

People v Barto

2016 NY Slip Op 32668(U)

November 1, 2016

County Court, Wayne County

Docket Number: 16-30

Judge: Daniel G. Barrett

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

At a Term of the County Court
Held in and for the County of
Wayne at the Hall of Justice in
the Town of Lyons, New York
on the 20th day of October,
2016.

STATE OF NEW YORK
COUNTY OF WAYNE : COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

THOMAS BARTO

Defendant.

DECISION ON MOTION
TO RENEW/REARGUE
BY DEFENDANT
Ind. No. 16-30

Appearances - People - ADA Christopher Bokelman, Esq.
Defendant - Richard C. Roxin, Esq.

The Court previously held an Huntley and Suppression Hearing on August 24, 2016. At the end of the hearing the Court reserved decision. Defense counsel asked to be able to submit a Memorandum by September 12, 2016. Subsequent to that defense counsel asked for an extension to September 26, 2016. Subsequent to that defense counsel filed a Notice of Motion to Renew and Reargue Hearing Based on New Evidence. ADA Bokelman responded to said motion by submission filed October 5, 2016.

On the above date the Court heard oral argument and since that time has reviewed submissions from both counsel.

The basis for the motion is information received regarding Trooper Campbell who is a drug recognition expert and did view and have contact with the Defendant on August 9, 2015.

Trooper James Wasko testified at the Huntley/Suppression Hearing. His role that day was to take a written statement from the Defendant at the scene. His testimony about obtaining the information, writing the statement and the Defendant reviewing and signing the same. After that interaction Trooper Wasko took the Defendant to Waterloo to see a drug recognition expert who happened to be Trooper Campbell as referred to above. He knows that Trooper Campbell did field sobriety tests but he, Trooper Wasko, did not participate in them. He did give the Defendant Miranda warnings at approximately 4:39 P.M., which the Defendant acknowledged and said he would talk in any event. He overheard the Defendant tell Trooper Campbell at the Waterloo station that he, the Defendant, had smoked marihuana earlier in the day as set forth in the 710.30 Notice.

Trooper Wasko was directed to obtain a blood sample from the Defendant. He had the Defendant sign a Waiver and he took the Defendant to the Geneva General Hospital to draw blood. Trooper Wasko testified that the Defendant never asked for a lawyer and never asked to make any phone calls.

Subsequent to the hearing ADA Bokelman provided certain information to Defendant's counsel by way of an e-mail. That apparently there had been post hearing contact with Trooper Campbell. Trooper Campbell did not testify at the hearing. It is acknowledged that there were no reports or notes written or produced by Trooper Campbell. That apparently Trooper Campbell also advised ADA Bokelman that he did not see any indicia of impairment that would merit going further with the DRE exam. Trooper Campbell also said it was possible he may have gone with the Defendant to the hospital for collection of the blood but he wasn't sure. It is also possible the Defendant called an attorney prior to consenting to the blood collection but again the Trooper was unsure that actually happened. Trooper Campbell also said he may have talked to other law enforcement and/or the District Attorney's Office about obtaining the blood sample from the Defendant at Geneva General Hospital but he wasn't sure. Essentially his recollection is vague and he has no notes or reports about the incident.

Defendant now moves the Court pursuant to CPL 710.40(4) to reopen the hearing, alleging that the Defendant has shown that additional personal facts have been discovered by the Defendant which he could not have discovered with reasonable diligence before the determination of the motion. The Defendant alleges the pertinent facts he could not have discovered before the post hearing contact by ADA Bokelman concerning Trooper Campbell's involvement with the Defendant in Waterloo. The Defendant is arguing that there are in fact additional pertinent fact and those facts could not have been discovered with reasonable diligence before the determination of the motion, see People v Velez, 39 A.D. 3d 38.

ADA Bokelman argues that the hearing should not be reopened as the allegations supplied by the defense are not new evidence or facts that could not have been previously discovered, CPL 710.40(4).

The People also submit the Defendant was already provided with more than sufficient information relative to the Defendant's contact with Trooper Campbell as set forth more specifically in the 710.30 notice and attachments provided at the arraignment on March 24, 2016. Those documents include Defendant's statements to Trooper Campbell as documented by Trooper Wasko and also the People's Response to Defendant's Demand filed April 29, 2016. In that Response there is a narrative of Investigator Bauer which specifically details the Defendant's interactions with Trooper Wasko and Campbell at the State Police Barracks at Waterloo, including Campbell's determination, that he found no drug intoxication at the time and further information that the Defendant was transferred from the scene to Waterloo and from Waterloo to Geneva Hospital for the blood draw. Further disclosure on May 17, 2016 in a Supplemental Response the People re-supplied the CFS report which details the times and locations of the Defendant being transferred from the scene of the accident to the Waterloo barracks and from Waterloo to Geneva Hospital. The People argue that the information provided in the e-mail referenced by the defense was neither new or something, even if additional, that could not have been discovered with reasonable diligence.

The People also argue that if the Defendant did speak to an attorney while at Waterloo he would be in the best position to provide that information to his counsel rather than relying on anything provided by the People.

The standard requires that the moving party needs to provide or show that a motion to reopen hearing defendant needs to establish that there is new evidence that could not have been discoverable with reasonable diligence.

In People v Crespo, 117 A.D. 3d 1538, the court denied the reopening of the Suppression Hearing where the defendant's contention was based upon evidence that was available and could have been discovered with reasonable diligence prior to the hearing or evidence that would not have changed the outcome of the hearing. In People v Wynn, 55 A.D. 3d 1378, the court refused to reopen a Suppression Hearing where the defendant failed to establish that his motion to reopen was based on additional evidence that could not have been discovered with reasonable diligence prior to the hearing. In People v Robertson, 271 A.D. 2d 17, the Appellate Division found that the trial court erroneously granted the defendant's application to reopen a Suppression Hearing where the basis for application, a police report, had been given to the defense counsel long before the hearing and its contents contained information varying slightly from the officer's hearing testimony.

The defendant who moves to reargue bears the burden of demonstrating that evidence was not reasonably available to him before trial, CPL 710.40(4). The defendant may not be able to satisfy that burden if he could have called the trial witness at the hearing, People v Fuentes, 74 A.D. 2d 753.

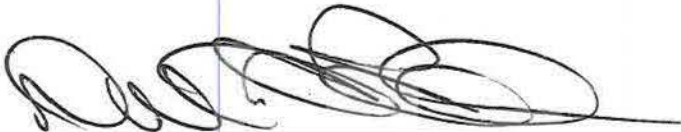
In this case the information referenced by the Defendant has been available to him since arraignment or shortly thereafter. The e-mail from ADA Bokelman provides no new information that was not previously known and/or discoverable by the defense.

Therefore the Defendant's motion to renew or reargue and/or reopen the hearing is denied.

The Court will now make a Decision on the Suppression/Huntley Hearing held on August 24, 2016. Defense counsel has until November 9, 2016 to provide that submission which was previously due initially on September 12, 2016 and then extended to September 26, 2016. Upon receipt of that ADA Bokelman will have until November 16, 2016 to respond.

This constitutes the Decision of the Court.

Dated: November 1, 2016
Lyons, New York



Daniel G. Barrett
County Court Judge