d_____

Argued - October 1, 2012

PETER B. SKELOS, J.P.
THOMAS A. DICKERSON
L. PRISCILLA HALL
SHERI S. ROMAN, JJ.

2011-00642

DECISION & ORDER

The People, etc., respondent,
v Phillip Williams, appellant.

(Ind. No. 8255/09)

Lynn W. L. Fahey, New York, N.Y. (William Kastin of counsel; Emma Brown-Bernstein on the brief), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Thomas M. Ross of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Firetog, J.), rendered January 13, 2011, convicting him of operating a motor vehicle while intoxicated, upon a jury verdict, and imposing sentence. The appeal brings upon for review the denial, after a hearing (Jacobson, J.), of the defendant's motion to suppress evidence of his refusal to submit to a breathalyzer test.

ORDERED that the judgment is reversed, on the law, the defendant's motion to suppress evidence of his refusal to submit to a breathalyzer test is granted, and a new trial is ordered.

The defendant correctly contends that the hearing court erred in denying his motion to suppress evidence of his refusal to take a breathalyzer test, as the officer administering the test did not advise the defendant that his refusal could be used against him at a trial, proceeding, or hearing resulting from the arrest (*see* Vehicle and Traffic Law § 1194[2][f]; *People v Guzman*, 247 AD2d 552, 552). Moreover, while such error is subject to a harmless error analysis (*see People v Guzman*, 247 AD2d at 552), the error here was not harmless. Where a nonconstitutional error is involved, the error is harmless where the evidence of the defendant's guilt is overwhelming and there is no significant probability that the error contributed to the conviction (*see People v Crimmins*, 36 NY2d

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230, 241-242; *People v Duggins*, 1 AD3d 450, 454, *affd* 3 NY3d 522). The evidence here was not overwhelming, particularly in the absence of the evidence of the defendant's refusal to submit to a breathalyzer test. Additionally, the People repeatedly relied on the defendant's refusal to take the breathalyzer test as evidence that he was indeed intoxicated. Under these circumstances, the judgment must be reversed, the defendant's motion granted, and the matter remitted to the Supreme Court, Kings County, for a new trial.

SKELOS, J.P., DICKERSON, HALL and ROMAN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court