

People v Wider

2006 NY Slip Op 30147(U)

February 1, 2006

County Court, Suffolk County

Docket Number: 0001159/2005

Judge: James F.X. Doyle

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Andriella proceeded to follow the 2003 Chevy westbound on Merrick Road. He stated he observed the subject vehicle cross a double yellow line heading into the eastbound lane of traffic and that there were no observable obstructions, potholes or debris in the road at that juncture. As the officer continued to follow the Chevy, he observed the vehicle cross a double yellow line for a second time. According to the officer, at that point there was no debris or anything in the road to cause someone to cross over a double yellow line. The officer activated his light and sirens and proceeded to pull the driver of the vehicle over after the car had turned northbound on County Line Road. The officer approached the vehicle, which was driven by the defendant, asked him to roll down his window and to produce his driver's license, registration and insurance card. The defendant rolled down the window, however, Mr. Wider only produced his driver's license. No other occupants were in the vehicle. Officer Andriella stated he detected a strong odor of alcohol emanating from the vehicle. When the defendant handed his license to P. O. Andriella, he noticed Mr. Wider's eyes were bloodshot and that his speech appeared to be slurred. The officer stated that the defendant became upset, belligerent and angry asking the officer why he was pulled over; that the officer had no right to pull him over; that the officer had pulled him over because of a fellow named John Kanas who worked for or is the CEO of North Fork Bank; that the officer was hired by John Kanas and that's the reason he was pulled over. The defendant was asked to exit his vehicle and upon doing so, Mr. Wider appeared to be unsteady on his feet, according to the officer. Mr. Wider, who was characterized by the officer as being very angry and belligerent, then allegedly made the following statements: "Please don't do this. I have already been arrested for this once before. I'm already on probation for this." When the defendant was first taken out of his vehicle and asked to step to the sidewalk, Officer Andriella asked the defendant if he had been drinking. In response to Officer Andriella's inquiry, Mr. Wider allegedly made the following statements: "You better hide under a rock mother f'er, because there's no place to hide" and "I had a liquor named Frangelica to drink."

The officer administered a field sobriety test consisting of walk-and-turn, one leg stand, and reciting the alphabet. Officer Andriella testified the defendant failed the aforementioned tests. At 12:53 a.m., Officer Andriella arrested the defendant based on the strong odor of alcohol, the defendant's failure to satisfactorily perform the field sobriety tests, his inability to answer questions and the officer's observations pertaining to Mr. Wider's operation of the subject motor vehicle. Mr. Wider was placed in the back of the officer's vehicle and transported

to headquarters at the Amityville Police Department. During the course of the ride the defendant remained extremely angry and belligerent, according to the officer.

Upon arrival at the Amityville Police Department, the defendant refused to exit the police vehicle and had to be physically removed with the aid of an additional officer. The defendant was then placed at a desk in the processing area of the Amityville Police Department. The testimony reflected that at no time did any officers make any threats to the defendant, display a handgun, strike the defendant, throw the defendant against a wall or to the ground. Mr. Wider was asked pedigree questions which included questions about his physical condition. During the course of that pedigree questioning, Mr. Wider mentioned to the desk officer that he had Frangelica to drink. A physical condition questionnaire was filled out, which the defendant initially refused to sign, started to sign, but eventually refused to sign because an officer had written "refused to sign on the form". The defendant stated: "If you cross that out I'll sign." When the officer crossed out the hand written comment and initialed it, the defendant began to sign his first name, but then stopped and refused to sign the rest of his name (People's Exhibit "1").

The defendant was then asked if he would consent to take an alcohol screening test. Officer Andriella testified that the defendant was read the warnings and questions in their entirety from the preprinted alcoholic/drug influence report (People's Exhibit "2") to which the defendant stated that he would not take any test. Andriello then wrote "refused" on the alcoholic/drug influence report and commenced reading the defendant his *Miranda* warnings. Upon receiving his *Miranda* warnings, the defendant, at 1:16 a.m. indicated that he wanted to contact a lawyer and would not answer any questions without a lawyer being present.

Conclusions of Law

The stop of the defendant's 2003 Chevy automobile is a limited seizure which was supported by Officer Andriella's personal observation of a least one violation of the Vehicle and Traffic Law.

There was sufficient credible evidence provided by Police Officer Andriello to establish probable cause for the defendant's arrest for operating a motor vehicle while under the influence of alcohol. Andriello testified that he observed the defendant's car crossing over into the opposite lane of travel on two

occasions and executing a turn without signaling. Thereafter, the officer had detected a strong odor of alcohol emanating from the defendant's vehicle and had an ample opportunity to observe the defendant, whose eyes appeared bloodshot and whose speech was slurred. The defendant's spontaneous remarks, (the officer had no right to pull him over; the officer pulled him over because of a fellow named John Kanas who worked for or is the CEO of North Fork Bank; the officer was hired by John Kanas and that's the reason he was pulled over; please don't do this; I have already been arrested for this once before; I'm already on probation for this; you better hide under a rock mother f'er, because there's no place to hide; I had a liquor named Frangelica to drink), coupled with the officer's observations of the defendant, the defendant's failing of the field sobriety tests and the defendant's erratic driving provided the officer with reasonable cause to arrest the defendant for Driving While Intoxicated under Section 1192-3 of the Vehicle and Traffic Law.

Further, the court finds that the statements made by the defendant, *supra*, which were subsequent to the defendant's arrest and prior to his *Miranda* rights being given, were spontaneous, *res gestae* statements and self-generated by defendant (*People v. Kaye*, 25 NY2d 139, 250 NE2d 239, 303 NYS2d 41 [1969]). The court believes the statements to be genuine and not the product of inducement, provocation or improper encouragement by the police (*People v. Stoesser*, 53 NY2d 648, 438 NYS2d 990 [1981]; *People v. Parsad*, 243 AD2d 510, 662 NYS2d 385 [2d Dept., 1977]). In addition, the aforementioned statements were not in response to any police interrogative questioning or the product of an interrogation environment as they occurred immediately preceding the defendant being placed into police custody. Further, absent interrogation, post-*Miranda* decisions have consistently held that volunteered or spontaneous statements made by suspects who were plainly in custody and had not been given the *Miranda* warnings are admissible. (See, *People v. Charles*, 66 Cal. 2d 330 [Cal. Sup. Ct., 1967]; *People v. Kenny*, 53 Misc 2d 527; *Ballay v. People*, 160 Col. 309 [1966]; *Pitman v. United States*, 380 F. 2d 368, 370 [9th Cir., 1967]; *United States v. Cruz*, 265 F. Supp. 15, 20 [W. D., Texas, 1967]; *Spurlin v. State*, 218 So. 2d 876, 878 [Miss., 1969]; *Bivens v. State*, 242 Ark. 362 [1967]; *Hammond v. State*, 428 S. W. 2d 639 [Ark., 1968]).

The defendant's statement at the station house that he had Frangelica to drink was in response to a question posed to Mr. Wider by the desk officer in connection with a physical condition questionnaire (People's Exhibit "1"). The latter statement, "I won't take any test", was in response to questions

asked from a preprinted alcohol and drug influence report (People's Exhibit "2"). While the defendant asserts that the aforementioned statements were the result of custodial interrogation, here, there is no evidence to support the defendant's contentions. The record before the court clearly supports the notion that neither of these statements were the product of inducement, provocation or encouragement by the police but rather were statements given in response to questions necessary for the orderly processing of the defendant given the alleged crime and providing for the his physical needs (*People v. Hester*, 161 AD2d 665, 556 NYS2d 97 [2d Dept., May 1990]). Based upon the foregoing, the defendant's motion to suppress these statements is denied.

Defense counsel urges that the alleged refusal of the defendant to submit to a chemical test was not "persistent" and that, therefore, evidence of such refusal should be suppressed. Support for the defendant's position is provided by VTL Section 1194(2)(f), which states, in part, that for there to be a refusal as that term is defined in the chapter there must be evidence that "The person persisted in his refusal".

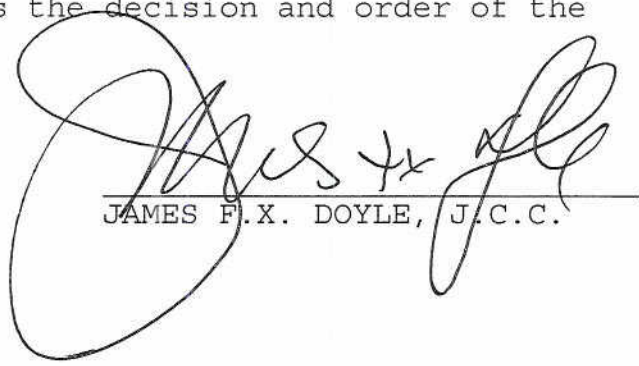
The case law indicates that what constitutes a persistent refusal varies with the facts pertinent to each case. It has been held that only one request may be sufficient where the defendant's response to a chemical test request is unequivocal and in the negative. In *Geary v. Commissioner*, 92 AD2d 38, 459 NYS2d 494 [4th Dept., 1983]), the response "no way" was held to be sufficient evidence of a persistent refusal even though only one request was made. Further, in the matter of *People v. Philip*, 9 Misc.3d 11179A, 2005 WL 2515836 (NY Dist. Ct.) 2005 NY Slip Op. 51628(U), the court held that while a defendant's refusal must be knowing, intentional, and unequivocal, the word "persist", as used in the statute, "refers to the quality and timing of the refusal, not the number of times one is asked to express it."

Here, the credible evidence before the court establishes that the defendant was given clear and unequivocal warnings of the effect of his studied refusal to take a chemical test of his breath. The defendant's refusal is clearly noted on the alcoholic/drug influence report in two places which is void of the defendant's signature (Peoples' Exhibit "2" in evidence). The court finds that the defendant's statement, "I won't take any test" (emphasis added), was clear, unequivocal, and in the negative. Under the totality of the circumstances, the defendant's statement, the defendant's declination to execute the

refusal and the defendant's taciturnity thereafter, must be considered to be the equivalent of not only a refusal, but a persistent refusal to submit to a chemical test. Based upon the foregoing, the defendant made the requisite refusal after he was properly warned of the consequences. Accordingly, the defendant's application to suppress refusal evidence is denied.

The foregoing constitutes the decision and order of the court.

E N T E R.



JAMES F.X. DOYLE, J.C.C.