STATE OF NEW YORK

COUNTY OF ONEIDA ROME CITY COURT

PEOPLE OF THE STATE OF NEW YORK

Vs. MEMORANDUM DECISION

TRACY A. COON

Docket No. 47929

Steven P. Feiner, 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 April 9, 2010, a suppression hearing was held in this matter on February 18, 2011 after six adjournments due to the unavailability of the Trooper to determine the admissibility into evidence of breath analysis test results obtained from the defendant upon the question of whether it was obtained in violation of the defendant's rights pursuant to the New York State and United States Constitutions 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. The defendant also raised an objection as to the validity of the notice served pursuant to §710.30 of the Criminal Procedure Law as to the alleged admissions herein. 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 January 16, 2010, Tpr. Joseph Tobiaz, a New York State Trooper with experience of 5 years on the state police was on patrol in the City of Rome.

2. At 11:00 P.M. the trooper was on the Old Floyd Road in the Town of Floyd when he observed a grey Chevrolet Lumina weaving within it's lane and ½ car length into the other lane. The weather conditions were dry at that time.

3. As the trooper proceeded westerly onto Rabbit Road he observed no violations, but after the vehicle turned left onto Cemetery Road, the trooper observed the vehicle go over into the other lane upon curves, and it went over the center line once. The vehicle then proceeded onto Butternut Road in the City of Rome where the vehicle was stopped at the direction of the officer. The testimony did not indicate at which time the defendant entered the City of Rome.

4. Trooper Tobiaz approached the driver of the vehicle, who was identified as being the defendant, and noticed an "average" odor of alcohol upon his breath. There were two other occupants in the vehicle. The trooper asked the defendant to produce a license and registration which he did. The defendant then grabbed a cigarette from the passenger in the back seat.

5. The trooper asked the defendant to step out of the vehicle so that he could ask him

some more questions. Upon stepping out of the vehicle the defendant used the door for support. The trooper then asked him where he had been drinking, to which he responded, "The Highway", which is a bar. The trooper asked him "How much?", to which the defendant replied at first, "one", and then,"a couple beers and shots". He was asked where he was coming from, and he replied, "a friend's, but first a funeral". The defendant's license identified him as Tracy A. Coon. The notice herein pursuant to §710.30 of the Criminal Procedure Law specified that the People intended to offer statements by the defendant at the scene that he "had been drinking" "a couple beers and shots" "at the Highway Inn", and that he "operated the motor vehicle", that he was "driving home""from a friends house" and that he "had prior alcohol convictions".

6. Tpr.Tobiaz then asked the defendant if he would perform certain field sobriety tests to which the defendant agreed. Trooper Pearl 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. A walk and turn test was conducted but the defendant lost his balance twice by using his arms, did not walk heel-to-toe, made a wrong turn, and walked off the line. A sufficient foundation was laid as to that test primarily through the cross-examination. The defendant failed the one-leg-stand test by putting his leg down, and a sufficient foundation was established primarily through the cross-examination. On the finger-to-nose test the defendant missed his nose once, and the foundation was also established upon cross-examination.

7. An alcosensor test was conducted to determine any consumption of alcohol and it was positive for such. A foundation was established as to that test.

8. Trooper Tobiaz 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 not agree to answer any questions. The defendant did consent to the conducting of a chemical test.

9. 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 keep right would constitute a violation of the Vehicle and Traffic Law of the State of New York.

2. §20.40 (4)(g) of the Criminal Procedure Law provides as follows:

> An offense committed in a private vehicle during a trip thereof extending through more than one county may be prosecuted in any county through which such vehicle passed in the course of such trip.

Furthermore, §20.50 of the Criminal Procedure Law makes that provision applicable to geographical jurisdiction between towns and cities. Accordingly, even though the underlying traffic infraction occurred in the Town of Floyd, the entire matter would be under the jurisdiction of Rome City Court.

3. 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 pertaining to operation upon the right hand side of the highway . 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).

As was stated in *People v. Thomas*, 121 AD2d 73, 76, affd 70 NY2d 823 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.). The alcosensor test would be admissible for such purposes at a trial of this action. 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.

5. Likewise, a sufficient foundation was established as to the walk and turn test, the one-leg stand test, and the finger-to-nose 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.

6.

CPL 710.30 is a notice statute intended to facilitate a defendant's opportunity to challenge before trial the voluntariness of statements made by him (*see, People v. Lopez, 84 N.Y.2nd 425 (1994);*

***People v. O'Doherty*, 70 N.Y.2d 479, 484, 522 N.Y.S.2d 498, 517 N.E.2d 213; *People v. Greer*, 42 N.Y.2d 170, 179, 397 N.Y.S.2d 613, 366 N.E.2d 273; *People v. Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179),** and the reliability of his identification by others (*see,* ***People v. Laing*, 79 N.Y.2d 166, 170, 581 N.Y.S.2d 149, 589 N.E.2d 372; *People v. White*, 73 N.Y.2d 468, 474, 541 N.Y.S.2d 749, 539 N.E.2d 577,** *cert. denied* **493 U.S. 859, 110 S.Ct. 170, 107 L.Ed.2d 127;** *cf.*, ***People v. Gissendanner*, 48 N.Y.2d 543, 552, 423 N.Y.S.2d 893, 399 N.E.2d 924).**

Thus, the statute requires that whenever the People intend to offer evidence of defendant's statements to a public officer or testimony of observations of defendant, they must serve notice of such evidence on defendant within 15 days of arraignment and before trial. There are but two exceptions to these requirements: the 15-day time provision may be waived for good cause and the notice may be excused if the defendant has in fact moved for suppression (*see,* **CPL 710.30[2], [3]**).

Manifestly, a defendant cannot challenge that of which he lacks knowledge; thus the statute requires that the notice "[specify] the evidence intended to be offered" (

1. CPL 710.30[1]). The notice served by the People in this case informed the defendant that the People intended to offer oral and written statements and specified the evidence as the statute commands. The People were required to inform defendant of the time and place the oral or written statements were made and of the sum and substance of those statements (*see, People v. Lopez, supra at p. 428;* ***People v. Bennett,*** **56 N.Y.2d 837, 453 N.Y.S.2d 164, 438 N.E.2d 870;** *People v. Laporte,* 184 A.D.2d 803, 804-805, 584 N.Y.S.2d 662, *lv. denied* **80 N.Y.2d 905, 588 N.Y.S.2d 831, 602 N.E.2d 239;** ***People v. Holmes,*** 170 A.D.2d 534, 535, 566 N.Y.S.2d 93, *lv. denied* 77 N.Y.2d 961, 570 N.Y.S.2d 495, 573 N.E.2d 583). Full copies of the statements need not be supplied but they must be described sufficiently so that the defendant can intelligently identify them.

Even if the court had found there to be inadequate notice, most of the statements were admissible against defendant because he moved to suppress his statements and those statements were identified at this hearing addressing their voluntariness (*see People v. Lazzaro*, 62 A. D. 3d 1035 (3rd Dept., 2009)

1. CPL 710.30[3]; ***People*** *v. Merrill*, 87 N.Y.2d 948, 949, 641 N.Y.S.2d 587, 664 N.E.2d 498 **[1996],** *revg. on dissenting mem. below* 212 A.D.2d 987, 988, 624 N.Y.S.2d 702 [1995] [Denman, P.J. and Balio, J., dissenting]; *People v. Martinez*, 9 A.D.3d 679, 680, 779 N.Y.S.2d 821 **[2004],** *lv. denied* **3 N.Y.3d 709, 785 N.Y.S.2d 37, 818 N.E.2d 679 [2004]; *People v. Brown*, 281 A.D.2d 700, 701, 728 N.Y.S.2d 100 [2001],** *lv. denied* **96 N.Y.2d 826, 729 N.Y.S.2d 446, 754 N.E.2d 206 [2001]).**

7. 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.

8. 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.

9. The testimony of the officers as to their observations of the defendant and as to Trooper Vanderlan's opinion that he was in an intoxicated condition based upon their experiences as police officers and in their private lives provided "reasonable belief on the part of the trooper

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).

10. "Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place" 1. (*People v. Bigelow,* 66 N.Y.2d 417, 423, 497 N.Y.S.2d 630, 488 N.E.2d 451 [1985] [citations omitted]). An arrest for driving while intoxicated is based on probable cause "if the arresting officer can demonstrate reasonable grounds to believe that the defendant had been driving in violation of

Vehicle and Traffic Law § 1192" (People v. Fenger, 68 A.D. 3rd 1441 (3rd Dept., 2009); *People v. Kowalski,* 291 A.D.2d 669, 670, 738 N.Y.S.2d 427 [2002]).

A probable cause determination is based on "the totality of the circumstances" 1. (*People v. Mojica,* 62 A.D.3d 100, 114, 874 N.Y.S.2d 195 [2009], *lv. denied* 12 N.Y.3d 856, 881 N.Y.S.2d 668, 909 N.E.2d 591 [2009]) and "need not always be premised upon the performance of field sobriety tests or any specific number of such tests" (***People v. Kowalski,* 291 A.D.2d at 670-671, 738 N.Y.S.2d 427**

11. 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 chemical test of the defendant's blood by analysis of his breath was not the product of an illegal detention. *Dunaway v. The State of New York,* 442 U.S. 200.

12. Accordingly, the defendant's motion to suppress would be in all respects denied.

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

ENTER:

DANIEL C. WILSON

ROME CITY COURT JUDGE

DATE: April 28, 2011