

**People v Kessler**

2010 NY Slip Op 33504(U)

December 27, 2010

Rome City Court, Oneida County

Docket Number: 49075

Judge: Daniel C. Wilson

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State of New York  
County of Oneida

Rome City Court

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People of the State of New York

vs.

MEMORANDUM DECISION

John D. Kessler,  
Defendant.

DOCKET NO.  
49075

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Joshua L. Bauer, Assistant District Attorney of Oneida County,  
for the People

Jeffrey A. Aumell, 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 October 8, 2010 and which was duly submitted to the court for decision on October 22, 2010 for an order seeking dismissal of the accusatory instruments pursuant to §170.35 of the Criminal Procedure Law, for discovery and inspection of certain listed items or alternatively for preclusion, and for disclosure of exculpatory material pursuant to federal and state case law, and for relief pursuant to *People vs. Sandoval*, 34 NY 2d 371 (1974) and *People v. Ventimiglia*, 52 N.Y. 2<sup>nd</sup> 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 and testimonial evidence as being obtained in violation of the defendant's rights under the United States and New York State Constitutions, and for leave to submit

memoranda of law following the hearing herein, and for leave to submit any further motions necessitated by the relief obtained from this motion. The People have opposed said motion by an answering affirmation which was filed with the court, and after due deliberation, the court determines the defendant's motion as follows:

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 also requests a copy of the Criminal Justice Services report, but the court will note that the report was supplied to the defense attorney in open court pursuant to the provisions of the Criminal Procedure Law.

The defendant's motion for suppression of items of certain unnamed evidence will be denied without a hearing since the defendant has failed to establish grounds for the ordering of a hearing. A defendant has the burden as to items of physical evidence of establishing standing by demonstrating a personal legitimate expectation of privacy. *People v. Whitfield* 81 N.Y. 2<sup>nd</sup> 904; *People v. Wesley* 73 N.Y. 2<sup>nd</sup> 351. As stated in *Whitfield* CPL §710.60(1) requires that a defendant's motion to suppress contain sworn allegations sufficient to raise standing as an issue of fact and avoid summary judgment under CPL §710.60(3). The motion papers only refer to the probable cause for arresting the defendant, but do not assert that the defendant had any possessory interest in any property or any other expectation of privacy.

The defendant's motion to suppress oral statements of the defendant will be granted insofar as a hearing will be scheduled to determine said issues on February 9, 2011 at 11:00 A.M., but pending said hearing, said motion would be in all other respects denied.

The defendant has also moved to dismiss the simplified traffic informations charging violations of §1194(1)(b) of the Vehicle and Traffic Law, Refusal of a Breath Screening Test, §1120(a) of the Vehicle and Traffic Law, Failure to Keep Right, §1229(c)(3) of the Vehicle and Traffic Law, Unrestrained Driver, and §375(31) of the Vehicle and Traffic Law, Inadequate Exhaust for being based upon hearsay, but cites inapplicable sections of the Criminal Procedure Law in support of such.

§100.10(2)(a) of the Criminal Procedure Law provides as follows:

2. (a) A "simplified traffic information" is a written accusation by a police officer, or other public servant authorized by law to issue same, filed with a local criminal court, which charges a person with the commission of one or more traffic infractions and/or misdemeanors relating to traffic, and which, being in a brief or simplified form prescribed by the commissioner of motor vehicles, designates the offense or offenses charged but contains no factual allegations of an evidentiary nature supporting such charge or charges. It serves as a basis for commencement of a criminal action for such traffic offenses, alternative to the charging thereof by a regular information, and, under circumstances prescribed in

1. section 100.25, it may serve, either in whole or in part, as a basis for prosecution of such charges.

§100.25(2) of the Criminal Procedure Law states as follows:

2. A defendant charged by a simplified information is, upon a timely request, entitled as a matter of right to have filed with the court and served upon him, or if he is represented by an attorney, upon his attorney, a supporting deposition of the complainant police officer or public servant, containing allegations of fact, based either upon personal knowledge or **upon information and belief**, providing reasonable cause to believe that the defendant committed the offense or offenses charged.

The supporting depositions were not requested by the defense.

The Court of Appeals has held even before the inception of the Criminal Procedure Law that the use of the Simplified Traffic Information is authorized where the information is signed by an officer whose knowledge of the facts is based upon information and belief. In

1. People v. Weeks, 13 N.Y.2d 944, 244 N.Y.S.2d 316, 194 N.E.2d 132, defendant was issued a Simplified Traffic Information under section 147-g of the Code of Criminal Procedure for speeding. The information did not state that it was based upon information and belief and it was not accompanied by supporting affidavits. Defendant pleaded not guilty and requested a bill of particulars which was supplied in the form of supporting affidavits, including one by the officer who operated the radar unit. The County Court had held the information defective since it did not state that it was based upon information and belief and it was not accompanied by supporting affidavits. This defect, the court stated, was not cured by the bill of particulars. The Court of Appeals reversed: 'The challenged simplified traffic information, being substantially in the form prescribed by the Commissioner of Motor Vehicles pursuant to section 207 of the Vehicle and Traffic Law, when coupled with the bill of particulars of the violation charged filed by the peace officers, was sufficient to inform defendant and the court of the nature and character of the violation with which defendant was charged and to satisfy the applicable statutory requirements' (supra, p. 945, 244 N.Y.S.2d p. 317, 194 N.E.2d p. 132). People v. Boback, 23 N.Y. 2<sup>nd</sup> 189 (1968).

Traditionally, the purpose of the rule requiring verified informations by persons competent to testify to the facts contained therein is to deter the bringing of baseless prosecutions by demanding 'that criminal proceedings be underpinned by 'the sanction of an oath and subject to the penalty for perjury if willfully false'". (People v. Jeffries, supra, 19 N.Y.2d p. 567, 281 N.Y.S.2d p. 69, 227 N.E.2d p. 872, quoting People ex rel. Livingston v. Wyatt, 186 N.Y. 383, 291, 79 N.E. 330, 333, 10 L.R.A.,N.S., 159.) Logically, if that be the goal,

it should also apply to informations used as pleadings. In the case of the Simplified Traffic Information statute, however, that basic policy is not achieved even where the arresting officer has personal knowledge. Neither section 147-f of the prior Code of Criminal Procedure, which mandated the service of a bill of particulars upon demand, nor section 147-g of that same statute, which set forth what the bill must contain, required that the bill of particulars be verified or that it be made by a person having personal knowledge of the events. The officer was required to take an oath only if he is called to give testimony at the trial. Consequently, the Boback case held that there would appear to be no reason to draw the distinction since in no event would he ever be protected by the 'sanction of an oath' and so it allowed the prosecution of the matter to proceed upon a pleading instrument. People v. Boback, supra

Since the information is to be used as a pleading only, there was no constitutional compulsion for the Legislature to limit the use of the Simplified Traffic Information to those cases where the officer had some personal knowledge of the violation. That it was the intent to override the pre-existing law is made clear in the Governor's memorandum: 'Pursuant to 1. Section 207 of the Vehicle and Traffic Law, the Commissioner of Motor Vehicles is presently authorized to prescribe the form of a uniform traffic summons and complaint. The uniform complaint to be prescribed by the Commissioner was intended to be used in a packet with the uniform traffic ticket and to serve as the pleading in instituting the prosecution of a traffic violation, as recommended by the American Bar Association. Although the form of the summons or ticket has been prescribed, it has been virtually impossible to formulate a complaint or information of sufficient brevity to be used in such a packet and which would meet the present requirements of law with respect to the specificity of criminal pleadings.' (Emphasis added.)

*People v. Boback, supra.*

It is, therefore, evident that neither the language nor the legislative history of the Simplified Traffic Information statute limits the use of the information to those cases where the officer making the information has some personal knowledge of the violation. Consequently the trial courts were not deprived of jurisdiction because the information was made by an officer having no personal knowledge of the relevant events.

The Constitution does require that the defendant be informed of the nature of the charge and the circumstances under which he is alleged to have violated the law. But the bill of particulars, and the supporting deposition herein, which the defendant could have had upon demand fulfills this function.

The Constitution does require that no person be deprived of his liberty unless there be probable cause for his arrest (U.S.Const., 4th Amdt.; Civil Rights Law, Consol. Laws, c. 6, s 8). However, the Simplified Traffic Information cannot itself furnish a basis for the issuance of a warrant of arrest or procure the defendant's appearance before the court. The defendant could not be deprived of his liberty if he should refuse to honor it. If he should choose to ignore the summons and not appear on the return date of the summons, the court must take testimony or have before it affidavits which would establish probable cause before issuing an arrest warrant (Code Crim.Proc., ss 148-149; see, also, proposed New York Criminal Procedure Law, s 60.20). Thus, the Simplified Traffic Information is being used solely as a pleading and, consequently, this aspect of appellant's constitutional argument fails. *People v. Boback*, supra at p. 917.

This would not be the case if the Simplified Traffic Information were to indicate that it was based on personal knowledge and contained sufficient particulars to establish

probable cause.

As noted above, the requirement that an information, used solely as a pleading, should also be based upon evidence sufficient to establish probable cause reflects a desire to protect all defendants from baseless charges. For that reason the Court in *Boback* applied the same specificity when the information is used merely as a pleading. (*People v. Jeffries*, supra; *People v. James*, supra; *People v. Scott*, 3 N.Y.2d 148, 164 N.Y.S.2d 707, 143 N.E.2d 901, supra.) It is clear that the procedures set forth by section 147-a et seq. and the provisions of the Criminal Procedure Law do not meet the same stringent requirements of these cases. Nevertheless, the failure to require that information comply with the James and Jeffries cases does not render the Simplified Traffic Information unconstitutional. *People v. James* rested on ‘policy’, not the dictates of the Constitution (4 N.Y.2d 482, 485, 176 N.Y.S.2d 323, 325, 151 N.E.2d 877, 879, supra.) There is no constitutional impediment to what the Legislature has here done (*Weeks v. United States*, 2 Cir., 216 F. 292, cert. den. 235 U.S. 697, 35 S.Ct. 199, 57 L.Ed. 431.) *People v. Boback*, supra at p.918.

Accordingly, the defendant’s motion to dismiss the simplified traffic informations upon their face would be in all respects denied.

The defendant’s motion for police reports and arrest reports as listed in part I of defendant’s moving papers and for prior statements of witnesses as listed in that same part of defendant’s moving papers would be granted as to any exculpatory material, but any other pre-trial discovery would be denied. The People will be reminded to comply with the procedure outlined in the Criminal Procedure Law for disclosure of such materials at the time of trial.

Parts I and J of defendant's moving papers requesting disclosure of exculpatory material will be in all respects granted with the consent of the People. The People have recognized their continuing duty to disclose any such exculpatory material to the defense.

The defendant's motion to delay the decision herein for the filing of memoranda of law will be denied unless novel issues of law appear within the hearing.

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:

A handwritten signature in black ink that reads "Daniel C. Wilson". The signature is written in a cursive style with a large, stylized initial "D".

DANIEL C. WILSON

ROME CITY COURT JUDGE

DATED: December 27, 2010