

**People v Kennedy**

2011 NY Slip Op 30246(U)

February 1, 2011

City Court of Rome

Docket Number: 48487

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,

MEMORANDUM DECISION  
DOCKET NO:48487

v.

LISA KENNEDY,

Defendant.

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*Scott D. McNamara, District Attorney, Oneida (John J. Raspante, of counsel) for  
the People*

*Frank Mellace, II, for the Defendant*

PRESENT: HON. DANIEL C. WILSON, CITY COURT JUDGE

Pursuant to a memorandum decision of this court, dated August 30, 2010, a suppression hearing was held in this matter on November 24, 2010, to determine the admissibility into evidence of field sobriety tests, chemical tests and statements made by the defendant to the police on the grounds that there was no probable cause for the initial stop of defendant's vehicle or her subsequent arrest. 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 April 14, 2010, Deputy Mark Chrysler, an Oneida County Deputy Sheriff with 8 years as a police officer was on patrol in the City of Rome.
2. At 1:33 A.M. Deputy Chrysler was driving on Muck Road when a vehicle proceeding in the opposite direction approached and passed his vehicle without dimming its headlights. The deputy then made a traffic stop of the vehicle.
3. Upon being stopped, defendant, who was driving the vehicle, produced her driver's licence at the request of Deputy Chrysler. Chad Murphy, a correction's officer, was riding in the passenger seat.
4. Deputy Chrysler asked defendant if she knew why she was being stopped and she told him that she did not know the reason. Deputy Chrysler advised her that it was for failure to dim her headlights.
5. Deputy Chrysler testified that he smelled the odor of alcohol on defendant's breath and noticed that her eyes were bloodshot and watery. In response to inquiries by Deputy Chrysler, defendant replied that she'd had a beer and that she was coming from Vernon.
6. Deputy Chrysler contacted Deputy Avard who responded to the location where defendant's vehicle was stopped.
7. On cross-examination, Deputy Chrysler acknowledged that the defendant's vehicle was proceeding around a curve at the time that he observed

defendant's vehicle with its high beams on but testified that defendant never dimmed her headlights even as she passed his vehicle.

8. Deputy Avar, who has made approximately 200 DWI arrests, testified that when he arrived at the location where defendant's vehicle was stopped, he noticed that the defendant's eyes were bloodshot and watery and that she was mumbling slightly.
9. Deputy Avar testified that the defendant told him that she was coming from "The Hill" and that she was on the way to her passenger's house.
10. Deputy Avar asked defendant to step out of the vehicle and defendant told him that she had consumed "4 Buds and a Yager Bomb;" the last one twenty minutes before leaving.
11. Deputy Avar asked defendant if she would perform certain field sobriety tests, to which she agreed. Deputy Avar 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. Based upon the presence of four of six indicators, Deputy Avar concluded that the defendant failed the test.
12. Deputy Avar laid a proper foundation for the conduct of other field sobriety tests, which Deputy Avar testified that defendant failed. The Alco-Sensor test was positive for the presence of alcohol.

13. Deputy Avard arrived at an opinion that the defendant was in an intoxicated condition based upon his observations and prior experience and placed her under arrest for driving while intoxicated. The defendant was advised of her rights pursuant to *Miranda v Arizona*, 384 U.S. 436 and also as to the consequences of a refusal to submit to a chemical test. The defendant agreed to a chemical test.
14. The defendant indicated that she understood her rights pursuant to *Miranda v Arizona, supra*, but no waiver of her rights was established.
15. The statements made at the scene at the defendant's own vehicle were knowingly and voluntarily made and were not the product of custodial interrogation.
16. Defendant testified at the hearing that on April 14, 2010, around 1:00 A.M. she was driving her vehicle on Muck Road and that she was coming from "The Hill" in Sherrill. Chad Murphy was a passenger in her vehicle.
17. Defendant testified that she had her high beams on as she was negotiating a curve on Muck Road in an area that did not have street lights. She testified that she saw another car's headlights coming towards her and that she dimmed her headlights prior to passing that vehicle.
18. Defendant acknowledged on cross-examination that she did not argue with Deputy Chrysler at the scene of the stop when he told her that she was being

pulled over for failing to dim her headlights.

19. Chad Murphy, defendant's front seat passenger, testified that he told defendant to turn her high beams on near a park as they approached a curve in Muck Road. Murphy also testified that defendant dimmed her high beams as another vehicle approached from the other direction.
20. The court credits Deputy Chrysler's testimony that defendant failed to dim her headlamps as she approached and passed his vehicle rather than defendant's testimony that she in fact dimmed her headlamps. Deputy Chrysler's testimony established that he was in an excellent position to observe whether defendant's headlamps were dimmed and that he has extensive experience on road patrol. Furthermore, defendant admitted that at the time of the stop she did not protest Deputy Chrysler's assertion that she had not dimmed her headlamps.

### **CONCLUSIONS OF LAW**

1. "At a *Mapp/Dunaway* hearing, the People have the initial burden of going forward to establish facts that demonstrate the arrest of the defendant was supported by probable cause and the contested evidence was legally obtained. In effect, the People must make out a prima facie case providing a legal basis for the police action. The burden then shifts to the defendant to persuade the court, by a preponderance of the evidence, that the seizure was in reality

unlawful” (*People v Chesley*, 27 Misc.3d 1227[A] at \*2; 2010 NY Slip Op. 50929[U] citing *People v Berrios*, 28 NY2d 361, 367).

2. “A police officer is authorized to stop a motor vehicle on a public highway when the officer observes or reasonably suspects a violation of the Vehicle and Traffic Law” (*People v Lamanda*, 205 AD2d 934, 935 [4<sup>th</sup> Dept. 1994], *lv denied* 84 NY2d 828, citing *People v May*, 191 AD2d 1011, 1012, *lv denied* 81 NY2d 1016; *People v Letts*, 120 AD2d 931, 934, *appeal dismissed* 81 NY2d 833; see also *People v Robinson*, 97 NY2d 341, 348-349; *People v Shroeder*, 229 AD2d 917 [4<sup>th</sup> Dept. 1996]).
3. Based upon Deputy Chrysler’s observation of defendant approaching within 500 feet of him and then passing him without dimming her headlamps, in violation of Vehicle and Traffic Law § 375-3, the People established the legality of the initial stop of defendant’s vehicle.
4. Although defendant and her passenger testified that defendant did in fact dim her headlamps, the court does not find this testimony credible. Deputy Chrysler, an experienced deputy, was in the best position to observe whether defendant dimmed her headlamps and defendant admitted on cross-examination that at the time of the stop she did not refute Deputy Chrysler’s statement that she had not dimmed her headlamps.
5. It is well established that a temporary roadside detention pursuant to a routine

traffic stop is not custodial in nature and that after stopping a vehicle for an alleged Vehicle and Traffic violation, a police officer may conduct a reasonable initial interrogation attendant to a roadside investigation (*People v Harris*, 186 AD2d 148). Since a defendant who is temporarily detained pursuant to a routine traffic stop is not considered to be in custody for *Miranda* purposes (see *People v Parris*, 26 AD3d 393, lv. den. 6 NY3d 851; *People v Fenti*, 175 AD2d 598 [4<sup>th</sup> Dept. 1999]), the statements made by defendant prior to her arrest are admissible at trial.

6. While conducting his initial roadside investigation, Deputy Chrysler noticed the odor of alcohol on defendant's breath, and that her eyes were bloodshot and watery. Defendant also admitted to having consumed an alcoholic beverage. Under these circumstances, the officer's observations of defendant's physical condition justified detaining defendant for the limited purpose of investigating whether she was operating her motor vehicle under the influence of alcohol (*People v Ballman*, 64 AD3d 9, 14 [4<sup>th</sup> Dept. 2009]).
7. The observations made by Deputy Avard, that defendant's eyes were glassy and bloodshot, that the odor of alcohol was on her breath, that defendant was mumbling slightly, and defendant's admissions that she had consumed alcohol, justified Deputy Avard's request that defendant submit to field sobriety tests (see *People v Rodriguez*, 26 Misc. 3d 238, 240, citing *People*

*v DeBour*, 40 NY2d 210, 223).

8. Deputy Avard's testimony established a sufficient foundation for the conduct of the field sobriety tests, including the Alco-Sensor test and the horizontal gaze nystagmus. Although the Alco-Sensor test is not admissible as evidence of intoxication (unless defendant challenges the probable cause for her arrest at trial), breath screening devices have won acceptance as being sufficiently reliable to establish probable cause for an arrest and therefore is admissible on the issue of probable cause (*People v Thomas*, 121 AD2d 73, *aff'd* 70 NY2d 823).
9. Thereafter, based upon Deputy Avard's initial observations, and defendant's inability to perform several field sobriety tests, and the fact that the Alco-Sensor test was positive for the presence of alcohol, there was probable cause to believe that defendant was operating her vehicle in violation of Vehicle and Traffic Law § 1192 (*People v Chelenza*, 303 AD2d 991 [4<sup>th</sup> Dept. 2003]; *People v Sarfaty*, 291 AD2d 889 [4<sup>th</sup> Dept. 2002]; *People v Welch*, 289 AD2d 1021 [4<sup>th</sup> Dept. 2001]; *People v D'Augustino*, 272 AD2d 914 [4<sup>th</sup> Dept. 2000], *lv. denied* 95 NY2d 851; *People v Schroeder*, 229 AD2d 917 [4<sup>th</sup> Dept. 1996]).
10. Deputy Avard testified that after he concluded that defendant was intoxicated he placed her under arrest and advised her of her rights pursuant to *Miranda*

*v Arizona*, 384 US 436, and also advised her of the consequences of refusing to submit to a chemical test.

11. Although Deputy Avard's testimony established that defendant was given *Miranda* warnings upon her arrest, his testimony did not establish that defendant waived those rights. As such, defendant's motion to suppress her post-arrest statements to the police is granted.
12. Since the results of the chemical test were obtained as a result of a lawful stop and arrest, they are admissible at trial.
13. At the time of trial, the results of the horizontal gaze nystagmus [HGN] test are admissible. A number of courts have conducted *Frye* hearings and concluded that the People have met their burden of establishing that the NHTSA's standardized HGN test is generally accepted in the relevant scientific community as a reliable indicator of intoxication (*see People v Prue*, 2001 NY Slip Op. 40594[U]). Based upon the prior *Frye* hearings, the court may properly take judicial notice of the results. "[O]nce a scientific procedure has been proved reliable, a *Frye* inquiry need not be conducted each time such evidence is offered ... Courts may thereafter take judicial notice of the reliability of the general procedure" (*People v Wesley*, 83 NY2d 417). Deputy Avard's testimony established a sufficient foundation for the gaze nystagmus test. Based upon its proven acceptance in the scientific

community, the results of the HGN test are admissible at trial.

The defendant's motion to suppress is GRANTED as to defendant's post-arrest statements to the police but is in all other respects DENIED.

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

ENTER:

A handwritten signature in black ink, appearing to read "Daniel C. Wilson". The signature is written in a cursive, flowing style.

DANIEL C. WILSON  
ROME CITY COURT JUDGE

DATED: February 1, 2011