

People v Kilmer

2010 NY Slip Op 30143(U)

January 25, 2010

Rome City Court

Docket Number: 47107

Judge: Daniel C. Wilson

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State of New York
County of Oneida

Rome City Court

People of the State of New York

vs.

MEMORANDUM DECISION

William R. Kilmer,
Defendant.

DOCKET NO.
47107

No appearance by District Attorney of Oneida County,
for the People

David A. Longieretta, Esq., Attorney
for the Defendant

PRESENT: Hon. Daniel C. Wilson, City Court Judge:

The defendant has moved this court by a motion which was filed with the court on November 13, 2009 and which was duly submitted to the court for decision on December 2, 2009 for an order seeking dismissal of a simplified traffic information herein charging a violation of § 1192(3) of the Vehicle and Traffic Law, Driving while Intoxicated pursuant to §100.25 of the Criminal Procedure Law discovery and inspection of certain listed items, and for disclosure of exculpatory material pursuant to federal and state case law, and for dismissal of the charges upon the basis that the arrest was not based upon probable cause, and for relief pursuant to *People vs. Sandoval* , 34 NY 2d 371 (1974) and *People v. Ventimiglia*, 52 N.Y. 2nd 350 (1981) as to the use for cross examination purposes or upon the direct case of the people of any prior criminal convictions and/or bad acts of the defendant at a trial of this action, and for suppression of alleged oral and written statements and for suppression of items of physical

evidence as being obtained in violation of the defendant's rights under the United States and New York State Constitutions, and for the ordering of a hearing pursuant to *Frye v. U.S.*, 293 F. 1013 as to the admissibility of field sobriety tests, and for leave to submit any further motions necessitated by the relief obtained from this motion. The People have not opposed said motion either orally or in writing, and after due deliberation, the court determines the defendant's motion as follows:

As to the defendant's motion to dismiss the charges herein pursuant to §§170.35 and 100.25 of the Criminal Procedure Law, CPL 100.10 (subd 2) and 100.25 in substance indicate that where a defendant receives a simplified traffic information and makes a timely request for a supporting deposition, he is entitled to the supporting deposition prior to trial and the failure to provide same mandates a dismissal (see *People v De Feo*, 77 Misc. 2d 523). Moreover, in order to be considered adequate, a supporting deposition in a case initiated by a simplified traffic information must set forth facts in a plain and concise manner which provide a reasonable cause to believe that the defendant committed every necessary element of the offense charged (CPL 100.25, subd 2). *People v. Key*, 1978, 45 N.Y. 2nd 111; *People v. Baron*, 1980, 107 Misc. 2nd 59 (N.Y. Sup. Ct., App. Term, 2nd Dept.).

In the instant matter the defendant contends that the simplified traffic information's allegations of intoxication is not supported by the supporting deposition.

§1192(3) of the Vehicle and Traffic Law of the State of New York provides as follows:

No person shall operate a motor vehicle while in an intoxicated condition.

§1195(2)(a) of the Vehicle and Traffic Law also provides that:

Evidence that there was .05 of one per centum or less by weight of alcohol in such person's blood shall be prima facie evidence that the ability of to operate a motor vehicle was not impaired, and that such person was not in an intoxicated condition — .

The supporting deposition herein consists of a checklist which alleges a chemical test of .00%, and purports to support the allegation of intoxication by an allegation of symptoms of impaired motor condition. It also alleges that certain field sobriety tests were conducted, consisting of a gaze nystagmus test, walk and turn test, a finger count test, reciting the alphabet and a one leg stand test with the conclusion that the defendant failed three of the four tests without facts to substantiate the results. The defendant also allegedly admitted to operating the vehicle at some time, but there was no admission that he consumed alcohol at any time, nor that he had not consumed any from the time that operation ceased. There was also filed with the simplified traffic information a supporting deposition pursuant to §100.20 CPL which alleges operation at a high rate of speed in an erratic manner, passing a red light without stopping and without headlights. The deposition also alleges that the vehicle collided with another vehicle.

A supporting deposition must be a "written instrument", "subscribed and verified", and "containing factual allegations of an evidentiary character — which supplement those of the accusatory instrument and support or tend to support the charge or charges contained therein" (CPL 100.20). In addition, CPL 100.25 (2) mandates that the supporting deposition contain "allegations of fact * * * providing reasonable cause to believe that the defendant committed the offense or offenses charged".

Here, the factual statements in the deposition are communicated by check marks made in boxes next to the applicable conditions and observations signifying the complainant's allegations as to the existence of those conditions and the truth of those observations. The Court of Appeals has held such signification sufficient to meet the requirements of CPL 100.20 that the supporting deposition be a "written instrument" containing "factual allegations of an evidentiary character" which "support or tend to support the charge or charges contained therein". *People v. Hohmeyer*,

70 N.Y. 2nd 41, 1987.

The accusatory instrument's supporting documentation contains factual allegations sufficient to establish reasonable cause that defendant violated

1. Vehicle and Traffic Law § 1192(3). The People were thus entitled to an opportunity to rebut the section 1195(2)(c) presumption at trial. *People v. Blair*, 98 N.Y. 2nd 722, 749 N.Y.S. 2nd 809 (2002). *People v. Gingello*, 181 Misc.2d 163, 694 N.Y.S.2d 579 [1999], was specifically overturned by the *Blair* case.

For an accusatory instrument charging driving while intoxicated to be facially sufficient there must be factual allegations providing "reasonable cause" to believe that defendant operated a motor vehicle upon a public highway while in an intoxicated condition (Vehicle and Traffic Law §§ 1192 [3]). A defendant is "intoxicated" when "such person has consumed alcohol to the extent that he ... is incapable, to a substantial extent, 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" (CJI[NY]2d VTL 1192 [3]; see, *People v Cruz*, 48 NY2d 419, 428, *appeal dismissed* 446 US 901; see also, *People v Ardila*, 85 NY2d 846, 847; *People v Gary*, 233 AD2d 939). Factors to be considered include, for example, a defendant's physical condition and appearance, balance and coordination, manner of speech, the presence of the odor of alcohol, the manner in which he operated the vehicle, opinion testimony regarding sobriety and the circumstances of any accident (CJI[NY]2d VTL 1192 [3]; see also, *People v Hohmeyer*, 70 NY2d 41, 44; *People v Lopez*, 170 Misc 2d 278, 281).

The results of any chemical breath test to determine the alcohol content of a defendant's blood must also be considered in determining facial sufficiency. Although the results of a chemical test would not be admissible at trial unless the test was administered in accordance

with law (Vehicle and Traffic Law §§§§ 1194, 1195 [2]; see also, *People v Freeland*, 68 NY2d 699; *People v Sawinski*, 246 AD2d 689; *People v Starowicz*, 207 AD2d 994), the court must consider this factual allegation in determining facial sufficiency just as the court is required to consider the opinion of intoxication by the officer even though that opinion would not be admissible at trial without proper foundation (*People v. Gingello*, supra at p. 165; *People v Smith*, 163 Misc 2d 353, 365).

The defendant's motion for discovery and inspection is granted in all respects since there has been no objection filed to this motion.

Part VIII of defendant's moving papers requesting disclosure of exculpatory material will be in all respects granted, the People having a continuing duty to disclose any such exculpatory material to the defense.

The defendant's motion for relief pursuant to *People vs. Sandoval*, supra and *People v. Ventimiglia*, supra, will be granted insofar as the People will be directed to serve upon the defendant and file with the court a list of all prior criminal convictions and/or bad acts of the defendant which they intend to use for cross examination purposes or upon their direct case at a trial of this action. Such list shall be served and filed by a date to be fixed by the court within three days of trial. At such time, the court will determine which, if any, of said list may be used for such purposes at the trial of this action. Pending said in camera ruling, said motion would be in all other respects denied.

The defendant's motion for suppression of any oral and written statements will be granted insofar as a hearing will be scheduled to determine said issues on March 5, 2009 at 2:30 P.M.. The motion is granted insofar as the hearing is scheduled, but in all other respects would be denied. The defendant's motion to suppress all other unnamed evidence obtained from the

defendant would be denied without a hearing for failure to allege grounds and identify the items seized.

The defendant has moved for a hearing pursuant to *Frye v. United States*, supra, as to the admissibility of field sobriety tests, but his objection is both to the admissibility of the test based upon the foundation, and upon the scientific basis for the tests. While foundation concerns itself with the adequacy of the specific procedures used to generate the particular evidence to be admitted, the test pursuant to *Frye v. United States*, supra, poses the more elemental question of whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally. *People v. Wesley*, 83 N.Y. 2nd 417 (1994). That *Frye* question will be addressed at the hearing scheduled above if the People intend to introduce the results as evidence-in-chief, and not just for purposes of showing probable cause. The issues of a proper foundation and of the adequacy of procedures here are before the court nevertheless.

The defendant's motion to reserve the right to submit any further motions necessitated by the relief obtained from this motion would be granted pursuant to the provisions of section 255.20 (3) of the Criminal Procedure Law, but in all other respects will be denied.

The defendant's motion is granted as above stated, but in all other respects will be denied.

This will constitute the Decision and the Order of the Court.

ENTER:

DANIEL C. WILSON

ROME CITY COURT JUDGE

DATED: January 25, 2010