

**People v Vukel**

2017 NY Slip Op 32995(U)

February 28, 2017

County Court, Westchester County

Docket Number: 16-1053

Judge: Barbara G. Zambelli

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COUNTY COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

DECISION & ORDER

- against -

Indictment No.: 16-1053

TOME VUKEL,

**FILED**

Defendant.

FFR 28 2017

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ZAMBELLI, J.

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

The defendant has been charged with one count of driving while intoxicated pursuant to VTL §1192(3) as a felony, one count of moving from lane unsafely (VTL §1128(a)) and, one count of failing to yield right of way (VTL § 1143) allegedly committed on or about April 16, 2016 on Lexington Avenue, in the Town of Cortlandt, County of Westchester.<sup>1</sup> He now moves by notice of motion with supporting affirmation and memorandum of law for omnibus relief. The People's response consists of an affirmation in opposition and a memorandum of law. Upon consideration of these papers, as well as review of the grand jury minutes and exhibits and the consent discovery order entered in this case, the motion is disposed of as follows:

1. MOTION TO INSPECT/DISMISS/REDUCE

The Court has conducted an in camera inspection of the minutes of the grand jury

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<sup>1</sup>Defendant is charged with driving while intoxicated as a felony because, as charged in the special information filed with the indictment, defendant was previously convicted of the crime of driving while intoxicated (VTL §1192[2]) on or about June 27, 2013 in Mamaroneck Village Court, Westchester County, New York (CPL §200.60).

proceedings. Upon review of the evidence presented, this Court finds that all counts were supported by sufficient evidence and that the instructions given were appropriate. There was no infirmity or defect that would warrant a dismissal of the indictment or reduction to lesser crimes. Accordingly, that branch of the motion which seeks dismissal of the indictment is denied. The Court further finds no facts which would warrant releasing any portion of the minutes of the grand jury proceedings to the defense (CPL §210.30[3]).

2. **MOTION FOR DISCOVERY/ROSARIO /BRADY /GIGLIO MATERIAL**

The application is granted to the limited extent of ordering that the People are to provide the defendant with materials and information, the disclosure of which is required pursuant to the provisions of CPL §240.44 and §240.45. As to the defendant's demand for exculpatory material and information favorable to the defendant, the People have indicated their awareness of their continuing obligation to disclose any such material immediately upon its discovery. Where a question exists as to whether a particular item should be disclosed, they are directed to submit the material or information to the court, for examination in camera in order to resolve the issue. The demand for witness statements is denied as premature. The People recognize their duty to comply with People v. Rosario, 9 N.Y.2d 286; CPL §240.44, §240.45.

The defendant's demand for disclosure of items or information to which he is entitled pursuant to the provisions of CPL §240.20(1) (a) through (l) is granted upon the People's consent. The application is otherwise denied as it seeks items or information which are beyond the scope of discovery and the defendant has failed to show that such items are material to the preparation of his defense (CPL §240.40 [1][a]). To the extent that deals or agreements, if any, have been made with witnesses, the same must be disclosed.

The People recognize their duty to comply with Giglio v. United States, 405 U.S. 150.

**3. MOTION TO SUPPRESS STATEMENTS/ DUNAWAY/ HUNTLEY**

The People have noticed two CPL §710.30 statements allegedly made by the defendant.

According to the People, on April 16, 2016, at approximately 11:20 p.m. defendant drove a motor vehicle while intoxicated on Lexington Avenue, in the Town of Cortlandt. A New York State Trooper observed defendant when he failed to yield to an approaching car while merging onto a public roadway and failed to maintain his lane by passing over the double yellow line. Based on these observations, the trooper pulled over defendant's car.

Upon speaking with defendant, the trooper observed that defendant exhibited the classic signs of intoxication by alcohol including: glassy eyes, slurred speech, poor motor coordination, and a strong odor of alcohol. Believing that defendant was operating the vehicle while intoxicated, the officer asked defendant to step out of the car and conducted a field sobriety test. During the officer's questioning, at approximately 11:26 p.m., defendant admitted that he had consumed four alcoholic beverages at Brodies Pub and that he was driving home. This statement was noticed pursuant to CPL §710.30.

According to the People, defendant then failed the sobriety test. He was placed under arrest and transported to the New York State Police Barracks in Cortlandt. While in the police barracks, defendant was read his Miranda rights. After receiving his Miranda rights, defendant admitted that: he drank four beers with his last drink having been one or two hours prior; he was not sick or injured and; he had no physical defects. In addition, defendant stated that he was not diabetic, epileptic nor did he require insulin. He further

confirmed that he was not taking any drugs or medication and had slept the night before.

This statement was also noticed pursuant to CPL §710.30.

Defendant now moves to suppress the noticed statements on the grounds that the statements were the product of an unlawful arrest, obtained in violation of his Miranda rights or, in the alternative, for a Dunaway/Huntley hearing.

The People assert that the motion should be denied after a Dunaway/Huntley hearing. The People argue that the statement made by defendant at the scene of the crime did not require Miranda warnings because it was in response to preliminary investigative questions. As for the statement made at the police barracks, the People assert, defendant's statement was voluntary because he was given Miranda warnings and effectively waived them as he indicated that he understood those rights and proceeded to give the statement to the police. As for defendant's motion to suppress his statements based on a sixth amendment right to counsel violation, the People assert, it should be denied because defendant failed to provide any facts in support thereof.

Defendant's motion is granted to the extent that the Court will conduct a hearing prior to trial to determine the legality of the stop of defendant's vehicle and defendant's arrest (People v. Ingle, 36 N.Y.2d 413; People v. May, 81 N.Y.2d 725), whether his statements were the product of an illegal stop or arrest, whether Miranda warnings were necessary and, if so, whether the defendant was so advised and made a knowing, intelligent and voluntary waiver thereof, and whether the statements were otherwise involuntarily made within the meaning of CPL §60.45.

#### **4. MOTION TO SUPPRESS PHYSICAL EVIDENCE/ REFUSAL TO SUBMIT TO A CHEMICAL TEST**

Defendant moves to suppress all physical evidence seized and observations made by the police or, in the alternative, for a hearing to determine the admissibility of said evidence, which he argues was gathered pursuant to an illegal stop and arrest. In addition, defendant moves to suppress the introduction into evidence of his alleged refusal to submit to a chemical test, or in the alternative, for a hearing thereon because defendant denies that he made a knowing, voluntary and unequivocal refusal and further denies persisting in such refusal.

In terms of physical evidence, the People assert that the motion is moot as no physical evidence was seized. In any event, the People state, as set forth above, the defendant's stop and arrest were both lawful as based on probable cause.

As for defendant's motion to suppress any observation made by the police while defendant was driving the vehicle, defendant does not, the People argue, have a reasonable expectation of privacy in his movements as he travels a public highway. Furthermore, there is no basis for suppression of the observations made by the officer after the stop as the officer had probable cause to believe that defendant had committed a traffic infraction as set forth above.

In terms of the refusal to submit to a chemical test, the People claim that, in the early morning hours of April 17, 2016, while at the Cortlandt police barracks defendant was read his DWI warnings at approximately 12:10 a.m., 12:15 a.m. and again at approximately 12:21 a.m. Defendant refused to submit to a chemical test each time, the People assert, as a refusal to submit to a chemical test may be evidenced by words or conduct and

defendant never submitted to the test.

Defendant alleges that, when asked to submit to the test the first time, he merely requested to use the restroom before deciding whether to take the test and the police misinterpreted this as a refusal to submit to the test. Defendant moves to suppress testimony regarding his refusal to take a chemical test on the ground that he denies making a knowing, voluntary and unequivocal refusal to take the test.

The People, in essence, argue that VTL §1194(2)(f), which allows evidence of refusal, requires an evidentiary showing be made as a predicate for admission at trial, but is not the proper subject of a motion to suppress here because there is no dispute concerning the facts surrounding the alleged refusal (People v. Smith, 18 N.Y.3d 544). Furthermore, the People point out, defendant's refusal to submit to a chemical test can be used against him as consciousness of guilt evidence because a motorist does not have a constitutional right to refuse to consent to the test. In any event, the People contend, defendant was given DWI warnings numerous times and was thus properly appraised of the consequences of his continued refusal to take the test.

As set forth above, defendant's motion is granted to the extent that the Court will conduct a hearing prior to trial to determine the legality of the stop of defendant's vehicle and of defendant's arrest. The hearing shall also determine whether any property seized and observations made, should there be any, pursuant to the stop and arrest were lawfully obtained or were collected in violation of the defendant's rights (People v. Ingle, 36 N.Y.2d 413; Mapp v. United States, 367 U.S. 642; People v. Holmes, 81 N.Y.2d 1056; People v. Selby, 220 A.D.2d 544). The hearing shall not include, however, a determination with regards to the officer's observations of defendant while driving prior to the stop as

defendant had no expectation of privacy while driving on the public road.

Furthermore, the defendant's motion is granted to the extent that a hearing shall be held before trial to determine whether defendant was given sufficient warning, in clear and unequivocal language, of the effect of a refusal to take a chemical test as provided by Vehicle & Traffic Law §1194(f) and whether he knowingly, voluntarily and unequivocally refused to take the test and persisted in such refusal (see People v. Thomas, 46 N.Y.2d 100; People v. O'Rama, 78 N.Y.2d 270; People v. Hak An, 193 Misc. 2d 301; People v. Delia, 105 Misc.2d 483).

**5. MOTION TO SUPPRESS PRIOR BAD ACTS (SANDOVAL AND VENTIMIGLIA)**

Prior to the commencement of jury selection, the People will disclose to defendant all specific instances of his prior uncharged crimes and bad acts they expect to introduce at trial for impeachment purposes (CPL §240.43). Defendant must then sustain his burden of informing the Court of the prior convictions and misconduct which might unfairly affect him as a witness in his own behalf (People v. Matthews, 68 NY2d 118, 121-122). In the event the People seek to introduce defendant's prior bad acts on their direct case, the burden is on the People to seek a Ventimiglia hearing to determine the admissibility of such evidence (People v. Ventimiglia, 52 N.Y.2d 350).

**6. REQUEST FOR ADDITIONAL MOTIONS**

The defendant's request for permission to make additional pretrial motions is denied. Additional motions will only be considered upon good cause shown pursuant to CPL §255.20(3).

This Decision constitutes the Order of the Court.

Dated: White Plains, New York  
February 28, 2017

  
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BARBARA G. ZAMBELLI  
COUNTY COURT JUDGE

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