| **People v Wesley** |
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| 2013 NY Slip Op 34233(U) |
| July 17, 2013 |
| County Court, Broome County |
| Docket Number: 12-650 |
| Judge: Joseph F. Cawley Jr |
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STATE OF NEW YORK
COUNTY COURT : : BROOME COUNTY

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THE PEOPLE OF THE STATE OF NEW YORK

-vs-

**DECISION AND ORDER**

Indictment No. 12-650

JACLYN WESLEY,

Defendant

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**JOSEPH F. CAWLEY, J.**

Defendant was originally charged by previous indictment (No. 11-511) with three counts of Vehicular Manslaughter in the First Degree ((PL 125.13(4)), Driving a Motor Vehicle with .08 of One Per Centum or More by Weight of Alcohol in her Blood (VTL 1192(2)), Driving While Intoxicated (VTL 1192(3)), Driving While Ability Impaired by the Combined Influence of Drugs or of Alcohol and any Drug or Drugs (VTL 1192(4)(a)), and three counts of Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree (VTL 511(1)(a)).

*Huntley* and *Mapp* hearings were held on April 20, 2012. A Decision and Order was issued by this Court on October 25, 2012. Trial was scheduled to begin December 4, 2012.

On November 30, 2012, defendant moved to dismiss Indictment No. 11-511 due to certain errors allegedly made during the presentation to the grand jury. The People consented to the dismissal by letter dated December 2, 2012, wherein the foregoing indictment was dismissed without prejudice, with leave granted to re-present.

The underlying matter was re-presented to a grand jury in December 2012, resulting in Indictment 12-650, charging defendant with three counts of Vehicular Manslaughter in the First Degree ((PL 125.13(4)), Operating a Motor Vehicle with .08 of One Per Centum or More by Weight of Alcohol in her Blood (VTL 1192(2)) and Driving While Intoxicated (VTL 1192(3)).

Defendant now seeks by Omnibus Motion, *inter alia*, a suppression hearing to determine the admissibility of blood sample(s) taken from defendant, as well as preclusion of trial testimony regarding Horizontal Gaze Nystagmus (HGN) testing of defendant, or in the alternative, that a hearing be conducted as to the reliability of such testimony. The People oppose, arguing that the admissibility of blood seized has already been determined by this Court, and a re-hearing is barred by the "law of the case". The People further contend that HGN testing is generally accepted in the scientific community, and therefore oppose the requested hearing on that issue..

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## REGARDING HGN

Frye v. United States (293 F.1013) addresses the elemental question of whether scientific techniques involved in a certain procedure, when properly performed, generate results accepted as reliable within the scientific community generally. Foundation for admissibility of such tests concerns itself with the adequacy of specific procedures used to generate the particular evidence to be admitted (People v. Wesley, 83 N.Y.2d 417 (1994)).

New York's admissibility standard for novel scientific evidence/techniques, as it relates to Horizontal Gaze Nystagmus (HGN), is whether the procedure and results of HGN, administered as a field sobriety test, have been generally accepted within the relevant scientific community as a reliable indicator of intoxication (see, People v. Wesley, 83 N.Y.2d 417). The admission of HGN field sobriety tests have been found to be accepted within the scientific community as a reliable indicator of intoxication and, thus, a court may take judicial notice of the HGN test's acceptability (People v. Tetrault, 53 N.Y.3d 558, *lv. den.* 11 N.Y.3d 835; People v. Hammond, 35 A.D.3d 905; see People v. Warner, 45 A.D.3d 1182; People v. Grune, 12 A.D.3d 944 (2004) *lv. den.* 4 N.Y.3d 831; People v. Prue, 8 A.D.3d 894; People v. Gallup, 302 A.D.2d 681(2003) *lv. den.* 100 N.Y.2d 594).

Further, the Court may conduct a *foundational inquiry* into whether the accepted techniques were actually employed and the tester's qualifications (People v. Hammond, 35 A.D.3d 905, *lv. den.* 8 N.Y.3d 946; People v. Gallup, 302 A.D.2d 681, *lv. den.* 100 N.Y.2d 594; People v. Grune, 12 A.D.3d 944, *lv. den.* 4 N.Y.3d 831) *(emphasis added)*.

It should be noted that "under the complete cluster of tests known as the HGN test, there are a maximum of six clues that may be present. Under the NHTSA's standards, if ***four or more*** of the six clues are present, the subject has failed the HGN test (*emphasis added*). Failure of the NHTSA's standardized HGN test indicates that the subject's central nervous system is impaired." "Among the many causes [for failure] is the consumption of alcohol in sufficient quantity to cause intoxication." (People v. Prue, 2001 WL1729710, 2001 NY Slip Op. 40594 (NY Co.Ct. 11/29/01).

In the present matter, the previous suppression hearing testimony of Deputy Thomas established, *inter alia*, that HGN testing was conducted upon defendant while she was supine in a hospital bed, "barely conscious", and receiving intravenous medications. Based upon defendant's present submission, and uncontested by the People, Deputy Thomas' written report also states, in relevant part: "She [defendant ] also consented to a Horizontal Gaze Nystagmus test, while she was on the backboard. I detected *some* Nystagmus at maximum deviation, but could not get a very good look because she would not/could not completely open her eyes."(*Affirmation in Support,* at para. 31). The results of the foregoing test, consisting of **two positive clues** (a *"little bit"* of nystagmus at maximum deviation) (*emphasis added*), purportedly assisted him in forming his opinion that defendant was intoxicated.

While the scientific reliability of HGN has been recognized, the techniques employed, as well as the value of the results thereof, permit this Court to conduct a "foundational inquiry" (*see*, People v. Hammond, 35 A.D.3d 905, *lv. den.* 8 N.Y.3d 946; People v. Gallup, 302 A.D.2d 681, *lv. den.* 100 N.Y.2d 594; People v. Grune, 12 A.D.3d 944, *lv. den.* 4 N.Y.3d 831) to determine the admissibility of those tests in this case. Although said "inquiry" can generally be conducted during the course of trial outside the presence of the jury, the Court feels that the more prudent course herein is to conduct same pre-trial. This will allow for full development of this issue on the record, without unnecessarily delaying trial proceedings.

A foundational inquiry will, therefore, be conducted by the Court to determine the admissibility of HGN testing performed on this defendant prior to jury selection. **Such inquiry is hereby scheduled for Friday, July 26, 2013, at 10:30 a.m.** Should that date/time pose a particular problem for either party, counsel should contact the court forthwith.

**REGARDING BLOOD SEIZURE**

Collateral estoppel, or "issue preclusion", is a common law doctrine rooted in civil litigation that, when applied, prevents a party from re-litigating an issue decided against it in a prior proceeding. The formal prerequisites for collateral estoppel are: 1) identity of parties; 2) identity of issue; 3) final and valid prior judgement; and 4) a full and fair opportunity to litigate the prior determination (People v. Aguilera, 82 N.Y.2d 23 (1993); People v. Goodman, 69 N.Y.2d 32 (1986)).

The party seeking the benefit of collateral estoppel has the initial burden to establish the existence of each of the four prerequisites. Collateral estoppel has been applied in criminal cases to preclude issues decided in pre-trial suppression hearings conducted in one case from being re-litigated in a subsequent case (People v. Carroll, 200 A.D.2d 630 (2nd Dept. 1994); People v. Guy, 121 A.D.2d 741 (2nd Dept. 1986)).

In defendant's *original* Notice of Motion under Indictment 11-511, she sought, *inter alia*, the suppression of the blood sample drawn from her while a patient at Wilson Memorial Hospital. She argued that due to her physical condition while at the hospital, she was unable to voluntarily consent to the taking of her blood.

The People opposed suppression, arguing that pursuant to VTL 1194.2(a), defendant consented to a chemical test by virtue of her operating a motor vehicle. They continued that had defendant been entirely unconscious at the hospital, the police would have been authorized to draw blood without any inquiry of her (*People's Response to Defendant's Motion*, 12/21/11, at para 26).

At the foregoing suppression hearing, the People called five law enforcement officers to testify to circumstances surrounding the accident in question, as well as defendant's custodial status in the hours thereafter. Great attention was given to defendant's physical and emotional condition

at the scene, as well as at the hospital. Findings of facts and conclusions of law were made by this Court regarding defendant's condition, the officers' actions, and her custodial status. This Court determined that defendant was not capable of giving voluntary consent to the blood draw, while also finding that the People had inserted into the case the issue of implied consent. Based upon the record developed, this Court found that VTL 1194(2)(a)(1) did authorize the withdrawal of blood from a defendant that is unconscious or unable to refuse, which the Court concluded was the case herein. *(See, Decision and Order, October 25, 2012).*

Therefore, for purposes of issue preclusion as it relates to blood evidence suppression and defendant's ability to fully litigate this issue, this Court finds that: 1) The identity of parties is the same; 2) issues herein are the same as existed at the time of the initial suppression hearing; 3) a final and valid prior judgement has been rendered; and 4) a full and fair opportunity to litigate the prior determination previously existed (People v. Aguilera, 82 N.Y.2d 23 (1993); People v. Goodman, 69 N.Y.2d 32 (1986)).

Defendant's application for a hearing to determine admissibility of blood seizure evidence is denied.

This constitutes the Decision and Order of the Court.

It is So Ordered.

DATED: July 17, 2013
Binghamton, NY

HON. JOSEPH F. CAWLEY
Broome County Court Judge

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