

People v Morel-Gomez
2010 NY Slip Op 34002(U)
December 17, 2010
Supreme Court, Bronx County
Docket Number: 63495c-2009
Judge: Alvin M. Yearwood
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SUPREME COURT OF THE STATE OF NEW YORK
 BRONX COUNTY, CRIMINAL TERM: PART 20

-----X
 THE PEOPLE OF THE STATE OF NEW YORK

-against-

Decision and Order

GELISON MOREL-GOMEZ,

Defendant.

Docket No. 63495c-2009

-----X
 ALVIN YEARWOOD, J.

Defendant was arrested for allegedly operating his motor vehicle in an intoxicated condition. By way of motion defendant seeks an order from this Court dismissing the criminal court information in this matter on Due Process and Equal Protection grounds. The defendant's motion to dismiss the information is denied for the reasons that follow.

Defendant is a non-English speaking person whose native language is Spanish. Defendant was arrested and transported to the Intoxicated Driver Testing Unit (IDTU) where members of the New York City Police Department (NYPD) requested that the defendant submit to a chemical test analysis to determine the defendant's blood alcohol concentration (BAC). Such request was made via the use of a Spanish language video tape which "contained only the refusal warnings as required by § 1194 of the Vehicle and Traffic Law (VTL) and no further information".

The People that the NYPD's failure to administer the physical coordination tests due to a language barrier is not discriminatory. Defendant argues that English speaking defendants will fit into one category, or classification, while non-English speaking defendants will fit into another. These two classifications naturally creates two

categories of defendants accused of driving while intoxicated. English speaking defendants who get two opportunities to show they are not intoxicated, and non-English speaking defendants who are limited to one opportunity to show their lack of intoxication, the breathalyzer. The latter assumes that the non-English speaking defendant did not "persistently refuse" to take the breathalyzer and "consented" to take the breathalyzer test despite the language barrier. Defendant cites to *People v Garcia-Crespo*, 22 Misc3d 490 (Sup Ct Bronx County 2008) and argues that the NYPD's failure to administer physical coordination tests to non-English speaking defendant's violated defendant's due process and equal protection rights and that the information should be dismissed.

If this Court were to take defendant's position to its natural conclusion, then anytime the NYPD fails to interview someone suspected of committing a crime due to an inability to actually understand what a person is saying, or otherwise be unable to communicate with a person, that anything that flows from that alleged failure is subject to dismissal on Equal Protection grounds.

This Court is mindful that there is a split in authority with respect to this issue, with courts in this jurisdiction holding that the failure to offer the physical coordination tests to non-English speaking defendants is not an equal protection violation, while other courts hold that such a failure is a violation.

The Constitution of the United States, Fourteenth Amendment, section one makes it clear that "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." Article I § 11 of the New York Constitution provides that "no person shall be denied the equal protection of the

laws of this state or any subdivision thereof." Furthermore, the passage of Civil Rights Law § 40-c expanded the coverage of Article I § 11 and such states that:

1. All persons within the jurisdiction of this state shall be entitled to the equal protection of the laws of this state or any subdivision thereof.
2. No person shall, because of race, creed, color, national origin, sex, marital status or disability . . . be subjected to any discrimination in his civil rights . . . by the state or any agency or subdivision of the state.

Thus, the "purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional or arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents" (*People v Molina*, 25 Misc3d 362 [Sup Ct, Bronx County 2009])(internal citations omitted).

The US Supreme Court has created a three part test to evaluate procedural due process issues:

"First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (*People v Garcia-Crespo*, 22 Misc3d 490 [Sup Ct Bronx County 2008] quoting *Mathews v Eldridge*, 424 US 319, 335 [1976]).

As stated above, here defendant refused to take the breathalyzer test at the IDTU facility, and then was not offered the opportunity to take a physical coordination test due to a "language barrier". Thus, it is not that the NYPD discriminated against the

defendant because of his ethnicity, national origin or lack of ability to speak the language. Rather, the police officer was unable to go further in his investigation and conduct the physical coordination test due to the defendant's inability to speak or understand English.

Were the officer investigating a different type of offense that did not require the recitation of a series of instructions involved in administering a physical coordination test, and if the officer was otherwise unable to communicate with a suspect or a witness, the officer would have to cease his investigation if there was no way of communicating with that person. It would not be discriminatory for the officer to cease the investigation at that point, but rather common sense as any further discussion or interview of a suspect (or a witness) is not possible and would be, in fact, futile.

Therefore, it is not an attempt by the State to deprive an individual of the opportunity to take the physical coordination test based upon his race, ethnicity, or country of origin, but rather that there was no means of communicating any of the instructions to the defendant. As such, it is the view of this Court that the police department's inability to investigate a crime, manifested here by an inability to communicate with a suspect in a criminal matter thereby preventing the administration of a physical coordination test, or investigate an alleged crime using the English language does not violate a defendant's Equal Protection rights, and does not warrant dismissal of the information

With respect to defendant's due process argument, another court in this jurisdiction has held that the "investigation of suspected intoxicated driving by the police, in the field or at the intoxicated driver testing facility, is not a judicial,

quasi-judicial or even an administrative proceeding. Accordingly, there is no authority for the proposition that due process applies to the conduct of such investigations" (*People v Perez*, 27 Misc3d 880 [Sup Ct Bronx County 2010]), and this Court agrees.

After review of the split in authority in this jurisdiction this Court finds that the failure of the NYPD to administer physical coordination tests to this defendant due to the defendant's inability to speak or understand the English language does not violate defendant's due process and equal protection rights under the New York State and Federal Constitutions. Therefore, the defendant's motion to dismiss the information is in all respects denied.

This constitutes the decision and order of the court.

Date: December 17, 2010
Bronx, New York


HON. ALVIN YEARWOOD, A.J.S.C.