[* 1]

STATE OF NEW YORK

COUNTY OF ONEIDA ROME CITY COURT

PEOPLE OF THE STATE OF NEW YORK

Vs. MEMORANDUM DECISION

SCOT J. CERAVOLO

Docket No. 46558

John J. Raspante, Esq., Asst. District Attorney of Oneida County,
for the People

John G. Leonard, Esq., Attorney for the Defendant

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

Pursuant to a memorandum decision of this court, dated December 30, 2009, a suppression hearing was held in this matter on April 16, 2010 to determine the admissibility into evidence of a chemical test refusal by the defendant and as to whether a valid foundation has been established for its admissibility at trial. Also the hearing was directed upon the motion to suppress admissions of the defendant, and as to the admissibility of field sobriety tests. After determining the credibility of the witnesses, the court makes the following findings of fact beyond a reasonable doubt and conclusions of law thereupon:

FINDINGS OF FACT

1. On May 29, 2009, Dep. Aaron Avard, an Oneida County Deputy Sheriff with a total

time period as a police officer of 4 years was on patrol in the City of Rome.

2. At 11:35 P.M. the deputy was on Erie Blvd in the City of Rome proceeding westerly when he observed a vehicle exiting a driveway onto the roadway. The exiting vehicle, later identified as being the defendant's vehicle, forced an eastbound vehicle to veer sharply to avoid colliding with the defendant, which constituted failure to yield the right-of-way upon entering a highway.

3. The deputy then made a u-turn and proceeded to stop the defendant's vehicle at the intersection with Gifford Road.

4. The deputy observed two individuals to be in the vehicle, a pick-up truck.

5. Deputy Avard approached the driver of the vehicle, who was identified as being the defendant, noticed an odor of alcohol and detected glassy and watery eyes. The deputy asked him to produce a license which he did and he asked him where he was coming from, to which he replied "T.A. Roman's", a restaurant and bar. The deputy asked the defendant if he had been drinking, and he replied, "four or five drinks since 6:00", and then later said "few beers tonight – 6 since 6:00". The defendant's license identified him as Scot Ceravolo, and he was also identified by the deputy as the operator of the vehicle.

6. Dep. Avard then asked the defendant if he would perform certain field sobriety tests to which the defendant agreed. Dep. Avard conducted a horizontal gaze nystagmus test and stated his background and experience in conducting such tests. A proper foundation was laid for the conducting of the test for field sobriety purposes. Dep. Avard concluded that the defendant failed the test. A walk and turn test was conducted but the defendant lost his balance once, did not walk heel-to-toe, turned too soon, and took an incorrect number of steps. A sufficient foundation was laid as to that test. The deputy concluded that the defendant had failed the test. The

defendant upon the one-leg-stand test swayed and the deputy concluded that he failed. A proper foundation was laid as to that test.

7. The defendant refused the breath screening test, the alco-sensor, by saying "absolutely not.".

8. Deputy Avard arrived at an opinion that the defendant was in an intoxicated condition based upon his observations and prior experience and placed him under arrest for driving while intoxicated. The defendant was advised of his rights pursuant to *Miranda v. Arizona,* 384 U.S. 436 and also as to the results of a refusal of the chemical test. The defendant indicated that he did understand his rights pursuant to *Miranda v. Arizona,* supra, but no waiver of his right to counsel was established and the defendant did say that, " I'll answer it depending upon the question." Also he did not specifically invoke his right to counsel by saying, " John Leonard is my attorney."

9. Upon being asked as to whether he would consent to a chemical test, the defendant said, "I'll refuse it." When asked again at the scene if he would submit, he again said, "No." In the police vehicle, as to the refusal, the deputy said to the defendant, " If you beat it, you'll be the first one." The defendant again then stated that, " I'm not taking it". In the Law Enforcement Building parking lot, the defendant was again advised as to the results of a refusal of the chemical test, to which he asked the deputy, "When was the last time that you calibrated the machine?", and the deputy responded, " it's self-calibrating", and the defendant again refuse the test. Also in the booking room the defendant again refused the test.

10. The statements at the scene at the defendant's own vehicle were knowingly and voluntarily made and were not the product of custodial interrogation.

CONCLUSIONS OF LAW

1. The initial stopping of the defendant's vehicle by the officer was a limited seizure subject to constitutional limitation. *Delaware v.Prouse*, 440 U.S. 648; *People v. John B.B.*, 56 N.Y. 2nd 482; *People v. Ingle*, 36 N.Y. 2nd 413. A stopping of a vehicle for a violation of the Vehicle and Traffic Law would constitute an articulable reason for the stop, a valid exercise of the police power and police conduct which may be characterized as reasonable when balanced against an individual's interest in being free from governmental interference. *Delaware v. Prouse*, supra; *People v. DuBour*, 40 N.Y. 2nd 210; *People v. John B.B.*, supra. Failure to yield the right-of-way upon entering a highway would constitute a violation of the Vehicle and Traffic Law of the State of New York.

2. The State may stop a vehicle and question occupants for a legitimate reason. The stopping of the defendant's vehicle was nonarbitrary and nondiscriminatory, since the officer observed the defendant to operate his vehicle in violation of a provision of the Vehicle and Traffic Law. After stopping the vehicle, hearing the defendant admit that he had been drinking and detecting an odor of alcohol, the officer had reasonable suspicion to believe that the defendant was operating a vehicle while under the influence of alcohol sufficient to request the defendant to submit to field sobriety tests and the gaze nystagmus test. *People v. Abramowitz*, 58 A.D. 2nd 921 (3rd Dept., 1977); *People v. Brockum*, 88 A.D. 2nd 697 (3rd Dept. 1982).

3. At the time of trial it would be error to allow testimony concerning the HGN field sobriety test without a proper foundation as to its scientific acceptance or reliability. *People v. Heidelmark*, 214 A.D. 2nd 767 (3rd Dept., 1995). *People v Quinn* (153 Misc 2d 139, revd 158 Misc 2d 1015) cannot be used to support a contention that HGN has been upheld as scientifically

reliable since it was reversed, with the Appellate Term refusing to directly address that issue. Although the courts of our State have not conclusively determined that HGN is generally acceptable as reliable (see, *People v. Middleton*, 54 NY2d 42 ,.the field sobriety test known as "Horizontal Gaze Nystagmus" is not admissible at trial without a proper foundation as to its scientific acceptance or reliability (see, *People v. Torrey*, 144 A.D. 2nd 865 (3rd Dept., 1988); *People v Thomas*, 121 AD2d 73, 76, affd 70 NY2d 823; see also, *Frye v United States*, 293 F 1013; *Commonwealth v Miller*, 367 Pa Super 359, 532 A2d 1186; *State v Barker*, 366 SE2d 642 [W Va]; cf., *State v Superior Ct.*, 149 Ariz 269, 718 P2d 171).

However, as was stated in *People v. Thomas*, supra, as to the Alco-Sensor field sobriety test, the Alco-Sensor testimony was clearly not admissible to show intoxication. It is well settled that "there must be a sufficient showing of reliability of the test results before scientific evidence may be introduced" (*People v. Spaight*, 92 AD2d 734, 735; compare, *People v. Donaldson*, 36 AD2d 37, 40). "Scientific evidence will only be admitted at trial if the procedure and results are generally accepted as reliable in the scientific community" (*People v. Hughes*, 59 NY2d 523, 537). The Court further stated in *Thomas*, supra at p. 76 as to the Alco-Sensor screening test, that although an Alco-Sensor test is not admissible as evidence of intoxication, breath screening devices have won acceptance as being sufficiently reliable to establish probable cause for an arrest (see, *Matter of Smith v. Commissioner of Motor Vehicles*, 103 AD2d 865, 866; see also, *Boyd v. City of Montgomery*, 472 So 2d 694, 697, supra.; *State v. Thompson*, 357 NW2d 591, 593, supra.; *State v. Orvis*, 143 Vt 388, 465 A2d 1361, 1362-1363, supra.). It would appear in the case of the Horizontal Gaze Nystagmus and Vertical Gaze Nystagmus tests, as well, that they would be admissible to show probable cause for the arrest at a suppression hearing, but would not be admissible at the time of trial without the proper foundation required by the above cases.

4. Likewise, a sufficient foundation was established as to the one leg stand, and the walk- and- turn test to use them for probable cause for the arrest, and also to be admissible at the time of trial for the jury's consideration together with other factors.

5. The court finds that the defendant was not in custody at the time he made the initial statements to the officer since the court finds at such a time a reasonable person, innocent of any crime, would have felt free to leave the presence of the police officer. *People v. Harris*, 48 N.Y. 2nd 208. Since the defendant was not in custody, it was not necessary for the officer at that time to advise the defendant regarding his rights pursuant to *Miranda v. Arizona*, supra. *Berkemer v. McCarty*, 468 U.S. 420, 439-440.

6. Accordingly, all statements made to the officer by the defendant prior to the arrest could be considered by the officer in determining probable cause for the detention of the defendant and would be admissible at a trial of this action as being knowingly and voluntarily made. Such statements may be used upon the People's direct case or for cross examination purposes.

7. The testimony of the officers as to their observations of the defendant and as to Deputy Avard's opinion that he was in an intoxicated condition based upon his experience as a police officer and in his private life provided "reasonable belief on the part of the officer that the defendant had committed the crime of 'driving while intoxicated' or at least the traffic infraction of ' operating while impaired' or the crime of 'operating a motor vehicle while having ten one-hundredths or more by weight of alcohol in the blood' ". The opinion of the officer was therefore sufficient to constitute probable cause for the arrest of the defendant,. *People v, Esposito,* 37 N.Y. 2nd 156, 160; *People v. David W.*, 83 A.D. 2nd 690 (3rd Dept., 1981).

8. Since the officer had reasonable grounds to believe the defendant had been operating

in violation of subdivisions one, two, or three of §1192 of the Vehicle and Traffic Law the refusal of the chemical test of the defendant's blood by analysis of his breath and the statements of the defendant were not the product of an illegal detention. *Dunaway v. The State of New York,* 442 U.S. 200.

9. While an individual arrested for DWI has a right to receive the aid of an attorney in deciding whether to submit to a sobriety test, any request for such assistance must be specifically made (*see, People v. Vinogradov, 294 A.D. 2nd 708 (3rd Dept., 2002);*

1. ***People v. Shaw,* 72 N.Y.2d 1032, 1033-1034, 534 N.Y.S.2d 929, 531 N.E.2d 650; *People v. Bradway,* 285** A.D.2d 831, 833, 728 N.Y.S.2d 286, *lv. denied* **97 N.Y.2d 639, 735 N.Y.S.2d 496, 761 N.E.2d 1; *People v. Peabody, supra,*** at 755, 615 N.Y.S.2d **92; *People v. Hart,* 191** A.D.2d 991, 992, 594 N.Y.S.2d 942, *lv. denied* **81 N.Y.2d 1014, 600 N.Y.S.2d 202, 616 N.E.2d 859).** Even upon a specific request, there is no absolute right to consult with an attorney before deciding whether to submit to a test. " 'If the lawyer is not physically present and cannot be reached promptly by telephone or otherwise, the defendant may be required to elect between taking the test [or] submitting to revocation of his license, without the aid of counsel' " **(*People v. De Ponceau,* 275 A.D.2d 994, 994, 715 N.Y.S.2d 197,** *lv. denied* **95 N.Y.2d 962, 722 N.Y.S.2d 480, 745 N.E.2d 400,** quoting ***People v. Gursey,* 22 N.Y.2d 224, 228-229, 292 N.Y.S.2d 416, 239 N.E.2d 351;** *see,* **Vehicle and Traffic Law § 1194** [1], [2]; ***People v. Kearney,* 261 A.D.2d 638, 638, 691 N.Y.S.2d 71,** *lv. denied* **93 N.Y.2d 1020, 697 N.Y.S.2d 579, 719 N.E.2d 940).** Here, the record does not support the conclusion that he ever specifically requested the aid of counsel.

10. Accordingly, the defendant's motion to suppress would be in all respects denied as well as the foundational motion as to the sobriety tests and the refusal of the chemical test.

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

ENTER:

DANIEL C. WILSON

ROME CITY COURT JUDGE

DATE: June 21, 2010