

People v Morgan

2017 NY Slip Op 33022(U)

April 17, 2017

County Court, Westchester County

Docket Number: 16-1217

Judge: Barbara G. Zambelli

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<p style="text-align: center;">FILED AND ENTERED ON</p> <hr/> <p style="text-align: right;">2017</p> <p style="text-align: center;">WESTCHESTER COUNTY CLERK</p>
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COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

THE PEOPLE OF THE STATE OF NEW YORK **DECISION & ORDER**

- against -

Indictment No.: 16-1217

BRIAN MORGAN,

FILED 

APR 19 2017

Defendant.

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

ZAMBELLI, J.

The defendant has been indicted for the crime of driving while intoxicated as a felony (VTL §1192(2)); driving while intoxicated, as a felony (VTL §1192(3)); aggravated unlicensed operation of a motor vehicle in the first degree (VTL §511(3)(a)(l)); circumvention of an interlock device (VTL §1198(9)(d)); speeding (VTL §1180(b)); and consumption/ possession of alcoholic beverage in a motor vehicle (VTL §1227 (1)) allegedly committed at 5:20 a.m. on or about July 23, 2016, on the Sprain Brook Parkway in the Town of Mount Pleasant, County of Westchester.¹ 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

¹Pursuant to the special information filed with the indictment, defendant was previously convicted of VTL §1192[2] on or about July 16, 2014, in New York County Criminal Court. On January 1, 2016 defendant was convicted of driving under the influence under VTL §1192(3). On or about June 1, 2016, defendant's license was revoked (See CPL §200.60).

follows:

1.MOTION TO INSPECT/DISMISS/REDUCE

The Court has conducted an in camera inspection of the minutes of the grand jury 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. Evidence of defendant's prior convictions for driving while intoxicated (VTL §1192[2]) on or about July 16, 2014, and for driving while intoxicated (VTL §1192(3)) on January 1, 2016, was appropriately presented and explained to the grand jury.

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 & INSPECTION / ROSARIO/BRADY MATERIAL

This 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, 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, which will conduct an in camera examination 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. 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. The People have acknowledged their continuing obligation to provide exculpatory information to the defendant (Brady v Maryland, 373 U.S. 83), and are directed to disclose any such information to the defense.

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]).

3.MOTION TO STRIKE STATEMENT NOTICE

The defense moves to strike the CPL §710.30 notice of statement. Defendant alleges in the memorandum of law that the notice was never served and writes that "however, the discovery material provided shows a record of statements made by [defendant] and that he was already in custody when these questions were being asked" [Defense Memorandum of Law p.15]. The People assert in their memorandum of law that the notice was served at the arraignment on January 4, 2017 [People's Memorandum of Law p. 21]. The motion is denied based on defendant's failure to provide sworn allegations of fact supporting the motion as required by CPL §710.60.

As for the language in the relevant CPL §710.30 notice, its contents informed the defendant of the time, place and manner in which the statements were made and as such the motion to strike based on the contents of the notice is denied (CPL §710.30[1]; see

People v. Lopez, 84 N.Y.2d 425; People v. Hartley, 244 A.D.2d 712).

In the affirmation in opposition, the People contend that the defendant waived his right to challenge the sufficiency of the CPL §710.30 notice by moving in the alternative to suppress the noticed statements. However, a defendant may move in the alternative to suppress without waiving a preclusion claim, so long as the suppression claim is not litigated to a final determination (see People v. Kirkland, 89 N.Y.2d 903; People v. Smith, 283 A.D.2d 189; People v. Figueroa, 278 A.D.2d 139; People v. Heller, 180 Misc.2d 160; Cf. People v. Smith, 8 Misc.3d 441).

4.MOTION TO SUPPRESS STATEMENTS/ DUNAWAY/ HUNTLEY

The People have noticed one CPL §710.30 statement allegedly made by the defendant. According to the People, in relevant part, on July 23, 2016, at approximately 5:20 a.m. defendant drove a motor vehicle while intoxicated on the Sprain Brook Parkway in the Town of Mount Pleasant, Westchester County N.Y. A New York State Trooper using a radar device, observed and gaged defendant operating his motor vehicle at a speed of 75 miles per hour in a posted 55 miles per hour zone. Based on this observation, the trooper pulled over defendant's car.

Approaching the vehicle, according to the People, the trooper smelled a strong odor of alcohol coming from the defendant and the vehicle. Upon speaking with defendant, the trooper observed that defendant exhibited the classic signs of intoxication by alcohol including: bloodshot and glassy eyes, poor motor coordination, and a strong odor of alcohol.

During the officer's questioning, defendant stated that he was driving home from

Brooklyn to Poughkeepsie; that he was not drinking; that spilled alcohol caused the odor and; that he moved to Poughkeepsie because his friends from Brooklyn get him in trouble.

This statement was noticed pursuant to CPL §710.30.

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. Once defendant stepped out of the vehicle, the trooper observed, in plain view, a plastic cup containing a brown liquid on the floor of the driver's seat that had a strong odor of alcohol. 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 Hawthorne where defendant gave a breath sample into a chemical test instrument which showed that defendant had .12 of one per centum by weight of alcohol in his blood. The People claim that the Breath Alcohol Analysis Record provided to defendant through consent discovery shows that the machine was calibrated.

Defendant now moves to suppress the noticed statement on the grounds that the statement was the product of an unlawful arrest, obtained in violation of his Miranda rights or, in the alternative, for a Dunaway/Huntley hearing. Defendant denies speeding and asserts that the police did not observe defendant operating any motor vehicle in an intoxicated state. Defendant further asserts that he was not intoxicated and performed all of the coordination tests satisfactorily and that there was no evidence vouchered to show that alcohol was recovered from the vehicle. In the memorandum of law, defendant further states that "in fact, the only thing they did observe was [defendant] asleep in a vehicle safely parked the side of the road. Sleeping in a vehicle hardly constitutes a crime. Thus any fruit of this illegal search and seizure must be suppressed" [Defense Memorandum of

Law p. 15-16]. Defendant claims that combined with no statements admitting intoxication, the record does not support the charge of driving while intoxicated.²

The People assert that the motion should be denied. The People argue that defendant's car was legally stopped based on defendant's speeding. As for the claim that defendant was asleep in the car on the side of the road and not speeding, the People state that, upon information and belief (as well as a complete review of the case file), no witness observed defendant asleep in a parked vehicle. Moreover, the People point out, this assertion by defendant is not based upon sworn allegations of fact from an identified source under CPL §710.60(1) as there is no mention of this conduct in the supporting affidavit.

On approaching the car, the officer smelled the strong odor of alcohol on his breath and observed glassy and blood shot eyes and poor motor coordination. Once out of the car, the trooper observed a plastic cup with brown liquid on the floor of the driver's side seat that had a strong smell of alcohol. Defendant's subsequent failure of the standard field sobriety test, in tandem with the container as well as defendant's symptoms of intoxication gave the trooper probable cause to believe that defendant had been operating the motor vehicle while intoxicated and he lawfully placed defendant under arrest.

In addition, the People contend that the statement made by defendant at the scene of the crime did not require Miranda warnings because defendant was not in custody and the statement was in response to preliminary investigative questions.

². The defense further claims that it has not been provided documentation to show that the Breathalyzer machine was calibrated. The People aver that the Breathalyzer machine calibration information was provided to defendant as part of consent discovery.

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 statement was 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 statement was otherwise involuntarily made within the meaning of CPL §60.45.

5. MOTION TO SUPPRESS PHYSICAL EVIDENCE/ RESULTS OF SOBRIETY TEST/ CHEMICAL BREATH TEST/MAPP HEARING

Defendant moves to suppress "all evidence of observations made by the arresting officer of the field sobriety tests" and in the alternative requests a Mapp Hearing. Defendant argues that the officer lacked probable cause when he arrested defendant and conducted a field sobriety test at the scene. "The only observation the officer had at the time he detained [defendant] and began conducting tests was that [defendant] had been speeding. There is no indication that he was swerving or driving in a manner that was reckless and would indicate intoxication. At the time that defendant was asked to perform these tests, he had not admitted to drinking any alcohol" [Defense Memorandum of Law p.16].

In addition, defendant moves to suppress the physical evidence seized and any the evidence stemming from his unlawful arrest, including evidence regarding the chemical test, video recordings or police observations. Defendant argues that such evidence was obtained unlawfully in violation of his constitutional rights from the Fourth and Fifteenth Amendments and the New York State Constitution. In the alternative, the defense

requests a hearing on the issue.

The People argue that, as set forth above, 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 cup in the car, the People assert, it was in plain view with the smell of alcohol and, as such, the trooper was lawfully in position to observe the item, had lawful access to the item when he retrieved it and the incriminating character of the item was immediately apparent. Moreover, the People assert that the trooper had probable cause to ask the defendant to perform a field sobriety test because he had probable cause to believe that defendant was operating a motor vehicle while intoxicated based on his observation that defendant exhibited the classic signs of intoxication by alcohol including: bloodshot and glassy eyes, poor motor coordination, and a strong odor of alcohol.

In terms of defendant's motion to suppress the chemical breathe test results on the ground that it was the fruit of an unlawful arrest, the People again argue that the trooper had probable cause for the stop and the arrest and, in any event, defendant voluntarily submitted to 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,

observations made and the chemical test results gathered from 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.

6. MOTION TO STRIKE ALIBI DEMAND


This motion is denied. There is no merit to the defendant's contention that CPL 250.20 is unconstitutional (see People v. Dawson, 185 A.D.2d 854; People v. Cruz, 176 A.D.2d 751; People v. Gil, 164 A.D.2d 887; People v. Peterson, 96 A.D.2d 871).

7. 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 N.Y.2d 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).

This Decision constitutes the Order of the Court.

Dated: White Plains, New York
April 17, 2017



BARBARA G. ZAMBELLI
COUNTY COURT JUDGE

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